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CONCURRENT SESSION

Coaching Your Non-Expert Witness

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Coaching Your Non-Expert Witness for Depositions and Trial

OUTLINE

Contents

Outline – Coaching Your Non-Expert Witness for Depositions and Trial

I. Educating Your Witness on the Case

a. In general, allot about three hours of prep time for each anticipated hour of testimony.

b. Know your witness.

   i. To properly educate your witness, you should know them as a person.

   ii. Build rapport with your witness; it will help put her at ease.

   iii. Observe the witness's body language. E.g., does she appear confident or nervous?

   iv. Observe the witness's vernacular. Does she use particular language or jargon when describing things to you?

   v. How familiar is your witness with depositions / trials? Has she testified or been deposed before? Does she have any past experience with opposing counsel or the judge?

   vi. Does your witness recall details from memory well?

c. Confirm the substance of what your witness knows about the case.

   i. Have the witness tell you the story as a narrative without interruption.

   ii. Ask clarifying questions to better understand her testimony. How did she learn all of that information?

   iii. Ensure that the witness has told you everything she knows. Sometimes a witness may withhold information believing it is not relevant or important when in fact it could be very useful to your case.

   iv. Repeat the witness's story back to them as you understand it, having them clarify any misconceptions.

d. Educate your witness on the case.

   i. Explain the theme of the case in addition to factual and legal matters at issue. When a witness understands the full narrative, she is more likely to provide intelligent testimony and answers to unexpected questions.

ii. Educate witness on prior depositions, discovery responses, prior statements, applicable protective orders, and relevant documents. Reviewing relevant documents will help the witness if she must deal with unwelcome surprises during cross-examination.

iii. Inform the witness of relevant local rules, customs, and/or practices, including those of the judge.

iv. Explain where the witness fits in. Explain her role in the case and why her testimony is relevant. Understanding the "big picture" will help the witness understand how she can convey a more coherent narrative.

v. Explain the opponent's case, including his factual theory, opponent's style and demeanor, and any discrepancies or contradictions in evidence—but proceed with caution. This is a gray area: a heads-up may be warranted but if one isn't careful this can veer into impermissible coaching.

e. The cardinal rule: tell the truth.

i. Your witness should provide answers based on her firsthand, personal knowledge, and not secondhand knowledge / hearsay.

1. Federal Rule of Evidence 602 requires a witness to have personal knowledge of the facts she testifies to. Generally, this means the witness was present at and observed all events she testifies about.

2. Secondhand knowledge is facts or knowledge that was not perceived by the witness herself and is typically inadmissible from lay witnesses.

3. Federal Rule of Evidence 701 requires a witness to have enough personal knowledge to make reliable conclusions.

ii. Do not guess or speculate.

1. Your witness should understand that this is not a test—it is okay not to know an answer. Advise her not to say "I think" or "I guess." Explain that she can answer if she is confident about her answer.

iii. Advise of possible consequences for failing to tell the truth.

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1. Lying under oath is perjury, which is a crime. If a witness is found guilty of perjury, she could potentially face jail time, probation, or be forced to pay fines.

2. Witness credibility is key to the case.

f. Know the difference between a proper education of the witness v. improper coaching.

i. "The line that exists between perfectly acceptable witness preparation on the one hand, and impermissible influencing of the witness on the other hand, may sometimes be fine and difficult to discern." *State v. Earp*, 319 Md. 156, 171 (1990).

ii. "An attorney must respect the important ethical distinction between discussing testimony and seeking improperly to influence it." *Geders v. United States*, 425 U.S. 80, 90 n.3 (1976).

iii. A lawyer may:

1. Inform the witness of the questions that will be asked on direct examination, and may also advise the witness as to any questions that may be asked on cross examination. Steven Lubet, *Expert Witnesses: Ethics and Professionalism*, 12 Geo. J. Legal Ethics 465, 471 (1999).

2. Advise when an answer is misleading, confusing, unclear, or likely to be misconstrued; suggest use of effective language and avoid jargon; suggest other ways of helping a witness convey her meaning.

3. Discuss the witness's recollection and probable testimony.

4. Reveal to the witness other testimony or evidence that will be presented and ask the witness to reconsider the witness's recollection or recounting of events in that light.

5. Discuss the applicability of law to the events in issue.

6. Review the factual context into which the witness's observations or opinions will fit.

7. Review documents or other physical evidence that may be introduced.

8. Discuss probable lines of hostile cross-examination that the witness should be prepared to meet. Restatement (Third) of Law Governing Lawyers § 116 cmt. b.

iv. A lawyer may not:

1. Influence the witness to alter testimony in a false or misleading way. *Ibarra v. Baker*, 338 F. App's 457, 465 (5th Cir. 2009) (citing John S. Applegate, *Witness Preparation*, 68 Tex. L. Rev. 277 (1989)).

2. Prepare a witness to give a rehearsed answer or suggest wording that would cause resulting testimony to be false.

3. Elicit false testimony.

4. Stay silent when aware that a witness has testified falsely.

5. Instruct a witness to say "I don't know" when the witness knows the answer to the question.

6. Encourage deliberately evasive answers.

v. Know what you must do if you believe the witness is not planning on telling the truth (or has lied already). You must take reasonable remedial measures, and may be required to disclose it.

1. Model Rule 1.2(d): A lawyer may not assist or counsel a client to engage in conduct the lawyer knows is criminal or fraudulent.

2. Model Rule 3.3(a)(3): A lawyer may not knowingly offer evidence the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

a. Consider a "noisy withdrawal"—i.e., not a full disclosure but making clear to the judge that you cannot represent the client anymore.

3. Model Rule 3.4(b): A lawyer shall not falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law.

4. Remedial measures include disclosure to the court, requesting that evidence be stricken, and recalling the witness to correct the testimony. Restatement (Third) of Law Governing Lawyers § 120(h).

5. The lawyer should act immediately. For example, one court imposed sanctions on an attorney for waiting three days to inform the court that his client had provided false statements to the court. *Centauri Shipping Ltd. v. W. Bulk Carriers KS*, 528 F. Supp. 2d 197, 202 (S.D.N.Y. 2007).

Outline – Coaching Your Non-Expert Witness for Depositions and Trial

II. Educating Your Witness on the Process of Testifying

a. Remember that witnesses usually are not familiar with the process of testifying.

b. Educate your witness on procedure.

   i. Your witness should know to whom she will be speaking.

      1. Explain who will be present and to whom she should address her answers. Usually she should speak to the questioner, but she should know there will be others present, such as a judge, jury, opposing counsel, videographer, court reporter, etc.

   ii. Explain the difference between bench and jury trials, if testifying at trial. She may need to answer questions from the judge.

   iii. Explain the difference between direct and cross-examination.

c. Instruct your witness on how to answer questions generally. Your witness should understand:

   i. She should take her time and listen carefully to each question, think about what each question calls for, and think through an answer before speaking.

      1. Explain that it is important to wait until the question is completed, and if needed, to wait a two or three seconds. This will give her time to understand the question fully as well as to give you time to object as needed.

      2. Explain that this is not a regular conversation.

   ii. She should provide the "shortest correct answer" to each question.*

      1. Explain that she should provide appropriate responses. For example, if the question calls for a simple "yes" or "no," simply provide such an answer. It is not rude to provide short answers if they are complete. Common examples:

         a. "Do you know what time it is?" The answer here should be yes or no, not the actual time.

         b. "Go Fish" example: "Do you have any queens?" The answer will be yes, or no, and you won't tell the opponent what you do have in your hand.

2. Generally, she should rely on you to ask her to expand on her answers, if needed.

3. * More fulsome answers may be advisable in certain situations to allow the witness to explain her position more clearly.

    a. For example, if preparing for a deposition in a case where trial is very unlikely (e.g., high chance of settlement or resolution on motion practice), the best type of answer may provide information that is fairly responsive and not just limited to the minimum. The benefits of a more fulsome response include (1) saving time, (2) providing a more comfortable way for the witness to respond without appearing defensive, (3) increasing the witness's credibility if evaluated by a later decision maker, (4) the transcript will read as more forthcoming and natural, and (5) the response may provoke less probing by opposing counsel.

    b. For trial testimony, you might encourage the witness to provide a quick explanation rather than just a "yes" or "no" because trial offers an opportunity for the witness to explain her version of the story.

    c. If a lengthy explanation is required, the witness should ask opposing counsel for permission to explain. Explain to your witness that if opposing counsel denies the request, she will have the opportunity to explain on redirect.

iii. She can and should say—if true—"I don't understand the question," "I don't know," or "I don't recall."

1. Explain the difference between when to say "I don't know" or "I don't recall" (or "I don't currently recall"). An "I don't know" answer is best if the question calls for something that is clearly not in the witness's personal knowledge.

iv. She should not guess, speculate, or try to figure out an answer (unless she is specifically asked to do so).

1. Explain that she should say what she knows and she should not worry about what she does not know.

v. She should not volunteer information.

The shortest correct answer is responsive and does not volunteer extraneous information. Give her an example of a yes or no question.

vi. She should answer questions unless otherwise instructed by you.

1. She should understand that she should not on her own refuse to answer a question.

2. If instructed not to answer by you, your witness should be prepared to state, if asked, "On the advice of my counsel, I decline to answer the question."

vii. That she is there to answer questions and not "fight" with others.

1. Explain that she should rely on you to "clean up" if the other side mischaracterizes something, and that she should rely on you to seek out the information that the witness believes is relevant by the proper use of questions.

viii. That she should ask for a break if appropriate.

1. Explain that the appropriate reasons for a break range broadly, including needing to use the bathroom, checking on kids, or just not being sure on what to do about a question that may deal with personal information.

d. Prepare your witness so she understands appropriate demeanor when testifying.

i. She should maintain appropriate eye contact with the questioner.

1. If at a video recorded deposition, instruct the witness to generally answer questions by looking at questioning counsel, but for longer answers to turn to the camera and provide the explanation to the camera (like a TV weatherman).

2. Use the same weatherman approach for testimony at a jury trial and turn to the jury for longer answers.

3. If at a bench trial, instruct the witness to address only the questioning counsel. Many judges prefer not to be addressed directly by witnesses.

ii. She should speak clearly and audibly and remain calm.

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1. Be aware of your witness's speech and demeanor habits (e.g., gesturing, fidgeting, mumbling). Assist her in avoiding those habits as necessary. A calm and pleasant demeanor enhances credibility.

2. Advise your witness not to joke around.

iii. Prepare your witness for aggressive and/or hostile lines of questioning on cross-examination. Consider enlisting the assistance of a colleague for difficult lines of questioning to avoid straining the relationship between you and the witness.

iv. Advise your witness to dress well and appropriately for the occasion.

1. Consider the image that you want your witness to project. Certain items may or may not be appropriate for the occasion (e.g., arriving in a limo with bodyguards, wearing huge diamond jewelry).

v. She should pay attention, even while not testifying.

vi. She must behave at all times—even in the bathroom or parking lot. You never know who is watching.

1. Warn your witness that she should not speak to or acknowledge in any way the jurors during a jury trial. She is not being rude by ignoring them, she is just being safe.

vii. She should bring nothing to the deposition.

1. No documents, notes, or any other paperwork. Explain that opposing counsel may be able to review anything the witness brings.

e. Address your witness's anxieties.

i. Give your witness the opportunity to express concerns and address each concern in a positive manner.

ii. Build up your witness's confidence with positive reinforcement.

1. Emphasize that anxiety is natural, and so are mistakes, and that mistakes can be corrected at later opportunities.

f. Emphasize important instructions by:

i. Repeating and confirming your witness heard each instruction.

ii. Providing examples.

Outline – Coaching Your Non-Expert Witness for Depositions and Trial

III. Preparing for Rule 30(b)(6) / Corporate Rep. Depositions[1]

a. Step 1 – Understand the Purpose and Requirements of a Rule 30(b)(6) Deposition.

i. Rule 30(b)(6) requires an organization to produce one or more witnesses to testify on behalf of and with all the knowledge reasonably available to the organization with respect to topics set out in a subpoena or notice of deposition.[2]

ii. Note the distinction between a Rule 30(a) deposition and a Rule 30(b)(6) deposition. When an individual is an officer, agent, or employee of an organization, pursuant to Rule 30(a) they may be designated for deposition by the opposing party. When a party notices a Rule 30(b)(6) deposition, the organization has the discretion to choose who will be its representative or designee.

iii. Rule 30(b)(6) depositions avoid "bandying," whereby several officers or agents of an organization deny having personal knowledge of facts that are clearly known by persons within the organization.[3] They also assist the organization by preventing unnecessarily large numbers of officers and agents from being deposed.

b. Step 2 – Review the Notice of Deposition.

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[1] Rule 30(b)(6) of the Federal Rules of Civil Procedure provides:

> In its notice or subpoena, a party may name as the deponent a public or private corporation, a partnership, an association, a governmental agency, or other entity and must describe with reasonable particularity the matters for examination. The named organization must then designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on its behalf; and it may set out the matters on which each person designated will testify . . . The person designated must testify about information known or reasonably available to the organization . . .

[2] *See U.S. v. Taylor*, 166 F.R.D. 356, 361 (M.D.N.C. 1996), quoting 8A Charles A. Wright, Arthur R. Miller and Richard L. Marcus, FEDERAL PRACTICE AND PROCEDURE §2103, at 30 (2nd ed. 1994) as follows: "Obviously it is not literally possible to take the deposition of a corporation; instead, when a corporation is involved, the information sought must be obtained from natural persons who can speak for the corporation."

[3] *QBE Ins. Corp. v. Jorda Enters., Inc.*, 277 F.R.D. 676, 688 (S.D. Fla. 2012) (explaining also that the purpose of Rule 30(b)(6) "is to curb any temptation by the corporation to shunt a discovering party from 'pillar to post' by presenting deponents who each disclaim knowledge of facts known to someone in the corporation"). *See also U.S. v. Taylor*, 166 F.R.D. 356, 360 (M.D.N.C. 1996).

i. Determine whether the requesting party has identified topics with reasonable particularity. Vague, overly broad and excessive requests can be difficult or impossible to prepare for and defend.

ii. Be prepared to seek a protective order. The failure of the requesting party to describe with reasonable particularity the matters for examination is a basis for objecting to the request and seeking a protective order under Rule 26(c). A subpoena which is so overly broad as to be onerous can be quashed or modified.[4]

iii. In *Calzaturficio S.C.A.R.P.A s.p.a. v. Fabiano Show Co.*, 201 F.R.D. 33, 38 (D. Mass. 2001), the court noted that if there is no way for Rule 30(b)(6) witnesses to educate themselves as to certain areas of inquiry, counsel for the organization should give advance notice to the opposing party about which topics the designees will be able to testify.[5]

c. Step 3 – Conduct the Necessary Factual Investigation.[6]

i. The organization is required to prepare the witness with information "reasonably available" or known to the organization. Because of this:

1. Rule 30(b)(6) witnesses do not need personal knowledge of the topics at issue. Rather, he/she testifies to the organizations knowledge. This testimony must be

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[4] In *New England Carpenters Health Benefits Fund v. First Databank, Inc.*, 242 F.R.D. 164, 166 (D. Mass. 2007), the court noted that absent agreement, a party who for one reason or another believes a Rule 30(b)(6) notice of deposition is defective, he/she must seek a protective order. It is not proper practice to simply refuse to comply with the notice.

[5] *Calzaturficio S.C.A.R.P.A.* quoted ABA CIVIL DISCOVERY STANDARDS at §19(g) which stated "[w]henever an officer, director or managing agent of an entity is served with a deposition notice . . . that contemplates giving testimony on a subject about which he . . . has no knowledge or information, that individual may submit, reasonably before the date noticed for the deposition, and affidavit . . . so stating and identifying a person within the entity having knowledge of the subject matter."

[6] *See Calzaturficio S.C.A.R.P.A. v. Fabiano Shoe Co., Inc.*, 201 F.R.D. 33, 36 (D. Mass. 2001) (quoting *United States v. Taylor*, 166 F.R.D. 356, 362 (M.D.N.C. 1996)), where the court stated:

> Rule 30(b)(6) explicitly requires [a company] to have persons testify on its behalf as to all matters known or reasonably available to it and, therefore, implicitly requires persons to review all matters known or reasonably available to it in preparation for the 30(b)(6) deposition. This interpretation is necessary in order to make the deposition a meaningful one and to prevent the 'sandbagging' of an opponent by conducting a half-hearted inquiry before the deposition but a thorough and vigorous one before trial. This would totally defeat the purpose of the discovery process.

distinguished from a mere corporate employee's, whose deposition is not considered that of the corporation.[7]

2. "I do not recall" is not valid testimony, as the witness is not testifying from personal knowledge, but organizational knowledge. However, when a corporation's designee legitimately lacks the ability to answer a listed question, and the corporation cannot better prepare the witness or obtain a substitute witness, then an "I do not know" response will be acceptable and, to a certain extent, binding on the corporation.[8]

ii. In order to prepare for a Rule 30(b)(6) deposition, the organization should derive information from:

1. A search of the files and documents within the organization's control;

a. Control does not require that the organization have legal ownership or actual physical possession of the documents. Rather, documents are considered to be under the organization's control when the organization has the right, authority, or practical ability, to obtain the documents from a non-party to the action.[9]

b. Be aware that the opposing party may be able to request "all documents reviewed in preparation for the deposition." In *F.D.I.C. v. Wachovia Ins. Services, Inc.*, 241 F.R.D. 104 (D. Conn. 2007) the court held that

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[7] *QBE Ins. Corp.*, 277 F.R.D at 688 ("The testimony of a Rule 30(b)(6) witness represents the collective knowledge of the corporation, not of the specific individual deponents."); *Taylor*, 166 F.R.D. at 361.

[8] *Id.* at 690. The court noted that "a corporation which provides a 30(b)(6) designee who testifies that the corporation does not know the answers to the question 'will not be allowed effectively to change its answer by introducing evidence at trial.'" *Id.* (quoting *Ierardi v. Lorillard*, No. 90-7049, 1991 WL 158911 at *4 (E.D. Pa. Aug. 13, 1991)). *See also Arkansas v. Hartford Casualty Ins. Co.*, No. 3:10-cv-322, 2014 WL 12321183 at *8 (S.D. Miss. Mar. 23, 2014) ("A nonmovant may not explain away contradictions between deposition testimony and a later affidavit on the grounds that its corporate designee was simply unprepared."); *QBE Ins. Corp.*, 277 F.R.D. at 690 ("If a corporation genuinely cannot provide an appropriate designee because it does not have the information, cannot reasonably obtain it from other sources and still lacks sufficient knowledge after reviewing all available information, then its obligations under the Rule cease."); *Taylor*, 166 F.R.D. at 361.

[9] *Calzaturficio S.C.A.R.P.A.*, 201 F.R.D. at 39 (quoting *Prokosch v. Catalina Lighting, Inc.*, 193 F.R.D. 633, 636 (D. Minn. 2000).

such a production was not precluded, notwithstanding *Spork v. Peil*, 759 F.2d 312 (2d Cir. 1985) where (i) the documents were not already in the opposing parties' possession through a prior document production, and (ii) the request was not limited only to those documents which the defending attorney revealed to the witnesses (the designee in preparing may have reviewed additional documents).

2. Interviews of current and former employees or others with knowledge;[10]

3. Documents produced in discovery;

4. Fact-witness testimony; and

5. Exhibits to depositions.[11]

iii. Preparation for a Rule 30(b)(6) deposition can clearly be a burden. The transaction at issue may have occurred years ago. Knowledgeable persons may have died. Memories may have faded. However, these difficulties do not absolve the organization from preparing its designated witnesses "to the extent matters are reasonably available."[12]

d. Step 4 – Select the Rule 30(b)(6) witness or witnesses.

i. The organization can select anyone to testify on behalf of the organization.

1. Rule 30(b)(6) witnesses can be officers, directors, managing agents, former employees, or outsiders hired by the organization hired to serve that purpose.

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[10] *See Berwind Prop. Grp. Inc. v. Envir. Mgmt. Grp., Inc.*, 233 F.R.D. 62, 65 (D.Mass. 2005) (requiring corporation to educate its witness about actions taken by former employees).

[11] *Calzaturficio S.C.A.R.P.A*, 201 F.R.D. at 37.

[12] *See Taylor* which involved CERCLA litigation. While the case was pending in 1989, the Rule 30(b)(6) deposition involved topics which covered time periods from 1959 through 1981. Most of the individuals with personal knowledge were either no longer employed by the organization or were deceased. *See also Calzaturficio S.C.A.R.P.A*, 201 F.R.D. at 37 ("Even if the documents are voluminous and the review of those documents would be burdensome, the deponents are still required to review them in order to prepare themselves to be deposed.").

2. Again, personal knowledge is not a requirement, therefore, the organization does not need to select the witness with the most knowledge of the facts at issue.

    a. In *QBE Ins. Co.* the court noted the following: "[M]any lawyers issue notices and subpoenas which purport to require the producing party to provide 'the most knowledgeable' witness. Not only does the rule not provide for this type of discovery demand, but the request is also fundamentally inconsistent with the purpose and dynamics of the rule. As noted, the witness/designee need not have **any** personal knowledge, so the "*most* knowledgeable" designation is illogical."[13]

ii. Witness testimony is not limited to facts of the case. Rather, the witness can also be required to testify as to the company's:

1. Subjective opinions/beliefs; and,

2. Interpretation of the facts.[14]

3. Further, note that some jurisdictions consider the Rule 30(b)(6) topics to be a mere minimum and not the maximum area subject to discovery, so the witness should be prepared on topics outside the scope of the listed topics (although with respect to those questions, the witness can answer that he/she does not know if, in fact, that is the case).

iii. Criteria and Personality Traits:

1. The witness should be experienced. His/her title and resume does not necessarily matter.

2. You do not want a witness who can be intimidated or flustered.

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[13] *QBE Ins. Corp.*, 277 F.R.D. at 688 (emphasis in original). In *QBE Ins. Co.*, the court further noted that individuals with personal knowledge may not be appropriate if "that witness might be comparatively inarticulate, he might have a criminal conviction, she might be out of town for an extended trip, he might not be photogenic (for a videotaped deposition), she might prefer to avoid the entire the entire process or the corporation might want to save the witness for trial."

[14] *Krasney v. Nationwide Mut. Ins. Co.*, No. 06-cv-1164, 2007 WL 4365677 (D. Conn. Dec. 11, 2007). *See also United States v. Taylor*, 166 F.R.D. 356, 362 (M.D.N.C. 1996) (The designee presents the corporation's "position," its "subjective beliefs and opinions" and its "interpretation of documents and events.").

3. The witness should:

    a. Have a good memory,

    b. Be articulate and confident, and

    c. Have the ability to commit time to preparation.

4. With respect to a Notice of Deposition, the organization can utilize more than one witness. However, per Rule 30(d)(1), with respect to a single witness, the deposition is generally limited to 7 hours, whereas, multiple witnesses each can be deposed for 7 hours.

e. Step 5 – Understand that there are consequences to not properly preparing a Rule 30(b)(6) witness.

i. The testimony of a Rule 30(b)(6) has evidentiary significance. In *Vehicle Market Research, Inc. v. Mitchell International, Inc.* 839 F.3d 1251 (10th Cir. 2016), the court quoting from 7 James William Moore et. al., MOORE'S FEDERAL PRACTICE – CIVIL §30.25 stated that:

> the testimony of a Rule 30(b)(6) deponent does not absolutely bind the corporation in the sense of a judicial admission, but rather is evidence that, like any other deposition testimony, can be contradicted and used for impeachment purposes. The Rule 30(b)(6) testimony also is not binding against the organization in the sense that the testimony can be corrected, explained and supplemented, and the entity is not "irrevocably" bound to what *the fairly prepared and candid designated deponent* happens to remember during the testimony.[15]

ii. Producing an unprepared Rule 30(b)(6) witness is tantamount to a failure to appear, subject to sanctions under Rule 37(d).[16]

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[15] *See also Sellers Cap., LLC v. Wight*, 2017 WL 3037802 at *4 (N.D. Ill. July 18, 2017) ("Rule 30(b)(6) testimony, however, 'is not a judicial admission that ultimately decides an issue' but, rather 'is evidence which, like any other deposition testimony, can be contradicted and used for impeachment purposes.'").

[16] *S*ee also *Black Horse Lane Assoc., L.P. v. Dow Chem. Corp.*, 228 F.3d 275, 305 (3d Cir. 2000) (A Rule 30(b)(6) witness who is unable to give useful information is "no more present for the deposition than would be a deponent who physically appears for the deposition but sleeps through it").

iii. If organization violates Rule 30(b)(6), the court can:

1. Direct that additional designees be named, prepared and deposed;

2. Direct that other designated facts be taken as established for purposes of the action;

3. Prohibit the disobedient party from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence;[17]

4. Strike pleadings in whole or in part;

5. Stay further proceedings until the order is obeyed;

6. Dismiss the action or proceeding in whole or in part;

7. Render a default judgment against the disobedient party; or

8. Treat as contempt of court the failure to obey the order.

f. Ethical Considerations

i. Be aware, and ensure the witness is aware, that you represent the organizational client and not the witness.

1. Model Rule 1.13.

ii. Know in advance if you are in an *Upjohn* or "control-group" jurisdiction.

1. *Upjohn*: privilege extends to any employee of the organization (or collective entity like a union) as long as the communication is for the purpose of obtaining legal advice.

2. Control-group: privilege extends only to individuals who can make legal decisions on behalf of the organization.

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[17] See, *QBE Ins. Corp. v. Jorda Enters., Inc.*, 277 F.R.D. 676, 681 (S.D. Fla. 2012) (Plaintiff precluded from offering any testimony at trial on the subjects which its designee was unable or unwilling to testify about at the 30(b)(6) deposition.).

Outline – Coaching Your Non-Expert Witness for Depositions and Trial

IV. Dealing with Documents

a. There is a difference between having a witness review a document and refreshing the witness's recollection, but it depends on the jurisdiction.

   i. With the latter, Federal Rule of Evidence 612 ***may*** apply; with the former, it does not.[18] *See e.g.*, *Aniero v. New York City Sch. Contr. Auth.*, 2002 WL 2577685, *2-*3 (S.D.N.Y. 2002) (documents used to refresh recollection of a witness must be produced).

b. Reviewing documents with a witness prior to deposition or trial:

   i. In certain jurisdictions, if a witness merely reviews a document under the direction or in consultation with her attorney, there is no basis to disclose to opposing counsel if:

      1. The witness finds the document to be consistent with her recollection; or

      2. The witness finds that she has no recollection of the document. *See e.g.*, *Bank Hapoalim v. American Home Assurance Co.*, 1994 WL 119575 (S.D.N.Y. 1994).

   ii. Note that in other jurisdictions, actual refreshment is immaterial as long as the document was used to attempt to refresh the recollection of the witness. *See e.g.*, *Audiotext Comm'ns Net. Inc. v. U.S. Telecom, Inc.*, 164 F.R.D. 250, 254 (D. Kan. 1996).

c. Strategies for refreshing a witness's recollection with a document prior to the deposition or trial:

   i. Prepare the witness without use of any documents.

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[18] Rule 612 of the Federal Rules of Evidence, "Using Writing to Refresh a Witness," states:

(a) Scope. This rule gives an adverse party certain options when a witness uses a writing to refresh memory: (1) while testifying; or (2) ***before testifying, if the court decides that justice requires the party to have these options.*** [Emphasis added.]

(b) Adverse Party's Options; Deleting Unrelated Matter. Unless 18 U.S.C. § 3500 provides otherwise in a criminal case, an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness about it, and to introduce in evidence any portion that relates to the witness's testimony. If the introducing party claims that the writing includes unrelated matter, the court must examine the writing in camera, delete any unrelated portion and order the rest be delivered to the adverse party. Any portion deleted over objection must be preserved for the record.

(c) Failure to Produce or Deliver the Writing. If a writing is not produced or delivered as ordered, the court may issue any appropriate order.

Outline – Coaching Your Non-Expert Witness for Depositions and Trial

1. Avoids any risk of having to disclose documents to opposing counsel.

2. Ethical concerns: potential difficulty complying with the following rules and ethics opinions:

    a. Model Rule 1.3, Diligence: "A lawyer shall act with reasonable diligence and promptness in representing a client."

    b. Model Rule 3.3(a), Candor Toward the Tribunal: "A lawyer shall not knowingly… make a false statement of fact or law previously made to the tribunal by the lawyer… or offer evidence that the lawyer knows to be false."

    c. District of Columbia Bar, Ethics Opinion No. 79 (1979), p. 139: "A lawyer who did not prepare his or her witness for testimony, having had an opportunity to do so, would not be doing his or her professional job properly."

ii. Recommended Strategy: Where possible, only show your witness documents that have been produced in discovery or exhibits that will be submitted to the court, in no particular order (in case the order would reveal information about your strategy).

1. Avoid allowing the witness to review lawyer-prepared summaries to refresh their recollection, which can potentially waive the work-product doctrine and subject the summaries to disclosure.

2. The "Fourteen Document Rule:" The National Institute of Trial Advocacy (NITA) recommends that attorneys present and prepare witnesses with no more than 14 documents per issue, both at depositions and at trial.[19]

    a. NITA also recommends organizing documents chronologically within a topic or issue to assist the witness with establishing cause and effect.[20]

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[19] David Malone & Peter Hoffman, The Effective Deposition: Techniques and Strategies That Work, 4th Ed., LexisNexis (2012).

[20] *Id.*

d. Instruct the witness on what to do when presented with a document at the deposition/trial.

   i. Explain that the witness should never rely on her memory regarding the contents of the document. Instead, she should examine it carefully and in its entirety, including any table of contents, to make sure it is complete; review related portions of text, not just those highlighted by the questioner; point out any other portions that change the meaning of the question/answer.

   ii. If the document is inconsistent with the witness's recollection, she should read the entire document to herself to determine if and why it is inconsistent.

   iii. The witness should avoid parroting language from documents produced by opposing counsel.

   iv. If the witness is asked "Have you reviewed any documents in preparation for this deposition/trial?" or "What did you do to prepare for your deposition/testimony?":

      1. Advise the witness that she should answer truthfully, i.e. "Yes, I have reviewed documents with my attorney in preparation for this deposition/trial."

      2. Advise the witness in advance not to identify particular documents (protected by the work-product doctrine), unless the questioning attorney can establish that the document did in fact refresh the witness's memory on a relevant point.

e. Additional Ethical Consideration: Advise the witness of the need to preserve documents.

   i. The duty to preserve documents is generally triggered when litigation is "reasonably anticipated." *Rimkus Consulting Group, Inc. v. Cammarata*, 688 F. Supp. 2d 598, 612-13 n. 7 (S.D. Tex. 2010).

   ii. The meaning of "reasonable anticipation of litigation" varies by jurisdiction, but in general, reasonable anticipation of litigation arises when a party knows there is a credible threat that it will become involved in litigation. *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 217 (S.D.N.Y. 2003).

Outline – Coaching Your Non-Expert Witness for Depositions and Trial

V. Privilege Issues

a. Federal law governs questions of privilege in federal question cases, which includes issues arising under the Bankruptcy Code. Fed. R. Evid. 501.

b. Familiarize the witness with any relevant privileges, including:

i. The **attorney-client privilege:** protects confidential communications between an attorney and a client that are made for the purpose of obtaining or providing legal advice, including: a client's request for legal advice from her lawyer; a client's communication to her lawyer of facts on which the lawyer must give advice; and the lawyer's legal advice. *See e.g.*, *Brennan Ctr. for Justice at N.Y. Univ. Sch. of Law v. U.S. Dep't of Justice*, 697 F. 3d 184, 207 (2d Cir. 2012). It protects virtually all modes of communication, including: written communications; oral communications; physical gestures, such as nods; and the client's actions, such as transferring documents. *See e.g.*, *Haines v. Liggett Grp., Inc.*, 975 F.2d 81, 90 (3d Cir. 1990).

ii. The **work-product doctrine:** protects documents and tangible things that are prepared in anticipation of litigation by (or for) a party or its representative. Fed. R. Civ. P. 26(b)(2)(C). However, these materials can be discovered if a party shows a substantial need for the materials to prepare his case, and he cannot, without undue hardship, obtain their substantial equivalent by other means. Fed. R. Civ. P. 26(b)(3)(A)(ii).

1. Distinction with fact versus opinion work product: Even if the court orders discovery of the materials, courts must still protect the mental impressions, conclusions, opinions, or legal theories of the party's attorney or other representative concerning the litigation. Fed. R. Civ. P. 26(b)(3)(B).

iii. Other privileges the witness may assert include the **common interest doctrine**, the **Fifth Amendment privilege against self-incrimination, physician-patient privilege, marital communications,** and **pastor-penitent privilege**.

c. Preparing a client versus preparing a third-party witness: for third-party witnesses, there is no attorney-client privilege, so the attorney should:

i. Explain to the witness that there is no confidential relationship, and that if opposing counsel asks about what was discussed, the witness may be required to disclose the conversation.

ii. Be careful not to inadvertently disclose privileged information to the third-party witness.

d. Is your compilation of documents for the witness to review in preparation for testifying protected attorney work product (Fed. R. Civ. P. 26(b)(3))? It depends on the jurisdiction—and some jurisdictions have not decided the question yet.

i. *Sporck* (majority view): counsel's selection of documents to prepare a witness for deposition is protected attorney work product because the selection reflects the attorney's thought processes and legal theories. Even so, such documents may still be discovered if the witness relied on them to refresh her recollection as to the deposition testimony.

1. *Sporck v. Peil*, 759 F.2d 312 (3d Cir. 1985).

2. *In re Allen*, 106 F.3d 582 (4th Cir. 1997).

3. *Shelton v. Am. Motors Corp.*, 805 F.2d 1323 (8th Cir. 1986).

4. *James Julian v. Raytheon Corp.*, 93 F.R.D. 138 (D. Del. 1982).

5. *SEC v. Morelli*, 143 F.R.D. 42 (S.D.N.Y. 1992).

ii. The minority view is that an attorney compilation of documents is not itself protected work product.

1. *In re San Juan DuPont Plaza Hotel Fire Litig.*, 859 F.2d 1007 (1st Cir. 1988).

2. *Audiotext Commc'ns Network, Inc. v. US Telecom, Inc.*, 164 F.R.D. 250 (D. Kan. 1996).

iii. But note that otherwise protected attorney work-product compilation may be discoverable if put to a testimonial use (Fed. R. Evid. 612). *Nutramax Labs., Inc. v. Twin Labs., Inc.*, 183 F.R.D. 458 (D. Md. 1998).

iv. For state court cases, you will need to review your state's approach to handling these issues.

1. Many states' evidence rules (particular Fed. R. Evid. 612) are virtually identical to the federal rules and thus you can look to federal courts for guidance. *See, e.g.*, *Samaritan Health Servs., Inc. v. Superior Court*, 690 P.2d 154 (Ariz. Ct. App. 1984).

2. Some states have different rules. *See, e.g.*, Fla. Stat. § 90.613 (providing for production of documents used while testifying but not before or in preparation for testifying).

3. Some states do not have codified evidence rules at all, such as Virginia.

Checklist – Coaching Your Non-Expert Witness for Depositions and Trial

CHECKLIST

- ❑ **Have you educated your witness on the case?**
  - ❑ **Get To Know Your Witness.**
    - ❑ Take inventory of your client's substantive knowledge of the case.
  - ❑ **Educate Your Witness on the Case.** Your witness should understand:
    - ❑ The theme of the case in addition to factual and legal matters at issue.
    - ❑ The big picture. Explain her role in the case and why her testimony is relevant.
    - ❑ Prior depositions, discovery responses, prior statements, and relevant documents.
  - ❑ **Cardinal Rule: Tell the Truth.** Make sure your witness knows:
    - ❑ She should provide answers based on her firsthand knowledge.
    - ❑ It is OK to say "I don't know."
    - ❑ There may be serious consequences for failing to tell the truth.
  - ❑ **Understand Ethical Witness Preparation.**
    - ❑ Understand the distinction between proper witness education and improper coaching.
  - ❑ **Know What to do if Your Witness Plans to Testify Falsely**
    - ❑ Take immediate remedial measures.

Checklist – Coaching Your Non-Expert Witness for Depositions and Trial

- ❑ <u>Have you educated your witness on the process of testifying?</u>
  - ❑ **Educating on Procedure.** Your witness knows:
    - ❑ To whom she will be speaking.
    - ❑ The difference between bench and jury trials (if testifying at trial).
    - ❑ The difference between direct and cross examination.
  - ❑ **Educating on Answering Questions Generally.** Your witness knows:
    - ❑ To listen carefully to the question before formulating an answer.
    - ❑ To provide the "shortest correct answer" to each question.
    - ❑ To say—if true—"I don't understand the question," "I don't know," or "I don't recall."
    - ❑ Not to guess or speculate unless specifically asked to do so.
    - ❑ To stop talking and listen carefully if you make an objection.
    - ❑ To answer questions unless otherwise instructed by you.
    - ❑ To answer questions and not "fight" with others.
    - ❑ To ask for a break if appropriate.
  - ❑ **Demeanor Preparation.** Your witness knows:
    - ❑ To maintain appropriate eye contact with the questioner.
    - ❑ To speak clearly and audibly and remain calm.
    - ❑ To dress well and appropriately for the occasion.
    - ❑ To behave at all times—even in the bathroom or parking lot.
    - ❑ To bring nothing to the deposition / trial.
  - ❑ **Anxiety Reduction.** You should:
    - ❑ Let your witness express her concerns. Address each with positivity.
    - ❑ **Confirm Understanding**. Make sure your witness heard each instruction; repeat and provide examples as needed.

Checklist – Coaching Your Non-Expert Witness for Depositions and Trial

- ❑ <u>Preparing for Rule 30(b)(6) / Corporate Rep. Depositions</u>
  - ❑ **Step 1** – Understand the Purpose and Requirements of a Rule 30(b)(6) Deposition.
  - ❑ **Step 2** – Review the Notice of Deposition.
    - ❑ Has the requesting party identified topics with reasonable particularity?
    - ❑ Be prepared to seek a protective order.
  - ❑ **Step 3** – Conduct the Necessary Factual Investigation.
    - ❑ The organization is required to prepare the witness with information "reasonably available" or known to the organization.
    - ❑ Search the files and documents with the organization's control.
    - ❑ Interview current and former employees, or others with knowledge.
    - ❑ Review documents produced in discovery.
    - ❑ Review the testimony of fact-witnesses.
    - ❑ Review exhibits to depositions.
  - ❑ **Step 4** – Select the Rule 30(b)(6) witness or witnesses.
    - ❑ The organization can select anyone to testify on its behalf—officers, directors, managing agents, former employees, or outsiders hired by the organization to serve that purpose. The witness need not have personal knowledge.
    - ❑ Should have a good memory, ability to distinguish personal versus organizational knowledge, and ability to commit time to prepare.
  - ❑ **Step 5** –Understand that there are consequences to not properly preparing a Rule 30(b)(6) witness. Prepare your witness thoroughly.
  - ❑ **Understand The Ethical Considerations.**
    - ❑ Be aware, and ensure the witness is aware, that you represent the organizational client and not the witness.
    - ❑ Understand whether you are in an *Upjohn* or "control-group" jurisdiction.

Checklist – Coaching Your Non-Expert Witness for Depositions and Trial

- ❑ <u>Dealing with Documents</u>
  - ❑ **Review documents with a witness prior to deposition or trial.**
    - ❑ Understand the difference between having a witness review a document and refreshing the witness's recollection.
    - ❑ Instruct witness on what to do with the question: "Have you reviewed any documents in preparation for this deposition/trial?" She should be truthful but avoid identifying particular documents unless the questioning attorney can establish that the document did in fact refresh the witness's memory on a relevant point.
    - ❑ If possible, prepare your witness with no more than 14 documents per issue, in chronological order.
  - ❑ **Instruct witness on what to do when presented with a document by opposing counsel at the deposition or trial**. The witness should:
    - ❑ Never rely on her memory regarding the contents of a document.
    - ❑ Examine it to make sure it is complete, including review of any table of contents, signature pages, etc.; verify the date and author.
    - ❑ Carefully listen to the questioner's characterization of the document, identifying any mischaracterizations.
    - ❑ Avoid parroting language from documents.
    - ❑ Review related portions of text and not just those highlighted by the questioner; point out any other portions that change the meaning of the question/answer.
    - ❑ If the document is inconsistent with the witness's recollection, she should read the entire document to determine if and why it is inconsistent.
  - ❑ **Understand The Ethical Considerations**
    - ❑ Understand the work-product doctrine and FRE 612!
      - Allowing the witness to review lawyer-prepared summaries to refresh their recollection may potentially waive privilege and FRE 612.
    - ❑ Advise the witness of the need to preserve documents.

Checklist – Coaching Your Non-Expert Witness for Depositions and Trial

- ❑ <u>Privilege Issues</u>
  - ❑ **Educate your witness on privilege and work product.**
    - ❑ Explain to the witness that witness preparation is ***typically*** protected from discovery under the work-product doctrine or the attorney-client privilege.
    - ❑ Explain the difference between work-product doctrine and attorney-client privilege.
  - ❑ **Educate your witness on handling questions on preparation.**
    - ❑ Make sure the witness is ready for these questions: "What did you do to prepare for your deposition / testimony?" or "Have you reviewed any documents in preparation?"
    - ❑ Educate your witness on how to answer questions regarding deposition preparation.
    - ❑ If the witness reviewed documents under the direction of or in consultation with her attorney and the witness finds the document to be consistent with her recollection or finds that she still has no recollection, the document was not used to refresh her recollection.
  - ❑ **Know your jurisdiction and how that affects work product protection.**
    - ❑ Know the majority vs. minority view and where your venue falls.
    - ❑ Note that otherwise protected attorney work-product compilation may be discoverable if put to a testimonial use.
    - ❑ If in state court, you will need to review your state's approach to handling these issues.