

Editor Note: As a means of illustrating specifically ‘how’ to prepare a witness for the ‘prep’ question, Bill Grimes offers this brief practice-oriented piece.

The “Prep” Question

by Bill Grimes

Bill Grimes (BGrimes@ZMF.COM) has been a litigation consultant since 1990. Prior to that he was a journalist. Among the services Bill provides are jury research, witness preparation, jury selection, trial strategy and post trial interviews. He is with Chicago-based, [Zagnoli McEvoy Foley](#) Litigation Consulting.

Despite the exposing of Jeff Skilling’s jury consultant while he was on the stand in his 2006 Enron fraud trial¹, and a federal judge’s ruling in California in 2008 that an expert witness can be cross-examined about being prepped by a jury consultant², the following remains a common reaction from attorneys: “The witness doesn’t have to prepare for that. I’ll never let it get that far.” While it is probably true most of the time that cross-examining a witness about preparing with a jury consultant would be successfully objected to as violating attorney-client privilege or attorney work product, it is obviously not true *all* of the time.

Prepping witnesses for the “prep” line of questioning has become a standard part of the witness preparation process for many jury consultants. While attorneys remain apprehensive about the jury ever finding out that a jury consultant was present at witness prep, and many attorneys don’t even want to discuss it, there is evidence that jurors finding out about the presence of a consultant has little affect on how believable jurors think the witness is. According to Ken Broda-Bahm of Denver-based *Persuasion Strategies*, a 2008 survey³ by his firm found “no significant differences” between a group of people who read a fraud case scenario and were told a key witness met with a jury consultant who “...helped him practice his testimony...” and a group of people who read the same scenario with no mention of a jury consultant.

As the Jeff Skilling experience showed however, what can be a problem is *how* being prepped by a jury consultant is revealed to a jury. It doesn’t help if the witness stammers, stutters and stalls when cross-examined about a witness prep session. The startling revelation that Skilling’s trial consultant was in the courtroom while he was testifying created drama Skilling didn’t need. So, it’s prudent for witnesses to be prepared for worst case scenarios, one of which is an attempt by opposing counsel to have the jury believe the witness was “coached” about what to say. Consider this exchange:

Q. Mr. Corrigan, please state your name and job title.

A. Michael A. Corrigan. I’m chief operating officer for Midwest Fabricating.

Q. Midwest Fabricating is the defendant in this case, is that correct?

A. Yes, that's true.

Q. How did you prepare for your testimony today?

A. I met with our attorneys a couple times, and reviewed my deposition.

Q. Was anyone else there besides your attorneys?



Where does your witness go from here, assuming the judge overrules the attorney's objection? Tell the truth, of course. Think about that for a moment. If a jury consultant was there, a simple "Yes" is truthful. Also true is, "Yes, a jury consultant was there." This is also an opportunity for the witness to say why a jury consultant was there. For example, "I've never testified in front of a jury before, so yes, there was someone there to help me be as clear as possible."⁴ The latter response not only diffuses the situation, it may score points with the jury. If the witness simply responds, "Yes, a jury consultant was there," the cross-examining attorney may end the line of questioning right there, leaving the jury to ponder the witness' need to have a consultant "prepare" him or her. The opportunity for the witness to give a perfectly legitimate reason for prepping with a jury consultant is missed.

The advantage of explaining why a jury consultant was present rather than just acknowledging that one was there is also borne out in a survey by Chicago-based Zagnoli McEvoy Foley Litigation Consulting in 2008. All 221 jury-eligible people presented with a short negligence litigation scenario knew a jury consultant helped prepare a key witness for the defense. Roughly half the group read Testimony-A which ended:

(Attorney): *Did you practice your testimony?*

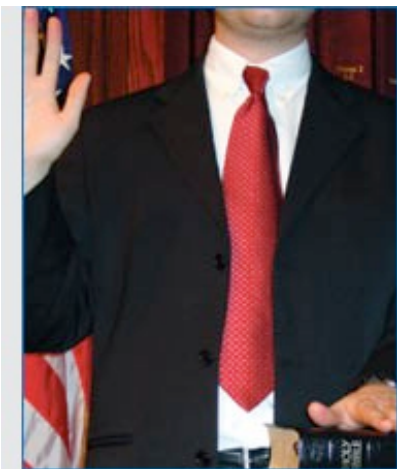
(Witness): Yes.

The other half read Testimony-B which ended:

(Attorney): *Did you practice your testimony?*

(Witness): *I've never testified in court before, so yes, we talked about what I probably would be asked and how I would answer.*

When asked directly about the presence of a jury consultant (keep in mind there was no discussion of the context of the case), a majority of respondents expressed skepticism that a witness would need such assistance. Those who read the explanatory response from Testimony-B, however, were less likely to believe a witness was "coached" and more accepting of a jury consultant helping prepare the witness than those who read the limited response of Testimony-A.



Every situation and every witness is different. It is important during the practice session to help the witness articulate for themselves the benefit of preparing with a communication expert. Have them talk about what they are getting out of the exercise. What were their concerns before the session started? How is the session helping? It is important to have the witness come up with the explanation in their own words. Pat McEvoy, a founding partner of Zagnoli McEvoy Foley, does not believe jurors would object to a witness offering a comment such as:

"I have never testified in court before, and I wanted to know what to expect."

Ken Broda-Bahm says much the same if a witness said on the stand something along these lines:

"I really appreciated having someone there who could help me understand what the lawyers are doing."

Chris Dominic, President of Tsongas Litigation Consulting, a Seattle-based firm, says appearing nervous when asked on the witness stand about prepping with a communication expert can create a negative impression with jurors. Dominic says it's important to convey to the witness during the prep session that "there is nothing to hide."

Witness preparation sessions routinely include role playing of a likely direct and cross-examination – what the witness can expect to be asked and how he or she would answer. Preparation and practice for any important exercise makes sense. Why should preparing for the high stakes, adversarial exchange of cross-examination be any different? If given the opportunity to convey that to a jury, a witness should take advantage of it.

Endnotes

¹ Jeff Skilling’s jury consultant, Reiko Hasuike, was identified in court by prosecutor Sean Berkowitz while he was examining Skilling.

² Judge Ronald M. Whyte, *Hynix Semiconductor Inc. v. Rambus Inc.*, U.S. District Court for the Northern District of California, February 8, 2008.

³ Five hundred respondents nationwide were presented with a fraud case scenario. Half of them were told a key witness met with a jury consultant who “*helped him practice his testimony.*” The other half was not given that information. All were asked about the believability of the witness.

⁴ The American Society of Trial Consultants’ (ASTC) *Witness Preparation: Practice Guidelines* expressly state, “Trial consultants do not script specific answers or censor appropriate and relevant answers based solely on the expected harmful effect on case outcome.”

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Editor's Note

Wow. Every issue I say to myself "This is our best issue yet!". I'm saying it again. It's amazing to watch an issue come together and I am grateful to all our authors, consultant-authors and consultant-respondents for contributing to yet another terrific issue of *The Jury Expert*.

We have articles on corporate defense strategies after a decade of corporate malfeasance, how to use simple rules for better jury selection, the legal and ethical implications of using trial consultants for witness preparation, specifics on how to prepare your witness to answer the "were you prepared" question, implications of the heightened use of images/graphics in the courtroom, skin color bias, and how defense attorneys can present damages issues effectively. Eighty-one pages of awesomeness!

I hope you find this issue useful AND if you do, please comment on our website. I know (courtesy of Google Analytics) how many of you read every issue. Comment! Or blog. And if you blog, let me know so I can link to your blog. Think of it as a small thing you can do to thank the authors who work hard to give us practical, relevant ideas to improve your litigation advocacy.

Happy January! And for those of you in snow-bound places--spring is a LONG ways away. So make some hot chocolate and hunker down and read *The Jury Expert*.

Rita R. Handrich, Ph.D., Editor

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