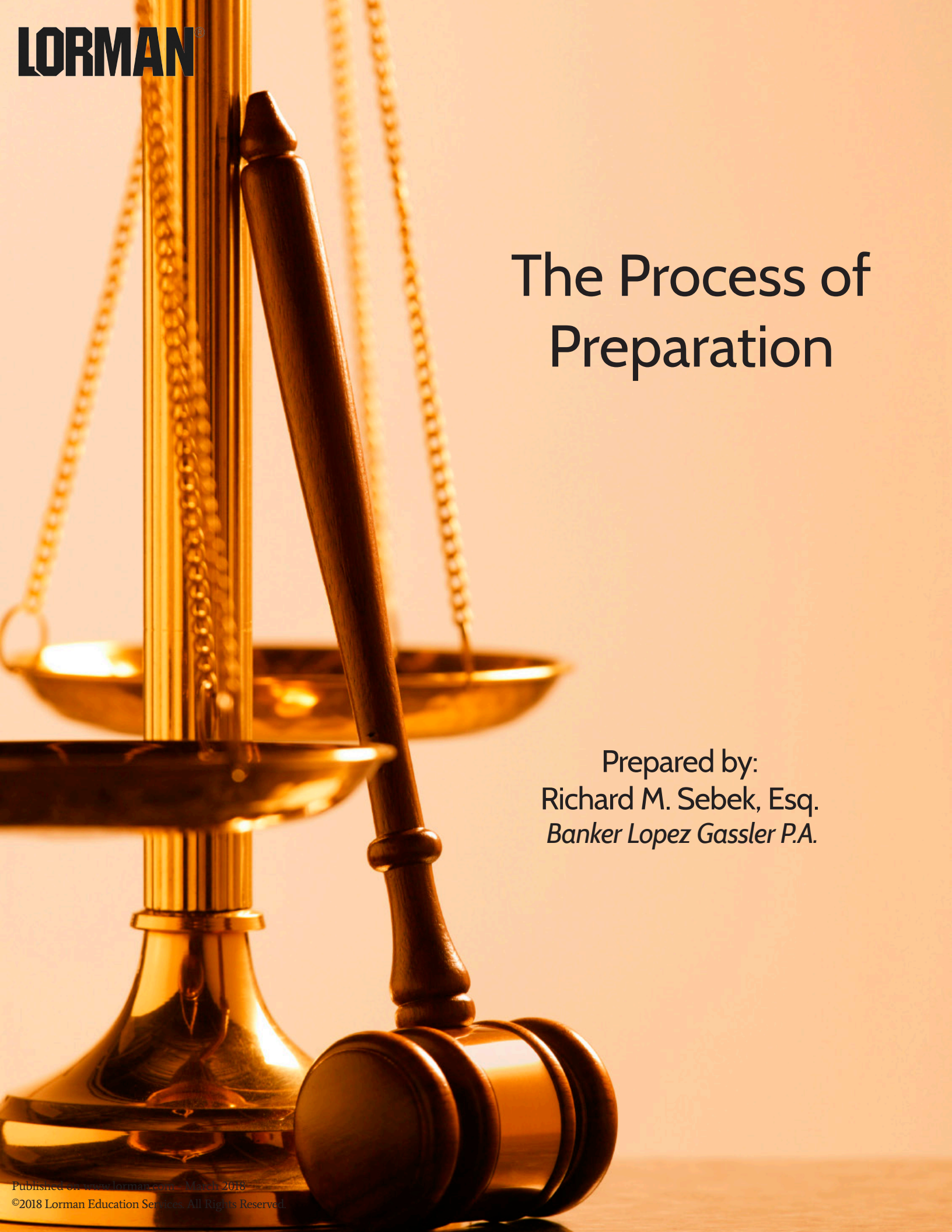

The Process of Preparation

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Published on www.lorman.com - March 2018

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The Process of Preparation.

Preparation has many meanings, depending upon one's point of view. Counsel's preparation of the case, much like the ringmaster of a three ring circus, entails knowing the seemingly infinite details of the case yet being able to maintain an overview of the entire action. Preparation for a deposition or an interview entails many of the same characteristics of preparation of the entire case, but on a more limited scale. Each witness occupies a role in the case. Part of the interview or deposition is to ascertain how broad or limited that role is. Whether you are meeting the witness in the cozy confines of counsel's office or in the more formalistic setting of a deposition, counsel's tasks remain the same: to determine what the witness knows which is relevant to the case; to ready the witness to testify; and to ensure that the witness understands the process.

Where and when the meeting occurs is important. Likewise, the manner in which the interview is conducted and what is asked will depend upon the witness. Is the witness a high level or low level employee? Is he or she still with the company? Is the witness litigation savvy or a novice? Is the witness a strong personality or pliable? It should be obvious that preparation does not follow a set formula, but, rather, is a process which will vary from witness to witness.

A. The Meeting.

Meeting the witness before the event (hearing, trial, or deposition) is absolutely essential. The situs of the meeting should be a quiet office and the principals should plan to spend uninterrupted time together. All forms of

distraction, be it human or electronic, should be avoided for the duration of the meeting.

Counsel should call the client to schedule the meeting. One can get a sense of the type of person with whom one is dealing by the following: information gleaned from his or her profile on the corporate website; whether the witness answers his or her own telephone; whether you are able to speak to the witness that day without an appointment; how long it takes for the witness to call you back; and when you do speak with the witness, whether he or she is more interested in the case or in getting you off the telephone.

Schedule the meeting within one week of the event. The issues raised and discussed will still be fresh in the witness's mind.

Plan to spend as much time as necessary to ready the witness. Build an extra thirty minutes to one hour into your meeting time. Typical witness meetings usually average four to five hours.

Plan to review documents, as well as discuss what the witness recalls. Many times the subpoena will require the production of documents, together with the witness. Review those documents carefully with the witness, detailing the witness's involvement in the preparation of same, ability to identify same, and, if known to the witness, the meaning of the documents within the big picture.

Consider and discuss issues to be raised by not only opposing counsel, but you, in the event of a cross-examination. Prepare the witness for cross-

examination on potential issues, as well as any testimony you feel may need to be clarified.

If the witness wishes, or you feel it necessary, bring another attorney to conduct a mock deposition.

It is not a question of whether the meeting will take place, but when, where, and for how long. Rarely will you see a witness presented at deposition who has not been prepared. You should not forfeit the opportunity to put on your client's best case by failing to prepare a witness.

B. The Interview.

While part of any interview is to learn what the interviewee has to say, the interview of a litigation witness entails much more. In addition to learning what the individual knows, counsel should also be educating the witness on how to be a witness. The latter includes an understanding of the requirements of testifying (the law) and why the witness is involved (the facts).

The location of the interview is important. You will want the witness's full attention. It is often said that serenity breeds clarity. An interview that is interrupted by telephone calls, assistance with messages, E-Mails, and business associates dropping by will be ineffective. Assess the witness's environment and work to remove him or her from it for a dedicated period of time. Another good rule is to turn off all cell phones. If your office is just as busy as the witness's office, consider a quiet, neutral location.

Know and understand your witness. Highly educated top level executives will be quick to understand the case facts, but will typically be more rigid in their position. Often, they will see the facts of the case through lenses tinted by loyalty and experience. Moreover, these individuals thrive in the problem solving environment of business management. The case, as well as your continued presence in his/her office, are problems which must be solved immediately, if not sooner. These individuals are forward thinking, hard charging people who act fast and decisively. They need to be convinced to set aside their day-to-day operating mode lest they speak rashly and sound arrogant. Further, most high level executives have little or no experience in litigation. Thus, the consequences of their acts must be made readily apparent to them in order to get their attention.

Lower level or less educated witnesses present a different problem in that it may take them longer to understand why they are being called as a witness. A lack of understanding of the case and a fear of the unknown will present roadblocks which need to be removed with patience and a calm, instructive demeanor.

All witnesses, irrespective of experience and education, will, to some degree, suffer from a fear of the unknown. A basic explanation of what the case is about should take place early in the interview. This helps establish kinship with the witness and provides some context to their presence in the case.

It is a good idea to explain any procedural events involving the witness. Is it a deposition, hearing, or trial which requires their presence? Explain what a deposition is and how it fits into the overall scheme of a case in litigation. Explain how a deposition works, noting who the main players at the deposition will be and what will actually occur. Tell the witness how depositions are used (i.e., to determine what a witness knows); substitution for live testimony at trial; impeachment, etc.). If a witness will be testifying live at a hearing or a trial, explain why the witness is necessary and the general nature of the testimony which you anticipate the witness can provide. Also, explain how you expect the testimony to assist you in accomplishing a particular end in the litigation or hearing.

Explain that the witness must "tell the truth, the whole truth, and nothing but the truth." Point out the importance of being truthful and that truth is the primary goal you are seeking. This will assist you in establishing a trust relationship with the witness, who will view you as someone who is trying to assist the party litigant in accomplishing good. Explain that the whole truth entails an awareness of both sides of the matter being litigated. This awareness occurs when a witness takes a broader view of his or her job. An example would be that policies and procedures do not replace professional judgment.

Ask the questions you prepared for the witness to learn what he or she knows. During this question and answer session, you will be able to assess the witness's demeanor, intelligence, ability to think on his or her feet, as well as

presentability. Mixing up open-ended and leading questions is helpful in determining if the witness is pliable or rigid.

After you have reviewed the facts of the case and the deposition process, explain to the witness how he or she can function during the deposition or other event in which testimony is to be provided. I usually take the time to explain certain rules for witnesses to live by. Those rules are as follows: (1) tell the truth; (2) listen, listen, listen; (3) do not rush; (4) remember the testimony given is being used to make a record; (5) be relentlessly polite; (6) do not answer a question you do not understand; (7) if you do not remember the answer to a question, say so; (8) do not guess; (9) do not volunteer information; (10) before testifying about documents and previous statements, please read them; and (11) rely upon your attorney.

You should anticipate problems, either based upon a prior history with the lawyer or, in general, the fact that problems are inherent in an adverse process, such as litigation. Explain to the witness that opposing counsel's job is to try and find a weakness in the witness's story or in the witness's ability to present during the proceeding. Based upon your assessment at the meeting, attempt to critique the witness and provide advice as to how the witness could do something better in an effort to stave off opposing counsel's attempts.

At the conclusion of the meeting, you will have a better understanding of not only what the witness knows, but also that witness's ability to assist you in the overall presentation of your client's case.

C. Key Concerns.

There are three basic rules of trial practice which are particularly applicable to interviewing a witness. The first is to know your case. Counsel must know everything about the evidence and the witnesses in the case. Take the time to really get to know the witness's background and any writings by the witness. This is particularly true if the witness is an expert or one who is employed by a company who may render expert testimony at the hearing, deposition, or trial. If you are interviewing these "expert" witnesses, ask for all published writings and any transcripts of depositions previously given. Similarly, for any employee who has litigation experience, obtain a copy of the deposition transcript to see what was said. Any weakness in that witness's prior testimony will be revisited in the hearing, deposition, or trial. Be prepared for it.

The second basic rule is to be prepared. Know what documents your witness has authored and why. Have the witness ready to discuss those documents at the proceeding in a fashion in keeping with the client's overall theme of the case. Interviewing and preparing witnesses for litigation events is another form of preparation of the case. As trial counsel, you should insist that this be scheduled and completed.

Finally, and I say this with emphasis, trial counsel is the boss. If the case goes south at trial, trial counsel will be the one who fields all blame. If you are willing to accept this type of responsibility, then you should insist that the case be

prepared according to your wishes. Insist on this. Even the most resistant client, after careful consideration, will appreciate your efforts in this regard.

D. Practice Questions.

Simulating a deposition can be helpful with a difficult witness. The hard charger who speaks before thinking can learn firsthand how a skillful cross-examiner can twist his or her words to attack the witness's credibility or the position of the client. Likewise, the novice witness may benefit from a practice run through questions you expect opposing counsel to ask. Many times the witness performs beyond expectations at deposition once he or she hears the same, or similar, questions asked by opposing counsel.

The session has to be realistic to be optimally effective. Bring in someone else to ask the questions.

Videotaping the deposition may be helpful in allowing the witness to watch his or her own performance after the practice session is over. Critiquing the witness while the witness watches can be very effective in educating the witness on how to better present and articulate the facts within his or her knowledge.

Many witnesses do not want, or simply do not have the time, to sit through a practice deposition. Practice questions can be framed throughout the interview and counsel can observe how the witness handles them. At the end of the interview, depending upon how the witness performed during those practice questions, a more formal session may be necessary. After having fumbled the

answers to the questions, the impatient witness may now be more amenable to a more formal question and answer session.

E. Case Themes.

Each case should have a theme or themes which counsel wishes to impart, through the evidence, upon the jury. The themes will vary from case to case, depending upon the facts. The theme of a typical personal injury plaintiff will involve liability or damages as the underpinnings therefor. One can expect the damage witnesses for the plaintiff to testify, to varying degrees, about how they observed the injured individual's suffering.

Conversely, the defense will advance, through its witnesses, that the plaintiff either did not suffer or that his pain was the result of some preexisting condition unrelated to the incident. Other significant case themes advanced by plaintiffs include: profits over people; David vs. Goliath; poor documentation; and a lack of care in the services provided.

Typical defense themes include: we take pride in our work as a company and our people are good people; the business is a good corporate citizen; America was built upon big business; our paperwork is not perfect because we work on providing excellent service; and the evidence shows that good care was provided.

When interviewing a witness, you are not trying to coach favorable testimony, but, rather, ask the right questions of the witness to voluntarily evoke same. During the interview process, you will have to ask the witness the "hard

questions" to see how he or she will respond. You should explain that there are times when concessions must be made, however, by embracing the theme of the case, the witness can answer the hard question in a way which places the theme of the case on the record for consideration by the jury.

Case themes are not just for the lawyers, but should also be shared with the witnesses so that they can advance the lawyers' litigation objective through their testimony.