

Goals Of Witness Preparation: From A Trial Consultant's Point Of View

By Katherine James

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*We love answering the questions that our readers have about our work.
This article is written as an answer to one reader's question.*

Reader Question: “When trial consultants work on witness preparation, what are the goals they seek and how do they work to attain those goals?”

Let me begin by saying that this is the most common question that I get from an attorney who has never used a trial consultant to aid in the preparation of a witness. What a wonderful and welcome question for any trial consultant from ASTC to answer – especially one who spends eighty percent of her time helping attorneys prepare witnesses for testifying as I do!

In this article, I will discuss four sets of goals that I believe we all have as trial consultants: Attorney Education, Witness Diagnosis, Witness Cure, and Follow Up.

In order to best understand how The American Society of Trial Consultants views witness preparation as an organization, I encourage anyone reading this article to put it side by side with our Professional Code, Practice Area B, [Witness Preparation](#).

Before panic sets in, please note that this part of the code is only a few pages long: 30 – 35. I had the honor of serving on the Standards Committee for ASTC when this part of our professional code was written, so I am very familiar with it. ASTC members have agreed to adhere to this code, and so attorneys can count on it as the basis of our witness preparation practices.

FIRST SET OF GOALS: ATTORNEY EDUCATION

The trial consultant's first goal is to reassure the attorney who asks this question that he or she is not alone. Most attorneys practicing the law today have never worked with a trial consultant. Attorneys often decide to use one of us for the first time because they are in some kind of a crisis situation. No one calls in a trial consultant to help prepare a witness the first time because things are going perfectly well. Most often we are called in because the attorney realizes that she or he has someone who is vital to the case who has to testify and seems to the attorney to be such a bad witness that he or she has the potential of blowing up the case. In a business case this witness is almost always a company owner or employee. In a personal injury case it is most often the plaintiff. In a medical or legal malpractice case it is the defendant doctor or lawyer. In a criminal case it is the defendant.

For the purpose of this article, I am going to assume that the witness is the client or an employee of the client if the client is a corporation.

The second goal is to educate the attorney on trial consultants' definition of witness preparation in order to allow the attorney to understand that our idea is consistent with theirs. I generally paraphrase or refer the attorney new to using a trial consultant to the definition of witness preparation found on page 30 of the ASTC Professional Code:

“... witness preparation refers to the assistance trial consultants provide attorneys ... in their effort to increase witnesses' understanding, comfort and confidence in the process of testifying for deposition or in court, and to improve witnesses' ability to truthfully present testimony in a clear and effective manner.”

The next goal is to let the attorney know that we will be working together to prepare the witness. I personally don't understand the usefulness of preparing a witness without his or her attorney and from a practical standpoint, it is a matter of privilege. If we are going to be discussing anything substantive – and we always are – the attorney's presence will always be required according to the code.

A trial consultant also has to advise the attorney that although widely assumed to be a privileged activity, some have challenged the confidentiality of witness preparation with a trial consultant. I can assure the attorney this is rare, and that in my more than three decades of working with attorneys and their witnesses this has not yet happened to me personally. In addition to clients, I have helped prepare other witnesses (experts, for example) but not without thoroughly making it known that the privilege is not going to extend to these witnesses. Many attorneys have an agreement with the attorneys on the other side not to discuss use of consultants. I encourage new clients to have such a provision with their opponents.

An important goal for any trial consultant is to let the attorney know just how much the consultant can or cannot help a given witness. For example, although very experienced with all kinds of human beings who testify there are certain things I can't "fix". I can't necessarily help someone who is seriously brain damaged be a better witness on a Tuesday and be assured that will "stick" on Wednesday.

SECOND SET OF GOALS: RESEARCH AND WITNESS DIAGNOSIS

The next thing the trial consultant needs to do is find out why the attorney believe that “this witness” needs extra help with witness preparation. What are the weaknesses that the attorney couldn't fix without professional help? We always need to know, “Why was I called in?”

We have various ways of doing this. I prefer a phone call or in person meeting. First, I ask the attorney what is wrong. The attorney usually describes a set of symptoms. For example, “She volunteers constantly and I can't get her to stop.” Or, “He's completely arrogant and angry and I can't get him to be nice.” I carefully listen for the lawyer's attitude toward the witness and often ask how the lawyer feels about the witness. This doesn't necessarily change what needs to be done in terms of fixing the witness, but it will make a difference in the long run. I find that some clients have driven their lawyers so



crazy that the lawyers hate them. Sometimes I find that a lawyer and a witness are very different people in the way that they learn, approach life, or think that the world works. I keep these first impressions of the attorney-client human relationship in mind for when we are in the witness preparation session itself.

As all trial consultants do, I always ask for some written material to review for the case. If we are preparing the witness for a deposition, I need to at least read the complaint and the response. If we are going to trial, I need to read the motion for summary judgment and the response or something equivalent. If there has been a focus group study, I want to read at minimum a summary of the findings and what the group said about this witness. This material allows the trial consultant a working knowledge of the case.

If the witness preparation is for trial testimony, the trial consultant will also want to review the deposition transcript and any recordings made (still often referred to as “videotape” although they will actually be either CD’s or computer files) of the witness during deposition. If there is prior trial testimony, it is very helpful for the trial consultant to read that as well. Review of these witness specific materials gives the trial consultant as good a handle as possible on a witness’ strengths and weaknesses before meeting him or her. It also allows the trial consultant even more of a working knowledge of the content of what this witness might be responsible for in direct and in cross-examination. From review of the written material a trial consultant can learn everything from whether or not this witness uses clear, active, regular English to the witness’s demeanor to the kind of impression this witness’ physical appearance makes.

This material also “fills out” the information that the attorney has already talked about – the attorney perceptions of the witness. It helps the consultant “diagnose” the witness’s “disease” the witness “presents” through all the “symptoms”. I can’t stress enough the need for this independent point of view. A trial consultant who prepares witnesses has often seen the issue or the problem again and again and knows the root causes and cures. For example, talking too much is a symptom for any number of problems from the witness wanting to take over control of the case to the witness having self esteem problems (just to name two). Most attorneys know the “what”, but most trial consultants have the answer to the “why”. It is in the answer to the “why” that the best results are achieved for making this witness the best possible witness he or she can be on the day of testimony.

THIRD SET OF GOALS: IN THE PREPARATION SESSION

The general goals in a witness preparation session are outlined in the ASTC professional code on page 33:

B. Methods used with the witness to meet the agreed upon goals for a witness preparation session can include, but are not limited to:

- 1. Assess and address verbal and nonverbal communication strengths and limitations.*
- 2. Identify witness concerns about testimony and goals for preparation.*
- 3. Work to increase witness comfort and confidence in testimony.*
- 4. Work to strengthen and help develop witness communication skills.*
- 5. Whenever helpful, educate the witness on significant aspects of the process and procedures for testimony in deposition or in other forums.*
- 6. Clarify the consultant’s role in the preparation process and address the possible limits of the confidentiality of the work.*

7. Address any issues with the physical appearance of the witness.
8. Discuss assessment with witness.
9. Discomfort or anxiety may be addressed by behavioral techniques, including, but not limited to: breathing exercises; relaxation or visualization techniques; reframing anxious reactions, fears or misperceptions; actual or facsimile courtroom visits; reviewing video recorded mock testimony.
10. Work to improve witness' listening skills.
11. Whenever possible, conduct and review a sufficient number of mock examinations to encourage the greatest improvement.

I believe that the attorney who asked the question on which this article is based wanted a specific methodology for the second part of the question “how do consultants work to attain those goals?”

Since there are so many different kinds of trial consultants and we come from so many different disciplines, I can't speak for all of us when it comes to specific methodology. As the professional code states on page 30:

“Trial consultants recognize witness preparation involves the art and science of interpersonal communication, and therefore our professional approaches will take many different forms. ASTC recognizes the diversity of practice by its members within this area.”

I come from the discipline of the theater, so my methodology is strongly based in learning everything – form and content – “by doing.” Other trial consultants come from various branches of psychology, from sociology, from education, and other backgrounds. Some even were or are attorneys in addition to being trial consultants. I will say, however, that almost all of us will have some component of mock examination and critique of that mock examination. Many attorneys are used to preparing witnesses “as they go along” in a lecture combined with a few questions sprinkled in along the way. Most trial consultants would rather have actual mock examination, which we often record with a video camera and then play back and discuss.

What this means practically for the attorney who is new to using a trial consultant for witness preparation is that the attorney needs to be prepared before the session with mock questions. If this is a deposition preparation, the attorney should have questions prepared for all the areas that she or he believes will be covered in the deposition. If this is trial preparation, the attorney needs to have both direct and cross-examinations prepared for these mock sessions.

Many trial consultants, myself included, pride ourselves on helping attorneys structure direct examinations as a whole and find “better” direct examination questions. One of the great benefits that an attorney new to using a trial consultant for witness preparation can achieve is learning new and better ways of telling the witness's story. Also, attorneys find that they can ask a trial consultant for a critique of the attorney's style, demeanor, presentation, etc. in these mock sessions. A word of caution – this is best done out of the earshot of the witness, who has enough on his or her plate without being involved in improving attorney performance.



Speaking of what is in this work for attorneys, one of the major goals of most trial consultants is to improve the relationship between the witness and the attorney. The trial consultant is not, for example, putting the witness on the stand in direct examination. Also, as I mentioned earlier, by the time one of us is called in on a case there might very well already be some kind of a rift between the witness and the attorney. I find that making a weak relationship stronger and a strong relationship great is often a by-product of my witness preparation sessions.

The number and length of witness preparation session it takes to ensure the witness is sufficiently “prepared” will vary from situation to situation and consultant to consultant. In my experience, it is rare that anyone is “fixed” in less than a half day. In my practice, I always encourage attorneys to allow a minimum of one day per witness per event when budgeting time for witness preparation. For example, you have two clients who are having their depositions taken. Allow a day for each. Be pleasantly surprised when one of them only takes a half day and relieved that you were able to apply that second half day to the other who needs it. I often find that when working with several witnesses in a case that this kind of time budgeting can pay off. Many attorneys only allow one or two hours to meet with a witness before a deposition, for example, and are shocked that many trial consultants tell them it is going to take longer.

FOURTH SET OF GOALS: FOLLOW UP

Follow up takes a few forms in witness preparation.

First, there is the question of whether or not another session is going to be needed with the trial consultant prior to the witness’s actual testimony. This is why so many consultants recommend that the initial preparation session take place with a comfortable amount of time between the session and the testimony. For example, in my practice I recommend a minimum of two weeks before a deposition for an initial preparation session. That way there is plenty of time to schedule more sessions if the witness needs them. This also allows time for wardrobe changes, hair cuts, and other “costuming” changes that need to take place.

Next, there is the question of testimony being delayed. Depositions get postponed and trials get pushed all the time. A witness who is prepped and ready to go for trial in January is not necessarily going to stay prepped until October.

Ultimately, the goals with any follow up preparation session are:

- to make sure that the witness is as prepared and ready as possible for testifying.
- to make sure that the attorney is well assured of this fact.

CONCLUSION

It is my hope that this response to a reader’s question results in both a discussion on this topic of “goals” between ASTC members and *The Jury Expert*’s attorney readers. And please keep submitting questions to be answered by us – it is our pleasure to answer them!

Citation for this article: [The Jury Expert](#), 2010, 22(2), 45-49.

Editor's Note

Welcome to our March 2010 issue of [The Jury Expert](#)! Once again, we have diverse and provocative offerings for you. Whether you flip first to our article on apology, choose to travel to East Texas, or ponder the impact of emotional evidence, see just how informative and persuasive visual communication can be, think about the goals of witness preparation, sweat through the surprising heat of attitudes toward atheists, consider the use of 606(b) in jury impeachment, or travel back in time with our March 2010 Favorite Thing, you are bound to have an experience that teaches you a thing or two and that means you have more interesting conversations with colleagues.

We are continuing to try new topics and formats of articles as we press forward with *The Jury Expert*. Let us know what you think (what should we do more of, what should we do less of, and what should we keep the same?) by sending me an email (click on my name below).

Tell us what you want to read. Tell us what you want to learn. Tell us what you are curious about (related to litigation advocacy). We will try to accommodate your questions, curiosities and desire for new topic areas.

You'll also see a bit of a new layout on our front webpage. We are looking for advertisers to help support costs of creating this publication and other activities of our publisher (the [American Society of Trial Consultants](#)). Read. Consider. Question. Comment on our website!

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The Jury Expert [ISSN: 1943-2208] is published
bimonthly by the:

American Society of Trial Consultants
1941 Greenspring Drive
Timonium, MD 21093
Phone: (410) 560-7949
Fax: (410) 560-2563
<http://www.astcweb.org/>

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