**IOC Witness Preparation: Tips for Woodshedding a Witness for Deposition or Trial**

First, evaluate your client as a witness. All witnesses have different strengths and weaknesses. Make them comfortable with each, and remind them that they are there to answer, not offer.

Second, evaluate what your opponent hopes to gain during the examination? Make (i) a list of the key points that your adversary needs to make and (ii) a list of the hardest questions that your client will face. Anticipate lines of questioning, as well as documents that may be used. Create an outline and assemble documents for your preparation session.

Third, regardless of sophistication level or personality type of your witness, identify potential "anchors". Anchors are anything that helps the witness address difficult questions effectively.

Fourth, review documents and depositions. If your witness has documents likely to be used or if previously gave testimony (affidavits, interrogatories too), then review these in advance.

Fifth, if other witnesses have been deposed, consider what they have said about your witness. (e.g., what the witness did or did not do, at what was the witness present, what the witness said.)

Sixth, evaluate what evidence you need from your witness for your case. Their role is not to win the case but to provide factual information.

Seventh, review key points that are almost universally applicable.

* Tell the truth.
* Speak audibly.
* Talk slowly.
* Think before you speak.
* Do not volunteer information; answer only the question that is asked.
* Be professional and polite.
* Take breaks as necessary (usually one per hour).
* If you do not understand the question, then ask for clarification.
* Do not speculate-"I don't know" and "I don't recall" are acceptable answers if truthful.
* Do not cut yourself off from further testimony.
  + For example, if asked for a list (e.g., people, documents, job duties), testify to everything you recall, but do not testify that your list is exhaustive unless you are certain.
* Beware of leading questions. (Opposing counsel is trying to testify for you.)
  + "Isn't it true that . . . ."
  + "Would it be fair to say that . . . ."
  + "Am I correct in understanding that . . . ."
* Stick to your answer.
  + "As I just said. . . ."
* When testifying about documents
  + Review the document.
  + Pay attention to the date, author(s), recipient(s), and signatory, if any.
  + Evaluate whether the document is a complete copy.
  + Remember that email chains are chronologically in reverse.

Eighth, be mindful of the limits of your preparation. The ABA Model Rules of Professional Conduct prohibit several types of activities:

* A lawyer may not counsel a client in conduct that is criminal or fraudulent. In other words, you can't counsel how to circumvent the law, or to do something wrongful, like make a fraudulent transfer to avoid losing an asset or to make it harder for an opponent to get the asset.
* A lawyer may not knowingly counsel or assist a witness to testify falsely or offer false evidence. For example, if something your witness has done is alleged to be wrongful but was a one-time event, do not try to characterize it as a habit in some attempt to limit efforts to impeach the witness based on character.
* A lawyer cannot offer evidence that he or she knows to be false. Same example—if you want to present something as a habit but it was the first time the witness did this, then do not try to bolster it as a habit just to try to develop some evidentiary point.
* A lawyer shall not counsel or assist a witness to testify falsely.

*Geders v. United States* (1976) and *Hall v. Clifton Precision* (1993) offer a number of guidelines on improper influence of witnesses. Preparing a witness to give a rehearsed answer is not proper if the purpose is to mislead the finder of fact or to frustrate the inquiring party from obtaining legitimate discovery

Ninth, a witness should understand that the witness can confer privately with the attorney during the deposition at any time. But that it is improper for an attorney to confer with a witness during the deposition, unless to assert a privilege. *Hall v. Clifton*, 150 F.R.D. 525 (E.D. Pa. 1993) [citing Federal Rule 30(c)]. So make sure the witness is comfortable with that reality.

Tenth, a witness should understand that incorrect or mistaken answers occur; but these can be corrected later. Note, the original testimony and changes are part of the record – and the deponent may be impeached. *SEC v. Parkerbur Wireless LLC*, 156 F.R.D. 529, 536 (D.D.C. 1994). If the changes are material enough, the deposition can be re-opened. *US ex rel. Burch v. Piqua Eng’g*, 152 F.R.D. 565, 567 (S.D. Ohio 1993), or the court may refuse to allow changes. *Greenway v. International Paper Co.,* 144 F.R.D. 322, 325 (W.D. La 1992). *See Devon Energy Corp. v. Westacott*, 2011 WL 11573334 (S.D. Tex. 2011) [Lee Rosenthal].