Proskauer

Deposition Prep and Presentation

October 7, 2022

Company witness testimony can be the most compelling — or the most challenging — evidence in any case. Preparation is key. Yet conventional preparation techniques are often ineffective and short-sighted. Partner Susan Gutierrez discusses her forward-looking approach to preparing executives and company witnesses for depositions that maximize confidence and promote case themes.

Transcript

> **Susan Gutierrez:** There is a school of thought about how to best prepare a company witness for deposition. There are misconceptions about what that means: what is and is not effective for preparing, and ultimately, what is and is not effective for the deposition itself. I'm going to outline three of those misconceptions.
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> The first misconception relates to a witness's recall—their ability to remember and describe events, facts, documents, or dates. Many lawyers are taught that the more a witness says in a deposition, “I don't recall” or “I don't recall specifically,” the better. Our practice group does not subscribe to that view. We use what is called the Memory Spectrum. The Memory Spectrum encourages and prepares witnesses to describe the quality of their memory. On one end of the spectrum is where the witness has absolutely no idea or memory of the answer. On the other end of the spectrum is where the witness is absolutely certain of the answer. Most people's memory, however, doesn't fall into either extreme. It falls somewhere in the middle. And that is when it's important to contextualize where one’s memory falls on the spectrum.

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Susan Gutierrez, Partner, Litigation

At trial, a jury may see a video of the deponent (the witness). And to hear that person saying—on a loop—"I don't recall," "I don't recall," "I don't specifically recall," can be devastating. Not just to that person's credibility, but to the credibility of the company and potentially to the case itself. In contrast, providing *context* to one's memory is both humanizing and much more believable. Contrast, for example, "I don't recall" with "I don't remember if it was November or December, but I do know it was around the fall." Providing context for the quality of one's memory ensures that your witness comes across as a believable, credible individual.

The second misconception is about answering the question asked, rather than the question the witness hoped had been asked. Our view—the way we prepare witnesses, is to answer the question in a concise manner, providing some context if necessary. For instance, in response to a question about whether a witness gave a particular instruction: "Yes, and the reason I gave that instruction is because the data supported it." The witness is providing a direct answer ("yes") followed by a very brief description that provides context.

The third misconception relates to showing the witness documents during preparation. In our practice, we believe that part of preparation is engaging the witness with the themes and documents that they will be confronted with in a deposition and potentially at trial. Because above all else, the witness needs to be confident and comfortable. And to do that, our group strives to emulate as much as possible what the deposition (or trial) will really be like, so that when that witness sits down to provide testimony, they will have been adequately, thoroughly prepared.

Related Professionals

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