Revisiting the Gotcha Question One More Time

By Matthew Keenan

Presidential politics gave us the gotcha question, but these days it is embraced in many aspects of our culture. Take HR, for instance. With the economy rebounding, those among us looking for new work are prepping for these kinds of questions:

- What is an example where you did something you were ashamed of?
- What is an instance where you failed?
- How do you explain the gaps in your resume?
- How would your worst enemy describe you?
- What is your biggest failure?

It would be a modest understatement to say that this tactic has entered the world of company witness depositions, particularly in the universe of litigation impacting drug and medical device manufacturers.

This article is designed to offer a basic set of tools to make sure they are ready.

Big Picture: The Essence of the Hazard

The gotcha question at its core is ignorance of things that others might expect you to know. At a basic level, you need to make sure your witnesses have an understanding of liability issues that the jury—empaneled perhaps years later and miles away—would expect them to know. These include:

- The core issues in the lawsuit, including plaintiff's name and injuries
- Awareness of potential product hazards and safety measures
- Why the product was recalled
- Statements by regulatory agencies that cannot be challenged
- Themes advanced in the trial
- Public statements from the company that bear on PR
- Employee Code of Conduct and ethical obligations that may apply to the profession

Every case will be different, and ideally by the time your witness is deposed, the key issues are crystalized. One tip I've learned along the way to help identify how questions are framed is to use word indexes for what I call "hot words"—terms that are built into their themes and will most certainly raise their head again.

Knowledgeable, but Tone Deaf

Not long ago being tone deaf was the domain of the Kardashians. Not anymore.

Social media has made everyone an expert—and a critic—in everything. Every counsel should be on guard to not unwittingly allow your witnesses to give the plaintiff's bar more ammunition. They have plenty already. Witnesses must navigate the delicate balancing act of defending, for instance, a product that is safe only when used properly.

Beth Devlin, a jury consultant from Edge Litigation Consulting, LLC, underscored the delicate balance witnesses need to strike: "The witness (and the trial team, for that matter) need to not be afraid to show empathy toward the plaintiffs. For that reason, you should encourage your witness to show compassion toward the plaintiff. I think what happens all too often is that the well-intentioned trial team, in the full throes of 'advocacy' mode, tend to dehumanize the plaintiff and forget that something unfortunate happened to that individual and/or they are suffering—even if it wasn't the defendant's fault."

More than anything else, witnesses need a keen understanding of the tried-and-true themes of profits over safety, profits over people, claims of lack of testing, cutting corners or rush to market. These days it may seem difficult to believe anyone would need to be educated on these concepts, yet, preventive measures should be on your checklist. At its core, the deposition preparation process requires the witness to understand and appreciate their role in the entire defense of the case. This includes visual cues of how depositions are played and used to both help and hurt the defense.

"When the jurors first hear about the case, that is where their mindset is. We consistently see that when a witness or a lawyer expresses genuine compassion for the plaintiff, jurors do not mistake it as an 'admission of guilt' as lawyers often fear. Rather, it serves to the witness' advantage in that it humanizes them and softens the stereotypical 'corporate' appearance, and can give the witness an instant credibility. So expressing genuine empathy is one way a

witness can be perceived as effective and credible," Beth adds.

In a recent MDL, I defended a witness for six days of depositions. When it was over, his observations were useful: "I didn't appreciate how attorneys will try to find isolated moments and exploit them. Sure, you know the case and the core facts, but that isn't where they will focus," he said. "You can have the science on your side, the facts on your side, but that is no safe harbor. They will try to create a picture of what you didn't mean or intend."

Someday long ago, the totality of deposition preparation consisted of telling the witness four words: "just tell the truth." If you long for those days, you have a lot of company. Today, the hazards of witness preparation are much more complicated.

There are times, of course, where the gotcha game is folly. Consider that in 1999, then-Texas governor and Republican presidential candidate George W. Bush had this question posed: name the leaders of four countries where the USA was engaged—Chechnya, Taiwan, India, and Pakistan. Bush was able to name only the leader of Taiwan.

In 1999, no one cared about the leaders of Iraq or Al Qaeda.

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