

## ■ SPECIAL FEATURE

# The Importance of Thorough Witness Preparation

By William E. Hannum III

Developing effective witness testimony is a critical component of litigation strategy. Sometimes, however, a party to litigation overlooks the importance of careful and thorough witness preparation in readying the case for depositions or trial.

The unusual settlement of a recent case in the U.S. District Court in Massachusetts serves as a reminder that failing to adequately prepare a witness to testify can have devastating, even fatal, consequences for the litigant's case.

### 'U.S. v. Stryker Biotech'

In *U.S. v. Stryker Biotech*, the government was forced to settle a major felony fraud case due to its failure to interview any of the seven alleged victims before bringing the case to trial.

The prosecution in the case alleged that

Massachusetts-based Stryker Biotech and three of its sales representatives had marketed a mixture of products for promoting human bone growth even though the U.S. Food and Drug Administration had not approved the products for such use.

In the indictment, the prosecution identified seven surgeons alleged to have been defrauded by the company's marketing of the products.

When the case went to trial, the prosecution announced in its opening statement that it would call dozens of witnesses and introduce hundreds of exhibits to prove the defendants' guilt.

But the prosecution made a critical omission: It had neglected to interview any of the seven surgeons alleged to have been victimized by the defendants.

Defense counsel, on the other hand, *had* interviewed the surgeons, who revealed that they had not, in fact, been victimized by any rogue marketing scheme. That enabled the defense to point out in its own opening statement that the prosecution had neglected to interview even one of the alleged victims, and that all of the surgeons would testify that the defendants had never deceived or defrauded them.

Shortly after opening statements concluded, the prosecution agreed to drop all of the charges against the individual defendants and to dismiss the felony charges against Stryker Biotech.



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As part of the agreement, Stryker Biotech pleaded guilty to a single misdemeanor count of misbranding a medical device and agreed to pay a relatively modest \$15 million fine. With the plea, the company avoided the potential for permanent exclusion from government health programs crucial to its business and averted a potential \$25 million fine.

The prosecution's failure to interview the surgeons who were allegedly defrauded by the defendants was a significant oversight that had major consequences for the case.

In fact, the government recently announced that the head of its Health Care Fraud Division would be stepping down — an apparent additional consequence of the *Stryker Biotech* case.

### Lessons learned

Thorough witness preparation is essential even in cases that are unlikely to have dramatic moments such as the defense's opening statement in *Stryker Biotech*. Attorneys who prepare their witnesses thoroughly help them feel com-



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fortable and confident in their testimony.

Additionally, thorough preparation enables a witness to gain an overall understanding of the case and to appreciate the purpose of his testimony in this broader context.

Detailed witness preparation also can help witnesses and their attorneys determine how best to deal with problematic facts.

In preparation sessions, counsel can candidly discuss challenging issues and make certain that the witness anticipates — and has a strategy for addressing — difficult questions from opposing counsel.

That not only helps to develop the factual record advantageously, but also enables the witness to ward off attacks on his credibility. Thus, through such “witness prep” sessions, a party can exert some control over how unfavorable information is disclosed and limit the damage that the information may cause to its case.

“Witness prep” sessions also play an important educational role, as even the most intelligent witness needs to learn how to answer questions effectively in a deposition or at trial. Preparation can help a witness remember to answer each question candidly and not to be afraid to respond with “I don’t know” or “I don’t recall” when appropriate.

Additionally, through effective preparation, a witness can learn *not* to answer a question that he does not understand, and *not* to volunteer information beyond the scope of the question.

## Recommendations

In light of the benefits of thorough witness preparation — and *Stryker Biotech’s* illustration of how quickly and drastically a case can turn when shortcuts are taken — litigants and their attorneys should be sure to take the following measures.

- First, talk with *all* potential witnesses in the course of trial preparation whenever possible. Accordingly, the witness list for purposes of preparing the case should include not only the party’s own witnesses (such as the

employees of a party-employer), but also third-party witnesses and individuals expected to testify for the opposing side. In some cases, a deposition will be the only means for questioning a potential witness before trial.

- Second, *meet* with all potential witnesses whenever possible. While information can be gathered via telephone, only an in-person meeting allows one to gauge the witness’s body language and the implications and inferences that may flow from it. For example, such factors as whether the wit-



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ness makes eye contact, looks away when addressing difficult questions, has good posture, and uses hand gestures effectively can say a lot about the effectiveness of the witness — and can best be observed in person.

- Third, when preparing a party’s own witnesses to testify, review not only the facts of the case but also the purpose of the testimony and the procedures that will apply when he offers the testimony. As to the latter point, a witness needs to know if he may be subject to cross-examination and should be given a realistic expectation of what that might entail.
- Fourth, have a party’s own witnesses prac-

tice answering anticipated questions in both “direct examination” and “cross examination” mode. Making a witness realize that he will not be able to control much of the questioning — and that opposing counsel may focus on the most difficult aspects of the case — is an invaluable way to hone the testimony and to protect the witness from any inclination to overreach. Attorneys might even videotape these practice sessions and review them with the witnesses as a means to emphasize the “do’s and don’ts.”

- Fifth, carefully and thoroughly discuss any problematic issues with a party’s witnesses so that they are prepared to address difficult questions in a straightforward and credible manner. When a witness addresses such issues for the first time from the witness stand, the result is usually not good (except, of course, for the other side).
- Sixth, be mindful of both the protections and limitations of the attorney-client privilege when dealing with witnesses. For example, if the client is a corporation, officers and managing agents generally will be considered agents of the corporation for purposes of the attorney-client privilege, but lower level employees generally will not. Special care is required in dealing with this latter group, as the corporate attorney’s communications with them may be discoverable. Similarly, when the proceedings are before a government agency, such as the National Labor Relations Board, agency rules and regulations may impose limitations on witness interviews with non-managerial staff.
- Finally, remember that thorough witness preparation is as vital for a deposition as for a trial. In that regard, unprepared deposition witnesses may hurt the cause by providing inaccurate, unclear and incomplete information, and it is difficult for such witnesses to alter their deposition testimony at trial without damaging their credibility. **NEIH**