



Fact Witness Depositions: The Blow-Hard, Brainiac, and Bozo

S. Christopher Collier
Hawkins Parnell & Young, LLP
303 Peachtree Street, NE
Suite 4000
Atlanta, GA 30308
(404) 614-7400
scollier@hpylaw.com

Chris Collier represents individuals as well as businesses, ranging from family-owned to Fortune 250 national and multinational corporations. Chris concentrates his litigation practice in the areas of premises liability, product liability, toxic tort, environmental, transportation, and general negligence. He is admitted to practice in Alabama, Connecticut, Georgia, Illinois, Missouri, and West Virginia, but he has represented clients in jurisdictions throughout the United States as National Counsel and first chair trial counsel.

The deposition – and in particular the plaintiff’s or key co-worker’s deposition – is frequently the most important aspect of an asbestos case. It is typically the testimony of these fact witnesses that either keeps your client in the case or leads to its dismissal.

While the initial scope of this presentation was conceived as an interactive session involving actual deposition techniques, the focus has shifted somewhat as we are now operating almost exclusively in a virtual environment in terms of depositions. Regardless of the setting or your experience level, you are still bound to encounter a Blow-Hard, Brainiac, or Bozo witness.

The Witness Types

The Blow-Hard witness is one who blusters and boasts. This is the witness who “always” did “everything” and was the most highly commended person in the entire operation. It is amazing the workplace was able to continue functioning after his retirement. The Blow-Hard is frequently the one with whom it is difficult to obtain any sort of useful information for purposes of constructing a dose analysis because he was “always” doing “everything.” The Blow-Hard is also the witness who can be made into the least credible witness with a lot of work and patience.

The goal with the Blow-Hard is to listen carefully to the answers given to the other lawyers who precede and follow you. If the Blow-Hard worked on ABC pumps “all the time,” he could not practically work on XYZ pumps “all the time.” Do not accept his representation as accurate and make him break down the percentage to something that is logical. This type of witness, though arguably helping his case in a deposition, is damaging his case at trial if alternate exposures are allowed to be addressed at trial. Also, if the Blow-Hard recalls working on ABC and XYZ pumps “all the time” but can’t recall the miles of asbestos-containing insulated pipe covering that your documents show were abated, his credibility will be dampened in front of a jury.

The Brainiac witness is the one who knows “everything” about “everything.” Frequently, this witness knows more about the client you represent than you do. The Brainiac can testify concerning every intricacy surrounding the product and its use. He can also offer significant details concerning the worksite that you might not get from reviewing prior deposition testimony and is generally the one who offers a laundry list of co-worker names.

Although possibly daunting on the surface because of the breadth of their knowledge, the Brainiac witness can occasionally provide you with helpful information to lead to the further defense of your client. Their testimony is also generally the easiest to “box in” in terms of the scope of their testimony, and they are the least likely to later try and expand on testimony they have already committed to. Thus, the goal with the Brainiac witness is to get as specific information as possible about both the product and the frequency, regularity and proximity of exposure.

The Bozo witness is one who knows very little about anything. Despite having worked in a single location for his entire career, this witness can offer no details or insight into how anything operated, including the equipment and materials he worked with on a daily basis. These are frequently the most difficult witnesses to deal with because they know so little about anything (or at least disclaim the knowledge) that assembling probing questions is challenging. In this instance, it is frequently the lawyer who knows far more about the product than the person who used it on a daily basis, and it becomes problematic to articulate questions to limit exposure.

When dealing with a Bozo witness, consider how his testimony will look when played or read to the jury. After a number of “I don’t know,” the Bozo witness will lose credibility, particularly if he later identifies your client’s product but lacks rudimentary knowledge of how it or the worksite functioned. Use this to your advantage.

Impact of Virtual Depositions

In today’s virtual world, Zoom depositions have almost exclusively replaced depositions taken in hotels or in a witness’ home, at least temporarily. While the goals of the deposition should remain the same, the process of achieving those goals has been upended with the transition to virtual depositions. The positive impact of this for a younger lawyer is that it provides you with a unique opportunity to develop and refine these skills using the technology available to us that many older lawyers will avoid.

It is much easier in an in-person deposition, even with a difficult attorney on the other side, to keep a fact witness on track. Now more than ever, it is important to reconfirm certain deposition “basics” – regardless of the type of witness – that most of us usually take for granted as precursors to get into the “meat and potatoes” of the deposition.

Commitments/Admonitions in Virtual Depositions:

1. Explain what the “record” is and what it means to be on and off the record.
2. Reiterate the importance of verbal responses, even though the deposition is being conducted virtually.
3. Remind the witness of the likely time lag between the video and audio components of the virtual deposition and to avoid talking over each other (see Tip 14 below). Confirm that if the witness does not hear or understand the question, they should ask for clarification rather than guessing at what the question was.
4. Explain the oath, its importance, and how it is the same oath as though the witness was in person with you or in court.
5. Confirm the witness has a sufficient remote connection and technology to complete the deposition.

6. Identify any time constraints with the witness. Keep in mind that people are now working, teaching, schooling, caring for children and parents, exercising ... basically doing everything from their homes and identify any possible conflicts before they arise in the deposition.
7. Confirm that the witness is both physically and mentally ready to proceed with the deposition. Are there any medications that have been taken prior to the deposition? It is also important to follow-up on this after breaks, since most witnesses turn off their video on breaks during virtual depositions.
8. Does the witness want to read and sign the transcript to confirm no errors were made in the remote transmission and transcription?

Regardless of the type of witness, don't get thrown off from your goals of the deposition:

1. Find out what the witness knows. This will be easier with the Brainiac. He will know everything, or at least believe he knows everything. The Bozo, on the other hand, will know nothing (or at least claim he knows nothing).
2. Investigate what the witness does not know. This is equally important for the purposes of establishing the boundaries of the testimony, both in the deposition and at trial. For the Bozo, this will mean most things; for the Brainiac, it will mean very little.
3. Figure out what is the "missing information." There will likely be little "missing information" with the Brainiac or Blow-Hard and a lot with the Bozo.
4. Set up Requests for Admissions and/or other motions. You can gain information during the deposition that may help you narrow the issues through a request to admit or to narrow the scope of the allegations in the case by way of a motion to strike or dismiss. In some jurisdictions, Requests for Admissions can then be used to save time and expense at trial based on admissions obtained during the deposition. These can be done effectively through all three types of witnesses, depending on the goals of your deposition. Is your goal to box them in at trial or to get out of the case at summary judgment (if not both)?
5. Consider escape routes that a witness might run toward. Make sure that you can walk away from the deposition knowing which facts the witness can and cannot prove. It is important to keep in mind the possibility of a later-produced affidavit and whether it carries any weight in your jurisdiction. Any time you hear "I can't recall anything else at the moment" or "not at this time," be aware that an escape route is in the making.

Because virtual depositions are on the rise, there are a number of issues to consider to effectively conduct a virtual deposition of any witness:

1. Place your computer's camera at a position slightly above eye level.

2. Talk to the camera and listen to the screen.
3. Ensure that notifications are turned off so that they do not interrupt your train of thought and are not inadvertently displayed on the screen.
4. Confirm that the microphone in your computer is effective; if not, consider using a headset.
5. Avoid distracting backgrounds and set the screen behind you to be relatively neutral.
6. Adjust the lighting so that there is more light on your face than behind you. Be cognizant if using natural light that the position of the sun will likely change during the course of the deposition and will impact your appearance.
7. Smaller rooms are better suited for audio, as are rooms that have carpet and lower ceilings.
8. Take more frequent breaks than if you were taking the deposition in person to allow more movement for yourself and the witness. Clarify after breaks what occurred on the break and what materials or people might have been consulted during the breaks.
9. Be cognizant of who is in the room or location with the witness and why they are present.
10. Clarify what materials related to the case/work history are present in the room with the witness, even if the witness is not directly looking at them during the deposition.
11. Prepare exhibits for quick online access, including call-outs to direct the witness' attention to them.
12. If responses are unclear or muffled, the deposition is the time to ask for clarification. If you did not hear the answer clearly, it is likely that the court reporter also did not entirely hear the response.
13. Hand gestures are going to have less impact in a virtual deposition. They are also likely going to lead to head turning, other movement, and voice inflection, which are difficult for computer microphones to pick up.
14. Slow down. Because of the possible delay between the video and audio connection, slow down your questioning and use simple language. Slowing down also allows an appropriate amount of time for objections to be made without people speaking over each other.
15. Test everything in advance and have a back-up plan in the event the technology fails. Obtain contact information for the plaintiff's counsel and the court reporter in the event you lose internet connectivity.

While the Blow-Hard, the Brainiac, and the Bozo can be vastly different in the information gleaned at deposition, understanding how to elicit the information most useful to the defense of your client can help you prepare for motion practice and trial preparation, if necessary.

The strategies to be pursued with each of these witnesses should be considered and re-evaluated as the deposition progresses. Because of the significant increase in the use of virtual depositions in the last nine months, consideration should also be given to how to effectively communicate and cross-examine these witnesses in this virtual environment.

We will cover the various witness types in more detail and with examples during the virtual session as well as review some of these issues unique to the virtual deposition process.