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Preparing Your Company Witnesses For The Gotcha Question

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November 29, 2017, 4:27 PM EST


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Media critics recently declared that we are now in an era of "gotcha journalism." Most of us didn't need an expert to tell us. We've watched it become commonplace, reaching a nadir when presidential candidate Gary Johnson famously responded to MSNBC's Mike Barnicle question about the refugee crisis in Aleppo, Syria, with the reply, "What is Aleppo?"

Catching a witness flat-footed on an important topic is no longer confined to cable news. If Gary Johnson's campaign died that day, it's worth noting that corporate legal defenses can likewise die when witnesses profess ignorance on things that jurors believe they should know.

Post-trial interviews of jurors confirm this. "We find that well-prepared company witnesses are the cornerstone of a successful 'good company' case, sharply reducing exposure to punitive damages," says longtime jury consultant Pete Rowland of Litigation Insights. "That said, the inverse is also true — if the company witness is perceived as arrogant and/or uninformed and disinterested, the price of punitive poker goes up. Arrogance and ignorance — in depositions and at trial — are almost always the product of inadequate preparation. Why? Because these same traits typically lead the successful executive to undervalue preparation and to resist the time demands required for preparation. Thus, job one for the attorney is to be assertive, demanding the time and attention necessary for adequate preparation."

As part of witnesses prep, I use a strategic paradigm that arises from the acronym PLEASE. It goes like this:

Prepare. Yes, I'm channeling Captain Obvious here, but witnesses need a playbook, which means illustrating the buckets of their responsibility, their ownership of the product in question and, most importantly, the documents he or she authored.

Listen. Again, an obvious point, but in my experience, witnesses initially don't appreciate the challenge of careful listening until they are walked through a mock exam. The late Stephen Covey noted that "most people do not listen with the intent to understand; they listen with the intent to reply." Therein lies the biggest challenge, because the witness intent on simply replying, with the goal of moving toward a conclusion, can pose the biggest risk to the company's defense.

Exercise control. The deponent, not the questioner, holds the most power during the deposition, and he

or she should feel comfortable exercising it. It's OK, for instance, for a witness to answer questions in the manner reflective of what in fact happened. Sometimes this means reshaping the question – for example, "What I would say is..." Repeated protestations of counsel cannot minimize this authority. It is also appropriate to feel empowered to ask for breaks every hour to hour and a half. And if the witness is fatigued, quitting early may be necessary.

Accept the obvious. Witnesses need reassurance that they don't have to quibble on undeniable propositions such as a company's obligation to follow regulatory standards, make safe products, or act quickly in the face of new clinical data.

Stay in your area. Witnesses need to keep in their box and not wander under the guise of "being helpful."

Emotion is OK. Witnesses can show that they care – for individuals claimed to be injured and also the devotion they may bring to their own job.

So this brings me to fending off claims of "not getting it."

There are five things that every witness must know:

1. *Case specifics*. Witnesses should be reminded that their testimony may be played in a courtroom where everyone is focused on the injuries of a mother, father, son or daughter. All it takes is one witness to be ignorant of the claims, and then, in a hasty retreat, cause even more damage. For this reason, I always insist that they know something about the lead plaintiff or the class of plaintiffs generally. I may have them read the multidistrict litigation complaint or even the plaintiff's deposition to get a sense for how the product at issue may have caused harm.

Furthermore, it's natural for them to show genuine sympathy for a plaintiff and his or her injuries. (See "Emotion" above.) Years ago, I was a defending a company whose product was alleged to cause blindness in one eye in a woman who used the product. The plaintiff's attorney asked her, "How does it make you feel that your company's product may have caused my client to lose sight in her left eye?" There was only one answer, and she gave it without hesitation: "I feel terrible. I really do."

2. *The Employee Code of Conduct*. Most corporations have a code of conduct, code of ethics or something similar. It's the kind of thing they may read and acknowledge on their first day of work, but it may not be at the forefront of their daily conduct. They may have totally forgotten about it as they focus on a specific product. It can be another simple thing that can cause heartburn if it underlies a "gotcha" question.

3. *The learned intermediary.* This may be completely outside their area, but in the world of medical devices and prescription drugs, the role of the doctor is not only central to the defense but key to how the company does business. This needs to be laid out for the witness and can be an essential tool in handling questions posed by plaintiff's counsel about the company's interactions with "my client" that would necessarily go through a physician first.

4. *Company positions on the product at issue*. The best example is a recall, nonrecall or other regulatory action taken and the reasons why. Or, in other cases, assertions made on the company website about the product. Again, witnesses need to have some general familiarity with the assertions made by their employer to the public or a smaller group, such as physicians, to avoid being inconsistent.

5. *Hold notice*. This topic is less likely to find a courtroom airing, but it is still a potential "gotcha" question.

There may be other nuances that can, under the wrong circumstance, suggest a witness is disconnected from the reality of an injured plaintiff. But that doesn't mean you can't employ some basic common sense tools to minimize the harm.

Today historians note that Gary Johnson's candid admission on Aleppo actually gave unexpected visibility to the topic of the Syrian refugee crisis. It also remains a teachable moment for otherwise earnest witnesses who are at risk to inadvertently harm their employer's defense.

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