



**ONE GOOD COMPANY WITNESS
IS WORTH
1,000 OUTSIDE EXPERTS**

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A photograph showing two hands in business suits shaking firmly. The background is a low-angle view of several tall skyscrapers against a blue sky with some clouds. The image is framed by a dark blue wavy border at the bottom.

**One Good Company Witness is Worth
A Thousand Outside Experts**

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The logo for Goodell DeVries, featuring a stylized 'G' and 'D' in a blue and white color scheme, followed by the text 'GOODELL DEVRIES' in a serif font.

**“Life is About Finding People You Can
Trust in Different Situations”**

Forrest Gump



The Role of Company Witnesses in Litigation

- 1** Critical to success of litigation management
- 2** Resource for in-house legal department
- 3** Resource for outside trial counsel
- 4** Partnership with counsel in the development and presentation of defense

Building The Team



- Recognition that company witnesses are possibly your most valuable resource
- Identify the specific issue you must address
- Who is involved?
 - In House Lawyers
 - Outside Counsel – National and Local
 - In House Experts

Building The Team

Involvement in
Product/Policy

Availability of Time
and Attention

Specific Expertise
at Issue

Personality/
Presentation

Jurisdiction

Factors

1

2

3

4

5

Company Witnesses as a Critical Resource

- 1 Create a culture where the role is both understood and appreciated by senior management
- 2 Develop team approach and atmosphere
- 3 Respect time and commitment involved
- 4 Develop policies regarding communication and assignments

Company Witnesses as a Critical Resource

- 5 Posses valuable institutional knowledge of the company
- 6 Can help to familiarize outside counsel with the company environment
- 7 Generally are not required to prepare expert reports
- 8 More affordable than their “for-hire” counterparts

Maintaining Long-Term Viability and Credibility

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- Define position and role
 - Establish individual expert has presented or supported design or decision before industry, Governmental or In-House peer groups—not just juries
 - Address argument not an independant scientist—individual expert as housecat or member of litigation team

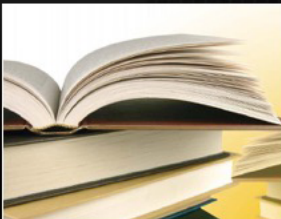
Maintaining Long-Term Viability and Credibility

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- Research and Testing Issues:
 - When conducted?
 - To assist in making (or justifying) a company decision
 - Prepare expert for non-scientific issues
 - Consider limiting areas of testimony
 - Protect company expert in areas outside his expertise and/or knowledge
 - Voir Dire and Opening
 - Direct Exam
 - Preparation for Cross

Practical Issues Regarding Effective Preparation and Presentation



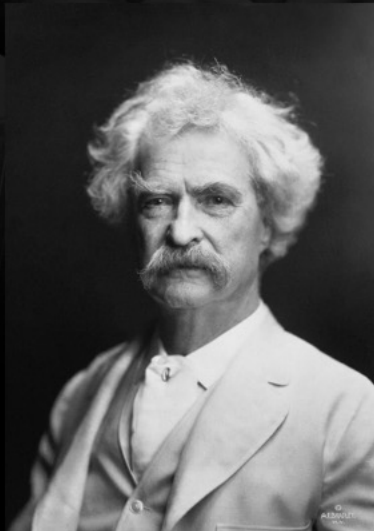
- In House Counsel and/or National Counsel involvement
 - Consistency of defense themes – global approach



- Do not assume preparedness

**“An Expert is Someone Who Can Compress More Words
Into Less Ideas Than I Have Ever Heard.”**

Mark Twain



Effective Preparation and Presentation

Understand and emphasize every case and every lawyer present unique challenges

Zealously protect and respect company witness's time — compare to outside experts

Emphasize importance of company witness's relationship to trial team

Issue 1

Issue 2

Issue 3

Issue 4

Issue 5

Require outside counsel to establish relationship with company witness

Continually evaluate the effectiveness of company witness —plaintiff's counsel will

- Prior testimony
- Age
- Jurisdiction

Effective Presentation At Trial

Require significant preparation in advance of trial—eliminate surprise

Invite and encourage exchange of ideas



Establish "Buy In" to defense effort and success

Make experience as comfortable and as enjoyable possible

Jurors form impressions of defendant companies and their defenses largely on the impressions made by company witnesses. But defense efforts usually focus instead on outside experts, taking whomever the company identifies as a witness more or less for granted. Defendants can dramatically improve their company story and trial results by identifying suitable in-house experts and developing and preserving their institutional expertise.

Role of Company Witnesses in Litigation

Company witnesses are critical to the success of litigation management. Their institutional knowledge and expertise make them a valuable resource for both in-house legal counsel and the outside trial team. First, however, the defense team must define the company witness's role.

In federal court, the traditional means of discovery related to a company witness is Federal Rule of Civil Procedure 30(b)(6). Depositions are one of the many tools available to parties in discovery, and the Federal Rules allow a party to depose "a public or private corporation, a partnership, an association, a governmental agency, or other entity."¹ Such a deposition commonly is referred to as a 30(b)(6) deposition.² The company being deposed must designate a person or persons "to testify on its behalf"³ as a company witness, who "must testify about information known or reasonably available to the organization."⁴ The Federal Rules require the deposing party to identify "with reasonable particularity" the subjects of the deposition, thus allowing the company to identify a witness or witnesses to testify on the given subjects.⁵ The identification of subjects of examination and designation of persons to testify allows a "Rule 30(b)(6) deposition to operate effectively."⁶

As a separate matter, a company may offer opinions at trial through the testimony of an expert witness. Opinion testimony in federal court must adhere to Federal Rules of Evidence. Generally, a witness may not offer opinion testimony unless she is "qualified as an expert by knowledge, skill, experience, training, or education"⁷ The expert's testimony must help the jury understand complicated facts or evidence, must be the result of reliably applied principles, and must be based on sufficient facts.⁸

Generally, a company witness deposed under Rule 30(b)

(6) testifies as to facts, not opinions, and the scope of her testimony is limited accordingly.⁹ However, a company witness, if appropriately qualified, can serve as both a fact witness under Rule 30(b)(6) and an opinion witness under Rule of Evidence 702.¹⁰ Defendants should consider an in-house witness's possible roles—that is, fact witness, opinion witness, or both—and how the role or roles best fit into the overall defense strategy. Doing so requires collaboration and coordination between the in-house witness and counsel to develop and present the defense plan.

Building the Team

Company witnesses can be the defendant's most valuable resource. As such, selection of particular witnesses warrants careful attention. Defendants should begin the process by first identifying the specific issues to address. In some instances, this is an easy task. For example, if selecting a witness for a 30(b)(6) deposition, the subject matters to be addressed must be identified with reasonable particularity in the notice of deposition.¹¹ In other instances, it may be less clear what exactly the issues are. For example, where the opinions of a plaintiff's expert delve into multiple, related fields of expertise, it may be unclear what specific types of testimony the defense needs in order to counter the expert's opinions.

Once the issues are identified, the entire defense team should be involved in selecting and preparing company witnesses. This involves three principal components: (1) the defendant's own in-house legal team; (2) outside trial counsel, both national and local; and (3) in-house experts and other employees. The in-house and outside attorneys are, of course, responsible for developing legal strategy and tactics. But the non-attorney members of the team are just as crucial. Many critical issues—such as the availability of key company documents and the historical context of company actions, among others—often are best addressed by the defendant's own employees.

A number of factors will guide selection of particular employees as part of the defense team. First, those who are or have been involved with the particular product or policy at issue generally are more desirable. However, a particular witness need not necessarily have personal involvement.¹² Second, team members must be able to devote sufficient time

¹ Fed. R. Civ. P. 30(b)(6).

² See, e.g., *Newill v. Campbell Transp. Co., Inc.*, 2:12-CV-1344, 2013 WL 6002349 at *3 (W.D. Pa. Nov. 12, 2013); *Dunn v. Wal-Mart Stores, Inc.*, 2:12-CV-01660-GMN, 2013 WL 5940099 at *1 (D. Nev. Nov. 1, 2013); *Cactus Drilling Co., LLC v. Nat'l Union Fire Ins.*, CIV-12-00191-M, 2013 WL 5524977 at *9 (W.D. Okla. Oct. 3, 2013).

³ Fed. R. Civ. P. 30(b)(6).

⁴ *Id.*

⁵ See Fed. R. Civ. P. 30(b)(6).

⁶ *United States v. Taylor*, 166 F.R.D. 356, 360 aff'd, 166 F.R.D. 367 (M.D.N.C. 1996).

⁷ Fed. R. Evid. 702.

⁸ *Id.*

⁹ See *JPMorgan Chase Bank v. Liberty Mut. Ins. Co.*, 209 F.R.D. 361, 362 (S.D.N.Y. 2002) ("In a nutshell, depositions, including 30(b)(6) depositions, are designed to discover facts, not contentions or legal theories, which, to the extent discoverable at all prior to trial, must be discovered by other means.").

¹⁰ See David M. Woods, *Company Witnesses: Fact or Expert Witness? Or Both?*, 48 No. 7 DRI For Def. 45 (July 2006); see also *Dunn v. Sears, Roebuck & Co.*, 639 F.2d 1171, 1174 (5th Cir.) opinion corrected on other grounds, 645 F.2d 511 (5th Cir. 1981) ("That a witness is an employee of a party does not preclude his qualification as an expert.").

¹¹ See Fed. R. Civ. P. 30(b)(6).

¹² See *Brazos River Auth. v. GE Ionics, Inc.*, 469 F.3d 416, 433 (5th Cir. 2006) ("[T]he duty to present and prepare a Rule 30(b)(6) designee goes beyond matters personally known to that designee or to matters in which that designee was personally involved." (quoting *Taylor*, 166 F.R.D. at 361)).

and attention to the defense. This can be a challenge if the employee must take on substantial litigation responsibilities in addition to his regular, full-time workload. Third, when determining which in-house experts to add to the team, the experts' particular fields of expertise must be considered. Counsel should know the governing standard for expert testimony in the jurisdiction at issue and understand how it applies to the witness's expertise.¹³ Fourth, those employees who may be required to give testimony at deposition and trial must be able to do so articulately, confidently, and in a way that resonates with a jury. Finally, the jurisdiction of the litigation is an important factor. For example, a jury in Los Angeles, California, may respond to a particular witness differently from a jury in Concord, New Hampshire.

Company Witnesses are a Critical Resource

Company witnesses are a critical resource. Indeed, when testifying as a 30(b)(6) witness, the witness becomes "the voice of the corporation."¹⁴ Testimony by in-house experts has several advantages compared to testimony by outside experts. An in-house expert has institutional knowledge of the company and its internal workings, which outside experts cannot acquire without considerable time and expense.¹⁵ An in-house expert can help to familiarize outside counsel with the company and the industry environment generally.¹⁶ Additionally, whereas outside, testifying experts must submit written reports in federal court, in-house experts are often exempt from the requirement.¹⁷ As long as an in-house expert is not specially employed to provide expert testimony or one whose duties regularly involve testifying as an expert, then no written report is necessary.¹⁸ The ability to produce an expert witness without also having to produce a written report is a significant advantage to the defendant.¹⁹ Finally, as a practical matter, an in-house expert's testimony "can result in enormous cost savings" compared to that of outside experts.²⁰

Companies should protect and foster company witnesses by creating a culture where their role is both understood and appreciated by senior management. This requires development of a team approach and atmosphere, both within the defense team and in the witness's everyday

work environment. Defendants and their counsel must also respect the time and commitment involved. In-house experts may struggle to prepare testimony while simultaneously managing their regular, full-time responsibilities. The entire defense team should develop and implement policies regarding communication and assignments to ensure that company witnesses are prepared.

Maintaining Long-Term Viability and Credibility

Defendants help their own defense by ensuring that the testimony of company witnesses remains viable and credible. To do so, the defense team should clearly define a witness's position and role.²¹ The team also must make sure that the witness's testimony is consistent. Remember: the testimony of a 30(b)(6) witness is binding.²²

If the company witness is to offer expert opinions, the defense team should establish that she has previously presented or supported her opinion outside the context of litigation.²³ Plaintiffs will not hesitate to portray an in-house expert as biased—a "housecat"—and the defense team must be prepared to address such tactics.

The defense team must anticipate possible issues related to the research and testing that form the basis of an in-house expert's opinions. An expert cannot "cherry-pick" his data,²⁴ and an analytical gap between data and opinions can be fatal.²⁵ Where flaws in an expert's analysis might leave aspects of his testimony susceptible to attack, consider limiting his testimony accordingly.

Effective Preparation and Presentation

As a practical matter, the defense team can improve the overall effectiveness of a company witness's testimony by being appropriately involved throughout the witness's preparation. A company witness should not testify in isolation. The defense team must consider the testimony holistically and ensure that a company witness's testimony is consistent with defense themes and the testimony of outside experts.²⁶ To be effective, a company witness must be prepared. The defense team should recognize that company witnesses have competing demands on their time, however, and must not assume that a witness necessarily has sufficient time and resources to prepare effectively.

¹³ Compare, e.g., *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923) (applying general acceptance standard) with *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993) (adopting multiple, non-dispositive factors).

¹⁴ *Rainey v. Am. Forest & Paper Ass'n, Inc.*, 26 F. Supp. 2d 82, 94 (D.D.C. 1998).

¹⁵ See James G. Speight, *The Scientist or Engineer as an Expert Witness* 11 (2008).

¹⁶ See *id.*

¹⁷ Fed. R. Civ. P. 26(a)(2)(B).

¹⁸ *Id.*

¹⁹ See George Brent Mickum IV & Luther L. Hajek, *Guise, Contrivance, or Artful Dodging?: The Discovery Rules Governing Testifying Employee Experts*, 24 Rev. Litig. 301, 316 (2005).

²⁰ *Id.* at 313 ("The hourly rate for independent experts generally starts in the range of \$300 an hour and heads upwards from there. Monthly bills for expert services to prepare Rule 26(a)(2)(B) reports and offer deposition and trial testimony may easily run into five figures. In lengthy litigation, the cost for an expert economist to analyze sales data, prepare a Rule 26(a)(2)(B) report and a rebuttal report, be deposed, and testify can easily run into six figures.").

²¹ See Section 2.

²² See, e.g., *Estate of Thompson v. Kawasaki Heavy Indus., Ltd.*, 85 Fed. R. Serv. 3d 219, 304 (N.D. Iowa 2013); *Rainey*, 26 F. Supp. 2d at 94.

²³ See *In re Bextra*, 524 F. Supp. 2d 1166, 1176 (N.D. Cal. 2007) (expert must base opinions on research, not vice versa); *Port Auth. of New York and New Jersey v. Affiliated FM Ins. Co.*, 245 F. Supp. 2d 563, 569–70 (D.N.J. 2001) (expert who in present case takes different position from earlier case may be unreliable).

²⁴ See *MyGallons LLC v. U.S. Bancorp*, 521 F. App'x 297, 307 (4th Cir. 2013).

²⁵ See *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997).

²⁶ See *Indus. Hard Chrome, Ltd. v. Hetran, Inc.*, 92 F.Supp.2d 786, 791 (N.D.Ill.2000) ("The testimony given at a Rule 30(b)(6) deposition is evidence which, like any other deposition testimony, can be contradicted and used for impeachment purposes.").

The defense team, including both counsel and company witnesses, should understand that each case is different and a cookie-cutter approach is not a suitable substitute for preparation. Outside counsel should establish a rapport and build a working relationship with company witnesses. Furthermore, outside counsel should do all they can to protect company witnesses, including mitigating demands on their time and interference with regular work duties. Company witnesses, especially those with little experience in litigation, may be nervous about testifying under oath. Given the increased scrutiny on company witnesses in recent, high-profile litigation, their apprehension is understandable. The defense team must help company witnesses to understand the importance of their testimony to the defense effort and to feel comfortable with their role within that effort.

The legal team can provide support by giving a company witness the resources she needs to prepare sufficiently. Doing so improves preparation and lessens the risk of surprise. Both in-house and outside counsel have important roles to play in witness preparation. In-house counsel in particular may be able to get a company witness to “buy in” to the overall defense effort. Outside attorneys, in comparison, may be in a better position than their in-house peers to critique a

company witness's testimony.²⁷ All counsel can encourage an exchange of ideas between a company witness and the legal team. Such efforts are likely to make preparation of testimony more pleasant for everyone involved and improve the effectiveness of the witness's testimony.

Conclusion

Company witnesses are critical to the success of litigation management. In-house experts in particular may be especially helpful to the defense effort because they: (1) possess valuable institutional knowledge of the company, (2) can help to familiarize outside counsel with the company environment, (3) generally are not required to prepare expert reports, and (4) are more affordable than their “for-hire” counterparts. The defense team should select company witnesses carefully, paying attention to the key issues at hand and each potential witness's fit. Each witness's testimony must be consistent throughout the litigation process and across the defense effort generally. To achieve consistency, company witnesses must be thoroughly prepared. In-house and outside counsel can support preparation by protecting witnesses' time, by engaging them in the defense effort, and by encouraging buy-in.

²⁷ See Earle F. Kyle, IV, Advising in-House Counsel on Expert Witness Issues, *Prac. Litigator*, at 23, 26 (March 2002) (“[I]n-house counsel are employed by their companies. While the rules of professional responsibility mandate our objectivity, subtle political dynamics or internal politics may not always provide the best forum for doing so. It may be easier, frankly, for outside counsel to bluntly tell an in-house expert witness that she needs to explain something more clearly or present herself differently in a deposition or at trial.”).

FACULTY BIOGRAPHY



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Mr. Cullen has practiced with the firm since 1987 and been a partner with the firm since 1994. His practice focuses on pharmaceutical, product liability and toxic tort litigation. Mr. Cullen has represented clients in the pharmaceutical, chemical and industrial product industries for over 20 years. He has taken cases to trial in over 15 states while representing clients as both national and local trial counsel.

Mr. Cullen has represented many clients in the pharmaceutical industry. Mr. Cullen has represented Bayer as local and national trial counsel for over 20 years. He has represented Bayer in hundreds of claims filed by hemophiliacs claiming exposure to HIV and the contraction of AIDS and hepatitis from the administration of blood factor concentrates. The firm served as national discovery and trial counsel and was responsible for all discovery matters, the formulation of legal and medical defenses, the development of experts, as well as trial preparation and trial. He has also represented Bayer as trial counsel in PPA litigation and actions involving alleged injuries due to the use of prescription antibiotics in jurisdictions throughout the country. Mr. Cullen continues to represent Bayer as trial counsel in the YAZ litigation and antibiotic litigation. Mr. Cullen represents Eisai Inc. as national trial counsel in product liability, qui tam and antitrust litigation. Mr. Cullen currently serves as trial counsel for Eisai in antitrust litigation pending in New Jersey as well as qui tam litigation pending in Florida. He has worked closely with Eisai in risk assessment and litigation management, as well as the defense of individual product liability actions.

Mr. Cullen has also been involved for over 20 years in the defense of toxic tort litigation. As national counsel for Vermont Talc, Mr. Cullen participated in the defense of over 3,500 product liability actions alleging lung injury from exposure to commercial talc in industrial settings. Mr. Cullen also serves as trial counsel for insurers providing coverage to landlords and property management companies involved in litigation alleging permanent injury to children exposed to lead paint. Mr. Cullen, as lead trial counsel, has taken numerous cases to verdict in the Mid-Atlantic region. Mr. Cullen has also represented clients in cases alleging injurious exposure to carbon monoxide, various chemicals and pesticides.

Mr. Cullen has taken numerous additional product liability actions to trial involving industrial products, mechanical equipment and medical devices. As national trial counsel for Crown Equipment Corporation, Mr. Cullen has tried catastrophic injury actions in numerous states where the claimants alleged injury due to an alleged defective design or inadequate warning.

Mr. Cullen continues to provide guidance to numerous clients in the assessment and management of product liability and litigation risk. He has participated in a number of comprehensive product liability audits involving silicates, chemicals, medical devices and prescription drugs.

Honors and Awards

- Best Lawyers in America, Mass Tort Litigation/Class Action, Product Liability Litigation, Personal Injury Litigation (2011-2015)
- Maryland Super Lawyers, Product Liability and Personal Injury Defense (2007 - 2015)
- The Daily Record - Leadership in Law Award (2008)

Education

- University of Memphis (B.A. 1984)
- University of Memphis (J.D., with Honors, 1987)