

So, You're Going to be a Witness: Preparing for and Testifying at Trial / BY JIM PROSZEK



You've done your investigation, you've testified at a deposition, mediation has failed and now you are going to trial. You get only one chance to make a good impression on the jury so you need to make the most of it. This article will provide you with tips on how to do so.

Preparation, Not Inspiration, Wins Trials

We all have watched as Perry Mason or Matlock, through the use of inspired questioning, gets the evildoer to confess just before the final commercial. That seldom happens in real life trials. Rather, the side that comes in the most prepared to tell its story in a simple, straightforward manner wins at trial. There are a number of aspects to being prepared: knowing your subject matter, developing a simple theme, making sure you and your attorney are on the same page, avoiding overreaching and anticipating where the other side is likely to attack.

Know Your Case: The best way to make a bad impression on the jury is to get on the stand and not know your own case or what you've said before. At best, you look like a poor witness for your side. Even worse, you could be perceived as a liar.

Make sure you have reviewed, and are thoroughly familiar with, the key facts of the case and the documents and photos your side will use at trial. Details can be significant. Why is it that you are sure the damage occurred at a specific time? How do you know the facility that was damaged was, or was not, accurately marked? Where and when was this photo taken? What does it all show?

Making a timeline of key events can be helpful. Once that is done, you can match the documents to the key events in the timeline and the points those documents illustrate. Talk with other witnesses. The collective memory of the group can help you remember what happened. It can also help you avoid a conflict with what another witness might say. Review your prior testimony and make sure your story at the trial does not change from the one you told at the deposition. If it does, you need to have a ready explanation.

Develop a Simple Theme for the Case: A critical mistake many make is making their case too complicated for the jury to understand. Develop a simple theme around the strongest points of your case and repeat that theme throughout the trial.

One of the most effective examples I have seen is a case where an excavator damaged a line after failing to expose it by hand before attempting to cross it. The excavator claimed the ground was too hard to dig with hand tools. The truth was that it would not have been impossible to do so, just more time-consuming and expensive. Throughout the trial, however, the excavator's lawyer repeatedly referred to the ground as "impenetrable coral rock." Repeating that theme consistently throughout the trial left an impression that was difficult to overcome.

Make Sure You and Your Attorney are on the Same Page: Sit down with your attorney and go over the questions he/she will ask at trial. Memorizing all the questions and answers is not the goal. However, you do want to make sure to give the answer he/she is expecting. Answering "no" to a question your attorney expected you to answer "yes" makes you both look unprepared and negatively impacts your, and your case's, credibility with the jury.

Don't Overreach: Tell your attorney beforehand if you are unsure about, or lack personal knowledge of, a point he/she anticipates proving through your testimony. Guessing or speculating about things which are beyond what you actually know leaves you open to having your credibility called into question on cross exam.

Walk a Mile in the Other Side's Shoes: Knowing the weakness of your case can be as important as knowing its strengths. Try to view the case from your opponent's perspective. What are the weak points in your case the other side will try to highlight? What questions would you ask to exploit those weaknesses? Consider those issues before you testify gives you the opportunity to formulate responses rather than being caught by surprise in front of the jury.

It's Now Time to Testify

You've prepared for trial – now it's time to put that preparation into action at trial.

Be a Teacher: You have worked in your business for years and know and understand it. You have worked on this case for months, if not years, and know and understand it, too. The jurors, however, know nothing about your case and likely just as little about your business. Your job on the stand is to teach the jury about your business and the facts of this case in a way they can understand.

Use Pictures and Drawings: While it may be a cliché, the phrase "a picture is worth a thousand words" is very often true. It is much easier to show the jury a picture of utility locate marks or a diagram of the "tolerance zone" than it is to explain it in words.

How You Say it is as Important as What You Say: Your attorney already knows your case and is on your side. You therefore want to engage the jury when testifying. You do this by talking to, and making eye contact with, the jury rather than the attorney when answering questions. Juries also tend to dislike witnesses who are disrespectful of the other party and the other party's lawyer. You want to answer the other lawyer's questions politely and sincerely rather than arguing or showing hostility or derision.

Speak English: The utility and excavating businesses are filled with technical terms and acronyms. If the jury does not understand your testimony, it is difficult for them to find in your favor. You should consider the best ways to explain your business and the facts of your case in plain English that the jurors can understand. **DP**

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