

Budget Conscious Witness Preparation

BY KATHERINE JAMES

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Introduction

These days everyone, it seems, is looking to cut down on costs. Large corporations who used to hire big firms are now looking for “boutique” firms who can try their cases for less. Plaintiff’s firms, who used to live and die by the model “wait until the last minute and then spend, spend, spend” are allocating time and resources on a per case basis from the time they get involved in a lawsuit. Criminal Defense lawyers are finding that they have to put their Clients on the witness stand more than before... and how many criminal cases have unlimited funds? And the insurance companies who are involved at the heart of so many of our cases are cutting litigation corners right and left.

This article is intended to give attorneys some good advice on how to prepare as efficiently as possible. This doesn’t mean that you won’t ever have to pull out the checkbook and get a witness preparation specialist involved in your case. Just because times are hard doesn’t mean that some witnesses will simply be beyond your skills as an attorney to prepare. But with proper planning, preparation and taking advantage of cyber space you can keep your costs at a minimum.

1. Inexpensive Investments = Big Rewards

First – educate yourself. Instead of skipping the session on witness preparation taught by a trial consultant at the next conference you attend (because you already “know everything”) go in and learn from whoever is teaching the course. Those of us who specialize in witness preparation have the latest scoop on how to prepare witnesses from many different approaches since consultants come from many different training backgrounds – from psychology to education.

Also, read whatever you can get your eyes on. I would suggest starting with the articles archived right here at *The Jury Expert*. Obviously, attorneys also write about witness preparation. The reason that I steer you to trial consultants is that attorneys only spend a fraction of their time preparing witnesses. Many of us spend the majority of our time preparing all kinds of witnesses in all kinds of settings. Frankly, why not learn from the folks who do this for a living?

The first equipment that you need to invest in is a digital camera and a system for video playback. Do you have an “okay” camera you use to take videos of your kids playing soccer? Get another one for your office. Do you already have a flat screen in your office? Then you have a system

for reviewing the video. A few wires to hook them together and you are good to go. I definitely suggest having a separate camera for your office rather than counting on “remembering” to bring in your camera from home or wresting it from the backpack of the young filmmaker to whom you find you have given birth. I learned this the hard way. “No one is allowed to touch Mom’s camera!” was a rallying cry in my house when my kids were growing up. It came from showing up thousands of miles away from home on more than one occasion minus a power cord, a tripod...or, of course, a camera.

Most witness preparation specialists use cameras and playback to help witnesses in role-playing mock examination sessions. You, too, will find that working with someone using video feedback makes your job so much easier. Witnesses look at themselves in playback and say, “My GAWD, I look like a gargoyle when a scrunch my eyebrows together while I am thinking!” You get to say, “In that answer you used way too much business jargon. How would you say that in English?”

I suggest that you record your witness the first time you meet that witness. Do it in a mock examination session. Hang onto it – it will be in a digital format – somewhere you feel is safe and privileged. You are building a small library on this witness. You can use this first file in future prep sessions to say, “Look how much you’ve improved from the day I met you!” You can send it to whoever is ultimately responsible for settling the case and say, “Seriously? You think we can let this person take a video taped deposition without hiring someone to help make her act like a human being?” There are multiple ways you can use these files – including sending them to a witness preparation specialist. More on this later...

Another inexpensive tool in which to invest is a hat. If you are used to having two attorneys prepare one witness at the same time, it is much less expensive to use one attorney. Most people, I find, use one lawyer to do direct exam and/or act as the defending lawyer in the deposition. They use the other as the lawyer who is taking the deposition or the lawyer who is cross-examining. Many attorneys say to me, “I don’t want my client thinking I am a bad guy!” I find that most people understand that you are playing another character – the character of the “bad lawyer” -- if you wear a costume. I’m not talking about dressing up like the other lawyer – just put a hat on your head when you are playing the other lawyer. I actually created the Good Lawyer/Bad Lawyer™ clothing line through making witness preparation hats. You don’t have to buy my hats – but if you are going to play both lawyers, you do need to distinguish yourself with a simple physical distinction – and a hat is as simple a solution as any.

2. Smaller Budget = More Time... Or Does It?

Many attorneys allocate the same amount of time to each witness they prepare. For example, they always allow three hours preparation time for a deposition of a “minor” witness and six hours of preparation time for a “major” witness. Still others allocate time based on the amount of time that witness will be on the stand or in the deposition. I’ve heard one hour prep time per hour on the stand.

Sounds like good budgetary planning, doesn’t it? The only problem is that witnesses are not like cupcakes. If you bake them all for 12-15 minutes in a 350° oven you will not get a perfect batch of testifiers, ready for frosting.

One way to figure out from your first meeting how much time this witness will need is to do a role-playing mock examination. Something short, sweet, and that gives you the answers to the questions that tend to haunt you from the ghosts of past preparation experiences. Make a list of criteria that you want from this witness – this will depend on the witness and case. A short list example might

be, “I need her to appear credible. I need people to know she is emotionally affected by what happened to her. I need her to answer the question she is asked – neither to ‘volunteer’ nor to say too little.” In your mock examination can she do all these things? Then you might be able to budget less time with her or fewer sessions. Can she do none of these things? Then you must budget more time with her or more sessions than you are going to with another witness in the case who can fulfill his or her list of criteria.

If you have a large group of witnesses from the same company, you might be used to preparing them one at a time and allocating a day for each one. For example, 20 witnesses means 20 first days of preparation. Another model, depending on privilege issues, might start with all twenty in a general preparation session that includes role-playing exercises for all of them. That session might include some content that is case specific or no content that is case specific depending on privilege. Out of that half-day session, you will learn who is going to need almost no time for preparation, who is going to need several hours, and who is going to need more than one session. You then can plan in a much more time-efficient and therefore cost-efficient manner. Out of those further sessions you will be pleasantly surprised and get to cut the time short with some and be unpleasantly surprised with others and allocate that “saved” time to them. I recently used this model in a lawsuit and helped prepare 44 witnesses in less than 15 days time.

3. In Over Your Head? Look to Cyber Thrift!

Suppose you realize you are in over your head – you need help from a witness preparation specialist with a witness. Before you arrange for travel and daily fees try the following two interim steps.

First, send the witness video you recorded from your first meeting, as well as any subsequent role-playing exercises you recorded from further meetings (if any) to a witness preparation specialist. You might also need to let your consultant review some content in the case. The consultant will charge you an hourly fee for this. Next, ask the consultant to send a written report with observations and recommendations. Talk with the consultant over the phone and discuss his or her tips on how to make the witness better. Or, if the consultant knows you are not able to affect the change that is needed, the consultant might recommend the next step.

The next step is having the consultant work with you via Skype or videoconference. Again, for an hourly charge by the consultant and perhaps some videoconference fees, you can have the witness preparation specialist work with you and the client long distance.

Anywhere during this process or at its end you might still decide it is best to bring the consultant to your witness, or for you and your witness to travel to see the consultant. You now have a consultant who is totally up to speed on your witness and you should have a very good sense of what the problems and issues are that still need to be addressed in person.

Conclusion

Witness Preparation does not have to bust your trial budget. With careful planning, assessment, and use of modern technology you can end up spending no more or less than exactly what is needed.