Corporate Witness Preparation: The 411
By: Matthew D. Keenan

A long time ago in a galaxy far away, attorneys advertised in phone books, in something called the Yellow Pages. Legal secretaries took shorthand, pleadings were prepared with carbon paper and the most admired attorney in the western hemisphere was Perry Mason. In that era, the terms 'mass' and 'tort' were rarely conjoined, and the totality of documents produced in a typical lawsuit might fill an expandable folder.

And witness depositions were handled much differently. Without electronic communications, much of the fact finding depended on specific recollections of witnesses. And those witnesses were prepared with these types of instructions:

-- "Never volunteer anything."
-- "Interpret the questions narrowly."
-- "If you don't remember, just say you don't recall."
-- "Don't review anything in advance that might refresh your recollection."
-- "When in doubt, just say as little as possible."

And then the world of litigation began to change.

Today legal historians credit the 1968 Congressional passage of the United States Judicial Panel on Multidistrict Litigation Act as planting the seeds for mass tort as we know it today. Even then, it took time for mass tort to take hold. Consider, for instance, that the 1980 Annual Report of the Judicial Panel on Multi-District Litigation reported that the significant MDL's were two air crashes – one at Stapleton Airport in Denver, and another outside of Van Cleve Mississippi. That year, the Copper 7 litigation, which was an IUD made of copper, was denied consolidation, with the panel concluding that "although some common questions of fact existed among the four actions, movants had not met their burden of demonstrating that transfer would further the purposes of Section 1407."

Today the civil discovery era is its own business. And with the vanishing trial, the discovery process itself dominates much of the litigation itself. And with these changes, the conventional wisdom about witness preparation that grew organically from the early days of litigation is no longer relevant.

These days, jurors expect authentic, interesting story tellers with narratives that can be understood quickly. Witnesses need to understand the themes, and where they fit into the equation.

This outline hopefully will impart something worthwhile to an audience already steeped in knowledge about the do's and don'ts of witness preparation.

The 30(b)(6) witness.

The 30(b)(6) witness is its own animal.

Plaintiffs notice Rule 30(b)(6) depositions because they believe that testimony of a representative deponent will "bind" the organization to that position throughout the litigation. An ill-prepared witness or an artful question can generate answers to oral questions which may be irrefutable. Moreover, the prospect of creating a witness to testify to matters about which no one has personal knowledge or recollection may be a daunting and intimidating task for an organization. Creating consternation and anxiety within the defendant organization is a well-recognized tactic of an aggressive litigant.

On the other hand, the corporate representative deposition may also lend opportunity for an organization to present its position in an understandable and reproducible fashion. A redirect examination of the corporate representative which surprises an adversary poorly prepared to conduct an effective cross-examination may provide the organization with the opportunity to preserve its story for use at evidentiary hearings.

The permanency and utility of the Rule 30(b)(6) deposition (especially if videotaped) demands that the client, witness, and attorney devote considerable time in preparation. This includes more than a witness fully prepared to testify about organizational information within the scope of his designation. The client must also fully understand the consequences of failure to abide by the dictates of the rule and the risks created by a poorly prepared witness.

The conventional corporate witness.

This witness is not any easier to prepare, thanks to endless e-mails and document creation years, sometimes decades earlier. While this type of witness does not have to worry about binding the company per the rules, he or she may nevertheless offer admissions that may find their way to a trial or mediation.

Road map to your company witness.

Back in the 70's, there was a best-selling book called The Memory Book. It was authored by Lorayne Harry and Jerry Lucas. Lucas was known to most of the public from his college basketball days at Ohio State and later years in the NBA. Their book was about trained memory and the concept of original awareness – if you know something originally, you can't forget it. They wrote that observation is essential to original awareness – "anything you wish to remember must first be observed." And then once observed, it must be connected to something you already knew.

This concept should be incorporated in witness preparation. The preparation needs to be visual, and needs to be tethered to something already understood. This can be done with a paradigm, even created on a flip chart. The witnesses see it, understand it, and learn from it.

And the paradigm goes like this:

PLEASE.

P = Prepare. Yes, this is obvious, but to a witness, what does it mean? They will have many questions, the most frequent of which may be:

-- "Can I take time off work to prepare?"
-- "Will my supervisor understand what's required?
-- "What's the best use of my time?
-- "Who can I talk to about this if I have questions?
-- "What do I need to review to get ready?

Preparation should include a direct exam for every witness. The direct should be timed to take less than an hour, and ideally include 3-5 exhibits, including an organization chart. The direct helps the witnesses understand their "box" – what's inside and what's outside of it. A direct exam is another way of keeping the focus on primary themes, which is also useful when the witness is responding to cross exam questions.

The graphics used often will include what the witness prepares for him or herself. These can serve as "anchor points" to help keep the direct focused and thereby keep the jury focused.

L = Listen. This is nothing new here, but the best way to illustrate this challenge is to conduct a mock cross exam with attendant miscues.

E = Exercise control. Witnesses often do not appreciate the power they can exercise in this process. They need to understand that "your role is more important than mine and the questioning attorney," To illustrate this point, the following examples are useful:

-- "Nothing happens until you are arrive and say you are ready."
-- "Once we begin, you have total authority over how questions are answered, when we take breaks."
-- "You have the power to answer easy questions directly with a "yes" or "no" and also the power to answer questions with a more elaborate explanation."
-- "You have the power to ask the questioner to rephrase, to clarify."
-- "You have the power to change the question to one that you can answer correctly."

They should be given specific examples … "The way I would respond to your question is that ……"

The witness also needs to distinguish between open ended questions "what happened next" and close ended questions "isn't it true that...", in order to empower the witnesses that they are allowed to answer the questions in the manner reflective of what in fact happened.

A = Accept the obvious. Most cases are built on a core set of historical events that cannot be denied. Whether it's a product withdrawal, a series of deaths or injuries "linked" with your client's product, or a CDC finding carrying with it the power of epidemiology, your witness needs to be prepared for this.

Blending these undeniable historical facts with characterizations of the adversary is where the witness needs to be careful.

Most of us are familiar with the "Reptile Brain" or the "Reptile Strategy" – in which the plaintiffs employ tactics to use a back door golden rule for jurors. These often find their way into questions that take the form of "safety rules" – protections put in place to safeguard the public, and therefore prospective jurors.

A medical director or a regulatory expert can expect a series of questions along the following lines:

- Safety is always a top priority, right?
- There are rules of testing devices and drugs to protect patients and consumers, correct?
- Violating a safety rule is never prudent, correct?

Overall, these are principles that most witnesses won't challenge and shouldn't challenge. There can be a lot more harm than good with a witness who appears to quibble over propositions that most jurors would think are simple.

At the same time, if the witness understands that they have the power to answer these type of questions on their own terms, they can craft their own reply in a manner that does not appear to be evasive or not credible. Examples include these:

-- "Generally speaking that is true, but you need to remember most of our medical devices are only implanted by trained surgeons, and they appreciate that there are risks with all our devices …."

-- "for sure safety is paramount in everything we do. But our pharmaceutical products include extensive warnings on everything from indications to dosage, and there are always risks including death even if used according to the label."

-- "what I would say is that we are in the safety business; our products are designed and cleared by the FDA to improve patient's lives. However, there are no products that do not carry some elements of risks …"

Accepting the obvious points gives witnesses some comfort on questions that may seem painful. Witnesses need to be assured that agreeing with these realities does not hurt their credibility or the defense of the case. At the same time, they need to be aware that small differences in the questions may require rephrasing the question.

Overall, these nuances may be too much for many witnesses. Still, this point is worth covering at the outset so they understand the importance of being attentive to the questions.

S = Stay in your area. Some witnesses get in the mode of trying to be "too helpful". We have all seen this. Witnesses should be reminded that in mass tort these days, the company witness depositions can run in the double digits. One witness should not feel compelled to speak on topics that are best left to others in the company.

There are obvious areas such as medical judgments, regulatory judgments and scientific judgments where the witness may be able to stiff arm. In preparation, flip charts or diagrams can be used to underscore this point, writing topics inside and outside the box. This visual reinforcement can be useful with some witnesses.

A different set of rules applies to 30(b)(6) witnesses. Frequently, these are the first witnesses deposed, and they may be forced to deal with broad topic areas, even some that may exceed their area of expertise. One practice pointer is to have counsel negotiate the scope of these notices, and narrow the topics as much as possible.

E = Emotion is acceptable. Witnesses can be guided on the effective use of emotion. They can be told: "You are not just the Vice- President of Regulatory Affairs. You are part of a team that makes products that improve people's lives. The jury may see this company as one that is entirely false – that you only care about profits. It's OK to show you care, and that the suggestion you don't makes you upset or even angry. Juries want to know you care about your company, you care about your job, and you care about this lawsuit and the man or woman who is claiming to be injured.

Another approach would involve the following: "There may be times where you feel like the plaintiffs' attorney is challenging your moral compass, and trying to paint you in a way that is not correct. You can remind him that's not true, in a direct, sincere, but forceful way. "

This approach can be tested in direct exams, where the witness is asked to respond directly to the 800 pound elephant in the room: "What would you say to the jury who hears this case about Mrs. Jones' injury? What would you say about the level of care you brought to your job every day?" This can often defuse delicate issues, and gives the witness an opportunity to answer an open-ended question that would not otherwise be asked in the cross exam part of the deposition.

Clearly, there is not one "right" or "wrong" way to achieve the goal of a prepared, competent, informed company witness.

Handling documents.

Opposing counsel will likely spend considerable time on their "hot" documents regardless of who may have authored them. This can increase the preparation challenges. Not even the most accomplished defense counsel can predict with certainty which documents may be used. So again, the witnesses should be given a simple framework from which to evaluate documents.

Working off another paradigm. witnesses can be prepared that every document falls into three categories – categories 1, 2 and 3.

1. Did the witness author the document? If so, the range of questions is quite broad – What did you mean? What was your motivation? What precipitated this memo? I ask open ended questions to tease out as much information as possible during the prep process.

For witnesses, this category should be the easiest for you to address. "You wrote it, you can explain it."

2. If the witness did not author it, but received it, another set of questions can be expected: "What did you do in response? Who did you talk to? What was going on at this time?"

3. If neither 1 nor 2 fit, then a much more modest agenda of preparation issues come to the forefront, and generally speaking, there is a much smaller box of topic areas that may be fairly asked of the witness. Generally speaking, category 3 documents pose the greatest risk of witnesses who want to be helpful, and may be offering opinions both outside their 'box' and also not constructive to the defense of the case.

"Gotcha" questions.

There are always some "gotcha" questions which must be anticipated. These include:

--- Knowledge of the case itself, the kinds of claims made, the nature of the injuries, etc. If the case is a single plaintiff, the witness should know the name of the plaintiff if possible.
--- Hold notices and document retention obligations.
--- Corporate integrity statements and other Codes of Conduct that might arise.
--- Relevant public statements on product safety/recalls/advisories that might impact the plaintiff's claims.

Civility and Professionalism

The corporate witness deposition can be an invitation to get nasty. Civility and professionalism is at the core of the ethical obligations of counsel. It's worth a quick review of the ethical rules.

From the Preamble of the ABA Model Rules:

A lawyer's responsibilities

[5] A lawyer's conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer's business and personal affairs. *A lawyer should use the law's procedures only for legitimate purposes and not to harass or intimidate others. A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers and public officials."*

[9] In the nature of law practice, however, conflicting responsibilities are encountered. Virtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system and to the lawyer's own interest in remaining an ethical person while earning a satisfactory living.

* * * * *

These principles include the lawyer's obligation zealously to protect and pursue a client's legitimate interests, within the bounds of the law, while maintaining a professional, courteous and civil attitude toward all persons involved in the legal system.

***From the Model Code*:**
Rule 3.5 Impartiality and Decorum of the Tribunal

A lawyer shall not:

(d) Engage in undignified or discourteous conduct degrading to a tribunal

Rule 4.4 Respect for Rights of Third Persons

In representing a client, a lawyer *shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person,* or use methods of obtaining evidence that violate the legal rights of such a person.

a) In representing a client, a lawyer s***hall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person***, or use methods of obtaining evidence that violate the legal rights of such a person.

Rule 8.4 Misconduct

It is professional misconduct for a lawyer to:

(d) Engage in conduct that is prejudicial to the administration of justice;

Robert Kraus, in a column in Business Law Today, May/June 2007. "Toward Civility in Civil Practice" offered this observation:

"Every lawyer handles multiple clients and matters (even in-house lawyers), and while many strive to make each client and matter be "number one" on the list, civility can be enhanced by recognizing that a counterparty's time may be taken up by other equally pressing matters. Asking for unreasonable return times for documents, or scheduling of conferences, only adds to the stress of the transaction. Of course, there is nothing wrong with attempting to expedite matters and "keep the ball moving," but such efforts should be framed as requests to, not demands of, the other side."

All of us have examples of this in our practice. What impresses me is when an attorney whom I don't know, and may never see again, shows courtesies, such as concluding the deposition so as to allow me to make my flight.

Ultimately, getting along not only is our obligation, but witnesses do better when they are not asked to testify in the middle of an argument between grown adults. Practicing civility and professionalism during the corporate witness deposition is critically important to achieving the client's goals.

Conclusion.

Every witness, every situation poses different challenges for the experienced attorney. As plaintiffs become more adept at crafting their deposition exams to create jury friendly nuggets to advance their narratives, defense counsel must up their game as well. Employing a visually simple but successful paradigm that carves out a clear roadmap is the best way to get witnesses prepared for the challenging task of testifying in your case.