

Taking and Defending Depositions to Win Your Case Program Outline

*Litigation Skills Training
Employee Rights & Responsibilities Committee Midwinter Meeting
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Deponent Selection

Defense Counsel's Focus

- Plaintiff
 - *Is there ever a time you would not depose the plaintiff?*
- Liability
 - Non-managerial witnesses
 - Willing to speak with defense counsel?
 - Crucial they understand you are not THEIR attorney.
 - Willing to speak, or have spoken, with plaintiff's counsel?
 - Former managerial witnesses
 - Do you represent THEM?
- Damages
 - Treating health care provider
 - Spouse/significant other
 - Family & friends
- Expense

Plaintiff's Counsel's Focus

- Rules of Professional Conduct: who is "represented"?
- Alleged Discriminating Official/Decisionmaker
 - How to handle multiple Decisionmakers?
- Human Resources
- Other Management
- 30(b)(6) deposition(s)
- Comparators
- Timing
 - Strategy for order of management-side deponents
 - Before or after plaintiff's deposition?

Plaintiff's Deposition

Plaintiff's Counsel's Focus

- Deposition Preparation: know the skeletons.
 - Social media is discoverable and can be used during depositions to harm your client's case.
- This is not your opportunity to tell your story!
 - Make sure you understand the question.
 - Answer only the question asked, and don't volunteer.
 - Don't speculate or guess.
 - Always tell the truth.
- Plaintiff should be prepared to answer questions about:
 - All prior statements, including charge;
 - Complaint – facts to support each allegation;
 - Discovery responses;
 - Mitigation efforts;
 - Any "harmful" social media evidence; and
 - What happened that was discriminatory?
 - WHY do you think it was discrimination?
 - Have you experienced emotional distress? (Could your emotional distress have been the result of other causes?)
 - What damages are you seeking?

Defense Counsel's Focus

- Get the story out using your leading questions.
 - Limit narrative answers if at all possible.
- Identify inconsistencies with prior discovery responses.
- Determine party's impact on jury.
- Elicit admissions for summary judgment.
 - Know what you need for summary judgment ahead of time
 - Speculation versus fact
 - Poor performance or wrong doing
 - Alleged "comparables" not similarly situated
- Damages
 - Establish lack of reasonably mitigation efforts.
 - Lack of written record
 - Lack of computer records showing what ads responded to
 - Failure to utilize available services to find work
 - "Emotional distress" simply that associated with any job loss
 - Vacations
 - Social activities
 - Facebook and other postings
 - Already on anti-depressants

Deposition of Employer's Human Resources Representative

Defense Counsel's Focus

- Doing the best with whom you have.
 - "True" HR versus "Default" HR
 - What is there is none?
- Knowledge/responsibility for policies
- Showing a lack of similarly situated co-workers
- Cat's Paw issues
- Dealing with bad HR facts
 - Policy deviation
 - Policy never disseminated
 - No policy in place

Plaintiff's Counsel's Focus

- Assess credibility/palatability of deponent.
- Define/confirm employer policies (or lack thereof).
- Obtain admissions regarding deviations from policies.
- Exhaust testimony on training, seminars, and efforts to prevent or remedy discrimination.
- Establish dates of employer's knowledge of discriminatory activity.
- Punitive damages: notice of prior complaints, knowledge of prior bad behavior by alleged discriminating official

Deposition of Alleged Discriminating Official (ADO)

Defense Counsel's Focus

- Thoroughly exhaust witness/s recollection of the action, omission and/or decision-making process in preparation so there are no surprises
- Ego in check
 - The attorney (You) is in charge, not the witness.
 - Exude confidence, not cockiness.
 - Exude contrition if proper (NO ADMISSION.)
 - Tell the truth.
 - No volunteering.
- Prepare for mud-slinging.
 - Do not sling back.
 - Prior “bad acts” or poor performance issues
 - Lack of training
 - Failure to follow policies

Plaintiff's Counsel's Focus

- Assess credibility/palatability of deponent
 - Consider videotaping deposition
- Expose any sloppiness in decision-making:
 - “Did you make an effort to . . . ?
 - Did you personally review . . . ?
 - Did you ask . . . ?
 - Did you consider . . . ?
 - Why not?”
- Use ADO's personnel file/results of any internal investigation
 - Also consider offensive use of social media, prior behavior
- Get ADO to commit to positives about Plaintiff. If they refuse to acknowledge any positives, probe for as many negatives as possible to expose bias.

Use of Plaintiff's Personnel File

Plaintiff's Counsel's Perspective

- With Defense Witnesses
 - Use file contents (or lack thereof) to expose sloppiness or inconsistencies in decision-making:
 - Did you make an effort to personally review X before making this decision?
 - Were you aware that CP's previous evaluations all rated her as "exceeds expectations"?
 - Follow up on gaps in file (missing evaluations, lack of write-ups or warnings)
 - "New" materials which were not submitted in response to statutory request for personnel file
- With Plaintiff
 - Review every item in personnel file containing Plaintiff's signature
 - Plaintiff should not bring documents or items with him or her (unless in response to deposition notice/subpoena)

Defense Counsel's Perspective

- With Defense Witnesses
 - Review of personnel file
 - What?
 - When?
 - Why?
 - Definition of "personnel file"
 - Statutory versus Company
 - Efforts to find "pieces" of file
 - Policy regarding maintenance
 - Access & Confidentiality
 - Contents
- With Plaintiff
 - Employee Acknowledgment
 - Handbook
 - Evaluations
 - Warnings
 - Opportunity to rebut

Use of Personal E-mail Accounts

Plaintiff's Counsel's Perspective

- Discuss "litigation holds"
- Applies to plaintiffs
- E-mails (work and personal) need to be reviewed and discussed with plaintiffs (social media messages as well)

Defense Counsel's Perspective

- Admission of all e-mail addresses used
- Foundation (summary judgment and trial)
- Access of private account on company computer
- Company policy

Use of Comparator "Evidence"

Plaintiff's Counsel's Perspective

- Definition of "comparator": Cast wide net to start, follow up on all reasons why individual is not considered comparator by defense.
- Use personnel files of Plaintiff and comparators
- Address defense objections (i.e., privacy) to production of comparator files prior to depositions

Defense Counsel's Perspective

- Understand what it means to be similarly situated
- In your particular jurisdiction
- For the wrongful conduct charged

Use of Social Media “Evidence”

Plaintiff’s Counsel’s Perspective

- Social media is, without question, discoverable and may come up in deposition.
- *See, e.g., Mailhoit v. Home Depot*, 2012 U.S. Dist. LEXIS 131095 (C.D. Cal. Sept 7, 2012); *EEOC v. Simply Storage Management*, 270 F.R.D. 430 (S.D. Ind. 2010); *Robinson v. Jones Lang Lasalle America’s, Inc.*, 2012 U.S. Dist. LEXIS 123883 (D. Ore. Aug. 29, 2012).
- Know the social media habits and skeletons of your clients and deponents before heading into deposition.

Defense Counsel’s Perspective

- Review any new “Facebook fishing” cases beforehand
- Understand evidentiary issues before use
- Have a full list of social media sites to ask about