

Witness Preparation – Ethical, Practical, and Common Sense Considerations

By Antonio Robinson, Richard W. Warren, and Pamela Chandran

INTRODUCTION

When preparing a witness – whether for a deposition, a hearing, or an arbitration – a lawyer would be prudent to keep in mind several different factors that may not be directly related to her case at all. This paper addresses the underpinnings of ethical witness preparation, and considerations for preparing a witness for a deposition and also for an appearance in front of a trier of fact.

ETHICAL WITNESS PREPARATION

By Antonio Robinson¹

In any adversarial contest, good coaching can often be the difference between winning and losing. Good coaching is generally defined as a form of development that leads an individual to the achievement of a specific personal or professional goal through training and guidance. When we think of successful sports franchisees like the San Antonio Spurs and New England Patriots, we note how their coaches motivate players to execute and perform in the winning ways they repeatedly practice. As lawyers think about preparing a witness for deposition or trial, they rightly believe an effectively coached witness will produce a winning outcome as well.

Without proper context, however, coaching a witness could lead to sanctionable ethical misconduct. While failure to ensure a witness is effectively prepared for deposition or trial could be considered malpractice, unethically coaching a witness can be just as problematic. As one judge put it:

While a discreet and prudent attorney may very properly ascertain from witnesses in advance of the trial what they in fact do know and the extent and limitations of their memory, as guide for his own examinations, he has no right legal or moral, to go further. **His duty is to extract the facts from the witness, not to pour them into him; to learn what the witness does know, not to teach him what he ought to know.**²

Coaching in the context of witness preparation has been defined as “obfuscating the truth or instructing [a] witness to lie.”³ To avoid running into ethical entanglements, there are several ethical rules that lawyers must understand and navigate in witness preparation.

¹ Antonio Robinson is General Counsel for Carters, Inc.

² *In Re Eldridge* 82 N.Y. 161 (N.Y. 1880) (emphasis added).

³ “*The ethics of witness preparation*,” Paul D. Friedman, LawyersUSA (February 25, 2008).

OBLIGATION TO PREPARE A WITNESS

As an initial point, all lawyers generally understand their obligation to zealously advocate for their clients. As indicated by Rule 1.1 of the American Bar Association Model Rules of Professional Conduct ("Model Rule(s)"), "a lawyer shall provide competent representation to a client." As noted in the comment section of Model Rule 1.1, "competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation."

The only way a lawyer can properly prepare a case for trial is to understand what a potential witness knows and how that person will respond to under the pressure of questioning. Similar to the adage never ask a question at trial you don't know the answer, no lawyer should present a witness at a deposition or trial without knowing the content of the witness' testimony and how the witness presents under cross examination. Indeed, a lawyer must review the facts and themes of the case and instruct the witness on how best to present information. Without question, the aforementioned is not only appropriate, but expected, in witness preparation.

ETHICAL PROHIBITIONS IN WITNESS PREPARATION

A lawyer, however, must balance the obligation to prepare a witness with avoiding the ethical trap of improper coaching. As posited by Chief Justice Warren Burger, "an attorney must respect the important ethical distinction between discussing testimony and seeking improperly to influence it."⁴ The Model Rules set forth several ethical guideposts for lawyers to observe when preparing a witness for deposition or a trial:

- Model Rule 1.2(d) provides that "[a] lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law."
- Model Rule 3.3(a)(3) provides that a lawyer shall not knowingly "offer evidence that the lawyer knows to be false."
- Model Rule 3.4(b) provides that a lawyer shall not "counsel or assist a witness to testify falsely."
- Model Rule 8.4 provides that it is professional misconduct for a lawyer to "engage in conduct involving dishonesty, fraud, deceit or misrepresentation; or engage in conduct that is prejudicial to the administration of justice."

⁴ *Geders v. United States*, 425 U.S. 80, 91 fn. 3 (1976).

Though these rules appear straightforward, the application of these rules in witness preparation can result in even the most upstanding lawyer threatening to breach the ethical line. As Richard C. Wydick wrote, inappropriate witness coaching falls into three categories:

- (1) “the lawyer knowingly and overtly induces a witness to testify to something the lawyer knows is false,”
- (2) “the lawyer acts covertly” to induce a witness to testify to something the lawyer knows is false, and
- (3) “the lawyer does not knowingly induce the witness to testify to something the lawyer knows is false, but the lawyer’s conversation with the witness nevertheless alters the witness’ story.”⁵

Overt Inducement

Let’s begin by saying that, unless a lawyer has an urgent desire to find another career, it is highly unlikely that any reputable lawyer would knowingly induce a witness to present false information. As noted above, Model Rule 3.3 specifically forbids a lawyer from presenting false information. That said, it is more likely that a lawyer may become aware that a witness is preparing to present false information than to guide a witness to do so. In that case, a lawyer will be faced with an ethical dilemma that, if not handled correctly, could result in sanctions.

At the beginning of any witness preparation, the lawyer should immediately set a foundation of integrity by insisting the witness be completely honest and tell the truth. By doing so, the lawyer will hopefully dissuade a witness with a win-at-all-cost mentality from lying under oath. If the witness, however, insists on presenting false testimony, the lawyer should attempt to persuade the witness against such a fool’s errand. In the event those efforts fail, the lawyer will be left with no choice but to seek a withdrawal from the case as no lawyer can suborn perjury.

Covert Inducement

The best known way that a lawyer covertly induces a witness to present false testimony is through a legal device called the Lecture. “The Lecture as practiced usually involves three elements: the law, the words, the focus.”⁶ The most notable example of a Lecture is from *Anatomy of a Murder*, wherein the defense lawyer explains:

The Lecture is an ancient device that lawyers use to coach their clients so that the client won’t quite know he has been coached and his lawyer can still preserve the face-saving illusion that he hasn’t done any coaching. For coaching clients, like robbing them, is not only frowned upon, it is downright unethical . . . Hence the Lecture, an artful device as old as the law itself, and one used constantly by some of

⁵ Richard C. Wydick, *The Ethics of Witness Coaching*, 17 Cardozo L. Rev. 1, 2 (1995).

⁶ The Ethics of Witness Preparation, <https://lawyertrialforms.com/power-litigation-tips-tactics/the-ethics-of-witness-preparation> (last visited October 12, 2017).

the nicest and most ethical lawyers in the land. “Who, me? I didn’t tell him what to say,” the lawyer can later comfort himself. “I merely explained the law, see.” It is good practice to scowl and shrug here and add virtuously: “That’s my duty, isn’t it?”⁷

As Wydick summarized the Lecture scene, defense attorney Paul Biegler is defending his client Army Lieutenant Frederic Manion “against a charge of murdering a man who allegedly raped Manion’s wife. At their first interview, Manion tells Biegler that he killed the man, and that he did it an hour or so after learning of the rape.”⁸ Hearing Manion’s story, Biegler knows that “a few right questions could mean first degree murder and life in prison for his client.”⁹ Biegler began to give Manion “the Lecture, meaning in this case a step by step explanation of the law of murder and the possible defenses. As Biegler leads Manion through the explanation, Manion begins to understand that his only possible defense is a type of insanity.”¹⁰ Manion gleaned the intended message and began to describe “his mental state at the time of the crime in a way that allow[ed] Biegler to invoke the insanity defense.”¹¹

As the example illustrates, covert inducement ultimately can result in the lawyer inappropriately influencing a witness’ testimony, often with a wink and a nod. Accordingly, lawyers should forego using the Lecture or any similar device if ethical witness preparation is a goal.

Inadvertent Influence

Though this type of coaching lacks the corrupt intent of the previously discussed types of coaching, it is equally, if not more so, capable of inducing a witness to provide false testimony. Often the inappropriate influence occurs simply by the lawyer having an appropriate conversation with the witness about the case. What makes this coaching potentially more dangerous is that the lawyer has no idea that the witness’ testimony has been altered. Even more, this type of coaching is virtually unavoidable.

Consequently, lawyers should be aware of the potential to inappropriately influence a witness’ testimony absent any intent to do so. During witness preparation, lawyers must be vigilant in their efforts to minimize any unintended influence on a witness’ testimony. Following the recommendations below should help reduce the risk of unethical conduct in witness preparation.

PROPER ETHICAL CONSIDERATIONS

“Ethical witness preparation is an essential part of preparing for deposition or trial. The crucial issue is that the lawyer does not falsify, distort, improperly influence, or suppress the substance of

⁷ Robert Traver, *Anatomy of a Murder* (1958), p. 35.

⁸ Wydick, *supra* at p. 35.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

the testimony to be given by the witness.”¹² Though there is little guidance on what passes for ethical witness preparation, Section 116 of the Restatement (Third) of the Law Governing Lawyers provides that as long as a lawyer does not elicit false or misleading testimony, that lawyer may satisfy his advocacy and ethical obligations under the Model Rules when performing the following:

- (1) discussing the role of the witness and effective courtroom demeanor;
- (2) discussing the witness's recollection and probable testimony;
- (3) revealing to the witness other testimony or evidence that will be presented and asking the witness to reconsider the witness's recollection or recounting of events in that light;
- (4) discussing the applicability of law to the events in issue;
- (5) reviewing the factual context into which the witness's observations or opinions will fit;
- (6) reviewing documents or other physical evidence that may be introduced;
- (7) discussing probable lines of cross-examination that the witness should be prepared to meet; and
- (8) practicing the witness' testimony and suggesting choice of words.

PREPARING WITNESSES FOR DEPOSITION

By Richard W. Warren¹³

I. Introduction

Discovery depositions typically fall into one of three categories: (1) Category A – the witness performs beautifully, places testimony on the record that advances your case and gives nothing useful to the other side; (2) Category B – the witness provides testimony that does not advance the arguments of either side; or (3) Category F – the witness implodes (metaphorically speaking), delivers only testimony that helps the other side, and destroys any hope of succeeding before or at trial.

Although lawyers can only do so much to impact the outcome of a deposition, for the simple reason that they do not get to testify, preparing to defend a deposition and preparing the witness for deposition are the single largest factors in determining whether a particular deposition falls into Category A, B or F. Throughout the course of this section, readers will learn about the importance of key necessary steps before witness preparation, goals for the initial contact with a witness, steps to take during the pre-deposition preparation session, and finally, key considerations for the deposition

¹² Erin C. Asborno, Ethical Preparation of Witnesses for Deposition and Trial, American Bar Associate, Section of Litigation, Trial Practice; <http://apps.americanbar.org/litigation/committees/trialpractice/articles/121311-ethics-preparation-witnesses-deposition-trial.html> (December 13, 2011).

¹³ Richard W. Warren is a Principal at Miller Canfield.

itself. Lawyers who focus on all of these aspects of deposition preparation are far more likely to end up with success than a witness that provides testimony that seriously damages your case.

II. Crucial Steps before Witness Preparation

Attorneys that begin their deposition preparation during the initial prep meeting with the witness are missing a significant opportunity to bring a far higher degree of preparedness to that meeting.

At the outset of the case, and before even scheduling witness prep meetings, lawyers should begin by reviewing the Complaint, requesting and analyzing the claimant's personnel file, requesting and reviewing any supervisor desk files and requesting from the client information and documents regarding similarly-situated employees who either were, or were not, treated in the same manner as the plaintiff. Finally, reviewing the applicable employment policies and handbooks is also a crucial step. The mere act of reviewing these documents will allow one to quickly identify the following:

1. The articulated reasons for the challenged employment actions.
2. Whether the underlying documents support those reasons.
3. The existence of inconsistencies and weaknesses in the claims.
4. Whether any grounds exist for the application of the after-acquired evidence rule.
5. Whether the claimant has a good chance at identifying employees treated differently for similar acts.
6. The existence of gaps in your knowledge about the case.
7. Areas that your opponent is likely to attack.
8. Facts that cut against the Plaintiff's claims or Defendants' likely defenses.
9. Identification of decisionmakers, supervisors and coworkers that you should interview before depositions occur.
10. The identity of potentially helpful or harmful witnesses.

Once this information has been collected and analyzed, and the lawyer handling the case has a good sense of the ten areas above, he or she will be far better prepared to conduct an initial phone or in-person interview with the client contact or decisionmaker. During this phone call, the lawyer can request information and documents necessary to conduct a thorough and effective deposition preparation session. He or she can also begin the process of challenging the client to provide responses to likely counter-arguments, and – even more importantly – begin managing the clients' expectations about the ultimate result by identifying particular trouble spots.

After completing this process, the next step is to make initial contact with the witness in question.

III. Goals for the Initial Contact with the Witness

Few witnesses perform well during a deposition where they have had little to no prior interaction with the lawyer defending their deposition, or where their prior interactions have been filled with mistrust. The initial contact with the witness is the best chance to make a good first impression, and to begin establishing trust, which will in turn lead to a more confident witness during the deposition.

Typically, the initial contact with the witness occurs days or weeks before the in-person deposition prep session, and is relatively brief when compared to the actual prep session length. Goals for this initial meeting should include the following:

1. Introduce yourself, your firm and who you and your firm represent.
2. Make your ultimate goal clear (i.e., to obtain dismissal of Plaintiff's claims / to right the wrong done to your client by the employer).
3. Determine the experience and anxiety level of the witness.
4. Arrange for a preparation location that best accommodates the witness.
5. Assess the witnesses' importance, attention level and willingness to dig into the facts.
6. Decide whether, and what documents, to send a witness in advance of the deposition prep session.
7. Decide whether to offer to represent the witness for purposes of the deposition.
8. Address any initial concerns the witness has.

Of the goals above, one of the most crucial is deciding whether to represent the witness for purposes of the deposition. If this issue is overlooked during an initial meeting, its significance could only become apparent when it's too late to do anything about it. Witnesses that lawyers do not represent are free to reveal to your opponent anything you discussed, reviewed or warned that witness about. On the other hand, opponents are not able to request this information from witnesses that you represent. Addressing this issue with the witness in an up-front manner may also address any concerns that the witness may have about whether you will care about their interests during the deposition.

Determining the witnesses' experience and anxiety level during the initial meeting will provide a firm guide as to how much prep time the witnesses requires, as well as how they can be expected to perform during the deposition. You may decide to ask questions of an experienced witness that you would not even consider asking someone who has never been deposed before, and is exceptionally nervous about providing testimony.

Establishing the witnesses' level of attention and willingness to help is also key. It will prevent you from asking too much of a witness. Similarly, ignoring this factor might cause an attorney to miss

obtaining testimony that could provide a significant amount of assistance later on in the case. For example, identifying a witness that is diligent and willing to help could cause you to ask that witness to search for helpful documents and information that otherwise might have been missed.

The initial prep session should also help you determine how important that witness is, and whether you should send the witness documents in advance of their deposition for review. Relatively unimportant witnesses, whom you do not offer to represent, typically do not warrant receiving any advance copies of documents before the prep session. On the other hand, sending a crucial witness the deposition transcript of an opposing witness could lead to a far more productive prep session than you otherwise would have had.

Handling former company employees called as witnesses can be particularly problematic for several reasons. First, if the employee has been terminated involuntarily, he or she could harbor animosity towards the company and, by extension, the lawyer representing it. Second, if the former company employee is a manager employed elsewhere, he or she could request compensation for the earnings that manager will not receive due to appearing at the prep session and deposition. The rules and guidelines as to whether, and under what circumstances, such compensation is permissible are best dealt with well in advance of the prep session and deposition. Third, former employees have no vested interest in telling an employer-friendly version of the facts, which might cause defense attorneys to uncover new facts that are difficult to contend with.

Finally, the initial contact with the witness can be used to determine the location the witness is most comfortable meeting at, as well as the location for the deposition. Handling the prep session at the employer's place of business, or alternatively at counsel's offices, each have their own advantages and disadvantages. Deposition prep sessions held at the employer's place of business has the advantage of allowing the witness easy access to documents and emails. At the same time, witnesses who meet there for a prep session can feel compelled to give you a more sanitized version of the facts. Deposition prep sessions held at counsel's offices remove that pressure, but at the same time could lead to the witness feeling less comfortable, and more nervous, due to being in an unfamiliar environment. Ultimately, perhaps the best approach is to hold the prep session in the same area, or building, where the deposition is being held, as this will help familiarize the witness with the deposition setting.

IV. The Preparation Session

With all deposition witnesses, the substantive deposition prep session often has the greatest impact on whether the deposition will be successful, or a minefield of problems. There is a fine line between sending in an underprepared and under-confident witness, and sending in a witness who has been so over-prepared that they struggle trying to remember exactly what it is they are supposed to say in response to specific questions. In general, beginning the prep session by emphasizing the following will yield the best results:

1. Explain the Complaint, the allegations the Plaintiff is making and how those are generally proven or disproven.

2. Explain the timeline of lawsuits, and where discovery depositions fit into that timeline.
3. Instruct the witness that he or she must tell the truth at all times.
4. Provide a brief explanation of your theory of the case, and where the witness fits within that theory.
5. Let the witness know that the case does not rise and fall on their testimony alone.
6. Make sure the witness understands that you have an opportunity to ask questions as well, and that any mistakes can be cleaned up through your questions.
7. Let the witness know that you will be making objections, and explain what those objections are and what they mean.
8. Ask the witness if they have any questions about the claims, or concerns about their role in the case.
9. Ask the witness what they have heard about the case so far.
10. Let the witness know that the beginning part of the deposition will include questions about where they live, their phone number and even who they live with. Some deponents see these questions as intrusive and an invasion of privacy, so a reminder that they are standard may be helpful.

These topics are crucial, and discussing them early in the deposition preparation session will help persuade the witness that you have a firm understanding of the process, the claims, their role in the process and that you are their best guide. Letting the witness know that the case does not rise and fall on their testimony alone can be very comforting, as it takes the pressure off a bit and lets them have an accurate understanding of their role. Also, advising the witness that you will handle the clearing up of unclear testimony, through your questions, will allow that witness to focus solely on answering the question that is asked.

As lawyers, we tend to forget how frightening depositions can be for individuals who have only participated in one or two, or who have never been deposed. The initial goal of the prep session should therefore be to break down the mystery of the deposition and help the witness understand the procedure, and what the important areas of the case are.

Once you are past the introductory phase of the deposition preparation session, you should focus on achieving the following goals and/or addressing the following factors:

1. Minimize witness anxiety, and maximize witness trust by providing information and confirming when the witness has an accurate recollection of facts.
2. Correct the witness when they tell you something that you know is not true, or is in conflict with documents produced in the case.

3. Adopt the questioning style and tone of voice that you expect your opponent to use, so your witness knows what to expect.
4. Decide what style to use when sharing information and correcting your witness – will you be harsh, or will you use phrases that allow them to save face.
5. Make sure that your witness is instructed to only answer questions that fall within their scope of work, or scope of their personal knowledge. This will discourage guesswork.
6. Correctly assess whether the attorney-client privilege applies to your preparation session and, if it does not, decide how much information and documents you want to share with someone who is able to reveal that information to opposing counsel.
7. Discuss with the witness all key documents that the witness is likely to see, and ask the witness to explain their involvement in creating or reviewing that document.
8. Shore up weakness in your case by playing devil's advocate and challenging the witness on key points. A witness who has not been challenged on key points is one who is unlikely to handle the rigors of a deposition.
9. Ask the witness if they've searched for and located any relevant documents. If the answer is No, ask them to explain how they've conducted their search.
10. Find out whether the witness has been contacted by your opposing counsel and, if so, what has transpired.

In addition to the foregoing, it is always up to the lawyer conducting the prep session to keep a careful eye on how the witness is handling the prep session, whether they are becoming fatigued and when the witness has simply lost focus due to that fatigue. In other words, you need to determine when a witness has simply had enough. There is little to be gained from pushing a witness to sit in a prep session when they are fatigued past the point of caring.

On a related note, lawyers preparing a witness for deposition must take care not to insist that witnesses rehearse and repeat back prepared lines in response to specific questions, for several reasons. First, such testimony comes across as hollow and unpersuasive. Second, you run the risk of crossing the line between witness and lawyer testimony. Third, witnesses are highly unlikely to remember each "line" they are supposed to repeat, and run the risk of botching those attempts at the detriment of your case. Instead, encourage a witness to use his or her own words, and provide light suggestions about particular phrases that should be avoided because they do not accurately convey what actually occurred prior to the filing of the lawsuit.

Although this rarely happens, it is worth considering how you will respond if a witness either announces or suggests that they intend to lie under oath. Under no circumstances should such conduct be allowed or condoned, and witnesses should be instructed that if they do not testify truthfully, you will not continue representing them and/or your ultimate client. It's also useful to

explore why witnesses feel they need to provide inaccurate testimony, as this might reveal that a witness has a concern that can easily be addressed, paving the way towards resolution of that concern and truthful testimony.

Lawyers also need to have a good grasp on how to handle a disinterested witness. When such a witness is within management ranks, it can be useful to remind them that managers can be held individually liable (in many states) for employment claims. For those who are not managers, it can be useful to remind them that the company's / claimant's future is at stake, and that the witnesses' failure to cooperate can adversely impact your client's interests.

Finally, always remember that many states allow recording of conversations so long as one party to the conversation consents. This can lead to situations where a witness surreptitiously records a lawyer during a prep session. For this reason, always conduct yourself professionally, and avoid negative comments about the Court, opposing counsel and your client.

V. The Deposition

The deposition is the time when all of your preparations pay off, and a witness can either provide tremendous assistance, no assistance, or harmful testimony. Given the importance of what's at stake, lawyers handling depositions should aim to address and complete the following:

1. Decide whether, and how much, additional prep time a witness needs the day of the deposition. Be mindful that witness anxiety tends to peak right before a deposition, so loading a witness with new information is likely to only increase that anxiety.
2. Just prior to the deposition, cover the 4-5 most crucial areas of the deposition, and remind the witness of one or two difficult questions you expect them to receive on those areas.
3. Decide whether to re-cover any procedural rules, such as the need to only answer the question that is asked, or the need to keep answers short and to the point. Explain the meaning of the foundation objection.
4. Keep a running list of follow-up questions you intend to ask the witness and, during a break, let the witness know what you plan to ask so they are not taken by surprise.
5. Be watchful regarding the witnesses' level of nervousness and fatigue level. If you notice that these levels are remaining high, it may be useful to ask for a break.
6. Decide whether your witness responds well, or poorly, to objections and arguments between counsel, and tailor your tactics accordingly.

VI. Conclusion

By following these guidelines, practitioners will be better-positioned to take advantage of witness strengths, minimize surprises to the witness and allow a witness to provide helpful, instead of harmful, testimony.

PREPARING WITNESSES FOR A FACT-FINDER

By Pamela Chandran¹⁴

These are tips, guidance, and suggestions culled from personal experience, both good and horrific. Ultimately, you'll find a style and process that works best for you. Really, there's no substitute for your own experience, but observing other lawyers is an excellent way to pick up tips both on what to do and on what to never do.

This guide is also geared toward preparing a novice witness; obviously, if you are preparing with a more experienced witness (the vice-president of labor relations, for example), tailor your style to your witness' experience and comfort level.

Before the first communication

Remember that the witness is a key component in you telling your story. Everything you do to prepare the witness should lead to this end and, if you learn surprises along the way that cause you to change your story, it is better to learn that sooner rather than at the proceeding.

When communicating with a witness for the first time, whether you do it by phone or in person, prepare yourself. This is critical not only for you, but to make your witness comfortable as well. Particularly if the witness has never had any interactions with you before in unrelated matters (or if you know that you come across as young-seeming), your first impression is critical both to instill confidence in your witness (which will make them feel more comfortable about being fully candid with you), and – fundamentally – to make the most efficient time of what may be your only opportunity to speak with the witness prior to the proceeding.

Familiarize yourself with the file, and identify what it contains (and what you may want to use as an exhibit) and – especially – what it is missing. (This is a good time to make a note if an information request has already been submitted, and if you need to follow up.) Particularly if the witness is testifying to a convoluted timeline, or a matter where the timeline is critical, prepare one for yourself based on the file and use it as a tool when preparing with the witness to ensure that you are on the same page and not missing any key events. Similarly, draw up a list of all questions that you have and the questions you anticipate the other side will have. Spend some time Googling your witness and checking out social media sites – you want to limit the surprises you may face in the proceeding and advise your witness accordingly (of course, all of this should be done within ethical parameters, both the social media sleuthing and the appropriate advising).

Talk to your non-witness client in advance about the case (for example, if it is a union rep, find out the rep's opinion of the case and of the witness (good and bad), and ask them what the other side is going to say about the witness; if your client is management, and the witness is a lower-level supervisor, inquire if the union has had run-ins with this individual prior, and if a particular type of

¹⁴ Pamela Chandran is a shareholder at Gilbert & Sackman, a union-side labor firm in Los Angeles.

grievance has been filed against your witness before), what your client's concerns are about this witness, and why your client thinks this person is necessary as a witness.

You should have a portrait of your witness and the matter that the witness is testifying to in your story, and you should also be prepared to scrap that portrait and to paint a new one after speaking with that witness.

Meeting and preparing the witness

For many witnesses, this may be the first and only experience with a quasi-legal (or legal) proceeding. Remember that, for you, this may only be the difference between an R-case hearing and a ULP-hearing; for them, they're speaking with a lawyer about testifying after swearing to tell the truth and having their words recorded, and the closest they may have come to this before is Law & Order – do what you can to put your witness at ease. Introduce yourself and explain your role in the proceeding (if the witness is not your client, lay that out before you begin; it may be uncomfortable, but it can be critical down the road).

Explain everything to demystify the process and make it less legal-scary – what the hearing room look like; who will be sitting at the arbitration table; whether your witness will stay in the room the whole time or be asked to wait in a separate room; etc. Explain that they will be sworn in, what that means, and how telling the truth is mandatory. If the results of the proceeding will affect them directly (e.g. a discipline arbitration), explain the timeline (hearing, briefs, the wait before the decision issues), and the possible results.

Explain credibility and how critical it is. Inform your witness that the trier of fact will not only be listening to their testimony, but observing their facial expressions and gestures as well. Even if you think you do not need to, inform the witness that eye-rolling, sighing, even strategically-timed arm crossing can come across as hostile, defensive, and unprofessional to the trier of fact.¹⁵ If you are representing someone whose behavior has been an issue in the past or is part of the matter at hand, inform them that the opposing side will try to bait them into precisely that behavior. As part of the credibility discussion, advise them that you have looked them up on social media and that opposing counsel no doubt will as well. Within ethical constraints, advise this person that social media posts along the lines of “I’m going to take down the whole hospital” are imprudent, to say the least, and may play a role either in the matter.

As a side-note, I generally allow spouses/friends/moral support to be present in the prep session up until the point we begin discussion material matters. Then, I ask anyone who has accompanied the witness to wait in another room, Starbucks, the car – wherever, as long as it is out of sight/hearing range/presence. There is no way to ensure that you have gotten your witness' cleanest, most

¹⁵ Particularly when I am addressing a witness who seems to have a propensity for big facial expressions or gestures, or just comes across as having a big personality, but who also interprets seemingly non-legal guidance such as sartorial recommendations as intrusive or condescending, I preface my comments in an apologetic tone and soften them with language like, “I’m sure you already know this, but I’ve had other witnesses get nervous and forget to do/not do x, y, and z, so I now I always make a point of saying...” I couch discussions of what to wear in a similar fashion.

accurate answers if they have a known audience there (especially if you're dealing with a disciplinary situation, or one where the witness' behavior is implicated, they may have shared an entirely different variation of the events with that person).

After anyone else has left, explain that the witness' job is to answer questions – and that is it. The witness is not there as second chair, and that any efforts on their part to mount a parallel case to yours could well tank the whole matter (this is generally accompanied by an “I’ll have my day in court” attitude).¹⁶

Ask everything. My old mentor described this process as walking through the house and closing all the windows, even if you do not think you’ve been in that room. For example, if your witness is addressing allegations of racial discrimination, ask if they have been accused of other kinds of discrimination or harassment. If they have been accused of allegations of impairment on the job, ask them if they have ever received a DUI. Ask what the witness thinks the other side will ask; this will often result in a franker understanding of what collateral issues are at play, and/or what your witness does not really want to tell you. Ask all of your questions; this is not the time to pull punches. The uncomfortable ones are the most important. Do not get cowed by discomfort or a lack of willingness on either your or their part to answer – be very clear (in an empathetic way, if that facilitates the matter) that you are about to ask uncomfortable questions, but you have to do so in the event the other side does so when the witness is on the stand.

After you have developed a good understanding of your witness' knowledge of the matter and after you have spent enough time with them to – hopefully – establish a rapport, role-play cross-examination with them.¹⁷ If you know that you are dealing with an opposing counsel who has a particularly challenging cross-examination style or personality, your witness' testimony may benefit if you take on that affectation as well. This may be valuable later if you have a witness who is determined that they have their day in court, or that their take on the matter – even if irrelevant and/or damaging to the case – absolutely must be heard. This is also the opportunity to explain what objections are and what they mean, and that they should stop talking once an objection is made.¹⁸

After your prep session, make your assessment of whether you should put your witness on the stand. I have chosen not to put terminated grievants on the stand because, even if they should not have received the discipline they did, an arbitrator may well agree both with me, but also with the employer that that person has no business in that job.

The day of the proceeding

¹⁶ I wait to have this discussion until after everyone has left because the angry, domineering spouse or the cousin who is an IP attorney may have a different take or vested interest than you, the labor and employment professional.

¹⁷ I've learned to be crystal-clear during preparation that I am now asking the questions that opposing counsel will ask them, and that the witness should not interpret these questions as my lack of belief in their telling of events. I reiterate that they need to be prepared to anticipate these questions.

¹⁸ This is also a good time to discuss that, if you object, your witness should not disagree with you but rather wait to see how the colloquy between the parties plays out.

Arrange to meet the witness on the day of the proceeding before it begins. Minimally – especially if you are handling multiple witnesses or this witness is only one small part of the proceeding – check in, take the witness’ temperature and see how they’re doing that day – are they nervous, are they ticked off? Reiterate the important things: don’t be sarcastic, answer questions minimally and only if they understand them, keep their cool and do not get baited. You will find your own way of sharing this advice, but tell them how critical it is not to do stupid stuff during the proceeding.¹⁹

Ask if the witness has spoken to anyone about their testimony since they met you, and if they’ve remembered anything else or different about what you discussed. Additionally – even if it is repetitive – ask if they have spoken to an attorney about their testimony. If so, gently steer them back to where you are and warn them that deviating may cost them the case.

During the witness’ testimony, do not hesitate to ask for a break if your witness needs it (understanding that your witness might not realize that they need it). Accept that sometimes people have to tell their own stories, and this means that sometimes they will lose their own case.

The aftermath

When the proceeding is over, sometimes your relationship with the witness is as well. Thank them for their assistance. Other times, the aftermath can be excruciating and you may have a trier of fact contacting you to request that you ask your witness to stop contacting him by phone in an effort to change his mind; or you may have opposing counsel asking you to ask the witness to stop emailing him about how his client lied to him and he may face Bar charges for suborning perjury.

Remember that your interactions with your witness will stay with them. Treat them with honesty and respect; often, they are the key to your case, and your ability to put them at ease and to develop their testimony constructively (and ethically) may well be the difference between winning and watching your case evaporate before your eyes.

¹⁹ I was representing a nurse accused of diverting narcotics. Shortly before her testimony and in front of an arbitrator, she leaned over her purse and popped a small, white tablet into her mouth. She swears it was a Tic Tac, but the arbitrator’s facial expression altered at that moment and I’m sure the image of the nurse popping a pill never left his head.