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Witness Preparation

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Witness Preparation

One Lawyer's Thoughts^{*}

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This is meant to be a practical paper. What follows is an outline of issues that could be considered before a witness preparation meeting. In italics are some practice pointers based on my own experience as well as those of other writers who have put to paper their views on this subject.

I. What kind of proceeding?

A. Deposition

1. Videotaped

Check the notice as the rules require notification of the method for recording. See FRCP 30(b)(3)(A), TRCP 199.1(c). Videotaped depositions incorporate a whole different set of considerations for the preparation. While similar to court room testimony, a videotape deposition also involve considerations of how body movements look when recorded and many more similar issues.

2. Rule 30(b)(6)

The federal rule number for a corporate representative deposition. Obviously a different category in that no deponent is named, only the subject matters that are to be covered. The selection of representatives and preparation of those representatives who may not have personal knowledge of the information is beyond the scope of this paper.

3. Transcribed only

B. Trial

1. Jury trial

Although many of the techniques of preparation work for both depositions and trials, there are significant differences that need to be taken into account. If the witness has been deposed, make sure that the witness has reviewed the deposition thoroughly and areas of possible impeachment have been covered as well.

2. Bench trial

II. What kind of witness?

^{*} With lots of help from the many other authors who have set down their ideas on witness preparation.. At the end of the paper is a bibliography of articles I used in preparing this checklist.

A. Expert

B. Corporate representative

C. Human resources personnel

In addition to the factual basis underlying the law suit, HR personnel need to be prepared in depth over company policies and practices. You should discuss general HR principles and practices that may be relevant to the lawsuit.

D. Senior executive

Potentially problematic witness. Almost always too busy to prepare, not used to being questioned by someone who has more power. Easy to become frustrated or antagonistic. If access is a problem (it often is) try to obtain multiple short sessions to discuss factual background and one in depth session to talk about deposition technique.

One quote sums it up: "Many commercial litigators note a correlation between the level of business success achieved by the client and the potential for disaster during the deposition." Calica, When Your Client's the Boss, American Bar Association Journal, June 1, 1999.

E. Former manager

My view is that if the manager's testimony is binding on the company, then attorney client privilege applies.

F. Peer of plaintiff

Quite likely that attorney client privilege will not be applicable. Will impact preparation method.

G. Third party

Attorney client privilege will not be applicable. Prepare witness accordingly.

III. Your pre-prep work.

A. Decide whether the sequencing of the depositions is important.

Although many defense counsel (and their clients) feel it is imperative that plaintiff be deposed first, like any rule of thumb, it should be a conscious decision based on the particulars of the case and the opposing counsel.

B. Instructions to witness before the preparation session.

Make a considered decision as to whether you want to instruct the witness before the preparation sessions to

- 1. Not talk to other witnesses or potential witnesses*
- 2. Not review or create any documents, or on the other hand, review specified documents.*

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