

Strategies and Techniques in Defending C-Suite Depositions via Zoom

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September 2, 2020

Agenda

- Why C-Suite depositions are different
- Preparation strategies and techniques
 - Substance of the prep
 - The critical role of mock cross
 - The critical role of in-house counsel when outside counsel is retained
 - What makes remote depositions different
- Technology considerations
- Defending remote C-Suite depositions
- Questions

Introductions



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Why Are C-Suite Depositions Different?

Ex-Theranos CEO Elizabeth Holmes says 'I don't know' 600-plus times in never-before-broadcast deposition tapes

Elizabeth Holmes has pleaded not guilty to wire fraud charges.

By Taylor Dunn, Victoria Thompson, Rebecca Jarvis, and Ashley Louszko
January 23, 2019, 5:12 PM • 30 min read



Forbes

Jul 20, 2016, 02:59pm EDT

Court Sanctions TransPerfect Cofounder Phil Shawe For Lying Under Oath, Destroying Evidence



Katia Savchuk Forbes Staff
Lists

I write about billionaires and entrepreneurs around the world

This article is more than 4 years old.

Update: In an Aug. 19 judgment, Delaware Chancery Court Chancellor Andre Bouchard directed Phil Shawe to pay \$7.1 million in attorney's fees to Liz Elting within 10 business days.

A Delaware judge today issued sanctions against the cofounder of one of the world's leading translation firms, concluding he had repeatedly lied under oath and intentionally destroyed evidence during a two-year legal battle with his business partner. The ruling ordered Phil Shawe, co-CEO of New York-based TransPerfect, to pay a large share of the attorney's fees and expenses that his opponent, co-CEO Liz Elting, incurred.

C-Suite Depositions: Higher Stakes

- Higher stakes for the company and the case
 - What they know (e.g., more sensitive/privileged info)
 - What they **should** know
 - Position gives their testimony weight
 - Viewed as speaking for the company: de-facto 30(b)(6) designee
- Cost: internal & external
- Time constraints
- Unique pressures on the lawyer preparing them
- Different personality traits and expectations
- More publicly available information
 - Bios
 - Press releases and media quotes



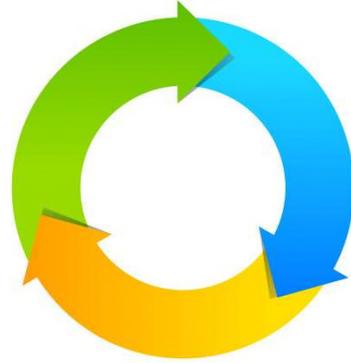
Long-Term Strategies to Prevent C-Suite Depositions

- Developing other witnesses with knowledge
 - Courts may quash CEO deposition if others have information
 - In-house attorney critical to identify alternative witnesses
 - The danger of other witnesses who don't know
 - Consider how witnesses will answer: "who would know?"
- Framing defenses to avoid CEO's unique knowledge
- Deciding whether to move to quash or negotiate scope



Turning the C-Suite Deposition to Your Advantage

- C-Suite deposition can break, or make, a case
- Advantages of C-Suite as witness
 - Unique ability to communicate the company's vision
 - May be able to "personalize" the company
 - Smart, savvy, likable
 - More comfortable in higher-pressure situations



Preparation Strategies and Techniques

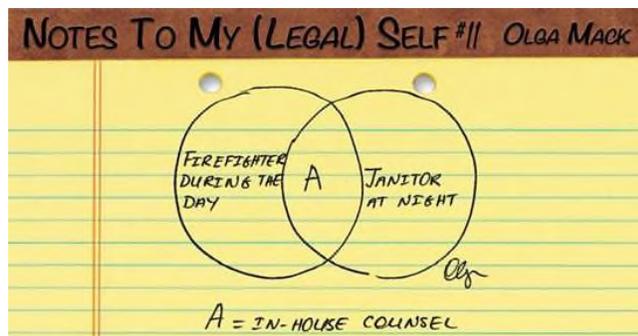
Laying the Groundwork

- Anticipate possible C-Suite depositions in advance
 - Proactive scheduling to avoid time crunch
- The pre-work (beyond the prep outline)
 - Identify and plan for tricky confidentiality and privilege issues
 - Identify and avoid potentially sensitive, unrelated issues
 - Set scope in advance
 - Involve court up-front if needed



In-House Counsel's Role

- In-house counsel's critical role, even if you have outside counsel
 - Institutional knowledge
 - Confidentiality/privilege issues
 - The witness as a person
 - Other litigation/depositions
 - The company's mission/goals
 - Protecting the witness
 - Securing preparation time
 - Gaining trust
 - Pre-work
 - Efficiency



Preparation Strategies and Techniques

- Timing, length, cadence of the prep sessions
 - Preference for multiple, shorter (4 hr. max) sessions
 - Beginning, middle, end
- Mental picture of what to expect
 - The room, the players
 - Logistics of reviewing documents
- Tone: thoughtful, honest executive

Preparation Strategies and Techniques

- Substance of the prep (documents, documents, documents)
 - What they will be asked about
 - Refreshing memory
 - Context - facts, timeline, and themes of the case



Preparation Strategies and Techniques

- **Mock cross**

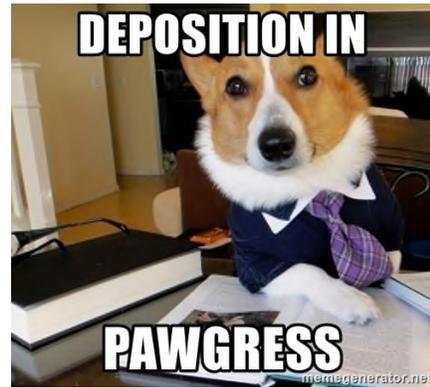
- Most critical part
- Do not ad lib all of the mock cross; plan out what will be the hardest questions
- Adjust depending on your opposing counsel
- If you have outside counsel, make clear this is expected
- Ensure enough time to “build the witness back up”



Mock Cross Example

Preparation Strategies and Techniques

- Pros and cons of using C-Suite deponent as 30(b)(6)
- If the witness is the 30(b)(6) designee
 - Additional homework
 - More time needed
 - Prepare for the inevitable: What did you do to prepare?
 - Plan to avoid second “bites at the apple”



Preparation Strategies and Techniques

- What's different about remote deposition prep
 - Logistics of the prep
 - Walk through the tech and its functions
 - Different screen views (make sure they can see you during the deposition)
 - Dry run through the platform
 - How exhibits will work
 - Plans for
 - Break outs
 - Technology glitches
 - Appearance
 - Attire
 - Background
 - Lighting
 - Camera placement
 - Audio



Additional Technology Considerations

- The platform - know it and its functions
 - Zoom vs. Microsoft Teams vs. GoToMeeting vs. WebEx
 - Views
 - Break out rooms
 - Screen sharing
 - Recording
 - Security
 - Mute button
- Your appearance/background, etc.
- Back up plan for tech issues
 - Tech person on call
 - Dialing in without video as a last resort



Defending the Deposition

- Stipulations/ground rules
 - Exhibit timing (enough time for you/witness to print)
 - Confidentiality
 - Tech issues
 - If you need to add exhibits
- Objections
 - The virtual hand in front of the witness
- Exhibits
 - Insist the witness look at the hard copy in front of them?
- Break outs (use another form of technology)
- Ethical issues unique to remote depositions
- In-house counsel's role if outside counsel is retained: ensure a plan is in place

Questions?



Thank you

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