



Employee Witness Preparations

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ROBERTO SCALESE: Good afternoon. The Association of Corporate Counsel and Smart Pros Legal and Ethics welcome you to today's webcast, Employee Witness Preparation. Please check your audio settings.

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Our presentation today will be moderated by Kerry Schalders, corporate attorney for R.H. Donnelley and ACC Litigation Committee Webcast Chair. Kerry will introduce today's speakers. Good morning, Kerry.

KERRY SCHALDERS: Good morning. Thank you, Roberto. This is Kerry Schalders. I am, of course, the Webcast Chair for the Litigation Committee of the Association of Corporate Counsel. Thank you all for joining us today.

We're pleased to present Employee Witness Preparation, sponsored by Morrison & Foerster LLP, an internationally recognized law firm with over a thousand lawyers, so thank you very much to Morrison & Foerster for your sponsorship.

Our presenters today are a high-powered group of professionals, commencing with Arturo González. He is the Chair of Morrison & Foerster's trial practice group and an associate with the American Board of Trial Advocates, nationally recognized on a number of "Best lawyers in America" style lists. He is also currently the lead trial and national coordinating counsel in the Hydroxycut litigation. He received his J.D. from Harvard Law School in 1985 and we're pleased to present him today.

Also joining us is high-powered litigation consultant Mark Phillips, with Phillips Partners Inc. He has been a litigation consultant for about 25 years. Thank you for joining us today, Mark.

And rounding out our panel is Mr. Dan Waldman, corporate counsel manager for litigation and employment law at Cypress Semiconductor Corporation. He oversees all of Cypress's litigation and employment law matters globally. So, thank you all.

We're going to start off our webcast today with a polling question for the audience. Roberto, would you please get us started with our polling question?

ROBERTO SCALESE: Thank you, Kerry. OK, I would like to ask our audience now: In your opinion, has your company's position in a significant litigation matter been harmed due to poor witness preparation? Please select yes, no, or unsure.

OK, we are now closing the poll and as you can see, 52% say that they have not been harmed due to poor witness preparation. Seventeen percent say yes, and 30 percent are unsure. Back to you, Kerry.

KERRY SCHALDERS: Well, we are hoping that the knowledge that we gain today will help make that answer more "noes."

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KERRY SCHALDERS: All right. We're going to start off our webcast today by addressing our first major question, which is whether your witness, who is your employee or former employee, needs separate counsel. Arturo, can you get us started, please?

ARTURO GONZÁLEZ: Sure. First of all, generally speaking, it is best strategically if one lawyer or one firm could represent both the company and the individual, and the reason for that is mainly control. It gives you control over preparation of the witness. If you get to the point of trial, it gives you control over the trial itself.

But there are circumstances where, unfortunately, you've got to get separate counsel for the employee. The most frequent circumstance is when you determine—you [as a] company determine—that the employee has, in fact, engaged in misconduct. Quick example: If you have a trade secrets case and you are sued for misappropriating someone's secret, and one of your employees is sued as being the alleged misappropriator, you'd do an internal investigation, find out, "Oh, my goodness, this person who came over from X company did, in fact, bring over some material that he should not have brought over." In that situation you would probably be better off getting separate counsel and trying to distance yourself from the employee.

But there is a middle ground, and the middle ground, which we use with some degree of success—a lot of success, I should say—is "shadow counsel." If you are in a situation where you are uncertain whether the employee needs separate counsel, but you want to protect yourself by ensuring that someone is giving the employee independent advice, then you can get shadow counsel. And this is a lawyer who can review all of the pleadings, review deposition transcripts, even, if necessary, attend a trial and sit in the audience, but not be counsel of record for the employee. And that person would be there to make sure that the employee's rights are defended.

One other point that I want to make on this slide, before I ask, Dan, if you've got any additional comments, is with respect to former employees, and it's an important point. As many of you know, it is permissible in most states to contact former employees. The one time you cannot do so, however—and this is pretty clear across the board—is when that former employee has counsel. So, I would encourage you, if you are involved in litigation and you know that the issues are going to require testimony from a former employee, I would encourage you to make contact early on and establish an attorney-client relationship with that employee. Let the employee know that if he or she wants to—at their own expense—get separate counsel should they be deposed, they can do that; nobody ever does that. And then, once that attorney-client relationship is established, it would prevent your opponent from possibly contacting that employee and getting information that might be harmful to you later.

And one other issue, quickly, that comes up is whether you can pay a former employee for the time that he or she spends meeting with you [or] your lawyer. And the answer that I like to give folks is: It is preferable that you not pay the former employee at all. But obviously, if the former employee is now self-employed, their time is valuable [and if] you need to spend a day prepping them but they don't have a day to give, what I usually tell people [is]: It's OK to pay them for their preparation, because you're simply reimbursing them for time lost. But I would never pay a former employee for the time spent in deposition. That might seem like a technical distinction, but you don't want anyone to argue that you're paying them for their testimony. So, I wouldn't pay them for their time at deposition or for testifying at trial. Dan?

DAN WALDMAN: Thanks, Arturo. I'd like to just add two points to this slide. The first has to do with the first contact with the witness. Arturo mentioned that in the beginning, there should be an internal investigation done as to whether or not any witness has potentially got any culpability, or what a potential witness's involvement in a litigation-related circumstance was.

Prior to talking to any witness, though, it is imperative that corporate counsel ensure that the witness is given proper *Upjohn* warnings. And what that means, in short, is that the witness is informed—the employee is informed—that the lawyers represent the company and not the witness individually. Second, that the privilege belongs to the company, and again not to the witness. Third, that the company may disclose some of the information discovered during that interview at the company's sole discretion. Some companies consider getting this *Upjohn* notice in writing. So, again, at the outset of speaking to any potential witness, it's important that they get these *Upjohn* warnings.

The second point I wanted to raise was [one] that the slide makes reference to: [The] corporation may pay for separate counsel. Under certain circumstances, the corporation *must* pay for separate counsel. For instance, here in California, Section 2802 of the Labor Code may require a corporation to do so. Under the laws of many of the different states, there may be circumstances where the corporation is required to do so. So, I'd like to move along to the next slide, please.

Selecting the right witness. Before we talk about persons most knowledgeable, the issue of selecting the right witness is something that in-house counsel needs to think about at the outset of litigation. Sometimes counsel has a substantial degree of control over who the witness is. For instance, with Rule 26 disclosures, the party is able to disclose any witnesses upon which it may rely in the future. That gives the company some degree of control over deciding who is going to be a witness [and] who is not going to be a witness. So, with respect to persons most knowledgeable [PMK], selecting persons most knowledgeable is a very tricky matter.

First of all, it doesn't need to be one person. You can choose multiple persons most knowledgeable. What's important, however, is that the PMKs speak as the company. They don't speak as individuals, and, as I mentioned before, it can be more than one person. The one departure from typical evidentiary rules here is that the person most knowledgeable does not have to have personal knowledge of the facts that they testify about. That means that counsel has a considerable degree of discretion as to who is chosen to speak on different subjects.

And this gets into questions of substance versus presentability, as noted in the slide here. The question is: How good is the witness going to be at talking on a subject? Is this somebody who is going to be able to convey the information that will allow you, in transcript form, to use it in support of a dispositive motion? Also, is this a witness who is going to present well to a jury? And these are questions that counsel needs to be asking at the very beginning, even before Rule 26 disclosures are made. This way, as we make decisions about who these witnesses are going to be, we're already thinking about: How will this person look on the stand? Or: How well will this person be able to present information that we can later use in a dispositive motion?

The last point that I wanted to raise had to do with reviewing the personnel files. Talking with managers or HR. Has this person testified before? And has this person had any problems or conflicts at work that could cast some credibility problems on what they may testify as to? At this point, I'd like to turn it over to Arturo. Do you have anything to follow up on?

ARTURO GONZÁLEZ: Yeah, I want to make just one point here that I think is critical. On substance versus presentability, I have always been of the view that it is best for the client to pick a witness who is going to present well. Even if that witness may not know all of the little details that the guy next door knows, if she presents better in deposition—if she would present better in front of a jury—I would go with her every time, hands down. You can always teach people substantive material that they may not know about the case. You cannot transplant a personality into someone who doesn't have one. Next slide.

MARK PHILLIPS: This is Mark Phillips, and I'd like to focus here really on the first-time witness—the rookie—because I think they have some special challenges and needs. I think those of us in the litigation business—I don't think we appreciate just how unsettling the prospect of cross-examination or being grilled at deposition is for the uninitiated. And it often conjures up anxieties and fears and the like, and it's important that we sort of be mindful of the emotional set of the first-time witness.

I think there are two things that all of us can provide, and that I think are sometimes shortchanged. One is confidence. It's helping them and making that, for your employee witness, a primary objective—to develop their confidence. And the second—and perhaps, in some cases, even more difficult—is to make our time available, and plentifully. I think, particularly for trial, and the bedlam of getting prepared for it, there are some tasks that I have found can get shortchanged, and I've always thought that preparing key witnesses was one. I am not sure why that is, but I speculate that some may fear that overpreparing a witness may result in rigid answers or a lack of spontaneity, and so, they want to sort of hold off until the end. Others may simply undervalue what can be done in preparing. And others may speculate that it is just a simple matter of telling the truth, and so, it doesn't really require that much preparation. And there may be some truth to all of these, but I have found that failing to invest enough time—particularly for important first-time witnesses—can be very, very risky, and that it is well worth the effort.

I'm a lawyer, not a psychologist, so I don't want to sound a little soft here, but there are things we can do to develop confidence, and, in some respects, they are parallel to what coaches do for athletes and Olympians and professional sports, and the amount of time that is spent on mental training. I always analogize—I think that it is a useful parallel to think—whether we're mentally conditioning ourselves for a golf swing or a tennis swing, or whatever it may be—there's much that can be borrowed from that body of knowledge and experience to helping a first-time witness get accustomed and comfortable with both the process and the players.

I may be poaching a little bit of Dan's area here but, as simple as it sounds, making sure that the orientation of the witness, in terms of visualizing the courtroom, the bailiff, the jury—know who the jury is, describe their typical educational profile, describe their proclivities, and how they like to hear testimony—describe opposing counsel, where the jury box is, where the well, where the witness [stand is], and really go into detail. What you're doing is helping that witness get comfortable with the geography of the courtroom, if it's in trial, and you're building their confidence along the way.

I have seen sometimes that, with the best of intentions, but if there are multiple preparers in a prep session that sometimes there are softly conflicting messages, and it can get very confusing for the witness. We should always ask ourselves, when we are sitting in a prep session, about: Are we paying attention to them? Are we looking at our BlackBerrys the whole time? Do we let a phone call come in and take it, rather than spend our time in focusing on [and] giving all our attention to the witness? Do we find ourselves getting impatient or overly critical, or lecturing the witness? All of these can be subtle cues that can sort of undermine the whole process of developing their confidence.

One last point: When you think about whether you have the overriding need to prepare a senior executive, or somebody in the technical department, or somebody born in a foreign land who is your employee. Obviously, with a senior executive, it may be one of your chief objectives to get enough time, if they need it. And that may literally be a calendaring [issue]. It's your single most important [objective]. And perhaps the second is: They are high up in the company, and if they are accustomed to talking to other executives or board members, it may be a challenge for them to learn how to talk in the language of a jury. Somebody in a technical [position]—a software coder or an engineer—when you think about preparing them, they will tend to be thinking in a more linear fashion, and I think it helps to have very clear, sequential goals. So, it's like writing code. Their learning style, if you will, may be more receptive when you lay things out in a very clear way. Dan, can I throw it to you?

DAN WALDMAN: Why don't we move along to the next slide, please? On the next slide, General Rules for Witness Prep, I really want to make just two points. The first point has to do with themes, and the second point has to do with handling the witness, and both of these are from the in-house counsel perspective.

With respect to theme, the minute the company has made a go decision in terms of defending or going on the offensive and being involved in litigation, in-house counsel must remain involved with outside counsel in developing the themes of the case and the trial themes. The reason is: In-house counsel needs to remain engaged in between outside counsel or in concert with outside counsel and the witnesses. If in-house counsel is merely sitting there and taking notes, while outside counsel is preparing witnesses for deposition, the counsel adds no value. However, if you're conversant in the themes, you can reinforce those themes, which leads to the second point, having to do with sort of liaising between outside counsel and your witnesses, [and] putting them at ease.

It's important that the witnesses know that the company—provided, again, that we know that the witness's interests are not adverse to that of the company—that the company is behind the witness. And, again, the more involved the in-house counsel is here, the more you can reinforce to the witness, "Look, tell the truth here, stick to our trial themes, testify accordingly, tell the truth, and things are going to be OK." But it is important there to acknowledge to witnesses, I think, early on, "You will be nervous. All witnesses are nervous." So, Mark, unless you have anything to add, I suggest we move along to the next slide.

ARTURO GONZÁLEZ: Depositions. What we're going to talk about now a little bit is more specific suggestions or thoughts about preparing people for an actual deposition or for trial testimony. And I would like to make a few points about

depositions. First, I have always thought that it is better, more productive, to have multiple shorter sessions as opposed to one long session. Frequently, counsel will arrange to meet with the witness the day before or a couple of days before the deposition to prepare for the deposition taking place the next day or two days later, and I actually think that's a mistake. If it is an important witness, I think you need to meet with the witness early on, just to get a feel for the witness [and] get a feel for what the witness knows. You should already have some idea of what the documents say about the witness. Find out what questions the witness has that you may not be able to answer, and get answers to those questions so that you have answers the second time you meet with the witness.

Also, I find that, if you meet with witnesses, their attention span is limited. I try not to ever meet with a witness for more than two hours. After that, I feel like they start getting tired, just like any of us, and so, shorter sessions, I think, are better than one long one.

[The] second thing is with respect to documents. Some lawyers believe that every document that has the witness's name, you've got to go over that document with the witness in order to make sure that the person is well-prepared. I am not of that school of thought. I think that you, the lawyer, have an obligation to know what the documents are, and you, the lawyer, have to pick out maybe five—no more than 10—of the key documents that you may want to actually show the witness. With respect to the others, all you need to do is make sure that you are generally aware of what they are, generally aware of what questions opposing counsel may have, and talk to the witness generally about how he or she should address those documents. If you have documents that deal with a contract, you can talk generally about those. But I would only show the witness and try [to get] the witness to really practice with a handful of documents that are really important, that you want to make sure the witness handles well.

Same thing with themes. I think that witnesses—especially if you've got a smart witness—can usually keep their answers within certain themes. And I would, again, just pick a few themes. You know, "Remember that we only broke the contract because they failed to pay us. Remember that we sent five e-mails asking them to pay us, and they never did pay us. So, we really didn't break the contract. They actually broke the contract by failing to pay us, and it was only then that we had to go out and look for somebody else to give us the product."

Focus on a few themes. Focus on a few documents. Have multiple sessions. Put the witness at ease.

One other point that I'll make on this slide that is quite important, actually, that most lawyers don't know about, I have found, which is: If you want to reserve the right for your witness to make a correction to a transcript in federal court, you have to say that, on the record, before the deposition ends. Again, most lawyers don't even know this because it's a quirky little rule, 30(e)(1). If you don't, on the record, say, "I'd like my witness to review the transcript and make any corrections that may need to be made," then you waive your right. So, just be aware of that. Dan, any thoughts on prepping witnesses specifically for deposition?

DAN WALDMAN: Yes, I do have one very brief anecdote, and I am thinking back on a deposition where a company witness was not apprised of the themes of the case—and I can't emphasize this issue enough—and when presented with sort of a very well-crafted leading question, the employee gave a terrible answer for us in the litigation. Had the witness been prepared to be focused on three, four, five themes at the most, this witness could have sort of returned to them as his safe harbors and crafted an answer that would have been a lot better for us. So, I can't emphasize that enough.

The second point is, as far as common examination tactics, I have found it very effective, as an in-house counsel, to turn to our company witnesses as our outside counsel are preparing them and say, "Remember, the only person being sworn in during this deposition is you. Nobody else who talks—and there will be other people talking—is testifying under oath. You are. So, what comes out of your mouth, or what is said during that deposition, you're the only one responsible for it. So you control the pace, you control what's said, and you also can control the questions. You are in control, because you are the one who is ultimately responsible for what is said." Next slide, please.

ARTURO GONZÁLEZ: A few comments on videotaped depositions. First of all, a videotaped deposition is far more frequent today than it was even just 10 years ago, and although this is not the topic of our talk today, if you are taking the

deposition, or someone is taking a deposition on your behalf of your opposing party—and it's an important deposition—you very much should consider videotaping it. I mean, it really does make a difference whether you show the jury a clip of a video or whether you have somebody read from a cold transcript. It makes a huge difference. But it's because of that that it's so important for you to you make sure that your witnesses are well-prepared in the event that they are videotaped. And first is something as basic as attire. Dress. How does the person look on videotape? Another basic point is: Where should the person look? I had one witness in one case that I had who stared at the camera the entire time. I am sure that she did this because her counsel told her to do that. Why, I am not sure, but it just looked really odd and people would literally laugh when they watched the vide tape. So, what I usually tell the witness is: "Just look at the person asking the questions."

One thing you might want to consider doing—which is good just for deposition preparation generally, but especially if they are going to be videotaped—is to do a mock video. It's so easy to do these days when you have these small cameras. You can just put it on a tripod, sit down in a small conference room, and ask some questions and videotape your own client, and then play it back. You'll be surprised at the little things that the client will pick up if they see themselves on videotape. The little things could be as simple as wiping your brow. A lot of jurors will see that and say, "Aha! The person is nervous." So, videotaping a witness is a good way to practice so that they can look at themselves and how they look on video. It's also a good way to practice, so they can see how they answer questions, and it is something that I have done a few times and it's worked out very well. It also works with nervous witnesses. It helps to put them at ease.

The last thing I'll say about a videotaped deposition is that there is obviously a cost involved. But I believe that if you are taking a deposition, and it's an important one, the cost is very much worth it.

Any thoughts on depositions, Mark? Videotaping or otherwise?

MARK PHILLIPS: Let me tell just a quick story. It's a little off, but I think it's really useful, in terms of in-house counsel. There was a brilliant technical witness who was videotaped maybe about seven years ago, and the quality of the video was poor. And interestingly enough, the way the shadowing worked out, he came across on the video as really quite frightening, which was not the only problem, since his testimony was just a killer for the defense. And indeed, it was a commercial case, and the plaintiff was going to show that video in its case in chief, and, in fact, it was going to be their second witness. And trial counsel, understandably, did not want to call him live, out of the fear that he would be damaged even more in a live cross-examination. But in-house counsel felt that the case would be lost for sure if there was no live rebuttal to that video testimony, and so she insisted that a huge effort be made to rehabilitate him, and to prepare him and to have him available, and to anticipate that he would be called live. And so, almost a week was spent getting him accustomed to a story and a thematic structure that made sense factually and in terms of his own sort of narrative.

And the short answer: It was decided that—he was called by the plaintiff and he did absolutely magnificently. And I thought it was just interesting because, one, the call by in-house counsel overriding what ordinarily would be good standard advice from outside counsel; completely understandable. And I thought that was a really important call. The second one—which was clearly a budget buster—to spend, to invest the kind of time needed to in fact rehabilitate him; it did work. And the lesson I always took from that is: As challenging and impossible a witness or employee may sometimes look, don't underestimate the ability for them to really make enormous gains. OK?

ARTURO GONZÁLEZ: The next slide, please. We're going to shift now and talk about preparing a witness for trial. In many cases these are witnesses who have already been deposed, so you've already got some idea of what the other side is going to ask [and] some idea of what the witness is going to say. But other times, as you know, these will be witnesses who are fresh witnesses without any prior testimony.

I want to start though, first, with a witness who has been previously deposed, and I want to pick up right where Mark left off, because I agree with Mark. One thing that we are frequently asked to do here at Morrison & Foerster is: We come in and take over a case when it becomes clear that the case is actually going to trial. Frequently, clients will retain counsel without really thinking too much of trial—what the heck, ninety-whatever percent of cases settle—and when they get closer to trial they start to ask themselves, "Wait a minute, is this the person that I want standing in front of a jury?" So, we frequently come in and take a case over, and we will find witnesses who have not done well in deposition and we face the issue that Mark has just addressed. And I really believe that most witnesses, if you take the time to prepare them, can do well, or at

least perform better than a very bad performance on videotape. So, generally speaking, if you've got a real bad videotape that you know the other side is going to play, I would really make a push for trying to rehabilitate your witness and putting that person in the chair as opposed to having a jury's only recollection of that person being a horrible videotape.

So, beyond that, let's move to trial. One thing that is just key, as basic as it may sound, is communication with your witnesses. Someone needs to be in charge of that on every trial team. That can be the in-house lawyer. It can also be an in-house legal assistant. But someone needs to be in charge early on. Basic things like: As soon as you get a trial date, every person who you know is going to be a witness needs to be advised of that trial date, especially experts. As you get closer, you've got to give the witnesses an idea of what date they will testify, and you've got to make sure they know exactly where they need to be, exactly when, etc.

With respect to the substance of the testimony, the point I want to repeat, that I made with respect to depositions, because it is equally important [here]: Do not try to cram everything into one prep session if it is an important witness. If you're going to have somebody just get up and testify that there was a chair in the room, and you know that they saw the chair, fine. You can talk to that person even before they testify the same day. But if you are going to have a witness testify about detailed information that is important to your case, multiple sessions is better. And don't flood the witness with documents. I find that that simply confuses them. Pick and choose the five or 10 trial exhibits that you are actually going to show the person, tell the person what you are going to ask him about the exhibits, make sure they are comfortable with it, and do not—and I want to repeat this—do not stretch the witness beyond where they are comfortable. What do I mean by that? Well, what I mean is fairly obvious: If you ask a witness about a document and the witness kind of waffles on you—they're not real sure—sometimes you can refresh their recollection and get them to the point where they'll say what you want them to say. But if they are not comfortable, I usually choose to not go there. It makes them feel better. Get somebody else to deal with that exhibit if this witness can't. I sometimes refer to that as only getting what the witness is able to give you.

The other tip is: Only get what you need, and stop. Figure out: What are the points that I really need to make with this witness? Make those points and go no further. There may be five other documents or 10 other documents that were sent by that witness, prepared by the witness, received by the witness, that are interesting to the case—maybe even relevant to the case—but if you really don't need them, perhaps because they are already in evidence, then don't bother going there. I have always thought shorter is better. Jurors appreciate it, and it's a way to score points with the judge as well.

One other point, before I pass the baton to Dan and Mark on this issue, is: If you are preparing—and we've got a separate slide on cross-examination—but when you are preparing a witness for direct examination, the witness is going to ask you—they always do—"Well, what do you think they're going to ask me?" So, anytime you're preparing a witness for direct examination, what I usually do up front is: I tell them, "I want to talk to you a little bit about what I expect to ask you, the information that I want to elicit from you, and go over some of the documents that I plan to show you. And then, when we are finished, we can talk about what we think they are going to do on cross-examination and how you can handle that." If you do that right up front, then the witness is comfortable that you are going to get there, and the witness will be patient until you get there.

My last point, actually, is themes. Again, I always think it is important to let the witnesses know what your trial themes are. Frequently lawyers don't do that. They just focus on the witness, what the witness needs to know. I always think it is important for the witness to know the themes. That way, if something should come up that maybe you didn't discuss during preparation, the witness may have the themes in mind, and may be in a better position to give an answer that will be helpful to your cause.

Mark, do you have any follow-up comments? And then you can pass to Dan.

MARK PHILLIPS: Arturo, yeah, just one, and this isn't necessarily advisable for every witness, but oftentimes even an abbreviated mock exam—placing the witness and having them feel the pattern and rhythm of the questions and the flow of it—is enormously helpful. It doesn't have to be two hours or one hour. [They] can just get the feel of it, and it's sort of a rhythm, and it often helps them get a better sense of how it's going to be in court. There are also others who, and maybe particular witnesses where that's not for one reason or another, advisable, and counsel can just talk their way through it in a more general basis. I think you have to pick your witness that way. Dan?

DAN WALDMAN: I don't have anything to add to this slide. We can move to the next slide, please.

ARTURO GONZÁLEZ: Cross-examination. And cross-examination—what we mean by this is that there are situations, as you know, where you are the defendant and the plaintiff chooses to put your person in the chair. And the disadvantage to you of that is that when you put your own witness in the chair, you can start off with softball questions, make the witness comfortable, and then get to the meat. You don't control the cross-examination, obviously, so it's a whole different mindset with respect to preparation.

One thing that I find is helpful is to ask the witness, "Is there anything that you're concerned about, or that you'd like to discuss, or that you think I should know?" I usually ask that because frequently they are concerned about little things that are not even all that important. "Well, I am thinking that they might ask me about X." And then I can explain to them, "Well, actually there was an *in limine* motion about X."

I want to drop *in limine* motions generally as a footnote here, because obviously—and this is a mistake that happens all the time—obviously you've got to tell your witnesses, "If the judge has excluded any testimony about X, you can't testify about X. You can't even mention X." You've got to tell your witnesses that. If you don't tell your witnesses that, and they should utter "X," the judge is not going to be happy. But I'll find that, frequently, when the witness tells me what they're concerned about you know, either (A) it has already been excluded *in limine*, or (B) it's not even that relevant, or (C) it may be something that was overlooked in the trial prep that should have been an *in limine* motion, and you may be able to just get opposing counsel to agree not to go there, and if they don't agree, raise it with the judge before the witness testifies.

But the preparation is different because, obviously, you're not going to start with "Well, I am going to ask you about this, then I am going to show you this document, then we're going to do this." The person is going to sit in the chair and they're going to attack, and there is no doubt about that. That's the only reason why opposing counsel will call your witness. Usually it's for them to score points. It's not for you to score points. And so, you need to anticipate where they're going to go and help the witness address the questions that you think they're going to be asked.

One tip that is very important when you are preparing someone for trial testimony—even for deposition—that hasn't been mentioned: This is not a race. This is not a race. Frequently, many lawyers—myself included, frankly—when we are leading a witness, bam, bam, bam, bam, there is one question right after another. Frequently with no notes, standing right in front of the witness, going toe to toe, and the witness feels like they are just kind of answering; they don't have any control over the situation. Well, you do have control over the situation. Just because a lawyer puts a question to you quickly, doesn't mean you have to answer quickly. So, I always tell my witnesses, "Wait until the question is over, think about it for a split second, and then answer it. You don't want to think about it for 10 or 15 seconds, because then you look evasive. But you don't have to get into a race with the lawyer. Take your time."

I think there are some witnesses who are extremely uncomfortable with the notion of sitting in a courtroom in front of a lot of people and testifying. I mean everybody, because we are human, is going to be a little nervous about it, and I usually tell my witnesses, "By the way, it's human to be a little nervous; don't worry about that. Everybody gets butterflies; that's just normal."

But there are some witnesses who are almost paranoid about doing it. What I have done with those witnesses: Usually there are orders in a trial that exclude witnesses so they can't sit there and watch, but what I have done is: I've brought these witnesses in to the actual courtroom—at the end of a day, before the day, during the lunch break, maybe even before the trial starts—and I show them exactly where they are going to sit, and I have them go up and I have them sit in the chair. And I say, "Over here is the judge. The people over here will be the jurors. The person asking you questions, if you're in federal court, is going to be at that podium. If you're in state court, they'll be wandering around, [but] usually at the podium. And I'll be sitting right there, and don't worry if they ask you any questions that are not appropriate. I'll object and I'll do what I can to protect you. But all you've got to do is tell the truth." And I find that it gives very nervous people some degree of comfort to at least be familiar with the setting before they actually are examined.

And with cross-examination, as with depositions, I find that it's helpful, if you have a witness who is important to your case—very important—to do a mock examination. I usually wouldn't do that on my own. I usually would get one of my partners or an associate who's got trial experience under his or her feet to do an examination of the witness. I find that it's a very good way of getting the witness used to the questions and giving the witness an opportunity for handling the questions that we can expect that person to get at trial. But again, as I have been saying throughout, I would not do a one-hour mock examination. I would do a 15-minute mock examination on your three most important points to make sure the witness knows how to handle those points. That's usually where you win and lose your case. So, focus on the points that are most important for that witness, and the witness will be in better shape to handle them. Dan?

DAN WALDMAN: Yes, I would like to add, from the in-house counsel perspective here, the idea of continuity to help give the witness confidence. That is going back to what we've talked about earlier. From the outset, in-house counsel must be engaged in the trial themes and litigation process. In-house counsel needs to be sitting in on the deposition preps. He needs to be sitting in on the depositions. By the time we get to trial preparation and the trial itself, the witness needs to be comfortable that in-house counsel is sitting there, and the message, whether it's express or implied by in-house counsel sitting there, having been engaged all along, is: "The company is involved. We have confidence that you're going to handle this well, and we're here to make sure that you're taken care of." And, of course, I think that rounds out the team. Outside counsel is responsible generally for trying cases. But as in-house counsel, one of the things we can do is help give the witness confidence that they are going to survive these cross-examinations and depositions and a trial. But continuity and involvement by in-house counsel is, I think, the best way to do that. That's all I have.

KERRY SCHALDERS: Thanks, Dan. This is Kerry Schalders talking again. There are about eight key points that we want to make sure that we communicate to the audience, and I know we have a varied audience of folks who, like me, do more litigation management than actually act as the litigator for the company. And so, mainly as in-house counsel, when there is a case that is being litigated—that is at trial—certainly there is a lot that we can do to better enable the company to defend itself.

One of them, especially with respect to the former employees that we talked about, is to be sure that communications are privileged. And we've also talked about the whole preparation process as being a witness confidence-builder. A presentable witness is oftentimes better than a substantive or technically competent witness, because this is an audience-driven activity, preparing for trial. One of the things that, as in-house counsel, we need to be aware of, as we are trying to select that witness from the company, is: What kind of point might our opponent try to make, and, in fact, what kind of points are we going to try to make in defending or in bringing the case against another party?

Something that often happens in-house, or with trial, is that we really don't expect too many cases to go to trial, so the employee witness preparation time is often cut off or is not given enough emphasis. So, if nothing else, remember to give yourself adequate prep time. Give your witness adequate prep time. Give your outside counsel enough notice to adequately prepare your witnesses.

Also, try not to overwhelm your witness. Many people who are going to act as witnesses for your company have never done so before. If you're lucky, you'll have some experienced witnesses available to you, but your goal is to get as many of your employees in that position where they are comfortable advancing the company's position. So, don't overwhelm them. Right? Show them the key documents. They don't need to see your three boxes full of potential exhibits, but they do need to know the key ones, and they need to know generally how to treat those documents if they're put in front of them.

Also very important, as Arturo mentioned, is to make sure that you put it on the record that your witness in a deposition is going to have the opportunity to review and make any corrections.

Make sure that your witness knows what the whole goal is of the trial is. Why is he there in the first place? And what does the company need from him?

And then, finally, that whole issue of making your witness comfortable with this whole process. Do they know what the roles of the different attorneys are? What the judge is for? Who the bailiff is? Where is the courtroom? What should they

wear that day? So, going through that type of basic logistic material is something that we can do as in-house counsel as well to build that confidence and to make our witness comfortable with this whole procedure.

So, those are the key points. We have a few minutes to go through Q&A. So, now would be a terrific time for anyone who has any pending questions who hasn't sent them in to please go ahead and do that via the Internet.

To our panelists, we've already had several questions come in, and some in-house litigation managers are concerned about establishing the attorney-client relationship with a former employee, especially if the in-house attorney is going to be handling the case. So what should they be aware of in establishing the attorney-client privilege? Do they need to put any kind of conflict waivers in place? Dan, being an in-house counsel yourself, maybe you can take that question.

DAN WALDMAN: Well, with respect to former employees, to the extent that they're testifying about what they did in the course or scope of their employment, then the privilege would attach. The same admonitions, though, with respect to the *Upjohn* waivers apply. Namely, at the outset, before we know what this witness's role in the matter was, we need to disclose to them that we may discuss privileged things with them, but the privilege belongs to the company, not to them. And the second thing is that after we've investigated and we have determined that their interests are in alignment with the company's interests, we can endeavor to represent them as well. I think if in-house counsel is handling the matter and endeavoring to represent a former employee, I think that's a little bit touchier. I think considering engaging outside counsel to do that might be a good approach.

KERRY SCHALDERS: Thanks, Dan. To what extent do our panelists think that having multiple witnesses available, and maybe doing preparation for multiple witnesses and then narrowing it down—is that something that say, Arturo, for example, that you might find more helpful when working with your corporate clients? To have a wider pool of witnesses available to you to choose from?

ARTURO GONZÁLEZ: We do that all the time. And it's a very good point. If you have a case that involves a complicated engineering issue, I will frequently ask the client to give me the three engineers who are most knowledgeable about that issue and try to figure out—not to pick on engineers—but which of the three engineers actually have the personality to present the issue to a jury, if necessary. So, having multiple options is not always an option, right? If you have a memo that was written from A to B, normally they are going to take the depositions of A and B, and you've got no choice. But where you have the choice—and the 30(b)(6) type of deposition, which we talked about earlier, is a good example—yes, absolutely you want to have multiple options that you can potentially choose from. At the end of the day, again, whether it is a deposition, whether it's a trial, whether you expect it to go to trial or not, doesn't matter to me. Pick the person who is most presentable. That will do more good for you than picking the person with the most knowledge.

KERRY SCHALDERS: OK, thanks. Mark, a question has come in about your experience as well. As a litigation consultant, where do you ring in on the question of doing mock exams versus general preparation for cross-exam, and talking more generally about what's going to be asked?

MARK PHILLIPS: I, in the last six months, have heard of three different cases where important witnesses were never asked a question about cross-examination in their preparation, and I am appalled. I just don't understand it. So, I am, as I'm sure Arturo and Dan are, there is—I mean, if there is one enormous challenge for any witness in court, it's cross-examination. And I think that in-house counsel can serve an incredibly valuable role as a reminder, if they don't see that enough time and planning is set aside for the preparation just of cross-examination, then they should throw the red flag and see to it that it is done. I'm just startled at how often it doesn't happen, and I'm not sure I understand it, but I am passionate about spending a lot of time planning and helping witnesses with their cross-examination.

KERRY SCHALDERS: That makes a lot of sense. One of our audience members has asked for some more details about specific steps that you might take in preparing for the preparation. You know, like, is step one pulling together all the records that that the company might have about a particular witness? Or is step one really trying to figure out some other aspect of what this witness is going to offer?

ARTURO GONZÁLEZ: Yeah, can I take a quick crack at that? That's an excellent question, and let me tell you how I generally do it. First, I talk to the in-house counsel, or whoever it is that has retained us, to try to get a general feel for what the case is about and try to get a general feel for who they think would be the key witnesses. If it is a case that we're brought into on the brink of trial or in the middle of discovery, I ask the same questions of the lawyer that's been representing the client. Then what I do is: I like to meet with the witnesses early on, before I've reviewed all the documents in the case, but with the two or three important documents. I mean, you always know early on in a case—frequently they're attached to the complaint itself—the two or three important documents. And get a feel for the witness, the witness's personality, whether there's anything that the witness is concerned about. Get their initial impression about the big meeting. Usually in every case there is a big meeting [or] there's a big event where something happened, and that's what the jury has got to figure out. Was it A or was it B? Somebody is not telling the truth. I like to get a just kind of their initial impression of what happened.

And then, after that, review all of the documents that pertain to that witness that you may want to ask them about at trial or that somebody else may want to ask them about at trial. Be familiar with those and then go have that second meeting, where now you know a lot more than you did the first time. You also will know what other people said about them in deposition. You know, I call them deposition excerpts. I've got some sitting right here next to me for a deposition I am taking tomorrow. I always review deposition excerpts so that going into the second meeting I know everything that I think opposing counsel knows about that witness, and it puts me in a better position to start thinking about: What do I want to get out of this witness and where do I think opposing counsel is going to go? You must master all of the documents. The witness doesn't need to.

KERRY SCHALDERS: We even have a couple of audience members who have either been called as a witness or have been threatened to be called as a witness. Now, assuming that that does go forward and it's not prevented by any type of privilege issues, are there any special considerations that you might offer for preparing in-house counsel for testimony?

ARTURO GONZÁLEZ: That's a whole other lecture. You know, actually, the truth is: I have defended one in-house counsel, and I treat them just like any other witness, with this obvious exception: Be overly cautious about the privilege. Overly cautious. You don't want to do anything that comes even close to a waiver. I'd rather assert the privilege at the deposition, force them to go to court with a motion to compel if they really want to, have a judge order it, and then, maybe then, and only then, would I have the witness answer a question that's remotely privileged. But you want to be extremely cautious about the privilege. And of course, before that deposition even happens, you've got to make sure that there is a good-faith basis for it. If there is a way for the opposing counsel to get the information from another witness, then I would argue to the judge—and most judges, I think, would agree—that they ought to take that witness's deposition instead.

KERRY SCHALDERS: Good advice, good advice. We have another question from an audience member. Does the *Upjohn* notice apply to both state and federal matters?

DAN WALDMAN: That is an excellent question. I don't know the answer for certain. I would say, though, that I think the best practice would be to follow that, irrespective of whether it's a federal or state matter. But I honestly don't know the answer to that for certain, but I know our approach is to give those cautions to our employees, frequently because you are having these discussions before there is any litigation. You're investigating something that is pre-litigation. So, I suppose you wouldn't even know whether it was state or federal.

KERRY SCHALDERS: All right, well, I think our final question of the day is going to deal with some of these tactics that we, as in-house counsel, should be advising our colleagues about if they are going to testify for the company. Can you give us some examples of tactics that opposing counsel might use and how you would prepare our witness to handle?

ARTURO GONZÁLEZ: Well, this is Arturo, and that's a very good question that unfortunately requires a very long answer. I'll try to give you the short version. One tactic is to try to argue that a document says something different than what the document says. Another tactic is to try to argue that a witness previously said something that is different than what the witness actually said. And the way you handle both those situations is the same: If a document says "X" and the lawyer tries to suggest that it says otherwise, first of all, the lawyer needs to object. A lot of this is trial lawyer work. A trial lawyer needs to be there to protect the witness, needs to object if the person is mischaracterizing the evidence [or] mischaracterizing the document: "It doesn't say that, Your Honor."

But the witness needs to be prepared on those points as well. Again, this is why I say, from the beginning, that you need to focus on just a handful of the key documents, because your witness needs to know those documents cold. And if anybody tries to misrepresent what was in the document, a well-prepared witness can usually say—well, even if the lawyer falls asleep and doesn't object—the witness needs to be prepared to say, “Well, actually, counsel, I don't think the document says that. What I said was that we might rescind the contract. I didn't say that we would.” And the same thing with the testimony: “Well, counsel, I don't think that's what I said. What I said was that she was about 10 feet away. I didn't say she was standing right next to me.” So, the key is to make sure that the witness knows the key points cold, so that if there is any attempt by counsel to misrepresent those key points, the witness can address them. And the last thing is that sometimes counsel will try to squeeze information that the witness is not prepared to testify about. The witness should always be prepared, and should be comfortable saying, “Actually, counsel, I wasn't at that meeting, so I couldn't tell you what was said.”

KERRY SCHALDERS: Good advice: Don't let your witness be afraid to push back at opposing counsel.

ARTURO GONZÁLEZ: No, absolutely not.

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KERRY SCHALDERS: Thank you. Thanks, Roberto, and thank you too, Arturo Gonzalez, Mark Phillips, and Dan Waldman for participating and presenting this information, and to our wonderful audience. We appreciate your attendance here at the call, Morrison & Foerster for their generous sponsorship of this webcast, and of course the ACC, and to our ACC members on the line, don't forget that we have the annual meeting coming up in Boston on October 18-21, and we hope to see you there. So, thank you from the ACC Litigation Committee. This call is now ended.

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