

## WITNESS PREPARATION

by Anthony L. Cochran

Witness preparation (sometimes euphemistically described as "woodshedding") is far, far more important than the limited role the lawyer plays during a deposition. Although "woodshedding" might suggest unsavory, or even unethical, conduct, that is not the purpose of witness preparation. Rather, the purpose is to prepare the witness for an unfamiliar proceeding which can be unnerving and fraught with subtle traps for the unwary. The purpose is not to frustrate the discovery process (for example, to coach witnesses to suffer temporary amnesia, e.g., "I just can't remember"); rather, the purpose is to ensure the accuracy of the discovery process by helping witnesses to carefully reconstruct events so inadvertent memory lapses and misstatements are avoided, which also protects and serves the best interests of a client/witness. A well-prepared witness is relaxed, confident, and ready to truthfully and accurately answer even the toughest questions.

Witness preparation is an art. You need to have a keen insight into human nature. For example, your most important insight is often your assessment of a witness' bias, loyalties<sup>1</sup> and motivation, i.e., Does the witness favor your client? Does he hate his guts? Is the witness too busy or self-important to be bothered? Does your client/witness believe he/she is smarter than you?

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<sup>1</sup>The state of a witness's feeling towards the parties and his relationship to them may always be proved for the consideration of the jury. O.C.G.A. § 24-9-68.

Once you size up a witness, you can adjust your preparations to take his/her foibles into account. For example, you might want to give a vivid illustration of impeachment to knock some of the wind out of a cocky witness.

A good witness is a truthful witness who is relaxed and well prepared. A witness cannot change his/her personality, but he/she can learn about depositions so they are relaxed and at ease with the process. A witness cannot change the truth, but they can review documents, reconstruct a chronology, visit the scene, study photographs, etc. to refresh their memory so they can testify as accurately as possible.<sup>2</sup>

"There are lawyers who refuse to woodshed witnesses at all, who just throw them up there on the stand and let them tell their story. Their clients most often are referred to as 'appellants'." "Preparing Witnesses", David H. Berg, The Litigation Manual, p. 469 (1989).

The keys to adequate witness preparation are: (1) thoroughness, (2) anticipation, and (3) rehearsal.

1. Thoroughness requires that you have an encyclopedic knowledge of all facts, pleadings, discovery responses and documents in the case, including an accurate, detailed chronology of events.

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<sup>2</sup>A witness may refresh and assist his memory by the use of any written instrument or memorandum, provided he shall finally speak from his recollection thus refreshed or shall be willing to swear positively from the paper. O.C.G.A. § 24-9-69; Johnson v. State, 125 Ga. 243, 246 (1906) (a witness may refresh his recollection out of court before taking the stand).

2. Anticipation requires you to be a "devil's advocate" so the witness will be surprised as little as possible during the deposition. You should carefully review the earlier questioning of all other witnesses from transcripts. You should also get an accurate scouting report on opposing counsel.

3. Rehearsal requires that you actually question the witness so he/she knows exactly what to expect during the deposition. Generally speaking, the more important the witness, the more time you should allow for rehearsal. The rehearsal should be conducted no later than the day before the deposition.

One purpose of rehearsal is to put the witness at ease with the process so they will relax and know exactly what to expect. Usually a witness is helped by having time to sleep and reflect on the preparations for the deposition. When problems or questions arise, you want and need ample time to address them. The last thing you need to have happen is for an unexpected problem which unnerves the witness to surface five minutes before or during a deposition.

Rehearsal should duplicate the setting for the deposition. You should anticipate and explain the presence and purpose of all attendees: counsel, parties, and the court reporter. Show the witness a transcript and explain the purpose and pitfalls of a transcript, e.g., how you can be impeached. Explain and talk through all formalities, such as stipulations, the oath, reading and signing the transcript, and objections.

Explain the purpose of a deposition, that is, it is opposing counsel's opportunity to discover answers to questions she/he may ask. "A deposition is a process by which a document is prepared, and nothing else. All that matters is the transcript." "The Witness Needs Help", Stuart A. Summit, The Litigation Manual, p. 497 (1989).

Explain basic instructions for all witnesses:

1. First and foremost, tell the truth, see, Fed. R. Evid. 603, "Oath or Affirmation", and O.C.G.A. § 24-9-60 "Oath or Affirmation Required";
2. Listen to and make sure the witness understands the question. Pause before answering;
3. Answer only the question asked, and answer directly, not evasively;
4. Do not exaggerate;
5. Do not guess or speculate, that is, if the witness does not know or does not remember, say so because that is the truth. Just because a lawyer asks a question doesn't mean the witness is supposed to know the answer. Answer the questions only with what the witness personally saw, knows, heard, or did, unless the question asks otherwise, see, Fed. R. Evid. 602, "Lack of Personal Knowledge";
6. Never answer any question about a document until the witness has carefully read the entire document, see, O.C.G.A. § 24-2-4 and Fed. R. Evid. 106 re: "the rule of completeness";

7. Qualify answers where appropriate, e.g., times, dates, distances, approximations or estimates; and
8. Any document(s) which the witness brings to the deposition or uses to refresh his/her memory might be discovered. Fed. R. Evid. 612 provides that if a witness uses a writing to refresh his/her memory for the purpose of testifying, either while testifying, or before testifying, the adverse party may be entitled to have the writing produced for inspection and for purposes of cross-examination. Under state law, if a witness uses documents to refresh his/her memory after the commencement of a hearing or trial, the cross-examiner is entitled during that hearing or trial to examine the documents. Johnson v. State, 259 Ga. 403, 883 S.E.2d 118 (1989); Johnson v. State, 194 Ga. App. 299, 390 S.E.2d 297 (1990).

Cover appropriate dress and demeanor with the witness:

1. Dress as though the witness were going to church;
2. Do not chew gum;
3. Never lose your temper. Stay calm and serious at all times and avoid being flippant or smart alecky. Avoid arguing with the other lawyer;
4. Treat opposing counsel the same way he/she treats you but watch out for lawyers who try to smooze or engage in friendly chit chat during breaks;

5. Do not look at counsel for answers or help. The witness is on his/her own.

Cover the witness' rights:

1. "It shall be the right of a witness to be examined only as to relevant matter and to be protected from improper questions and from harsh or insulting demeanor." O.C.G.A. § 24-9-62, and, see, Fed. R. Evid. 611(a) re: "protect witnesses from harassment or undue embarrassment";
2. The court reporter can be asked to read back a question;
3. Recesses can be taken at reasonable intervals;
4. The questioning attorney can be asked to explain ambiguous or confusing terms or words in a question;
5. A witness is entitled to give an uninterrupted, complete answer;
6. The witness can read and sign the transcript, making "any changes in form or substance", Rule 30(e);
7. The witness can confer with counsel on matters of privilege. Hall v. Clifton Precision, attached; and
8. Privileged communications may not be discovered. O.C.G.A. §§ 24-9-21, 24-9-22, 24-9-40, and 43-3-32 (attorney, accountant, physician, psychiatrist, clergyman, and spousal privileges).

Illustrate all of these instructions as you explain them; then after you explain all of these things, rehearse. You cannot expect anyone to learn how to field a baseball by only being told how to