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Practical Tips For Preparing A Video Deposition

Law360, New York (March 08, 2010) -- As the modern jury trial has evolved with advances in technology, today's juries expect sophisticated visual presentations, including video presentation of witnesses. Long gone are the days when an associate or paralegal plays the part of an absent witness by reading from a deposition transcript.

Although litigators often spend hours preparing witnesses for deposition, they frequently devote too little time focusing on the fact that the deposition will be videotaped, or that clips of video deposition testimony may be played to the jury, consistent with the rules of admissibility and evidence.

If witnesses are not properly prepared for the camera, these video clips can have devastating effects at trial. The following practical tips will help ensure that your deponents do not sink your case with the jury.

1) Instruct witnesses to testify as if they are addressing a live audience.

Just like trial witnesses, deposition witnesses should testify for the camera as if they were addressing the jury in person. Importantly, witnesses must both dress and act professionally. If you would instruct a male witness to wear a jacket in court, he should do the same at deposition.

Similarly, witnesses should convey throughout the deposition that they take the matter seriously, no matter what personal feelings they may have about the case, the opponent, or opposing counsel.

Additionally, witnesses should not have food, drink, pens, notepads, or other items with which they may fidget within view of the camera.

Similarly, witnesses should speak audibly, clearly and confidently, and when applicable, should take time to explain complex or technical issues in a way that the jury will

understand.

2) Coach witnesses on the importance of body language.

As every litigator knows, credibility at trial is key. Thus, when a deposition is videotaped, the manner in which a witness testifies can be as important as the substance of the testimony itself. Be sure to coach deposition witnesses to sit up straight and look directly at the camera when responding to questions.

Additionally, counsel should be aware of a witness' particular mannerisms that will not show well on videotape, such as a witness covering his or her mouth when responding to questions, scowling or making other expressive facial gestures, playing with a witness' hair, or slouching in the witness' chair.

Because many witnesses do not realize they engage in these types of damaging behaviors, counsel should take time to practice with witnesses ahead of time.

3) Remind witnesses that patience is a virtue.

No jury likes an argumentative, annoyed, or rude witness. No matter how insulting, mundane, repetitive or argumentative the questions become, deposition witnesses must be instructed to keep their cool.

Particularly because video clips are cut up and edited, the jury may not understand why a witness is exasperated or frustrated with a particular line of questioning, even if justified. Indeed, a clip of a deposition question and answer is a small window of what is often a full or multiday examination.

The jury, however, does not get to see the full context of the deposition, including whether a particular clip was preceded by poor questioning or battles with opposing counsel.

Similarly, the jury will not know that the witness has been in the chair for six hours by the time a key question is asked. Thus, to assure that an answer at 4 pm is as solid as one at 10 am, be sure to take appropriate breaks throughout the deposition, and keep your witness focused and alert from start to end.

4) Keep witnesses focused during objections.

Of course, it is as important to properly preserve your objections in a video deposition as it is when the camera is not present. If your objection is overruled by the trial judge, however, all

that will be played to the jury is the question and answer. While you are objecting or engaging in colloquy with opposing counsel, your witness may start thinking about lunch.

From the jury's perspective, the result is a lucid question with an incoherent answer. If your witness is not particularly diligent during lengthy objections or attorney discussion, make sure to have the question read again so the witness has it fresh in his or her mind before giving a response.

5) Take time reviewing your opponent's proposed clips and cross-designate when necessary.

The more time you spend reviewing your opponent's proposed video clips, the better. First and foremost, ensure the proposed clips comport with the rules of evidence.

In every case, carefully scrutinize whether or not the clips are relevant and/or unduly prejudicial. Additionally, make sure the clips do not lack foundation, which can often be the case when testimony is elicited in the less formal setting of a deposition.

If time allows, watch the proposed video clips themselves, rather than simply reviewing the written transcripts of the proposed clips. In some cases, there may be something in the video itself that warrants exclusion of the clip, even if it does not show up on the written transcript.

For example, if you are sitting next to your witness, you may be unaware that in response to a particularly annoying question, the witness made an exasperated facial expression or rolled his or her eyes.

Although you otherwise may not object to that particular clip, you certainly would want to try to keep the clip from the jury, including making relevance and prejudice objections given the particular circumstances.

Also consider cross-designating additional clips if necessary. In some cases, this means proposing to opposing counsel (and/or the court) that the clips be extended because they are misleading as edited.

In other cases, it may mean designating your own clips to play as rebuttal to the clips played by your opponent. In either case, it is best to keep your clips as short as possible, as juries often become bored — and even annoyed — with too much video.

6) Have witnesses testify live.

Finally, if you have the option, always bring deponents to testify live on your case. Even the best deposition witnesses come across better if the jury has the chance to meet them in person.

Similarly, if a witness' deposition video does not make a good impression, questioning the witness live gives you a chance to rehabilitate your witness' likeability.

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