A New Roadmap for Depositions

Susan A. Powell, Ph.D.
President
Strategic Litigation Research

The following article was written as part of a presentation for the Practising Law Institute's "Taking and Defending Depositions" Seminar in June 2009.

Introduction

When asked to write an article on the taking and defending of depositions, a trial consultant will have an entirely different perspective than a trial lawyer. The common assumption is that a jury consultant should be brought on board in the latter stages of a case in order to help "spin" the story for jurors. However, what a good trial consultant often finds at this stage of a case is that the record, developed during the process of discovery, has made the job of crafting a "sellable" message to a jury (or judge or arbitration panel) very difficult indeed. In fact, misguided depositions are frequently fundamental roadblocks in developing a consistent, concise and compelling story for any audience. The record left behind can make the ability to go forward with a winning story very difficult, and sometimes impossible.

The key weaknesses that emerge from an outsiders' perspective are twofold, both dealing with preparation: the failure of the attorney to properly prepare for the deposition, and, more dramatically, the failure to properly prepare the witness for the deposition.
First, it is frustrating to read (or watch) a deposition where the questioner is unclear as to the goals of the deposition. Key questions (or objections) are missed. If you do not know where you are going, it's very difficult to get to your destination. Meaning, an attorney is simply on a fishing expedition if he/she lacks a theory of the case, or what we consultants call case "themes" and a case "storyline." Furthermore, it is important to not only think about your story before a deposition, it is equally critical to think about your opponents' story.

Second, the witnesses must be thoroughly prepared – and they are frequently not. The most common failure is that the witness designated for the deposition has not been adequately informed as what to expect during the deposition. Almost always, the deponent has not been educated on the overall case story. This lack of knowledge is very frustrating, and sometimes terrifying, for the witness. The result is a nervous and hesitant witness who is more easily discredited by the other side. I have heard repeatedly from prospective witnesses that they have no clue as to what to expect in deposition, and have not been advised by their attorneys as to what to expect. Furthermore, witnesses are frequently ill advised, if advised at all, as to word choices, sentence structure, body language and even mode of dress. A prepared witness is a confident witness. Confident witnesses make fewer mistakes; fewer mistakes mean a cleaner case record.

As Benjamin Franklin once said, "By failing to prepare, you are preparing to fail."

Whenever possible, we have included actual quotes from surrogate jurors in this article to reveal jurors' reactions to various styles and types of witness testimony.

Preparing Yourself

Actually, this is the easy part. As trained attorneys, you know all of the rules of the game and have access to key case documents to begin preparing yourself. You've been formally trained in the taking of depositions, and pretty much know about all the tools in the toolbox. However, some things are worth re-thinking. Some ideas are outlined in the section below.

- **Prepare a "map" for your case with themes and a storyline.** This is your "roadmap" in helping to determine what information you wish to learn about the case and therefore what you need to retrieve from the witness. While trial lawyers may call this "the theory of the case," consultants think about it in much simpler terms. "The theory of the case" is frequently translated into the legal theories behind the case. What we are talking about is crafting a story around the case that can be broken down into simple, concise and understandable concepts; concepts that are developed as themes. Use everyday language for your themes and storyline; language that the lay public understands and uses. As Frank Luntz writes in Words

That Work, "No theme. No focus. No discipline."

- **Prepare a "map" for your opponents' case, also with themes and a storyline.** Because you are still in discovery, you may not believe that you know where the opposition is going. But think about it; that is not true. At a minimum, clues to the oppositions' strategies will be in the complaint (or in the response to the complaint) and any discovery taken to date. It is invaluable to put yourself into the "other guys' shoes" and think about how you would attack the case if you were on the other side.

- **Think creatively and flexibly when you are preparing your deposition outline.** Preparing an outline for the taking of a deposition is standard operating procedure. However, it is critical that you are flexible and not get tied down into a static outline. Critical opportunities will be lost. Listen carefully to the responses of each witness and adjust your questions accordingly; witnesses will be giving you clues as how to best get information out of them and you should adjust accordingly. Each witness is unique. Each witness has a different background and personality; each has different flash points that will either open them up or close them down. Change your style if necessary; some witnesses respond better to a friendly examination but a competitive person might respond better to hostile questioning. And watch the body language. Facial expressions of anger, frustration or confusion will show up on the witnesses face. Watch closely as these will be clues as to whether or not you are being successful in your examination and whether or not you should change your strategy with this witness.

- **Think of depositions and trial testimony as being complimentary, not separate, events.** Do not think of deposition and trial as "bifurcated" events. Too frequently, deposition and trial seem as if they are two distinct, unrelated events. It is true that a common goal in deposition is to have the opposition learn as little as possible about your case or your witness. However, this strategy, if taken to extremes, can mean trouble up the road. We have seen witnesses in depositions not remember their educational histories, their job functions, or a major event in their lives. This strategy can backfire. First, it is not believable. Your witness will lose credibility, and never get it back. Second, in trial, the witness cannot appear so ignorant and you will find that the witness that said "I can't recall" 101 times can no longer hide. Prepare the witness by reviewing the record, jog their memories with important facts, develop a timeline and help them remember important events. Consistency between deposition and trial is critical for developing and maintaining witness credibility. Developing and maintaining credibility is essential.

- **Always strive to use the language of everyday life.** This is the time to begin to teach yourself and your witness about simple communication techniques. Learn to ask questions simply and clearly. Be brief. To the layman's ear, who might be listening via videotape or transcript at a later date, a muddled or confusing question can discredit the attorney. This could possibly allow some sympathy for the witness to develop. A juror listening later may think that the attorney is purposely attempting to confuse the deponent. When you can, use everyday words, not the words of a lawyer.

- **Assume that your witness will be videotaped.** In "The Effective Deposition, Techniques and Strategies that Work," published by the National Institute for Trial Advocacy, there is an interesting statement, "…most videotape depositions are taken of a party's own witness who expects to be unavailable for trial." (p. 248). Increasingly, this is no longer true. The videotaping of witnesses has become common practice, and an important one. While there are different rules in different states, videotaped testimony can be used in many states to impeach a witness. Needless to say, a "picture" of a witness contradicting him or herself is much more compelling than simply reading the words of that witness. Therefore, when preparing a witness for deposition and trial, focus must be placed on the "whole" person; the words they speak as well as the language their bodies convey.

Preparing Your Witnesses

Most witnesses have never been in a deposition and find that it is unfamiliar and frightening. Since the litigation environment is familiar territory for an attorney, it is very difficult to remember how strange the legal process is for the average person. While it is strange to an American, it is completely bizarre for a foreign witness and all of this must be taken into consideration during a preparation session. The more the witness lacks familiarity with the system, the more preparation and "hand holding" the process will require.

- **Know your witness.** This is the most important aspect to keep in mind while you are preparing. Each witness is different – a different personality, a different history and a different view of the world. Therefore, depending on the role, current situation and the history of the witness, their perspective and reaction to events will vary dramatically. Generally, there are four basic types of witnesses who you may be preparing for deposition: the senior executives of a company, the middle managers of a company, the "novice" and/or your hired experts.

  The first category includes senior executives who will be called upon to be deposed. A CEO will most likely be the most confident, and, possibly, arrogant. The CEO is the most important witness you may prepare. He or she is the "face" of the company. Therefore, what image the CEO projects will dictate the image that the company will instill in the minds of the audience.

  It is the rare CEO who does not appear to exude an attitude of superiority over any listening audience. Furthermore, all too frequently, a CEO believes that he or she can argue the case better than you can. CEOs who are lawyers magnify this problem by a thousand times. It is important to remember that an executive is used to being in control of the situation. Persons of this stature find it debilitating to relinquish control to anybody, including their attorney.

  In dealing with the over confident executive, the critical first step is to appeal to their need to "win." This is a characteristic particularly dominate in most corporate executives. More than anything, a CEO never wants to lose. Let these executives know why you are pursuing a particular strategy and, above all, explain why this will help you win. This approach will aid you with a second weakness of CEOs - their temptation to control everything, including this lawsuit. Therefore, it is particularly critical to be inclusive in letting company executives know where you are going and why. Co-op your CEO into accepting your strategy; better yet, have them participate in developing the strategy so they "own" it. This strategy is so important that it is not unusual to conduct a mock jury or mock bench trial exercise just to reveal to the client that a certain strategy or tactic will or will not work.

  One common but dangerous strategy in deposition, particularly with a company executive, is to do what we refer to is the, "I don't know CEO" defense. This is one of the most destructive deposition strategies that we have seen. Above all, your audience, particularly a jury, does not want to hear a corporate executive time and again say, "I don't know, I don't recall, I am not responsible." Actually, they don't want to hear any witness, fact or expert, responding in this manner over and over again. And this is where deposition and trial merge; if a witness cannot remember an important fact in deposition, how credible is it when that witness miraculously recalls this fact at trial? Simply stated, these witnesses lose their credibility, no matter how cleverly we attempt to redeem them. The lesson in this is that your witnesses must do their homework, studying diligently before a deposition. They must review the record well in advance of the deposition, they must work out the timelines surrounding their actions or inactions, they must be familiar with the basics of the case and where you intend to go with your offensive and defensive measures. They must be clear as to their story in advance, and learn what words work that can best tell that story. Ignorance, or feigning ignorance, will not get a witness out of trouble. To the contrary, it will get that witness into trouble.

  Of course there are instances where individuals truly cannot remember and attempts to jog memories fail. This is especially true in cases that have dragged on for years and people have retired or long since moved on professionally. The best one can do under these circumstances is to make sure that what the witness says is consistent; if the witness cannot certain remember facts, be sure to have them stick to the story. Stick to the few facts that the witness can clearly remember, and stay away from the extraneous. Streamline, simplify and whenever possible, find others to attest to the information that this person has forgotten.

  The second category of witness represents very different challenges. This is the corporate witness who does not sit at the top rungs of corporate management, normally known as "middle" managers. These witnesses are usually less confident, less secure and more nervous. This witness can frequently represent the CEO's polar opposite – desperately seeking the trial teams' guidance, support and insights. It is not uncommon for these witnesses to feel that their jobs are in jeopardy. Many feel that they will be fired if they are unable to perform up to senior management's expectations. These witnesses require a different kind of

support and preparation.

Generally, these witnesses will require more positive emotional re-enforcement than the average senior executive. The level of stress for this witness is exceptionally high. These witnesses may need to be repeatedly reassured that their jobs are safe and secure (assuming that this is true). They will need to be particularly well informed as to what to expect during a deposition, in detail. They will need to completely understand what they are expected to know, and what they are expected not to know. They will need to feel that they are in command of the process and they are faced with as few surprises as possible. Let these witnesses know where you are going and why and then help them decide how to respond accordingly.

The third type of witness is the "novice." The "novice" is the least sophisticated individual involved in a lawsuit. The type of individual included in this category would be the actual plaintiff in a lawsuit (most likely personal injury or product liability). This category would also include any third party bystanders who may testifying for the plaintiffs or defendants at trial.

This category of witness has many features in common with our corporate "middle" manager. However, these witnesses will need even more support, advice and education. Most likely, these individuals will have had no formal exposure to the legal system. Any exposure has likely been through watching crime shows on television or serving on a jury. Therefore, these witnesses will need extensive training on understanding "real" legal processes and procedures. If they are plaintiffs and have suffered a personal loss, they may be emotionally fragile. Some may be angry or hostile. Some may cry. If you are in the role of representing the defendant in such a situation, the most important thing to remember is to tread softly. While you still need to cross examine this type of witness, do so calmly and carefully. It will be easy to offend your audience if you are too hard on such a witness – even if they do not believe what the witness is saying is true.

The fourth type of witness is the expert witness. The biggest danger here is to assume "experts" are experts at testifying. This will most likely be true even if the expert claims to have been deposed numerous times, or even testified at trial many times. Just because expert witnesses are considered authorities on specific topics does not mean that they can relay their knowledge in a clear and concise fashion to third parties. Experts range dramatically in their presentation skills. Traditionally, the focus when hiring experts is on their formal credentials. Too little time is spent on determining if the potential expert can effectively communicate complex ideas in a simple manner to a third, less informed party.

Experts can be harder to prepare because they consider themselves in complete command of the topic at hand. Therefore, a great deal of effort may be needed in helping them to learn how to craft their message clearly, stay on topic, talk in simple language, and answer questions in a quick and straight forward way. Wanting to be teachers, experts frequently succumb to wanting to "teach" the questioner about the topic at hand. The result can be talking too much, straying from the topic, and feeding the opposition too much information. In preparation for deposition, lawyers preparing experts may need to pay particular attention to keeping the expert on topic, and only addressing areas of their expertise.

In sum, study your witnesses carefully. Spend time with each witness in order to understand that individual's strengths and weaknesses. The time spent will help develop a trust between the attorney and the witness, something essential as you move forward and you are in the position to evaluate and sometimes criticize the witness. Coach each witness in order to accommodate to his or her strengths and weaknesses. Stating the obvious, the more important the witness, the more important it is that you are able to "get inside the witnesses' head" and help them counter their weaknesses and play up their strengths.

- **Don't make it a guessing game.** Witnesses always want to know what the case is about and strategically where you are going with the case. They also want to know about what to expect of the process.

  Unfortunately, many witnesses enter deposition not knowing where the case is headed, what the case is about and what story you are attempting to relay. We are not saying that you should "tell" the witness exactly what to say, simply in order to support the story that you are attempting to tell. However, witnesses can better think through their answers if they have some idea as to where you are going. It is not unusual for a witness to begin to "guess" what the case is about, "guess" what

answers you "want" and begin to formulate responses to those guesses. Unfortunately, the guess work generally turns out to be wrong, and the responses on record can run counter to the story you are trying to tell. While you always want your witnesses to tell the truth, what you do not want is one of your witnesses to begin to shape a story that contradicts where you ultimately want to go. Getting out of these possible contradictions may prove to be very difficult.

Furthermore, it is important that the witness knows what to expect in terms of the process/ procedure itself. It is not unusual for a witness to not even know what a deposition is. This means knowing about the mechanics of the deposition as well as what types of questions that will be asked. Witnesses need to know where to look, what to do if there is an objection, how to listen, how to respond, when and how to ask for breaks, what to do if they feel they have made an error. All of these factors need to be addressed well in advance of the deposition itself, and repeated numerous times. By the time a deponent reaches deposition, the witness is most probably so nervous that he or she is unlikely to remember last minute instructions. Therefore, prepare the witness well in advance of the actual event; keep repeating the basic instructions. The responses of the witness will need to be instinctive, not robotic or over rehearsed.

Help the witness with word choices and sentence structure. Witnesses need to be taught to use short, clear sentences and everyday words. A typical juror comment is, "Can you translate your "double speak" into basic English for us laypeople?"

- **Determine if your witness is a "talker" or "evader."** Brevity is essential. Some witnesses need to be encouraged to avoid "rambling." However, while brevity is essential, brevity used in the denial of truth can also backfire. Therefore, each witness much be carefully evaluated to gage whether he or she is a "talker" or an "evader." Witnesses generally have two responses under stressful circumstances – they talk too much or they talk too little. It is important that potential witnesses are instructed to craft their answers to be honest, brief, clear, simple and consistent.

  When witnesses talk too much, the implications are clear. The witness unearths new information for the opposition, and opens new roads in discovery. Furthermore, a "talker" can cross contaminate, meaning they identify other persons that can then be called upon to testify. Closing doors, not opening them, is one goal of deposition, and a talker is a dangerous liability if they cannot be taught to carefully listen to the question, think about the answer, and respond in as few words as possible.

  Two types of witnesses seem the most inclined to talk too much; these witnesses may need particular attention and careful guidance. The first type is the CEO or senior corporate executive. Some of these executives believe that if only he or she had the opportunity, they could argue the case better than the trial team. This type of witness spends a lot of time arguing with the questioner in an attempt to convince the other side that he or she is right. The second type of witness who is inclined to talk too much is the expert. Some experts believe that they need to "teach" the opposition about everything THEY think is important.

  On the other hand, unbelievably, a witness who says too little, even in deposition, can be as big a problem as the talker. One of the key goals of deposition is to give the opposition as little ammunition as possible. However, if a witness says too little, and looks ignorant or incompetent, it creates enormous credibility problems. It does not get the witness off the hook. That witness will still be held accountable for their actions or inactions. If a case goes to trial, and if the record has a witness saying little but "I don't remember", "I don't recall", "I don't know", or "Someone else was responsible" all credibility is lost; credibility that cannot be recouped at trial. This problem is particularly critical in today's volatile environment. Jurors (and even judges) want to see people taking responsibility for their actions. Corporate executives in particular are under the microscope for how they behave and how credible they are. After hearing segments of depositions in mock jury exercises, it is common to hear comments such as:

  - *"Who is running the business? You seem to be unsure about everything…"*
  - *"How did you get the job if you knew nothing about it?"*
  - *"How are you at the head of the company without knowing what is going on?"*
  - *"Who coached you to answer 'I don't know' to every question? It looks really bad."*

- *"Why don't you know important information about the company?"*

- *"I don't believe that you have no knowledge of the financial side (of the company) and what went on. It might not be your area of expertise but you are too sharp to be so disinterested."*

- *"Is there anything about this company that you know?"*

As pointed out in Words that Work, "In today's anti-corporate, deeply distrustful, and highly politicized environment, there's a simple linguistic equation: Silence=Guilt." (p. 129).

- **Witnesses need to be taught to use short, clear sentences and everyday words.** In essence, they need to be taught to be good communicators. We know that good word choices and clearly articulated sentences are essential for trial. However, it seems too little thought is given to the idea that witnesses who use strong words and crisp clear sentences are more effective in deposition. In fact, strong communication techniques appropriately used can shorten a deposition. This is because the questionnaire "gives up" more quickly. This is due to the fact that it is harder to poke holes in the testimony of an articulate witness who speaks with confidence and clarity than a witness who is unclear, uncertain and garbles their responses. You want your witness to speak with confidence and authority.

  Some juror quotes that re-enforce the need to use clear, concise strong language include:

  - *"Why are you so EVASIVE?"*

  - *"It seems like he is good at talking around questions."*

  - *"You seem to be sweeping things under the rug."*
  - *"Why are your answers not straightforward? What are you trying to say?"*

  - *"Why are you so vague?"*

  - *"Why can't you answer questions more directly and sharply?"*

  - *"Why can't you answer a direct question? Why are you beating around the bush when asked certain questions?"*

  - *"He is very long winded."*

  When possible, have witnesses use strong words. Examples of strong words are "I know," I am sure," "I am certain" and "I remember." Weak or "weasel" words should be avoided. By "weasel" words we mean words that include: "I guess," "I can speculate," "I assume," "Perhaps," "Possibly," or even nuances such as, "It is quite likely."

  It is particularly important to prepare a witness to avoid speculation. Since a witnesses' testimony needs to be truthful and accurate above all else, a witness should always stick to what he or she knows to be true. A witness needs to listen carefully to the question, ask for clarification if necessary, think before he or she answers and responds in a clear and consistent manner.

  A witness also needs to be taught to use proper grammar and short sentences. Long, entangled sentences confuse, never enlighten. Consider this one sentence answer to a question in deposition, given by an expert:

  Q: "Can you just explain the point?"

  A: "Certainly. The point is that programs like this, and (this program) is certainly an important instance, want to ensure that they provide care to their covered lives, the people covered or are eligible to be covered under the program, and also want to do it at as low cost as possible, but the objective of ensuring that eligible program eligible people have adequate access is an important objective, and it's one that frequently appears in documents and deliberations, and the point here is that when you compensate a provider of products or services under the program, you create – based on how much you compensate them, you create economic incentives for them to participate or not participate in the program, and it's a balancing act for the agency to try to pay enough to get the access that they want to see forthcoming but not too much, because they want to save money, and so it's in that sense that you can see differentials, as I put in quotes, meaning what appear to be gaps between what you and the market knows agencies are paying, say, for a product, and what you are paying them, i.e. that

you are paying them perhaps more than what they are paying or even quite a bit more than what they are paying because of this other consideration of wanting to ensure that they have the economic incentives to remain in the program."

Give or take, this sentence is 250 words long. Shorter and clearer sentences would have advanced the ball further than the confusion of an entangled, lengthy response. Experts in particular can succumb to this need to teach, overreach or exaggerate. The lesson here is that all potential witnesses, fact or expert, need to be coached about how to construct brief, simple responses with as few words as possible.

- **Make sure that your witness establishes credibility.** Witnesses need to understand the keys to credibility: telling a consistent story, being consistent with the facts, and making statements that are believable.

  Changing stories, denying basic facts, refusing to answer simple questions or displaying selective memory can completely nullify the effectiveness of a witness. Extreme examples that we have experienced include witnesses that have forgotten their educational backgrounds, forgotten their salaries, and forgotten their most basic job responsibilities. This is particularly destructive when the same witness manages to remember the most irrelevant small detail, revealing that they have no memory problems at all. Responses are exemplified in the following surrogate juror comments:

  - *"How can you remember the exact date you were promoted and not remember any topics discussed in the meetings held?"*
  - *"Considering your position…how can your memory be so selective in not recalling or providing answers to specific questions?"*

  Purposely playing dumb doesn't work either; people just get angry, as the following quotes display:

  - *"How do you not know your salary?"*
  - *"How is it possible that you sold millions in stock and do not remember?"*
  - *"How believable is it to not know how much money you earned from such a big stock sale?"*
  - *"I can't believe that an intelligent man like you cannot remember your salary."*
  - *"Did they not prepare you?"*

  This re-enforces the need to prepare the witness to respond with credible answers. Once a witness is discredited by feigning ignorance on basic questions that they could not have possibly forgotten, they have lost their ability to be trusted or listened to. The witness must be armed with a credible story and consistent facts to match the story. Keep the witness consistent by having them stick to the story, always making sure that the story itself is believable.

- **Instruct the witness on good body language.** Since many depositions are now videotaped, witnesses need clear guidance on how to manage their facial expressions, body movements and even tone of voice. Actually, this is good preparation for trial.

  Unfortunately, it seems that most everyone today thinks that they are experts at reading body language. Some television shows promote the idea that by "reading" facial expressions and "analyzing" body movements you can determine if someone is telling the truth. Shows like "Lie to Me" and "CSI" promote this myth. Furthermore, the popular media promotes this thinking by having "guests" on their programs (such as jury consultants) who brag about their ability to accurately interpret facial expressions and body language. Some trial consultants actually claim that they can ascertain if someone will vote for the plaintiff or defense based solely upon watching them walk through the courtroom doors. Jurors have picked up on this trend and engage in interpreting body language as well, as revealed by the following quotes:

  - *"Your body language is very telling, especially a hand over your mouth."*
  - *"Why do you look so uncomfortable answering these questions?"*
  - *"Why do you look so uncomfortable if you are speaking the truth?"*

  Witnesses need simple advice in helping them think about good body language. For instance, someone who is constantly sipping water during a

deposition ends up looking nervous (our throats get dry when we are nervous). Therefore, a witness should be taught to exercise some restraint when reaching for that bottle of water or can of soda. A witness who looks up and rolls their eyes is showing contempt for the process; something that should be avoided at all costs. Also, some witnesses are always looking up, and they also have long pauses between questions while they are looking up. Unfortunately, this body language suggests that these witnesses are trying to concoct an untruthful answer on the spot. Note the quotes by jurors below:

- *"Can you explain what a "stare up at the ceiling calculation" is?"*
- *"How can you just look at the ceiling and come up with a number?"*
- *"Why do you delay so long in answering the question?"*

While pausing after a question is essential, waiting too long suggests that the witness is developing a story on the spot. We recommend the five second rule. This suggests that a witness pause about five seconds before he or she answers a question. This is important because if the witness answers too quickly a number of things can go wrong. First, the witness may not have thought through the answer. Second, the questioner may not have finished and the witness might end up answering the wrong question. Third, it gives the witnesses' attorney time for an objection.

Special problems arise with very nervous witnesses. Some people smile too much. Some people laugh too easily. Some people have smirks on their faces. Some are so stern that they look positively frightening to the viewer. Some people are constantly moving in their chairs, or swiveling back and forth in their chairs. Some people express their feelings of disgust with heavy sighs. None of these physical gestures are appropriate for a professional setting.

Working with a witness to improve their physical presentation is important. Give them general hints: look at the questioner (the respectful thing to do), sit up straight with hands on the table or lap, try to relax, be yourself and answer questions politely and in an even tone (never get angry, sarcastic or disgusted), keep hands down (and away from your mouth), and be an active listener. The best way to help your witness learn these techniques is to practice.

- **Practice with your witnesses until they are comfortable.** Practice as if your witness will be videotaped, and that video tape will be shown to the world, because it just might be.

  Have formal "practice" sessions. During these sessions take your witness through a demanding and rigorous cross-examination. Give them examples of the landmines and pitfalls they may face. Help them develop "safe harbors" to use when they feel trapped. Witnesses want to experience what they might face in real life; the fewer the surprises, the better your witness will fare.

  A picture is always more valuable than just verbal feedback as a learning tool. If legally possible, videotape some of your practice sessions. Play back to the witnesses some of their practice testimony so that they can see for themselves their strengths and weaknesses.

  Build the witnesses' confidence up but be honest. Work with your witness to develop confidence and trust in you; then work with them to help build confidence in themselves. This means giving the witness clear examples of when they have done well; give specific examples of answers that worked. Also, give the witness examples of answers that didn't work. And tell them specifically why one answer was more effective than another. The more specific you can be with the witness, the better.

  Finally, while remembering that practice is essential, it is equally important that practice sessions do not turn into "rehearsals." While it is important that witnesses understand the rules of the road, and have plenty of time to practice the rules, witnesses should not look as though they have memorized their answers to pre established questions. Witnesses should never look "coached." Witnesses need the tools to be successful; they do not need pre-determined "answers."

We always present some rules to our witnesses when we are preparing them for deposition or trial. We name them the "Do's and Don'ts of Cross-Examination." The list is as follows:

DO:

- Focus on the moment
- Be truthful
- Be accurate
- Stick to your story (be consistent)
- Stick to what you know
- Ask for clarification
- Listen carefully to the question
- Think before speaking (the 5 second rule)
- Keep an even and respectful tone
- Use strong words
- Be mindful of your body language
- Accept only information you know to be true
- Do your homework
- Know your facts
- Be professional

DON'T:

- Memorize your testimony
- Exaggerate, guess or speculate
- Volunteer information
- Ramble
- Cross contaminate
- Try to "sell" or impress
- Reach conclusions
- Hide "bad" facts
- Interrupt the questioner
- Look back on a prior answer
- Get angry, defensive, argumentative or sarcastic
- Over reach or exaggerate
- Answer a question you don't understand
- Answer a question about a document you have never read

Conclusion

It is a time consuming process to properly prepare someone for the rigors of deposition. The more important the witness the more effort it will take. The more difficult the witness, the more time it will take. You will not always succeed. Witnesses will vary widely in their learning curves. Some will learn rapidly. Some will learn slowly. Some will seem well prepared but fail in action. Some will never learn. Some will never listen to you. Nonetheless, most of the time, if you are prepared and execute a disciplined witness preparation program, your chances of leaving behind a bad record that will haunt you later in the case, are greatly diminished.