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Preparing Witnesses for Deposition: Overcoming Challenges With 30(b)(6) Representatives and Fact and Expert Witnesses

Navigating Current Restrictions on Defending Counsel, Complying With Ethical Guidance, and Strategies for Witness Preparation

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STRAFFORD WEBINARS

“Preparing Witnesses for Deposition: Overcoming Challenges with 30(b)(6) Representatives and Fact and Expert Witnesses”

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March 31, 2020

Subjects:

- I. Importance Of Planning And Preparation
- II. Restrictions On Defending Counsel
- III. Ethical Considerations And Requirements
- IV. Tips For Preparing A Fact Witness
- V. Tips For Preparing A Rule 30(b)(6) Witness
- VI. Tips For Preparing An Expert Witness
- VII. Keeping The Videotaped Deposition In Mind

I. Importance of Planning and Preparation

A. Importance of Depositions – Generally

1. Prove your case – obtain useful admissions for summary judgment or trial
2. Rebut adversary's case – learn or confirm what you know to prepare your attack
3. Assess witness credibility and scope of knowledge
4. Lock in testimony for cross-examination
5. Attack expert qualifications and opinion
6. Facilitate settlement

B. Importance of Depositions – Your Witness

1. Witness must know the case – the relevant facts, positions and themes relevant to him or her
2. Witness must avoid damaging admissions made by mistake or omission

Importance Of Planning And Preparation

- C. Witness Assessment, Planning, Preparation and Rehearsal are essential
 - 1. Witness Assessment: Know personality type, personal characteristics, and role of the witness to set reasonable goals for witness performance
 - 2. Planning and Preparation: Hard work must continue throughout the entire deposition process starting from notice
 - 3. Rehearsal: Practice with Q&A is essential for excellent performance at the deposition
 - i. Witness may be experienced, or not
 - ii. Witness may be skilled, or not
 - iii. Preparation may be short, or long, depending on need
 - iv. Preparation may require practice over multiple days

II. Restrictions On Defending Counsel

A. Principal Areas of Restriction

1. Attorney-witness communications during deposition
 - i. What about breaks, lunch, interim periods before deposition resumes?
 - ii. What about protecting privilege?
2. Attorney objections and instructions to witness not to answer

Restrictions On Defending Counsel

B. Limitations On Attorney-Witness Communications

1. No conferences with the deponent while deposition question is pending, **except** to determine if privilege should be asserted (see SDNY/EDNY Civil Rule 30.4)
2. Many federal courts, including New Jersey federal courts, follow rule set forth in *Hall v. Clifton Precision*, 150 F.R.D. 525, 531-32 (E.D. Pa. 1993)

Restrictions On Defending Counsel

3. New York State Courts
 - i. Attorney shall not interrupt deposition to communicate with deponent, **except** (NYS Uniform Rules Section Rule 221.2):
 - a. Privilege
 - b. Court ordered limitation
 - c. Question plainly improper and causes prejudice
 - ii. Reason for communication must be stated on the record clearly and succinctly (NYS Uniform Rules Section 221.1(b))

Restrictions On Defending Counsel

4. New Jersey State Courts

- i. Once deponent is sworn, no conversations between deponent and counsel **except** (N.J. Ct. R. 4:14-3(f):
 - a. Regarding assertion of claim of privilege
 - b. Right to confidentiality limitation pursuant to Court order

(See, *In Re PS&G Shareholder*, Lit. 320 N.J. Super. 112, 118-119 (Ch.Div. 1998)).

Restrictions On Defending Counsel

C. Proper Objections and Directions

1. Federal Courts (Fed. R. Civ. P. 30(c)(2))

- i. An objection must be stated **concisely** in a **non-argumentative** and non-negative manner
- ii. An attorney may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation ordered by the Court, or to present a motion to terminate or to limit under Rule 30(d)(3)

Restrictions On Defending Counsel

2. New York State Courts (NYS Uniform Rules Section 221.1(b))
 - i. Objections stated succinctly and framed so as not to suggest an answer
 - ii. Include a clear statement of the defect in form or other basis of error or irregularity

Restrictions On Defending Counsel

3. New Jersey State Courts
 - i. Objection must state why form is objectionable to allow interrogator to amend question (N.J. Ct. R. 4:14 – 3(c))
 - a. Waiver – Objections concerning form, manner of taking the deposition or other matters that might have been corrected are waived if not made during deposition (N.J. Ct. R. 4:16 – 4(c)(2))
 - ii. Attorney may instruct not to answer only when (N.J. Ct. R. 4:14 – 3):
 - a. Necessary to preserve privilege
 - b. To enforce a limitation ordered by the court
 - c. To seek to terminate the deposition where conducted in bad faith or in a manner that unreasonably annoys, embarrasses or oppresses the deponent

Restrictions On Defending Counsel

D. Restrictions are Enforceable by Sanctions

1. See *Security National Bank of Sioux City, Iowa v. Abbott Laboratories*, 299 F.R.D. 595 (N.D. Iowa 2014), *rev'd on other grounds*, 800 F.3d 936 (8th Cir. 2015)
2. New Jersey State Courts (N.J. Cr. R. 4:14-4 and 4:23 *et. seq.*)

Restrictions On Defending Counsel

- E. Defending Attorney's Response to these Constraints
 - 1. Recognize witness must be able to fend for himself or herself at deposition
 - 2. Bottom Line: You best defend your witness by preparing him or her **in advance**

III. Ethical Considerations And Requirements

- A. Ethical Duty to Client to Prepare Deposition Witness
 - 1. Model Rules of Professional Conduct 1.1 and 1.3
 - i. Competence
 - ii. Zeal in advocacy
 - iii. Reasonable diligence

Ethical Considerations And Requirements

B. How Far Can You Go During Deposition Preparation?

1. Ethical Requirements:

i. RPC 3.3: Candor Toward the Tribunal

(a) a lawyer ***shall not*** knowingly

(4) ***offer evidence the lawyer knows to be false.*** If a lawyer has offered material evidence and comes to know of its falsity the lawyer shall take reasonable remedial measures

ii. RPC 4:1: Truthfulness in Statements to Others

(a) In representing a client a lawyer ***shall not*** knowingly:

(1) ***Make a false statement of material fact or law*** to a third person

Ethical Considerations And Requirements

2. Comment §116 Restatement (3rd) Law Governing Lawyering

In preparing a witness to testify, a lawyer may:

- Invite the witness to provide a truthful testimony favorable to the lawyer's client;
- Discuss the role of the witness and effective courtroom demeanor;
- Discuss witness's recollection and probable testimony;
- Reveal to the witness other testimony or evidence that will be presented;
- Ask the witness to reconsider the witness's recollection or recounting of events in that light;
- Discuss the applicability of law to the events in issue;

Ethical Considerations And Requirements

Comment §116 Restatement (3rd) Law Governing Lawyering:

- Review factual context into which the witness's observations or opinions would fit;
- Review documents or other physical evidence that may be introduced;
- Discuss probable lines of hostile cross examination;
- Rehearse testimony;
- Suggest choice of words that may make the witness's meaning clear;
- **BUT MAY NOT** assist the witness to testify falsely as to a material fact

Ethical Considerations And Requirements

3. Selective Case Law

- *RTC v. Bright*, 6 F.3d 336 (5th Cir. 1993)

A lawyer may “**attempt to persuade** a witness, even aggressively, that the witness’ initial version of a certain fact situation is **not complete or accurate**”

- *State v. McCormick*, 298 N.C. 788, 259 S.E. 2d 880 (1979)

A lawyer may explain the law in a given situation and go over questions and answers, so long as the testimony is the witness’s own testimony, and **not testimony placed by the lawyer in his or her mouth, and is not false or perjured**

- *Ibarra v. Baker*, 338 Fed. App’x 457 (5th Cir. 2009)

Attorney “crosses the line” when he/she influences the witness to **alter testimony in a false or misleading way**

Ethical Considerations And Requirements

C. Conclusion:

Vigorous “sandpapering” by counsel of a witness’s potential testimony during preparation is ethical, ***so long as the deposition testimony is the witness’s and it is not false or perjured***

IV. Tips for Preparing A Fact Witness

A. Assessing the Witness

1. Experience
2. Personality type
3. Degree of nervousness/seriousness of purpose
4. How does this witness fit into your case?
5. What testimony do you need affirmatively from this witness?
6. How good is his or her memory of key events/documents?
7. How much time/effort (yours and the witness') will be needed?
8. Set reasonable goals for the witness' performance
9. Schedule your time to make sure you meet those goals (plan on at least two separate preparation sessions)

Tips for Preparing A Fact Witness

- B. Explain in Simple Terms the “Nuts and Bolts” of What Goes on at a Deposition
 - 1. Oral examination of witness under oath
 - 2. Examination will proceed using Q&A format
 - 3. Usually deposition will be conducted at the adversary lawyer’s office
 - 4. Who can be present (including representatives of the adversary party)
 - 5. What documents the witness is likely to be shown

Tips for Preparing A Fact Witness

6. What the witness is expected to do
7. What defending counsel can do to protect the record (given the constraints discussed above)
8. No judge is present to rule on objections
9. The informality of the environment belies the importance of the deposition itself
10. A deposition transcript will be prepared by the court reporter that the witness will review and correct, if necessary

Tips for Preparing A Fact Witness

- C. Deciding What Documents to Show the Witness
 1. How much should you educate/review documents with your witness?
 2. What do the pleadings/documents/interrogatory answers, etc. say about the role of this witness?
 3. Where does this witness fit into your case?
 4. What affirmative testimony do you need from this witness?
 5. How much does this witness remember/how much can he/she remember about the case after your preparation?

Tips for Preparing A Fact Witness

D. The Preparation Process

1. What is your theory of the case/what is the adversary's theory of the case – use the pleadings, the interrogatory responses and key documents
2. Discuss key players, roles, and trial themes
3. Prepare and use a chronology of events
4. Use a whiteboard to reinforce visually
5. Review all critical documents that the witness authored or received (directly or by “cc”) or documents that likely crossed his or her desk

Tips for Preparing A Fact Witness

6. Review documents line-by-line if necessary
7. Practice answering all types of questions:
 - i. Open-ended questions
 - ii. Leading questions
 - iii. “Hard questions”
8. Discuss and re-work the answers (remember the ethical line discussed earlier)
 - i. Listen carefully to the vocabulary used by witness
 - ii. Watch out for “sound bites,” flippant responses, or improper characterizations

Tips for Preparing A Fact Witness

E. Maloney's Ten Commandments for Preparing the Deposition Witness**

1. "Tell the truth"

- i. First, last and always
- ii. You are entitled to a fair, understandable question and the examiner is entitled to a complete and accurate answer

2. "Try to wait at least 3 seconds before responding to the question"

- i. Think before you begin to speak
- ii. Give your attorney time to make an objection, if appropriate

** Quoted from John C. Maloney, Jr., "Ten Commandments for Preparing the Deposition Witness," *Today's General Counsel*, 54 (February/March 2015)

Tips for Preparing A Fact Witness

- 3. “Listen carefully to the question and to your attorney’s objection”**
 - i. Do not hesitate to ask that the question be read back by the reporter
 - ii. Make sure you understand the question that was asked
 - iii. Are you sure of the time period?
 - iv. Are you sure of the context?

Tips for Preparing A Fact Witness

4. **“Do not hesitate to say you do not understand the question or ask the examiner to rephrase the question or to be more specific (as to time period/context)”**
 - i. The examiner is not your friend
 - ii. Be polite and civil, but wary
 - iii. Despite the comfortable surroundings, this is an interrogation, not a conversation
 - iv. Watch any “off the record” chit chat

Tips for Preparing A Fact Witness

5. **“Answer only the question that was asked (this is harder than you think)”**
 - i. Do not volunteer unnecessary information (we will practice this)
 - ii. The examiner should follow up and get further details if he/she wants

Tips for Preparing A Fact Witness

6. **“Take the time to review every page of every document you are asked to look at or identify before responding to any question”**
 - i. Have I seen this document before?
 - ii. Maybe you saw it only during witness prep
 - iii. How am I linked to this document?
 - iv. Did I write it?
 - v. Did I receive it (as addressee, cc or type of material that likely crossed my desk)?
 - vi. Is the document complete?

Tips for Preparing A Fact Witness

- 7. “Recognize and be aware of the difference between responding “I do not know” and “I do not remember” or “I do not recall”**
 - i. “I do not remember” presumes you knew at one time and the examiner is entitled to try to refresh your recollection
 - ii. Be careful when saying “I do not know” since it is difficult to say later that you do know

- 8. “Be vigilant, and do not allow the examiner to put words into your mouth”**
 - i. Very few questions can be answered completely with a “yes” or “no” response
 - ii. Do not be afraid to say you cannot answer
 - iii. Do not accept examiner’s characterization, descriptions or underlying assumptions if you are uncomfortable with any part of them

Tips for Preparing A Fact Witness

- iv. Before responding, you may need to break any question down into manageable subparts (as in “that is not completely true,” or “that happened frequently, but not in this case”)
- v. When asked leading questions such as “would it be true to state,” “is it correct that” or “isn’t it a fact that,” do not hesitate to respond by saying “it would not be entirely true,” or “it would not be totally correct” or “it is not entirely true,” if those are accurate responses. You are entitled to and should push back against the examiner, to resist total agreement or to refuse to provide requested “sound bites” if what follows the leading question is not entirely true or accurate

Tips for Preparing A Fact Witness

- 9. “Be wary of stating absolutes (as in “never,” “always”) unless you are certain; so be modest in your recollection of events; you may need wiggle room later”**
 - i. This event happened “a long time ago” or “more than five years ago” or “I do not remember exactly but” or “there are a lot of documents involved”

- 10. “Protect the attorney-client privilege and attorney work product doctrine”**
 - i. This is an exception to the “no conferences while a question is pending” rule
 - ii. Do not hesitate to ask to confer with your counsel before responding if you reasonably believe your response may involve any communication with your attorney.”

V. Tips For Preparing A Rule 30(b)(6) Witness

A. Overview of 30(b)(6) Depositions

1. Directed to **organization's** knowledge
 - i. Witness is designated by organization that receives notice or subpoena, **not** identified by name
 - ii. Scope – list of “matters for examination” must be described “with reasonable particularity”
2. Not a “Person Most Knowledgeable” (PMK) deposition
 - i. Personal knowledge of designated witness is irrelevant
 - ii. Duty to respond extends beyond personal knowledge
3. Testimony binds organization

Tips For Preparing A Rule 30(b)(6) Witness

- B. Logistics Under Fed. R. Civ. P. 30(b)
 - 1. Notice and subpoena “must describe with reasonable particularity the matters for examination”
 - 2. Response of organization – Matters of examination
 - i. Review matters promptly with client – client may identify important reasons for objection not apparent to counsel
 - ii. Notice must describe “with reasonable particularity”
 - a. No specific rule on “reasonable particularity”
 - b. “Any and all,” “included but not limited to” and “the subject matter of this action” generally not enough
 - c. If topics too broad, not possible to prepare witness and opens doors to dispute as to scope of deposition
 - d. Topics should not be ambiguous or directed to privileged information

Tips For Preparing A Rule 30(b)(6) Witness

3. Negotiate/Object/Move for Protective Order
 - i. First, try to reach agreement with adversary regarding topics
 - a. If agreement reached, get revised topics in writing
 - b. If agreement not reached, promptly serve objections
 - ii. Address and resolve topics sufficiently in advance to prepare witness for deposition

Tips For Preparing A Rule 30(b)(6) Witness

- iii. Consider whether to request protective order
 - a) General protective order rules apply – prevent annoyance, embarrassment, oppression or undue burden or expense
 - b) Burden on party seeking protective order to show good cause by demonstrating harm or prejudice
 - c) Topics generally not considered unduly burdensome merely because information available elsewhere or in produced documents
 - d) What might justify a protective order?
 - i. Excessive number of topics, some of which have marginal relevance
 - ii. Unduly complex topics or topics intertwined with privilege
 - e) May seek protective order substituting a discovery method under Rule 26(c)(1)(C) such as interrogatory

Tips For Preparing A Rule 30(b)(6) Witness

4. Response of organization – Designation of witnesses
 - i. Designation of deponents who ***consent to testify*** on its behalf
 - ii. More than one deponent may be designated
 - iii. Identify matters on which each person will testify
 - iv. The designated persons must testify about information “known or reasonably available to the organization”

Tips For Preparing A Rule 30(b)(6) Witness

C. Identification Of Designated Witness

1. Must be capable of satisfying duty to testify about information known or reasonably knowable to organization
 - i. Review relevant organization documents (generally collected by attorneys)
 - ii. Speak with others about their personal knowledge of information in matters for examination
2. Potential witnesses
 - i. Current employees
 - ii. Former employees
 - Beware of reason why employee left organization!
 - iii. Third parties
 - What is current relation with organization?
 - iv. Attorneys
 - Beware of waiver issues!

Tips For Preparing A Rule 30(b)(6) Witness

3. More than one witness may be required to cover all noticed matters for examination
4. Required skill set of designated witness
 - i. Remember responses binding on corporation
 - ii. Testimony may go beyond facts to organization's positions, knowledge, subjective beliefs and opinions
 - iii. Designated witness should be sophisticated
 - a. Careful and prudent
 - b. Capable and willing to learn
 - c. Able and willing to devote significant time to preparation
 - d. Has support of organization

Tips For Preparing A Rule 30(b)(6) Witness

D. Responsibilities Of Defending Counsel

1. Involvement in designation of witness
2. Education of witness on topics
 - i. Collect and review documents
 - a. Also include pleadings, interrogatory responses, etc., with relevant information
 - b. Avoid privileged documents
 - c. Watch for adversary confidential documents
 - ii. Identify and schedule others with knowledge to speak with witness – current and former employees
 - iii. Preparation of outline of key documents or chronology may be useful to bring to deposition – assume outline will be produced
3. Keep careful track of sources of important information

Tips For Preparing A Rule 30(b)(6) Witness

4. Same rules for preparation of fact witnesses apply
 - i. Prepare for rehearsal of Q&A
 - ii. The “I don’t know” problem
 - a. Always happens
 - i. Examiner goes beyond topic
 - ii. Examiner goes into nuances and minutia
 - iii. Different views of scope of topic
 - b. Avoid saying organization does not know
 - c. Don’t guess at an answer – *it’s binding on organization*

Tips For Preparing A Rule 30(b)(6) Witness

5. Special objections for 30(b)(6) witnesses – question is ***beyond the scope*** of matters for examination
 - i. If correct, any answer not binding on organization
 - ii. If correct, lack of witness knowledge is justified
 - iii. If not correct, deposition will resume on another day, and sanctions may be awarded

6. The individually noticed witness who has also been designated under Rule 30(b)(6)
 - i. Conduct separate depositions because personal deposition not binding on organization
 - ii. Obligation to learn facts not applicable to personal deposition

VI. Tips for Preparing An Expert Witness

Two Fundamental Differences For Experts

- A. Scope of Deposition Limited by Rule 26(b)(4), not by Privilege or Work Product
- B. Experts are not Limited to Knowledge of Facts
 - 1. Fact witness – may not know facts – OK
 - 2. Rule 30(b)(6) witness – may not know all facts – but obligated to learn facts related to noticed topics
 - 3. Expert witness – should know relevant facts
 - i. Lack of knowledge of facts may hurt credibility
 - ii. May be asked hypotheticals

Tips for Preparing An Expert Witness

Rule 26(b)(4)

- A. Experts that Provide Reports Can be Deposed Only After Report Provided (Rule 26(b)(4)(A))
- B. Draft Reports are not Discoverable (Rule 26(b)(4)(B))
- C. Communications Between Attorney and Expert are Protected, Except:
 1. Expert's compensation (Rule 26(b)(4)(C)(i))
 2. Facts or data provided by attorney that expert **considered** in forming opinion (Rule 26(b)(4)(C)(ii))
 3. Assumptions that attorney provided that expert **relied on** (Rule 26(b)(4)(C)(iii))

Tips for Preparing An Expert Witness

Communications With Expert

- A. Deposition Preparation Begins With First Communication When You Contact Expert – Even if You Don't Hire or Use that Expert
 - 1. Facts, data and assumptions may be provided
 - 2. Restrictions on discovery are never ironclad

- B. Always Think Carefully About How Facts and Assumptions are Provided to Experts Throughout the Case, **However:**
 - 1. Must provide expert with everything expert requests (except for privileged or work product documents because of waiver)
 - 2. Must provide expert with all relevant facts
 - i. Failure to provide facts may compromise opinion
 - ii. Failure to provide facts may compromise expert's credibility

Tips for Preparing An Expert Witness

What Are The Other Side's Goals?

- A. Exclude the expert through a *Daubert* challenge
- B. Tie the expert to his report
- C. Destroy credibility through overlooked facts
- D. Destroy credibility by attacking expert's independence and delegation of analysis to others
- E. Destroy credibility by inconsistency
 1. Within opinion
 2. Testimony in other matters
 3. Writings
- F. Set up summary judgment motion

Tips for Preparing An Expert Witness

What Are Your Goals?

Avoid A – F!

Tips for Preparing An Expert Witness

By The Time Of The Deposition, It May Be Too Late

- A. Flawed expertise cannot be fixed
- B. A flawed report cannot be fixed
- C. Overlooked facts harm credibility, even if unimportant and subsequently reviewed
- D. Compromised independence cannot be fixed
- E. Inconsistent positions cannot be easily explained without compromising the expert's credibility

Tip – Start Preparation When You First Hire Expert

Tips for Preparing An Expert Witness

What You Can – And Should – Do

- A. Key – Know the other side’s case better than they do
- B. The expert must know:
 1. His or her report
 2. The other side’s report
 3. The parties’ positions in the case
 4. The key facts
- C. Know how you would attack your own expert
- D. Go over “hard” questions
- E. Unlike most fact witness, most experts have experience testifying

Tips for Preparing An Expert

The Daubert Cases

- A. *Daubert v. Merrill-Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993)
- B. *Joiner v. General Electric Co.*, 522 U.S. 136 (1997)
- C. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999)

VII. Keeping The Videotaped Deposition In Mind

- A. Notice is required
- B. Affects behavior of witness and counsel/length of deposition/protocols for breaks, etc.
- C. Witness's demeanor will be on full display
 1. Time lapse between question and answer
 2. Facial gestures and other "tells"
 3. Location of camera and maintaining eye contact with examiner
 4. Manner of review of documents

Keeping The Videotaped Deposition In Mind

D. Tips for preparation

1. How to dress
 - i. Be specific
2. Project knowledge and self-confidence
 - i. Rehearsal and familiarity with process are key
3. Record portion of preparation session and review with witness
 - i. Focus on any distractions
 - ii. Looking at camera and maintaining eye contact with examiner
 - iii. Practice reviewing and referring to documents by exhibit names
 - iv. Be aware of “open” microphones

Thank You

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