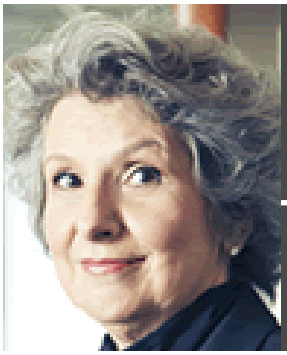

WIN OR LOSE: HOW WELL DID YOUR COMPANY WITNESS DO IN DEPOSITION?

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Getting to Uneventful: How to Avoid Fireworks in Company-Witness Depositions

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The tactics in company-witness depositions are simple. Likely buried among many innocent-enough sounding questions, plaintiff is looking for sound bites to be introduced as admissions during plaintiff's case—which will make the jury despise the company. Among the company lawyer's goals is to present a witness who fairly and truthfully answers those questions that are asked, without allowing reality-distorting sound bites to go unaddressed during the deposition. This paper offers practical tips to achieve those defense-side goals.

Company Witness Testimony can Make or Break a Case.

Ask potential jurors what they think about ginormous international companies and their interest in safety, and many will answer quite negatively. Ask what those same jurors think about the group of eight engineers primarily involved in a project and their interest in safety, and many will be less likely to make a snap judgment and willing to wait to hear the evidence. Companies act, decide, and speak through the testimony of their employees. Employees do the real work in humanizing the company. Employees who testify accurately, convincingly, and passionately about what they do will lead to more favorable settlements and jury verdicts. Your goal in preparing your witness is to get them to a place of comfort, so that the stress of the deposition doesn't smother those feelings at the outset.

Answering Yes or No.

One traditional deposition preparation strategy – "Answer 'yes' or 'no' if you can"– can lead to an adverse jury verdict. Deposition testimony must be more than just truthful; it must also be complete. The words "yes" and "no" are sometimes truthful, but they rarely constitute complete answers to the difficult questions faced in depositions. Worse, with a skillful opposing questioner, repeated one-word answers can lead to the rollercoaster ride of "yes." Those "yeses" can then form the foundation for a "Reptile-style" plaintiff friendly theory of the case.

Perhaps most importantly, no company is humanized by cryptic "yes" or "no" answers. And it's no solution to have an employee say "yes" or "no" to the plaintiff's lawyer asking questions, only to have the same witness be forthcoming and fulsome when "helping" the company team. Jurors will put that sort of one-sided cheerleading aside, leaving the company with no credible witness to carry the company mantle.

The Most Important Question to Ask Employees: Why?

So many trials are won or lost because the jury thinks one party behaved unreasonably or unfairly. A conclusion of unfairness or unreasonableness happens even in trials where neither of those two words appears in the jury instructions. An expert can opine that what the company did was appropriate, but only an employee can answer "why" by describing the options that were available when a particular decision was made and how the decision was weighed.

Thoughtfully preparing the company witness means constantly asking, at every step, two basic questions:

- Why did you do this?
- Why didn't you do that?

Repeatedly asking "Why" during depo prep does more than prepare a witness for questions Plaintiff may ask. It does more than provide needed, repeated Q and A practice, but also . Carefully listening to and watching an employee confronted with the "Why" question provides valuable clues about where this witness is emotionally about decisions that were made by the company. Few witnesses will voluntarily offer up those sentiments in response to a direct question. But if an employee is second-guessing or even regretting past decisions, it needs to be addressed prior to the deposition—and before plaintiff makes that discovery for you.

How Long Should the Employee's Answers Be?

A quiet-as-churchmouse witness has no appeal, but neither does a witness who can't stop talking. (Worse, damaging admissions can sometimes be found among the dross when a witness begins monologuing.) The witness should therefore imagine that their mother is sitting next to plaintiff's attorney during the deposition. When the employee says "It depends" in response to a question, ask them "did your mom just roll her eyes?" If your mom didn't think you were sufficiently responsive, the jury won't either. On the other hand, if it's mom losing focus, then maybe it's time to stop talking.

Don't Guess or Speculate.

All lawyers tell their clients not to guess or speculate during a deposition. But for a company witness, what does that really mean? Many company employees have college degrees in subjects quite different from the job they perform. Some employees believe they have a good idea, accurate or not, of what company policy is on a host of subjects.

When the employee is asked a question in a deposition, have them imagine that tomorrow, the CEO passes them in the hall and asks the same question. Does the employee answer it on the spot? Or does the employee say: "Let me get right back to you"?

If the employee answers the question on the spot, then the employee can go ahead and answer it in the deposition.

When Plaintiff is Done, Ask Your Witness Questions.

Unless so designated, depositions of company witnesses are not discovery. They are trial testimony. So, during the deposition, listen to the employee's testimony just as you would in a real courtroom with a real jury. Listen for the two-sentence sound bite that may be the only part of the deposition that plaintiff will admit at trial. Indeed, the sound bite might later become the demonstrative that plaintiff uses to sharpen his closing argument with.

Just as importantly, trial counsel for the company must be prepared – with trial exhibits – to conduct a thoughtful, complete re-direct examination at the deposition. Put the sound bites in context. Explain them. In this regard, Federal Rule of Evidence 106 is a gift:

> If a party introduces all or part of a writing or recorded statement, an adverse party may require the introduction, at that time, of any other part — or any other writing or recorded statement — that in fairness ought to be considered at the same time.

When a quality re-direct is taken in a deposition, it can be offered in the midst of Plaintiff's case-in-chief. This allows the defense to respond – immediately—to whatever part of the deposition plaintiff proposes to read to the jury during Plaintiff's case. Meanwhile, the jury isn't waiting two weeks to learn what that company response is.

What Kind of Company Witness Deposition Has Been Noticed?

Remember: there are two types of company witness depositions: one, where the employee is named individually, and the other, where the company is responding to a request under Federal Rule of Civil Procedure 30(b)(6) (or some analogous state provision). Though the above concepts hold true for both types of witnesses, how a witness is prepared under each context does differ in some key ways.

Special Challenges of the Company Witness Noticed by Name.

Company witnesses are noticed by name because the Plaintiff believes they have, or should have, personal knowledge. The company is not obligated to show the witness documents. If documents are requested as part of the deposition notice, only documents in the possession of the witness need be produced by the witness. The company is not obligated to search for those records.

An employee noticed for deposition by name can say a lot of things a 30(b)(6) witness should not, most notably

"I don't know" and "I don't remember." This greater permissiveness reflects that a single human's knowledge is more limited—and sometimes fallible. In contrast, many jurors expect a corporation—and the corporate 30(b)(6) acting as the company's voice—to have near complete and perfect knowledge.

Use the flexibility. Outside of the 30(b)(6) context, it's easy for a witness who has been otherwise thoroughly prepared to feel defensive if asked a question that they do not know the answer to. Encourage witnesses to take a step back: Should they know the answer to the question? Frequently, it's appropriate to respond: "I've never worked in that area of the Company. I cannot answer for the people who have, and they should answer that question."

Special Challenges of 30(b)(6) Company Witness Testimony

The 30(b)(6) company witness deposition process starts with the notice: A party names the company as the deponent, and must describe with reasonable particularity the matters for examination. The company must then designate one or more persons who consent to testify on its behalf, and it may set out the matters on which each person designated will testify. The persons designated must testify about information known or reasonably available to the company. Fed. R. Civ. P. 30(b)(6), modified.

The witness is the company. And because the witness is the company, some courts hold that 30(b)(6) testimony survives the case in which it is taken, living on forever in future cases. At the very least, Federal Rule of Civil Procedure 32(a)(8) allows for the admission of prior 30(b)(6) deposition testimony in a subsequent action involving substantially identical issues and parties. CWC Builders, Inc. v. United Specialty Ins. Co., 134 F. Supp. 3d 589, 593 n.2 (D. Mass. 2015). Likewise, Federal Rule of Evidence 804(b)(1) creates a hearsay exception for an unavailable witness's deposition testimony from a prior action if the opposing party in the prior action had similar motives and an adequate opportunity for cross-examination. Dykes v. Raymark Industries, Inc., 801 F.2d 810 (6th Cir. 1986). What does this understated exception really mean? In Dykes, it meant that a deposition taken ten years earlier in a different case was admissible evidence in a present-day trial. It also means that a 30(b)(6) deposition taken in a relatively small exposure case next week could be admitted into evidence at a future trial with catastrophic exposure. So, defense counsel needs to be cautious before shortening a witness's deposition preparation because of low-to-moderate case value of the current matter.

It is pretty well settled that an attorney who has noticed a deposition under 30(b)(6) is not limited to the designated topics in the deposition. See, e.g., Cabot Corp. v. Yamulla Enterprises, Inc., 194 F.R.D. 499, 500 (M.D. Pa. 2000); But see Paparelli v. Prudential Ins. Co. of Am., 108 F.R.D. 727 (D. Mass. 1985). It is equally well settled, however, that ANSWERS to questions outside the scope of the 30(b)(6) notice do not bind the company in the same way as those within the scope. See, e.g., McKinney/Pearl Restaurant Partners, L.P. v. Metropolitan Life Ins. Co., 241 F. Supp. 3d 737, 752 (N.D. Tex. 2017) (questions and answers beyond the scope of a Rule 30(b)(6) notice "are merely treated as the answers of the individual deponent") (internal quotation omitted).

So, to protect the client in this case and future cases, the wise defense attorney will serve formal objections to the 30(b)(6) notice. Then, attach the objections to the deposition as an exhibit, make a statement on the record at the beginning of the deposition about precisely what this witness has been designated to testify about (as described in the objections), and object to questions outside the scope of what the objections stated. Only by policing the boundaries of the notice can one hope to make a clear record of precisely which testimony the company designated this witness to testify about.

Generally, in a Rule 30(b)(6) deposition, "I don't know" is not a good practice. For example, imagine an employee who answers "I don't know" 37 times in a deposition. A savvy plaintiff's attorney will read (or worse – play the video of) those 37 answers – and no more – to the jury at trial. What will the jury conclude? That the company witness did not make good decisions. That the company wasn't informed. And, perhaps, that the company still doesn't care enough about the issue to bother putting up a knowledgeable witness.

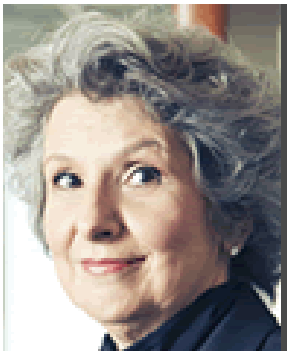
Rule 30(b)(6) says that the person designated by the Company "must" testify about information known or reasonably available to the Company. 30(b)(6) witness cannot answer "I don't know." If the deponent is asked a question that they do not know the answer to, an appropriate response is an apology for not anticipating that particular question, with a promise to obtain that information as soon as possible. The potentially inflammatory words "I don't know" should never to be spoken by a 30(b)(6) witness.

It also helps employees to have a visual aid to refer to that shows the types of questions that fall into their 30(b)(6) designation, as opposed to another designee's. During a preparation meeting, have the witness prepare their own visual aid to help them understand during the deposition when they have personal knowledge or when they can

defer to another designee. All the witness's answers should be shown inside this "witness box." Inside the "box" is the employee's educational and occupational background, what the employee has seen or heard, and the topics on which they have been designated. Outside the "box" are areas about which they lack sufficient personal knowledge or expertise. Feedback on this visual aid by real, live employees has been very positive.

Conclusion.

The steps laid out in this article have a specific purpose: to put your designated company witnesses in the best position possible to avoid fireworks and generating sound bites in their depositions. Always keep in mind that they are merely processes. It is ultimately the diligence with which you approach witness designation and preparation that dictates whether you achieve those goals. Ample preparation should equip you to fight back against even the craftiest plaintiff tactics.



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Cheryl A. Bush has extensive first-chair trial experience and has obtained exceptionally positive results for her clients, including Fortune 500 companies, by winning 95.97% of her jury trials. She serves as National Counsel for a major automotive manufacturer, handling catastrophic air bag trials and coordinating discovery throughout the country. Her cases, which have spanned 30 states, often involve high-level nationwide media exposure.

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- Won summary disposition in a multi-million dollar employment suit brought by an executive of a major automotive manufacturer and then successfully defended the win on appeal.
- Secured settlement shortly before trial for pharmaceutical manufacturer.
- Obtained numerous favorable settlements in high-exposure product liability actions across the country against a major automotive manufacturer, including cases involving alleged traumatic brain injury, paraplegia, and other serious alleged injuries.
- Represented a major automotive manufacturer in wrongful death action and secured favorable settlement through strategic motions in limine.
- Obtained no cause following one-week jury trial in case involving negligence allegations related to the death of a truck driver.
- Obtained no cause following two-week jury trial in product-liability action relating to severe upper body injuries suffered in high-speed crash.
- Obtained no cause following three-week jury trial in product liability action arising from accident in which eight-year-old was rendered a ventilator-dependent quadriplegic.
- Obtained no cause following two-week trial involving closed head injuries and broken bones sustained teacher in accident in which vehicle went over a cliff.
- Obtained no cause in highly publicized four-week trial involving seven-year-old child purportedly killed by passenger airbag in a 1995 minivan.
- Obtained no cause following one-week trial in which a 17-year-old attempted to pass another car on a two-lane road.

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