DEPOSITION STRATEGIES IN EMPLOYMENT DISCRIMINATION LITIGATION:
TAKING AND DEFENDING DEPOSITIONS OF PLAINTIFFS

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I. DEPOSITIONS MATTER

A. Goals of the Deposition

1. Lock in testimony
2. Fact-finding
3. Obtain admissions – for summary judgment and trial
   a. Establish or foreclose a legal claim or defense
   b. Establish, foreclose, or limit an element of damages
   c. Obtain agreement with your client’s theme for trial
   d. Lock in dates and details you will want to put on a trial demonstrative exhibit
   e. Establish lack of knowledge
   f. Credibility issues - truthfulness (cheated, lied, stretched the truth, inconsistent testimony/statements/writings, stole, felony conviction)
   g. Credibility issues – foundation (wasn’t present, didn’t see, couldn’t hear, knowledge from hearsay, was distracted)
   h. Credibility issues – bias (reason to favor or protect one party, reason to dislike or want to hurt one party, hidden agenda, potential personal gain, relation/friend, paid by one of the parties)
4. Develop questions for cross-examination
5. Establish the foundation of documents that may be trial exhibits
6. Assess witness believability, likeability, and presentation skills
7. Obtain sufficient representative testimony in series of questions for possible use in focus groups/mock trials

B. Uses at Trial

1. Impeachment
2. Refresh recollection
3. Stand-in for testimony of an unavailable witness (testimony preservation)
Party’s deposition may be used for any purpose (FRCP 32(a)(3)) – includes officer, director, managing agent at the time of the deposition, or FRCP 30(b)(6) or FRCP 31(a)(4) designee

II. DEPOSITION RULES

A. Requirements for use at trial from FRCP 32:
   1. Opposing party was represented at deposition or was given notice
   2. Deposition testimony conforms to evidence rules

B. Two important addenda to the basic rule
   1. Substitution of party does not affect previous depositions (FRCP 32(a)(7))
   2. Deposition from another proceeding may be used under certain circumstances (FRCP 32(a)(8))

C. Any witness’s deposition may be used for impeachment (FRCP 32(a)(2))

D. Outside of impeachment, a lay non-party witness’s deposition may be used only in particular circumstances, including:
   1. Witness is dead or unavailable
   2. Witness cannot be compelled to attend
   3. “Exceptional circumstances”

III. PREPARING FOR DEPOSITION

A. Key Strategies
   1. Timing: Take plaintiff’s deposition early
   2. Preparation, preparation, preparation: Whether you are taking or defending a deposition, it’s all about the preparation
   3. Identify case themes and incorporate them into deposition preparation
      a. Stick to key themes and identify relevant evidence (good and bad)
      b. Don’t get distracted with irrelevant matters

B. Steps
   1. Investigate – know what your witness will say
a. Propound and review discovery, including document requests, interrogatories and request for admissions
   i. Get the responses in advance of the deposition
   ii. Keep the deposition open if the witness hasn’t produced everything
b. Site visit
c. Public records
d. Your client’s records
e. Social media
f. Published materials (books, articles, news)
g. Prior testimony of the witness
   i. Earlier or contemporaneous cases
   ii. Other statements under oath
h. Other witnesses’ testimony about the witness

2. Develop your chronology and case strategy

3. Prepare deposition outline and/or checklist

4. Identify and prepare copies of exhibits

5. Arrange for location, court reporter, videographer, and (sometimes) copy service and notice the deposition
   a. Videotaping is well worth the expense

6. If non-party, serve a subpoena on the witness

C. Bring the right company representative

IV. PREPARING A TRIAL-FOCUSED DEPOSITION OUTLINE

A. Identify anticipated key admissions to obtain at the outset

B. Consider examining by subject or claim, as opposed to chronologically

C. Lead the deponent to clear admissions that will become your cross-examination
questions at trial

1. Clear and concise, plain-English questions
2. Use exhibits to lay foundation for the admissions
3. Establish the boundaries of the deponent’s knowledge on critical events

D. Identify the elements, claims or defenses that this deponent’s testimony can support or harm

1. Obtain lists to close out all facts or allegations to avoid surprises at trial
2. Close out credibility problems for witnesses who will attest to those critical events

E. Highlight credibility problems

1. Develop questions for which either answer supports your case
2. Use exhibits to demonstrate self-contradictions
   a. Between the deponent’s testimony and the documents
   b. Between the deponent’s written accounts of key events
3. Use exhibits and/or questions to trigger an emotional response

F. Confirm credibility of other witnesses

G. Confirm facts that fit into your trial theme

V. SELECTING EXHIBITS FOR DEPOSITION

A. Documents that deponent touched (prepared, signed, sent, received)
   1. Authentication vs. explanation

B. Documents that can be used to obtain admissions
   1. Key dates and facts
   2. Notice and content of key policies
   3. Prior written characterizations of events by the deponent

C. Documents that highlight credibility problems
1. Internal inconsistencies (e.g., between multiple complaints)
2. Contradictions with complaint allegations or defenses
3. Documents that reflect poorly on the deponent
4. Careless emails
5. Social media

VI. NOTICING THE DEPOSITION

A. Consider including request for documents to be produced at or before the deposition

B. Videotape parties and key hostile witnesses
   1. Play key testimony in opening statement
   2. Far more compelling impeachment at trial

C. Translators
   1. Complete written conferral in advance
   2. Confirm translation at deposition means translation at trial

VII. TAKING THE DEPOSITION

A. Listen
   1. Don’t be wedded to your outline
   2. Be willing to improvise

B. Admissions vs. fact-finding
   1. Start with leading questions aimed at clear admissions
      a. Yes, no or I don’t know vs. narrative responses
      b. Close out “I don’t recall”
   2. Take notes and ask follow-up questions to explore new facts
   3. Close out the deponent on all lists and new facts

C. Use plain language that lay juries can understand
D. Build case themes into as many questions as possible

E. Think about how the testimony will sound if read back; try again or create additional summary questions that can be used at trial

F. Impeachment and Cross-Examination
   1. Give the deponent a chance to lie or exaggerate
   2. Highlight misrepresentations and unreasonable positions

G. Use the video to your advantage
   1. Interruptions to consult attorney
   2. Emotional responses
   3. Sloppy dress, posture, hand movements, facial expressions, eye movements

H. If videotaped, be mindful of how you present on audio
   1. Calm, modulated tone
   2. Clear, crisp, audible, well enunciated questions
   3. Avoid sarcastic tone or flippant comments

I. Keep a nice pace/rhythm for key sets of questions that could be played back to a jury
   1. Try to keep a conversational pace
   2. Don’t get trapped into arguing objections

J. Lay the foundation for motions in limine
   1. Rule out deponent’s qualifications to provide expert testimony (e.g., on damages)
   2. Establish the boundaries of any privilege-based objections

K. Use silence strategically