

## PREPARING THE CORPORATE WITNESS

Kay Barnes Baxter  
SWETMAN BAXTER MASSENBURG, LLC  
New Orleans, Louisiana  
504.799.0503

Elizabeth Haecker Ryan  
COATS | ROSE  
New Orleans, Louisiana  
504.299.3085

Terrence M.R. Zic  
WHITEFORD TAYLOR PRESTON LLP  
Bethesda, Maryland  
301.804.3612

### Introduction

The corporate deposition is becoming a popular tool for Plaintiffs to use against Defendants. It is such a powerful tool that some Defendants will settle for more than the case is really worth to avoid having to give one.

Plaintiff's counsel frequently accuse corporate defendants and their counsel of being obstructionist in discovery. Not only does this accusation come in motions to compel more "complete" interrogatory responses and document production, but in accusing corporate witnesses of not being sufficiently prepared for depositions, and/or of producing the wrong witness. Exacerbating the situation are corporate deposition notices that are frequently vague, overly broad, and request that a witness perform research that is so unduly burdensome, that it is virtually impossible.

Diligent, thorough preparation of your corporate witness is necessary not only to comply with state or federal rules, but to make the positive points for your case. It will also take the “hammer” out of Plaintiff counsel’s hand.

### Identifying the Witness - The Deposition Notice and the Complaint!

Federal Rule of Civil Procedure 30(b)(6) states that the noticing party “must describe with reasonable particularity the matters for examination.” The corporate witness or witnesses “must testify about information known or reasonably available to the” corporation. It is these matters for examination to which the corporation must respond. However, unless you have an experienced, knowledgeable witness ready to go, the time between being served with the deposition notice and the date of the deposition may not be sufficient for preparation. Start thinking about your corporate witness when you receive the first complaint. Early and frequent practice makes a difference.

Should your witness be a current employee, retired employee who has more knowledge than any current employee or someone you hire to learn the material? Some courts have required the designation of non-employees as witnesses.

Draft your own deposition notice to your client as if you were plaintiff’s counsel and start talking to your client early about who the potential witness(es) may be, even if a corporate deposition has not been requested. It is only a matter of time until you receive that request.

### Why You?

Significant questioning, sometimes with regard to each matter for examination, will take place, as to whether the witness you produced is the most knowledgeable witness, and who else has knowledge. Your witness needs

to be able to explain the depth of her knowledge, why she is qualified to be the witness, and the time and effort expended to prepare for the deposition. She also needs to have the right temperament to withstand sometimes hostile questions and questions that will challenge her integrity and that of a corporation that she may have devoted her life to. The witness needs to be able to focus and be willing to put in the hours necessary to prepare to speak for the corporation.

### The Obligation to Gather Information That Is Reasonably Available

Corporations must make a conscientious, good faith effort to investigate the matters for examination and prepare the witnesses so that they can provide complete answers. Remember, the testimony in the deposition is binding on the corporation. Preparation means interviewing available employees and perhaps former employees with knowledge and review of documents. You must keep in mind protecting attorney-client privileged communications and work product materials. When preparing a witness, only show the witness documents that you are prepared to produce to plaintiffs, that is, documents that would otherwise normally be discoverable. In the same vein, information that forms the basis for the witness' testimony must never come from counsel, but from other persons. These other sources of information will invariably be identified and may be deposed, so evaluation of them as witnesses is also important.

### The Deposition/Trial Witness Problem

Corporate witnesses are obligated to testify to "information known or reasonably available to the organization." Thus, the corporate witness is likely testifying beyond his or her personal knowledge. Corporate witness rules and in some cases state statutes, don't use the word hearsay, but by implication of

the requirements of such rules, are indeed requiring hearsay testimony, if the source of the information is what the witness learned because another person provided that information. Should the same corporate witness appear at trial, however, plaintiff's counsel may, and in the event of information unfavorable to the plaintiff, likely will, object to the testimony on the grounds that the witness does not have personal knowledge of that information and it is inadmissible hearsay.

If the information is favorable to the defense of the case, make sure you conduct your own direct of the witness at the end of the deposition so that you can make counter-designations of that testimony in the event that plaintiff's counsel designates any portion of the testimony for trial. There is no hearsay exception for that, but it makes it difficult for plaintiff's counsel to argue that you cannot counter-designate testimony from the same deposition that they designated.

#### No Testifying By Logical Inference

We all tell our witnesses not to speculate. Indeed, plaintiff's counsel will frequently advise our witnesses not to speculate in the introductory "ground rules" speech at the beginning of a deposition. However, plaintiff's counsel may use as a tactic a line of questioning that seems to make logical sense and therefore the "factual" conclusion must be so. If it makes sense, it must be true. Plaintiff's counsel's tactic is to make the witness feel foolish if she does not agree with him. The witness must stick to what she knows because she has seen it, experienced it or read it personally. If there are favorable documents that support what the witness is testifying about, consider having a binder of those documents at the ready for the witness to produce.

If you sense that your witness is getting frustrated or starting to lose focus, take a break. Also insist on taking lunch. Everyone wants this over as soon as possible, but it should not be done at the sacrifice of the client. This is not a marathon. A witness who is composed and focused will be a better witness than a witness who is flustered.

Another challenge that a corporate representative faces is an aggressive hostile plaintiff's counsel. Do not allow your witness to be intimidated. Stop the deposition with the instruction that you are willing to start again as soon as counsel can compose him or herself and continue in a professional manner. This should help the witness feel protected and more at ease when answering questions.

#### How Do You Know That?

In everyday life, people speculate. It is human nature, and part of normal conversation. However, we need to remind our witnesses that a deposition is an artificial, strange environment, that is uncomfortable. No matter how congenial plaintiff's counsel may appear, witnesses should not let their guard down and must always keep in mind the parameters of what they know and how they know it. When preparing the witness, instill the discipline of the witness asking herself how she knows the answer, before she gives it. Does her knowledge come from her own experience as a company employee, what other company employees told her, or from documents? If she can't point to the source, she is probably speculating. Caution your witness never to feel comfortable enough to joke or be flippant during a deposition. Remember that deposition transcripts do not reflect that the entire room laughed in a light hearted moment and that videos are edited to accomplish the plaintiff's goal of

showing the corporation as a heartless entity with no regard for the injured victim.

It the Corporation Being Deposed, Not You,  
But You Are the Spokesperson

Every corporate deposition has that series of questions in it that establishes that the witness knows she is speaking for the corporation and her answers are binding on the corporation. In some cases, plaintiff's counsel will inform the witness that he will assume all answers are on behalf of the corporation unless the witness states otherwise. Do not let your witness be misled by such a statement. All answers *are* on behalf of the corporation and have the potential to be used against it, regardless of whether the witness says the answers are qualified or are not on behalf of the corporation. If plaintiff's counsel gets an answer they like, they will argue that the answer was given by the corporate representative and is binding on the corporation. Most courts will allow it to be read to the jury, or in the case of live testimony, used on cross-examination. There should be no such answer as: "I don't know what ABC Company thinks of what is written in this company document, although I know what I think it means." Similarly, your witness should never answer: "This is me speaking, not the company." Prepare your witness to be sure enough of the answers to the matters for examination, such that she knows the factual material and knows that she is authorized to speak for the company on those matters.

Questions Beyond the Scope of the Matters for Examination

It happens, but it is a rare occasion when plaintiff's counsel stays within the confines of the matters for examination. Of course, you should object that the question is beyond the scope of the deposition notice. (If you are allowed

to say more than: “Objection to form.” More on that below.) What do you do next?

Do you instruct the witness not to answer? That is treacherous territory, which can result in a sanction to bring the witness back with accompanying monetary sanctions, or worse, some evidentiary sanction. The witness needs to be prepared to say that as she read the matters for examination she did not understand that she would be asked such a question and is therefore not prepared to answer it (let alone bind the company with an answer). Careful though, this type of answer may preclude you from offering such testimony at trial. You should anticipate which points you want made in the deposition, notwithstanding what the matters for examination are, and prepare your witness accordingly.

### Teach Your Witness What The Objections Mean

If you are permitted to state a brief basis for your objection: “Objection, lacks foundation,” your witness needs to understand what that and your other objections mean. The classic over-simplified example that some of us still use when training our witnesses is “Have you stopped beating your wife?” Possibly the easiest training tool is the question “do you know what time it is?” That is clearly a Yes or No answer, yet most people will go further and tell the person asking the question the time. Teach them to listen and to recognize the type of question being asked.

The witness takes an oath to tell the truth, the whole truth and nothing but the truth. How can your witness provide a truthful answer to a question that does not have a foundation or is false or misleading in its premise? How can your witness provide a concise thoughtful answer to a vague or ambiguous question?

Witnesses need to understand *why* you make your objections, and what is wrong with the questions. Too many witnesses, even experienced ones, think lawyers make objections to be able to argue about something later, and they don't pay attention to the objections.

You need to teach your witness how to parse questions or at least say, "I don't/can't accept the premise/basis for your question. So, I cannot provide an answer to your question." Or simply, "I have not and do not beat my wife."

"I'm sorry Mr. Smith, I cannot answer that question with a yes or no because a yes or no would not be a truthful answer."

### The Potted Plant Rule

There are some states where all you are permitted to say when you object is: "Objection to form." This hardly provides any guidance to the witness. In that case, you need to teach your witness about objections and how to recognize dangerous/bad questions, especially the questions that contain some negative implication. Too many well-educated, smart witnesses just do not see where plaintiff's counsel is going with such questions.

Go over some real-life examples, without showing them to your witness in writing, and parse through the questions to show your witness how she could be lead down such a path. Ask the witness again "Do you know what time it is?" and see how they answer after this training session.

### The Questions that Call for a Legal Conclusion

How should a witness respond when she is asked a question that calls for a legal conclusion? Legal conclusions are almost never on the matters for examination of a deposition notice. Plaintiff's counsel nevertheless ask such questions. The purpose of such questions is usually to get the witness to agree



to standards of behavior that go beyond what is required by the law, but obviously have not been met by whatever the facts are in a case. A savvy witness realizes this, and can deal with such questions. However, some witnesses will think that what plaintiff's counsel is asking them sounds reasonable and will simply agree.

In some jurisdictions, but not most, you may be able to instruct the witness not to answer. In most situations the witness should be prepared to say that she is not a lawyer and does not know the answer, and work in that she did not see that issue in the matters for examination.

Is this a statement of ABC Corp.'s policy/position?

Another favorite tactic of plaintiff's counsel is to find a general statement in a memo or other corporate document and ask the witness to confirm that the statement is the corporation's policy or position. Most companies will have a formal procedure for establishing a "policy" and in many cases, there is no such thing as a company "position," except perhaps the position that your client has taken in the lawsuit.

Consider an answer such as: "When ABC Company adopts a policy, that policy is stated in a formal policy letter. This is not a policy letter. This is simply a statement made by Mr. Jones in a memorandum to Mr. Smith." Or instruct your witness to ask to see the entire document and then take the time to read it before offering any comment. A corporate witness should not be afraid to take the time needed to review a document before testifying about a snippet of information.

Practice, Practice, Practice

Discussing the issues, anticipated strategies of plaintiff's counsel, and the objections, and reviewing documents are all important aspects of preparing your witness. But, there is no substitute for practice. After you have spent some time yourself in practice sessions with your witness, if you can, bring in another lawyer who knows the case, but who the witness does not know to take her out of her comfort zone. Simulate a real deposition environment as best you can in terms of the anticipated formality, the personalities of the lawyers, the review and introduction of exhibits, and the length of the deposition.

Whether your corporate witness is a female or a male, a female attorney conducting the cross-examination is often the most disarming and when your witness will most frequently let down her guard and forget all of the hours of preparation. Prepare your witness for those moments and let her know that any misstep severe enough to worry about, will be taken care of during your questioning.

Another good practice tip. If you know which plaintiff's attorney will be taking the deposition, get a transcript from one of this attorney's prior corporate depositions and go over the types of questions that will be asked and the phraseology that the attorney favors. Practice those questions and answers. Let your witness know that there are going to be questions that you could not anticipate or practice and that she should be comfortable with that; she should take a deep breath, ask for the question to be repeated to make sure that the question is clear and then think back through all of the practice in order to identify what type of question is being asked. Is it asking her to interpret what someone else was thinking? Is it asking her to give a legal conclusion? Is it asking her to answer "when she stopped beating her spouse"? If the question is answerable, then she should answer. If it is not, then she should feel just as comfortable saying so.

Good luck!