PREPARING WITNESSES TO GIVE EVIDENCE

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This paper is to be limited to the preparation of factual witnesses, as opposed to expert witnesses, which will be dealt with by someone else in this program. Factual witnesses are also called "ordinary witnesses", a misnomer. No such animal exists. Ask any witness.

I was once told by my uncle that for the Judge, a trial is just like a movie : you have a story, characters, drama, high points, low points and eventually, a conclusion… expected or not expected. The trial lawyers are the directors of the movie. Even though the two directors might have different ideas about the way the movie should end, my uncle used to say that both share the responsibility of making that movie interesting. You make a dull movie, you will have a dull response from the audience. You present a bad trial, expect a bad judgment. My uncle is a judge and that was one of the best pieces of advice I got when I started my practice.

When you are preparing your witnesses for trial, you are preparing the actors that will appear in your movie and, hopefully, somebody will listen to them. You must do a good job.

Keep in mind that you already have a pretty good script of what your witnesses will eventually say or at least should say, whether you represent the Plaintiff or the Defendant. This basic script is constituted of the following elements :

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1. The Preliminary Story : The facts as you got them from your client coupled with the facts resulting from your fact finding research done before preparing the pleadings;

2. The Pleadings : Both sides will eventually try to prove what was alleged;

3. The Discoveries :That I call « the dust busters » where you will be in a position to define the real case you will eventually have to meet;

4. Opening Statements : Rule 494 says that whenever a party proposes to adduce evidence, a counsel for the party shall immediately before introducing any evidence, open his case by making a short statement giving a concise outline of the facts that the party proposes to prove and of the applicable law. This practice is generally followed before the Federal Court of Canada. However, the Defendant does not always give an opening statement. I recommend, in every cases, that as a Defendant, an opening statement should always be given to the Court. The mere fact of preparing it before the trial will give you a clearer view of what to prove to the Court.

5. The Documentary Evidence : Documents usually contain all kinds of facts with which you will eventually have to deal, one way or the other.

Therefore, in preparing your witnesses and preparing the cross-examination of the witnesses you anticipate the other side will present, remember that your witnesses will have to say substantially what they said before or wrote before (beware of those documents signed by one of your witnesses and filed during discovery). If your witnesses do not say substantially what they said before or wrote before, they should have a very good and credible reason. This works for the other side too.

Nothing is more dangerous than filing documents in bulk without having good knowledge of their content. Documents should always be handled with care.

It is of the utmost importance that before trial you obtain perfect knowledge of all prior statements given by any person likely to appear as a witness at trial.

PREPARING YOUR WITNESSES

There are two kinds of witnesses, those you control before the trial and that you will be able to meet and discuss the case with, and those you do not control, assigned by subpoena and who will refuse to meet you before trial.

Meet all the witnesses you control, individually, two to three months before trial and go over the facts. Have them tell you their story and avoid telling them what kind of story you would like to hear. Remind them of what they said or wrote before about the case and if you are unsure of anything, ask them for a satisfactory explanation. Discuss all factual aspects of the case which they might have knowledge of. At that first formal meeting, you should not have a list of questions prepared. This should not be a final rehearsal of their testimony. You should rather have an extremely good knowledge of the factual aspects of your case and try to see if spontaneously the facts given by the witnesses match the facts that you have knowledge of.

Do not be afraid to explain to your witnesses, in general terms, what your case is and what you are trying to achieve with their testimony. It may not be necessary to do this with a witness testifying on a very simple question of fact, as an example a witness called only to recognize a signature on a document or a witness testifying on a number of refrigerators sold to a particular outlet.

Show to your witnesses all exhibits that will be presented to them during their testimony.

During the week before the trial, meet all your witnesses together and at this time, have your questions ready. This should be the final rehearsal before trial. Ask your questions in the sequence you will ask them at trial. Listen carefully to what your witnesses are saying. Do not concentrate on the questions only. Up to a certain extent, they are not important. The answers are important. Since you cannot ask leading questions to your witnesses, make sure that the answers you are looking for are coming naturally from your witnesses without undue suggestions.

Your witnesses should be relax and natural. Explain how things are done in Court, the various roles played by the people present and how the case will evolve. Tell them that they might be excluded from the Court room if the demand is made and that yourself may make such a demand.

Witnesses are called to help the Court, not you or your case. Make them feel the importance of their role, they will perform better.

Tell them that most likely, they will be cross-examined by the other side. Explain thoroughly how a cross-examination is conducted and the purpose of it. They should listen carefully to the questions asked and the suggestions

made. Tell them that they do not have to agree automatically with the suggestions made just to please everybody. Explain that when they do not know or remember a fact, "I don't remember" and "I don't know" are acceptable answers when the whole of the testimony is credible. Witnesses, by nature, feel that they must answer every questions asked, because they think it is their duty.

Just a few words on those witnesses that you must call (I insist on the word "must") and you do not control, especially those who will refuse to see you before trial. This kind of testimony must be prepared very carefully. Since they are your own witnesses, leading questions will not be permitted unless the witness is labelled by the Court as hostile. Only essential questions must be asked. Open ended questions are to be avoided. Usually, this kind of testimony is short. Prepare a list of the facts that you want this witness to establish, look for your answer and if you get it, leave the subject. If you do not get it in the form you want it, stay with the subject until you get a satisfactory answer. Once you do have a satisfactory answer, do not look for more. You may spoil it.

In final preparation for trial, see if those facts cannot be established otherwise, by another witness, by cross-examination of the other side witnesses or by a document.

Sometimes, you may wish to examine in chief the other party. The examination must be prepared in the same way. Do it only if you have to do it.

Usually, it is done for impact only, since you always have the discovery that you can read in the record. If you have a good discovery with answers from the other side that can be interpreted in only one way, in your favour, go ahead. It is always nice to have the Judge hear something good about your client coming from the other side. If you do not get the same answers at trial, contradict the witness with his discovery. That's nice too. However, you must show him his previous statement:

Q. Do you remember having been examined by me on July 17, 1988, at my friend office?

A. Yes.

Q. Here is a copy of the stenographer notes taken on that occasion and I will read to you a few of the questions asked and answers given by you at page 53.
Do you remember these questions asked and those answers given?

A. Yes.

Always advise your witnesses to tell the truth. Never get so involved in a case that you might lose sight of what the purpose of it all is. This is not your case, it is your client's case. Clients come, clients go, but you stay and your good reputation will serve you well on the long run.

CROSS-EXAMINATION

Hearing the statement: "your witness", is often compared to giving the keys of a sports car to a sixteen year old kid who just received his driving permit. Even if he has nowhere to go, it is certain he will go somewhere.

When your friend tells you "your witness", if you have nowhere to go, stay where you are. It is a though thing to do, especially in front of your client.

If you with to cross-examine, know in advance what you want to achieve, isolate the statements made by the witness that you wish to contradict or at least diminish its impact. Do not cross-examine on every small points or even on something you know to be untrue if it does not hurt your case, unless you want to attack the credibility of the witness.

Just like examination in chief, cross-examination should be prepared before trial and adapted after you heard in Court what is said *viva voce* by the witness.

You always have a good idea of the identity of the witnesses the other side will call and, as for your own witnesses, you should have in your file, statements in various forms concerning the issues on which they will testify. Even if you don't know the identity of the witness that will testify on a particular issue, prepare a cross-examination on the issue rather than of the witness itself.

Use when possible the "aim-lock-release technique". "Aim" at the issue and make sure that the Judge and the witness know which one you are talking about. Be clear in your mind what you want to establish with this particular witness. "Lock" the witness into previous statements he made or wrote, or previous facts established by the evidence. When properly locked, release the question and enjoy a good hit.

Example

In a trade mark case, the corporate counsel testifies that part of his job is to be vigilant and diligent about unauthorized use of trade mark considered confusing with the company's main trade mark in order to safeguard its distinctiveness. As part of your defence, you have listed thirty-five trade marks in use which you consider to be confusing.

1. Aim at the issue: Distinctiveness and ambit of protection:

Q. Sir, you have testified that to protect the distinctiveness of your employer's trade mark, part of your job was to be vigilant and diligent about unauthorized use of confusing trade mark.

A. Yes.

Q. Do you consider that a good trade mark must be distinctive and unique?

A. Certainly.

2. Lock the Witness: Ask a few questions to make sure that he won't be able to escape your grip once he understands where you want to go:

Q. And if it is not distinctive and unique, a trade mark is not entitled to the same protection by the Court?

A. Well, that is not for me to say. The Court will decide the kind of protection to which a trade mark is entitled.

Q. But, by your testimony, were you not implying to the Court that your trade mark should be entitled to a wider ambit of protection, being very distinctive because of your vigilance and diligence?

A. Well, yes.

Q. Therefore, you agree with me that at least in your mind a trade mark which is distinctive and unique is entitled to a wider ambit of protection?

A. Yes.

Q. Sir, was the particulars of the list of thirty-five trade marks referred to in the Statement of Defence, brought to your attention, which thirty-five

trade marks contain in whole or in part your trade mark and some of which are in use in the city where your office is located?

A. It was brought to my attention, but I felt that because their field of activities appears so different to ours, no risk of confusion exists.

Q. Did you send somebody to check what there real activities were?

A. No, because the field of activities appears so different.

Q. So you sent nobody?

A. No.

3. Release: Establish the point you want the Court to understand.

Q. You did not bother to check?

A. Well …

Q. What is this about being vigilant and diligent?

You made your point.

Always be conscious of the person you are cross-examining. You do not deal in the same manner with an old lady as you do with a mature businesswoman. This may seem obvious, but I have seen many lawyers having gone too far with a witness and find themselves with a crying old lady and a mad Judge.

Always keep your eyes and ears open in the Court room. You may hear or see things very helpful to your case. Observe what spectators might be doing or saying. They may all be called as witnesses.

In considering the evidence your witnesses will give, remember Mr. Justice Jackett's comments in *Nicholas Zavadiuk* v. *Minister of National Revenue* (1967) C.T.C., 447, at 450:

> "I did not find the appellant's evidence persuasive. He was obviously doing his best to put forward a view of the facts that would support his appeal. His evidence seemed to me to be an example of how a person trying to recall events of the past can persuade himself that did not actually occur. This is not an uncommon phenomenon in the courts and, when it occurs, the person involved has frequently brought himself to the point where he honestly believes what he says."

CONCLUSION

Being well prepared enhance your chances of winning the case for your client. Also, and it is important, you will be more relax and you will perform better.