Preparing Your Witness And Yourself For A Trial or Arbitration

By: Hon. John P. DiBlasi, J.S.C. (Ret.)

During my fifteen years as a Judge, I have heard the testimony of hundreds of witnesses in all types of proceedings. As a trial attorney in private practice, I prepared a great number of witnesses to testify. Even with the best preparation, my father, who was a great trial lawyer, would say he would die a thousand deaths when he heard his witness deviate from everything that had been pored over in terms of prospective testimony. The witness would become a different person or come up with some new fact (either invented or true) that came as a complete shock.

We, as attorneys, so often believe that it is our performance in the courtroom, or the arbitration setting, that dictates results. Certainly there is merit to that belief. There is nothing like experience and sharply honed skills as an advocate. One can see that such skill will, to a degree, affect the outcome before a jury, judge or arbitrator.

I rarely talked to jurors after trying a case as a trial attorney. My sense was that most often I was getting a filtered version of what went on in the jury room or that I was being told what I wanted to hear. As a Judge, however, I would often speak to jurors after the trial, if given the opportunity. My take away was that, as lawyers, we were more functionaries in the system. In the end, the jury made their decisions based on their perception of the witnesses and, more importantly, whether they liked your client or not. Yes, I know the power of a great opening statement or closing argument and everything that falls in between. However, at the end of the day, it all comes down to the performance and likeability of your witnesses. The jurors could love or hate a particular lawyer, but the most often cited reason I have heard for the basis of a decision is the testimony of the witnesses.

Preparing the Witness

In an arbitration, your "Jury" (the arbitrator) is far tougher and less forgiving than a group of lay people. The arbitrator or panel can apply the concept of Falsus in Uno (false in one - false in all). This allows the fact finder to reject testimony in its entirety based upon a falsehood or accept so much as he/she deems to be credible and reject the rest. Witness preparation becomes all the more critical in front of the "professional" juror who knows all of the jury charges on credibility and will apply them.

Given all this, I have found that all too often witnesses at arbitrations are often not as well prepared as they would be at a jury trial. Over time, I have become convinced that this has become a function of the informal nature of the arbitration forum versus that of the traditional courtroom setting. The rules of evidence and procedure are relaxed in an arbitration. However, just because the forum does not have the formality of the courtroom setting doesn't mean that an advocate should conduct themselves any differently. In fact, the issue of credibility may be even more critical given that it will be judged by an experienced neutral who is familiar with all facets of the law.

For those who prepare witnesses on a regular basis, this article may be simplistic. However, what I have learned, over my career, is that there is nothing like getting back to the

basics and breaking down what you're doing. Coach John Wooden, who won more NCAA championships than any other college coach, always preached that preparation begins with tying your shoes properly. So let's talk about the basics to make sure our shoes don't come off at the trial.

Preparing Yourself

So where to begin? My law school dean and professor used to say after asking a question "anyone with a grasp for the obvious." Before you prepare any witness to testify in any forum, you first better prepare yourself. That starts with thoroughly reviewing your case file. Do you understand all of the facts surrounding the case from the point of view of both sides? Is it at your fingertips? Have you reviewed the applicable law? If it is a jury trial, what is your request for charge going to be? Are you going to ask to submit proposed findings of fact and conclusions of law if this is an arbitration? What is the theory of your case? This all begins with a thorough review of the pleadings.

All too often, I have seen attorneys who have wasted time proving admitted facts or have failed to realize that they have to prove those that are denied. What affirmative defenses have been asserted? Sometimes its boilerplate and other times not. One of the worst experiences that I had as a judge was to have to dismiss a legal malpractice action that was based upon the failure to timely file the action within the statute of limitations. The affirmative defense sat there like a time bomb waiting to go off and, in the days prior to jury selection, the ability to serve and file the complaint nunc pro tunc expired permanently, thereby barring the action.

Scrutinize all of the discovery demands and responses. Have you disclosed what you have been required to? Is there any possibility of preclusion against you? What has your adversary disclosed? Are there any motions in limine to be made based upon a complete review of everything contained in the case file? Keep in mind that while the rules of evidence and procedure may be relaxed in an arbitration, an arbitrator or panel will not look kindly on any evidence that should have been the subject of a discovery response when it comes up for the first time during the hearing. If it is not precluded outright, it certainly will affect its weight.

The components of preparing the witness to appear and answer questions will be addressed in a future article.

*Hon. John P. DiBlasi is a retired Justice of the Supreme Court, Westchester County, Commercial Division. He is a member of NAM's (National Arbitration and Mediation) Hearing Officer Panel a*nd is available to arbitrate and mediate cases throughout the United States. *For the third straight year, Judge DiBlasi was voted the #1 mediator in the United States in the 2016 National Law Journal Annual Reader Rankings Survey. He was also named a National Law Journal 2016 Alternative Dispute Resolution Champion,* as part of a select group of only 48 nationwide. *Judge DiBlasi was voted one of the Top 10 mediators in the 2016 New York Law Journal Annual Reader Rankings Survey for the seventh year in a row. Additionally, he has been designated a Super Lawyer for the fourth consecutive years (2016, 2015, 2014 & 2013) and he holds an AV Preeminent Peer Rating from Martindale-Hubbell in both Alternative Dispute Resolution and Litigation – a distinction given only to those who possess the highest ethical standards and professional ability.*

For any questions or comments, please contact Jacqueline I. Silvey/ NAM General Counsel, via email at jsilvey@namadr.com or direct dial telephone at 516-941-3228.