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Defending Lawyer Depositions: Lessons From Waymo v. Uber

By **Arturo González and Michelle Yang** (April 27, 2018, 12:21 PM EDT)

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There are general rules for preparing witnesses for deposition. But what if the witness is a lawyer for a party in the case? Do the rules change, or do you treat the lawyer the same as you would any other witness? And, as a client, should you be concerned that your lawyer might testify in deposition or at trial? This article addresses four lawyers who were deposed in the Waymo v. Uber litigation, the facts that led to their depositions, and the strategy we — Uber's counsel — employed in preparing them for deposition and trial.

The Witnesses

There were 187 depositions in the Waymo v. Uber litigation, and several of them were lawyers, including the top lawyers for Googleand Uber. This article focuses on four other lawyers: Uber's former head of litigation, an Uber in-house lawyer who trained certain Uber employees with respect to attorney-client privilege, and two law firm partners.

Why Were Lawyers Deposed?

The law firm partners were deposed because they were involved in the due diligence related to Uber's acquisition of Ottomotto. One is a specialist in employment and trade secrets law, and he assisted Uber in its effort to ensure that no Google[1] information came to Uber. The other performed a patent analysis to advise Uber on potential intellectual property exposure stemming from the transaction. Uber's head of litigation was involved in communications regarding the due diligence and was the recipient of the infamous "Jacobs letter," discussed below. The other Uber lawyer was deposed because the Jacobs letter claimed that this lawyer instructed Uber employees to assert attorney-client privilege in improper ways.

Considerations in Defending Lawyer Depositions

The most important distinction between lawyer and nonlawyer depositions is the sacred attorney-client privilege and the related work product doctrine. The defending lawyer, the lawyer witness and the client need to have a clear understanding and plan on where the privilege lines will be drawn. This is not an easy task, and mistakes in planning or execution could have serious consequences. The privilege cannot

be used as a sword and a shield. Voluntarily testifying about a topic could lead to a finding of waiver in connection with that entire subject matter. Thus, there has to be precision in identifying what is fair game and what will be asserted to be privileged.

Because lawyer depositions are generally limited in scope, it is important to focus the preparation on the specific issues that the lawyer and client agree the lawyer will testify on. Similarly, the preparation should focus on only those documents that the lawyer will address substantively. If there are 50 other documents where privilege will be asserted, it is not necessary to spend time in preparation addressing those documents. The key is to focus the lawyer witness on the handful of issues he or she will address, and nothing more.

Finally, the standard deposition instruction about waiting a second or two before answering is especially important when defending lawyers. And attentiveness to every word of each question is key. When in doubt, assert the privilege, take a break, and talk to the witness.

Voluntary Waiver of the Privilege

In some cases, the client may decide for tactical reasons to waive privilege on a topic and allow the witness to testify. The client needs to understand that such a waiver will likely lead to the production of emails and other written communications that would otherwise be privileged. A thorough review of such communications should be undertaken before a decision is made with respect to waiver. Likewise, waiver of attorney-client privilege could lead to waiver of fact work product on the same subject matter, and this fact work product should be reviewed. For example, a work-product document attached to an otherwise privileged email may be found to fall within the scope of the waiver. Also, it would be prudent for the lawyer to confirm the client's waiver decision in writing.

An equally difficult question is what a lawyer may testify to that is not privileged to begin with. If the lawyer was a witness, for example, to an unprivileged conversation, the lawyer's testimony about that conversation is probably fair game. Allowing the lawyer to testify to that conversation should not represent a waiver. But the lines are fine, and difficult judgment calls need to be made knowing that defending those lines before a judge may also be challenging.

The Lawyer Depositions

Partner No. 1

The first partner deposition was short and uneventful. Privilege was asserted over the specific information he considered when performing his due diligence task, his findings, his opinions that led to those findings, and his communications with the client. He was instructed not to answer any question that began with "what did you think of" or "did you ever consider." Any question that delved into his mental thought process was privileged work product and, depending on the context, possibly attorney-client privileged as well. Although Waymo repeatedly threatened to call lawyers as witnesses at trial, this partner was never included on Waymo's witness lists during trial.

Partner No. 2

The second partner's deposition was more challenging. He was the engagement partner, and his involvement was broader. He was allowed to testify regarding why the due diligence was performed. Thus, he testified about his conversations with Uber about engaging a forensics firm, Stroz Friedberg

LLC, to help with the due diligence. It was important for the jury to hear directly from this partner that the objective was to prevent Google information from coming to Uber.

At trial, Waymo indicated it would call this partner as a witness. We did not object because we believed that he would make a credible and persuasive witness and that any effort to discredit him would backfire. Waymo apparently agreed. After two days of trial, Waymo offered a compromise — it would not call him to the stand as long as Uber agreed that six documents that were sent to or from him would be admissible. We rejected that proposal. On the third day of trial, Waymo offered not to call him if Uber agreed to the admissibility of one email that he wrote. Again, Uber rejected that proposal. When we received Waymo's final witness list after four days of trial, he was no longer on the list.

Uber In-House Counsel

A key tactical decision had to be made regarding the privilege in connection with this witness. The allegation was that this witness had used a PowerPoint presentation to encourage Uber employees to assert attorney-client privilege in improper ways. The witness could have denied the allegations, and Uber could possibly have asserted privilege in connection with the slide deck. But how would that look to the jurors?

In our view, the client had no choice but to produce the PowerPoints and not to assert privilege with respect to the training provided by this lawyer. Thus, four versions of the training PowerPoint were produced, and the witness answered all questions regarding the training that he provided to Uber employees on privilege. The fact that the PowerPoints did not contain anything improper regarding the assertion of privilege added to the credibility of the lawyer's testimony. Ultimately, U.S. District Judge William Alsup ruled that the allegations of asserting improper privilege were inadmissible under Rule 403, and thus this witness did not testify at trial.

Uber's Head of Litigation

Waymo attempted to assert settlement leverage by threatening to call Uber's head of litigation as a trial witness. Waymo had deposed her twice. The second deposition involved a lengthy demand letter that she had received from a former employee's lawyer (the "Jacobs letter") that included references to alleged discovery abuses relating to trade secrets theft and other purported misconduct. It had not been produced in Waymo v. Uber.

Waymo argued that Uber intentionally hid the letter. But we never thought that the jury would accept that theory. The lawyer had retained former prosecutors to review the allegations in the Jacobs Letter, and the letter did not cite to any specific evidence that Uber misappropriated trade secrets. (In fact, both the former employee and the lawyer who wrote the demand letter admitted that the reference to Waymo trade secrets was "an error in communication.") More importantly, she had voluntarily turned the letter over to both the United States attorneys in the Northern District of California and the Southern District of New York and to the U.S. Department of Justice in Washington, D.C. That hardly smacks of a conspiracy to hide evidence from Waymo.

In addition to testifying in two depositions, this lawyer testified at an evidentiary hearing before Judge Alsup, a former trial lawyer who personally questioned her under oath. She was a strong, credible witness. She testified that it was her decision to hire Stroz Friedberg, and that she did it to prevent Google information from coming to Uber. With respect to the Jacobs letter, she explained that she limited the distribution of that demand letter because she did not want to impede the investigation by

the former prosecutors. She colorfully testified that she shared the letter with the Justice Department and U.S. attorneys because the lawyer for the former employee was threatening to go to the government and she wanted to "take the air out of his extortionist balloon."

At trial, Waymo made a wise decision. After four days of trial testimony and as Waymo was nearing the end of its case-in-chief, Waymo did not include Uber's head of litigation on its final witness list.

In sum, the proper preparation of a lawyer witness should address difficult privilege issues. And if the lawyer witnesses perform well, as they did here, it can be an important factor in helping to resolve even the most contentious disputes.

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Disclosure: Arturo González was Morrison & Foerster's lead trial counsel for Uber, and Michelle Yang was a senior associate on the trial team.

[1] Waymo did not exist at the time of the Ottomotto acquisition; it was spun out of Google in December 2016.