



The prepared witness

The best trial testimony comes from a prepared witness



Cooper

BY MILES B. COOPER

Late one night, the lawyer sat in his office, working on a summary judgment opposition. A terrible noise interrupted his focus. He went to the window. A car without tires – rims only – made a run up the steep San Francisco street outside the office. Valiant effort, but without rubber, a bit problematic. The car slid backward, only to try again. The lawyer called 911 to report the chaos and went back to work.

About a year later, that same lawyer stood next to the witness stand. He felt surprisingly nervous – this was not his usual spot. “Please raise your right hand,” said the clerk, swearing the lawyer in. The lawyer then took the stand to testify in a criminal case about what he had observed.

Hammer time

We get inured to the courthouse’s intimidating nature. Taking a different role – juror or witness – reminds one that experiences differ. Have a hammer? Everything looks like a nail. When you’re a trial lawyer, courthouse visits are common. But step into a potential witness’s shoes and that familiar landscape looks much different.

Fail to plan...

Contact potential witnesses well before trial. With experts, this can be months before. With lay witnesses, a 100-day warning helps. This allows time to continue the trial if a witness is unavailable. As that trial gets closer, friendly reminders help. Do cases get out on the trial date? Not always. But the case where one fails to tamp everything down is the case that tries. Guaranteed. (If I’m wrong, I’ll refund the price you paid for this magazine.)

The subpoena power compels you

Even friendly witnesses get a subpoena – albeit via an acknowledgment of receipt instead of a process server’s added cost. Send it with clear instructions on where to go and what to do. Subpoenaing a witness defuses the “you came to court today because you are the plaintiff’s friend, didn’t you?” question. “She’s my co-worker but I came because I was subpoenaed,” is a nice counterpunch. It also helps fight the creeping lack of respect for the judiciary (and sometimes not so creeping, right, Mr. President?).

Of late, witnesses sometimes seem to feel like they are doing us a favor by coming to court. The process server’s added cost can be worth the impact for some witnesses. The knock on the

door and official document compelling attendance may take the attitude down a peg.

Talk to the witness

Sending a subpoena and a year-old deposition transcript is not adequate preparation. Contact the witness a few days before the scheduled testimony. Get the witness’s cell phone number (and program it). Provide your number to the witness. Tell the witness to text you directly should an issue arise. Give detailed directions on how to get to the right place (the bench outside the trial department). If the security line can be unusually long, tell the witness. Discuss attire. Give input on the judge’s demeanor and pet peeves. Make sure the witness knows not to walk into the courtroom until called. Go over the motions in limine rulings and other forbidden subjects. This is not the witness’s world. The witness does not know (unless the witness is told) referencing insurance will get lawyers jumping faster than House of Pain.

Describe what will happen when the witness is called. Someone will bring the witness in. Everyone will be staring at the witness enters the courtroom. The jurors will be off to the (left or right) and the witness remains standing to take the oath. Explain that making eye contact with the jury helps during testimony. Pro tip: the phrase “explain to us...” and sweeping a hand toward the jury helps witnesses turn to the jury. Make sure the witness knows to respond to the opposing counsel’s cross-examination with the same respect and demeanor as on direct. Even with unpleasant opposing counsel.

Thank the witness during the prep session and explain you will not be able to say thank you, shake the witness’s hand, or escort the witness out after testifying. If you don’t do this, the witness may try to shake your hand on the way out. That makes your witness look like *your* witness – less credible to the jury.

Finally, a thank-you letter with the trial outcome is a nice touch. Witnesses like to know what happened. And if you did your job properly in the preparation and the trial, there’s a good chance that witness may suggest your name when someone is looking for a lawyer.

Outro

The lawyer felt strange, sitting in the hot seat. He answered the prosecutor’s questions on direct and the defense lawyer’s cross, trying to remember his own advice to his witnesses. When it was done, he walked out of the courthouse, glad that in all likelihood he’d be the one asking questions the next time he was back.



Miles B. Cooper is a partner at Emison Hullverson LLP. He represents people with personal injury and wrongful death cases. In addition to litigating his own cases, he associates in as trial counsel and consults on trial matters. He has served as lead counsel, co-counsel,

second seat, and schlepper over his career and is a member of the American Board of Trial Advocates. Cooper's interests beyond litigation include trial presentation technologies and bicycling (although not at the same time).