



## **2018 New York Conference**

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### **PREPARING AND FINDING “THE RIGHT STUFF”**

#### **I. The importance of preparing and finding the right deponent**

In cases involving allegations of “bad faith” and a claim for extra contractual damages where the damages are outside of the policy limits a plaintiff must convince the fact finder that there is a valid reason for awarding such damages. Although this presentation is centered on those providing testimony on behalf of the company as a corporate representative in a case where extra contractual damages are the focus, it can be applicable to any deposition in which a claims representative is called upon to testify.

Extra contractual litigation involves a number of potential witnesses including the claim handler and the corporate representative. Who you choose to be the company representative can have a considerable impact on the case. Therefore, it is important in any insurance representative’s deposition that they are ready for that deposition, that they know their file and that they can testify credibly on behalf of the company. The carrier has no choice in the person with the “right stuff” for some depositions, but has control over who should act as the corporate representative. Precisely *who* should be chosen to represent the company is a factor which should be decided after careful thought and analysis. Often cases rise and fall based solely on this testimony.

Keep in mind that a corporate representative’s testimony in an extra contractual case binds the company to everything to which they testify. Thus, having an uninformed representative will doom the defense where there are too many “I don’t know” or “I don’t recall” type of answers. Those areas will be great fodder for the plaintiff’s arguments the company is incompetent, uncaring, willfully ignorant or

a number of other indiscreet commentary to increase the value and likelihood of obtaining a verdict in the plaintiff's favor.

In addition to the binding effect of the testimony, keep in mind that the representative is the face of the company, and, essentially, the pillar of your case.

## **II. Considerations for “the right stuff”**

What are the considerations in choosing the person with “the right stuff” to be your pillar and face that binds the company?

- Know and research your venue. For example, the jury pool and expectations may be very different between Eastern Kentucky and New York City and may require a very different type of witness.
- Does your corporate representative need to be someone that is a reflection of that jury pool or is it enough they know their stuff, and are likeable and credible on the stand? If the representative is unbelievable, arrogant, cavalier or unlikeable when testifying that pillar will topple the case on behalf of the company no matter what the other witnesses on behalf of the defense are like.
- Should it be a man or a woman?
- How high up should that representative be from the claims representative that had the responsibility for the claim when it became a possible extra contractual claim?

These are issues that need to be analyzed before choosing the representative.

### Consistency:

What about consistency? Do you want a designated person who is the one called upon for most, if not every, extra contractual corporate representative deposition? This can be valuable providing consistency in testimony, but it can result in robotic type of answers to similar questions that are mainstays in these types of cases. Yet, this representative should not be undermined by prior testimony in another case... unless there are early depositions where the representative stumbled-a nuance that can be held against them. What about the question to this representative: “You have testified 25 times for your company on these issues haven't you?” That question tells the jury that this company has been sued 25 times. Maybe previous cases involved different issues and adjusters and different venues, not all similar to the one in which he is presently testifying, but that sure doesn't help the defense does it? Can the testimony be neutralized? The answer is a resounding, “Yes.” But the practiced witness must know that question will come up and be prepared to answer it, spinning it in favor or the insurance company.

### Representative Preparedness

Is your chosen representative willing to take the time to be properly prepared for the deposition? It may take hours, days or even weeks, depending on the case. It may require study, research and being involved in mock depositions. Is that representative too overworked to be able to commit to the time necessary to be familiar with all the areas they will be called upon for testimony? Is the corporate representative or representatives (remember you can designate different representatives on different

topics) the type of person that can take the heat of a deposition and not lose their composure? Is this person willing to listen to and heed the advice of the attorney preparing them for the deposition? Is this witness the type that likes to “be helpful”, thinking that will assist them in the deposition?

The chosen representative needs to be involved in his or her own preparation. The more they personally know about opposing counsel and the venue, as well as, the claim the better choice they will be. Due diligence learning about the opposing counsel and the venue apart from the time in preparation with the attorney can be invaluable as it is not something they need to retain but is something they have taken the time to learn. Their retention will be much better if they do some of their own research on the issues. Can the chosen representative interpret and understand the case law in the venue on what is considered bad faith and what is not? Has the chosen representative ever dealt with the important issues in the venue before?

### **III. The attorney role in preparing the deponent**

#### Educate

The attorney must educate the deponent on the case law on the issues that will affect the outcome of the case. Summarize, provide key points, or whatever is necessary to properly prepare them. Get intelligence on opposing counsel from other attorneys in other cases involving the particular plaintiff’s counsel. Even if you are familiar with opposing counsel, you should speak with other attorneys that have faced your opposing counsel to get their take. Make sure to fully research decisions and appeals they were involved in regarding the same area that is involved in your case. Get other depositions, if possible, by the opposing counsel in which the subject matter was the same or similar. These can be invaluable for the deponent to see the style and even possible questions for which to prepare.

#### Prepare

The attorney’s job in helping to select and prepare the corporate representative requires her to ensure the opposing counsel provides the road map for the corporate representative’s deposition. Are the issues to be addressed at that deposition specific, vague or overly broad? It is imperative the attorney obtain a specific notice that the deponent can prepare for and be able to point to at the deposition as the only topics they are prepared to testify to. That can only be done if the notice is specific. Request topics for the deposition be amended if they are not specific. Do not agree to a notice where a topic is identified that says: “testify as to how the company handles claims,” or “testify to the claims manual”. Any questions this broad or vague puts every possible claim or rule in the claims manual as fair game. Are all those claims or is everything in the claims manual at issue? What time period are we talking about—things change over the course of time at a company with new management, new techniques, new policy language. Is the claims manual a living document that changes or is it static and has been used forever, despite changes in the law. The list can go on and on as to why these two topics are not specific enough.

Are any of the topics objectionable? The attorney needs to address those objections with counsel and/or the court long before the deposition so there is time to prepare the witness on the topics to be addressed at the deposition. The objections might be overruled but they must be made in advance and not at the deposition itself. A call to the judge is not going to help your witness if they have to testify

“off the cuff” to questions they were not prepared to answer because the attorney believed they were objectionable and not going to be answered.

Two of the most helpful preparation techniques is for the attorney to put together the toughest set of deposition questions they can for a mock deposition. Not only should the attorney be prepared to fire those questions at the proposed corporate representative, but the attorney should have the sessions videotaped. The body language of the deponent can be just as telling as what is being said at a deposition and the fact finder will absolutely take that in to consideration. This type of preparation also gives the witness confidence and, although at first take doesn't seem like it, does take away some of the fear factor approaching the deposition day.

#### **IV. Preparing for the reptile to rear its ugly head...**

Preparing witnesses for their depositions is crucial in any case. But when the reptile theory is being used it cannot be stressed enough that the witness must be ready for reptile-type questions. These questions start as innocuous questions that most deponents cannot help but agree to. But they ultimately lead to the deadly “gotcha” moment that is hard to disagree with based upon the prior answers. Questioning used in the reptile theory will begin by asking questions that any unsuspecting witness would agree to without a second thought. The plaintiff's counsel then builds a cadence of quick answers to these questions. The trap is then set, and when the questions get to the specific facts of the case, the witness will have to agree that the defendant failed to comply with some broad, vague, made-up safety rule or theory of appropriate claims adjusting resulting in bad faith.

Once the deponent agrees with the questions, he or she will be hard pressed to deny them, and the plaintiff's counsel will make it appear that the deponent consciously decided to violate the made up safety rule or theory of appropriate claims adjusting and is unwilling to accept the responsibility for the failure of the company to comply with it. Therefore, the preparation of the witness must no longer be to provide short, concise answers, but rather, to voice disagreement in this particular case to a made up safety rule or theory of proper claims adjusting; or to request clarification of the broad, general rules being placed before the witness by opposing counsel. Answering the questions related to reptile questions should be “that is a broad generalization,” or “in most cases, but . . .,” or “it depends on what you consider safe . . .,” or other types of precursors to an explanation that takes the response back to the theme/narrative and facts of this case. Teach the deponent to recognize the need for a different response when the question begins with “you would agree” or “it would be fair to say.” The answer should never be just “yes” or “no.”

Answering the reptile questions in the realm of extra contractual damages requires counsel to prepare a theme/narrative for the case early and then rely upon the theme/narrative in responding to all discovery and the deposition. That theme/narrative gives the witness something to hold on to and to use for the basis of the disagreement with the attempted “gotcha moment”. If properly prepared, opposing counsel will never even get to the “gotcha” moment and the pillar of the plaintiff's case will begin to crumble.

If the defense has not recognized the use of the reptile theory in the discovery that has gone before the deposition, or the potential for it to be used at the deposition, the deposition will doom the defense to failure. Time and again, defense attorneys have bemoaned the fact that they did not know what the reptile theory was and did not prepare their witnesses accordingly. The best tool that a defense attorney

can use in the fight against the reptile theory is to prepare the witnesses for the questions that may be raised and how to defeat them.