

**University of Cincinnati
College of Law
Witness Preparation Workshop**

January 11, 13 & 15 2011

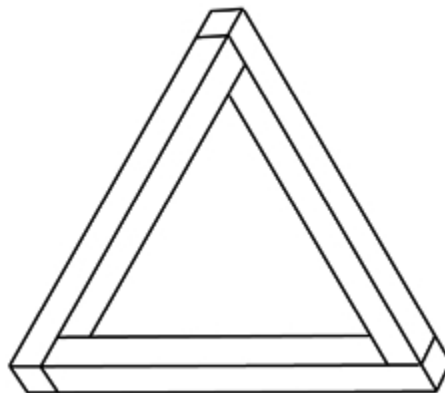
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Witness Preparation Checklists © 2010

Disclaimer -These witness preparation checklists are to be used for guidance and evaluation purposes and in conjunction with the other materials for this course. They are not intended to be a complete catalogue of each and every step that a trial attorney would perform in preparing every kind of witness for every kind of testimony. Also, not every measure on these lists will be required for every witness to the same degree. Each witness' aptitude for and attitude toward testifying will dictate the nature, scope and depth of the preparation required by the advocate. Some apparent conflicting measures will require judgment and discretion by the advocate.

The terms "explain", "show", "confer" etc. as used herein are shorthand for "Do this and more to make sure the witness will follow through in the courtroom as you intend". This will require the additional steps of demonstrating, practicing, admonishing, cajoling, and encouraging the witness to follow through in the courtroom.

CAUTION: In your preparation sessions with the witness, keep the substantive testimony discussion separate from the "how to" discussion as much as humanly possible. This will avoid much confusion.



CHECKLISTS

I Gaining the witness' confidence

(in you as an officer of the Court)

- A. Be prepared¹
- B. Be professional and stay professional throughout
- C. Treat the witness with respect
- D. Listen to the witness
- E. Exemplify the practice of listening thoughtfully before responding
- F. Understand the witness' situation (and how it may affect the testimony)
- G. Explain your obligation to present truthful testimony
- H. Explain your obligation to assist the witness in presenting testimony
- I. Explain that preparing the witness is proper and ethical
- J. Explain the benefits of "telling the truth"
- K. Repeat your mantra "Tell the truth" at every phase of preparation

II Explaining the witness' role/obligation

(giving the witness confidence)

- A. To tell the truth
- B. To tell the truth so it is: *(see I H. above)*
 - 1. understood
 - 2. believed
 - 3. remembered
 - 4. acted upon
- C. To testify about that part of the case for which they are best suited
- D. To prepare for their courtroom appearance
- E. To take pride in their courtroom appearance (family, community)
- F. To treat the role of witness with respect
- G. To participate in the community's affairs *(It's not about your case)*
- H. To participate in a just result *(")*

¹ Among many other things, being prepared includes knowing your witness' background – family, social, educational, occupational, legal and criminal. If you do not have the ability to gather this information before your meetings with the witness, you must persuade the witness to share this information with you during your interviews. The best way to do this is to establish trust with the witness and to convince the witness that you will make every effort to limit the amount and the harmful effects of any information that is disclosed in connection with his/her testimony. If you treat this process as a routine and necessary part of the preparation, the witness is more likely to understand it that way.

III Uncovering and testing important information

- A. Prepare time line
- B. Listen – really listen
- C. Be patient
- D. Get the witness to be patient (as in accurate and thorough)
- E. Ask for details
- F. Ask for more details
- G. Test the witness' version
 - 1. against the laws of physics
 - 2. against the laws of nature
 - 3. against the laws of human nature
 - 4. against the witness' other statements
 - 5. against the physical evidence
 - 6. against other credible evidence
 - 7. against common sense
 - 8. against your gut & heart
 - 9. against first hand knowledge requirement
 - 10. against anticipated cross-examination
- H. Confer with the witness about your concerns and how to overcome them
(*places where the testimony may not ring true for the fact finder*)
- I. Be careful not to “put” words into the witness' mouth
- J. Be careful not to contaminate the witness' first hand knowledge

IV Showcasing the witness' testimony

- A. Explain that the jury will usually want to believe the witness
(*unless and until the witness provides reason(s) to believe otherwise*)
- B. Explain the loss of credibility resulting from witness advocacy
- C. Explain the loss of credibility resulting from “characterizing”
- D. Explain the loss of credibility resulting from cross examination surprises
- E. Explain that less is more
- F. Explain that you will draw out more if needed
- G. Explain the need for the witness to engage the fact finder
(*“Please explain to the L & G... ”*)
- H. Explain the need to use plain language (own words ?)
- I. Explain the need to be sensitive to the jurors' language expectations
- J. Explain the value of a straightforward and sincere appearance
(*demeanor*)
- K. Explain that controlled emotion is given much credence

V Working with Evidentiary Foundations (and your witness)

- A. Identify the foundations that you will need as you prepare the witness
- B. Include the foundation elements in your witness outline
(*consult practice aid*)
- C. Explain the formal requirement for foundations
- D. Explain that you realize they seem legalistic
- E. Explain that your foundation questions may sound unnatural
- F. Explain that, if done well, they make the testimony more credible
- G. Explain that the witness should listen just as carefully to these questions
- H. Explain that the witness should provide only the requested information
- I. Explain the problems resulting from the witness jumping ahead of you
- J. Explain the importance and benefits of proceeding “one step at a time”
- K. Explain that you will take responsibility for eliciting “the real evidence”
- L. If warranted, explain the use of refreshing recollection and/or prior recollection recorded foundations (cross your fingers)

VI Preparing the witness for cross-examination and beyond

- A. Explain that a good direct exam will limit the cross exam
- B. Explain that the jury should not remember the cross exam (no fireworks)
- C. Remind the witness to keep answers short and responsive
- D. Remind the witness not to volunteer information
- E. Remind the witness to listen to the question and answer that question only (*unless more is needed to avoid misleading the jury – “May I explain?”*)
- F. Explain common cross exam techniques
- G. Explain how to manage those techniques
- H. Explain the importance of being reasonable, but within limits
- I. Explain the importance of not taking the bait
- J. Explain impeachment techniques (you can’t rewrite prior statements)
- K. Explain why the witness can’t win an “argument” on cross examination
- L. Explain that you will not be able to fix too much on redirect exam
- M. Explain that redirect invites more cross exam (‘nough said)

VII Reducing the risk of and impact of unexpected or damaging testimony

- A. See above regarding preparation and prevention
- B. Explain the importance of not deviating from the plan
- C. Explain that it may be necessary to deviate from the plan
(*refreshing recollection/prior recollection recorded for example*)
- D. Explain that you will guide the witness through any deviations from plan
- E. Explain that you will then resume the planned testimony