PART I. INTRODUCTION (CONTINUED)

CHAPTER 1. INTRODUCTION

I. WHY PREPARE WITNESSES?

- § 1:1 Importance of preparing witnesses
- § 1:2 Effect of good preparation on settlement or plea bargain
- § 1:3 No two witnesses are alike
- § 1:4 When to commence preparing witnesses

II. PURPOSE, PROCESSES, PARTICIPANTS AND SEQUENCE: TRIAL, DEPOSITION, GRAND JURY, AND ARBITRATION

- § 1:5 Introduction
- § 1:6 Trial
- § 1:7 Deposition
- § 1:8 Grand jury proceeding
- § 1:9 Arbitration

III. THE WITNESS

- § 1:10 Introduction
- § 1:11 At trial
- § 1:12 At deposition
- § 1:13 Grand jury proceedings
- § 1:14 Arbitration

CHAPTER 2. ETHICAL CONSIDERATIONS

- § 2:1 Ethical obligation to prepare witnesses
- § 2:2 Extent of witness preparation
- § 2:3 Limitations on witness preparation

- § 2:4 The dividing line: Ethical preparation and improper influencing or coaching
- § 2:5 Opening statements and improper vouching
- § 2:6 Checklists for opening statements

CHAPTER 3. THE TRIAL NOTEBOOK

- § 3:1 A trial notebook: why?
- § 3:2 What is in a trial notebook?
- § 3:3 Developing a trial notebook
- § 3:4 Trial notebook checklist—Personal injury matter
- § 3:5 —Family law matter
- § 3:6 —Criminal law matter
- § 3:7 —Sample index for general litigation
- § 3:8 Costs for trial notebook

PART II. MATTERS TO CONSIDER BEFORE WITNESS PREPARATION

CHAPTER 4. DIFFERENT KINDS OF WITNESSES

- § 4:1 Introduction
- § 4:2 Fact witnesses
- § 4:3 The expert witness
- § 4:4 Why classify witnesses
- § 4:5 Classifying witnesses: a glossary
- § 4:6 Witness defined by relationship to the parties
- § 4:7 Witness defined by role or function or the matter in dispute
- § 4:8 Witness defined by characteristic or behavior
- § 4:9 Values bearing on witness selection
- § 4:10 Witness effectiveness
- § 4:11 Witness controllability
- § 4:12 Witness credibility
- § 4:13 Witness personal characteristics
- § 4:14 General advice on handling different types of witnesses
- § 4:15 General advice on dealing with the verbose witness
- § 4:16 General advice on dealing with the hesitant and nervous witness

§ 4:17	General advice on dealing with the obstinate witness
§ 4:18	General advice on dealing with the megalomaniac or egocentric witness
§ 4:19	General advice on dealing with the reluctant witness
§ 4:20	General advice on dealing with adverse and hostile witnesses
§ 4:21	Protect the client and the case from the hostile witness: memorialized statements
§ 4:22	The neutral witness
§ 4:23	The document foundation witness

CHAPTER 5. PREREQUISITES TO WITNESS PREPARATION

- § 5:1 A prepared lawyer § 5:2 Does the client have legally suffici-
- § 5:2 Does the client have legally sufficient claims or defenses
- § 5:3 Preliminary fact investigation and document review
- § 5:4 Preliminary litigation plan
- § 5:5 Identifying potential witnesses
- § 5:6 Necessary witnesses
- § 5:7 Desirable witnesses

CHAPTER 6. WHO CAN BE A WITNESS

- § 6:1 Introduction
 § 6:2 Fact witnesses
 § 6:3 Who can be a witness
 § 6:4 Witness capacity
 § 6:5 Witness competency
 § 6:6 Lack of testimonial competence: judges, lawyers, jurors
 § 6:7 Witness capacity to remains
- § 6:7 Witness capacity to perceive
- § 6:8 Witness ability to recall
- § 6:9 Witness's inability to recall: hypnosis to refresh recollection
- § 6:10 Hypnosis to refresh recollection: consider the witness
- § 6:11 Hypnosis to refresh recollection: is such testimony admissible?
- § 6:12 Hypnosis to refresh recollection: guidelines to prepare witnesses to be hypnotized

§ 6:13	Witness ability to communicate
§ 6:14	Witness's ability to understand and follow instructions
§ 6:15	Witnesses and privileges
§ 6:16	—Types of privileges
§ 6:17	Expert witnesses
§ 6:18	Is expert testimony necessary and/or desirable
§ 6:19	Trial court determines admissibility of expert testimony
§ 6:20	Expert witness personal qualifications
§ 6:21	Admissibility of expert testimony

CHAPTER 7. PSYCHOLOGICAL IMPLICATIONS IN WITNESS SELECTION AND PREPARATION

§ 7:1	Psychology and the litigating lawyer
§ 7:2	Psychology and witness selection
§ 7:3	Psychology and witness preparation generally
§ 7:4	Psychology and the initial witness interview
§ 7:5	Psychology in interviewing a prospective witness
§ 7:6	Psychology in interviewing a prospective witness: what to ask
§ 7:7	Psychology in interviewing a prospective witness: how to ask
§ 7:8	Psychology in interviewing a prospective witness: when to ask
§ 7:9	Psychology and the eye witness
§ 7:10	Psychology and the eye witness: witnesses see what lawyers want them to see
§ 7:11	Psychology and the eye witness: distorting

CHAPTER 8. DIFFERENT TESTIMONIAL APPEARANCES REQUIRE DIFFERENT DREDARATION

DIT.	FERENT FREFARATION
8:1	Introduction
8:2	Testimonial appearances in civil litigation
8:3	Depositions
8:4	Hearings on litigated motions
8:5	Civil trials
8:6	Grand jury proceedings

eyewitness testimony

§ 7:11

- § 8:7 Criminal trials
- § 8:8 Arbitrations

CHAPTER 9. CONSIDERATIONS IN PREPARING CERTAIN WITNESSES

9:1	Introduction
9:2	The client as witness
9:3	Preparing the client in a civil action
9:4	Preparing the client as criminal accused
9:5	Preparing the client as criminal accused: multiple defendants
9:6	Preparing the client to testify: the client who dissembles
9:7	Preparing the client to testify: courts consider the client who may dissemble
9:8	Preparing the client to testify: courts consider the client who may dissemble; further comments
9:9	Preparing a child to testify: threshold questions and issues
9:10	Preparing a child to testify: special considerations
9:11	Preparing a child to testify: using closed-circuit television
9:12	Preparing a child to testify: minimizing trauma during testimony
9:13	Preparing a spouse to testify
9:14	Preparing a spouse to testify: marital privileges
9:15	Preparing a character or reputation witness
9:16	A lawyer as witness: introduction
9:17	A lawyer as witness: general considerations
9:18	A lawyer as witness: the legal expert witness
9:19	A lawyer as witness: the advocate as witness
9:20	A lawyer as witness: some judicial decisions
9:21	A lawyer as witness: opposing counsel as a witness
9:22	Preparing the corporate executive: introduction
9:23	Preparing the corporate executive: selecting the representative
9:24	Preparing the corporate executive: adequate preparation
9:25	Preparing the foreign language witness: deciding whether to use an interpreter
9:26	Preparing the foreign language witness: using an interpreter

CHAPTER 10. SPECIAL ADDITIONAL CONSIDERATIONS IN PREPARING WITNESSES

- § 10:1 The witness: an important human being
- § 10:2 The witness: personal treatment
- § 10:3 The witness: considerations of time and schedule
- § 10:4 The witness: purpose of witness preparation
- § 10:5 The witness: maintaining reasonable expectations

PART III. WITNESS PREPARATION

CHAPTER 11. WITNESS INTERVIEWS

- § 11:1 The witness interview: an introduction
- § 11:2 The witness interview: process and goals of the witness interview
- § 11:3 The witness interview: distinguishing information gathering from witness preparation
- § 11:4 The witness interview: when and where to interview
- § 11:5 The witness interview: witness self-preparation
- § 11:6 The witness interview: building witness confidence
- § 11:7 The witness interview: conducting the interview
- § 11:8 The witness interview: clarifying sources of testimony
- § 11:9 The witness interview: two approaches
- § 11:10 The witness interview: controlling the interview and the witness
- § 11:11 The witness interview: discoverability of interview content
- § 11:12 The witness interview: four phases of the process
- § 11:13 The witness interview: the first phase
- § 11:14 The witness interview: the second phase
- § 11:15 The witness interview: the third phase
- § 11:16 The interview process: the fourth phase
- § 11:17 The witness interview: making mental notes
- § 11:18 The witness interview: making mental notes during the interview

§ 11:19	The witness interview: learn by listening and observing
§ 11:20	The witness interview: listening and observing concentration and attentiveness
§ 11:21	The witness interview: listening and observing noting unintentional distortions
§ 11:22	The witness interview: avoid hasty judgments
§ 11:23	The witness interview: final considerations
§ 11:24	The witness interview: memorializing the interview

CHAPTER 12. BASICS OF INTERROGATION

§ 12:1	Introduction
§ 12:2	Adapt interrogation to the witness
§ 12:3	Two basic questioning patterns
§ 12:4	Open or narrative questions
§ 12:5	Leading questions
§ 12:6	Hypothetical questions and an alternative
§ 12:7	Two-in-one questions
§ 12:8	Let each witness understand his part
§ 12:9	How many witnesses
§ 12:10	Order of witnesses

CHAPTER 13. GENERAL CONSIDERATIONS FOR PREPARATION OF WITNESSES

§ 13:1	Locating all potential witnesses
§ 13:2	Locating all potential witnesses: a hypothetical
§ 13:3	Scheduling witness preparation
§ 13:4	Scheduling witness preparation: how long before trial
§ 13:5	Scheduling witness preparation: presence of others
§ 13:6	Preparing the witness: the initial interview
§ 13:7	Preparing the witness: the trial notebook as aide-memoir
§ 13:8	Preparing the witness: outline areas to inquire about
§ 13:9	Preparing the witness: using documents
§ 13:10	Preparing the witness: testing credibility and perception

§ 13:11	Preparing the witness: considering truthfulness and perceptions by content
§ 13:12	Preparing the witness: considering truthfulness and perceptions by behavior
§ 13:13	Preparing the witness: the age factor
§ 13:14	Preparing the witness: memorializing the interview and preparation sessions
§ 13:15	Preparing the witness: prophylactic measures
§ 13:16	Preparing the witness: the practices of experienced litigators to memorialize the preparation process
§ 13:17	Preparing the witness: considerations concerning recording witness interviews
§ 13:18	Preparing the witness: pretrial discovery of trial preparation
§ 13:19	Preparing the witness: the attorney work product doctrine
§ 13:20	Preparing the witness: maximizing attorney work-product protection
§ 13:21	Preparing the witness: an illustrative hypothetical concerning memoranda
§ 13:22	Preparing the witness: additional thoughts on memorializing witness interviews

CHAPTER 14. PREPARING THE WITNESS FOR TESTIFYING: GENERAL ADVICE FOR THE LAWYER

§ 14:1	Introduction
§ 14:2	Testimonial appearances at deposition and trial
§ 14:3	Witness preparation for deposition
§ 14:4	VIP witness preparation
§ 14:5	Witness preparation for deposition: <i>Caveat</i> on consulting with the lawyer during the deposition
§ 14:6	Master the facts: a necessity
§ 14:7	Master the facts: fact gathering
§ 14:8	Master the facts: analyzing the facts and information
§ 14:9	Master the facts: building a theory of the case
§ 14:10	Master the facts: the importance of documents and demonstrative evidence
§ 14:11	Master the facts: developing documentary and demonstrative evidence

§ 14:12	Master the facts: matching the witnesses with the facts
§ 14:13	Master the facts: establish a cooperative relationship with each witness
§ 14:14	Master the facts: prepare for the adversary's tricks
§ 14:15	Master the facts: communications between witness and the adversary
§ 14:16	Master the facts: the unexpected witness

CHAPTER 15. PREPARING THE WITNESS TO TESTIFY GENERALLY

§	15:1	Introduction
§	15:2	General advice on testifying effectively: introduction
§	15:3	General advice on testifying effectively: answer truthfully
§	15:4	General advice on testifying effectively: understand each question, only answer the question asked
§	15:5	General advice on testifying effectively: answer with best present recollection
§	15:6	General advice on testifying effectively: speak clearly with common language
§	15:7	General advice on testifying effectively: speak spontaneously, not from memory
§	15:8	General advice on testifying effectively: pause and think before responding
§	15:9	General advice on testifying effectively: acknowledge lack of knowledge, faulty recollection, even error
§	15:10	General advice on testifying effectively: ask the lawyer to clarify a question
§	15:11	General advice on testifying effectively: do not try to out-think or argue with the lawyer
§	15:12	General advice on testifying effectively: always be courteous
§	15:13	General advice on testifying effectively: maintain an appearance of neutrality
§	15:14	General advice on the litigation process:
§	15:15	General advice on the litigation process: nature of proceedings
§	15:16	General advice on the litigation process: explain the proceedings

§ 15:17	General advice on the litigation process: explain the difference between direct examination and cross-examination
§ 15:18	General advice on the litigation process: testifying about time and space
§ 15:19	General advice on the litigation process: objections and witness' reaction
§ 15:20	General advice on the litigation process: creating a favorable impression
§ 15:21	General advice on the litigation process: answering the witness's questions
§ 15:22	General advice on the litigation process: a checklist
§ 15:23	Preparing character witnesses for DUI proceedings

CHAPTER 16. PREPARING THE WITNESS TO TESTIFY IN ARBITRATION

§ 16:1	Introduction
§ 16:2	Arbitration is not litigation
§ 16:3	Continuing concern with the law of evidence
§ 16:4	Preparing prospective witnesses and the law of evidence
§ 16:5	Preparing the witness: absence of pretrial discovery
§ 16:6	Obtaining the assistance of one with relevant expertise
§ 16:7	Selecting and ordering arbitration witnesses
§ 16:8	Preparing the client or witness
§ 16:9	Some thoughts on ethics
§ 16:10	Reconsideration of witness preparation for

CHAPTER 17. PREPARING THE WITNESS TO TESTIFY ON DIRECT EXAMINATION

0 17.1	To Anna Anna Athair
§ 17:1	Introduction
§ 17:2	Designing trial strategy as a preface to
	preparatory sessions
§ 17:3	Analyzing available evidence and information
§ 17:4	Developing a theory of the case
§ 17:5	Planning direct examination

§ 17:6	Using the outline to prepare the witness
§ 17:7	Advising the witness about contradictions and credibility
§ 17:8	Developing a persuasive direct examination
§ 17:9	Direct examination should open with easy questions that personalize the witness
§ 17:10	Semantics and direct examination
§ 17:11	Direct examination and witness memory lapse
§ 17:12	Direct examination and witness memory lapse: rehearsing refreshed recollection
§ 17:13	Direct examination and witness memory lapse: rehearsing past recollection recorded
§ 17:14	Direct examination: use of documents
§ 17:15	Direct examination: use of non-leading questions
§ 17:16	Direct examination: picking up clues and cues
§ 17:17	Direct examination: rehearsal
§ 17:18	Redirect examination: the overlooked preparation

CHAPTER 18. PREPARING THE WITNESS FOR CROSS-EXAMINATION

** # .	
§ 18:	1 Introduction
§ 18:2	2 Introducing the witness to cross-examination
§ 18:3	B The nature and scope of cross-examination
§ 18:4	Help the witness to anticipate the shift to leading questions
§ 18:	5 Preparing the witness for testing direct examination
§ 18:6	6 Cross-examination to test direct examination: pinning the witness down
§ 18:′	7 Cross-examination to impeach the ability to perceive, recall, and relate
§ 18:8	B Cross-examination to impeach, generally
§ 18:9	O Cross-examination: preparing the witness for trick questions
§ 18:	10 Cross-examination: preparing the witness for various forms of interrogation
§ 18:	Cross-examination: preparing the witness to handle prior inconsistent statements
§ 18:	Cross-examination: preparing the witness to be disciplined and controlled
§ 18:	Cross-examination: maintain the same demeanor as on direct

§ 18:14	Cross-examination: advising the witness about objections
§ 18:15	Cross-examination: a summary
§ 18:16	Cross-examination: rehearsing the witness
§ 18:17	Cross-examination: consider preempting the
	cross-examiner's impeaching material
§ 18:18	Preparing for cross-examination in a DUI case
СНА	PTER 19. REHEARSAL AND FINAL
	PARATIONS BEFORE TRIAL
§ 19:1	Introduction
§ 19:2	The rehearsal: the setting
§ 19:3	The rehearsal: a courtroom visit for client and witnesses
§ 19:4	The rehearsal: different formats
§ 19:5	The rehearsal: the structure
§ 19:6	The rehearsal: some additional suggestions and observations
§ 19:7	The rehearsal: final instructions to witnesses
§ 19:8	Final suggestions to the lawyer
СНА	PTER 20. THE EXPERT WITNESS
§ 20:1	Introduction
§ 20:2	Purpose of expert testimony
§ 20:3	When to retain the expert witness
§ 20:4	Client approval of retention of experts
§ 20:5	Selecting the expert
§ 20:6	Selecting the expert: qualities to seek
§ 20:7	Relationship between lawyer and expert
§ 20:8	Expert as consultant
§ 20:9	Qualifying the expert as witness
§ 20:10	Admissibility of expert testimony
§ 20:11	Preparing the expert witness: acting and communicating
§ 20:12	Preparing the expert witness: reviewing all relevant materials
§ 20:13	Preparing the expert witness: opinion, inference, conclusion, or hypothetical
§ 20:14	Preparing the expert witness: cross-examination
· ·	1 O - T - T - T - T - T - T - T - T - T -
§ 20:15	Motion in limine to preclude expert testimony

injury

§ 20:17 Expert checklist in litigation for violations of prohibition against prerecorded commercial phone calls to residential numbers pursuant to Telephone Consumer Protection Act

CHAPTER 21. PREPARING THE GRAND JURY WITNESS

- $\S~21:1$ The grand jury witness: introduction
- § 21:2 The grand jury witness: the functioning and purpose of a grand jury
- § 21:3 The grand jury witness: the prosecutor's witness
- § 21:4 The grand jury witness: a private lawyer learns a client has been called to testify
- § 21:5 The grand jury witness: what to do when first retained by a grand jury witness
- § 21:6 The grand jury witness: representing a target or subject
- § 21:7 The grand jury witness: preparation

PART IV. EXAMPLE EXAMINATIONS

CHAPTER 22. INTRODUCTION

- § 22:1 Examining witnesses is a learned skill
- § 22:2 Know the basics

CHAPTER 23. DIRECT EXAMINATION

- § 23:1 Qualifying witnesses
- § 23:2 Qualifying witnesses: the child witness
- § 23:3 Qualifying witnesses: corrections officer
- § 23:4 Qualifying witnesses: the expert witness
- § 23:5 Qualifying witnesses: structural engineering expert
- § 23:6 Qualifying witnesses: expert witness in MTBE contamination of water case
- § 23:7 Examination of expert—checklist
- § 23:8 Authenticating documents: personal documents
- § 23:9 Authenticating documents: business records
- § 23:10 Authenticating tangible objects
- § 23:11 Faulty or lapsed memory: refreshing recollection
- § 23:12 Faulty or lapsed memory: past recollection recorded

PREPARING WITNESSES

§ 23:13	Summaries of voluminous documents
§ 23:14	Opinion testimony: introduction
§ 23:15	Opinion testimony: lay witness
§ 23:16	Laying foundation: corporate witness
§ 23:17	Sample direct examination: plaintiff's expert
	witness in motorcycle products liability action

CHAPTER 24. CROSS EXAMINATION

- § 24:1 Introduction
- $\$ 24:2 Cross-examination: prior inconsistent statement generally
- § 24:3 Cross-examination: prior inconsistent statement under oath
- § 24:4 Impeachment; refreshing recollection

Table of Cases

Index