

Witness Preparation Program

Why getting your clients ready for trial—from educating them on the legal repercussions of testimony to teaching them about the implications of body language—is so critical to winning a case.

BY **BILL MILLER**

WITH ALL THE FOCUS ON USING FACEBOOK, TWITTER, AND THE NEWEST COMMUNICATION TECHNOLOGIES, THE BASICS OF PRACTICING LAW ARE OFTEN PUSHED TO THE WAYSIDE. In a litigation practice these days, considerably more time is spent in depositions than actual trials and—all too often—more time is spent preparing to discover the other side’s information than evaluating your own clients’ and witnesses’ knowledge, their “Internet exposure,” and how they will testify. (Think how tickled you are when you find the other guy’s incriminating Facebook post; have you checked your own client’s page?) For a solo practitioner, finding the time and resources to track down a client’s online footprint can seem daunting. But it’s necessary. Often, the most important witnesses to prepare for deposition are your own. Getting your witnesses ready for the cross-examination they can expect from opposing counsel can be the key to a good outcome and an opportunity to strengthen your relationship with your client.

Preparing your witness for deposition involves much more than having them tell you the facts. They need preparation for frontal attacks and also flanking maneuvers good trial lawyers use. The witnesses should understand their testimony in the context of the legal issues and other facts in the case. Most important, your client and witnesses need to realize that telling the truth makes your job easier. As lawyers, we can always work with the



facts we know to better address the legal issues our clients face. It is the surprises—the facts our clients and witnesses fail to mention in advance (or we failed to ask about)—that throw kinks into perfectly good cases. Preparing your witnesses for deposition gives you the perfect opportunity to delve into the facts from your opponent’s perspective, both to educate your client about the case and to improve the chances for a favorable outcome.

1. *Know the law controlling your case.* We learned in law school to pull the applicable jury instructions early in a lawsuit, yet all too often lawyers only begin looking at the law well into a lawsuit. When preparing your client and witnesses for giving their testimony, don’t fly blind about what kinds of facts are important to the lawsuit. Know which facts are required for your burden of proof and which ones are required for the opposition’s. Understanding what kind of facts must be addressed head-on and which need to be thoughtfully considered under the controlling law is critical.
2. *Work with your witnesses.* First and foremost, that means spending time with them—thorough preparation usually takes longer than the actual deposition. You should help them understand the facts they are going to provide and help them more comfortably understand the process itself. Most lay witnesses have never been to court or attended a deposition.

Helping your clients or witnesses understand how the process works—and what your role will be during the proceeding—is an important first step in raising their comfort level. That, in turn, helps them provide their testimony for the case. They need to know not only what the fact issues are but also what the legal ramifications are to the answers they provide. They don't need a law review article, but you do need to provide them with enough legal background to understand why the facts they can testify about are important to the case.

3. *Use the witness preparation time to further understand and develop your case—and to learn more about your clients or witnesses on issues that may only be tangential to the case (i.e., what have they posted on Facebook).* Talk about the lawsuit but also about other issues that may affect how they testify. Use the preparation time to critically evaluate what they know about the case and how they perceive the facts and the process. Proceed like you are the opposing counsel. Ask hard questions about the case so your witnesses understand what you believe the other side will be looking for. Test your clients or witnesses on your theories of the case and the theories you believe the other side will be operating under. Better yet, after preparing your witnesses, have a partner or associate “depose” them. You'll be surprised to discover problems you hadn't even considered. More often than not, approaching your clients or witnesses as opposing counsel provides you with additional information you may not have otherwise learned—until the other side asked about it. When your witnesses give a bad answer, be sure to use it as an educational opportunity before the actual testimony. Spend the necessary time with your clients and your witnesses before the deposition to minimize such occurrences, which can lead to problems later.
4. *Remind your clients that the jury is not only judging words but also their “whole” credibility.* With today's trial technology, small parts of videotaped depositions can be shown “on the fly” at trial for impeachment and cross-examination. The nonverbal communication that witnesses provide at depositions can sometimes be more important than the verbal testimony that is given. Working with your witnesses and focusing on their physical reactions to questions, as well as how they respond, can often be significant to how the other side, and the ultimate trier of fact, judges your case. Now, witnesses' words are memorialized for trial along with the rolling eyes, scowls, grimaces, and glances at the lawyer. Preparing your witness for deposition in today's high-tech legal environment must involve more than just what they wish to say.
5. *Remember that active preparation with your clients and witnesses helps their case and provides you with a perfect opportunity to show your work.* In today's paper-driven, email-oriented litigation, having an opportunity for face-to-face contact with clients is even more vital. Make sure your clients understand the importance of “first impressions,” as the party deposition is often the first real opportunity the other side has to evaluate the case. Prior planning and preparation prevents a poor performance. **TBJ**



BILL MILLER

is a partner at Greer & Miller, L.L.P., in Texarkana. Licensed in Texas and Arkansas, Miller practices civil litigation in both states and in federal court with a focus on business, commercial, and personal injury litigation.

Texas Legal Directory “Official Directory of the State Bar of Texas” Your Blue Book of Attorneys since 1935

Federal Section
State Section Exec & Legislative Branches, State Offices, Tax Depts
Court Section State, county and local contact info
Professional Associations
County Map and County/City list
Judicial Pictorial Section
Board of Legal Specialization Section
Areas of Practice Section
Classified Section
Roster Section
Out of State Roster
Biographical Section of participating law firms & individuals

\$68.00 + P&H & Tax **4 vol set**

Legal Directories
PO Box 189000
Dallas TX 75218
(800) 447-5375



View your listing at: www.LegalDirectories.com “The Legal Search Engine”