

# Taking and Defending Depositions to Win Your Case

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**

# Deponent Selection

- **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 Personnel**
  - **30(b)(6) depositions**
  - **Comparators**
  - **Timing**
    - Strategy for order of management-side deponents
    - Before or after plaintiff's deposition?

# Plaintiff's Deposition

- **Plaintiff's Counsel's Focus**
  - **Dep Prep: 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**
    - 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
    - "Emotional distress" simply that associated with any job loss
      - Social media showing parties, etc...
      - Whether professional assistance sought

# Employer's HR Representative

- **Defense Counsel's Focus**
  - **Doing the best with whom you have**
    - "True" HR versus "Default" HR
    - No HR representative
  - **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 re: deviations from policies**
- **Exhaust testimony on training, seminars, 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 ADO**

# Alleged Discriminating Official

- **Defense Counsel's Focus**
  - **Ego in check**
    - You're 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
    - Lack of training
    - Failure to follow policies

- **Plaintiff's Counsel's Focus**

- Assess credibility/palatability of deponent
  - Consider videotaping deposition
- Expose any sloppiness in decisionmaking: “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 decisionmaking: “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)
  - **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)

- **Defense Counsel's Perspective**
  - **With Defense Witnesses**
    - Definition of "personnel file"
      - Statutory versus Company
      - Efforts to find "pieces" of file
    - Policy regarding maintenance
      - Access & Confidentiality
  - **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 deposition
- **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**
  - Understand evidentiary issues before use
  - Have a full list of social media sites to ask about

*Thank you!*