

MEDICAL DEFENSE AND HEALTH LAW

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IN THIS ISSUE

Robert G. Smith outlines strategies and considerations for selecting and preparing a corporate representative for deposition and trial.

Put Your Best Face Forward: Selecting and Preparing the Corporate Representative

ABOUT THE AUTHOR



Robert G. Smith is a capable litigator and is a partner in Mayer LLP's office in Houston, Texas. Rob's clients include many types of healthcare providers including physicians, hospitals, long term care facilities, and nursing homes (and a couple cases involving correctional facilities), in litigation and transactional matters. Rob served as the Chair of the Medical Defense & Health Law Committee in the International Association of Defense Counsel (2021-2023), and he is also a member of the IADC Product Liability and Business Litigation Committees. Rob is on the steering committee of the ALFA International Product Liability & Complex Torts Practice Group and is a member of the Business Litigation and Corporate Transactions Practice Groups. Rob graduated Phi Beta Kappa with a degree in mathematics from Louisiana State University and attended law school at the University of Houston College of Law. He is Board Certified in Personal Injury Trial Law by the Texas Board of Legal Specialization and has tried a wide variety of cases during his 29+ years of practice. He can be reached at rsmith@mayerllp.com.

ABOUT THE COMMITTEE

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The International Association of Defense Counsel serves a distinguished, invitation-only membership of corporate and insurance defense lawyers. The IADC dedicates itself to enhancing the development of skills, professionalism and camaraderie in the practice of law in order to serve and benefit the civil justice system, the legal profession, society and our members.

Presenting a corporate representative is often seen as running the gauntlet, something that the rules of discovery require, and you simply hope to get through it without your client suffering wounds that cannot be corrected or accounted for at trial. A poor deposition by the corporate representative can be the material that results in a nuclear verdict. The corporate representative is the embodiment of the company. It is a unique opportunity to help create the company's personality you want the jury to see during trial. With comprehensive planning the corporate representative deposition can be a powerful tool for the defense, something that can be used to develop evidence supporting narratives to be used during trial in addition to establishing facts.

Limiting the scope of the corporate representative ("CR") deposition:

As a preliminary matter, take steps to limit the scope of the CR's deposition as much as possible, by requesting that plaintiff counsel send specific interrogatories or a list of the topics. If an agreement cannot be reached regarding the appropriate topics and scope of testimony, file a motion for protection to preserve any applicable privileges, maintain confidentiality, and limit the areas of inquiry as much as possible. By agreement or court order, seek a protective order to maintain confidentiality of testimony and documents that contain proprietary or otherwise confidential information.

Selecting the appropriate corporate representative:

Are they qualified? The person who will be the best CR should have a broad skillset that includes appropriate education, experience, personality, speaking ability, understanding and commitment to the process.

Do they have experience testifying in deposition or trial? Prior experience as a witness may be helpful because they better understand the process. Remember, they will likely have to respond to questions about any prior testimony. Prior testimony also allows you to assess their performance as a witness, to consider whether they presented well and succeeded in the role or whether they struggled, seemed uncomfortable, and may cause you to consider another option.

Is their position in the company appropriate in context to the matter? In federal court the CR should be an officer, director, or managing agent of the organization. Someone in the appropriate position in the company will more likely be invested and engaged in the litigation process.

Consider what they know compared to what they will have to learn. The CR is not required to have personal knowledge of every issue and document that may be addressed during the deposition or trial. However, if they are already knowledgeable about the product, transaction, or incident at issue in the litigation, they will have a larger database of information at hand that can be used to

anticipate a line of questioning and respond preemptively when possible.

What can they learn? Consider the scope of the issues outlined in the deposition notice and the number of related documents. Depending on the person's role in the company and whether they were previously familiar with the material, it may not be possible for a particular person to prepare adequately in the time you have. Unfortunately, many times the person with background knowledge about the issues and documents may not be the best CR for other reasons.

Do they listen well? Engaged listening in a deposition or trial is more than just hearing the question, it involves understanding the pending question and how it, along with the prior questions and anticipated next question, fits into context with the issues in the case. Understanding the context of a question can help the CR respond to the question proactively in a way that is consistent with the themes of the defense.

Can they control their emotions? A flat affect is not particularly engaging, but emotional outbursts or mannerisms that clearly show when a witness is flummoxed are not helpful either. The CR represents the company's personality, so visualize what the company would sound like, how it would present, etc. if it could talk. You want a CR who sounds like and presents like the company, and who is emotionally controlled and reliable.

Are they professionally credible? Consider whether the person failed to obtain appropriate professional certifications, changed jobs without explanation, was terminated from another company, has written papers or given presentations that are inconsistent with common thinking about an issue.

Are they personally credible? Of course, you must consider whether the person has a criminal history, but there may be other things that could impact their credibility. Review their LinkedIn page and other social media for accuracy and to confirm whether there are misrepresentations. Unfortunately, someone's personal positions that have been disclosed publicly may be a source of effective cross examination or may impact their credibility.

Are they likeable? As a representation of the company's personality, it would be helpful if the CR is likeable. This does not mean overly bubbly but should be the appropriate personality for the specific company they represent.

Are they relatable? The CR should be well qualified and prepared to give the testimony but should not be condescending or smug. The CR should be careful to not use jargon that lay people may not understand. You can explain complex ideas with simple language. Working on how to present your positions with simple clear language is helpful not only to prepare the CR for testimony but is helpful to prepare your discovery plan and is imperative to present your case at trial.

How are they perceived? The CR (and hopefully all your own witnesses) must be both honest and perceived as honest. We have all seen instances, today more than ever before, where a person says something that is factually accurate and objectively honest, yet they are not believed. Unfortunately, we have also seen instances when a person says something that is objectively false, but they say it with such conviction, with such emotional appeal, that it is believed.

Are they willing to spend the time for prep and deposition? Reviewing documents and talking with others in the company about the deposition topics is time consuming, especially if the subject matter does not involve the person's role in the company. Add to that the deposition preparation sessions, the deposition itself, and possibly attending trial, and the time investment may be significant.

Do they understand the significance of the role they have been asked to play, or is this just some bothersome litigation they are being dragged into? Attitude is everything. The CR must understand the significance of the role of representing and speaking on behalf of the company in litigation. The most compelling witness is engaged in and cares about the subject matter and the company.

Do they speak well? The CR should be able to articulate the company's position very well to a layperson. They must understand any technical material that is involved and be

able to explain it in everyday language without a bunch of technical jargon. The CR should have a reassuring demeanor and the ability to quickly adjust their testimony in response to cross-examination.

Are they comfortable being filmed? The CR deposition will likely be filmed and given most communication is nonverbal, the CR must be comfortable being filmed. There will be questions during the deposition that the CR may not have expected or when they feel stuck and the CR must be prepared to maintain their composure and not react with an expression of shock, fear, or anger. The CR may need to attend trial in person and/or testify live during trial and maintain the same level of professionalism in front of the live jury.

Designate multiple witnesses if necessary. Designating multiple CRs results in more total deposition time, risks conflicts between witnesses, and risks more unhelpful transcript. However, sometimes the topics are so broad that it only makes sense to use more than one witness. Consider not only the characteristics of the individual prospective CR but also how their characteristics fit with any other prospective CR. Hopefully, between the two people you will have broad coverage of knowledge and abilities that will give you a powerful arsenal to represent the company.

Preparing the corporate representative:

Meet multiple times. How much preparation is necessary varies depending on the

breadth of the topics at issue, how many documents there are, prior experience of the CR, and their personality. Preparing for testimony is not like cramming for an exam. Sessions of no more than two hours are good because after two hours of active listening, etc., a person's attention starts to wane. Also, the CR's mind will subconsciously continue thinking about the issues you discussed, and often they come up with questions or strategies that you will discuss in the next session.

Allow time to replace the witness if necessary. Start with at least two 2-hour sessions, with the first session more than two weeks before the deposition. After talking through the topics and doing some practice questions it may become apparent that this is not the appropriate person to be the CR and you want to be in a position where you can identify someone else as the CR.

Schedule as many sessions as necessary for the witness to feel confident. Preparation with the CR should continue until the attorney and the witness both agree the CR is ready. The goal is for the CR to not hear any questions during the deposition or testimony that were not discussed during preparation sessions.

Discuss plaintiff's claims and defendant's defenses, focusing on the elements and issues that could be raised during the deposition or testimony. Talk through the issues you expect plaintiff will raise based on the topics in the deposition notice, and how

to inject defense positions and themes in their responses. Also focus on the evidence and arguments that support the company's affirmative defenses, help to defuse juror anger, address damages, etc. Knowing most cases do not go to trial, doing a brief direct examination may be useful in negotiation or mediation to emphasize the strength of your position.

Describe plaintiff counsel's personality and style. Every plaintiff attorney has a deposition style. Some are very personable, and the CR must be aware and conscious to not let their guard down and think that if they can just explain the case to the plaintiff attorney, he will dismiss the case. Others are very aggressive and hostile and can rattle the CR. Have the CR watch video or read prior transcript of the plaintiff attorney questioning a witness if possible, or practice questioning the CR using the plaintiff attorney's aggressive style, so the CR gets comfortable with it and remains calm and focused on your game plan.

Avoid being bitten by the reptile. Thorough examination of strategies to address reptile tactics is beyond the scope of this paper. However, keep in mind that reptile tactics are intended to create simple rules and principles that on the surface seem true and are difficult to argue against (a company should keep customers safe, should not endanger its employees, etc.). A CR must be thoroughly prepared to respond to reptile style questions because it is not intuitive.

Practice cross examination, make the witness uncomfortable. Given that the large majority of human communication is nonverbal, the CR must be prepared for difficult questions, times when they do not know the correct answer, and when they may get boxed in based on their response to a prior question. Practicing cross examination and making the CR uncomfortable is the only way they can become more comfortable in that circumstance and develop strategies about how to respond, pivot, divert, or otherwise get out of a difficult position.

Anchoring facts. Sometimes a simple yes or no answer can sound disingenuous, but if the witness includes a few ancillary, seemingly irrelevant, facts it can give context and credibility to the answer. For example, if asked “were you present for the conversation” the witness could simply say “yes” or they could give more context, such as “yes I know I heard the conversation because I was working late because I had tickets to show that evening and did not want to go him and return to the city”.

Basic fact traps. Most preparation with the CR will focus on the primary and most difficult issues in the case, but sometimes a witness can stumble over a question about something simple that was not part of the preparation and can cause them to lose credibility. For example, the CR could be knowledgeable responding to questions about the company’s design and safety history of a product, but when asked when the product was first introduced to the

market, or what product is its main competition, have to concede they do not know.

Physical presentation and demeanor. As discussed above, the CR should be relatable, not condescending or smug, and should present as you would want the company to present if it could take the stand and testify for itself.

Positive affirmative testimony versus defensive testimony. A witness can respond to a question in a defensive tone and posture which sounds less credible, more “guilty”, or can respond to the same question with positive affirmative testimony. Inject defensive positions and helpful facts in responses even if part of the response is not helpful.

How does the witness testimony fit in context with the claims and defenses? The better the CR understands the topics in the deposition notice and how they fit in context to the claims and defenses in the litigation, the better prepared they will be to anticipate issues and questions and give answers that preemptively address plaintiff’s positions.

Promote the company’s personality, history, character, positive impact to customers, the community, and the world. The CR must show that the company is more than just a profit-seeking monster on paper, and that it is made up of people who are doing their best to provide products or services to other people just like those serving on the jury. The CR should present a positive corporate

culture, and that its people are proud of the work they do and how it positively impacts customers and the world.

Identifying the appropriate CR involves weighing numerous characteristics, including their background with the company, personality, speaking ability,

understanding and commitment to the process, and their mental agility to think ahead about what issues the questions are addressing. Assessing a person's abilities in these areas is not simple, but having a plan that considers these areas can help ensure the company presents its best face to opposing counsel and to the judge or jury.

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