

# Preparing Witnesses



FAMILIAR COMPLAINT IN DEPOSITION AND AT TRIAL IS that counsel is “coaching the witness.” Certainly, ethical rules prohibit counsel from attempting to convince a person to lie or withhold the truth. (See Cal. Rules of Prof. Conduct, Rule 5-200.) But there’s more to effectively pre-

paring for litigation than simply instructing a witness to be honest and not volunteer information that isn’t requested.

Indeed, there are many appropriate ways that a lawyer can help a witness get ready to testify convincingly. Here’s a rundown of several.

## 1. Open-ended questions provide opportunities.

Help the witness understand that, for any open-ended question, there are many different ways to answer truthfully: The witness may provide minimal information, or specific details. Often this is not an easy concept for lay witnesses to grasp.

Consider a wrongful termination case in which the defendant is asked why she fired the plaintiff. One truthful answer is “he didn’t work out.” Another truthful answer is “he was habitually late, and I let him go after giving repeated warnings that were ignored.” Both answers are equally true, but the second, which is more specific, is a much better answer.

## 2. Chronology is overrated.

The order in which a witness presents facts in an answer is also something to think about; chronological order is not always the best way to deliver information. For example, let’s say your client is a plaintiff in a fraud case, and the defendant’s counsel asks him what was discussed in the conversation in which the misrepresentation was made. If your client gives a chronological account, he might prattle

on about vacations discussed, or pleasantries exchanged about family, instead of starting with, and focusing on, the fraudulent statements.

## 3. Remember the theme.

Help the witness to provide a truthful answer that best carries forward the theme of your case. Preparation sessions are the best time to test different answers—more general, more specific, with different emphases, delivering information in varying order. See which version best drives home the merit of your client’s position.

## 4. Tone is key.

The witness must understand that her tone is nearly as important as the content of her answer. In fact, tone usually plays a major role in the message that is ultimately conveyed to the judge or jury. Angry, condescending, or sarcastic witnesses won’t be persuasive, no matter what they say.

## 5. Don’t be defensive.

Train the witness not to be defensive. If there is an unfavorable fact, your witness must take responsibility for it without trying to “weasel” out of it. On cross-examination, a wrongful-termination plaintiff’s answer to the question “were you late for work the week you were fired?” should be “yes,” not “yes, but my car broke down.” Mitigating facts can come out during redirect examination.

## 6. Look sharp.

Make the witness aware that how he appears when testifying matters a great deal. Discuss in advance what the wit-

ness should wear to a videotaped deposition or hearing. If the witness’s posture tends to be slumped, bring a pillow to support his back. Videotape the witness in advance and point out any instances when he puts his hand in front of his face while testifying (which jurors will read as lying) or if he has fidgety or wandering hands.


## 7. Beware of the dating game.

Train witnesses to avoid the “when” problem. Many people naturally assume that a “when” question must be answered with a *date* and if they can’t recall the specific one, they may just guess.

But there are many ways to answer a “when” question properly without providing an exact date. For example, assume the question is “when did you sign this contract?” A truthful witness could say: “last spring” or “after we moved into the new building.” Neither answer contains a date, yet each is completely accurate and sounds much better than “I don’t recall.”

## 8. Be positive.

Finally, use pre-deposition and pretrial brainstorming sessions to instill confidence. Too often, a preparation meeting serves only to jangle the nerves of a witness who is simply trying to tell the truth. It is a mistake to overload people with too much information. Give positive reinforcement, especially as the testimony date approaches. But remember never to wear out a witness with practice the day before testifying.

Paying attention to these guidelines will maximize your opportunity to present persuasive evidence from the witness stand. 

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