

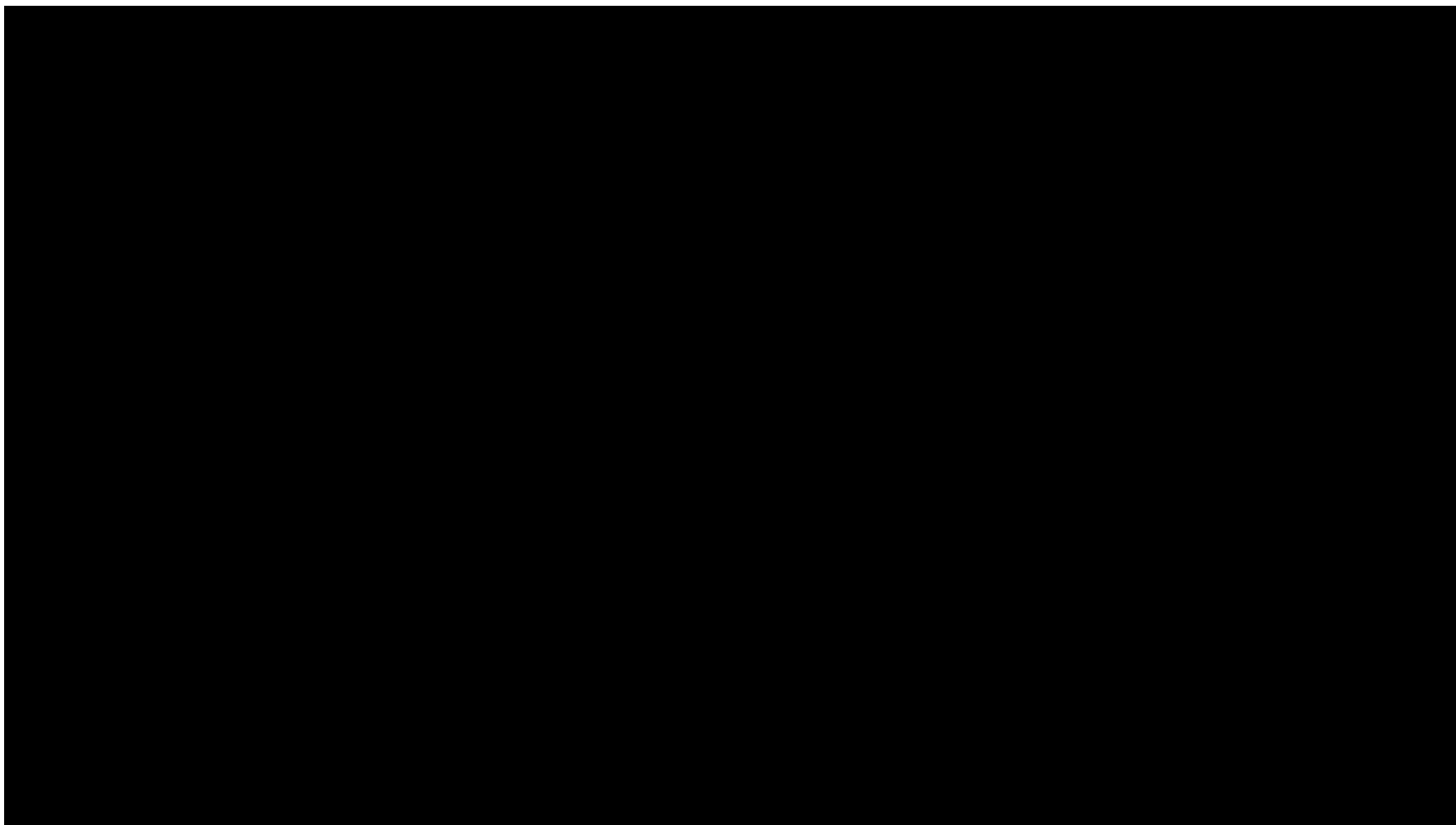
Advancing the Case

Advice for More Effective Corporate Representative Depositions

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Association of Corporate Counsel, South Carolina Chapter

2025 Winter Meeting



Corporate Representative Witnesses and Why They are So Important

- They “bind” the company
- They are your face in litigation
- The testimony will never die; bad depositions will come back to haunt the company for years



Overview

- The Rules
- When the Notice Arrives
- Preparing the Witness
- In the Deposition



The Rules

- Rule 30(b)(6), FRCP and SCRCPP
- Local Civil Rule 30.04 and Rule 30(j), SCRCPP
 - Rule 30(c)(2)
- Rule 32, FRCP and SCRCPP

Rule 30(b)(6)

- Requires:
 - Deposition Topics be “describe[d] with reasonable particularity”
 - The witness to consent to testify on behalf of the organization
 - Testimony be provided “about information known or reasonably available to the organization”
- Does Not Require:
 - A “Person Most Knowledgeable” or “Person Most Qualified”
 - Unless you’re in California state court
 - Witness to be an employee or former employee
 - A witness identified by the noticing party
 - A witness with direct or personal involvement with the subject matter

Local Civil Rule 30.04 and Rule 30(j), SCRCPP

- Objections regarding things that can be fixed during the deposition are waived if not made then
- Prohibits private conversations with the witness about “the substance of the testimony” except to determine whether to assert a privilege or move for a protective order
 - If such a conference occurs, it must be disclosed on the record and is not privileged so deposing counsel can determine whether there was witness coaching
 - What if a witness says something you know the witness knows is not correct?
- Prohibits “speaking” objections; *i.e.* those that suggest an answer
 - See *also* Rule 32(c)(2), FRCP and
 - What if deposing counsel asks for an explanation of the basis?

Rule 32

- Concerns the use of depositions in court proceedings
- 30(b)(6) depositions may be used by adverse parties for any purpose, regardless of witness availability
- May be used by any party for any purpose if the witness is unavailable
 - “Unavailability” is defined by the rule
 - The Federal and South Carolina definitions are similar, but not identical
- Parties adverse to the proponent of the deposition are permitted “to introduce other parts that in fairness should be considered with the part introduced”

The Notice

Detection Algorithm, Software, and the front and side crash sensors for the Subject Vehicle. For the sake of clarity, inquiry will include, but not be limited to:

- a. Your involvement;
- b. Communications with Kia Corporation or any entity acting on Kia Corporation's behalf (including but not limited to HACO, Bontec, Mobis, etc.);
- c. The identities of Your employees responsible for the design and specifications, and/or negotiation of the design and/or specifications of the ACU.
- d. Design and /or specification for the ACU and its components, including the DS84 ASIC;
 - i. The sample rate;
 - ii. The low pass filter value utilized;
 - iii. Any information stored on the Airbag ECU (and not in the CDR)
 - iv. Location of fault storage;
 - v. Any faults stored on the ACU;
 - vi. How faults are communicated to the driver;
 - vii. Are faults latched / locked;
- viii. Time to Fire Spreadsheets for all crashes and simulation for the Crash Detection Algorithm;
- ix. Final Calibration results for the Crash Detection Algorithm;
- x. The circuit protection for the ACU and/or DS84 ASIC;
- xi. The circuit protection utilized in other vehicles containing the ACU and/or DS84 ASIC;
- xii. All recommendations made by You, including Your reasons for the recommendations, to HACO, Mobis, Kia Corporation, or any entity acting on behalf of or for the benefit of Kia Corporation, regarding circuit protection for the 2010 Kia Forte;
- xiii. All recommendations made by You, including Your reasons for the recommendations, to other OEMs or any entity acting on behalf of those OEMs, regarding circuit protection in other vehicles containing ACU and/or DS84 ASIC;
- xiv. The level of resistance to transient electricity of the MS84 ASIC and the DS84 ASIC;
- xv. When and why did You stop manufacturing and/or selling ACU and/or DS84 ASIC?; and
- xvi. When and why did You stop licensing the design of the ACU and/or DS84 ASIC?

xvii. Burn in;



- i. Design and /or specification for the front and side crash sensors and/or other G Sensors;
 - i. The location and orientation of the sensor in the vehicles;

- ii. The manufacturer of the sensors;
- iii. The specifications for the sensors;
- iv. Brackets utilized in the vehicle;
- v. Any durability issues with sensors / brackets;
- vi. Any benefit to rear impact sensors and/or ability of other sensors to detect rear impacts;
- j. The design and/or specifications of any safing sensor;
- k. Design and /or specification for deployment of airbags;
 - i. The DFMEA for the airbag sensing system;
 - ii. The DVPRM for the airbag sensing system;
- l. Design and /or specification for deployment of pretensioners;
 - i. Any benefits of pretensioners in rear impacts;
 - ii. Any benefits of pretensioners in concatenated events;
 - iii. The ability of the ACU to command firing of pretensioners;
 - iv. Any modification(s) needed for the ACU to command firing of pretensioners in a rear impact or concatenated event;
- m. Design and /or specification for no-fire scenarios;
- n. Design and /or specification for underride scenarios;
- o. Design and/or specification for the Crash Detection Algorithm and/or software utilized in the ACU. For the sake of clarity, inquiry will include, but not be limited to:
 - i. The name of the Crash Detection Algorithm present in the Subject ACU;
 - ii. The process by which the Crash Detection Algorithm was designed;
 - iii. The specifications on which the Crash Detection Algorithm was based;
 - iv. Any specifications You received from Kia Corporation, Mobis, or any entity which contributed to or influenced the design of the Crash Detection Algorithm;
 - v. Any entity to whom you have provided the Crash Detection Algorithm;
 - vi. Any testing of the Crash Detection Algorithm;
 - vii. Any modifications to the Crash Detection Algorithm after initial design;
 - viii. The changes and/or cost associated with modifying the ACU or Crash Detection Algorithm to store additional crash records;
 - ix. The changes necessary to allow the ACU and/or Crash Detection Algorithm to command deployment in a rear impact collision;

The Notice: In-House Counsel's First Tasks

- Begin searching for witness candidates
 - Despite the burden, it is often better to have multiple witnesses
 - Remember, the witnesses do not have to be former or current employees
- Take the steps necessary to ensure the witnesses will have appropriate time to prepare
 - Speak with their managers or supervisors
 - Learn the conflicts in their schedules
 - If possible, find witnesses that have given depositions on the same or similar topics (assuming they did well, of course)
- Identify the internal support the witnesses will need to properly prepare
 - People in other departments or with historical knowledge?
 - Information about the witness outside counsel should be aware of?

Picking Your Witness



Selecting Witnesses

Good Witness Characteristics

- Good listener
- Willing to learn
- Careful and precise
- Steady temper
- Strong under pressure
- Pleasant demeanor (particularly with video)
- Instructor, not advocate

Poor Witness Characteristics

- Know-it-all
- Overly nervous
- Reluctant to participate
- Capitulate easily when pressed
- Interrupt
- Hurried
- Easily upset
- Condescending, combative

Witness Typology Matrix

Demeanor	<p><u>"Evasive , Angry"</u> (Aggressive, Non-disclosing) Hostile, wise guy, argues with Q, won't answer directly</p>	<p><u>"Heavy –handed"</u> (Aggressive, Informative) Has good things to say, but is too eager, too much of an advocate, can't be wrong, over confident</p>	<p><u>"Careless/Bully"</u> (Aggressive, Over-disclosing) Know it all, something to prove, needs to win every point, self-absorbed</p>
	<p>"Unprepared" (Assertive, Non-disclosing) No doubts, but no facts either – How should I know?</p>	<p>"Good Communicator" (Assertive, Informative) "Newscaster" - objective, confident, competent, Non defensive</p>	<p>"B.S. Artist" (Assertive, Over-disclosing) Talks too much, too fast, salesman, strays from subjects</p>
	<p>"Empty Chair" (Passive, Non-disclosing) Wallflower, introvert, spineless, scared</p>	<p>"Boring" (Passive, Informative) Not my job, dull, don't care</p>	<p>"Victim" (Passive, Over-disclosing) – volunteers harmful information, hoping to just get it over with</p>
Information			

Use Your Resources!

A Witness With the Right Demeanor



The Notice: Outside Counsel's First Tasks

- Determine whether topics are described with “reasonable particularity”
- Determine whether topics are within the scope of court orders and/or unruled-upon positions regarding the proper scope of discovery
- Meet and Confer!
 - Rule 30(b)(6), FRCP, provides that “promptly after the notice or subpoena is served, the serving party and the organization must meet and confer in good faith about the matters for examination”
 - But this is expected practice, and strategically beneficial in every jurisdiction
- Serve objections and/or a response that explains what topics will be addressed and why
- Will the deposition be on video? Should it be?

Is a Protective Order Necessary ?

- Gap in the rules that could use clarification
 - Beware: case law in many jurisdictions suggests that a protective order must be obtained before the deposition; these sometimes show up in state specific discovery manuals/practice guides
 - But these cases usually do not involve 30(b)(6) depositions and/or are outdated
- Make your motion sooner than later if you are going to move
 - But not before a thorough and good faith meet and confer process
 - And be considerate of your opponent, even if they do not reciprocate

When Should You Move for a Protective Order

Probably Not Necessary

- Boilerplate topics and instructions
- Topics or instructions that clearly violate the rules
 - But note these in your written response
- Topics that are within the scope of discovery but not a primary focus of the case
 - Discuss this during meet and confer
- Experience with counsel
- Things that may be beyond the scope of discovery, but that don't matter

Think Hard About It

- Aggressive counsel that plays “the discovery game”
- Larger discovery scope positions that will eventually require court resolution
- Topics that blend in and out of scope subject matter
- Your court's proclivities

Once Upon a Time...

16. Information related to the system and parts description for the components in the left and right rear wheel well area for the 2014 Chevrolet Corvette vehicle, VIN 1G1YJ2D78E5120960.
17. Information related to any proposed and/or completed changes of the fuel system components for the Chevrolet Corvette Stingray from 2014 to 2017 including but not limited to changes to the design, manufacturing, function, materials, or size.
18. Information related any proposed or completed changes to any mating components, wire harnesses, connectors, or wire sizes for the Chevrolet Corvette Stingray from 2014 to 2017.
19. Information related to the electrical system and power distribution for the Chevrolet Corvette Stingray from 2014 to 2015.
20. Information related to the 2014 Chevrolet Corvette Stingray Fuel Control Module.
21. Information related to the proposed and/or completed changes to the electrical circuits for the 2015-2017 of the Chevrolet Corvette Stingray.
22. Information related to consumer notices or complaints regarding any system or component of the 2014 Chevrolet Corvette Stingray fuel system.
23. Information related to whether there are any components, systems, features of the 2014 Chevrolet Corvette Stingray that have been discontinued.
24. Information related to a history of fires related to the 2014 to 2015 model Chevrolet Corvette Stingray, the allegations made for the cause of the fires, investigations performed in response to Defendant's notice of the fires, and any determinations related to the cause of the fires.
25. Information related to any complaints, formal or informal, made by consumers based upon excessive power use, or overheating conditions of any components in the left rear wheel or right rear wheel area of Chevrolet Corvette Stingray for model years 2014-2015.
26. Information related to Special Coverage notices or other communications Defendant sent to owners of a Chevrolet Corvette, model years 2014-2015.
27. Information related to problems, defects, exceptions, or issues in the performance of the Chevrolet Corvette Stingray model year 2014.
28. Information related to any complaints, formal or informal, made by consumers based upon fuel tank for the Chevrolet Corvette Stingray for model years 2014-2017.
29. Information related to any fires related to the 2014-2017 Chevrolet Corvette Stingray's fuel control module or components in proximity to the fuel control module.

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Notice Depo. General Motors.

“Before the deposition, Plaintiffs served a notice of deposition specifying the areas of inquiry for the deposition. Defendant stated it objected to the scope of the deposition notice, but did not move for a protective order...The Court has reviewed the deposition transcript. Defendant’s counsel made over one hundred speaking objections. Many were leading. For example, Defendant’s counsel repeatedly objected that a question was beyond the scope of the notice and then instructed the witness to answer “if you know”—clearly inviting the witness to answer ‘I don’t know.’”

Mills v. General Motors, LLC, 2017 WL 4279651*4 (2017 D.S.C.)

A Better Way



Preparing the Witness



Why Depositions Go Wrong

- Lack of preparation
- Witness doesn't "own" the testimony
- Under stress, the witness forgets the lessons learned
- Lack of coping strategies
- Failure to take it seriously



In-House Counsel's Role During Deposition Preparation

- Reinforce lessons
- Answer questions
- Identify issues for outside counsel
- Assist with locating and producing documents identified during preparation



Preparation: Initial Steps

- Develop a preparation schedule
 - Time to collect information
 - Time to work with the witnesses
 - Should the 30(b)(6) deposition take place before or after other company witness depositions?
- Have an initial meeting with the witnesses to discuss the topics, their baseline knowledge/background information, and to gain a sense for their personality
- Give the witnesses initial homework assignments and ensure they keep track of who they speak to and what they review
- Meet with the witnesses about their progress on the homework and assist with their roadblocks (external and internal)

Preparation: Provide Case-Specific Fundamentals

- Explain to the witness the basic case facts, allegations, and defenses
 - Usually, the witness does not need to know detailed information about the incident that gave rise to the lawsuit
- Explain your fundamental strategic themes
 - Distill these to 3 if possible (it's always possible)
- Explain your opponent's fundamental themes
 - Again, 3 is the right number
- Explain what a 30(b)(6) deposition is and how it fits into the case at large
 - No heroes: You can't win a case in a 30(b)(6) deposition, but you can lose one!

Preparation: 30(b)(6) Deposition 101

- Understand the obligations of a 30(b)(6) witness:
 - Provide strategies on what to do if the witness does not know the answer to a noticed topic
 - Explain how you can and cannot assist during the deposition
- Basic Q & A instruction you would provide any witness:
 - Tell the truth
 - Listen to the question
 - Wait for objections
 - Don't speculate
 - Answer the question asked, but don't volunteer additional information
 - Read documents before answering
- Demeanor:
 - Stay respectful and professional
 - Don't lose your cool; don't bite when opposing counsel is a jerk
 - Don't be intimidated or change because of opposing counsel's style
 - Is the deposition going to be videoed?

An Early Intimidation Tactic

Exhibit D275 - 22-07-19 Amended

File | D:/HMA%20v%20Knight%20-%20Defendants%20Exhibits/Exhibit%20D275%20-%202022-07-19%20Amended%20Notice%20of%20Deposition%20-%20P...

Set Microsoft Edge as the default application for reading PDF files? [Set as default](#)

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Attachment A

1. The defect(s) in the Theta II GDI engine (whether claimed to be design or manufacturing) in particular with regard to Recalls 132, 162 and/or 953 and/or the engines containing mismatched parts;
2. The design of the Theta II GDI engine, including any design revisions or changes made to correct and/or mitigate any defect(s) in the engine, particularly with regard to Recalls 132, 162 and/or 953 and/or the engines containing mismatched parts;
3. The manufacture of the Theta II GDI engine, including any manufacturing revisions or changes made to correct and/or mitigate any defect(s) in the engine, particularly with regard to Recalls 132, 162 and/or 953 and/or the engines containing mismatched parts;

James Smith

Preparation: 30(b)(6) Deposition 201

- Encourage witnesses to “own” their testimony
 - They should use their own words
 - But give guidance on avoiding sound bites/things that can be misrepresented and/or jargon or technical language
 - They should not hesitate to explain what opposing counsel is getting wrong or misunderstanding
 - Remind them that they are the subject matter experts
- Work with the witness on “hot” documents
 - Pay special attention to ones with their names on them
- Provide the witness with “safe harbors”
 - These will be guided by your fundamental themes
 - But make sure the witness does not overuse them or use them at inappropriate times
- Teach the witness to recognize and address general or “reptile” questions

Work with the Witness's Personality

- Likeability comes in lots of packages and styles
- What makes this person successful in your organization?
- Encourage your witness to embrace what makes them successful
- They have to be themselves!



Safe Harbor Testimony

- Topical and ties into notice
 - “Our design goal is always to create a product that will be safe for users under a variety of use circumstances. There are benefits and tradeoffs to every design.”
 - “We have an established protocol to report incidents like this, and all employees receive written instructions and yearly training on this process.”
- Provide context to questions that are fishing for bad soundbites

“Reptile” Questions

- Safety Rule + **Danger** = "**Reptile Brain**" reaction in minds of jurors – (protect themselves and their community)
- "Umbrella Rule" – Wouldn't you agree that a Manufacturer/Bank/Business should:
 - Never needlessly endanger the public.
 - Make products for the public as safe as possible.
 - Do its best to make sure its policies are followed.
 - Place safety of the public over profit?
- These questions are hard to answer because the natural instinct is to agree, but...
- They actually create an impossible standard that is not the law

Snake Repellant

- "That's what we do. Let me explain..."
- "That's a very broad statement. I think the way we would say it is..."
- "Safety and functionality are balanced. Let me explain what I mean by that..."
- "Of course what you say is important, and we take it very seriously, but I cannot agree entirely with what you said. Let me explain..."



Distinguish, Don't Fight

- “Although that’s true under some circumstances, that’s a very broad description, it would be more accurate to say”
- “Yes, that is one of the many factors we consider when”
- “Are you asking about [this] or about [this]? Because we generally treat them as two separate topics that are evaluated differently”

Practice

- Begin with short sessions of in-character practice
 - Five minutes is plenty
 - Don't use documents
 - Give constructive feedback
 - Follow with another session on the same topic
- Do the same with “hot” documents and, perhaps, surprise documents
- Switch to a few longer sessions
 - Have a colleague conduct these while you play your role of defending the deposition
- Don't be afraid to humble a witness early in the prep, but do not destroy his or her confidence
- Enough is enough

Logistics and Notes

- Hold the deposition away from your company office
- Leave work laptop and cell phone at home
- Referring to documents is a good thing!
- Always read and sign

Recurring In-Deposition Issues



Inevitably, You Will Be Faced with In-Deposition Judgment Calls

- Impossible to predict them all; there is no substitute for good judgment
 - Experience
 - The School of Hard Knocks
- However, in each case, there are at least a few issues you can reasonably anticipate
 - Identify these for your witnesses
 - Tell them your plan for dealing with them before the deposition starts
- Two recurring examples:
 - The appearance of inadequate preparedness
 - The blurred line between legal positions and their factual support

Ensuring the Witness Cannot Be Accused of Being Unprepared

- Witness should know generally how information is kept and who/what department is the specialist
 - “I don’t know the exact answer, but I know where I would go to find out...”
 - Counsel should be prepared to step in when the witness does not know the answer to a properly noticed topic: “We’ll get you that answer.”
- Consider providing a list of what the witness reviewed/who he or she spoke to in preparation
- Consider creating a summary of data/voluminous information or “trivia” for the witness to use during the deposition
- Be ready to rehabilitate the witness if necessary
 - This is most effective when it concerns topics that are more tangential to the fundamental issues in the case

Rehabilitating a Witness's Preparation



Factual Matters Overlap with Legal Strategy

- Remember, your opponents are entitled to discover all the factual bases for your legal positions
 - You are obligated to provide them
 - And you want to because you risk exclusion if you do not
- Most commonly arises when topics concern the bases for your pleadings or your discovery responses
- But it is easier said than done, especially with an opponent who legitimately does not understand your position, or, even more so, is playing games

Dealing with the Legal/Factual Overlap



Should You Re-Direct?

- Before the deposition, determine if there is a line of questions you know you want to cover
 - Consider very closely if punitive damages are a possibility
 - Consider whether this witness is likely to appear at trial
- Reasons to re-direct:
 - Witness was not allowed to finish an answer
 - Witness gave a bad sound bite
 - Close the loop on something the jury might wonder about
 - Generate testimony to assist with teaching the judge or jury



Closing the Loop

- Primary consideration is whether it will reassure the jury that it was reasonable for the witness to not know the answer to something important
- Particularly useful when your opponent persists in asking questions of the “wrong witness” or that the company reasonably does not know



Teaching Testimony

- Consider re-directing to explain technical subjects that are likely to be the subject of pre-trial motions
- Take account of whether the witness is likely to testify at trial
- Do not get greedy



Re-Direct Tips

- If you have one planned, write it *all* out and practice, practice, practice before the deposition
- For potential issues that might arise in the deposition, during prep:
 - Explain the potential reasons you might have to re-direct
 - Explain that you will never ask about anything tricky or that has not been covered in your preparation
- Pay attention to your witness's agility during your practice sessions and take that into account before beginning a re-direct
- When you begin, ask preliminary questions that refer to the prior testimony so as to orient your witness
 - You will likely get leading objections, but just be sure your orientation is accurate and non-suggestive
 - Do not ask questions that are even close to leading once you have oriented the witness

In Closing, Good Witnesses . . .

- Know ***exactly*** what is going on and what adversarial games opposing counsel is trying to play.
- But they comes across like they're just there to helpfully answer neutral questions.



Questions?