



Preparing Witnesses by Videoconference

By Michael A. Gross



Social distancing policies are requiring many attorneys to practice law remotely. Attorneys are learning to adapt to this new environment along with their clients. Many attorneys have some experience taking depositions by video. However, remote preparation of a client requires some additional knowledge and skill. There are some real advantages to remote witness preparation. Learning how to be more effective at preparing witnesses remotely can actually translate into having a witness who is more successful in their video-taped depositions. Importantly, as attorneys, we must be aware of various ethical and practical considerations involved with any client videoconference.

We have been preparing witnesses by videoconference for the past two years. As the largest group of attorneys exclusively dedicated to witness preparation, we have experienced both the advantages and limitations of remote preparation. The advantages include having the benefit of assessing a witness by video and seeing how the witness will appear to a jury when the video deposition is played during a trial. The witness will also experience what it is like to be in front of the camera and have the opportunity to get real-time feedback on how he or she appears and performs on video. As for the actual preparation process, it will require more planning and execution up front to get a better prepared witness. Here are some steps that you should consider when you prepare your client or witness remotely.

Planning Before the Prep

Your witness needs to have a computer or tablet that can access the conferencing platform that you use. (We have typically used Zoom or GoToMeeting.) He or she will need to download the application in advance, and it should be tested before the actual day of the prep. If there are issues with video or audio quality, the witness may need to change to a room with better internet speeds.

The witness will also need a secure and private environment to maintain the attorney-client privilege. The only other individuals attending the preparation session should be the attorney, or attorneys, and the client. Any nonattorney attending remotely, or a room that is not private, may jeopardize the integrity of the attorney-client privilege.

The witness needs to have in his or her possession any documents that the witness needs to reference during the prep. The witness should have electronic access to those documents in advance, or you should send hard copies beforehand for the witness to use. You should consider the manner in which the documents will be presented to the witness during the deposition and mimic that approach.

Both the attorney and the witness need to dress professionally and be groomed. The witness should know in advance that the preparation is not an informal chat but rather an important meeting that should be treated as if it were the actual deposition.

The attorney should send a letter explaining the process to the witness in advance of the preparation session, and the expectations should be sent to the witness well before the video session so that he or she can prepare for the actual session. Included in the letter should be instructions to review any and all relevant documents in advance of the preparation session.

The attorney should practice and be comfortable using the remote-access platform and be capable of using the tools that the platform provides, such as whiteboards and screen sharing.

There needs to be a written agenda or outline to make the session efficient and directed. It is more difficult for a witness to stay engaged and concentrate while looking at a computer screen than it is when the attorney and witness are together in the same room. The attorney who prepares beforehand and has an agenda to follow will make the witness more engaged and more effective in the end.

In medical malpractice cases, the law firm needs to have signed, in advance of the session, a "HIPAA Business Associate Agreement" with the videoconferencing platform. Both Zoom and GoToMeeting have these agreements, and your account will automatically be configured for HIPAA requirements. Failing to have the agreement in place may jeopardize the patient-privacy protections required by HIPAA.

Before starting the videoconference session, the attorney needs to ensure that the videoconference is secure. At a minimum, the session should be password protected. In

addition, the attorney should host the meeting (and remain the only host) and have the sole ability to admit and expel attendees; lock the meeting; and control screen sharing, whiteboard access, chat access, and the transmission of documents. All of these security measures will minimize the chance that an unauthorized person can join the meeting.

During the Preparation

Once the session starts, the physical separation between you and the witness may make it difficult to sense what the witness is feeling. The mere thought of testifying can produce anxiety, so it is important to address whether the witness has any anxiety directly. For some, the anxiety is the result of a misunderstanding about the litigation process. For others, they may have anxiety based on past experiences. Commonly, when asked, witnesses will express some fear or anger related to the litigation, and this may impair their ability to testify. To get the most out of them, you will need to address each concern by asking questions in a way that helps a witness deconstruct the problem and come to his or her own resolution. This process should continue throughout the session to make sure that your witness is gaining confidence.

Many problems with the way that witnesses testify are exacerbated on video. It is often very difficult to know when someone is finished speaking on video, so interruptions tend to happen more frequently. Moreover, since the witness is typically alone in a room during the videoconference, he or she may act more informally. This informality can result in rambling and indirect answers. The witness will need to develop discipline on video to succeed.

Accordingly, you must pay close attention to the way that the witness is answering your questions. Is the witness answering directly? Is the witness rambling on and on in response to a simple question? Is the witness interrupting you? Is the witness answering too quickly? Does the witness express doubt or lack confidence? If you see any problems in the way that the witness is responding to your questions, address them immediately. Don't wait until you practice cross-examination; start instilling discipline from the very beginning of the videoconference. Doing this will help the witness become an active listener—a critical skill for any witness.

Most of us grew up learning with visual aids. Using them during the videoconference presents some challenges but is effective when done the right way. A large Post-it Pad on an easel (or sticking the Post-it pages on the wall behind you)

is a good tool to use. You can board questions and break them down, list critical issues, or create a timeline. If you go this route, make sure that the Post-it Pad is close enough to the camera and that you write in a dark, bold, thick marker so that the witness can see it clearly. Alternatively, if you are using Zoom or GoToMeeting, there is a screen-sharing feature that includes the use of a virtual whiteboard. The Zoom desktop application will automatically save your whiteboards for you. If you use the Zoom iOS application on your iPad, or use GoToMeeting, though, you will need to take a photo of each whiteboard before you end the screen sharing.

As you practice cross-examination you will have an opportunity to see how your witness will look on video. There is plenty of multitasking involved. It is just as important to pay attention to how the witness looks on video as it is to evaluate the quality of the answer. To the extent possible, you will want to practice the same type of tactics that the plaintiff's attorney probably will use during the deposition—not just in the way that the plaintiff's attorney will ask questions, but also how the attorney will present documents, how the attorney will interrupt your witness during an answer, and what your witness should do if it happens—and any other techniques that you expect opposing counsel to use. Practicing even the small details will help reduce the witness's anxiety and give him or her the confidence to testify.

Closing Thoughts

The preparation of a witness in today's litigation environment will certainly require a new flexibility on the part of all parties involved. Videoconferencing has afforded us the ability to remain connected in a time when our health and safety depends on us physically distancing from one another. Attorneys who are willing to integrate remote witness preparation into their practice will benefit from less interruption to their normal workflow, the opportunity to stay connected to their clients, and a confident witness during a deposition.

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