EFFECTIVE WITNESS PREPARATION AND PRESENTATION IN A FRANCHISE CASE

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I. INTRODUCTION

Few trial lawyers would disagree that the presentation and performance of a party’s witnesses are essential to obtaining a successful litigation result. Even in this email-driven and text-obsessed, world, flesh and blood witnesses are necessary to convey a party’s story and to persuade a fact-finder. Witnesses bring documents to life, and they provide context and meaning to business interactions.

If witness presentation is so essential, it follows that witness preparation is one of the most important tasks a litigator and trial lawyer must perform. The goal of witness preparation, whether during discovery or at trial, is to help the witness to testify truthfully, credibly, and persuasively. Any experienced trial lawyer has many stories about witnesses – the good, the bad, and the ugly. Witnesses that nailed it; witnesses that did not come off as expected; and witnesses that imploded on the stand. Effective witness preparation can mean the difference between a good or bad pretrial settlement, or between winning or losing at trial or arbitration.

This paper will help franchise litigators and trial lawyers prepare for that next important witness deposition or witness presentation at trial or arbitration. The paper first covers the relevant rules regarding the taking and use of depositions. Next, the paper addresses ethical issues governing witness preparation. The paper then describes best practices for preparing witnesses for depositions and for preparing witnesses to testify at a trial or arbitration, including ideas and tips for conveying common themes in franchise litigation. Finally, the paper addresses practical considerations regarding the role of in-house counsel in helping to prepare business clients to give effective testimony.

II. THE BASICS

A. The Rules for Depositions

The most common witness preparation task most business and franchise litigators encounter is preparing a witness to testify at a deposition. The first step in preparing a deposition witness is assuring that one is familiar with the rules that govern depositions in the first place. While substantive witness preparation is crucial, failure to adequately follow the rules can significantly hurt one’s position in a case. Understanding how the deposition process works and how a deposition may be used in the litigation is an important foundation for proper witness preparation.

Depositions in federal court are allowed pursuant to Rules 30, 31, and 32 of the Federal Rules of Civil Procedure (FRCP). FRCP 30 governs depositions by oral examination and FRCP 31 governs deposition by written examination. FRCP 32 governs the use of depositions in court proceedings. Most state court rules are modeled on the corresponding Federal Rules.

Deposition by Oral Examination
FRCP 30 delineates the rules applicable to depositions by oral examination. Typically, a party may “depose any person, including a party, without leave of court.” However, there are certain applicable exceptions where a party must obtain leave of court for the taking of a deposition. First, “if the parties have not stipulated to the deposition” and 1) the deposition would result in more than 10 depositions being taken; 2) the deponent has already been deposed in the case; or 3) the party seeks to take the deposition before the time specified in Rule 26(d). Second, “if the deponent is confined in prison.”

An oral deposition may be recorded in different methods, such as audio or audiovisual means. A deposition may also be taken by telephone or other remote means if ordered by the court or stipulated by the parties.

Moreover, to conduct a deposition by oral examination, “reasonable written notice,” including time and place of the deposition and, if known, name and address of the deponent, must be given to each party. The method of recording is also a necessary component of the written notice. FRCP 30, however, does not indicate what constitutes “reasonable notice.” An attorney waives his right to object to a defect in a deposition notice unless the objection is promptly served on the party giving notice.

At the deposition, an officer authorized to administer oaths must be present. A party can object to the qualification of the officer before the deposition begins or promptly after the basis for disqualification becomes known or should have been known. At the commencement of the deposition, the officer must begin with an on-the-record statement including: the officer’s name and business address; the date, time, and place of the deposition; the deponent’s name; the officer’s administration of the oath or affirmation to the deponent; and the identity of all persons present. The officer must also put the deponent under oath or affirmation and record the testimony by the designated method. During the depositions all objections must be noted.

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5 Fed. R. Civ. P. 30(b)(3).
8 Fed. R. Civ. P. 30(b)(3).
13 Fed. R. Civ. P. 30(c)(1).
on the record.\textsuperscript{14} The officer must conclude the deposition by “stat[ing] on the record that the deposition is complete and . . . set(ting) out any stipulations made by the attorneys about custody of the transcript or recording and of the exhibits, or about any other pertinent matters.”\textsuperscript{15}

Under the Federal Rules, a deposition is limited to seven hours in one day, unless stipulated or ordered otherwise.\textsuperscript{16} Sanctions may be imposed on “a person who impedes, delays, or frustrates the fair examination of the deponent.”\textsuperscript{17} If a party believes a deposition is “being conducted in bad faith or in a manner that unreasonably annoys, embarrasses, or oppresses the deponent,” a motion to terminate or limit may be filed.\textsuperscript{18}

Once a deposition is completed, the deposition must be sealed and sent to the attorney who arranged for the deposition.\textsuperscript{19} Any documents or tangible things produced for inspection must be attached to the deposition materials.\textsuperscript{20} A deponent must be allowed 30 days to review and make changes, by way of a signed statement, to the transcript or recording.\textsuperscript{21} There must be a note as to whether a review was requested and an attachment, known as an errata sheet, reflecting any changes made.\textsuperscript{22} A party can object to “how the officer transcribed the testimony—or prepared, signed, certified, sealed, endorsed, sent, or otherwise dealt with the deposition— . . . [if] a motion to suppress is made promptly after the error or irregularity becomes known or, with reasonable diligence, could have been known.”\textsuperscript{23}

Using Depositions in Court Proceedings

FRCP 32 governs the use of deposition testimony in court proceedings. Generally, at a hearing or trial, all or part of a deposition may be used against a party, pursuant to the following conditions: “(A) a party was present or represented at the taking of the deposition or had reasonable notice of it; (B) it is used to the extent it would be admissible under the Federal Rules of Evidence if the deponent were present and testifying; and (C) the use is allowed by Rule 32(a)(2) through (8).”\textsuperscript{24}

\textsuperscript{14} Fed. R. Civ. P. 30(c)(2).
\textsuperscript{15} Fed. R. Civ. P. 30(b)(5)(C).
\textsuperscript{16} Fed. R. Civ. P. 30(d)(1).
\textsuperscript{17} Fed. R. Civ. P. 30(d)(2).
\textsuperscript{19} Fed. R. Civ. P. 30(f)(1).
\textsuperscript{21} Fed. R. Civ. P. 30(e)(1).
\textsuperscript{22} Fed. R. Civ. P. 30(e)(2).
\textsuperscript{24} Fed. R. Civ. P. 32(a)(1).
The deposition may be used “to contradict or impeach the testimony given by the deponent as a witness,” even if the court finds that the witness is unavailable. However, if a party received less than 14 days’ notice of the deposition and had a pending motion for protective order when the deposition was taken, the deposition may not be used against that party.

A party can also object to the taking of the deposition. First, a party can object to the competence of the deponent or to the “competence, relevance, or materiality of testimony” before or during the deposition. Second, a party can object to an error or irregularity in the oral examination. However, this objection is waived if: (i) it relates to the manner of taking the deposition, the form of a question or answer, the oath or affirmation, a party’s conduct, or other matters that might have been corrected at that time; and (ii) it is not timely made during the deposition. Lastly, a party can object to a written question if the objection is “served in writing on the party submitting the question within the time for serving responsive question or, if the question is a recross-question, within 7 days after being served with it.”

Local Rules

In addition to the rules set out in the FRCP, it is important to be aware of local rules and judge-specific standing orders addressing deposition issues. “To address perceived voids in the federal rules, various courts . . . have adopted local rules . . . that concern deposition scheduling.” These provisions frequently require or encourage attorneys to accommodate the schedules of opposing counsel and the deponent, and typically direct attorneys to make a good-faith effort to coordinate the deposition with opposing counsel before sending an expected notice.

26 Fed. R. Civ. P. 32(a)(4). A witness is deemed unavailable if the courts finds: (A) that the witness is dead; (B) that the witness is more than 100 miles from the place of hearing or trial or is outside the United States, unless it appears that the witness’s absence was procured by the party offering the deposition; (C) that the witness cannot attend to testify because of age, illness, infirmity, or imprisonment; (D) that the party offering the deposition could not procure the witness’s attendance by subpoena; or (E) on motion and notice, that exceptional circumstances make it desirable—in the interest of justice and with due regard to the important of live testimony in open court—to permit the deposition to be used.
31 Id.
34 Id.
Additionally, since the term “reasonable notice” is ambiguous in the FRCP, some jurisdictions have rules to establish what constitutes “reasonable notice.” For example, Local Rule 7030-2 of the United States Bankruptcy Court for the Southern District of Florida provides that “the deposition of any person upon oral examination may be taken upon actual delivery of at least 14 days’ notice in writing to the deponent and to every other party to the action.” Local Rule 3.02 of the United States District Court for the Middle District of Florida also requires 14 days’ notice. While many districts and particular judges have similar guidelines for depositions, it is important to be aware of the precise rules because different jurisdictions have different rules. Without being properly informed of these rules, an attorney may be unable to depose an individual because he did not adequately comply with the notice provision or any other provisions implemented by that specific jurisdiction.

B. Ethical Issues

Witness preparation raises important ethical issues for litigators and trial lawyers. The ethical starting points are, on the one hand, a lawyer’s duty to provide zealous representation and adequately prepare versus, on the other hand, the clear prohibition against knowingly encouraging or allowing false testimony. We all have seen examples from the movies of unscrupulous lawyers trying to shape a witness’ testimony or, worse yet, tell the witness what she needs to say to maximize his chances of success in the lawsuit. But ethical issues are not limited to egregious situations of suborning perjury. A lawyer must be aware of the limits of permissible ways to work with a witness in how to frame or present the witness’ testimony.

Courts have explained through the years some of the limits and prohibitions regarding attorney conduct in connection with witness preparation. The United States Supreme Court stated: “An attorney must respect the important ethical distinction between discussing testimony and seeking improperly to influence it.” In one of the oldest reported cases involving witness coaching, the New York Court of Appeals explained that a lawyer’s duty “is to extract the facts from the witness, not pour them into to him; to learn what the witness does know, not to teach him what he ought to know.” The Fifth Circuit, in *Ibarra v. Baker*, further explained: “An attorney enjoys extensive leeway in preparing a witness to testify truthfully, but the attorney crosses a line when she influences the witness to alter testimony in a false or misleading way.” However, the line between proper preparation and improper influencing has not been clearly delineated in reported cases.

The American Bar Association’s Model Rules of Professional Conduct (“Model Rules”) provide governing principles for ethical witness preparation. The Preamble to the Model Rules,

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35 Id. at 16.


38 *Geders v. United States*, 425 U.S. 80, 90 n. 3 (1976) (reversing trial court order prohibiting counsel from conferring with criminal defendant during overnight recess between his direct and cross-examination, but recognizing options for trial judge to prevent witness coaching).

39 *In re Eiridge*, 82 N.Y. 161, 171 (N.Y. 1880).

40 338 F. App’x 457, 465 (5th Cir. 2009).
in describing a lawyer’s responsibilities, states that a competent lawyer “zealously asserts the client’s position under the rules of the adversary system.” The Preamble further explains that a competent lawyer “provides a client with an informed understanding of the client’s legal rights and obligations and explains their practical implications.” These principles are incorporated into certain specific rules, including Rule 1.1 which defines competent representation to include “skill, thoroughness and preparation reasonably necessary for the representation.” According to the comment to Rule 1.1, this duty of competent representation includes “adequate preparation.” Further, Model Rule 1.2(d) specifically authorizes a lawyer to “discuss” with the client the consequences of the client’s conduct.

On the other hand, the Model Rules impose clear limits on an attorney’s conduct relating to witness preparation. The relevant rules provide as follows:

- Model Rule 1.2(d): “A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent....”
- Model Rule 3.3(a)(3): “A lawyer shall not knowingly...offer evidence that the lawyer knows to be false.”
- Model Rule 3.4(b): “A lawyer shall not...falsify evidence, counsel or assist a witness to testify falsely....”
- Model Rule 8.4(c): A lawyer may not “engage in conduct involving dishonesty, fraud, deceit or misrepresentation.”

The comments to these Model Rules provide some general explanation but few specifics. The comment to Rule 3.4 explains that “[f]air competition in the adversary system is secured by prohibitions against destruction or concealment of evidence, improperly coaching witnesses, obstructive tactics in discovery procedure, and the like.”

Commentators recognize that it is both appropriate and necessary for lawyers to prepare witnesses for deposition and trial testimony, but they also acknowledge the lack of clear rules governing that conduct. Most practitioners would agree with the commentator who stated that witness preparation is considered “a fundamental duty of representation and a basic element of effective advocacy.” On the other hand, another commentator has noted that the boundaries of proper witness preparation are “controlled by lawyers own informed conscience.”

The Restatement (Third) of the Law Governing Lawyers synthesizes many of the applicable ethical rules and case law principles in an effort to provide more practical guidance to litigators and trial lawyers. It notes that there is “relatively sparse authority” on witness preparation but also explains that a lawyer preparing a witness “may invite the witness to

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41 MODEL RULES OF PROF’L CONDUCT, R. 1.1 cmt.
42 MODEL RULES OF PROF’L CONDUCT R. 3.4 cmt. 1.
provide truthful testimony favorable to the lawyer’s client.”45 The Restatement goes on to state that preparation consistent with this Rule may include the following:

- Discussing the role of the witness and effective demeanor;
- Discussing the witness’ recollection and probable testimony;
- Revealing to the witness other testimony or evidence that will be presented and asking the witness to reconsider the witness’ recollection or accounting of the events in that light;
- Discussing the applicability of the law to the events in issue;
- Reviewing the factual context into which the witness’ observations or opinions will fit;
- Reviewing documents or other physical evidence that may be introduced;
- Discussing probable lines of cross examination;
- Rehearsal of testimony;
- Suggesting a choice of words to make the witness’ meaning clear.

A few examples from cases and bar ethics opinions illustrate conduct that has been deemed permissible. In EEOC v Mitsubishi Mfg. of Am.,46 the court refused to impose sanctions on plaintiff’s counsel who sent a letter to class members in a sexual harassment case asking them to “try to remember whether or not you have experienced or observed [sexually harassing] activities.” The judge noted: “Although lawyers cannot ethically tell or allow their clients to tell a lie, suggesting subject matter to focus on in telling their story is surely what every competent lawyer, including the Mitsubishi lawyers, do to prepare their clients for a deposition.”47

In State v. Earp, the Court of Appeals of Maryland explained:

It is permissible, in a pretrial meeting with a witness, to review statements, depositions, or prior testimony that a witness has given. It also may be necessary to test or refresh the recollection of the witness by reference to other facts of which the attorney has become aware during pretrial preparation, but in so doing the attorney should exercise great care to avoid suggesting to the witness what his or her testimony should be.48

47 Id. at *6 n.2.
The District of Columbia Bar Association addressed the issue of a lawyer assisting the witness with particular word choices in a 1979 ethics committee opinion. “The fact that the particular words in which testimony, whether written or oral, is cast originated with a lawyer rather than the witness whose testimony it is has no significance as long as the substance of the testimony is not, so far as the lawyer knows or ought to know, is false or misleading.” The opinion noted, however, that suggestions regarding how to phrase testimony may cross the ethical line if the changes in phrasing are “so significant as to make one version misleading while another is not.”

Other court decisions and ethics opinions that have affirmed various kinds of challenged conduct relating to witness preparation include:

- **Resolution Trust Corp. v. Bright** (where attorneys presented former employee witness with their version of events, evidence purporting to show those events, and "aggressively challenged" the witness's version of events during three interviews before having her sign an affidavit, attorneys did not attempt to induce witness to testify falsely under oath merely because they were persistent and aggressive in presenting their theory of case to the witness).

- **Nunn v. Noodles & Co.** (“Sharing [defense counsel]'s theory with the witnesses does not amount to outrageous, egregiously cruel, or venal conduct. There is no evidence that [defense counsel] instructed witnesses to lie. Defining the line between preparing witnesses by informing them of a legal theory and improper coaching is a nuanced legal issue, and the record contains no expert testimony suggesting that [defense counsel] crossed that line. Although the record could allow a jury to conclude that [defense counsel] may have overemphasized the consequences of highlighting the social aspects of the meeting, a jury, based on its lay knowledge, could not conclude that he crossed the line into improper coaching.”).

- **In re Otero County Hospital Association, Inc.** (“An attorney refreshing a witness's recollection in an effort to have a witness recall events more favorably to the attorney's client is not misconduct so long as counsel does not assist the witness to testify falsely as to a material fact. See Restatement (Third) of the Law Governing Lawyers § 116 (2000). The evidence does not establish that counsel for [defendants], by attempting to refresh Dr. Austin's recollection were attempting to assist or encourage him to testify falsely. Nor did [defendant's] counsel do anything wrong by asking Ms. Kushmaul, the Hospital's lawyer, to refresh the recollection of a Hospital employee rather than doing so himself in an informal interview or deposition. The efforts by counsel for [defendants] to

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49 D.C. Bar Legal Ethics Committee, Opinion No. 79 (December 18, 1979)

50 Id.

51 6 F.3d 336 (5th Cir. 1993).


attempt to refresh Dr. Austin’s recollection did not constitute attorney misconduct.

- Bar Association of Nassau County Committee on Professional Ethics Opinion No. 1994-6 (explaining that in a situation where an attorney cuts a client off in initial client interview to explain the law to client before client can give his version of events, while “the problem is a difficult one,” “this Committee does not believe that it is within its province — absent a specific code provision — to either mandate or prohibit specific interviewing techniques in an area so subjective. As long as the attorney in good faith does not believe that the attorney is participating in the creation of false evidence, the proposed conduct does not violate the Code.”).

III. WITNESS PREPARATION FOR DEPOSITIONS

Preparing witnesses for depositions is perhaps the most common task of a litigator. Most cases settle, so witnesses rarely end up taking the stand at trial in front of a jury, judge, or arbitrator. But most cases go through some deposition discovery before settling or being resolved on a dispositive motion. The deposition testimony of key witnesses can make the difference between a good or bad settlement, or between summary judgment and the opportunity to take a case to trial.

The most effective witnesses testify truthfully, credibly, and persuasively. A thorough and effective preparation process maximizes the chance for your deposition witness to achieve these important goals.

A. Common Aspects Of Effective Deposition Preparation

1. Preparation By The Defending Attorney

Effective deposition preparation begins well before the defending lawyer sits down with the witness to prepare her for a deposition. The defending lawyer first must prepare himself to conduct an effective deposition preparation session. The defending lawyer must thoroughly understand the facts, documents, and legal issues in the case, both at the macro level of the overall case and at the micro level for the particular witness.

Step one is to collect all the documentary references to the witness and her role in the case. This effort includes identifying and reviewing all emails and other documents authored by, sent to, or mentioning the particular witness. All discovery responses mentioning the witness should be reviewed, including initial disclosures by both sides describing witnesses with knowledge of facts relevant to the case. The attorney should review interview notes or other documented recollections of other witnesses to understand what others in the case might think or have to say about the witness being deposed. If a witness has given a prior affidavit or declaration, it should be reviewed carefully to make sure the witness’ testimony is consistent. Affidavits or declarations should be avoided if possible (except to the extent needed for preliminary injunctions or other motions) because they will be fodder for deposition and trial questioning. Finally, the lawyer should have someone conduct a thorough internet search regarding the witness and review all potential relevant references, including materials from the company’s website, press reports, published writings, and social media profiles and posts.
In addition to knowing all the facts relevant to the witness and her potential testimony, the defending lawyer must have a full command of the legal theories of the case, including the elements of each claim and defense. A good starting point for this analysis is to review the applicable jury instructions for each claim and affirmative defense, and supplement that analysis with legal research on specific issues that are likely to arise.

2. Conducting The Witness Preparation Meeting(s)

Effective deposition preparation meetings have several common elements. First are the logistics. The prep meeting it should be an actual in-person meeting. There is no substitute for sitting face-to-face, across the table with a witness. An in-person meeting maximizes the likelihood that a witness will focus exclusively on the task at hand, rather than multitasking on her computer during a conference call. It helps to build rapport between the witness and lawyer, which is important to successful witness preparation. It also allows the lawyer to assess the witness in a way that is simply not possible over a telephone or even a video conference. While it can be appropriate for the lawyer to have an initial “get to know you” session with a witness by a phone or video, effective deposition preparation requires in virtually all instances an in-person meeting.

Second, the deposition preparation meeting should be sufficiently in advance of the deposition to allow both the lawyer and the witness to conduct any necessary follow-up activities. While it is often appropriate to hold a final prep session the day before the deposition, it is risky to wait until then to conduct the first substantive prep meeting. It is often the case that the lawyer learns of new or different facts, or new documents, during the prep meeting. It is important that the lawyer and the witness have time to digest the significance of new facts or documents and follow up on any other unanticipated issues that might arise. In addition, holding the primary prep session sufficiently in advance of the deposition gives more time for the witness to become comfortable with both the process and the substance of the deposition, and allows time to identify and prepare for the most difficult issues or the hardest questions that might arise.

At the deposition preparation meeting, the first thing the lawyer should do is to explain what the lawyer wants to achieve in the meeting. The place to start is to tell the witness that the most important, overriding thing to keep in mind in giving deposition testimony is to tell the truth. Explain that although the deposition will take place in an informal setting such as a conference room, the witness is giving testimony under oath just as if she was in a courtroom and the testimony can be used in future proceedings in the case. While it is legitimate and proper to discuss other things to be aware of or to keep in mind in answering deposition questions, the lawyer should make clear that nothing said during the prep meeting is intended to change the witness’ honest recollection or to encourage her to do anything other than to tell the truth as best she can remember it.

Another important purpose of the deposition preparation meeting is to explain the nature of and reasons for a deposition. Some witnesses will have testified at deposition before, but many witnesses will be going through this process for the first time and can greatly benefit from an explanation of what is going to happen. Generally, there are two reasons that lawyers take the deposition of a particular witness. First, there is the pure discovery purpose – finding out what the witness knows, recalls, or will say about a particular event, document, or issue. Most depositions have a significant “discovery” component to them. But a witness should also be aware that lawyers use depositions to obtain admissions or concessions that they believe will help their case and will be harmful or at least disadvantageous to the positions of the witness or
the witness’ company. It is important to make the witness aware of this adversarial purpose so the witness will focus and take appropriate care during the preparation process.

Next, the lawyer should cover the logistics of the deposition and how the questioning will occur. The lawyer should explain that the process involves the questioning lawyer asking specific questions for the witness to answer, and the witness is obligated to give truthful answers to the questions asked. The deposition is an exercise for the benefit of the questioning lawyer, and it is not the primary opportunity for the witness to present everything she might know that is relevant to the case. If the questioning lawyer does not ask about a particular issue or document, the witness has no obligation to volunteer information about it.

Explain that a deposition is a very literal exercise, and the witness must be precise in her answers. The witness should not attempt to engage in humor or make off-the-cuff remarks, which at best often fall flat and at worse can be misconstrued. The lawyer should explain any limitations of time or otherwise imposed by rules of procedure or specific court rules.

Once the purposes and logistics are covered, the lawyer can begin discussing the substance of the case and the witness’s relevant knowledge or involvement. It is often helpful to begin with the big-picture context of the dispute and summarize for the witness the key positions taken by the parties, including the specific legal claims or relevant defenses and the factual allegations pled to support those claims or positions. The goal is not to send the witness to law school, but to help her understand what the case is about and what issues are likely to be important in determining the outcome.

The next substantive step is to discuss the witness’ role in the underlying transaction or events giving rise to the lawsuit. Sometimes the witness was a decision-maker or other key actor, and other times the witness was more of a role player or supporting witness. The nature of the preparation may vary depending upon the witness’ role in or relationship to the underlying events.

Early in the prep session, the lawyer should spend as much time as necessary discussing and understanding the witness’ full recollection of the events of which she has knowledge. The lawyer should be careful to understand and confirm those aspects of the witness’s recollection that are firm, definite and based on personal knowledge, versus those aspects that are less certain or based on information obtained from others. Although less certain or hearsay understandings may be fair game for questioning, it is important for the lawyer to understand and for the witness to be clear as to the nature and extent of her knowledge. It is important for the lawyer to actively probe and cross-examine the witness to make sure all relevant facts and the full extent and/or limits of the witness’ knowledge are revealed.

One of the most important parts of most witness preparation meetings is the review and discussion of relevant documents. It is often helpful to organize the documents both in a single chronological file and separately by witnesses or relevant topics. As mentioned above, it is essential that the lawyer review and organize all documents authored by, received by, or mentioning the witness and have those documents available to discuss. Sometimes the documents will be necessary to refresh a witness’ recollection of key events. In other cases, the witness will need to explain what is meant by certain references in the documents, or what actions led to or resulted from particular documents. Again, the lawyer must develop a full understanding of the contents, context, and significance of documents relating to the witness being deposed.
Further, for any significant witness, the lawyer should prepare a list of potentially difficult issues or potentially hard questions. One of the most important jobs of a lawyer in preparing witness is to identify the toughest questions the adversary is likely to ask and, based on the witness’ knowledge, help to find the truthful answers that best advance the client’s position or most effectively refute the other side’s position. These “hardest questions” should be discussed and examined using all available evidence relating to the witness. They also should be the subject of mock examination as discussed below.

The primary goals of an effective witness preparation meeting are to understand the full scope of the witness’s knowledge of relevant facts and documents, and to anticipate issues and documents the questioning lawyer is likely to raise during the deposition. Successful witness preparation avoids, to the greatest extent possible, surprises for the witness (and her counsel) during the deposition.

Another important step in an effective deposition preparation process is to engage in mock examination on key issues and documents that are likely to be the subject of the witness’ deposition. It is important for the witness to have a sense for what it feels like to answer questions from an adversary’s lawyer, rather than just discussing the facts or documents with her own lawyer. It is a good practice to take the handful of most significant documents and create cross-examination questions for the witness from the perspective of the other side to make sure the witness knows how the adversary might try to characterize or use those documents, and how best to frame truthful responses to such questions. If there are particular admissions that the other side is likely to seek from the witness, the preparing lawyer should go over those questions as well. These role-playing exercises will help a witness be more comfortable with both the adversarial nature of the questions and with the substance of her answers, all of which should result in more effective deposition testimony.

At the end of the session, the lawyer should ask the witness to voice any questions or concerns she might have regarding either the process or substance of the deposition. This is an important part of the process to make the witness comfortable and to build rapport between the lawyer and witness. Any questions or concerns the witness articulates at this point can be used as the basis for final preparation, including additional mock examination, shortly before the deposition.

B. Different Philosophies For Deposition Witness Preparation

1. Traditional Guidelines

Most litigators approach the deposition preparation process with the mindset of trying to minimize the amount of information conveyed by the witness. The idea is either to give the questioning lawyer the least amount of information possible or minimize opportunities for the witness to commit errors that might harm the case – or both. “Don’t volunteer.” “Answer only the question asked.” “Give the shortest truthful answer possible.” “Don’t use the deposition as an opportunity to tell your story or argue your case.” These are traditional admonitions lawyers give to deposition witnesses so the questioning lawyer will end up with as little information as possible.

This traditional philosophy is motivated by legitimate considerations. A deposition is inherently an adversarial process, so the witness needs to be careful and stay on guard for unfair or even just inartful questioning. Here are some of the traditional deposition preparation guidelines to cover with a witness.
• **Tell the truth.** This is the fundamental rule of giving any testimony, and should be the starting point for instructions to any witness.

• **Make sure you understand the question.** Listening carefully to the question and making sure you understand before trying to answer it may be the most important deposition rule besides telling the truth. Some deposition takers ask questions that are intentionally tricky; some questions are just inartful or unclear. Many witnesses feel uncomfortable pushing back on a question or challenging the questioning lawyer. It is essential, however, for the witness to know that she is entitled to a clear, fair question, and that she must understand what is being asked before attempting to answer it. If the witness has any doubt about what the questioning lawyer means by a potentially ambiguous term or phrase, she should ask for clarification and not just assume that her understanding is the same. A lawyer should not encourage a witness to be unnecessarily difficult or combative about every question, but a witness must feel empowered to ask about unclear or ambiguous terms or any other thing that prevents the witness from fully understanding the question.

• **Answer only the question asked.** The witness’ obligation is to give truthful answers to the specific questions asked. The witness is not required to give a lengthy narrative of everything she knows that might be relevant to the case. As a general rule, the witness should not volunteer information that is not responsive to the question. The most concise truthful answer that fairly responds to the substance of the question is usually the best kind of answer.

• **Don’t try to anticipate or “help” the examiner.** Witnesses often get frustrated with the tedious process of a deposition or what they perceive as uninformed or clueless questioning. As a result, they sometimes try to anticipate the information they think the questioning lawyer really wants to know and go straight to providing those answers. Witnesses should resist the urge to anticipate questions or “help” the questioner! It rarely speeds up the deposition and often gives the opposing lawyer information for which she otherwise might not have asked.

• **Stick to your personal knowledge and don’t speculate.** Every witness has her own box of knowledge regarding the events relevant to the lawsuit. That knowledge can come in many ways – because the witness did something, said something, saw something, heard something, or read something – but the witness should have some basis in her personal knowledge before answering a question. Guessing, speculating, or even filling in gaps in memory is not appropriate and often gets a witness into trouble. Questioning lawyers sometimes try to make a witness feel like she ought to know about a particular issue, and will invite the witness to speculate or give her “best guess.” A lawyer should prepare the witness to resist that temptation and stick to answers within her box of knowledge. If a witness feels compelled to offer an answer based on less than complete knowledge, she should make sure to qualify the answer as being "to the best of my recollection" or her “best estimate.”

• **“I don’t know” or “I don’t recall” are proper answers, if true.** Many witnesses, particularly business executives, are uncomfortable saying that they don’t know or don’t recall something that happened on their watch or within their
area of responsibility. Those answers generally are not good ones to give to one’s boss or business colleagues. But if that in fact is the truthful answer to a particular deposition question, then that is what the witness should say. It is appropriate for a witness who has some knowledge or knows some facts about an event to testify to the extent of her knowledge, but the witness should be careful to identify where that knowledge ends and not to speculate beyond it.

- **Be extra careful when the examiner tries to put words in your mouth.** The questioning lawyer is generally entitled to ask leading questions of a witness who is a representative of or affiliated with the opposing party. But deposition witnesses should be extra careful in agreeing to any question where the opposing lawyer is trying to put words in the witness’ mouth. A witness should be alert for “red flag” questions, which may not be questions at all – simply statements to which the lawyer is asking the witness to agree. Or, the question might begin with an introductory phrase such as “Isn’t it true that;” “Wouldn’t you agree that;” or “Isn’t it fair to say that.” Any time a question begins with such phrases, the questioning lawyer likely has formulated the statement in a way he perceives is favorable to his client, so the witness should be very careful before agreeing to that characterization. Another type of “red flag” question is where the questioning lawyer attempts to paraphrase the witness’ prior answer or summarize her prior testimony. Such paraphrases or summaries are rarely complete or totally accurate, and a witness should be careful before agreeing to the opposing lawyer’s attempt to restate her testimony.

- **Be careful with documents.** Depositions in franchise and other business cases usually revolve around documents and written communications, and it is common for a questioning lawyer to cover dozens of exhibits with a witness. Whenever a witness is asked about a document, the witness should insist upon seeing a copy of the document. Further, the witness should take enough time to familiarize herself with the document before answering questions about specific statements or terms. That is not to say the witness needs to read every page of a 50-page document before answering any questions, but the witness should review the document sufficiently to determine whether she recognizes it and understands the substance and context of the document.

- **If you don’t know what to do, ask.** Witnesses often get confused when their lawyer objects or the lawyers engage in colloquy about questions or issues. A witness should be told that if she is unsure what to do in light of objections or lawyer discussions, she should feel free to ask her lawyer how she should proceed. This process allows the defending lawyer to instruct the witness not to answer if appropriate (e.g., a privilege issue or court-ordered limitation) or to tell the witness to answer if she is able to do so. When in doubt about what to do, the witness should ask her lawyer how to proceed.

This list of key points may be a lot for some witnesses to keep in mind. An effective way to reinforce these guidelines is to suggest that the witness go through a simple process before answering each question:

- Make sure the questioning lawyer is finished asking the question.
• Ask yourself “do I understand the question?” If not, ask for any clarification or explanation that might be necessary.

• If you do understand the question, give the most concise truthful answer based on your personal knowledge.

• After answering, stop and wait for another question.

C. More Expansive Witness Preparation Philosophies

Some lawyers believe that overly rigid adherence to the traditional deposition preparation instructions described above can prevent a witness from being as strong and credible as she otherwise could be and therefore harm a party’s case. One of the most avid proponents of discarding the traditional rules of deposition preparation is Kenneth Berman, a litigator with Nutter, McClennan & Fish in Boston, who recently published a book entitled REINVENTING WITNESS PREPARATION – UNLOCKING THE SECRETS TO TESTIMONIAL SUCCESS (ABA 2018). Berman argues that the traditional approach to deposition preparation – encouraging a witness to limit answers and be overly cautious about answering certain questions – results in undue attorney control over the witness which often limits the effectiveness of the witness’ testimony. Berman argues that lawyers should prepare their witnesses to have the confidence and skill to answer questions in ways that will affirmatively advance their cases and get their stories out.

Berman describes the danger of turning a good witness into someone so afraid of saying the wrong thing that she might fail to say the right thing. Instructing witnesses to give up as little information as possible can make them less credible before jurors, who expect people to be reasonably cooperative in answering a question or explaining something they are asked about. Berman also explains that excessive reliance on answers like “I don’t know” and “I don’t recall” undermines a witness’ credibility and sometimes unnecessarily boxes in their answers in ways that limit their effectiveness down the road in the case.

This more expansive witness preparation philosophy is designed to empower the witness to take more control of the questions and her own testimony instead of being purely defensive. Some of Berman’s modifications to the traditional guidelines discussed above include:

• Don’t simply tell the questioner “I don’t understand.” If the witness understands the basic gist of the question, she should answer it and clarify any potential ambiguities in her answer by telling the questioner how she is construing the potentially ambiguous word or phrase.

• Volunteer information that is relevant to a question when doing so would help your case or refute a story the questioning lawyer is trying to develop.

• If you have a recollection, even if it is vague, answer whatever it is you can recall and qualify the answer by saying “to the best of my memory” or similar words. Doing so makes the witness more credible than simply saying "I don't know" or "I don't recall."
• Never answer simply “yes” or “no” to the questioning lawyer’s “red flag” questions. Instead, the witness should answer using her own words which will add relevant context and hopefully build credibility for the witness’ story.

• Berman’s alternative philosophy can be summed up in the following conclusion to his ABA LITIGATION article: “The historic core of conventional witness preparation – the idea that less is more – is not always a helpful guidepost. In many instances, more is more.”54

So which philosophy is the right one – having the witness say as little as possible, or having the witness take more control and tell more of a story? In other words, how proactive should a lawyer encourage a deposition witness to be? The answer is, of course, “it depends.” A lawyer must know his witness and know his case before making the decision how much leeway to give the witness.

First, the lawyer needs to assess the knowledge level and competence level of the witness. Is the witness someone who can understand the overall context of the case, know how other lawyer’s questioning relates to key case issues and themes, and be trusted to know where to “counterpunch” or reframe questions to her party’s advantage? Or, is the witness someone who either lacks sufficient confidence to assert herself or is prone to speak without fully thinking through the answer. Only certain witnesses should be given license to depart from the traditional, more cautious deposition guidelines.

Second, is the witness a key person through whom the lawyer will likely need to tell his client’s story at trial? Such important witnesses usually are in a better position to be more proactive in responding to questions, and in any event the jury will expect them to have a more expansive story to tell. On the other hand, an ancillary witness or a more minor player can more easily take the traditional path of answering as little as possible and avoiding potential contradictions with the more significant witnesses.

Finally, is the witness someone the jury will expect to have more expansive knowledge or to take responsibility for the events in the lawsuit. It can look bad for a key decision maker to come across in deposition as having limited knowledge and being unwilling to respond to questioning as a lay juror might expect.

In sum, the preparing lawyer must know his witnesses and know his case, and then decide how to prepare each witness according to her strengths and capabilities and her role in the case.

D. Preparation for Rule 30(b)(6) Depositions

Federal Rule of Civil Procedure 30(b)(6) allows a party to take the deposition of a corporation, organization, or other entity. The party seeking the deposition must describe with reasonable particularity in the notice the topics identified for examination. The organization must then designate one or more officers, directors, managing agents, or other persons who will

54 Kenneth R. Berman, Reinventing Witness Preparation, LITIGATION, Vol 41, No. 4 (Summer 2015).
testify on the organization’s behalf “about information known or reasonably available to the organization.”

The different structure and legal requirements for a Rule 30(b)(6) deposition require different preparation strategies for the lawyer representing the organization. A party responding to a Rule 30(b)(6) deposition notice has an affirmative obligation to present a witness capable of testifying to all matters known or reasonably available to the entity. Unlike a normal fact witness, a Rule 30(b)(6) representative cannot say “I don’t know” in response to a properly noticed topic. Fulfilling this duty may require the organization to conduct an investigation and review voluminous documents to enable the representative to be adequately prepared.

Moreover, because the witness is testifying as an official representative of the organization, the organization will be bound by the representative’s testimony. The stakes therefore are higher, and a 30(b)(6) deposition requires even more time and effort to prepare.

The first step to prepare for a Rule 30(b)(6) deposition is to review the noticed topics and collect as much information as possible regarding the knowledge of the company about those topics. This fact investigation effort should include reviewing relevant company documents and interviewing knowledgeable company witnesses, which sometimes will include former employees.

The second step is to select the appropriate corporate representative witness. Selection of the witness is a crucial decision because, both practically and legally, this witness will be the “face” of the organization in the lawsuit. But with great responsibility comes significant control – the party can pick anyone it likes so long as that person is properly prepared to testify. The 30(b)(6) witness often is an officer or executive of the entity, but it also can be a lower level employee, former employee, or even an outside person who agrees to testify on behalf of the entity for purposes of the deposition. The representative often is the person who has the most knowledge about the noticed topics, but the preparing lawyer should not reflexively designate someone simply because she is the person most knowledgeable. Considerations for selecting the appropriate corporate representative witness include:

- relevant knowledge regarding the noticed topics;
- how much time it will take to prepare the witness to testify to the full knowledge of the entity;
- how much time the person is able or willing to spend learning the information necessary and preparing to give an effective deposition;
- what kind of image does the person present for the organization, including being articulate, having a likable demeanor, and the ability to convey an overall positive impression to the fact-finder; and
- all other things being equal, a more experienced witness is better than a neophyte.

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It is usually best to select a single representative to testify, as that makes preparation more efficient. However, a party may designate multiple representatives for multiple topics or even for a single topic.

Next, preparation of the selected witness is different in many ways from preparation of solely a fact witness. Because the testimony will bind the organization, the stakes are higher to get the answers right.\textsuperscript{57} In addition, the rule imposes a legal duty to present a witness who can testify to the full knowledge of the organization, and the court may impose sanctions if the witness is not adequately prepared to testify on a properly noticed topic.\textsuperscript{58}

Here are some practical tips for effective preparation of a Rule 30(b)(6) witness:

- Prepare a binder of the key, non-privileged documents relevant to each noticed deposition topic. This provides an organized way for the preparing lawyer to walk the witness through the key events and communications relevant to each topic and “anchors” the witness by allowing her to refer back to key documents if necessary. For particularly document-intensive cases, the preparing lawyer may allow the witness to appear for deposition with the document binder if necessary to make the witness feel comfortable or to allow for complete testimony.

- Make sure the witness understands the organization’s key case themes so the witness can incorporate those themes into her answers where appropriate. Often more than with fact witnesses, Rule 30(b)(6) deposition questions give the witness an opportunity to articulate and advance the testifying party’s case themes and positions, and the preparing lawyer should make sure that the representative witness is prepared to do so.

- Prepare the witness to explain the basis for the organization’s actions and why the organization believed that it was appropriate to make the challenged decision or engage in the challenged conduct. It is important to work with the witness during the prep sessions to make sure she is comfortable advocating the party’s positions and that she has a few concise but accurate “sound bites” ready to use as the appropriate time.

- Make sure the witness is prepared to be asked about her personal knowledge of material issues outside of the noticed topics. Even in a Rule 30(b)(6) deposition, the defending lawyer usually cannot instruct a witness not to answer just because the question goes beyond the noticed topics, so the witness must be prepared for other areas of questioning that can be reasonably anticipated. The defending lawyer, however, should indicate by objection or otherwise when he believes that a question or a line of questioning is outside of the scope of the Rule 30(b)(6) topics so it is clear that the witness is answering in her personal, not representative, capacity.

\textsuperscript{57} QBE Ins. Corp., 277 F.R.D. at 690 (holding “I don’t know” answer by 30(b)(6) witness to be binding on the party); Ierardi v. Lorillard, Inc., No. 90-cv-7049, 1991 WL 158911, at *3 (E.D. Pa. Aug. 13, 1991) (preventing party from offering evidence at trial contrary to testimony of 30(b)(6) witness).

\textsuperscript{58} See, e.g., Black Horse Lane Assocs., L.P. v. Do Chem. Corp., 228 F.3d 275, 304) (3d Cir. 2000) (producing an unprepared 30(b)(6) witness “is tantamount to a failure to appear that is sanctionable under Rule 37(d)).
Finally, preparation of a Rule 30(b)(6) witness raises important attorney-client and work product privilege considerations. Counsel has a more substantive role in preparing a corporate representative witness than a mere fact witness. Counsel often organizes the documents and directs the witness to persons who might have additional knowledge. Sometimes counsel even provides relevant factual information to educate the witness. Counsel must be aware that the communication of facts generally is not privileged just because they were communicated by an attorney.

Counsel also must be careful to protect privileges in preparing a Rule 30(b)(6) witness. Showing the witness a privileged document as part of her preparation can waive the privilege.59 A preparing lawyer should rarely, if ever, use a privileged document as part of his preparation of any witness. It can be tempting to do so with a Rule 30(b)(6) witness, who often must be educated as to certain facts or other information. The better practice, however, is to use exclusively non-privileged documents as part of the education and preparation process.

E. Dealing With “Bad” Facts And Documents

In preparing a witness for a deposition, it is sometimes more important to emphasize the bad facts and documents, as opposed to the good facts and documents. Every case has some bad facts and if the questioner asks the proper questions, he is entitled to truthful answers even if not favorable to the witness’ side of the case.60 It is the attorney’s job to put the bad facts in proper context, not hide them.61 One of the biggest mistakes a lawyer can make is neglecting to address bad emails and documents with the witness prior to the deposition.62 Most witnesses are not familiar with the litigation process, let alone with how to properly structure answers that contain damaging evidence. If the witness is the bearer of what may be “potentially damaging evidence,” it is important to “discuss strategies to honestly and accurately answer questions in ways that soften the impact.”63 If these strategies are not discussed, then the witness will be vulnerable to revealing this negative information in a way that will create more harm than it should. By preparing the witness to answer questions in a specific way, one is creating a path to conveying this information in a way that will soften the blow.

Attorneys can take different strategies in preparing a witness for addressing “bad” information. A strategy of attacking from all points, contesting every issue, and conceding nothing will only lead to short-term benefits.64 Ultimately, a better strategy is to concede the bad facts that are unavoidable and focus on the good facts in your favor.65 However, it is always


61 Id.


63 Redemann, supra note 41, at 1872.

64 Wolfe, supra note 43.

65 Id.
important to keep in mind that answering tough questions about bad emails and bad facts is not easy, especially for a person who has little or no prior deposition experience.66

Thus, preparation is key. The lawyer needs to explore with the witness the context of a potentially damaging document or statement, and why it was made. Asking these questions before the deposition may help the witness put these answers in the proper context and provide an explanation that mitigates the potentially negative impact.67 Conducting mock examination will give the witness the opportunity to get comfortable with discussing the bad facts in a way that will be less damaging to the case. Reviewing answers with the witness in advance of the deposition is not akin to improperly coaching a witness by suggesting answers. Rather, there is more than one way to say the same thing, and advance preparation regarding how to address bad facts simply helps to put these facts in the proper context and deliver them in the least damaging, yet accurate, fashion.

F. Video Depositions

We’ve all heard the expression “A picture is worth a thousand words.” Similarly a video deposition is worth a thousand pictures, making it worth 1,000,000 words. A video deposition can be just as influential as a persuasive performance on the witness stand and can be the turning point in a case.68 Many people remember what they see on a screen better than what they merely hear, and many times a video deposition will be much more memorable to a fact-finder. A video deposition can serve as a powerful weapon, whether it is used beneficially or not. A video deposition can have positive effects on your case, such as by presenting witnesses unavailable at the time of trial, saving on expert witness travel costs by having them testify via video, and providing good impressions of a witness to make the testimony more memorable. But a video deposition can also have negative effects on your case, such as by highlighting sarcasm in a witness’ voice, revealing if a witness took a substantial amount of time to answer a question, and diminishing the witness’ credibility.

For this reason, “[i]t’s critical to prepare . . . witnesses so that jurors will see them in the best positive light if clips are played in court.”69 Therefore, a video deposition deserves as much preparation as an in-court examination.70 The first step in preparing a witness is to notify the witnesses that their testimony will be videotaped.71 This way, the witness is on notice and is more conscious of her demeanor before even beginning the deposition. Also, videoing mock examinations can be helpful in working with the witness on facial expressions, insecure body language, poor verbal responses, and potential questions from opposing counsel.72

66 Id.

67 Redemann, supra note 41, at 1872.


69 Id.


Additionally, mock depositions give witnesses an opportunity to answer questions more quickly so that long pauses are not present.73 A witness can then see her appearance on camera to gain a better understanding of what is appropriate.74

While it may seem straightforward, advising witnesses on their physical presentation is crucial in a video deposition. It is important for a client to feel comfortable, but to also present a professional appearance.75 If the witness is in a profession where she has never worn a suit, she may not feel comfortable in a suit so perhaps a more relaxed type of professional dress would be more suitable.76 Additionally, turning off cell phones or electronic devices is key, as a ring or beep during a video deposition may not go over very well with the fact-finder.77

In sum, whether it is working with witnesses on their physical appearance or the actual substance of a video deposition, preparation is crucial. A video deposition can serve to substantially help one’s case, but without proper preparation, it might create more bad than good.

G. Deposition Tactics With Trial In Mind

In considering different tactics and strategies to implement in a deposition, it is important to always have trial in the back of one’s mind. The most important element in any litigation is presenting a compelling case. For this reason, it is vital to develop and convey key facts and themes via witnesses, before even reaching trial. Witnesses are sometimes the biggest sources of information, and assuring that witnesses convey information in accordance with the key themes that will be argued in trial is crucial.

However, it is also important to not create an impression of hiding something or playing games. Witnesses are still obligated to answer questions truthfully, and if it looks like witnesses are dodging questions or hiding information, that will have a negative impact. A prime example of how a witness should not act is the manner in which Bill Gates conducted himself in videotaped depositions played during a Microsoft trial. “A review of [Gates’s] entire deposition shows that throughout, Gates quibbled, dodged, shot sarcastic comments – and stuck to his guns.”78 The judge presiding over the case “audibly laughed and shook his head during the sometimes comical war of words between the argumentative attorney and the hostile witness.”79 The last thing any attorney wants is to have a judge laughing and shaking his head at the testimony of a

73 Redemann, supra note 41, at 1872.
74 Andre, supra note 53.
76 Id.
77 Id.
78 James V. Grimaldi, Microsoft Trial – The Gates Deposition: 684 Pages of Conflict, THE SEATTLE TIMES (Mar. 16, 1999 12:00 AM), http://community.seattletimes.nwsource.com/archive/?date=19990316&slug=2949718
witness. For this reason, employing any tactics with trial in mind should be done in a way that will not resemble playing games.

Another thing that attorneys can do in a deposition is ask questions of their own witnesses. First, following up to clarify facts or issues from opposing counsel’s questions can be determinative in what the fact-finder gathers from a specific answer. A follow-up question can completely change the perspective of a certain response. Additionally, attorneys should ask questions that are in harmony with the same key themes that will be implemented at trial. This way, if the witness was unable to convey these key facts and themes in the first set of questions, the witness now has an opportunity to more explicitly relay the message. Constantly reinforcing these key facts will help to convey your message and make your case.

H. Resolving Disputes During Depositions

Disputes during depositions can occur often, and it is important to know how an attorney should act when they do. Depositions lack “the absence of a looming authority figure, [and] many attorneys will attempt antics they would never dream of trying in court.” Disputes during depositions can occur often, and it is important to know how an attorney should act when they do. Depositions lack “the absence of a looming authority figure, [and] many attorneys will attempt antics they would never dream of trying in court.”80 What if the witness being deposed says something that you know to be incorrect? If the witness is making a minor mistake, such as misstating a page number, you should not correct the witness.81 At that point, it is the witness’ decision as to how to fix the mistake.82 This is why preparation is so important; good preparation will avoid substantive mistakes. However, if the witness’ testimony will fundamentally change the impending testimony, then perhaps a good strategy is to request a break.83 During the break, you can point out the mistake to the witness and have them correct the mistake once the deposition resumes.84

IV. WITNESS PREPARATION FOR TRIAL OR ARBITRATION

A. General Guidelines

Witness preparation for trial or arbitration bears some similarities to preparation of a deposition witness but also involves some important differences. A deposition primarily involves responding to questions by the opposing lawyer, so the preparation process is focused more on “playing defense.” Trial or arbitration testimony, by contrast, is where the witness must effectively communicate to advance her company’s side of the case. It is the difference between giving careful answers to the other side’s questions versus affirmatively telling the witness’ own story in a credible and convincing way.

Some aspects of witness preparation for trial or arbitration are similar. The preparing lawyer should meet with the witnesses in person and spend sufficient time to make the witness

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80 Dickinson, supra note 36, at 4.


82 Id.

83 Id.

84 Id.
feel as comfortable as possible and to understand her role in trial. It is also helpful for the lawyer to provide a trial witness with the broader context of the trial and where the witness' testimony fits within that context. The lawyer should explain the client's case themes, and it can be helpful when preparing before trial to give the witness some of the key facts and points to be made in the opening statement. The lawyer also should explain the opposing party's case themes and primary contentions, as well as any points the opposing counsel is likely to try to make through the witness' testimony.

The nature of the testimony at trial and thus the preparation for effectively delivering it is very different from deposition testimony. The lawyer should start by preparing a testimony outline of the issues, key questions, and exhibits to use with each trial witness. The direct examination topics and questions should be organized to keep the jury's attention and tell a compelling story. Some lawyers prepare detailed question-and-answer scripts for direct examination. Although preparing such scripts may give comfort to the questioning lawyer, they often do not help the witness. A lengthy script can intimidate a witness and make her even more nervous than she might already be. And if the witness does succeed in remembering the scripted answers, such answers often come across as rehearsed and therefore less credible.

It is fine for the questioning lawyer to write out the questions he wants to ask and to go over those questions with the witness. But for the witness' answers, the better practice is simply to include short bullet points of the key facts the lawyer wants to elicit in response to each question. This method gives the witness a clear idea of the factual information the lawyer wants to elicit, but allows the witness to put those facts in her own words which likely will make her testimony more persuasive.

Doing a dry run of the direct examination of a trial witness is crucial. From a substantive standpoint, the witness needs to understand what questions the lawyer intends to ask and what points the lawyer wants her to convey. Practicing the direct examination is important to make sure the factual details are correct and complete. The lawyer also should go over the exhibits he intends to use and point out the particular references he intends to discuss, so the witness can testify efficiently and not waste the jury's time.

Dry runs are also important to work on the witness' presentation style and demeanor. Projecting confidence, having the right tone of voice, and engaging with the jury all are things the preparing lawyer should work on with the witness to present the most credible and persuasive testimony possible. For important witnesses, consider videotaping questions and answers and then reviewing the video with the witness to show her distracting mannerisms or other stylistic issues she should try to change. People are often surprised to see how they appear on video, and having one or more video sessions can be more impactful and helpful to the witness than the lawyer's verbal critiques.

In addition to working on the direct examination, the lawyer should also prepare the witness for anticipated cross examination. As with preparation for a deposition, the witness needs to know what it feels like to experience fielding questions from the opposing lawyer. Also as with deposition preparation, the lawyer should prepare a list of the toughest anticipated questions to go over with the witness and make sure that both the witness and the lawyer are as comfortable as possible with the answers. It is equally important to do dry runs of mock cross examination as it is for direct examination. It is often helpful to have another lawyer on the team conduct the mock cross-examination so the witness has the experience dealing with a different lawyer than the one who has been preparing her for the more friendly direct examination.
Videoing and critiquing the mock cross examination sessions are also helpful to work with the witness on her style of answering and her demeanor.

It is also important to discuss the applicability of the law to the events at issue. It is important that the witness understand why certain facts are important. Specifically, witnesses should be aware of what a key fact means in the overall context of the case. Many witnesses lack knowledge as to why certain factual scenarios matter in relation to the applicable law and how each event is helpful or hurtful for the witness’ case. For this reason, it is important to advise witnesses as to how each event correlates with the law, and why some events are more important than others. This way, witnesses can, where appropriate, place more emphasis on certain events that are more important and more favorable in the eyes of the law, as opposed to other events which may be less relevant.

The preparing lawyer should understand that most witnesses will be more nervous about testifying at trial versus at deposition, and the lawyer should address that reality during the preparation process. Where possible, give the witness comfort that the documents can guide her testimony or that other witnesses will support or supplement her story. For important witnesses it can be helpful to show them the courtroom where the trial will occur. Knowing the surroundings where she will testify can lessen the inevitable anxiety level and help the witness to focus on the substance of her testimony.

Finally, it is important for the lawyer to let the witness know that he genuinely cares about trying to help her do the best job she can do as a witness. Testifying in a trial or arbitration is an unfamiliar and anxiety-inducing process for most people. It helps for the witness to know that the lawyer will do everything he can to make her feel comfortable and to help her deliver credible and persuasive testimony. Developing a relationship of trust and confidence between the lawyer and witness is an important intangible aspect of effective trial witness preparation.

B. Common Themes For Franchisors And Franchisees To Convey Through Their Witnesses

Franchise cases can involve a variety of legal issues, but there are common themes that often appear. Franchisors want to convey themes that support the value of the franchisor’s offerings and the importance of the franchisee’s compliance with the contract and brand standards. Franchisees, on the other hand, often want to convey themes relating to their substantial economic investments in the franchise and their efforts to build the market for the franchisor’s products or services in their areas. This section discusses ways a trial lawyer can convey key franchisor and franchisee themes through their witnesses.

1. Franchisor Themes
   a. Educating The Jury, Judge Or Arbitrator On The Nature Of Franchising

Franchising is ubiquitous in today’s economy, but people often do not know how the franchise relationship really works. It is therefore important for a lawyer representing the franchisor to educate a jury, judge, or arbitrator regarding the nature of the franchise relationship and the important duties a franchisee must perform. Here are some key themes that a franchisor can work into the testimony of its witnesses to educate the fact-finder about the nature of the relationship.
A franchise conveys a temporary license to use intellectual property, brand equity, expertise, and other methods of operation that the franchisor spent much time and money developing. The franchisor's witnesses should describe the extensive efforts spent by the franchisor over many years to develop its brand and system from a start-up to what it is today. The franchisee gets the benefit of the franchisor’s extensive investment by “renting” the franchisor’s goodwill for the term of the franchise agreement in exchange for paying the required fees. For established franchisors, witnesses can describe the length of time the franchisor has been in business, how the franchisor developed its regional, national, or international scope, the amount of money the franchisor spends on advertising, and other indicia of the franchisor’s name recognition or brand equity.

b. A Franchisee’s Conduct In The Context Of The Overall System

The importance of system standards and maintaining the goodwill of the overall brand and system is a common and important theme for the franchisor in many kinds of cases. Many franchise cases involve claims that the franchisee has violated or failed to adhere to the brand standards or operating requirements of the franchisor. The franchisee may defend under the theory that its performance is “not that bad” or that the franchisor’s requirements are stricter than necessary.

In such cases, the franchisor’s witnesses should explain that there is a broader context and principle at stake than just the single franchisee involved in this litigation. When it signed the franchise agreement, this particular franchisee agreed to become a part of a larger franchise system and agreed to operate under brand standards and other operational requirements that are in place for the benefit of the entire system. Allowing the franchisee in litigation to criticize or minimize the importance of those brand standards and operational requirements has broader and deleterious consequences on other franchisees and on the franchisor’s brand as a whole. It can be particularly effective for the franchisor’s witnesses to explain, where applicable, that other franchisees or even the franchisee association support the franchisor’s efforts to maintain and enforce system standards for the benefit all franchisees.

c. The Franchisor's Reasonable Business Judgment

A franchisee will often challenge decisions made by the franchisor that the franchisee contends have a negative or disparate impact on the particular franchisee’s business. Assuming the franchisor’s conduct is not expressly proscribed by the franchise agreement, the franchisor can defend by arguing that it exercised its reasonable business judgment in making decisions it believed were in the best interests of the franchise system. In response to such allegations, the franchisor’s witnesses should present evidence of the reasonableness of the process the franchisor used to reach the challenged decision, the other alternatives considered, and why it rejected those alternatives. They can point out that “hindsight is always 20/20,” and it is unfair for the franchisee to use hindsight to second guess the results of a decision that was reasonable at the time it was made because of the alleged impact on a particular franchisee.

Further, the franchisor's witnesses can explain that it is not possible to make decisions on a system-wide basis where all franchisees benefit equally. The franchisor’s witnesses can enhance the fairness and reasonableness of its actions by explaining that the decisions being challenged do not unfairly advantage company-owned units over franchised units generally, or benefit favored franchisees over allegedly disfavored franchisees. The franchisor’s witnesses should explain that in making decisions for the brand, it must do so based on what is in the best
interest of the system and brand as a whole, and show that this was the motive behind the challenged decision.

d. **Uniformity Versus Disparate Treatment**

Many franchise disputes arise from the tension between uniformity and responding to individual circumstances or changing market conditions, which some franchisees view as unfair disparate treatment. A hallmark of franchise relationships is the importance of uniformity in brand presentation and customer experience. But it is also true that franchise agreements create relationships that go on for many years, and both market conditions and customer preferences can change materially during that long-term relationship. Sometimes the franchisor needs to justify the basis for treating one franchisee differently from another franchisee that the franchisor believes is not similarly situated.

The key in these cases is to convey in real-world terms how the franchisee that receives a concession or modification of requirements is in a materially different position than the complaining franchisee. Sometimes that is because of increased competition in the other franchisee’s market, or because of some other circumstance unique to the other franchisee’s business. When a franchisor has to justify different treatment, the franchisor’s witnesses should explain that is only enough to match the nature and duration of the need. The franchisor also should show that the different treatment does not compromise or vary fundamental brand standards. The theme of the franchisor exercising reasonable business judgment can also be important to explaining or justifying conduct that on its face seems to discriminate between franchisees.

e. **The Value Provided By The Franchisor Under Franchise Agreement**

Franchisees often make claims based, in one way or another, on the contention that the franchisor either has not performed its duties under the franchise agreement or that the services provided by the franchisees have little value. In these cases, the franchisor’s witnesses must explain the nature and value of the franchisor’s support services or other methods of performance. In addition to showing the training and assistance offered or number of visits by franchisor representatives to the complaining franchisee, the franchisor’s witnesses can describe the time and effort the franchisor put into developing its training and operational processes. The franchisor’s witnesses can show important differences between the franchisor’s training and processes and those of its competitors.

Where applicable, the franchisor’s witnesses also can show how other franchisees have been able to increase sales or otherwise improve their performance as a result of the franchisor’s training or operational methods. Often, franchisees who assert claims for deficient support have failed to follow key aspects of the franchisor’s system. A franchisor can refute this type of attack by presenting evidence that the franchisee has disregarded or failed to adhere strictly to the franchisor’s methods of operation, training, etc.

f. **Legitimate Business Interests To Support A Non-Compete**

Terminated or break-away franchisees often challenge the enforceability of non-competition covenants in their franchise agreements. To enforce such covenants, the franchisor must establish, among other things, that the covenant serves the franchisor’s legitimate business interests.
To support this element, franchisor’s witnesses should explain the nature and extent of the franchisor’s proprietary system, methods of operation, training, and other valuable know-how that was provided to the franchisee during the relationship. The franchisor’s witnesses should convey the theme that it is unfair to allow the former franchisee to use the franchisor’s proprietary information to compete against the franchisor or other franchisees within the system. This is like a former player taking his old team’s playbook to his new team.

Another important business interest of the franchisor is the opportunity to reestablish the franchisor’s brand by putting a new franchisee into the market to fill the hole created by the terminated or breakaway franchisee. The franchisor’s witnesses can explain that it is only fair to restrict the former franchisee from competing in the same area for a limited period of time so that the franchisor has an opportunity to replace and maintain the goodwill generated under its trademark in that trading area.

2. Franchisee Themes

a. Franchisee’s End-Goal Is To Be Successful

“Buying a franchise can be a life-changing experience.” Many times, a franchisee’s life is invested in a franchise. Thus, it is vital that a witness convey this message via her testimony. A franchisee’s end-goal is to be successful. While not many people have the natural ability or expertise to efficiently run a successful business, a franchisee is given the tools to build a fruitful business by “grow[ing] under a common brand and shar[ing] in the benefits of a larger group of business owners.” Most franchisees seek flexibility, money, and status. It is common for people to leave huge salaries accompanied by misery to launch a franchised business in pursuit of the American Dream. Many sacrifices are made by franchisees in order to marshal the courage and financial resources necessary to acquire a franchise. Incorporating themes based upon such sacrifices into the testimony presented is an important aspect of delivering the message of what a franchisee has had to endure in order to start down the path of success.

Ultimately, franchisees want to reach success. Often, however, franchisees are not only concerned with their business, but with the livelihood of their employees and customers due to the jobs and services they provide to the local neighborhood. All of this information should be conveyed through a witness’ testimony. A fact finder needs to understand a franchisee’s purpose and intent in becoming a franchisee. This way, the fact finder can more easily relate with the franchisee and understand that the franchisee’s livelihood is at stake.

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87 Id.

88 Id.

b. **Demonstrate The Franchisee’s Substantial Compliance With The Franchisor’s Rules**

While the common notion is that franchise owners have high rates of financial success, franchise owners often don’t achieve the financial success they had hoped for. The historical success of multiple units and an operating manual do not guarantee a particular franchisee’s success. Franchisees are forced to follow a system, whether that system is successful or not. As such, franchisees are limited in the decisions they can make in their own businesses because they are subject to the rules and limitations of the franchisor at all times. The franchisor dictates how the franchisee must operate the business, what the franchisee can sell, and much more. Franchisees are legally bound by all rules that the franchisor has in place, and any deviation from those rules can result in termination by the franchisor. As such, franchisees are unable to change the operation or system of the business, even if the franchisor’s system proves to be unsuccessful.

Thus, it is important to demonstrate substantial compliance by the franchisee with as many of the franchisor’s requirements as possible. Many times, franchise disputes are centered on a franchisor’s claims against a franchisee for lack of compliance with a particular franchise agreement provision or brand standards requirement. When these issues arise, it is important to emphasize the franchisee’s compliance with regards to other rules set out by the franchisor. This includes royalty payments, ongoing franchise fees, advertising fund payments, and compliance with any other rules established by the franchisor. This will show the fact-finder that, while the franchisor may be alleging non-compliance with one specific rule, the franchisee is generally compliant and does not deserve to be terminated.

c. **Franchisees Should Be Able To Rely On The Representations Made By The Franchisor**

Franchisees are sold a system and a business model represented to be successful. Many times, this is precisely what attracts franchisees to purchase a franchise. It is often the case that franchisees have no experience with that particular business or running any business, at all. This is why franchisees are enticed by the “package deal” that comes with buying a franchise. In the sales process, the franchisor represents to the franchisee how the business will run and what the franchisee can expect from owning the franchise.

Franchisees, at the very least, should be able to rely on their franchisor's representations regarding the business model and the system’s competence. If, at any point, the franchisor made representations that were inflated or inaccurate, this needs to be conveyed through the witness’ testimony. While the franchisor may be attempting to expand its brand and make the nation aware of its presence, the franchisor is, many times, taking the franchisee’s life savings in return for a license to operate a franchise. While that may seem small when compared to an entire franchise system, the reality is that franchisors cannot take advantage of franchisees to simply further their brand. Franchisees need to make clear that, while their specific franchised location may be only one of many, they are also important and they should be able to rely on the franchisor and its representations.

d. **Franchisees Are Not As Successful As One May Think**

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90 Stites, supra note 74.
The fact-finder also needs to understand that the life of a franchisee is not usually as lavish as one is trained to think. A franchise owner’s take-home income comes from the franchise’s net profit.91 While the gross revenue of the franchise may be significant, the franchise owner only keeps a small percentage of the gross revenue after paying all the business expenses.92 Common franchise business expenses can include royalties or ongoing franchise fees (in additional to the initial franchise fee), inventory, supplies, marketing fees, professional fees, and working capital.93

Ultimately, the franchisor gets paid before the franchisee. The franchisee must pay the franchisor all of the required fees, regardless of whether the franchisee will end up with no profit or even a loss at the end of the day. Due to the high level of expenses that franchisees are obligated to pay franchisors as well as the other expenses associated with running a business, the money that eventually goes to the franchisee is not necessarily as considerable as a judge or jury may think. For this reason, it is important that franchisee’s witnesses dispel any myths regarding the operation of the franchise and perceived financial success rate of franchisees.

e. Personalize Each Case Beyond An Investment

It is important to personalize the case beyond the franchised business just being a source of income for the franchisee. Commercial matters do not tend to be emotionally stirring because the parties are rarely real people, but fictional people and corporations instead.94 However, there is almost always an emotional component to every dispute.95 “These entities we represent have people behind them, and the feelings of these people need to be managed and channeled for the client’s benefit.”96 The right to be heard is crucial in telling a story, especially when there is a feeling of having been wronged.97 This right is not “merely designed to ensure that [judges and juries] get the information they need to render an informed or impartial decision, . . . [but] to allow people to unburden themselves, to come to peace with the past and move on with their lives.”98 Franchisees have made substantial investments of time and money in their business, and expressing their struggles will help to personalize the case beyond a financial investment.

C. Building An Effective Direct Examination


92 Id.

93 Daszkowski, supra note 69; Grossman, supra note 70.


95 Id.

96 Id.

97 Id.

98 Id.
In trial, organization is most important in direct examination. Appropriate structure avoids “flailing, scattered, repetitive excursions” that only confuse the judge and jury. There are different ways that one can structure a direct examination to result in effective testimony. In the first two or three minutes, the jury should learn who the witness is and what is her role in the case. After the introduction, the body can be structured chronologically in a way that is easy to follow. A key pointer is to start strong and end strong. In some instances, however, chronology may not be the best way to structure the body of a direct examination. What is heard first establishes credibility and what is heard last will be more easily recalled. Any harming testimony should be buried somewhere in the middle so it does not stick out. Therefore, sometimes the direct examination should be structured in a manner that highlights the good testimony, and buries the harming testimony in the middle. Additionally, sometimes there are key ideas and concepts that need to be understood before a chronological order of events can be detailed.

Having this in mind, it is often better to have an outline of the direct examination, as opposed to a script. The examination may stray from the script, making it harder to assure all bases have been covered. On the other hand, an outline allows for more flexibility to confirm that all major points are addressed. Whether an attorney prefers to structure the direct examination one way or another, what is most important is the end result: the delivery of testimony in an organized manner, effectively transmitting the witness’ testimony in a way that is favorable to your case.

One often effective method of building a direct examination is through documentary evidence. Consider what documents will need to be placed in evidence through this witness (and what documents will this witness likely be presented on cross-examination). The witness needs to be familiar with each document and be prepared to answer foundational questions about them. Documents can be an aid to effective witness presentation – they can frame the narrative and give nervous witnesses a crutch or guide for their testimony.

D. The Valuable Role of In-House Counsel

99 James W. McElhaney, Organizing Direct Examination, 76 ABA Journal 92, 92 (1990)
100 Id.
101 Id. at 94.
102 Id.
103 Id. at 94-95.
104 McElhaney, supra note 83, at 94.
105 Id.
106 Id. at 94-95.
107 Id. at 95.
108 Id.
109 Id.
Many franchisors as well as some large franchisees employ inside counsel in their businesses. An inside lawyer, even one without significant litigation experience, can play a very valuable role working with outside litigation counsel in the witness preparation process. Inside and outside counsel should take advantage of the ways they can work together in the preparation process to achieve the most effective witness presentations at deposition or trial.

First, an inside lawyer is uniquely suited to help identify the proper witnesses for particular issues in the case. This is particularly important for identifying and selecting appropriate corporate representative witnesses in response to a Rule 30(b)(6) deposition notice. Even for fact witnesses, a party often has options for which employee to offer to tell the company's story on particular issues. An inside lawyer who knows the players and has worked with them over time can greatly assist outside counsel in selecting a witness who is likely to make the best presentation of the company's case.

Second, having inside counsel involved to communicate with the employee witnesses and participate in the prep meetings can have many benefits. An inside lawyer usually has more immediate access to a company witness and can greatly assist in getting the witness' attention and focus. Sometimes this involves running interference with the witness' supervisor or co-workers to explain the nature and importance of the process and free up needed time to prepare. Having inside counsel involved also shows the witness the importance of the litigation to the company and the importance of the preparation process to the company's success in the case. An inside lawyer can make the witness more comfortable with and trusting of the outside counsel who will be presenting the witness, and this increased comfort level can help the witness perform better at deposition or trial.

Third, an inside counsel can more quickly and effectively obtain answers to questions and get other necessary information or documents that might become important during the preparation process. The inside counsel is more likely to know who else within the company has the needed information or where important documents can be found, and often is able to motivate other employees to provide the information or documents quickly. This is particularly important when the prep session occurs shortly before a deposition or trial.

Fourth, an inside lawyer often will have greater insight into the witness' personality, motivation, and sometimes the substance of her knowledge or involvement, and can put that to productive use during the preparation process. An inside counsel who has a longer relationship with the company witness might know when to correct a witness who is mistaken about certain facts or when to prompt a witness to be more forthcoming on a particular issue. He also can be more frank with the witness than the outside counsel might be comfortable doing, which can help get to the full truth.

Fifth, inside counsel can continue working with the witness, whether formally or informally, when the outside counsel is not around, which has both substantive and cost-saving benefits. Sometimes this takes the form of a pre-meeting to give the witness background or a general explanation of her role in the case. If the inside lawyer works in the same location as the witness, the lawyer can follow up after the prep meeting to reinforce points or answer questions. The inside lawyer also can more regularly update management regarding the status of or developments in the litigation.

Finally, the inside lawyer can make sure that outside counsel understands important internal dynamics and priorities within the company that might impact the witness preparation
process. For example, is the witness personally invested in the decision or action that is the subject of the dispute, or does management consider the witness responsible for the situation that led to the lawsuit? If so, that is important for outside counsel to know in working with the witness. Also, how important is the dispute in the broader context of the company's business? If it is a major case touching on a core part of the business, or if the dispute has the attention of the CEO or board, then outside counsel may want to proceed differently than if the company views the lawsuit as a nuisance matter.

V. CONCLUSION

Effective witness preparation is crucial to obtaining the best possible outcome in litigation. It is also one of the most invigorating and rewarding parts of a trial lawyer’s job. Knowing the details of the case, knowing your witnesses, and putting in the time and effort to prepare are all essential elements to enable your witnesses to testify truthfully, credibly, and persuasively at deposition or trial.

Franchise cases involve all the normal witness preparation strategies and efforts, but present their own challenges. Counsel for franchisors and franchisees must prepare their witnesses to educate the jury, judge, or arbitrator about issues and themes particular to the nature of franchising, the franchise relationship, and the specific issues in dispute. Properly conveying these sometimes case-dispositive points requires special diligence and skill.
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Alejandro Brito is a partner at Zarco Einhorn Salkowski & Brito, P.A., a Miami based franchise law firm. The firm represents franchise and distribution clients in litigation and other forms of dispute resolution throughout the United States. The firm has represented franchisees from almost every major franchise system in the hotel, restaurant, and service industries. The firm has also represented franchise clients from Mexico, France, Holland, Germany, Australia, New Zealand and throughout the Caribbean.

Alex obtained his J.D. degree from the George Washington University in 1996. Alex graduated from Florida International University with a Bachelor of Arts degree in 1993. Currently, Alex litigates franchise, distribution and general commercial disputes in state and federal courts. In addition, Alex has handled numerous franchise disputes in arbitration proceedings throughout the country. Alex has also served as an arbitrator in actions between franchisees and franchisors. He is a member of the Florida Bar and is admitted to practice in United States District Courts for the Southern District of Florida, Middle District of Florida, Northern District of Illinois, and the Eastern District of Wisconsin, as well as the United States Court of Appeals for the Fifth Circuit, Sixth Circuit, Ninth Circuit, and Eleventh Circuit.

Alex has been listed in “The Best Lawyers in America” publication since 2006 and has received a Peer Review rating of “AV” by Martindale-Hubbell, indicating the highest level of legal ability and ethics. Alex has been recognized in the South Florida Legal Guide’s Top Lawyers and Florida Trend Magazine’s Legal Elite. In addition in 2010, Alex was a Finalist for the Most Effective Lawyer in Miami, as awarded by the Daily Business Review and was also named one of the “Top 20 Professionals Under 40” by Brickell Magazine.

Since joining Zarco Einhorn Salkowski & Brito, P.A., Alex has authored several articles discussing legal issues at the forefront of the franchise industry. Alex has also been a co-presenter at the ABA Franchise Forum on several topics: "Rediscovering Subjectivity: Does the UCC’s Open-Price Doctrine Offer New Theories for Reining in Discretion and Filling In Gaps In Franchise Contract Rights," (2007), "Litigating Incurable Defaults," (2010) and False Advertising In Franchise Systems (2013).

Alex has also had the privilege of serving as a Director and Lifetime Fellow of the Florida Bar Foundation, a 501(c)(3) public charity, and the only statewide organization that provides financial support for legal aid and promotes improvements in addressing the civil legal needs of the poor.
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Mr. Coleman has written and spoken extensively on intellectual property, franchise, and general litigation topics. He currently serves as a member of the Governing Committee of the ABA Forum on Franchising and as co-chair of the Trade Secrets Subcommittee of the ABA Section of Litigation's Intellectual Property Litigation Committee.

Mr. Coleman received his A.B. degree, cum laude, from Duke University in 1983 and his J.D. degree, with honors, in 1986 from Duke Law School, where he was a member of the Editorial Board of the Duke Law Journal. He served as a law clerk to the Honorable James C. Hill, United States Court of Appeals for the Eleventh Circuit in 1986-1987.