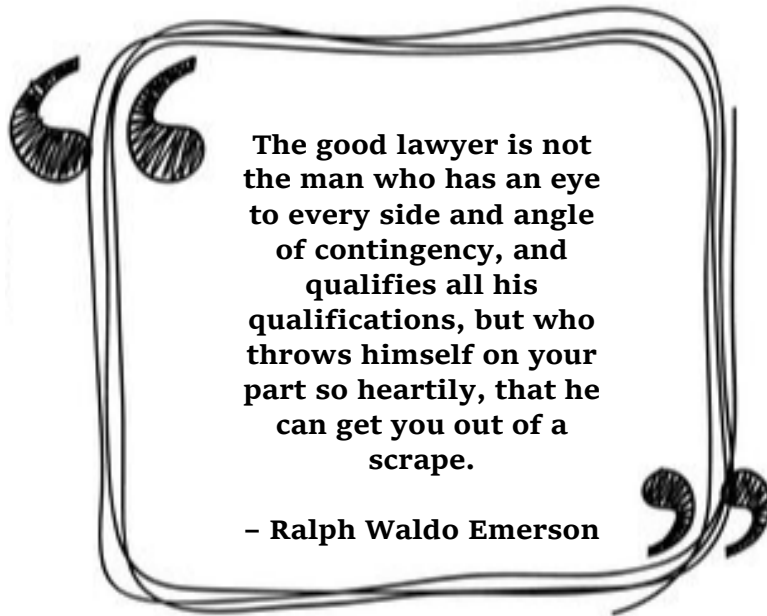


## Chapter 2

### PREPARING WITNESSES

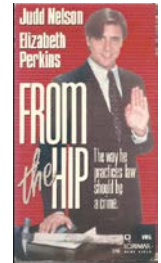
*Preparing a witness to testify at trial does not mean scripting out questions and answers and rehearsing them over and over. A properly prepared witness knows what to do and where to go when called into the court to testify and has some level of comfort beyond mere panic. Here is how you to get them to that point.*



## Chapter 2 – Preparing Witnesses



The one person more nervous than you in that courtroom is the witness. And that is pretty nervous based on your level of anxiety (just admit it). The witnesses' understanding of the crucible of trial typically comes from movies and television and then not good examples like *My Cousin Vinny* or *From the Hip*,<sup>1</sup> but from over-acted, inferior procedural dramas like *Law & Order: Emoluments Clause Division*. Thus, the witness expects to be yelled at, intimidated, and tricked into confessing to crimes they (likely) did not commit. Having been a witness, and having talked to thousands of them, I can tell you for a fact that no one wants to be a witness.



Greatest Legal  
Movie ...  
Of. All. Time.

Unfortunately, you do not have a lot of time to establish rapport with most, what I will call, third-party witnesses (essentially, those important but periphery characters who fill in the facts but in-and-of-themselves are not key to the success or failure of a trial, unlike the “decisive” witnesses such as the victim, an eyewitness, or the Accused). Fortunately putting these third-party witnesses “at ease,” or at least more

at ease than they initially are, is not difficult. It simply requires a concise effort to re-educate them about how trials actually work and what their role will be during it.

So, the following is my script for almost every third-party witness I meet with for the first time (and most often the only time outside of court). For me as the hired gun,

that first time is likely a couple days before trial as I blow in to town like a caffeine-infused derecho. For you, your first meeting with a potential third-party witness will likely be months before trial is even a twinkle in the eye of the convening authority so

**The one person more nervous than you in that courtroom is the witness ... [they] expect to be yelled at, intimidated, and tricked into confessing to crimes they (likely) did not commit**

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<sup>1</sup> Google it, one of the best legal movies of all time that you have never heard of. I guarantee it.

you will need to revise this script to fit the circumstances. Whenever it is done, however, the following conversation is worth having as early as appropriate.

## ACT I

*Scene: A shadowy courtroom in a tomblike legal office on a late Sunday afternoon, two days before trial is set to begin. I, the gallant and dashing senior prosecutor [visualize Brad Pitt], joined by the baby-faced young trial counsel and the seasoned and salty case paralegal, absent-mindedly check our smartphones while awaiting the witness. Four chairs are pulled into a circle in the well of the court ...*

*[Witness enters stage right, spies the empty chair, sits, painful and perfunctory introductions and stilted small talk ensues, not as painful as watching law-enforcement agents “build rapport” at the start of their interviews, but still painful, and then ...]*

ME: Hey before we get into it, have you had a chance to review the written statement you gave to OSI a couple months ago?

WIT: No sir.

ME: No!?!? Well that’s crazy. Here [*handing witness their written statement*], read this over and then we can talk about it.

*[Witness reads their statement ... when they are done ...]*

ME: Done? [*Witness nods*]. So anything in there that you need to correct or think needs more explanation? Sometimes people remember things after being interviewed that they had forgotten during the interview.

WIT: Nope, this is about it.<sup>2</sup>

ME: Great. Alright, guessin’ that you’re a little nervous about testifying at trial this week?

WIT: Yes sir.

ME: Also guessin’ that it’s your first time testifying at a trial?

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<sup>2</sup> Go read *United States v. Giglio*, 450 U.S. 150 (1972) and its progeny (like *United States v. Green*, 37 M.J. 38 (C.A.A.F. 1993)) for how to handle this situation – spoiler alert, if a witness that makes a statement that is inconsistent with a previous statement or is otherwise has potential impeachment value, that information “favorable to the accused” must be turned over to the accused, just like *Brady* material. That is why I like to call repeated interviews of witnesses, after they have given their statements, to include written ones, *Giglio* interviews as invariably that one-too-many interview will result in something inconsistent with a past recitation of events and that will require a *Giglio* notice.

WIT: Yes sir.

ME: Probably feel like the weight of the trial is on your shoulders, I'm guessing.

WIT: A bit.

ME: Sure, that would make me nervous as well but what I want you to understand is that the weight of this trial is not on your shoulders, it's on ours. Let me explain, let's see if we can't put your mind at ease a bit about what's going to happen. Have you ever seen a trial on TV or in a movie?

WIT: Sure ...

ME: Well good, forget all about that. Real trials are not nearly as exciting as they make them out to be on TV. Trials are just about letting people who know something about what happened tell other people, in this case a jury, what they know. Because there are always at least two sides to every story, the prosecutor and the defense counsel want to make sure that all those facts, not just the facts that help one side or the other, are presented to that jury. And to do that, the prosecutor and the defense counsel get to ask the witnesses questions to make sure all those facts get to the jury. Easy enough?

WIT: Ah ... I guess?

ME: I can tell you're not convinced that this isn't going to be a terrible experience. So let me tell you how the process works to make sure the jury gets all those facts. My guess is that you are worried that you are going to be tricked into saying something that hurts or helps one party or the other. First, don't worry about whether your testimony helps or hurts one side or the other. Though we are calling you as a witness, I don't want you to think that you are on "our side" *[air quotes]* or on "our team" *[air quotes]*. You're not on anyone's team, just like the witnesses the defense calls are not on their side or their team; you're all just there to tell what you know and answer the questions we or the defense counsel or the members of the jury or the judge ask you. Second, the process of testifying is set up so you can't be tricked into saying the wrong thing and if you do say the "wrong thing" *[air quotes]* by mistake, like you meant to say the stoplight was red but by mistake you said the stoplight was green, there is a process in place to fix that mistake.

So we're going to call you to testify. Can't tell you when that will be exactly, but you'll be waiting in the conference room, in your service dress, and the bailiff or paralegal will come get you when it's time. They will bring you in here and you'll walk up to here *[pointing to a spot near witness chair]*, where you'll stop and face me and I'll swear you in. Now on that, would you rather swear to God or affirm, either one is fine, whichever you're more comfortable with?

WIT: I think I'll go with affirm.

ME: Got it, I'll have you raise your right hand and I'll say "Do you affirm that the testimony you are about to give in the matter now in hearing will be the truth, the

whole truth and nothing but the truth?” And you’ll say “yes, sir,” and then you can sit right down. Easy enough so far?

WIT: Yes, sir.

ME: Great. Let’s practice that one time so you’ll know exactly how it works [*practice it, then back to the interview ... leave witness in the box, stand where you are going to stand when you do the direct and continue*]. So when you sit down you’ll see the court reporter sitting here [*pointing*] recording the proceeding, the judge up here [*pointing*], the defense counsel and the Accused sitting there [*pointing*], and the jury crammed together in that little box over there [*pointing*]. Everyone will be in service dress and though we don’t know exactly who will be on the jury, you can expect it to be anywhere from five to 10 officers, anywhere from first lieutenants to colonels. Couple things to remember while you are testifying. See this microphone? [*Tapping microphone in front of witness*]. It only records, it does not amplify your voice so remember to talk loud enough so you can be heard in the back. In a few minutes when we go through your story we’ll have SSgt Green sit way back there to make sure you can be heard everywhere in the courtroom. Also, remember, I know what happened, so when I ask you a question and you give the answer, you don’t give the answer to me, you give it to them [*pointing to the jury box*]. So go ahead and look at me and listen to my question, but then turn to them when you give the answer ... just like when someone talks to you, you want to not just hear them you want to “see” what they say so you can read their body language not just hear the words, we want the jury members to “see” what you are saying so they can see what a credible witness you are. Any questions about that?

WIT: Nope, makes sense.

ME: OK, now that you’re all sworn in, time to get started. What I’m not going to do today is give you a script or detail the questions that I am going to ask you or the answers that I expect you to give when you testify, likely on [*insert best guess*]. Because when you testify on direct examination, when I am asking you questions, I just want you to tell your story to the members. I’ll help it along with a more specific question if I think you need to clarify something or if we skipped over part of it, but for the most part my questions to you will be some variation of “what happened next.” Once you get to the end of your initial testimony, I’ll likely loop back and focus on an area or two, but for the most part you just need to focus on telling the members what you know. What I don’t want is for you to be thinking to yourself “what was I supposed to say,” or “what was the next question going to be.” That make sense?

WIT: Sounds good sir.

ME: Now when I’m done with you the defense counsel is likely going to ask you some questions and I’m pretty sure that’s what makes you the most nervous. Every witness is worried about cross-examination. Don’t be. These questions will be a little different, they are going to sound like statements and only require you to answer “yes, ma’am” or “no, ma’am” or if you don’t know or don’t remember answer that way as well. Sounds simple right?

WIT: It does ...

ME: Well, it's not. The problem is going to be that you are going to want to explain your answer because you'll think that your answer is only part of the story. Or you're going to want to argue because you feel like they are trying to make you out to be the bad guy. Or you're going to get confused because the question was so badly worded that you answer "yes" when you mean "no" or testify that "the light was red" when you meant to say "the light was green." I've seen it a thousand times; you gotta fight that urge, you gotta just answer the question put to you, don't worry about if you're being led down a particular path or are cut off from giving an explanation. Now if the defense counsel asks you a question that allows you to answer more than "yes" or "no," feel free to give a short answer, but for the most part just answer the yes or no question with a "yes" or a "no."

WIT: OK, but I'm worried that they'll trick me into saying something that isn't true.

ME: Not to worry, because military trials are different than trials you see on TV. We don't play those gotcha games because cross-examination is not the end of your testimony. After the defense counsel is done, I get another chance to ask you questions to clarify or emphasis something you said or weren't allowed to say on cross. So if you accidentally said "the light was red," I may ask you "I want to confirm, what color was the light at the time of the accident?" And you'll get to clarify that it was green and explain why you were confused during cross-examination. Or if you answered "yes" to a question but that answer really needs explanation to make sense, I'll ask you "when you weren't allowed to answer the question about [whatever], what did you want to explain to the members?" And we go through that process of cross-examination by the defense counsel and what we call re-direct examination by me until everyone, the attorneys, the judge, even the members—who can ask questions as well—are satisfied that they got everything they need out of you. Make sense?

WIT: Yes sir.

ME: That's why you should understand that the weight of this trial is not on your shoulders. Like I said, you're not on either team, you aren't expected to read a script or guess why a certain question is being asked or why we are not focused on something you think is really important. All of that is on us. All you have to do is answer the questions asked to the best of your ability. If you're asked a question on cross-examination that you think needs follow up but on re-direct I don't follow up on it, it's not because it is not important in the grand scheme, it just may be that that question is a red-herring or something better left for another witness to testify about, or just something that isn't important for this trial. But I get paid the big bucks to make those decisions, you don't have to. You just have to answer the questions, truthfully of course, to the best of your ability. Can you do that?

WIT: Yes, sir.

ME: Great, now let me give you one more tip about answering questions to the best of your ability, OK? [*Witness nods head*]. I understand that this crime occurred a long time ago and you only witnessed part of it and only for a couple minutes. That memory in general terms may be seared into your mind like it happened yesterday. But it may

not. Or parts of it may be fuzzy. Or maybe there are parts of it that you simply don't remember. It is perfectly acceptable and actually expected that you are not going to have a crystal-clear memory of everything that happened. Frankly if you did the members would probably think your testimony was scripted and they are less inclined to believe you—and like I said we are definitely not going to script your testimony here today. So it is perfectly fine to answer a question, “I don't know” or “I don't recall” if you truly don't know or don't recall. It's human nature to fill in gaps with speculation or conjecture, and then to give an affirmative answer to something you are really just speculating about. So don't do that. If you don't know the answer to a question, that doesn't make you a failure, that makes you human. Answer that you don't know or you don't recall. Remember, we can ask you questions around whatever you don't remember to get to what you do remember and it's what you do remember that we want the members to hear. OK?

WTT: Yep, that makes me feel much better, thanks sir.

ME: Also, there may be times when the defense counsel objects to a question I ask you or I object to a question they ask you ... and if things were for some reason to get unnecessarily argumentative on cross-examination rest assured the judge will put an end to that or I'll object and ask her to. But when you hear someone object, remember that you need to stop talking and allow the judge to decide whether your answer to whatever question that generated the objection is appropriate. Maybe it is, maybe it isn't, but you don't need to worry about that. You just do what the judge says. The judge says “sustained” that means you don't answer the question; the judge says “overruled” you can answer the question. But don't worry, if you are ever unsure whether you can or cannot answer the judge will let you know. Just remember to stop when you hear that word “objection.” Got it?

WTT: Yes sir.

ME: Great, then I think you're ready. Why don't you just tell me what happened on the night of 23 June 2017.

## ACT II

[This is where you “practice” the direct, and forecast a potential cross-examination, for however long it takes until you feel comfortable that the witness is ready and you feel that the witness feels that he or she is ready. Stand where you will stand during direct and put your assistant trial counsel and case paralegal in the jury box. Get the witness comfortable to listening to your question and turning, naturally, to give the answer to the members. If you have a quiet talker, have the case paralegal sit in the furthest reaches of the courtroom and have the witness remember to talk loud enough so that the paralegal can hear them. Another article will talk about how to structure

this part of the interview, but for now think “getting the witness comfortable” as your goal for Act II].

### ACT III

ME: OK, that about does it. How ya’ feeling about all of this?

WIT: Fine, bit nervous still but not as worried.

ME: OK, then. You’re almost done. I understand that you have an interview with the defense counsel next. Couple things about that. The first question the defense counsel is likely to ask you is “what did the prosecutor ask you during your interview.” You should feel free to tell them everything that we talked about in here today. No secrets. We don’t play gotcha in our system. If they want you to describe everything we did, or summarize everything I told you, or even repeat the questions that I asked of you for the last hour to them, no problema, go right ahead. Remember, you’re not on a team, your job is simply to testify truthfully about what you know. And along those lines, after you’re done with that interview, give SSgt Green a quick call. She’s just going to ask you how the interview went and if there was anything discussed that we might want to know about, particularly if it was about something we did not discuss here together.

WIT: OK.

ME: And the other thing is that the defense counsels are going to treat you right while you’re over there for their interview. They are going to be nice, they are going to be friendly. Now I can’t promise they will be as nice and friendly during cross-examination, but that’s their job, nothing personal. And since you’re testifying truthful, and just telling what you know, not worried about whether you’re helping or hurting one side or the other, cross-examination is nothing to worry about. Now, of course you aren’t a prisoner over there just like you weren’t a prisoner here today. No witness should be treated poorly and no witness who is being treated poorly has to sit there and take it. This won’t happen, but if you feel like you are being treated poorly, you can stop the interview and leave. Give SSgt Green a call to let her know that that happened and we’ll deal with it, but again, I really doubt that that is going to be a problem. I’ve been doing this a long time and it’s only happened a couple times and those were just misunderstandings that we were able to resolve when we spoke lawyer to lawyer. So nothing to worry about or to expect, but just stick it in the back of your mind if things go off the rails. Got it.

WIT: Yes sir.

ME: Great, then we’ll see you next at trial.

*[fin]*



Before summing up, a note about letting the witness review their prior statement before interviewing them/preparing them to testify. There is nothing legally or ethically wrong with that and for the life of me I cannot figure out why so many young trial counsel are so reticent about doing it. Maybe it is the misunderstanding that the refreshing recollection evidentiary rule applies at trial, not at a pretrial interview. Frankly, you are unnecessarily setting your witness up for failure if you do not allow them to review their earlier statements (but certainly not statements from other witnesses). If you do not allow them an opportunity to review their earlier statements, you are going to create inconsistent statements that are not the result of any motive to fabricate, but the result of faulty memory for a witness for whom the underlying event is a historical artifact that they have not been obsessing over for months like you and the rest of the parties to the case have been doing. Maybe they do not need to be refreshed; maybe they do. Maybe everything they know about what happened is in the statement; maybe it is not. Maybe the statement is error-free; maybe it is not. Regardless, figuring all of this out prior to having a conversation is better than breaking midstream to clarify something and preparing your *Giglio* notice—setting your witness up for failure is not going to help you establish rapport with them and without rapport you are going to have trouble putting them at ease. A nervous witness will not appear to the members to be a credible witness.

In sum, there are a number of benefits with this re-education approach, but in the end it comes down to credibility ... as should everything at trial. Though you told the witness that they are not on your team, and while that is technically true, at least subconsciously the members are going to think of witnesses you call as your witnesses, as your “team.” Because your witness is prepared, to a degree at ease, understands their role and comports themselves accordingly, and talks for-the-most-part in an unscripted way to the members (rather than eyeballing you the entire time), they will appear credible regardless of what their testimony is (of course, that testimony itself can destroy that credibility but the facts are the facts, nothing you can do about that). And because you have followed some version of this script, you have enhanced your credibility with your witness and thus your rapport. You put them at ease, they appear at ease, they appear credible, and you have a leg up with the members when they later

deliberate and decide which witnesses' testimony they are going to credit and which testimony they are going to discount—who was more credible.

“

**Setting your witness up for failure is not going to help you establish rapport with them and without rapport you are going to have trouble putting them at ease. A nervous witness will not appear to the members to be a credible witness**

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