

4<sup>th</sup> ANNUAL ABA SECTION OF LABOR AND EMPLOYMENT LAW CONFERENCE

November 5, 2010; Chicago, IL

SUMMARY JUDGMENT: THE PAPER FIGHT- HOW TO ADVANCE YOUR POSITION

Effective Plaintiff's Techniques To Defeat Summary Judgment Motions  
(as applied to Allison v Leaky Roof Ins. Co., at al.

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I. INTRODUCTION:

Anyone who practices employment law realizes quickly and emphatically that employment cases C perhaps more so than in many other areas of the law B are won or lost on the basis of effective pre-trial discovery. Through effective pre-trial discovery, a talented Plaintiff=s lawyer can turn a marginal discrimination or wrongful discharge case into a substantial verdict or settlement and a talented defense attorney can destroy an otherwise strong case, generally by dismissal on summary judgment. And probably the most important discovery steps in bringing either of those scenarios about are the depositions of the Plaintiff and of the key decision-makers for the employer.

Employment lawyers who do not fully embrace the reality that their cases are won or lost at th6ir computers preparing effective written discovery requests and at the conference room table taking effective depositions will experience little success in this field. One key aspect of effective plaintiff's discovery in employment cases is the plaintiffs' lawyer's recognition that the Aold@ conventionally-taught methods of deposition taking are generally ineffective in employment law. While those methods can be effective in, for example, automobile accident

suits where it is clear that genuine issues of material fact exist such that a trial (or settlement) is inevitable, the same is not true in the murky world of employment law, where B save for the occasional Adirect evidence@ case B it is on the strength of inferences from the facts upon which the case will rise or fall. To take effective depositions in employment cases, lawyers need to master these Anew rules.@

A. Why This Is: The Summary Judgment Monster

The stubborn prevalence of the summary judgment motion in employment cases B fueled by its increased chances for success B has caused many Plaintiffs= attorneys to re-think our strategies for selecting, preparing, and taking discovery in our cases. It has forced us to play by some new rules that may run contrary to the conventional wisdom which we learned in law school or experienced in other practice areas. But the prevalence and significance of summary judgment motions in this field Acuts both ways.@ As our courts have strayed ever further from the principle that a motion for summary judgment is merely to test whether there exists sufficient genuine issues of material fact B instead becoming a Atrial by paper@ B Plaintiffs= lawyers risk losing more of their cases on that basis. At the same time, however, and because of that shift in focus, orders denying summary judgment carry more significance and a more ominous message for employers than ever before.

More than ever, surviving summary judgment is the key to victory in employment law, so much so that the vast majority of the time surviving the summary judgment motion is the functional equivalent of winning the case. In reviewing my cases over the past several years, surviving summary judgment generally has been followed by a rapid settlement or an Aeasy@ trial victory, almost invariably at figures far higher than would have settled the case months

prior. So high is the bar for Plaintiffs on summary judgment that even most federal judges express surprise when a case does not settle shortly after the motion is denied. After all, everyone now realizes that what was once a tenuous relationship between surviving summary judgment and a victory on the merits for the Plaintiff is now a virtual certainty. Indeed, the overwhelming majority of the time, to avoid summary judgment is to win the case. Conversely, of course, the pressure is on the employer=s attorney as well, frequently B and especially with a sympathetic Plaintiff and compelling facts B the possibility of dismissal via summary judgment is the employer=s last and best chance for victory.

B. Explaining The ANew Rules@ To Your Client.

Plaintiffs' employment lawyers have slowly come to this realization and have begun to tailor case selection, strategic planning, and their discovery techniques to avoiding summary judgment. The process must begin with your client at case selection time. Inexperienced litigants may never have heard of summary judgment and often express shock and confusion over the attorney=s suggestion that a judge may Athrow out@ their case without a trial, but only after the litigation process has become devastatingly costly. Clients often dismiss the notion as too unlikely for concern. Their reactions are understandable B the suggestion does not sound inherently logical. Plaintiffs= employment lawyers need to educate their clients at stage one about this peculiar reality of employment law.

How to explain it to a client? Skip the discussion about Agenuine issues of material fact.@ Face it, that is no longer the standard and any explanation along those lines will only allay your client=s fears about summary judgment. Instead try something like this:

Most people who have never brought an employment case believe that they are entitled to a trial by jury and that nothing the defense does can change that. But the dockets of

federal judges have become extremely overcrowded in recent years. One reason for that is that no one ever dreamed there would be this many employment discrimination cases in the courts. Rather than spend a week presiding over each case, many judges have found it very efficient to >dismiss out= as many cases as they can in order to cut that backlog and reduce the number of trials they must hear. After we have finished all of the discovery in this case, the defense will make what is called a motion for summary judgment. You must think of it as a test B a >final exam= for your case. The defense will write a brief and attach to it all of the favorable evidence that they have in an effort to convince the judge that your case is simply not good enough to go to trial. We then need to do the same. In essence, we must try your case >on paper= and get the judge to rule in our favor before you will be entitled to have a trial. It is only if our case passes that Afinal exam@ that we will have a right to a trial.

C. Conducting Plaintiff=s Discovery by the ANew Rules@.

Playing by these Anew rules@ is most critical in affecting your discovery plan. Many attorneys blindly follow the Aold rules@ which used to make sense. For example, before the summary judgment explosion, it made sense to conduct discovery in a manner consistent with what discovery was originally meant to be: methods of Adiscovering@ what evidence your opponent had so as to better prepare for trial. Depositions were routinely taken with that goal alone in mind: to find and out everything the deponent has to say about each relevant topic so that you can assess the strengths and weaknesses of your case and better prepare for trial. Now the goals of depositions of defense witnesses in employment are radically different. Yes, we still need to Adiscover@ all that each deponent knows. But more importantly, we need to aggressively cross-examine deponents much as we might at trial, scoring as many Apoints@ as we can and creating as many Apages@ of Local Rule 56 attachments as we possibly can.

D. Preparing Your Client for Deposition Under The ANew Rules@.

Second in importance only to the success of the depositions of the primary defense witnesses is preparing the Plaintiff for deposition under these Anew rules.@ Again, Plaintiffs=

lawyers routinely adhered to the conventional wisdom of preparing a client for a deposition: ADo not talk too much, do not volunteer anything, do not argue with opposing counsel, etc.@ While those are still valuable pieces of advice in general, Plaintiffs= lawyers have begun to realize that there are many times at a deposition where the Plaintiff should, indeed, talk a great deal and volunteer a great deal of information and even some times when it isn=t so bad to argue with opposing counsel.

E. Propounding Written Discovery, Writing Your Brief, And Preparing Your Local Rule 56 Statement Under The ANew Rules@.

Finally, the “new rules” require new strategies for arguing summary judgment motions and for coming forward with evidence in the form of deposition excerpts, affidavits, and exhibits. The summary judgment response must be every bit as persuasive as a closing argument in a courtroom. It must grab the judge=s (or, more typically, his or her clerk=s) attention in the first paragraph and not let go. If it is a case where summary judgment is particularly inappropriate, it must express annoyance about that and make clear to the judge why that is. The evidence presented with the brief must be lengthy, comprehensive, and complicated. It must not overlook any item of evidence that might in any way support your client=s case. The “old rules” about “saving something for trial” have little applicability because in the modern day, this motion often is the trial.

With this backdrop in mind, this paper presents a series of suggestions, considerations, and strategies that will help avoid summary judgment using the Anew rules” with reference to the Allison v Leaky Roof Ins. Co. et. al case scenario.

### III. INCORPORATING THE NEW RULES.

A. Don't Throw Out All of the Old Rules. some still make sense. For example, Plaintiff must put each decision-maker deponent in a box on every material issue in the case:

§     AIs that all that happened?

§     AWas anything else said?

§     AWere any other steps taken?

B. The Denial/Don't Remember Distinction.

§     It is a major distinction. Don't ask the decision-maker ADo you remember the Plaintiff complaining to you about discrimination? Ask him or her AAre you denying that Plaintiff complained to you about discrimination? In the Allison case, don't ask Sam Marshall "Do you recall Ms. Allison specifically asking you for the accommodation of assignment to a territory in the Topeka region?" Instead, ask "Are you denying that Ms. Allison specifically requested the accommodation...?"

§     When the deponent says AI don't remember to anything material, phrase the question with whatever you are trying to prove and ask him/her: ADo you deny it? or AAm I accurate in concluding that you cannot deny this fact? e.g. "Now, Mr. Marshall, am I accurate that you have no evidence to dispute that the claims files were taken from Ms. Allison's office without her knowledge?"

Written Discovery To Pursue Vigorously In Allison v Leaky Roof Case

At a minimum, Ms. Allison's attorney should pursue and move to compel if necessary:

-the history of performance reviews and disciplinary measures with respect to all other adjusters in as wide a comparative group as the Judge will allow;

-specific reasons for each geographic assignment made by Marshall;

-all reasons for Marshall's eventual termination;

-all steps taken with respect to any investigations concerning Ms. Allison's complaints;

-the personnel files of all other employees who have used the "Open Door Policy";

-the employment histories of all employees who have sought accommodations or FMLA protection.

C. :Make Pages - Part I

Nothing presents a clearer illustration of a material disputed fact than making the deponent/decision-maker say it herself, i.e.:

§ ADo you understand that one of Plaintiff=s allegations in this case is that you refused to meet with him to discuss his performance appraisal?@

§ AAnd you are denying that you refused to meet with Plaintiff to discuss his performance appraisal?@

§ ASo that is disputed fact between you and Plaintiff in this case, isn=t it?@

§ AIn effect, you are saying one thing, and he is saying another about whether you agreed to meet with him to discuss his performance appraisal?

§ ADo you feel, as a supervisor, that it is important and useful to meet with

employees to discuss their performance appraisals if an employee wants to do that?@

§ ADon=t feel that a discussion of any performance deficiencies with an employee may enable that employee to improve his performance?@

§ AAnd whether or not Plaintiff was performing his job adequately is an important issue in this case, isn't it?@

Applying this principle to the Allison case, plaintiff's attorney might question Mr. Marshall at his deposition as follows:

“Now. Mr. Marshall, isn't it a fact that you criticized Ms. Allison for using a photograph of a roof that had been taken by an inspector? And that you told her that was impermissible?” Isn't it a fact that Ms. Allison then showed you a passage from the claims manual verifying that it was permissible to use photographs from “any credible source.” OR

“Do you agree with me that Ms. Allison is alleging in this case that on one occasion when you and she were meeting in your office, she sought to leave your office in order to go to the washroom, and that you told her she could not do so?” Mr. Marshall, I am not asking you yet if that happened. I am asking you if you understand that Ms. Allison is alleging that fact?” And it is your testimony that that never occurred right? So, she is saying one thing about that meeting in your office and she is saying another?” And they can't both be true, right?

A similar line of questioning would be useful with respect to the issue

of Ms. Allison being blamed for problems with the files that she did not have and with respect to the issue of Marshall's claim that Ms. Allison's files were too "disorganized."

C. AOpening Up@ The Well Prepared Or Reluctant Deponent

§ ACould you describe for the record...?@

§ ACould you tell us in more detail the ways in which...?@

§ AI am afraid that I don't know much about your line of work.... Can you explain as though you are talking to a total novice how...?"

D. "Use The Remote" To Tune Out Opposing Counsel.

§ Ignore her during all questioning of the witness.

§ There is just one appropriate response to an objection: ADo you understand my question@A to the deponent.

§ There is just one appropriate response to a second objection as to the same question: "Are you instructing the witness not to answer?" to the opposing attorney.

§ There is just one appropriate response to continued, improper, and obstructive objections by opposing counsel: ALet=s take a ten minute break, go to my office, and call the Judge.@

Save all the other Achit-chat@ and argumentative brilliance for the breaks.

IV. PREPARING FOR THE DECISION-MAKER DEPOSITION.

A. The ASchizophrenic@ Goals of the Decision-Maker=s Deposition: Finding Out Everything About Every Potential Issue In The Case And Making Pages. The AOld Rules@ v. The ANew Rules.@.

§ Most experienced deposition-takers can do the former well. The latter takes a great deal of preparation.

B. Write Out Every Single Question And Possible Follow-Up Question, At Least On Topics Relating To Any Material Issue In The Case.

§ You can always ignore your pre-planned questions if a stroke of brilliance hits during the deposition, but you are not just creating pages during the deposition, you are creating chapters, i.e. a chapter on each comparative whom you have discovered through written discovery. These chapters must read well and flow just as though you were writing the transcript yourself.

C. Prepare The Paper.

§ Do not take a deposition until you have all of the documents and sworn interrogatory answers that you want. (Let the defense counsel take his depositions first, unless you feel strongly. I think it is usually a mistake).

§ Review every single document obtained in discovery or from your client and select the deposition exhibits just as you would trial exhibits. The deponent does not need personal familiarity with a document in order to use it at the deposition to make a point in your client's favor.

§ Have ample pre-marked copies for the reporter, defense counsel, the deponent, and yourself. It keeps the deposition moving and makes you appear very organized and efficient.

D. Strategies At The Decision-Maker's Deposition

1. In Allison v Leaky Roof Ins. Co., we have no information yet as to which type of deponent Sam Marshall will be. Early in his deposition, the

plaintiff's lawyer needs to determine which A witness type@ the deponent is and adapt accordingly. Mr. Marshall will likely fall into one of these three categories:

- The AWait A Minute, This Is Under Oath@ Deponent: the deponent who feels it is important to be basically honest, but wants to stop short of A hurting@ her case.

§ AWell, isn't it impossible that ....?@

§ AWould you grant me that....?"

§ ACan you deny under oath that....?"

§ ADid you have any doubts at all about your decision? Can you tell us about them?"

- S The Liar/Exaggerator:

§ Encourage it. Go with the flow. When he is on a Aroll@, ask more questions right then that encourage exaggeration so that you can make few Acredibility@ pages.

§ After topics. Come back to a question you asked two hours ago. (It gets very difficult to remember all of those lies). In your Rule 56 Statement and Brief, quote the answers side by side.

§ Remember the value of the Liar/Exaggerator. He will dispute virtually everything you ask him and his testimony will be inconsistent with that of other deponents. In your Rule 56 Statement and brief, list the inconsistencies among witnesses side by side.

- Mr. ANo Memory@: the deponent who believes that no memory is the safest path.

§ “Plead” for more detail with the deponent.

§ Explore everything that the witness can think of that might help him remember something.

§ Ask lots of open-ended questions.

§ Establish that he cannot Adeny under oath@ the claims of Plaintiff.

## 2. Topics to Cover With Decision-Maker.

§ Deponent=s Aposition@ on all direct evidence of discriminatory attitude.

§ Deponent=s Aposition@ on all direct evidence of any fact material to the case (i.e. years of good performance reviews).

§ Make deponent acknowledge all Agood@ facts about Plaintiff.

§ Question deponent regarding his Amanagement style@. This can help you find comparatives who were treated inconsistently therewith.

§ Establish all reporting lines and organizational structure of company and all changes therein over several year period.

§ Beat to death all Astrange happenings@ whether they seem Amaterial@ or not. (i.e. disciplining Plaintiff first thing in the morning of her return from a funeral leave).

§ Fully explore all personnel steps taken with respect to Plaintiff and comparatives.

§ Fully explore all personnel policies of the company and any departures from them with respect to Plaintiff. (**Hint:** Almost every company claims to have some version of an “Open Door Policy.” This policy typically invites employees to verbalize complaints or promises quick action in trying to resolve them. Most

supervisors become furious when employees use the policy and most companies do not want to waste any time trying to resolve employee complaints.)

§ Explore the timing of the adverse decision. Too long? Too short? Why so long or short? Either can be made to look suspicious.

§ Commit the deponent to all discussions that she participated in or is aware of concerning the adverse decision.

§ Explore all investigations into any workplace disputes involving the Plaintiff. Did the supervisor go speak with Plaintiff after she became aware of an issue? Why not? (This is a very disarming question. Try it!)

§ Explore discriminatory attitudes of the deponent directly; i.e. "How do you feel about hiring women with young children into a job that frequently requires overtime or travel?"; "What is your opinion of affirmative action?"; "Do you have any social relationships with African-Americans? Who? Describe your interactions with those friends." Such questions will often, surprisingly, draw a relevance objection. After all, intent to discriminate is the key issue in disparate treatment cases. What could be more relevant than the decision-maker's own attitudes and lifestyles?

§ Explore all human resources input into decisions affecting the Plaintiff. HR people are often in a "damned if you do; damned if you don't" position and at least some of the tension created by their divided loyalties can usually be brought out. Remember that discussions with an in-house attorney are not necessarily privileged where the attorney is acting partially as a decision-maker with respect to adverse employment actions.

- § Ask the decision-maker to reveal all of her sources of knowledge and advice, both about discrimination laws and about decisions made with respect to the Plaintiff.
- § All contradictions and inconsistencies. In addition to those between and among defense witnesses, look for inconsistencies among any statements made to the EEOC or IDHR, in the Answer, in interrogatory answers. (**Hint:** Decision-makers often exaggerate before the EEOC or IDHR or offer reasons that they are later persuaded by counsel to change. Statements made to investigatory bodies are frequently good sources of contradiction.)
- § Challenge the decision-maker on paragraphs of the company's Answer or statements made to the EEOC or IDHR. If the Answer contains denials of obvious facts or baseless Affirmative Defenses, ask the decision-maker why.
- § Go through the personnel-related history of the decision-maker. Have him describe all training in discrimination law and personnel management. Determine what he thinks is illegal. Ask him to identify and tell about all employees of the protected category at issue that he has ever supervised. How many employees has he terminated in this and prior jobs?
- § Explore all potential comparatives. Make pages. Each comparative is a chapter. Again, a deponent can be used to identify comparatives treated differently by the company even where the deponent was not herself directly involved.

Applying these principles to the Allison v Leaky Roof Ins. Co. case scenario, here are some good avenues to explore with Mr. Marshal I (or other decision-makers or HR representatives):

-Force Marshall to address and acknowledge Ms. Allison's previous years of good reviews and the fact that she had been promoted. Ask him his explanation for why an employee who was performing at that level would experience such a rapid deterioration in performance.

-Make Marshall say all "good things" about Ms. Allison. "Now, Mr. Marshall, are you contending that here was NOTHING AT ALL good about Ms. Allison's performance?" (Any answer is a good one).

-Ask Marshall bluntly what his own opinions are of Chron's Disease, of the FMLA, of the ADA's requirement of reasonable accommodation, of employees who are away from work frequently due to medical issues. Have him state his own conception of what the duty to reasonably accommodate means.

-Force Marshall to address why he pushed for a meeting with Ms. Allison so soon after her surgery and to acknowledge that, in retrospect, he may not have done so. Force him to address how Ms. Allison must have felt about that.

-Inquire as to Marshall's specific reason for each territory assignment, and gave him admit that he COULD have swapped assignments between Ms. Allison and another adjuster if he had wanted to do so;

-Ask Marshall about all conversations with anyone (including his secretary and Ms. Allison's physician) about Ms. Allison's condition. Ask him to speculate as to why his secretary would have said such a thing. "Do you have any reason at all to believe that your secretary would invent such a totally false story?"

-Explore with an HR representative what steps were taken to insure that there would be no retaliation against Ms. Allison for having used the “Open Door Policy.”

3. Some Questioning Techniques: (All Of The Following Are From Actual Deposition Transcripts Of Decision-Makers, Which Were Then Cited To by The Court In Denying A Motion For Summary Judgment.

a) Differential Treatment of a Comparative (Making Pages - Part II):

Q. You have testified that one of the reasons you did not consider transferring the Plaintiff instead of firing her was that her last performance review ranked her as Unsatisfactory, correct?

A. Yes, that's correct.

Q. Who is John Jones?

A. Johnny is a sales rep who worked for me a few years back.

Q. For the record, John Jones is a male who worked as a sales rep under your supervision in the Chicago office from June, 1991 until August 1996?

A. Yes, I believe those dates are correct.

Q. Isn't it a fact that Mr. Jones was transferred from the Chicago office to the Schaumburg office in or about August, 1996?

A. Yes, I believe that was the time.

Q. Isn't it true that you, as his supervisor, needed to approve that transfer?

A. Yes, that is company policy.

Q. I am handing you what is marked as Smith Deposition Exhibit #23... is this a copy of the performance appraisal of John Jones prepared and signed by you in July, 1996?

A. It appears to be.

- Q. And it shows, does it not, that Mr. Jones= last performance appraisal prior to his transfer ranked his performance as “unsatisfactory”?
- A. Well, that what... that would appear to be what you are showing me.
- Q. So it would be accurate to conclude that a sales rep can in fact be transferred even if his last performance review ranked him as Aunsatisfactory,@ correct?
- A. Well, I don=t know that.... there may not be a hard and fast rule. I seem to recall that around that time, Johnny may have requested that transfer because he had bought a home in that area.
- Q. Is that the company=s policy? That a sales rep with an Aunsatisfactory@ review can be transferred if they are buying a home in another area?@
- A. No. No. It has nothing to do with...I just meant that in John=s case, the transfer seemed to make sense.
- Q. But when the Plaintiff asked you to approve a transfer to another region, that made no sense to you?
- A. I simply meant that there was another reason why the transfer made sense in John=s case.
- Q. Would it be accurate to conclude that you treated Plaintiff differently from the way you treated Mr. Jones with respect to approval of a transfer?
- A. Well . . . I guess, if you want to call that differently.

(The Judge, in denying summary judgment, relied as proof of pretext principally on the fact that the comparative (Jones) had been transferred while Plaintiff=s transfer request was denied.)

b) Developing the Liar/Exaggerator:

- Q. Now you have indicated that you received complaints about the Plaintiff from a variety of persons, correct?
- A. Absolutely.
- Q. During what period of time that you supervised Plaintiff did you hear such complaints?
- A. Constantly.
- B.

Q. Constantly: Do you mean for the entire four and one-half year period that you supervised him?

A. Basically, I always heard complaints about \_\_\_\_\_. Always. I can't find him. He's incompetent. You name it.

Q. Can you give me an idea how often you would hear a complaint about \_\_\_\_\_ during the time you supervised him?

A. Oh, geez, it was constant.

Q. Can you give me your best estimate?

Defense Counsel: Objection. Asked and answered. He's already indicated that he cannot estimate a number of times. Move on to a new question, counsel.

Q. Can you give me...can you tell me how many complaints about the Plaintiff you would hear in a typical week?

A. Look, they were constant. I would say at least ten times a week I would hear something bad about \_\_\_\_\_ from somebody.

Q. Okay, about ten times a week. So that would be about 40 complaints a month?

A. Well, around there.

Q. And that would be about 520 complaints a year?

A. Well, I didn't count them.

Q. But I correctly heard you estimate 10 complaints per week for a four and one-half year period?

A. Well, more or less, to the best I can remember.

Q. So that would be over 2000 complaints that you heard about \_\_\_\_\_ during the time period that you supervised him?

Defense Counsel: Objection: You are badgering the witness.

Q. Now of these approximately 520 complaints per year that you would hear about the Plaintiff, can you name everyone whom you heard make such a complaint?

A. Oh geez. I mean; there so many...you want me to literally name....

- Q. Yes, Name everyone who complained to you about \_\_\_\_\_.
- A. Well.... (witness struggles to recall four names).
- Q. Now, aside from the four individuals whose names you recall, how many other people complained to you about the Plaintiff? I mean did these four complain repeatedly or ...
- A. No, No. I heard these complaints from everybody.
- Q. And out of these 2000 plus complaints about \_\_\_\_\_, you can recall just four individuals by name?

(In denying summary judgment, the Judge observed that the decision-maker=s testimony concerning the number of complaints he had heard about the Plaintiff might be viewed by a reasonable jury as so inherently incredible that it would find the Defendant=s articulated reason to be pretext.)

Other rulings denying summary judgment in various of my cases over the past several years have pointed to a decision-maker=s lack of memory, to contradictions between Defendant=s articulated reason and statements made to the EEOC, and to significant departures from announced corporate personnel policies or practices.

#### V. PREPARING YOUR CLIENT TO BE DEPOSED.

- § Sure, you should take a week to do this, but is it realistic?
- § Provide some written guidelines for client to review on his/her own.
- § Explain the difference between a depositions and a conversation. Explain it several times.
- § Urge client to tell the truth. Explain that you will be far better off that way than if he/she uses Awhite lies@ or exaggerations to explain away the case=s problems.

- § Explain what impeachment is and how it works at a trial.
- § Tell client which documents to review to prepare for deposition, but tell him/her to bring nothing with them to the deposition.
- § Explain about “box” questions. A good answer is “That is all I can remember at this time.”
- § Explain to client that it is okay and often good to say “I don’t know” or “I don’t remember right now.” Tell client never to speculate or make up something just as a question to be answered.
- § Prepare client for “What proof do you have of age discrimination?” and “What is the basis for the damages you are claiming?”
- § Explain to client the “audition” aspect of a deposition. He/she is auditioning for the role of a person who should be offered a large settlement.
- § Pray or take up meditation so that you can remain calm while your client is being deposed.

## VI. WARNING THE DEFENDANT.

We all know defense attorneys who love to make threats of sanctions. If you believe that your case is particularly unsuited for resolution by summary judgment and you suspect that your opponent is planning such a motion in any event, issue a strong warning near the end of the discovery period. Write a polite letter explaining why a motion for summary judgment is inappropriate or stands limited chance of success. Make repeated reference in the letter to facts favorable to your case which emerged during discovery. Warn your opponent that any motion for summary judgment will cause serious consideration of a motion for sanctions and remind

your opponent of the safe harbor provision of Rule 11. If you are ignored and you believe a motion for sanctions to be warranted, file the motion for sanctions, attaching your letter as an exhibit. It may be denied, but it will demonstrate to the Judge how strongly you feel about the strength of your case, or, at least, about the propriety of summary judgment.

## VII. ARGUING THE MOTION.

### A. The Rule 56 Statement.

- § Omit no fact or even tangential or remote relevance. If you believe that there is a juror somewhere on earth who might be influenced by a bit of evidence, include it. Try to exceed the number of facts within Defendant's Local Rule 56 Statement by three or four times.
- § Begin arguing those facts in your responses to Defendant's Rule 56 facts as frequently as possible. Look for a Defendant's fact early within its Rule 56 Statement that provides any justification for a lengthy response which allows you to summarize all of your most significant evidence.
- § Present the facts in a persuasive and argumentative (but not sarcastic) fashion. View the Rule 56 Statement as an extension of your brief & a chance to argue your case at greater length and in greater detail than a brief will allow.
- § Logical sequencing of your facts and use of topic headings strengthen your argument by rendering it more brief like.

## B. The Brief.

§ Have a clear and understandable theme that is set out in the first paragraph. AThis case is about .....@ ADefendant asks this Court for summary judgment in a case where..@

§ Argue!

§ Argue creatively and expressively. Think of the brief as a commercial advertisement for a product you are trying to sell. ACatch phrases@ and vivid examples can be just as persuasive and useful here as they would be for a commercial product.

§ If it is a case where you believe that summary judgment is particularly inappropriate due to the existence of contested facts or clear law, argue that point aggressively.

§ Almost every defense motion for summary judgment I have seen takes some liberties with the facts or tries to present to the Court a deceptively simple picture of the case which intentionally ignores record evidence which the defense knows to exist. Many such motions essentially say AHere is Defendant=s evidence. Let Plaintiff tell you about any other evidence.@ Hit any such disingenuousness on the part of the defense very hard. Point out to the Court as often as possible where the defense has ignored evidence favorable to your case. Argue that the defense is misusing the summary judgment motion if it does not present a full and fair version of Plaintiff=s evidence, forcing the Court to ferret out the missing evidence with the aid of Plaintiff=s counsel. Argue that allowing the defense to address such evidence B which it knew to exist B for the first time in its reply

brief is unfair Asandbagging. @

§ Stress to the Court that the summary judgment motion was designed to have a limited and specific use: to enable a Court to dispose of a case with no triable issues of fact after having been presented with a full and fair description and analysis of the facts of law. It was not designed to be a tactic for harassment of Plaintiffs nor an additional discovery device for defendants nor as a basis for Atrial by paper.@ Defendants who use summary judgment motions for such purposes make litigation a Agame@ and subvert its true purpose, all the while causing needless work and expense for judges and Plaintiffs= lawyers alike.

VIII. A PLAINTIFF=S LAWYER OFFERS A ATOP TEN@ LIST OF ADVICE TO THE DEFENSE:

Being a Plaintiff=s employment lawyer, the majority of this paper has been heavily slanted toward representing the employee in employment cases. After litigating in this field for many years, however, against outstanding defense attorneys as well as ineffective ones, I feel qualified to offer the following advice to those of you who practice on the Awrong side@ of employment law: Here is my Atop ten@ list of advice for the defense.

10. Objecting to every single discovery request will damage your credibility before most judges. An effective Plaintiff=s lawyer will be certain to highlight your unreasonableness on any motion to compel. For example, objecting to the relevance of the ages of the workforce in an ADEA case or objecting to a request as unduly burdensome or irrelevant without producing or answering any portion which you do not deem irrelevant or too burdensome will come back to haunt you B particularly if you seek to use any evidence which would have fallen under the request.

9. Personalize your client. No matter how large an employer or how great a faceless bureaucracy you represent, make the case about good people trying to do the best they could. Admit that agents of your client may have made some mistakes or errors in judgment in handling certain matters. It is far more credible than trying to stubbornly defend a mistake or poor business decision.

8. Have a theme. Just as a good Plaintiff's lawyer will have a theme of what the case is all about, the employer can have one, too. Argue your theme early and often in your briefs and use your depositions to bolster it.

7. Do not let the Plaintiff add self-serving affidavits to his or her summary judgment response that contradict or attempt to amplify or add to their deposition testimony. The law regarding contradictory affidavits is very favorable to the defense in this field of law.

6. Challenge the Plaintiff at his or her deposition to Aprove@ their discrimination claim. Ask them repeatedly what Aproof@ or Aevidence@ they have that an employer's acts were motivated by discrimination as opposed to some other motive. After exhausting and Apicking apart@ each item of Aproof@ that the Plaintiff offers, remember to ask a final, all-inclusive summary question, such as AOkay, then, other than your poor 2001 performance review, your supervisor's remark to you that he found you >unmotivated=, and your >gut feeling= that he was uncomfortable working with disabled persons, am I correct that you have no other evidence that your termination was caused by discrimination?@ Designing such a Asummary@ question provides you with an effective impeachment question to ask at trial should the Plaintiff's memory suddenly become sharper and overcomes the problem of trying to impeach the Plaintiff who has made many such remarks over several deposition transcript pages.

5. Induce the Plaintiff to concede that factors other than discrimination may have played

a role in an employer=s decisions. Use questions such as ADo you make room for the possibility that your supervisor may have been motivated by jealousy or personality conflict with you?@

4. When up against one of the better Plaintiff=s employment lawyers, do not invariably insist upon deposing the Plaintiff first, before any defense witnesses are deposed. I know that this bit of advice may go against the conventional defense wisdom and that it is generally effective to depose the Plaintiff right away. But talented Plaintiff=s attorneys will uncover areas, theories, and approaches you may not have thought of early on in the case. When this happens, you never have a chance to question the Plaintiff about those events which may never have occurred to you had you deposed the Plaintiff before you have a strong sense of how the Plaintiff=s attorney will try to prove his or her case.

3. Explain to your clients that it is essential that they tell the truth at their deposition! Make sure they realize that they are far better off admitting that they may have made an off-color remark or became angry and raised their voice at the Plaintiff. NOTHING HURTS THE DEFENSE AS MUCH AS DECISION-MAKERS WHO LIE ABOUT SMALL DETAILS OR WHO FEEL THEY MUST DENY EVERYTHING IN ORDER TO WIN THE CASE. Once you get to trial, do not argue Ain the alternative@ or, at least, do so as minimally as possible. Jurors frequently report that nothing hurts an employer=s credibility as much as the argument that goes: APlaintiff=s supervisor, Mr. Smith, did not make those remarks to the Plaintiff. But, even if he did, those acts do not rise to the level of sexual harassment under existing law@ or AMr. Smith at no time shouted at the Plaintiff and called her stupid. But even if he did, that is not against the law.@ Only lawyers and judges live in the world of theoretical alternatives. Jurors decidedly do not.

2. In your quest to make the case appear simple and straight-forward, do not omit significant facts which you know your opponent will rely upon in his or her brief and Rule 56 statement. I have heard a number of judges mention that nothing destroys the defense's credibility more than ignoring the existence of disputed facts which the Plaintiff is certain to highlight. For example, in a recent case, a federal judge, in denying summary judgment, admonished the defense for neglecting to even mention in its brief or Rule 56 Statement that one of the Plaintiff's performance reviews made reference to his age. Instead, acknowledge that the fact exists, but argue why it is immaterial such that a reasonable jury could not base a verdict upon it.

1. And my number one piece of discovery advice to employment defense attorneys: Explain very carefully to your clients that their deposition is not a good forum to engage in sarcasm, ridicule of the Plaintiff, or exaggeration. Corporate officials, in particular, frequently posture and pontificate at their depositions, mistakenly thinking that they are helping to "win" the case for the company and that a judge or jury will never hear or read their remarks. A good Plaintiff's employment lawyer will make certain that every such rude, sarcastic, or exaggerated remark finds its way into the record, usually in the form of "make shift" impeachment at trial. The judge and jury WILL hear the offensive remarks and it will impact them negatively.