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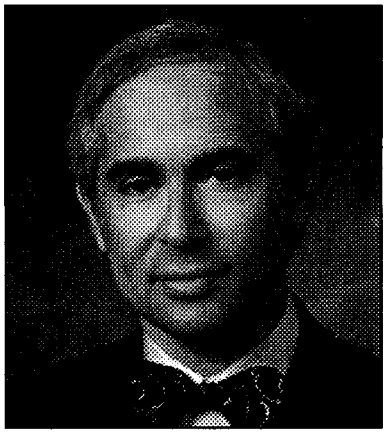
Protecting the Quarterback: How to Prepare Your CEO for Trial

Trials are seldom won or lost by the CEO. In most lawsuits, the CEO plays at most a bit part. He may provide the "face" of the corporation for the jury. But given delegation of responsibilities and the role of the modern chief executive, he will seldom have been the principal officer involved in a dispute.

This article addresses those uncommon situations in which your CEO will be front and center at trial. As Scott Fitzgerald might say, CEOs are different from you and me. They have different strengths - and vulnerabilities - than other witnesses within the company. Preparing them for deposition and trial presents peculiar challenges. Here are some tips that have worked with my clients.



Boris Feldman

The Vulcan Mind Meld

You and your CEO must become as one. What he knows, you must know. But not necessarily vice versa! What does this mean?

At an early stage in the litigation, you must try to understand the CEO's perspective on the events and issues in the dispute. Ultimately, what he tells you during the initial interview is likely to be what he will testify to under klieg lights. His recollection and articulation will prevail over coaching, so you better hear it in his words up front.

CEOs are usually smart. Begin by explaining the context of his testimony: the claims involved; the legal framework; the pivotal factual disputes. Who else will testify, and what are they expected to say? Where are the landmines? Often, the CEO will not have worked with you before. Make him comfortable that you understand the company's objectives in the litigation and that you have a strategy - consistent with the provable facts - to get there. At your initial meetings with the CEO, he will be evaluating you as much as you are evaluating him. The personal interplay between the two of you will be important at trial, and the judge will pick up on it. If you do not click with the CEO, submerge your ego and find someone else on the team who does.

Your initial interview of the CEO, and his first depo prep session, are often one and the same. CEOs like to talk. Let him. Don't try to reign him in with a bunch of narrowly circumscribed questions. There will be plenty of time later to acclimate him to listening and answering carefully. For now, you want to let the CEO walk you through what happened, from his perspective and in his words.

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Do your homework in advance. Before the meeting, you should have collected what everyone else involved in the dispute says about the CEO: on your side, from the witness interviews; and on the other side, from discovery. Have a detailed chronology close at hand, because he is unlikely to remember all the dates or even the sequence of events. Bring the documents produced from his files, so that you can refer to his calendar and to emails and memos that he received. Remember, you are engaged in a confidence-building process. If he thinks that you are on top of the details, then he will draw strength from you.

Ignore protocol in deciding whom to bring to the interview. You do not necessarily need to include the other partners on the account. You do need someone with total mastery of the factual minutiae. If there is someone at your firm who has the CEO's trust and who makes him relax, consider including that person in the meetings, even if he isn't a litigator or wasn't involved in the transaction in question. Remember, a big part of your job is to win the CEO's trust.

Don't pollute the witness. What the CEO did not know may in some cases be as important as what he did know. For example, if the CEO was unaware at the time that a lower-level employee objected to a particular decision, you may not want to confuse him by discussing that employee's views. It is important that you hear what the CEO knows before you start feeding him facts. He may have difficulty later separating his own knowledge from information transmitted by counsel. There is no brightline rule for what you should not tell him. Obviously, you don't want him to be shocked or flustered at a deposition or at trial by a hitherto-unknown fact. But you should resist the natural (for litigators) tendency to tell him everything about the case until you have considered, item by item, whether a fact is something that he needs to know or is better off not knowing.

My preference is to schedule several shorter meetings with the CEO rather than one marathon session. He does, after all, have a business to run. After an hour or two, his attention may start to drift to other crises on his plate. Better to come back to the company often for short, productive sessions, rather than burn him out.

Neither A Gates Nor A Clinton Be

A dominant factor in how well your CEO performs at trial will be how well he performed at his deposition. If he testified well, he is likely to make a good trial witness. If he remembered nothing at the deposition, good luck putting on your case through him at trial; he will be eaten alive by impeachments.

A popular self-help book a few years back was called "Everything I Know I Learned in Kindergarten." With respect to CEO deposition conduct, a sequel might be called "Everything I Know I Learned in the Gates and Clinton Depositions." The depositions of Bill Gates in the Microsoft antitrust litigation and of Bill Clinton in the Paula Jones case will go down in history as exemplars of how not to behave at a deposition. One key lesson: don't play dumb. Gates's professed inability to understand what a "browser" was did not endear him to the trial judge. Take the time to prepare your CEO for the deposition. If he does not remember things, then try to refresh his recollection in advance of the deposition, not just at trial. People - judges and jurors - expect a CEO to know certain things (such as how much they were paid or the proceeds from their stock sales). Make certain that they know those things, rather than giving answers like "somewhere between 10 and 20 million."

A second key lesson: don't nitpick the questions. Will a student of the Clinton impeachment controversy ever forget the classic answer "it depends what you mean by 'is'"? Explain to your CEO that he cannot answer a question by applying a hypertechnical construction of the question. The judge or juror will think he was being evasive, not clever. If the question is a trick question, then he should make clear in the answer what he is addressing. He should not try to create wiggle-room for trial that might reasonably offend others.

A third lesson: remember the camera. Your CEO will almost certainly be videotaped at the deposition. Video clips of a snarling or condescending CEO will make a lasting impression on the jury during opening argument. Make sure that your CEO understands that the jury will watch the clip of him - not the obnoxious provocation from counsel that preceded the clip.

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Two other suggestions for deposition etiquette. Make your CEO understand that he will not convert counsel for the other side. While it is true that a strong deposition performance can affect settlement discussions, it is naive to think that opposing counsel will see the error of his ways once the CEO lays out the truth. CEOs are used to persuading people. But they must understand that they are not likely to persuade their adversary.

With respect to your own behavior at the deposition, don't pick fights. If you have prepared the CEO well, he will do fine. If you haven't, then all the speaking objections in the world won't save him. Witnesses generally - and CEOs in particular - do not find squabbling between counsel helpful; they find it distracting and irritating. Don't make objections unless you need to in order to preserve the objection for trial. If the other side is abusive, don't respond in kind. Warn opposing counsel once, then terminate the deposition if it happens again. Do not make your CEO sit through a torture session.

Showtime!

As you prepare your CEO for trial, try to make sure he reads his deposition transcript. This will drive home how his answers look to others. It will also reduce the danger of impeachment. Be sure to update him on things that you learned since his deposition prep: what others said about him; new documents that emerged; the final contours of each side's case as they approach trial. Give him positive - but candid - feedback on how he did at the deposition. Although he cannot contradict his depo testimony at trial, he can continue to refine his testimonial techniques.

As you prepare the CEO's testimony, define your objectives precisely and narrowly. Do not make the CEO carry more water than he must. He is your quarterback; protect him in every way that you can. If someone else can make a point as effectively, make it through that person. Do not put the CEO in the position of having to testify to things that he really does not know or that are beyond his ken; he'll be dissected on cross. Don't use the CEO as the vehicle for putting all your exhibits into evidence; try to sponsor them through others who are of lesser importance to your case.

Focus the CEO on key trial themes. Let him know what your other witnesses will address. Help him understand what evidence you need from him and how it relates to the rest of your case. Let him know your greatest vulnerabilities, so that he is not surprised by them. Don't assume that, because opposing counsel did not explore a topic with him at the deposition, the counsel will skip that topic at trial.

Make sure that you have plenty of time to run the CEO through his testimony repeatedly before trial. The trick is to make sure he is adequately prepared, but not over-prepared. He should not come across as programmed or scripted. My own preference is not to provide the CEO with a list of questions and answers, since he may try to memorize them. If your CEO is having trouble making the transition to star witness, consider retaining a jury consultant to help provide feedback on presentation techniques. Try to keep the final prep sessions small - ideally, you, the CEO, and perhaps the General Counsel. This is key time for the CEO, and you don't want him distracted by large crowds during the prep.

Stay out of the CEO's way during his testimony. Toast has been described as a butter-delivery system. Think of your role during the CEO's direct testimony in toast-like terms. You should be as invisible as you can. Let the CEO talk to the judge or jury. If you are pulling the words out of him, they will have less impact. If he has been well-prepared, he will take over the testimony, and the jury will conclude that he is saying what he believes. It is important that the judge and jury feel that they have a true measure of the CEO as a person, not as a packaged product.

The same is true of cross-examination. The time to protect your CEO is in preparation and in defining his direct testimony. You should put him through the most difficult mock cross-examinations you can imagine. In fact, it's often helpful to bring in the most capable cross-examiner at your firm to conduct a mock cross. You may instinctively pull your punches. You want the CEO to get used to tough questioning from someone he doesn't know. As much as possible, stay quiet during the CEO's cross. Absent unusual circumstances, you should not make many objections during his cross. You

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risk irritating the judge and possibly the jury. Don't create the impression that the CEO needs your help to survive cross. Let him do it on his own.

One of the complexities of putting the CEO on at trial is the existence of multiple audiences. The most important one is the judge and jury. But they are not the only audience. In a high-profile case, the CEO's performance at trial will have a major impact on public perceptions of the company. It will be watched by employees, by customers, by competitors, and by shareholders. As you define the CEO's role at trial and prepare his direct testimony, don't forget those other constituencies. Avoid the litigator's tendency to think only of the immediate trial, without considering the broader spillover effects.

Think through in advance how long you want the CEO to attend the trial. In some cases, he will need to be there throughout, as a statement of commitment to the judge and the jury. On the other hand, if he stays after his testimony, you risk having him recalled as a witness by your opponent to address issues or testimony that arose after he left the stand. If you are going to have him stay, make sure that he knows that he might be recalled and is not flustered if that occurs. Keep him up-to-date on developments during the trial so that he is not blind-sided if called back to the stand.

Conclusion

Taking the CEO through testimony at trial is a uniquely rewarding - and nerve-wracking - experience. It can be a personal career highlight and an occasion for epoxy-like bonding with a client. Or it can provide the basis for recurrent nightmares that replace the one about showing up for a college exam having skipped all the lectures. Never lose sight of the fact that the most important person at the company - someone used to being in charge and calling the shots - is at a moment of vulnerability, in a setting very different from the one in which he functions every day. He is looking to you for guidance and preparation. Don't let him down.

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