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How to Prepare Your Executives to Testify

Anna Rotman and Autry Ross, Texas Lawyer

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In complex litigation, depositions by high-level executives are often the most important event in the discovery process. These depositions can be high-stakes affairs. So, if an executive comes across as combative or arrogant, or even worse, provides damaging testimony in the form of embarrassing "sound-bites," the best-laid case strategies can be torpedoed. Expensive settlements and bad publicity can follow on the heels of such disastrous performances.

Given the potential risks and rewards of C-level depositions, what are the best strategies for counsel tasked with ensuring a solid performance from the witness? Here are some points to bear in mind:

1. Understand why executives make poor witnesses. Executives have often successfully scaled the corporate ladder due to their abilities to think strategically, control the room, delegate to others, and exude confidence. These qualities are of little use in the witness chair where witnesses are on their own, minute details matter, answering—not asking—questions is the drill, and confidence can be perceived as arrogance. For perhaps the first time, an executive is subject to vigorous examination concerning her memory, motives, and business judgment. That can create a natural tendency to "lash-out" or treat opposing counsel with condescension. Counsel must help executive witnesses to recognize and rein in those instincts.

2. Deliver the bad news. Counsel bears the unenviable task of convincing their C-level witnesses that the tactics that have served them well in the boardroom are likely to backfire in the courtroom, ultimately harming the case. Emphasize that the role of a testifying executive, like any other witness, is to be an "answerer," not a participant in a conversation, or an interlocutor who guides the discussion.

3. Get the executive engaged. Testifying executives have many demands on their schedule, which represent a challenge for setting aside sufficient time for preparation. It is critical that executives understand upfront that preparation required, both in terms of substance and presentation, and the goals of the exercise.

Start by explaining that a deposition testimony is treated exactly the same as testifying in open court before a judge and jury. Then, provide background on the judge and the jury pool so that the witness knows her audience. Witnesses must understand that expectations will be high. Jurors, in particular, are likely to expect that executives know all about the company's business, and will question the witness's credibility and forthrightness if she repeatedly answers, "I don't recall" or "I don't know." Equally embarrassing is the executive who claims the company followed its usual procedures, but doesn't know their terms.

4. Teach the drill. To demystify the process and set expectations, it is useful to explain the logistics of the deposition early on. Where will it be; how long will it last; who will attend; what should (or shouldn't) the witness bring; what should (or shouldn't) the witness wear; the role of the court reporter; how to control the pace; how objections work; how privilege works; when the witness can consult with counsel, what tactics opposing counsel is likely to employ, and how the video and testimony could be used at trial. All of this will provide helpful context for executives as they learn the case.

5. Teach the case. All deposition witnesses are entitled to a clear explanation of the issues they are expected to address. More than with lower level employees, executives' credibility can be effectively undermined if they don't exhibit a detailed knowledge of the facts and the themes.

- Emphasize case themes: From an informational standpoint, it helps the executive understand case issues in a concise, comprehensible way. Case themes, such as "fairness" or "honesty," helps build an overall case narrative and at the same time helps tie the witness to that story.
- Deal with bad facts: Where bad facts are obvious and cannot be denied, the C-level witness should address those mistakes in a non-defensive and frank manner. Juries can accept the mistakes are made, particularly where corrective measures follow.
- Do your homework: Counsel should put together background information about the executive, combing through agency filings, media reports and social media. A well-prepared opposing counsel will not leave these rocks unturned, so the witness needs to be prepared to address personal topics that they may seldom discuss, such as their compensation, where they own homes, and where they went to school.

6. *The intangibles.* The final piece of the puzzle—before the practice starts—is to discuss with the executive how she wants to be perceived by and what she wants to communicate to the jury. This can be accomplished by a simple exercise in which the executive is asked to imagine herself at her own funeral and three important people from her life are going to speak. Whom would she choose to speak and what would she want those people to say? The answers your client provides reflect important personal core values and these now become the "filter" through which all her depo answers should pass before the words are spoken. For example, if the executive would want to be remembered as someone who was always respectful of others, respect will be the filter she employs during the deposition, reminding her to be respectful of opposing counsel. This exercise also makes the witness drop her guard and now counsel and client can work together on strategies to meet these presentation goals. Now, presentation techniques like how the client talks, dresses and sits make sense because they all fit together with those core values in one package.

7. *Feedback, feedback, feedback.* Testifying executives will benefit from a "practice" deposition, which includes videotaped cross-examination. To simulate more realistic conditions, use an examiner who has not been involved in preparing the witness and is prepped to imitate opposing counsel's tactics. Those sessions should progress from simple and non-threatening to more complex and confrontational. They should include the "bad facts" questions, the complex questions that require a simple answer, and even embarrassing questions that weren't previously prepped.

Deposition preparation is always a time-consuming and difficult process. That's doubly true for the depositions of corporate executives where expectations and risks both often run high. With the right preparation program though, counsel can convey the skills and substantive knowledge needed for effective testimony—and for avoiding those embarrassing headlines.

Anna Rotman is a trial partner and Autry Ross is of counsel with Yetter Coleman. Anna is president of the Harvard Law School Alumni Association of Houston. She handles contract, business-tort and antitrust claims for plaintiffs and defendants. Autry concentrates his practice on complex commercial matters, including securities and antitrust. He is a former federal prosecutor.

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