

PREPARING YOUR CLIENT TO TESTIFY

OVERTON THOMPSON
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**EMERGING RESPONSIBILITIES OF IN-HOUSE COUNSEL
TO ADVISE, PROTECT AND DEFEND**

PREPARING YOUR CLIENT TO TESTIFY AT TRIAL

INTRODUCTION

- A lawyer's role during trial is important. But the most important role is in the preparation of the case for trial.
- Experts say that 90% of what it takes to be successful at trial occurs before the trial ever begins.
- Preparing your witnesses and corporate representatives to testify is the most critical part of that preparation.
- Far too often, however, that preparation is hurried or ignored.
- Set forth below is a simple process for making sure that preparation is done effectively.

First Step - Know the theme of your case.

- By this point, you and your trial counsel should already have decided what the theme of your case is.
- Every case must have a theme, and that "theme" must transcend every portion of the trial, from the opening statement through the closing argument.
- If the theme set forth during the opening statement, however, does not come through loud and clear during your client's direct exam, and survive your client's cross-exam, then your trial counsel has wasted their breath.
- Consequently, before you begin preparing your client to testify, you must have firmly in your mind what your theme is and how your client's testimony will fit within that theme.

Second Step - Communicate that theme to client.

- The next step logically is to communicate that theme to your client so they will understand what you are trying to accomplish.
- For example, in a case where your client terminated their President and the President brought suit alleging there was not sufficient cause for the termination under his employment contract, you may decide that the theme of your case should not be so much that the plaintiff violated some particular provision of his employment contract, but simply that this is someone who needed to be fired.
- You want the jury to believe that regardless of whether your client technically had "cause" for the termination, this is a guy that needed to be fired simply because of who he was.
- It is critical that your client understand that theme from the outset.
- It should affect their entire testimony. Every chance they get they need to talk about what a jerk this guy is.
- If they don't understand that that is the theme of the case, they might be tempted to focus too much on the particular misconduct that precipitated the termination.

Third Step - Make client do her homework

- The next step in preparing your client to testify is to make her do her homework.
- Give her a copy of her deposition, any previous testimony she might have given in an earlier hearing or proceeding in the case, any affidavit she may have signed, answers to interrogatories, and any statements she may have given that were produced to the other side, and tell her to read all these at least three times.
- Stress to her how important it is that she read this material.
- Tell her how devastating it will be at trial if her testimony is inconsistent with something she has previously said under oath.
- Tell her that the lawyer on the other side will take that one inconsistency and argue to the jury that your client is not to be believed, either because she is a liar or because her memory is flawed.
- Hopefully, this will motivate your client to spend the time necessary to read all of this material.
- Send this information out several weeks before you have scheduled the time to prepare your client so she will have sufficient time to read the material.

Fourth Step - Prepare client for direct examination

- The next step is to engage in the time-consuming process of preparing your client for her direct exam.
- There are several parts of this process

Logistics

- Schedule at least 2 days, even in the smallest case.
- Make your client go with you to your trial counsel's office where she will not be disturbed. Make her tell her assistant that she cannot be reached except in an emergency. It is essential that you have her complete attention.
- If you have multiple corporate representatives, prepare them all individually. You cannot effectively prepare more than one person at a time because each client will need different levels of attention in different areas. You are not dealing with robots.
- Finally, make sure that the lawyer who is going to do the direct exam does the preparation. Communication between the two is essential.

Overview

- Next, give your client a quick overview.
- Remind her of the theme of the case and tell her specifically the goals you want to accomplish through her testimony.
- This is work your trial counsel should have already done when he sat down at his desk and prepared his direct examination.
- Tell your client that each question she will be asked is designed to further one of those goals.

- Make sure she understands these goals and how her testimony will fit within the overall theme of the case.
- For example, one of the goals you may want to accomplish through her testimony is to show the jury that she is well-educated and has vast experience in hiring and firing employees.
 - Communicate that to your client so she understands that when she is asked about her education and work experience, that she should include all of her various graduate degrees and carefully describe her prior work experience.
- Or one of your goals may be to show how arrogant the plaintiff was throughout his tenure with the company.
 - Communicate that to your client so every chance she gets, she will talk about the plaintiff's arrogance.
- Letting her understand what you are trying to accomplish through her testimony will go a long way toward making her direct exam a success.
- Also, tell her up front that this is going to be a very laborious process, but that preparation is nine tenths of the battle and will pay off in spades at trial.

Substance

- Once you have given your client this overview, have your trial counsel take her through her direct exam.
- Do not give her a script, or even a list of questions.
 - First, she might sound too rehearsed at trial, in which case the jury will not believe her.
 - Second, the other side is entitled to see whatever your client reviews in preparation for her testimony.
- Also, you do not want your client to memorize answers, you want her to understand her answers.
- Explain to your client that trial counsel will not be allowed to ask leading questions.
- Take her carefully through each subject matter to be covered in her direct testimony.
- Be particularly careful to deal with any problems or sensitive areas in her testimony. Now is the time to address problems, not on the witness stand.
- Make sure you ask your client to tell you about any particular areas of her testimony she is concerned about.
- Decide on appropriate answers to difficult questions together. If you make the client part of the process in developing an appropriate answer, they are more likely to remember it at trial, and it is less likely to sound like it came from a lawyer.
- At the same time, you are the lawyer and understand what must be proven in order to prevail at trial.
- Be candid. In a constructive way, address their weaknesses. Do they talk too much? Too little? Are they too quiet? Too loud? Are they too fidgety? Too stiff? etc.

Exhibits

- As part of the preparation for the direct exam, make sure you cover with your client all of the exhibits your trial counsel intends to offer through them at trial.
- Nothing would be more embarrassing than for your client to be unable to identify a particular document intended to be introduced through their testimony.
- In our hypothetical case, if the client was unable to identify the employment contract at issue, the jury is likely to believe she did not consult the contract before she fired the plaintiff.
- Familiarity with the contract and its content will lead the jury to believe not only that your client consulted the contract before firing the plaintiff, but also that she believed she had cause under the contract to fire him.
- Make sure your client is thoroughly familiar with each exhibit, including any computer-generated exhibits.
- Also, make sure your client is familiar with the foundations that must be established before the contract can be admitted into evidence.

Fifth Step - Prepare your client for her cross-exam.

- Once your trial counsel has covered with your client all of the areas that will be addressed on her direct, it is time to discuss her cross-exam.
- In many cases this will be the most important part of the preparation.
- Prior to this day, you and trial counsel must have spent a great deal of time putting yourself in your adversary's shoes, and thinking about what he is likely to ask your client.
- Some questions will be obvious. Some not so obvious.
- Again, preparation is the key. If your client is asked a question on cross that you and she have discussed, then she will come off as confident and relaxed, and therefore believable, at trial.
- On the other hand, if your client is asked a difficult question which you have not discussed, it is likely she will hesitate, appear nervous and not be as believable.
- The goal is that she be so well-prepared that she is not unnerved by anything the opposing lawyer asks her.
- This kind of confidence will speak volumes to the jury.
- In William Kennedy Smith's trial, the prosecutor asked him on cross whether he really expected the jury to believe his story. The defendant quickly responded that it was not a story, it was the truth.
- Whether he and Roy Black had actually anticipated that question is unknown. What is clear is that the defendant was confident he could handle any question the prosecutor put to him.
- Go over each question the witness is likely to be asked and again, together, formulate an appropriate response.

- Also, be sure to address any trick questions such as, “What did your lawyer tell you to say?” “The truth.”
 - “Isn’t it possible that” Either “no” or “anything’s possible.”

Sixth Step - Discuss logistics of trial and do’s and don’ts of testifying

- Once you have covered with your client both her direct testimony and what she is likely to be asked on cross, the next step is to discuss logistics and some general do’s and don’ts about testifying.
- Tell her what to wear. Dress neatly and conservatively with clothes appropriate to her background.
- Take her to the courthouse and show her the courtroom. Show her where everybody will be sitting and where she should sit.
- Also, give her the following pointers on testifying.
 1. Be yourself - most important. Otherwise, the jury will not believe you. Tell her to use her own vocabulary, not yours.
 2. Talk to the jury - look them in the eye as you would a friend; all of us judge credibility on whether someone can look us in the eye.
 3. Speak clearly and loudly so that the last juror can hear you.
 4. Be serious, be polite, be respectful.
 5. Do not get angry; do not lose cool.
 6. Listen carefully to the questions.
 7. Do not volunteer.
 8. Don’t guess. If you do not remember, say so. If you do not know, say so.
 9. Do not be afraid to ask if you don’t understand a question.
 10. Above all, tell the truth!

Seventh Step - Video! Video! Video!

- I am convinced that it would be malpractice in any significant case not to video your client before the trial both on direct and cross.
- Your client will learn more watching the video than from anything you tell her.
- People instinctively know what’s effective and what’s not. (A picture paints a 1000 words!)
- So, after you spend a day with her preparing her direct and cross, bring her in the next day for a dress rehearsal.
- Have the lawyer that’s going to handle the direct at trial do the direct and get the biggest S.O.B. in their office to do the cross. (Give them a script to follow.)

- Tell the person doing the cross not to hold back. The goal is to make it worse than what will happen at trial. Hopefully, the real thing will be a cakewalk.
- After you're finished, praise your client for what she did well and give her constructive criticism.
- Then watch the video together.
- Stop and discuss good points and bad points. Everything you've discussed the day before will begin to make sense to her.
- Again, be sure to ask her about anything she is uncomfortable with.

CONCLUSION

- **Know the theme of your case.**
- **Communicate that theme to client.**
- **Make client do her homework.**
- **Prepare client for direct examination.**
- **Prepare your client for her cross-exam.**
- **Discuss logistics of trial and do's and don'ts of testifying.**
- **Video! Video! Video!**

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Vanderbilt University -

J.D., 1984

University of the South -

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Bar Admissions

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Honors & Distinctions

Listed in: *Chambers USA,*

The Best Lawyers in

America® and *Benchmark*

Litigation "Local Litigation Stars"

Member, Board of Directors,

Travellers Rest Historic

House and Museum (Past

President)

Member, Executive Board,

Boy Scouts of Middle

Tennessee

Member, Board of Directors,

Men of Valor

Past Board Member: Monroe

Harding Children's Home

(Chair); Exchange Club of

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Garden Show of Middle

Tennessee

Overton is chair of the firm's Litigation Department. He focuses his practice on complex business litigation, including cases involving securities and shareholder class action defense, derivative actions, officer and director liability, intellectual property, breach of contract, business fraud, corporate and partnership dissolutions, lender liability, and trust and estates litigation.

Securities and Corporate: Overton has handled class actions, derivative actions, and merger and acquisition litigation for a number of public companies in cases pending in Tennessee, New York and Delaware. He was lead counsel for Genesco Inc. in its successful and much-publicized case involving the breach of a \$1.5 billion merger agreement. The case, involving actions pending in both the Chancery Court of Davidson County, Tennessee and the U.S. District Court for the Southern District of New York, was reported in both *The Wall Street Journal* and *The American Lawyer* magazine. Overton was also lead counsel for an institutional minority-shareholder in the successful defense of a shareholder derivative/breach of fiduciary case tried in the Court of Chancery of the State of Delaware, Newcastle County. Overton has also handled cases involving alleged breaches of the securities laws, including particularly Section 10-b/10-b-5 cases.

Commercial and Banking: Overton has handled numerous cases over his career involving various commercial disputes. He has represented the plaintiff and defendant in a number of business fraud, breach of contract, and insurance disputes, representing companies in a wide array of industries. He has represented healthcare companies, senior-living providers, financial institutions and other businesses in cases pending in Tennessee and around the country. He has also represented both plaintiffs and defendants in a number of cases involving trusts and estates litigation.

Other Representative Matters include:

- Counsel for board of directors in successful defense of shareholder derivative action alleging defendants breached their fiduciary duty by manipulating the financial results and engaging in insider trading;
- Representation of mutual fund and fund investment advisor in class-action suit brought on behalf of former fund shareholders alleging various causes of action under federal securities laws and state common law;
- Representation of national accounting firm in securities class-action suit brought on behalf of shareholders of publicly-traded company alleging causes of action under federal securities laws;
- Representation of large national bank in consumer class action alleging violations of the Truth-In-Lending Act;
- Successful representation of start-up hi-tech manufacturing business in case alleging theft of trade secrets and breach of covenants not to compete;
- Successful representation of national bank in multiple lender liability claims asserted by purchasers of limited partnership interests in failed real estate ventures.