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Preparing Witnesses: A Practical Guide for Lawyers and Their Clients

By Daniel I. Small

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REVIEWED BY MICHAEL FOSTER

Almost nothing is as rewarding to a trial lawyer as taking an effective deposition of an opponent's key witness. To have gotten the witness committed to a set of facts, and to have covered all he or she knows that is relevant to the case, gives one a sense of a job well done. If, in the process, the witness also concedes facts that strengthen one's client's case, the satisfaction is all the greater. Conversely, almost nothing is more agonizing than to watch helplessly as a client self-destructs while testifying, in spite of your best efforts to prepare the clients.

Careful preparation is a key to having testimony turn out to be useful in building a case rather than a harmful waste of time. An attorney who knows the client's case well is prepared to take advantage of a witness's testimony to strengthen the case or weaken the opponent's case. Almost any motivated lawyer can become reasonably proficient at the critical skills of fact finding and case building. Most clients, however, come to this process unprepared for the alien atmosphere they will encounter. Usually they are not experienced at testifying, have misconceptions about what occurs when they do, and harbor the fervent hope that if they just tell what they know, the ordeal will be over quickly and they can go home. Few understand how unlike a normal conversation testifying under oath can be. They will justifiably rely on their lawyer's ability to prepare them for this unfamiliar and grueling task.

Daniel Small's *Preparing Witnesses* not only offers useful reminders to attorneys about the importance of their role, but also provides the basic steps for training clients to be good witness-

es. It can be read and understood by clients who want to know what is expected of them when they testify, and for those who are not willing to read it, it includes — in both an appendix and a computer disk — suggested preparation forms that can be distributed to clients.

Early in the book Small directs his attention to attorneys, reminding them of the importance of spending ample time with clients in order fully to understand the subject matter about which the clients are to be questioned. He urges emphasizing the differences between ordinary conversation and testifying under oath, and how the question-and-answer format offers little opportunity for the normal amenities of conversation. The adversarial nature of the circumstances seldom allows congeniality, and attempts at it are usually capitalized on by a determined opponent. Equally important in Small's view is to stress the superior position of the experienced, prepared questioner over the witness under oath, who will be asked to recall events that occurred at a time remote to the testimony and that may have seemed insignificant when they occurred. Clients may be asked to examine and explain documents they have not previously seen, or to speculate on or draw inferences from the spare body of knowledge they possess. Without careful preparation and strong self-discipline, a client can falter badly in the course of what may be days of testifying under oath. While Small's advice may seem obvious to experienced counsel, it reminds us that the consequences of not preparing clients to testify can be catastrophic.

To simplify the task of preparing clients, Small has devised a set of rules for surviving relatively unscathed. He divides the rules into two categories: "listen, listen, listen" rules and "don't try too hard" rules. The first group encourages the client to take the time needed to understand the question, and to avoid being rushed into answering. He uses the phrase "you can't unring the bell" to emphasize that poorly thought-out or poorly expressed responses can be damaging.

He advises clients to be cautious in using absolute terms like "always" or "never," which can make testimony seem unreasonable. He warns clients not to speculate or go beyond what they know, and to be candid in their responses, even if the answer casts them in a bad light. Clients, Small says, should be unerringly polite and businesslike and not spar verbally with the questioner or challenge questions in ways that tend to undermine credibility.

The last of the "listen, listen, listen" rules warns clients not to answer questions they do not understand. Small describes three types of confusing questions: those that lack clarity due to a questioner's misstatement, those that are incomprehensible because the witness does not understand the questioner's words, and those that the witness cannot answer without accepting false premises.

The "don't try too hard" rules cover such pitfalls as guessing or drawing inferences that the questioner suggests are reasonable, even though the witness cannot knowledgeably do so. By use of the time-honored acronym KISS — "keep it simple stupid" — he reminds clients to speak plainly, not in jargon or technical terminology, and not to volunteer information not expressly sought by the question.

Small also suggests an approach for clients questioned about documents, which includes a "document option tree." This is a chart that explains how to answer based on familiarity with the document, whether the client or someone else wrote it, the purpose the document serves, and where it fits in the context of other records in the case. Small insists on clients' rereading documents before answering questions about them or, if not permitted to, limiting their answers to facts of which they have personal knowledge. He explains to clients the distinction between past recollection recorded and past recollection refreshed, so that they will not be drawn into testifying about events described in records but which they do not recall. On the subject of prior inconsistent statements, Small advises clients not to affirm ear-