

# How to Prepare Your MIP (Most important Witness)

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# Who is the MIP

- Perspectives – employee vs. management
- Will each side come up with the same conclusion about WHO is MIP?
- Is this for depo or trial? – there are differences
- Proposition: In **employment litigation**, your “most important witness” is often the **decision-maker** (or the plaintiff, depending on posture).
  - Agree? What about experts? Unbiased corroborating witnesses?

How that witness is prepared can **win or lose the case**, not because of theatrics, but because employment cases turn on:

1. **Credibility**
2. **Consistency**
3. **Documentation**
4. **Motive and related bias**

**WHAT ELSE?**

# Communicate Theory of the Case to MIP

# Don't Develop Theory As you Prep your witness

The biggest mistake is preparing a witness in isolation\_  
and without understanding their role in the case.

# Before Prep

- 1. Decide what needs to be dealt with pre-emptively
- 2. Understand your own story of [un]lawful motive (depending on side)
- 3. Know/determine **what facts are disputed, what are undisputed, and what don't matter**
- 4. Decide **what the witness must own, what can be contextualized, and what should not be over-explained**

Answers should support core narrative, e.g.:

- Plaintiff case: the company well knew the rules around accommodating disabilities and chose to not just ignore them, but violate them, so they could get rid of plaintiff.
- Defendant case: This decision was based on legitimate business reasons applied consistently

# Documents – Master them all – not just hot dox

- Documents beat testimony
- Know the key performance reviews, emails, complaints, and termination docs
  - Witness should be intimately familiar with the 50 most critical documents
  - That goes for senior management who would just prefer to say “I don’t recall” or “I didn’t have an opportunity to look at the docs before my deposition”
- What helps/hurts/benign
- Obviate witness surprise with any detail in any document

**Do not reconcile the documents to the witness's memory.**

**Reconcile the witness to the documents.**

# Re documents that might look bad:

- Acknowledge them
- Contextualize them
- Do *not* explain them away with speculation or revisionist memory
  - Don't add reasons for termination 2 years later
  - Don't add complaints/claims 2 years later
- DON'T LIE (Duh but don't assume duh)
- Judges and juries forgive bad facts more than they forgive **witnesses who fight the record.**

## What to teach the witness – Legal lens; not the law

### **Explain in Plain Language**

- Timeline matters
- Comparator evidence matters
- Consistency more than correctness
- Retaliation claims are easier

### **Helps avoid language that tanks case**

- She was being difficult after complaining
- Everybody hated her
- I wanted to send a message
- I was frustrated
  
- (Differs from ED testimony)

Instead, it's about:

- Focus on **performance, policy, conduct, and business impact**
- Separation of **protected activity** from **decision factors**

# Tone must be controlled, not content

Employment cases are **emotional**. Tone matters as much as substance.

- Present the human being – so witness should be human
  - For employers = managerial, but approachable and relatable
- Respect when talking about the plaintiff
- Neutral language (“concerns” vs. “complaints,” “performance issues” vs. “problems”)
- No sarcasm, no eye-rolling, no moral judgments
- Do not “oversell” your case = don’t be an advocate

Red flags:

- Anger about complaints
- Defensiveness about management decisions, DEI, HR, or accommodations
- Dismissiveness of employee emotions

A technically correct answer delivered badly can sink you.

# Train to Answer Like human, not corporate clone

- Witness should not appear over lawyered/over prepared
  - Hold off on the polish
  - No legalese/buzzwords
  - Planned jokes – NO
  - Sounded scripted - NO
- Evasiveness
- Memory only good on good facts
- Defensiveness; condescending; smartest guy in the room

## What to strive for

- Stop and think....but not too long
- Calm, measured, conversational answers
- The right demeanor
- Humanizing details
- Natural admissions where appropriate
- Dependability = they tell the jury what they told you
- Stay on point = answer the question asked
- Willingness to say “I don’t remember” ; “I don’t know”
  - IF True

# Prepare, prepare, prepare

- 4 x12 hours is not insane
- Multiple iterations
- Variations in wording
- Follow-ups after admissions
- Goal: not to *avoid* the bite— but to **absorb it and move the testimony back to safe ground.**

# Pull together the basic questions

- Jury instructions are a good guide
- Facts directly relevant to claims and defenses
- Standard case questions

## Standard Defense witness questions

- “When did you learn about the complaint?”
- “Who else engaged in similar conduct?”
- “Why wasn’t progressive discipline used?”
- “Isn’t it true the timing looks bad?”
- “Was the decision already made?”
- “What would you have done differently?”

# Standard Questions for Plaintiff Witness (Plaintiff; Expert)

- What do you want from this litigation
- Why did you turn down mitigation jobs
- Why didn't you report this to \_\_\_\_\_ (or report it earlier)
- Isn't it true that you are hoping to be awarded millions of dollars for the loss of a job that you had for a year?
- You really don't know what [the bad actor] was thinking, do you?
- You were spoken to about a number of performance issues, right?
- This happened four years ago....isn't it true that your memory has faded over time on these issues?

Other ideas??