

GOOD FAITH WITNESS PREPARATION
IN A BAD FAITH CASE

WARREN TAYLOR

TAYLOR & TAYLOR
ATTORNEYS AT LAW

1001 FANNIN, SUITE 600
HOUSTON, TEXAS 77002
(713) 615-6060
tandtwrt@prodigy.net

701 BRAZOS, SUITE 500
AUSTIN, TEXAS 78701
(512) 320-9115

TABLE OF CONTENTS

GOOD FAITH WITNESS PREPARATION IN AN AGE OF BAD FAITH

I.	INTRODUCTION	1
1.	The Witness Role	1
2.	Know the salient facts.	1
3.	Enabling the witness to respect the oath.	1
4.	The basic instructions.	2
5.	Precision and clarity are at a premium	2
6.	Lawyer's tips	2
7.	One other issue.	3
8.	Final thoughts.	3
9.	Conclusion.	3

GOOD FAITH WITNESS PREPARATION IN A BAD FAITH AGE

1. INTRODUCTION

The key to presenting a witness in a bad faith case is to remember the objective of litigation: the peaceful resolution of a dispute. It is easy to get caught up in "war games". However, litigation is not a tool of war but of peace. Obstruction of facts and subornation of perjury are the worst threats to the judicial system. In fact, they challenge the very foundation of our system of justice.

We have heard it many times, but the oath bears repeating here: "Do you swear to tell the truth, the whole truth, and nothing but the truth, so help you God?"

As advocates, we do not get to pick and choose which questions are answered truthfully (including the whole truth) and which ones we "cheat" on. Our zealous advocacy must be tempered by the constraints of ethics and common honesty. The purpose of witness preparation, and, in fact, the only legitimate purpose of witness preparation, is to enable the witness to honor the oath by telling the truth, the whole truth, and nothing but the truth. A good witness preparation will accomplish three goals: 1. It will enable the witness to know his role; 2. It will enable the witness to know the salient facts; and 3. It will enable the witness to abide by his oath at all times during the examination process.

1. The witness' role.

It is not the witness' role to win the case, or even to give testimony to "advance the ball" so that a particular party can win the case. Witnesses who "try to help" immediately lose credibility, often lose focus, and hence rarely testify effectively. On the contrary, witnesses find it liberating when they recognize they are no longer responsible for the outcome of the case. In a bad faith case, it is the company's job to evaluate the claim, to evaluate whether anything was done poorly or incorrectly,

and to determine whether settlement needs to be pursued. It is the lawyer's job, if the case is to be tried, to win. So what is the witness' job?

I would submit that in a bad faith case, a company witness has one and only one job: **to articulate what the company did, and why.**

2. Know the salient facts.

In order to articulate what the company did and why, the witness must know the salient facts. Bad faith cases are detail intensive. Our firm prepares a chronology of claim handling on every extra-contractual claim that we receive. The chronology takes each telephone call, inquiry, letter, expert report, inspection date, and any other activity connected with the file, puts them into chronological order, gives them a date and time, and a reference for where that event can be found in the file. It is amazing how quickly people can forget significant facts on even the smallest file. It is also amazing how many times I have asked witnesses why something was done and they don't recall. Often, in the general discussion about why something was done, we may even speculate wrongly about why. However, as part of the witness preparation, I will proceed through the file on a "blow by blow" basis, covering every entry by reviewing the chronology in detail, and reading out loud every letter and every log entry in the file. Ninety-nine times out of a hundred there is a reason for what was done, and the reason is revealed in the chronology. Witness preparation cannot begin in earnest until the witness knows the file cold, backwards and forwards, and could, in effect, pass a pop quiz about all incidents in the file.

3. Enabling the witness to respect the oath.

Once the witness understands his role, and once he has regained his knowledge of the facts, then the witness needs to be advised about the oath. Most witnesses that I have met are quite willing to

be fair to the other side, and are not interested in committing perjury for the purpose of hurting the other side. Interestingly, many times the witness interprets the oath as an oath to be fair as opposed to an oath to tell the truth. The situation is further complicated by an opposing attorney asking questions designed to put words in the witness' mouth, and designed to elicit testimony that would be favorable to the plaintiff without regard to whether the witness subjectively believes that the testimony as elicited would be true. Thus, instruction on the oath must not only remind the witness not to shade the truth in his favor, it must also enable the witness to control his own testimony in the face of a slanted cross examination from the other side.

Stated differently, the goal of witness preparation is not to tell the witness what to say, but to give the witness control over her own testimony, so she can communicate the truth effectively. Orient the witness, refresh her memory, and prepare her for cross examination. In the bad faith context, this is particularly important because so often the plaintiff's attorney does not care what the facts are, and the witness must be given the opportunity to articulate them.

4. The basic instructions:

- Always, always, always tell the truth.
- Listen and understand the question before you respond – frame your answer before you begin speaking.
- It's okay to be nervous– a jury expects you to be nervous. You are not a professional witness.
- Answer the person who asks you the question unless otherwise requested. Include the court or jury in your answers only if requested.
- Always assume you are on the record.
- You can be cross examined over anything.
- You can be called out of order by the other side.
- In most areas do not volunteer.
- Use your ear. A good cross examination has an

agenda behind every question and you must respond to both.

- Answer the question asked, not some other question.

- Stay within the question asked. Don't answer the "next" question yet.

5. Precision and clarity are at a premium:

- Be precise. There is less room for "spin".

- Avoid figures of speech.

- Answer in your own words. Do not parrot back to the attorney his words.

- Watch out for questions that paraphrase your answers or prior questions.

- Avoid value judgments, particularly his. Where appropriate, give the specifics (facts) and the jury will draw the correct conclusion.

- Use the active voice.

- Never use "specific" or "to be honest"; be careful with the use of "actually" as in "I've never actually done that".

- Admit preparing for the deposition/trial.

- Correct mistakes.

- Do not guess. At least qualify the answer.

- If you get tired, take a break.

6. Lawyer's tips:

- Know your final argument and anticipate the Plaintiff's final argument before you begin.

- Allow adequate time for preparation. More frequent, shorter meetings are better than one long session.

- Do not overload the witness. Focus on the critical issues. An overloaded witness is an ineffective witness.

•Prepare the witness for cross examination.
Explain the plaintiff's theories.

•Explain purpose and results of a deposition/cross examination.

•Ask questions, do not make statements.

•Explain the process/method and timing of breaks.

•Limit critical comments to one at a time.

•Use the format: "I observed, I want to see; this is how you might accomplish that."

7. One other issue:

•Deposition mode versus trial mode?

8. Final thoughts:

•Don't overlook the obvious. Your insurance company witness should be able to discuss article 21.55 to the definition of bad faith, and article 21.21.

9. Conclusion:

•Instead of scripting or trying to control the witness, think in terms of educating and empowering her. You will be surprised how well she does.