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7 Common Mistakes In Company Witness Prep

By **Matthew Keenan** (June 6, 2018, 3:09 PM EDT)

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Paul Newman's portrayal of plaintiff's lawyer Frank Galvin in the film "The Verdict" earned him an Oscar nomination and wide critical acclaim. But it is the role of the defense lawyer — Ed Concannon, played by British actor James Mason — who earns mention here. Concannon provides us with an example of the most common mistake made in witness preparation. What was his error? Preparing his client, Dr. Towler, in a room crowded with other attorneys and paralegals. Concannon had too many cooks in the kitchen. Large groups in a deposition prep signals to the witness the importance of witness testimony to the client's cause, thereby raising uneasiness in the one person needing reassurance. Likewise, it diminishes the prospect of a frank and confidential exchange of information and counsel. Often in mass tort, the witness' first instinct is to point fingers. This can be a healthy exercise at the outset and clears the air for more useful discussions. Nothing dampens the confidence of the witness more than inviting half the law firm to eyeball key witness No. 1.

Too often as attorneys we focus on the facts of the case and assume the witnesses will be ready for the scrutiny of our adversaries. In my 30 years defending companies in national product liability cases, I have learned the importance of earning the trust of corporate witnesses in any civil trial: it is essential. Below are six more mistakes often made in witness preparation.

Not Preparing Witnesses to Exercise Their Control

The process of testifying under oath is intimidating. This creates the risk that the witness may feel deferential to the other participants in the process. Respectful and deferential are two different things when it comes to a witness who may feel pushed to "go along" with a polite but nevertheless forceful questioner.

The deponent has the power and should use it. Whether it's breaking for time, asking for clarification, or rejecting the question and answering on their terms — these are rights the witness has and should exercise.

Not Preparing the Witness for the "Hot" Words

Obviously depositions have a fact-finding aspect to them, and witnesses are there to testify truthfully

about their knowledge and involvement in key events. At the same time, plaintiffs counsel is preparing to push their themes and characterize conduct in an unfavorable, unflattering way — taking facts and then injecting opinion to craft answers that represent sound bites for the trial. They do this with certain phrases and hot words that witnesses need to be prepared to address when they are used.

Today, identifying the hot words is relatively easy, and with the word index at the end of mini-scripts I can quickly identify the most popular words and the frequency of their use. The hot words may spring from a single document or a series of emails, and they often come from documents not created by the witness but used as if they have endorsed the characterization. These usually flow from the sales and marketing side of the company.

Hot words in pharmaceutical and medical device litigation may include:

- "targeting" certain patients
- "promoting" products to doctors and patients
- "rushing" devices to market

I prepare the defense equivalent of key terms that flow from the company's own exhibits. The best source for these are U.S. Food and Drug Administrationapproval documents, findings from peer-reviewed clinical trials, or safety summaries from package inserts. Those become the witness' anchors in the exam.

Failing to Use Visual Aids in the Preparation

Prominent research tell us that of all our senses, 11 percent of what is educated is generally imparted from hearing and 83 percent of learning comes from the sense of sight. With this in mind, I incorporate flip charts in my witness prep with a focus on outlining defense themes, identifying the plaintiff's pressure points, and defining the buckets of the witness' responsibility. I've seen some counsel use PowerPoints but I like old school:

- documents blown up for visibility
- a white board
- flip charts

The visual nature of the prep goes beyond these basic tools. One of the things I've learned witnesses find helpful is to show them the conference room or hotel work areas where the deposition will occur. Since I'm producing the witness, I choose the venue. Sometimes it's a hotel conference room; other times it might be a conference room at local counsel. I give the witness an opportunity to see it and understand things like the placement of the camera, court reporter and counsel. This is no different from taking trial witnesses to walk around the empty courtroom in advance of a trial.

If the witness is one of a long number of employees deposed, I take a photo of the layout so they get an idea of it. Ideally, I try to capture the photo while the deposition is in progress so they can see and get familiar with the layout.

Failing to Refresh the Witness on Details of Prep and Document Review

Just about the first thing defense counsel tells their client is, "Everything we discuss in our meetings and phone calls is protected by the attorney-client privilege." Yet as soon as the witness is sworn to tell "the

truth, the whole truth, and nothing but the truth," counsel asks about those very meetings — who was present, how long they were there, and often, what documents were reviewed.

To attorneys this is routine; to witnesses, however, it is anything but. Witnesses have told me that these opening questions invite confusion and discomfort. Even if the witness has clarity about where the privilege starts and stops, the discomfort zone can continue when he is asked the names of those meeting with him, how long the meetings went, and other details that may be somewhat elusive. Sometimes then, right off the bat, the witness is on his or her heels. For this reason, I always cover this again on the morning of the deposition. A quick review of the dates, the times, and the people present is a good investment to ensure things start off smoothly.

Another simple thing I've learned is helpful: Always arrive early to the venue and get the meet and greets out of the way. This is an ice-breaker and gives the witness time to get settled.

Not Preparing to Conduct a Direct Exam at the Conclusion of Plaintiff's Questions

Witnesses deserve the opportunity to tell their stories on direct. I always conduct a direct exam, typically starting with the open-ended question, "Tell the jury a little bit about yourself," and concluding with, "Explain to the jury your passion for what you do."

In prep, I have my witnesses verbalize these responses, just as I did with a mock cross-exam. Hearing themselves speak these responses helps them get comfortable with the exercise and gives me more tools to assist them in preparation.

Not Preparing for the Gotcha Question

Plaintiffs counsel love gotcha questions. These tend to have their foundation in litigation-related facts, such as receipt and compliance with litigation holds, knowledge of public statements on a recall or FDA advisory, or the types of claims being made in a mass tort. This is not the witness' world and they need to be prepared for these. Anything to make a corporate representative appear to be tone-deaf is ripe for exploitation.

Conclusion

In "The Verdict," Concannon's prep of his anesthesiologist client makes for great Hollywood imagery. Dr. Towler is seemingly cornered in the law firm's conference room, which is dripping with all the trappings of a prominent Boston firm: mahogany table, Hammond Green brass bankers lamps and Queen Anne leather chairs. Mason sports a vest and bow tie, and paces the floor. But as we know, Galvin gets the win, and, along with it, his redemption. And the rest of us are reminded that when it comes to witness prep, four is a crowd.

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