

WITNESS PREPARATION TRIAL AD

- GENERAL GUIDELINES



Or . . .

- He's incredibly polite



Preparing witnesses

- For trial
- Not clients
- Experts?

Be ready—start early

- Witness's statements
- Role
- Tough sledding?

GOALS

- Truth
- Strongest version
- From witness

GOALS

- Prepare witness
- Assess witness
- Survive cross-examination

## What not to do?

- Prepare don't coach
- Polish the content
- Don't change it

## Case law

- *Ibarra 1983* law suit vs. police officers
- trial court sanctioned defendant police department
  - Expert witness
  - Terms witness used
    - "high crime area" and "retaliation"
    - Suspicious timing
    - Officer's notes from meeting w/expert

## Be wary of talking points memorandum

- Discoverable
- Script
- Hints for testimony

## Baron Budd memorandum

- It is important to emphasize you had no idea asbestos was dangerous when you were working around it
- It is important to maintain that you never saw any labels on asbestos products that said Warning or Danger
- Do not mention product names that are not listed on your work History Sheets

## More asbestos prep

- It is very important to say that there were lots of other brands. You just cannot recall all the names.
- Unless your Baron & Budd attorney tells you otherwise, testify only about installation of asbestos material, not tear out of old stuff. This is because it is almost impossible to prove what brand of materials were being torn out.

## Witness prep sheet

- You want to be perfectly clear on the record that you did not expose yourself to asbestos once you learned it was dangerous.
- You may be asked how you are able to recall so many product names. The best answer is to say that you recall seeing the names on the containers or on the product itself.

## If it comes up!

- The more you thought about it, the more you remembered! If the defense attorney asks you if you were shown pictures of the products . . . say that a girl from Baron & Budd showed you pictures of many products, and you picked out the ones you remembered.

## Witness prep sheet

- If there is a mistake on your Work History Sheets, explain that the girl from Baron & Budd must have misunderstood what you told her when she wrote it down.
- The difference between your exposure to asbestos and your exposure to cigarettes is this: Cigarettes are addictive and you would quit if you could! You didn't know asbestos was harmful when you worked around it.

## WITNESS PREPARATION

- Getting in and out of the woodshed
- Organization
- Ethical concerns

## VEGI TALES

- VENTILATE
- EXPLAIN
- GENERIC QUESTION PREP
- ISSUE PREP

## Ventilate

- Let witness get acclimated
- Check on distractions
- Ice breakers issues which prevent preparation

## Ventilate stage

- Child care
- Parking
- Illnesses
- Commitments
- Number of different meetings

## Switch hats

- Explain the process
- Where witness fits in case
- What the witness will be testifying about

## Generic witness prep

- Where
- When
- How long will they need to be available
- Always tell them it will take longer

## Put witness at ease

- Nerves
- Build confidence
- AG depo gun dealer law suit

## Generic preparation

- Tell the truth



## Trial prep steps

- Tell the truth--no one can trip you up
- Go over the trial process
- Practice testimony

## Trial prep

- Meet with client early
- Prepare witness for cross
- Don't fight with opposing counsel
- Always tell the truth

## LOGISTICS

- Location
- Time
- parking

## Trial prep logistics

- Cell phone
- Dress
- Leave house—you're on trial

## Witness evaluation

- Confident
- Uneasy
- experienced

## Honest

- Tell the truth
- Most important—make sure you know the answer

## Answer

- ATQ
- Not what you want to say
- Don't try and win the case on cross

## Appropriate

- Wait a second for the objection



## Do I get the cheeseburger?

- Judge is the person at the counter



## Cross-examination - Foxhole

- Keep responses short
- Don't volunteer—sharks don't need lifeguards
- Not a cocktail party
- MA Syndrome
  - Have witness say, "I don't know"
  - Repeat as necessary

## Issue preparation

- The woodshed



## The rules

- Lawyer may interview witness for the purpose of preparing witness to testify
- Lawyer may not unlawfully obstruct another party's access to a witness
- May not unlawfully induce or assist prospective witness to evade or ignore process

## The rules

- Section 116 the Law Governing Lawyers, Restatement 3<sup>rd</sup>
- Permits witness interviews

## The rules

- Comment (b)
  - Inviting witness to provide truthful testimony favorable to the lawyer's client
  - Discuss role of witness and effective courtroom demeanor
  - Discuss witness's recollection and probable testimony

## Section 116 (b)

- Revealing to witness other testimony or evidence that will come in at trial and ask the witness to reconsider the witness' s recollection in light of contrary evidence

## 116(b)

- Discuss the applicable law
- Talk about where the witness fits in the story of the case
- Review documents, exhibits

## Candor towards tribunal

- Rule 3.3
- Lawyer shall not knowingly:
  - (1) make a false statement of fact or law to a tribunal

## Fairness to Opposing Counsel;

- Rule 3.4 a lawyer shall not
- (a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act...!!

## Truthfulness in Statements to Others

- Rule 4.1
- In the course of representing a client a lawyer shall not knowingly:
  - (a) make a false statement of material fact or law to a third person;
  - Or
  - (b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act, unless disclosure is prohibited by Rule 1.6

## Rule 1.6

- Confidentiality of Information
- Lawyer shall not
  - Reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, or
  - Permitted by paragraph (b)

## 1.6 (b)

- Confidentiality of information
- Crime fraud exception
- To get legal advice about lawyer's compliance with these rules
- Establish claim or defense in action between lawyer and client

## Go over difficult points

- You can explain the law to the witness
- But you cannot change her testimony from the truth
- The lecture
  - Before you tell me what happened...



## Anatomy of a Murder

## Bad facts

- Theory of case
- Theory of witness
  - Lubell's past

## The lecture

- The Law
  - Lawyer may inform the client about the law before getting client's version of facts—as long as attorney in good faith does not believe she is participating in creation of false evidence

## The Lecture

- The Law
  - Lawyer may tell client about the law before getting client's version of facts as long as lawyer:
    - In good faith does not believe she is participating in creation of false evidence

## The words

- Lawyer can suggest choice of words to make witness's meaning clear
  - DC Bar opinion 79 (1979)

## What's permitted

- Listen carefully
- Confront your witness with contrary evidence
  - Exhibits
  - Testimony
  - Statements

## Language choice

- Suggest stronger language
  - Accident versus crash
  - Will the witness be comfortable saying it
  - Bottom line—does it change the witness's meaning
    - Extract not inject

## Insulting and provoking battery

- Security guard
- Bar fight
- Defense attorney
  - Prep session
    - Felt upset when D hit him

## The subject of focus

- Lawyer can suggest witness focus on certain subject matters in responding to certain questions at trial
  - *EEOC v. Mitsubishi Motor Mfg. of America, Inc.*,
  - 990 F. Supp. 1059 (Central Dist. 1998)
  - Although telling witness to lie violates ethics suggesting subject matter to focus on is what every competent lawyer does to prepare clients for testifying

## Rehearse with witness

- Do mock cross
- Big enough case—have associate do it
- Alienating experience
  - Red Team

## Witness preparation

- Have all statements
- Understand how witness fits in case
- Confront witness with contrary authority
  - Make witness comfortable with the process
  - Practice cross-examination
    - Strong language/consistent with witness' s knowledge

## Prepare to prepare

- Know witness' s statements
- Have witness read statements first
- Appeal to reason, ego, provide preview