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Preparing A Witness For A Successful Deposition

Law360, New York (September 10, 2008) -- In my 20-some years of working with company witnesses as part of the discovery process, I've learned that the prospects of a deposition can stress even the most accomplished corporate executive.

One way of lowering their level of anxiety is to give them mileposts to follow as they prepare. Something that's easy to remember but useful. This article shares with counsel my system for witness preparation, with tips and tricks for a successful undertaking.

My approach is based on a simple acronym – PLEASE.

It goes like this.

P – prepare

There is no substitute for taking the necessary time to refresh recollection, understand the primary plaintiff themes, and be prepared.

At one level, you are helping prepare the witness for questions in areas within his or her job description. Whether it's a scientist, or a corporate Vice President with a business background, they can reasonably expect questions about his or her job, knowledge and experience.

At an entirely different level, the witness can also absolutely anticipate questions on the fringe of his or her employment. Opposing counsel may spend considerable time on their "hot" documents regardless of who may have authored them. This can increase the prep challenges.

Documents are another area obvious area. Not even the most accomplished defense counsel can predict with certainty which documents may be used. So again, I try to give my clients a simple framework from which to evaluate documents.

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My approach is to instruct witnesses to review each document marked and ask themselves whether it falls in one of three categories.

1. Did the witness author the document? If so, the range of questions is quite broad – what did you mean? what was your motivation? what precipitated this memo?

2. If the witness did not author it, but received it, another set of questions can be expected: what did you do? Who did you talk to? what was going on at this time?

3. If neither 1 nor 2 fit, then a much more modest agenda of prep issues come to the forefront, and generally speaking I draw a much smaller box of topic areas that may be asked.

Other topics on my short list of prep issues includes some knowledge of the case itself. If the case is a single plaintiff, I want my witness to know something about her case. Her name, her claimed injury. If its part of a MDL proceeding, depending on the witness' job title, this approach will vary. In any event, I would urge you to put this on your short list.

The preparation may also include a direct exam, which I would strongly recommend. Often I've found that a direct exam is another way of keeping the focus on primary themes, which is also useful when responding to cross exam questions. What I will often have the witness prepare a set of graphics that serve as the short hand benchmarks for the main points we intend to address.

These can serve as "anchor points" to help keep the direct focused on five to ten main points, reminds them what we will cover, and gives them a concrete sense of the affirmative points we need to underscore – whether on direct, or cross.

L – listen

Obvious, but nevertheless worth repeating early and often. All of us have experience with witnesses whose attention to detail wanes after lunch. This is difficult to prepare except to underscore that it will happen. It always happens.

E – exercise control

I always begin this discussion by raising an issue that can be confusing to witnesses. They typically want clarity about defense counsel's role. "Do I have to answer questions you object to?" Counsel has little control over the deposition, I explain, but the witness has all the control, and they should use it. They have the power to answer easy questions directly with a "yes" or "no" and also the power to answer questions with a more elaborate explanation.

"I would answer your question in this way: we followed our own internal rules, and those directives given to us by the FDA. There are no short cuts with a highly regulated

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product like this one.” I try to help the witness distinguish between open ended questions “What happened next” and close ended questions “Isn’t it true that...”

Empowering the witness that they are allowed to answer the questions in the manner reflective of what in fact happened. They should feel comfortable reshaping the question – “what I would say it is this” and repeated protestations of counsel cannot take away that power.

A – accept the obvious

Most cases are built on a core set of historical events that cannot be denied. Whether it’s a product withdrawal, a series of deaths or injuries “linked” with your client’s product, or CDC finding carrying with it the power of epidemiology, your witness needs to be prepared for this.

I see this in almost every deposition – where the opponent tries to paint the witness in a light that impugns his or her credibility. Accepting the obvious points gives witnesses some comfort on questions that may seem painful.

Witnesses need to be assured that agreeing with these realities does not hurt their credibility or the defense of the case. Likewise, agreeing with undeniable propositions is not harmful either. “Your company cares about the health and safety of consumers who use your products.” “It would be wrong to knowingly violate FDA rules and regulations.” “Doctors have a right to rely on your product insert, isn’t that true?”

S – stay in your area

Some witnesses get in the mode of trying to be “too helpful.” We have all seen this. In MDL proceedings I emphasize just how many company witnesses either have or will be deposed. One witness should not feel compelled to speak to endless topics that are best left to others in the company. There are obvious areas such as medical judgments, regulatory judgments and scientific judgments they may be able to stiff arm.

I am fond of flip charts. Often I will use a diagram to underscore this point, writing topics inside and outside the box. This visual reinforcement can be useful with some witnesses.

A different set of rules applies to 30B6 witnesses. Frequently these are the first witnesses deposed, and they may be forced to deal with broad topic areas, even some that may exceed their area of expertise. I would encourage counsel to negotiate the scope of these notices, and narrow the topics as much as possible.

E – emotion is acceptable

I may say this to my witnesses: “You are not just a corporate Vice President. You are a mother, a spouse, a daughter. You have dedicated your entire life to making products

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that help people, that change their lives for the better. The notion that you worked on a device that actually harmed someone would naturally be upsetting to you. That's OK. Juries want to know you care. That you care about your company, you care about your job, you care about this lawsuit.

And caring about such things does not mean you are culpable or deviated from some standard of care. There may be times where you feel like the plaintiffs' attorney is impugning your good faith, your hard work, your caring. You can remind him that's not true, in a direct, sincere, but forceful way.

Often with my direct exams I may invite the witness to respond directly to the 800 pound elephant in the room. "what would you say to the jury who hears this case about Mrs. Jones' injury? What would you say about the level of care you brought to your job everyday?"

This can often diffuse delicate issues, and gives the witness an opportunity to answer an open-ended question that would not otherwise be asked in the cross exam part of the deposition.

In short, its my experience that defense counsel develop their own way, their own system to go about their work. Clearly, there is not one "right" or "wrong" way to achieve the goal of a prepared, competent, informed company witness. Nevertheless, its my experience that using the acronym PLEASE with company witnesses brings some degree of clarity to an otherwise confusing process.

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