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A horizontal banner with an orange-tinted background. It features a grid pattern and various images including a magnifying glass over a document, a stack of books, and a typewriter keyboard. The words "IN PRINT" are written in large, white, sans-serif capital letters across the center.

IN PRINT

DISCOVERY CHANNELS

By **Caroline Mitchell and Lara Kollios**

With the rise of the global economy, litigation in U.S. courts increasingly involves disputes involving foreign witnesses. For many, this is their first exposure to the rigors of American-style discovery. Given the limited pretrial discovery available in countries outside the U.S., the breadth of American discovery often comes as a shock to a foreign client.

The deposition, while one of the most effective discovery tools, is one of the most unfamiliar to a foreign client. The deposition offers a chance not only to discover information outside of documents and formal attorney-drafted interrogatories, but to test the strength of settlement positions, the veracity of a deponent, and the prospects of success at trial. The significance of a deposition, combined with the

inexperience of your foreign client, makes effective preparation critical to success. Often, preparing yourself and your foreign client for deposition requires a return to basic, “common sense” tactics that sometimes are forgotten when working with seasoned American clients.

Ample time for preparation is the most important component to a successful deposition of your foreign client. As soon as the deposition is confirmed, contact your client to arrange at least two separate preparation sessions. Your client has a lot to learn (and you have a lot to learn from your client), and trying to cram everything into one meeting will likely result in a one-way lecture with a glazed-eyed client. If possible, both sessions should be in person. You will have to

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gauge whether you need more or less time based on the amount of material to be covered, but typically, each session should last one-half to one full business day.

Before you begin the first session, become a student of the culture of your client's country and the hierarchy of the witness's company. Americans tend to cut to the chase and begin to immediately talk business, devoting little time to small talk. In some countries, such a quick transition to brass tacks can seem rude and abrasive. Additionally, explain to your deponent that his or her employer supports your efforts and encourages full cooperation. This is most convincing if you understand your client's reporting protocols and have supervisors reinforce this message in advance of your preparation session.

Once you have built a rapport with the employee, the first preparation session should focus on the generalities of the deposition and the discovery process. Take time to explain the details of American-style discovery. Describe the kind and breadth of information that is discoverable—*i.e.*, documents from employees within the company (including the deponent), from third parties with relevant information, and written interrogatories that may attribute knowledge to the deponent. Explain the protective order process, so that the employee can help flag portions of the deposition that should be designated as confidential.

Foreign deponents can be surprised when they discover that their email or other files have been produced. Explaining why this production occurred and the protective order process will reduce surprise during the deposition and increase the witness's comfort level.

Use the first session to describe the deposition procedure. Explain to the witness who will be present and why; the location of the deposition; where you both will be sitting; what each objection means and the purpose of objecting; the length of the deposition; the permissibility of breaks; and the purposes for which the testimony can be used in the future. Describe the kind of information the examiner is allowed to seek (*i.e.*, generally any information not protected by the attorney/client or Fifth Amendment privileges), and explain that the examiner will ask most (if not all) of the questions,

but that your client will have an opportunity to examine the opposing party in other depositions.

Explain that the court reporter's job is to transcribe every word that is spoken. If your client plans to testify in English but has a heavy accent that the court reporter may not understand, it is particularly important to explain that the court reporter may ask the witness to repeat testimony to fully capture it in the transcript. Emphasize that in response to such an inquiry, your client should just repeat testimony verbatim, not try to justify or elaborate on the testimony previously given. Otherwise, a witness may volunteer information not called for by the question. Remind your client that speaking slowly will minimize the need to repeat testimony. Leave no stone unturned. The last thing you want is your client taking offense at some procedural facet of the deposition and becoming angry and unmanageable because of a simple misunderstanding.

You also will need to cover the customary deposition preparation topics for all witnesses, such as advising a client to listen to and understand each question fully before responding and to not speculate. The first session is a good time for this.

Another important purpose of the first session is to confirm that the witness has produced all of the called-for discovery and to ensure that there has been no miscommunication on that subject. If any information or documents have not been produced, you can correct it at this juncture and mitigate opposing counsel's claims of surprise and having an inadequate opportunity to prepare for the deposition.

Finally, use the first session to describe the case and how the deponent's testimony fits in on a global level. Confusion about the litigation process may lead a foreign deponent to assume that the request to sit for deposition is a punishment or accusation by his or her employer of wrongdoing. Understanding why his or her testimony was requested and that the deponent is not being sued personally goes a long way toward decreasing the deponent's anxiety.

If possible, the first session should be a few weeks to a few days before the deposition to give the deponent time to

digest the information and ask follow-up questions during the second session.

The second preparation session is the time for a more detailed fact overview and a mock examination. Review all of the documents and declarations written by and referring to the deponent, unless the latter are unmanageable. Foreign deponents do not initially understand how much information, particularly about them, is already available to the opponent. Reviewing more produced discovery than in the normal course helps the deponent comprehend the breadth of American discovery.

If the documents are inconsistent with the facts as your client is relating them to you, it is better to find out during preparation than to have confusion ensue at deposition. Often, once deponents have an opportunity to focus on the events at issue and refresh their recollection through document review, ambiguities and inconsistencies are resolved. If you rush the preparation process, an inconsistency may arise for the first time during deposition when the deponent's rendition of events is impeached with his or her own email. Having this occur for the first time in deposition, rather than preparation, is something every client would like you to avoid.

Also use the second session to conduct a mock examination. The mock examination can be done throughout preparation or at the end, after review of the necessary documents and information. Have a third person present to object or examine the foreign deponent so that the deponent becomes comfortable with interruptions. Absent a mock examination, you may find your deponent staring at you blankly when you object, wondering whether or not to answer. The more realistic the mock examination, the more smoothly the deposition will proceed.

During each preparation session, your bedside manner makes a difference. Remember, while you live American discovery, and likely the facts of the case, nearly everything you have discussed with your foreign deponent is new to that person. The point is not to cover every possible preparation issue, but to make your client knowledgeable about the case and comfortable with the process.

Cultural differences will affect the deposition and your client relationship, so be patient and listen to your client. Be cognizant of any gender or age issues that may be culturally uncomfortable for your foreign deponent. If, for example, it is contrary to your deponent's culture to disagree with an elder, you may need to explain that it is acceptable in a deposition to disagree with the examiner. First and foremost, the deponent must tell the truth, without worrying about whether that will cause offense to others.

Before launching into any preparation, ask your deponent if he or she has any concerns, and keep a keen ear for those concerns throughout preparation. Interact with, rather than talk at, your client. Given the scope of information reviewed during the preparation sessions, it is helpful to repeat important tips and facts throughout. Follow-up questions are a simple way to ensure that your foreign deponent is absorbing the important points.

A deliberate and focused preparation will allow your foreign client to approach the deposition with less anxiety and more confidence. Acknowledge the importance of these preparation sessions because once they are complete, the success of a deposition largely rests in the hands of your deponent.

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