



Posted on: December 12, 2007

## PREPARING LAY WITNESSES FOR TRIAL

December 12, 2007

James D. Vilvang

Vancouver, BC

*Presentation*

### PREPARING LAY WITNESSES FOR TRIAL

Lay witnesses can literally make or break your case. In situations where liability is in issue, obviously they are crucial. In proving damages, their evidence is often as valuable as the plaintiff's and more valuable than the experts. Generally experts are confined to their reports. Both sides have a good idea of what their evidence will be. Also, experts are usually experienced witnesses. They usually know how to play the game. Even the best cross examination of an expert usually gets only a few concessions of any significance. With lay witnesses on the other hand, real surprises often occur. Nobody really knows what they are going to say, even in direct, until the words come out. Evidence from the lay witnesses is "the wild card" in many trials. Proper selection and preparation of your lay witnesses is essential to success. In this paper I hope to present some practical tips which I hope will assist you in preparing your lay witnesses

#### 1. Choosing the Right Lay Witnesses

##### (a) Liability

(i) When it comes to liability, you normally have no ability to choose your witnesses so I will focus on the lay witnesses you will need to prove your damages. The same tips for preparation of the liability witness apply.

##### (b) Damages

(i) Early on, advise your client of the role of the lay witness in the case. Then ask your client to provide the names and contact information of people who he/she thinks might be



able to assist. Normally I tell the client to give each of them a call to advise them that they can expect a call from the lawyer and to give them a brief explanation of what the lawyer will want to discuss. I then check back in with the client before calling the people to make sure that the client has made contact with them and to find out what their initial reaction was. This information can assist you in determining how to approach the first interview.

(ii) Generally I would ask the client to provide names of:

(A) family members who have known the client before and after the collision and see him/her frequently

(B) people from the client's place of work

(C) teachers or former teachers

(D) people who participate in social and recreational activities with the client

(E) neighbours who might not even be friends, but who may have seen the client attempting to work around the yard, or may be able to give observations of the condition of the client's house or garden.

(iii) After the first interview with the potential witness, I would ask myself:

(A) Does this person have anything to add?

(B) Did the person seem credible? If you didn't believe what the person was saying, chances are that the judge or jury won't either. Don't automatically reject this witness. Instead ask yourself

(C) Can I rein this witness in? Can I get this witness to stick to the unembellished truth.



## 2. The First Interview

(a) Ideally, I would suggest that this interview should be in person, but practically, I realize that this is not always possible.

(b) Begin by clearly identifying yourself. Hopefully the witness will be expecting your call. Once you are certain that the witness knows who he/she is speaking to ask the witness if they have spoken to anyone else about the case. Explain that the witness is free to speak to whomever they want, but that they are not obliged to speak to anyone. A whole paper could be written about this part of the interview alone.

(c) Be patient. Remember that most people are intimidated by and suspicious of lawyers and the whole legal system. Many of them have seen TV shows in which lawyers are yelling at witnesses and witnesses break down confessing their web of lies in the stand. Before you get into a discussion about the evidence you are seeking, get to know the person a bit and let the person get to know you. I suggest that you generally proceed by:

(i) Asking the witness about him/herself. Find out things like their age, occupation, family situation, educational background, address, etc.

(ii) If the witness has previously given a written statement give them a copy and ask them to read it or read it to them. Ask if there is anything they would like to change. Never fall into the trap of thinking that what is in the statement is all they might have to say. I recommend that you proceed with your interview almost as you would if there was no written statement. Ask the questions you want, not the questions somebody else wanted.

(iii) Tell the witness about the theme of the case

(iv) Tell the witness about the other witnesses you expect to call and what you expect them to talk about generally. Ask the witness if he/she has any suggestions for other witnesses who might be able to help. This is important because often witnesses feel that it is up to them to prove your client's case. Explain that while their evidence is important, they do not have to argue the case for their friend or family member, and they do not have to go beyond what they have actually seen and heard.

(v) Give them a basic overview of the structure of the trial and their role. Make sure that they have an understanding of direct and cross examination.



(vi) Then get into questions about their observations of the plaintiff. At the TLABC Seminar held on February 4 2005 entitled *Counsel Work at it's Finest*, Roger Oatley and John McLeish presented a Lay Witness Interview Checklist. I have stolen it and attached it to this paper.

(vii) Give the witness lots of opportunity to talk. Sometimes a phrase that they use might become the theme of your case.

(viii) Always ask them to give simple examples rather than talk in generalities. "Bob had a lot of trouble going up stairs" carries very little weight. "Bob had to brace himself on the railing with one hand and put his other arm around my shoulder and I practically had to carry him up the stairs because he couldn't bend his right leg or put any weight on it because of the hip to toe cast he was wearing" is much more effective.

(ix) After you have gone over the evidence advise the person that you will be sending out a statement based on the notes you have taken, request that they review it and make any corrections or call you to advise of errors and that you will correct it and re-send it, and then request that they sign and return it. If you are using mail, always include a stamped self-addresses return envelope. If you are using e-mail, I prefer to have a signed scanned copy returned rather than just a direct e-mail. I still put a lot of weight on a signature.

### 3. The Second Interview

(a) While a face to face interview is desirable for a first interview, it is mandatory for the second interview, assuming the second interview is the last one before the trial.

(b) I think it is best to have your actual questions prepared along with the answers that you expect the witness to give. I recommend that you do not give a copy of this to the witness. You do not want the witness to look too rehearsed in the stand. You want to be able to establish a conversational tone with the witness in the stand without having to interrupt the witness or let the witness ramble on. You want to be in control without appearing to be in control. If you just go over one long statement with the witness, they will not understand how much they are expected to say in response to any one question. Some people will take a simple question and give an answer that goes on for ten minutes. With other witnesses it is almost impossible to get them to say more than five words consecutively.

(c) I recommend that you ask the question, give the witness an opportunity to answer it as they see fit, then review their previous statements on that particular topic and give them some tips, then go over it again.



(d) By going over the expected testimony one question at a time you assist the witness in staying focused. The witness will hopefully realize that they don't have to get the whole story out all at once.

(e) I recommend that you give the witness the following specific advice:

(i) Dress appropriately.

(ii) Don't bring any papers or notes into the witness stand with you. In fact, I always try to remember to ask the witness to empty their pockets outside the court room right before they go on the stand.

(iii) Don't chew gum.

(iv) Listen carefully to the question. Wait for the lawyer to stop speaking before you start speaking.

(v) Make sure you understand the question before you try to answer. You can ask for clarification or to have the question repeated.

(vi) Answer only the question you have been asked. This is a tricky one. I don't want the witness to appear to be evasive and many people take this advice to mean say as little as possible. I usually give some examples of complete and incomplete answers and say to the client that if your answer requires an explanation, feel free to give it, just don't answer a question you haven't been asked.

(vii) Keep your voice up.

(viii) When you have given your answer stop. Don't worry if there is silence. You don't have to fill in the gaps.

(ix) Don't think out loud. Think silently about your answer then give it.

(x) If you are sure about something give your answer firmly.

(xi) If you are not sure about something, say you are not sure, but, if possible try to give an estimate or range. Don't just resort to "I don't know." For example, I often interview witnesses sitting at a table which is about 8' long. I usually say if someone asked you "how long is this table and you answered "I don't know", the next witness could come along and



say it was 100' long and we couldn't contradict that. You could estimate that it is between 6' to 10', or whatever you are comfortable with."

(xii) Don't guess, or speculate, or assume.

(xiii) Don't get angry.

(xiv) Don't be sarcastic.

(xv) Don't joke.

(xvi) Don't feel that you have to argue the case. Just give your answers objectively.

(xvii) Explain that statements like "It took a long time" don't mean anything. Always try to have the witness say something concrete like "It took six months..."

(xviii) Try to look at the person asking you the question while they are speaking to you then look at the judge or a jury member when you are giving your answer.

(xix) Don't talk about the case or your evidence in the hall outside the courtroom, you never know who that person sitting nearby might be.

(f) If you intend to have the witness look at any documents or an object, or, most dangerous of all, a sketch, make sure you deal with the actual document or object or sketch as thoroughly as possible with the witness during your preparation. I have seen some absolutely bizarre things happen when witnesses are presented with a map of an intersection and are asked to start marking the location of vehicles and directions of travel. It seems that no matter how much you prepare, the only thing you can expect is the unexpected. I try to avoid maps and sketches as much as possible. Estimates of time and speed are other things that are notoriously inaccurate.

#### 4. Conclusion

(a) Some general advice:

(i) I recommend that you always give the witness a Subpoena. Even with the most sympathetic witness, things can go wrong. If for any reason a witness doesn't show up and you haven't given that witness a Subpoena, your chances of getting the court to stand down or adjourn will be greatly weakened. But don't just send the Subpoena out in a vacuum.



Telephone the person and explain that you will be sending it as a precaution. Keep it friendly, not threatening.

(ii) Always make sure that while you are in court, the witness will have a contact person at your office who knows who that witness is and where they are expected to be and what time they are expected to be there. Witnesses often call and say that they are lost, or can't find a place to park. Make sure that the witness and your secretary have spoken previously and that the witness knows that he/she can call your secretary if they are having any problems getting to court.

(iii) Always interview the witness one on one. I strongly recommend against having your client or other witnesses present. I do not want the witness to feel pressured to say what the client wants to hear. I also don't want witnesses tailoring their evidence to conform what other witnesses might say. Naturally, if there are direct contradictions in what different witnesses say, you will have to address that.

(iv) Always make sure that the person who has interviewed the witness is the same person who actually conducts the direct examination in court. The person who conducted the interviews will have a rapport with the witness. Hopefully the witness will have developed a level of trust in the lawyer who conducted the interviews. The lawyer should have developed a sense of the witnesses manner of speaking, the rhythms of their speech, their vocabulary, the type of cues they might need, etc. I have observed that it is very awkward to attempt to conduct a direct examination of a person to whom you have never spoken before.