

Advance Witness Preparation

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Corporate Representative

- **The testimony binds the company so it must be comprehensive and responsive. An answer “I don’t know” to a question clearly covered by the notice is a bad answer.**

Unless the corporation can prove that the information was not known or was inaccessible, a corporation cannot later proffer new or different allegations that could have been made at the time of the corporate representative’s deposition.

- **The person designated to serve as the representative does not have to be the most knowledgeable witness on the various topics. Spend time exploring your choices and involve senior management who will know the personalities, prior experiences and potential problems.**
- **Instead, the corporation must make a conscientious good-faith endeavor to designate the person having knowledge, and to prepare the person in order that she can answer the questions.**

- **The fewer the number of designees to respond to the topics identified in the notice the better**
- **The representative should be able to tell the company's story and be well spoken. She will be the face of the company.**

- **Fully prepare the corporate representative**
 - 1) Theories of the case
 - 2) Other side's evidence
 - 3) Deposition testimony of key fact witnesses
 - 4) Hot documents
 - 5) Declarations of key witnesses
 - 6) ESI/document retention policy
 - 7) The Notice of Deposition
 - 8) Any objections to the Notice
 - 9) The key pleadings
 - 10) Interrogatory responses
- **Make sure she speaks with others with knowledge**
- **Give her full access to files and data so she can say "everything" was available to me.**

- **Advise the witness about questions that go beyond the topics in the notice. It is inappropriate to instruct the witness not to answer merely because the question falls outside a topic designated for that witness. However, the answer is not binding on the company, and “I don’t know” is an acceptable response.**
- **Don’t assume the corporate representative has no knowledge of matters outside the Notice. Perform a document search to make sure you understand the universe of materials upon which she can be questioned.**

- **The research and investigation conducted by the representative are not privileged, but the communications with counsel remain privileged.**
- **Use of videotape preparation: the pros and cons.**
- **Make sure to role play with another lawyer taking the lead on cross-examination.**
- **Let the witness answer her way before you make suggestions.**
- **Consider conducting direct examination during the deposition.**

Non-Party Witnesses

- **Determine if the witness is represented by counsel. If so, work through the lawyer to determine the person's willingness and need to be prepared.**

- **Realize the communication is not privileged, and protect yourself accordingly.**
- **Be very careful of what you say and how you characterize the case and your opponents.**
- **Review the statute involving witness tampering.**
- **Take someone with you for the preparation session.**
- **First and last statement to the witness: “Please tell the truth.”**

- **Determine whether it is better to refresh the memory of the witness or have the witness remain uninformed.**
- **If unrepresented, consider representing them for purposes of the deposition. The pros and cons.**
- **The pros and cons of “reimbursing” witness for lost time and expenses above the subpoena fee.**