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Employee Witness Preparation  
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# Agenda

1. Introductions
2. Does the Witness Need Separate Counsel?
3. Selecting the Right Witness
4. Preparing for the Prep
5. Witness Preparation – General
6. Deposition Testimony
7. Trial Testimony
8. Q&A

***Before we get started, a question for  
the audience ...***

## Does the Witness Need Separate Counsel?

- Company = client
- Witness entitlement to separate counsel
  - Per employment contract
  - If witness and company interests are potentially not aligned
  - Corporation may pay for separate counsel
- Attachment of privilege
- Former employees
  - Contact early to establish attorney-client relationship or risk making them fair game to opponent
  - Learn why they left from HR records/former managers
  - Issue: paying for prep or testimony time

## Selecting the Right Witness

- “Person Most Knowledgeable”
  - Required?
  - Before selecting, meet witness live or by phone
  - Backup/alternate witness needed?
- Substance vs presentability
- Assume corporate rep for discovery responses will be deposed
- Evaluate witness truthfulness: could misstatements = obstruction of justice?
- Review personnel files; talk with manager/HR

## Preparing for the Prep

- Prepare early to allow time for follow-up meetings
- Beware conflicting messages from multiple preparers: set outside or in-house counsel as lead.
- Know which facts/theories this witness advances
- Research your witness: learn what opposing counsel knows about your witness from Facebook, LinkedIn
- Handle different personnel types as needed: The Senior Executive, The Geek (IP), The Foreign Born, The Salesman, The Corporate Representative, The Union Guy

## General Rules for Witness Prep

- Positive reinforcement: build relationship, trust, and witness confidence
- Ethical limits to coaching a witness
- Rehearsing vs. preparing
- Common witness fears: career damage, discipline, liability, criminal penalties, harming company's position

# Depositions

- Make witness comfortable with proceedings and expectations
- Consider videotaping a mock deposition for prep purposes
- Tell witness to tell the truth: witness may say this if asked what he was told to say
- Tell witness to answer only question asked: listen, pause, give short answers
- Describe common examiner tactics and teach witness how to handle them
- Explain witness right to correct/explain answers on transcript - beware of waiver (FRCP 30(e)(1))

## Videotaped Depositions

- Assume your opponent will videotape
- Greater use and greater impact
- Discovery deposition vs. tactical trial use
- Prepping for video

## Trial Testimony: Direct Exam

- Prepare early and often
- Tell witness what to wear
- Inform witness about process, place, roles
- Help witness develop a coherent story
- Build 5-10 solid points to build witness confidence
- Be selective about showing documents
  - Don't overwhelm witness
  - Talk generally about less-important documents and describe how they'll be handled
- Rehabilitate a poor witness

## Trial Testimony: Cross Exam

- Ask witness what he fears most
- Get witness comfortable with his story on direct exam
- Build confidence by asking witness the 5-10 points of which she is absolutely certain
- Tell witness how to deal with opponent's questions about prep
- Explain redirect
- Issue: Are mock exams better than discussing cross exam questions?

## Summary of Key Points

1. Be sure your communications are privileged
2. The goal is witness confidence – teach them the procedure and address their fears
3. Ask yourself what points opponent might make
4. Give yourself adequate prep time – complex testimony can take five or six sessions!
5. Only show witness key documents
6. Request review of deposition testimony
7. Educate or remind witness about themes (3 or 4)
8. Communicate about trial logistics

## Q&A

- Please ask your questions via the internet

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