AMERICAN BANKRUPTCY INSTITUTE

2020 Virtual Winter Leadership Conference

Witness Preparation: A Roundtable Discussion

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CONCURRENT SESSION

2020

Witness Preparation – A Roundtable Discussion
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Witness Preparation Tips[1]

Deposition Preparation - Experts and Non-Experts

1. It is opposing counsel's show

In a deposition, you do not do a direct examination of your own witness. As a result, the focus is on preparing your witness for opposing counsel's questions which can take many forms but often are a fishing expedition versus a focused inquiry.

2. Go over the ground rules

The witness needs to understand the ground rules for a deposition. Most important among these are: (a) allowing the whole question to be asked before responding; (b) answering verbally; (c) never speculating or guessing; and (d) never volunteering or trying to be "helpful" in thinking that you know what opposing counsel is asking but that counsel is not doing it very well.

3. Understand the purpose of objections

Explain that when you object, it is likely because you are trying to send the witness a message. Instruct the witness to stop and let you make the objection before the witness answers. If you object to "form," it may be because the question was poorly phrased, and the answer could be misconstrued. The witness should consider asking for the question to be repeated, and if the problem remains, the witness may want to ask for it to be rephrased. A good example of this is a compound question, where an answer might lead a factfinder to a conclusion that is not intended. After repeating and asking for the question to be rephrased, the witness might have to answer but should be careful to answer with a detailed and focused response.

[1] These tips were initially prepared prior to the Covid-19 pandemic and the switch to virtual hearings. Most of the tips are still relevant to virtual hearings. However, also see the Addendum starting at page 8 that was recently prepared and is submitted with these materials for specific tips related to virtual hearings.

4. Deposition behavior

The witness needs to be aware that passing notes, reading off of papers that the witness brings (but was not required to produce), whispering to counsel, or constantly asking for breaks to confer with counsel can all be problematic and prolong/complicate the deposition.

5. Oral versus video depositions

There are material differences between the oral deposition and the video deposition. In the event that the deposition is conducted via video, counsel the witness regarding mannerisms, etc. and prepare the witness in a manner more consistent with trial testimony.

Trial Preparation - Generally and Non-Experts

Direct Examination

1. Rehearse but not too much

While you should prepare your witness for direct examination, you do not want the testimony to sound too rehearsed or scripted. If done well, the testimony should be a conversational dialogue that tells a story or narrative.

2. Know the big picture

Your witnesses need to understand how their testimony and areas of knowledge or expertise fit into the "big picture issues" of the case. Make sure that they understand what the case is all about and what you are trying to use their testimony and reports, if applicable, to achieve.

3. Know your case and tell the story

The witness should understand that you will be asking open-ended questions and attempting to "moderate" a discussion that gets the right facts into evidence. The witness should know the key evidence he or she is intended to provide and be on the same page with counsel about how the examination will proceed and what the goals are. Often, the best organization is chronological, as it allows the judge to develop a timeline. If the issue has sub-issues, the organization might be by issue, but chronological within the issues.

4. The witness is the star

It is important for the witness to understand that he or she—not the lawyer—is the star of the examination. It's natural for a witness to think that the lawyer is the center of attention – you're playing on the lawyer's "home field," after all. However, the witness needs to be the center of attention on direct, which is why leading questions that yield a yes or no response are completely ineffective (and objectionable).

5. Understand the question and think before answering

Counsel your witness to listen carefully to each question. Witnesses cannot tell the truth if they have not heard and understand the question. It is not a sign of ignorance, weakness, or lack of cooperation to require reasonable clarification of questions. Your witness should also not say "no" to a question if the true answer is "I do not recall." "No" means absolutely not. "I do not recall" means what it says.

6. You are on stage and the judge is your audience

Establish the witness's credibility by eliciting candid responses and demeanor. Consider the witness's eye contact; depending upon the courtroom's set-up, consider having the witness look at the lawyer when a question is being asked but then at the judge when responding. The audience is the judge—no one else matters in this exercise, so slow down and make your points. The judge needs to take notes.

7. Know the judge and opposing counsel

Instruct your witness regarding the judge's style, preferences, idiosyncrasies, and professional background. Was this judge a musician or an accountant in a previous life? Provide your witness with published opinions by the judge on issues similar to those on which your witness will be testifying and make sure that the witness reads them. Take your witness for a visit to the courtroom to observe the judge's general demeanor and the set-up of the witness box, court reporter, screens, technology, etc. Assume your judge has terrible eyesight and enlarge charts so the judge will be able to review them. Likewise, counsel your witness about the opposing party's trial counsel and that counsel's style of cross examination.

8. Anticipate

The witness and attorney should anticipate and confront major points that the opposition will attempt to elicit on cross. Preempting the opposition may defuse unfavorable evidence and allow the witness to explain more fully.

9. Objections

Instruct your witnesses to wait until rulings on objections and to listen to their own attorney and the judge. There may be some valuable instructions or clues to problems in that dialogue.

10. Do not accept opposing counsel's statements as fact or truth

The witness should not accept a "fact" stated by an attorney when being questioned as true. While the fact may be accurate, if the witness does not *know* it to be true, he or she cannot truthfully accept it.

11. Documents

Make sure that the witness is familiar with foundation questions/mantra before diving into documents.

Cross Examination

1. Objections

The witness should understand the difference between objections in a deposition and objections at trial. At the deposition, the objection is lodged for purposes of creating a record, but the witness is free to proceed with an answer. At trial, the judge is in charge and will rule on the objection and instruct the witness whether to respond. Also, because nearly all bankruptcy trials are bench trials, it is important for the witness to understand that constant objections may annoy the judge. Therefore, you will likely be much more selective in your objections at trial. Remember, the purpose of objections is to exclude problematic evidence.

2. Open-ended questions

The witness should be ready for an errant open-ended question or a request for a summation or conclusion. When given the opportunity to testify more broadly on cross, the witness should jump at it.

3. Credibility

Cross examination will often include an attack on credibility or the potential bias of the witness. Warn your witness and counsel him or her that grace under fire and avoiding defensiveness are key to establishing credibility.

4. Rehearse cross

Mock cross examinations are usually very helpful, and exploring potential issues or responses is key. If counsel does his or her job correctly, the toughest cross examination that the witness goes through should be in the preparation session.

Trial Preparation - Expert Witness

1. You do not always know

An expert is not required to know everything. Therefore, an expert witness should not hesitate to answer "I don't know" when that is the truth. Expert witnesses need to understand that there are endless possible questions to which they may not know the answer. They should not let counsel make them feel that they are uninformed or concealing something because they truthfully answer certain questions with "I don't know. Moreover, an expert should not react to counsel's disbelief or skepticism and decide that he or she knows something that another witness does not.

2. Know the reports inside and out

The expert's report is the roadmap to any expert deposition or testimony. The expert should be prepared to testify regarding the "birth, life, and death" of the expert report and any rebuttal report. The expert must know the reports inside and out before giving any testimony.

3. Review the assumptions

As part of making sure that experts know the report inside and out, make sure that expert witnesses are comfortable with all of the assumptions that underlie their report. Questions that all experts should be able to answer include: What are your assumptions? Why did you make these assumptions? What is the basis for each assumption? What happens to your opinion if that assumption is wrong or changed?

4. Think about what the expert did not do

A close corollary to the question of an expert's assumption is to make sure that the expert witness is also prepared to answer what the expert did not do. These types of questions include: What would you have done if you had had more time? Why wasn't that done? What were you told not to do? What did you ask for, but not get? Did you do what the other side's witness did? If not, why not?

5. Be prepared for qualification questions

The key question that all expert witnesses should be able to answer is: "What in your background was helpful in forming an opinion in this case?" All experts should not only be familiar with the *Daubert* standards, but also be prepared to articulate how the *Daubert* criteria were applied to the methodology used by the expert in the case.

6. Identify and discuss vulnerabilities

Experts have many advantages – including that they are often not intimidated by the process, can "hide" behind their expertise, and often have superior knowledge in their field (more than the lawyer or the judge). But with those advantages and familiarity also come disadvantages. First, experts can be concerned about their consistency – both with their prior opinions and the opinions of others in the field. That concern can somehow undercut the opinion in the case at hand. Second, pursuant to Federal Rule of Evidence 803(18), the expert is subject to attack by learned treatises. Finally, the expert on the other side has a different opinion, which can make an expert defensive. Experts should review these vulnerabilities and try to mitigate them before giving any expert witness testimony.

7. Know the opposing expert's case

Make sure that your expert knows the opposing expert's opinions, the facts relied on, and the assumptions made in formulating conclusions. Your expert should understand and be prepared to respond as to why and how he or she may disagree with the opposing expert's opinions and predicates. Your expert should be prepared to identify and explain the deficiencies in the opposing expert's theories, their application, and the areas of factual disagreement when contrasted with your case results.

8. Experts are not clients

Privilege does not protect the expert's conversations with counsel – it is fair game to ask a number of questions, including: What documents were reviewed? What was not reviewed? Who selected the documents that were reviewed? Who did the witness talk to? Does your opinion hold if our witnesses are truthful and yours are lying? What sources or people does the

expert acknowledge as expert authority? Experts should be prepared to answer all of these types of questions before they testify.

9. Do not "play lawyer"

Experts should not try to figure out *why* the attorney is asking a particular question or set of questions if the reason is not immediately apparent. This will distract the expert from listening to the question and answering truthfully. There is not necessarily a reason for every question asked by a lawyer. Indeed, the lawyer may be confused or may not know why the line of questioning is being pursued or even what he or she is talking about. Moreover, lawyers argue; witnesses testify. Experts should not "argue" with opposing counsel – they should simply answer the question posed to them and not be diverted by trying to advocate or argue with the lawyer. The expert should stay above the battle and let the jury or judge contrast angry or negative conduct to the expert's patient and reasonable behavior.

10. Correct mistakes

If experts realize that they have said something that was not accurate, they should interrupt the questioning and correct the answer. Experts should not be afraid to do this even if the inaccurate statement was given long before the realization of the error occurs. If your experts do not realize that a mistake has been made until they have left the witness stand at trial, they should be instructed to inform counsel as soon as possible about their mistake.

11. Analyze documents carefully before answering

If a document is important enough for the attorney to use it in questioning the expert, the expert should give it the same importance and scrutinize it carefully before answering. Experts should never assume that they have seen the document before. If the document is lengthy, experts are not required to review and absorb it instantly. They can request a recess to take more time to review the document so that they feel comfortable answering all questions truthfully regarding the document.

12. Be cooperative and polite

Counsel your expert to be cooperative, polite, and respectful no matter how rude a lawyer is or how stupid a question may be. Juries and judges do not like experts who act too important to be bothered with having to answer questions. Experts must also be receptive to questions from counsel or the judge seeking clarification or follow-up on something that the expert said.

<u>Top 10 Additional Observations/Suggestions from the Bench</u>

1. Keep it simple

Avoid using complex sentences, lawyer speak, and industry jargon. Talk and write in plain English.

2. Organize, organize, organize

Use headlines, themes, and other organizational aids to make clear what you're trying to prove. Take the judge by the hand and lead the judge through your presentation.

3. Listen to everything and everyone

Listen to the questions, to the judge, to the objections. Do not be so concerned about the next point you want to make in your testimony that you do not hear what the issues are on the current or previous points.

4. A picture is worth a thousand words!

The testifying witness must go the property, premises, manufacturing facility, business office, etc. and talk to management, owners, employees. The testimony will be much more effective if the witness has "kicked the tires" and can testify from personal observation.

5. Give other people credit

If the witness is relying on the work of subordinates, say that. And explain why that reliance is perfectly appropriate and does not adversely affect the witness's testimony, conclusions, or opinions.

6. Slow down when it counts

Make sure that your main points are not rushed. Pause. Raise your voice a little. Make eye contact with the judge. Gesticulate. Get the court's attention!

7. Listen for speaking objections or judicial guidance

If the judge permits your counsel to make speaking objections, listen carefully. Your counsel is trying to tell you something if the objection is more than just identifying an evidentiary rule. These objections may be summarizing, re-directing, or reminding you where your testimony is headed or should be headed. Likewise, if the judge says something about your testimony or counsel's questions, listen to the judge. The judge may be identifying a problem or something that is confusing which you need to explain or clarify.

8. This is not Judge Judy!

Avoid all histrionics, emotional outbursts, and name calling. There is no place in the courtroom for any of this kind of behavior, from anyone. It will have only one effect on the judge – a negative one!

9. Make sure that you are remembered for your testimony

This may seem obvious, but apparently that is not always the case. Make sure that the witness is dressed appropriately for court and does not wear too much jewelry, perfume, or after shave. These little things can be very off putting. Instead of remembering the witness for the helpful testimony, the witness may be remembered for his strong aftershave or her noisy bracelets. Also, remember that the bench is elevated. This is a key point to keep in mind when choosing the appropriate neckline.

10. RESPECT

Aretha Franklin had it right. No matter what you think of your opponent, the other witnesses, the case, or the judge, you must still comport yourself in a professional manner and treat all parties with respect and civility – no matter how stupid you think they are or what kind of stinking liars they may be!

Addendum for Virtual Hearings and Issues in the Age of Covid-19

Virtual Hearings

1. Know the general order and your judge

Due to Covid-19, most bankruptcy courts have entered general orders with new protocols for virtual and/or in-person trials and hearings. Some courts may also be relying on the general orders of district courts. In addition, some judges have entered their own orders or have prepared specific, detailed protocols for hearings with that judge. Make sure that you have reviewed the most current orders affecting the court in which you will be "appearing" and have discussed those orders with counsel.

2. Prepare for a virtual courtroom experience

Whether a witness is testifying for the first time or the thousandth time, that witness needs to be ready for what a virtual hearing will be like. Prep sessions using Zoom or other platforms that the court will be using are essential, especially for a witness who has not testified remotely before. Such sessions enable both attorneys and witnesses to see how they come across when the camera (and thus the judge) is focused on them in a way that may not be as pronounced as it is in an in-person hearing.

3. Does the camera really add 10 pounds?

Witnesses testifying at a virtual hearing must remember that they will be on camera. As a result, they have to be prepared and consider how they will appear. For example, witnesses must ensure that their virtual background is professional. While they may not be the only ones working from their bedroom or basement at home, they should not forget that they are in a courtroom. In addition, witnesses must make sure to have proper lighting. If bright lights are placed behind or to the side of witnesses, they will appear in the dark on camera. The court needs to see faces and discern expressions on those faces when witnesses speak.

All witnesses and attorneys should use their proper names on their screen IDs. Doing so will enable them to get admitted to the hearing, help the court reporter know who they are, allow all parties to remember participants' names, and help the judge keep track of people joining or dropping off the call.

In addition, witnesses should make sure that there are no interruptions during their testimony. It is cute for only about the first five seconds if their dog or two-year-old appears on camera. After that, such appearances can be annoying, distracting, and unprofessional. Thus, both witnesses and attorneys should ensure that they are in a private space, alone, with no disruptions.

4. Exhibits

Witnesses should ensure that they are able to see and review the exhibits about which they will be testifying. Some courts allow witnesses to have hard copies in front of them while testifying. Other courts will allow witnesses to view exhibits only on a shared, virtual screen. Witnesses must make sure that they know what is allowed in the court in which they are testifying. If they have issues with eyesight, they should raise the problem early on so that accommodations can be made.

Expert reports and other documents about which witnesses may be testifying must be properly labeled with pages numbers so that both witnesses and the judge can easily find the exhibit—and the page within that exhibit—which counsel is directing them to.

Witnesses are not permitted to have any notes in front of them or receive any external communications via text or email during their testimony. Courts will have different ways to assure that witnesses are complying with these rules, so attorneys must make certain that they are aware of the rules and do not violate them.

5. Counsel is on camera too!

Attorneys should also understand how they come across on Zoom and other technology platforms. When they are not speaking, the court will likely be able to see counsel in a way that is more focused than in an actual courtroom. Attorneys should avoid distracting mannerisms and exaggerated expressions (for example, in response to opposing counsel's statements). Being noticed by the court for the wrong reasons is never good. Attorneys must be mindful of camera angles and distractions. They do not want the court to see anything other than a professional person, appropriately dressed, comporting himself or herself as if in a live courtroom at all times.

6. Slow down and do not interrupt

It is vital that everyone slow down when speaking at a virtual trial and not interrupt each other. Generally, when two people speak at the same time, nothing is heard from either.

7. Objections

If a party objects while a witness is testifying—either by raising a hand or trying to speak—the witness must stop talking immediately. At that point, the witness should wait for the court to invite the objecting party to state the legal basis of his or her objection and for the court to rule on that objection. The witness should not begin to speak again until given direction by the court on how to proceed.

8. Breaks

If a witness is testifying and needs a break, the witness should speak up. The court understands and will take a recess so that the witness can attend to whatever is necessary. However, witnesses may not ask for a break in the middle of questioning to ask counsel for guidance. If attorneys need a break to talk to witnesses or others, they should ask for one and their request will be addressed by the court.

9. Excluding witnesses

Counsel may ask that the court exclude testifying witnesses from the "courtroom" during the testimony of other witnesses. Excluding these witnesses may mean putting them in a virtual "waiting room" until their testimony is required. Alternatively, those witnesses may be directed to dial back in to the trial at a specific, designated time.

Live Hearings

1. Covid protocols

Attorneys should find out if witnesses will be required to wear masks while testifying. If so, masks should be professional looking. No Joker masks please! Other questions that attorneys should ask ahead of time include: Will there be plexiglass barriers? Will courtroom occupancy be strictly limited? Will there be paper exhibits or electronic ones?

2. Travel issues

Attorneys must understand all state travel restrictions. For in-person hearings, attorneys should determine whether witnesses and counsel will be required to quarantine for a period of time after arrival and whether they need to obtain a negative Covid test. These considerations are important when witnesses are traveling from "hot spots" and may need to be separated from their families for weeks just to attend a one-day hearing.

3. Settlement implications

How will travel restrictions impact settlement? If attorneys or witnesses are subject to various Covid-related restrictions, such restrictions may drive settlement. For example, where out-of-state counsel or witnesses will need to travel and quarantine, such requirements will increase the burden and potentially move parties to settle rather than go to trial. Similarly, many litigators and their clients prefer in-person trials and hearings to virtual ones. If they have to wait months or years, will they evaluate settlement differently?

4. Jury trials

How will Covid-related restrictions impact trial strategy? For many matters, there is a material difference between a jury trial and a bench trial. Questions that attorneys should ask in connection with jury trials include: Is there any possibility of a virtual jury trial? Would attorneys and their clients want that? How long will attorneys and their clients have to wait for an in-person jury trial? What is the court's backlog? Is the right decision to waive the right to trial by jury to resolve a dispute more quickly?