Preparing Witnesses for Depositions

"Okay, Angus," said Mike. "What do you think?"

"It depends," said Angus. "What should I be—honest or supportive?"

"Was it that bad?" asked Mike.

"Pretty bad," said Angus.

Mike Pirelli had hung up his own shingle when he graduated from law school last year and has been starting to build a litigation practice. When one of Mike's first cases started to heat up, Mike asked Angus if he would sit in on the plaintiff's deposition and help him evaluate how everything went.

"The truth is," said Angus, "your plaintiff didn't make a very good impression."

"You're right," said Mike. "But don't worry. He'll come around. You'll see. By the time of trial, he's going to be great."

"Mike," said Angus, "I don't know how to tell you this, but, chances are, that deposition you just participated in was the trial."

"What are you talking about?" asked Mike.

"Come on," said Angus. "You know the statistics—90 to 95 percent of all cases settle before trial. So in more than nine cases out of ten, the depositions are the only trial you get.

"And the settlements reflect the impressions that you and your clients—and your other witnesses—make in the depositions."

"Look, Angus," said Pirelli, "I know that prepping witnesses for depositions is important, but it takes time, and . . . ."

"Wait a second," said Angus. "Did you ever have your wisdom teeth pulled?"

"What does that have to do with prepping witnesses for depositions?" asked Mike.

"Easy," said Angus. "Did the dentist give you a handout that explained what to expect, how to take care of yourself, and what to do if something went wrong?"

"Yeah," said Mike, "so what?"

"If the dentist can do it," said Angus, "so can you."

"Wait a minute," said Mike. "I may have not done the world's best prep job on Emil Sanders, but it sure was better than giving him some dumb handout and then hoping he would get everything right."

"Giving a witness a handout is not a substitute for live witness preparation," said Angus. "It's part of it. The handout—the letter—is useful in all kinds of ways.

"First, make it short and simple. One of the advantages of a simple checklist is that your witness can read it over several times before the deposition—and some people really need the repeated exposure. Use the handout to explain what the deposition is all about, to help put the witness at ease, to set the ground rules for how to answer questions, to explain what to do if you object, and even make some suggestions for how to dress.

"But the handout is just the start. Next, you should make your own videotaped instructions. You can do it yourself in your own office, if you want. You can have a friend or an associate serve as the person you talk to, so you won't have to look right in the camera lens the whole time. Besides, having someone to talk to makes the whole thing go easier.

"If you aren't ready for a videotape yet, you can make a simple audiotape. Work from notes, rather than reading a prepared script, and it will sound a lot more natural. Even if you make the videotape, you should make an audiotape as well. Some clients—especially business people—would rather listen to a tape in a car than be a captive who is forced to sit in front of a video screen. And maybe some of your clients do not read well—if at all. You want to do something for them.

"You will do a better job with the basics if you put it in writing and on tape, rather than making it something that you do every time from rote memory."

"Well, maybe," said Mike, "but I still think the personal touch is better."

"Of course," said Angus, "which is why you are going to such lengths to get the basics nailed down. This way you can concentrate

on the real problems in the case. Because after the witness reads the handout or watches the videotape, you are ready to go to work."

The Conference

"Now comes the conference with the witness. And there are a number of points you need to make—which are based on an outline developed by Steven M. Kaufmann from Denver and the late Bob Hanley from Chicago," said Angus.

1. Tell the truth. No fudging, no shading, no exceptions to the rule.
2. Explain why the witness's testimony is important to your case. What may seem obvious to you may be a revelation to the witness, and will almost always have a good effect. Witnesses who feel they have an important role in the case tend to take it seriously and want to do well in the deposition.
3. Go over what the witness should expect. Touch on some of the points from the handout, and see how well they have sunk in. If the witness seems exceptionally concerned, you may want to actually go to the deposition room a day or so early, to get the feel of things (as you might take a witness to the courtroom before trial).
4. Tell the witness this is serious business. No chit-chat or small talk with the other lawyer. No sarcasm, no facetious remarks. The cold record will not get the joke, so wait until the deposition is over. Remember: No matter what, no matter how nice he or she may seem, the other lawyer is not your friend.
5. Listen to the question. Take your time. Make sure you understand before you answer. If there is any part of it you do not understand, say so.
6. Answer the question—not some other question—just the question you are asked. Say no more than is necessary to answer the question. Do not volunteer extra information or explanations.
7. Do not guess. If you don't know the answer, say so. If you don't remember, say so. It is your job to give the answers you know—not to speculate about the answer you don't know.
8. You are the witness—not the lawyer. Do not argue with the lawyer for the other side. Do not object. Do not try to sell the case. Just answer the questions.
9. Watch out for questions that paraphrase your answers. Lots of times the lawyer may take your ideas and put them in other words—changing your meaning in ways that you might not catch

at the time. If the lawyer asks if his paraphrasing is accurate, you