

The Right and Wrong Ways to Prepare Your Witness for Deposition

By Thomas M. O'Toole, Ph.D.

The deposition performance of a key witness is critical to the outcome of any case. Summary judgment motions are often won or lost on the testimony of central witnesses. Even when the case survives summary judgment, unfortunate behavior or answers in depositions can have a detrimental impact at trial, leading jurors to dislike or distrust the witness, which lowers their motivation to want to find in favor of the party that witness represents.

I often receive calls from attorneys who are looking for a witness preparation session just before trial for a difficult witness. The typical explanation is that the witness performed poorly in his or her deposition and needs to improve for trial. These calls are frustrating because, while I am happy to help, there is no need for a witness to perform poorly in a deposition. There are a variety of strategies attorneys can use to position a key witness for success in his or her deposition. Unfortunately, these strategies are often not used and attorneys instead rely on deposition preparation sessions with witnesses that create more problems than they do solutions.

The purpose of this article is to discuss the right and wrong ways to prepare a witness for a deposition. All key witnesses should go through this process. Attorneys should avoid making an assumption that a witness will perform well in a deposition because he or she is smart, sociable, or a good communicator. The trenches of daily life vary greatly from the trenches of a deposition. Skill sets that make a person successful in daily life do not necessarily translate to or prepare a witness for a deposition. There is no greater example of this than former President Bill Clinton. Clinton's defining trait was his communication skills. He was a smart, charismatic man who was known for his ability to adapt to just about any situation and demonstrate excellent communication skills in the process. When he was deposed in the Paula Jones sexual harassment lawsuit, most expected a solid performance. The American Spectator described Clinton as the kind of witness "who would strike fear into the hearts of opposing lawyers." However, his performance was anything but. The American Spectator went on to describe him as "an unsophisticated witness, revealing a desire to please the opposing lawyer, and telling prepared stories that suggested he had lots to hide."¹

In order to understand the right ways to prepare a witness for a deposition, let's start by looking at the wrong ways to prepare a witness. The typical preparation session between a witness and an attorney involves both of them sitting down in a conference room for a few hours or more and talking through the case.

¹ Michael Craig. "He Talked Too Much Mr. Clinton was an ideal witness--for the other side." *The American Spectator*. June, 1998.



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The attorney probes the witness on issues the attorney needs to know more about and gives the witness all sorts of advice on how to talk about different issues in the case. The session usually ends with a homework assignment for the witness requiring him or her to review a bunch of documents and try to remember an unreasonable amount of items.

There are several reasons this approach fails. First, the witness will not remember the majority of what he or she was told. All of the studies on recollection suggest the witness will remember about 10-20% of what he or she was told in that session. Second, the witness is not given the opportunity to practice the testimony, which is critical. Witnesses need the experience dealing with all of the standard attorney tricks. They learn this through actual practice. Third, all of the tips and advice from the attorney can be overwhelming. Depositions are intimidating enough and now the attorney has piled on all sorts of “important” things the witness “must” remember. In short, this cramming approach does not work and can often backfire. Witnesses perform poorly when they feel overwhelmed and not in control.

The difference between an ineffective and an effective prep session is what I would describe as an “attorney-centered” approach versus a “witness-centered” approach. The former focuses on the attorney’s needs while the latter focuses on the witness’s needs. The fundamental goal of any prep session should be giving the witness comfort and confidence, which are essential to a successful performance. Everything else derives from these two items. I often joke that witness prep sessions are actually therapy sessions. In this respect, the joke is half-true. Comfort and confidence empower a witness to see clearly and take control of what his happening in the deposition.

Let’s now look at the practical strategies for giving a witness comfort and confidence.

1. *Determine what the witness can realistically accomplish in his or her deposition.* This can vary greatly among witnesses and will impact the approach the attorney should take. For example, the goal for some witnesses may be as simple as not “bombing.” In another instance, the witness may be better suited to carry the weight of the case. An honest assessment is critical here. I have seen attorneys try to get witnesses to take on more than is realistic, which overwhelms them and ultimately leads to poor performances.
2. *Practice the deposition.* The attorney should sit across from the witness in a conference room and pretend to be opposing counsel, asking all of the questions and deploying all of the standards tricks one would expect from opposing counsel. The witness should pretend it is the actual deposition. This gives the witness an opportunity to fail and learn from it, which is much more impactful and memorable than merely discussing the case for a few hours. Witnesses need to get used to the environment of a deposition and the



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failure to practice forces them to learn and adjust during the actual deposition. Conduct this practice in 10-15 minute segments and do not let the witness call “time out” when he or she is uncertain about how to deal with a question. The attorney needs to see how the witness will deal with it when he or she cannot call “time out.” Each 10-15 minute segment should end with a discussion of where the witness can improve as well as what he or she did well. Positive reinforcement in the form of the latter is critical to maintaining the witness’s comfort and confidence.

3. *Identify a few basic ground-rules and try to tie all of the feedback back to them.* I usually start my prep sessions by explaining to the witness that depositions can be very easy if the witness just follows a few basic ground-rules. This helps ease stress and creates confidence in the witness that he or she will be able to get through the deposition without any major blunders. I usually provide four ground-rules. First, the fundamental task is to listen to the question and answer only that question as efficiently as possible, while correcting any problematic language or assumptions that need to be corrected. It’s the most painfully simple (but effective) tip for any deposition, yet witnesses get so overwhelmed that they lose sight of this simple, important rule. As part of this, I explain that listening is actually more important than talking in a deposition. Sometimes, I’ll ask witnesses to adopt the habit of rephrasing the question in their answer, which helps ensure they are listening and catching any problematic language or assumptions in the question. Second, I tell them that all of their answers should come from one of three places: what they personally know or remember, what the records show, or what their common practice was. Anything beyond these three sources is speculation and should be avoided at all costs. Third, I tell witnesses to not be afraid of saying “I don’t know” or “I don’t remember” if it is the accurate answer. Many witnesses treat depositions as a test where “I don’t know” or “I don’t remember” is a wrong answer. This leads to speculation and inaccurate answers. Finally, I tell them to own the facts, not run away from them. I will usually highlight what I believe the bullet-point summary of the case is and help them appreciate that there is nothing to run away from, which means a “yes” answer should not become a “yes, but...” answer followed by a lengthy explanation. These “yes, but...” answers sound defensive and suggests insecurity. The simplified, bullet-point summary of the case also helps witnesses understand and talk about the case in a more clear manner. In my experience, the vast majority of problems get back to the witness violating one of these four ground-rules. By keeping it short and simple and trying to tie feedback to these points, the witness will start to realize that he or she does not need to be intimidated or nervous and has the ability to take control of the deposition and perform well.



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4. *Let the witness complain or rant.* If something is bothering the witness about the case, the parties, or anything else, let him or her rant about it. It can be painful to listen to sometimes, but it is important for the attorney to understand what is going on for the witness and it is even more important for the witness to have an outlet for those concerns. If the attorney does not provide the outlet in the prep session, the deposition becomes the outlet. This results in long, rambling answers that become fodder for opposing counsel's opening statement.

A whole book could be written about preparing witnesses for their depositions. It is difficult to limit the discussion to the length of an article for the Bar Bulletin since there are so many tips and tactics for improving a witness's performance in deposition, but hopefully these tips provide attorneys with a good springboard for an effective witness preparation session. The key is practice. It is this experience and feedback that will best arm your witness for success in a deposition.

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