



Dealing the Best Deck: Succession Planning for In-house Witnesses

Litigation and Dispute Resolution





CHEAT SHEET

- ***Demeanor.*** A witness who sweats, fidgets and avoids looking at the questioning counsel will not be credible or likeable.
- ***Temperament.*** A company witness needs to maintain a calm and professional demeanor throughout the deposition. He must be able to remain mentally strong throughout a long, grueling deposition.
- ***Attitude.*** Perhaps a witness feels the company is not treating him right. Someone who may be hostile toward the company should, obviously, be avoided.
- ***Availability.*** The witness must be willing to invest the necessary time to prepare for the deposition. You may have someone who is willing to help, but his regular job demands are too high.

Imagine this scenario. It's another day in the office, and you're managing a large personal-injury case with millions of dollars at stake. Your outside counsel forwards you a notice for a corporate designee deposition accompanied by 50 deposition topics. You look at the topics and feel confident that your go-to employee witness, a 20-year veteran of depositions, can handle the topic and put the company's best face forward. You reach out to him to get some available dates, and he informs you that he is retiring from the company and moving to Florida at the end of the week. He won't be testifying for the company now or anytime in the future.

Now what? You've always used this witness, and you don't have someone else from the company to testify on these topics. You need to produce a witness to provide sworn testimony that will bind the company, and you don't know where to start. You reach out to the platform and are informed that it has a young engineer who will be happy to assist with litigation. He has no experience with the litigation process and has never been deposed.

You and your outside counsel do your best to prepare him. You meet with the witness for several days. You explain the litigation process. You educate him on the relevant documents and potential minefields. You conduct a mock examination. You've done everything you can with this new witness. He's ready, and you're confident that he will do well.

The day of the deposition arrives. It starts smoothly, as you expected. The witness provides his name, background, company position and what he did to prepare for the deposition, all without a hiccup. Then the hard questions start. The plaintiff's counsel spits rapid-fire questions at the witness. And suddenly, despite all your preparation, your new witness folds. Terrified, he invokes the fight-or-flight response and begins acquiescing to every question. Suddenly, as you watch in horror, your case is over. You realize with dismay that your company must now pay a ridiculous settlement amount because the testimony is so damaging that you cannot win at trial.

Does this situation sound familiar? Have you ever experienced it? This is what can happen when a company does not have a corporate witness succession plan — and no backup plan. This is the result of producing an inexperienced witness for deposition who does not know how to handle aggressive questioning by a veteran plaintiff's lawyer over the course of an entire day.

Some companies have the corporate designee process down. They have whole departments dedicated to litigation support — a veritable plethora of witnesses to choose from when that dreaded corporate designee notice comes arrives on in-house counsel's desk. If you work for one of those companies, then your company is a good model for witness succession planning.

Most companies, however, do not have a pool of competent and experienced witnesses. Some companies are lucky to have one person with experience and willingness to testify on behalf of the company. What happens when that one person retires or gets sick? Does your company have a backup plan? Or will you find yourself faced with the similar scenario of putting up a witness who has never testified before with little time to prepare and no idea how he will hold up under pressure?

Witness succession planning

Witness succession is a common problem in companies. Despite what we tell our employees when we prepare them for deposition, they *can* lose the case for the company. I've seen it, and I'm betting you have too. While it's unlikely that a good witness will win the case for the company, it sure can pave the way for a win at trial. Knowing that your witness can make or break a case and, depending on the type of case, cost your company millions of dollars, you need to ensure that you have a pool of knowledgeable and competent witnesses at your fingertips. You need to do what you can to avoid that bad deposition that will haunt your company for years to come and bind the company to that testimony.

Keep in mind that succession planning is different from replacing a witness. Succession planning is a long-term process that takes time and mentoring of a number of potential witnesses to build a large talent pool. To properly implement a witness-succession plan, it takes buy-in from upper management to establish proper incentives for the employees involved. Remember, the employees involved are either learning how to be a corporate witness or have been in this role and are training/mentoring the incoming witnesses. Employees need to feel that their time as either a mentor or protege in this process is valued and appreciated. Otherwise, they are unlikely to put in the time and attention necessary to allow the passage of knowledge from mentor to protege.

If your company does not have a witness succession plan, it's time to develop one. Take a long, hard look at your current roster of witnesses. Do you have a second string? What about a third? If not, dig deep into your company's various departments to determine who else you can introduce to the litigation process and begin educating those employees about the process. Put together a list of potential witnesses, interview them, explore how they will do under the pressure of a deposition, and start the training process for the best possible candidates.

I've looked at my roster, and I need more available witnesses ... now what?

If you've determined that you need more witnesses, it's time to research potential candidates. A great place to start is with your current witnesses. Ask them if they know anyone they work with who might make a good company witness. Check with the department heads and see if they can recommend anyone. Talk to your colleagues and see if they have interacted with anyone who they think would make a good witness. Keep in mind that finding new company witnesses is not just a matter of finding someone with the most knowledge in a particular area. Many other considerations are more important, such as demeanor, temperament, availability and attitude toward the company, to name a few.

Demeanor

Some potential witnesses may be nervous and easily flustered. Some are poor communicators, have difficulty conveying their point or speak in a weak voice that may be perceived as evasive, deceptive, or not credible. Poor demeanor can lead to disastrous results. Imagine putting up a nervous witness for a videotaped deposition or trial who sweats, fidgets, avoids looking at the questioning counsel or looks to his own counsel for approval before answering any questions and generally appears like a deer in headlights. This witness will not be credible, nor will he be likeable. Worse yet, imagine this witness being easily flustered and simply agreeing to questions posed by counsel without really listening to the question. What's the result? Admissions against the company's interests that are not true — not the company's position and probably not even the witness' belief — but will now bind the company throughout the litigation of not only that case but all cases involving this same subject matter for years to come.

Temperament

A potential witness must also have the right temperament. A company witness needs to maintain a calm and professional demeanor throughout the deposition. Moreover, the witness must remain mentally strong and sharp throughout a long and grueling deposition. The witness cannot be rattled by an aggressive or difficult lawyer. Imagine if your witness becomes hostile toward the questioning lawyer by shouting, giving sarcastic remarks or even using foul language. A jury is unlikely to forgive those transgressions. You should be looking for a witness who is not prone to these types of outbursts. While you may not be able to spot this when first identifying a witness, if you follow the training process set forth below, you should be able to weed these candidates out.

Attitude toward company

Some potential witnesses may be hostile toward the company. Perhaps he feels the company is not treating him right. Perhaps he holds a view contrary to the company's policy and feels he is not being heard within the company. He may feel that a deposition is his opportunity to express those feelings and provide his opinion, which is contrary to the company's goal. Putting this type of witness up can have disastrous results for the company and should, obviously, be avoided.

Availability

It seems obvious that a potential witness must be available. However, availability means more than just being able to provide a date for the deposition. The witness must be willing to invest the necessary time to prepare for the deposition. You may have someone who is willing to help, but his regular job demands are so high that he simply cannot commit to the additional work. Even if he can commit to the additional work, his manager may not support the dedication of time needed to prepare for and participate in the deposition process.

Bear in mind that because there is no rule that the corporate witness must be the most knowledgeable witness in a particular area, you have the freedom to find someone who is available, has a good demeanor and attitude toward the company, and is familiar with the litigation process. Once you have those basics, educating him on the topics to become a knowledgeable, credible and likeable witness is the easy part.

Steps for witness succession planning

1. Look at your company's current witness roster. Does your company have more than one witness available for each business area? Are your company's witnesses close to retirement? Where will your potential witnesses be in five years?
2. If your witness roster is not robust enough, start looking at potential corporate witnesses in the different business areas in which you might expect litigation and the need for corporate witnesses. Compile a list of potential witnesses.
3. Interview the potential witnesses on your list. Factor in demeanor, temperament, availability and attitude toward the company. Narrow the list to the potential witnesses who favorably meet these considerations.
4. Begin the education process. Educate the witnesses on the litigation process and what to expect. Have them talk to experienced witnesses from your company and, if possible, shadow them so they learn what to expect.

I've identified my ideal witness, but he doesn't want anything to do with litigation ... How do I get him on board?

It probably won't come as a shock to you that not all employees are going to be eager to assist in a lawsuit with the company. There are numerous reasons why you may find a desirable company witness resistant to becoming involved in the process. He may be unfamiliar with the process and nervous about what it will entail. He may be concerned that he won't have all the answers or will mess up and get the company in trouble and put his job at risk. He may have time commitment issues, concern that his manager will not approve or an unwillingness to take on additional responsibility, particularly without additional compensation.

If you have a potential company witness whom you really want to get on board, whom you've identified as someone with has good demeanor, temperament and attitude toward the company, dig a little further into why he doesn't want to assist with litigation. You want to make an effort to get cooperation from desirable witness candidates. There are ways to address each and every one of the issues behind the hesitation to testify for the company.

Unfamiliarity with the process

If the witness is afraid to become involved because he is unfamiliar with the process, familiarize him. Educate him on the litigation process and what his role will involve. Inform him that he will be supported throughout the process by in-house and outside counsel and that by the time he has to actually testify, he will be comfortable with the process, the expectations and the areas he will testify about. Take fear out of the equation.

Concern about making costly mistakes

Explain to the witness that the only thing expected of him is to listen to the question and answer truthfully and honestly. Let him know that he will be adequately prepared and have counsel there with him for support and that you asked for his help because his involvement will help the company.

Get managers on board

When the sticking point is obtaining managerial approval, the best course of action is to speak directly to the manager. Let the potential witness know you plan to contact his manager and explain why it is important to the company that he assist in the litigation process. When speaking with the manager, appeal to his work ethic and pride in the outcome. Explain that you understand the employee's value, and that is why you need his assistance in litigation. Often, a manager can be persuaded to lend his employee to the litigation process after learning the stakes in the litigation and the potential negative outcome for the company and the department's reputation if a competent, knowledgeable witness is not produced.

My witness is on board, but he doesn't know anything about litigation ... How do I educate him?

Witnesses need to know the litigation process. They need to know what their role is and how it fits into the process, what their deposition means and how it affects the company. It is your job to begin educating the witness long before a corporate designee notice is served.

Consider a multiday training workshop for newly identified potential witnesses on the litigation process. During this workshop, you can explain the entire process, from complaint filing through trial, and familiarize people with what to expect from their role in that process. This workshop should differ from the age-old, formulaic deposition preparation session. Instead, this training should be a practical, interactive, hands-on approach that provides them with the necessary tools to go through a deposition and maintain a calm demeanor, listen to what is asked and answer honestly and maintain mental clarity and strength even in the seventh hour of a deposition. Give potential witnesses examples of deposition testimony. Show excerpts of videotaped trial testimony, both good and bad. Put your people through a mock examination and videotape it. Replay the video to show them any bad habits, such as fidgeting, speaking too softly, poor temperament and avoiding eye contact. The video replay will also show how certain responses can be perceived, which will help your witnesses learn how to better structure responses to accurately and effectively convey the company's position.

Sample workshop agenda

- Introduction
 - Icebreaker and overview of litigation
- Deposition Guidelines & Tactics
 - Explain process and what to expect
 - Show videotaped deposition examples
- Deposition Demonstrations
 - Mock depositions with faculty and lessons learned
- Breakout Sessions
 - Small working groups with videotaped mock depositions of potential witnesses
 - Replay of videotaped mock depositions and provide feedback

A workshop, rather than a classroom-style lecture, is beneficial for novice witnesses (and, at times,

for some experienced witnesses) because it provides them with a familiarity with the process in a comfortable setting with no adverse consequences. They can practice testifying under vigorous mock examination without fear of damaging the company's position at trial. The visual component of replaying the testimony and discussing the good and the bad is a vital component of this training to aid in learning what works and does not work in a deposition or trial setting. This type of training can also settle the nerves of a witness who is hesitant to testify because of a fear of the unknown.

Use this workshop to further refine your witness list. When the workshop is over, you will have a much better idea of who will be a good witness for your company and who you want to avoid having to testify at deposition or trial. Start giving your newly identified witnesses some experience in the process. They can help you gather documents in response to discovery requests or attend inspections. Provide them with deposition transcripts of experienced company witnesses, or, better yet, have them watch videotaped depositions if you have them available. Produce them for deposition in smaller exposure cases. By the time you need them for that big case, when your more experienced witnesses are retired or otherwise unavailable, they will be ready.

If you have the means to do it within your company, make this a recurrent and fluid process. Continue to identify potential witnesses within your company, and train them in the process before receiving a corporate designee notice. A witness who is familiar with the process, whom you know and trust will be a good witness for the company, will allow you to breathe a little easier when that corporate designee notice crosses your desk.

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