

**DEPOSITIONS THAT WIN CASES:
A DEFENSE PERSPECTIVE**

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I. Introduction

It would be difficult to overstate the importance of depositions in employment litigation. A single deposition transcript may be sufficient to support summary judgment for the employer. Conversely, the outcome of a single deposition may insure that trial of the case will be required, absent settlement, or may make class certification likely. Even worse, from the defendant's standpoint, a single deposition may be the event which makes the plaintiff's case.

This is not intended as a primer on the nuts and bolts of taking a deposition, but as a few suggestions for taking depositions in the employment law arena. It will be left to the reader to surmise how many of the offered lessons were learned the hard way.

II. Taking the Plaintiff's Deposition

A. Decide your goals.

Of course, your major goal is always the same: To make certain that you know of each and every fact and claim that the plaintiff may use against your client. That goal always overrides all other goals. Beyond that, however, you should decide what else you want to accomplish in the deposition. This means, of course, that before taking the deposition you should be familiar with the case. In the typical individual disparate treatment case, you want to set up your motion for summary judgment, or at least obtain admissions which will be useful at trial.

The limitation on the duration of depositions imposed by Federal Rule of Civil Procedure of 26 and comparable state court rules dictates that attorneys refine more precisely the goals-that depositions are intended to accomplish. Indeed, attorneys cannot afford to waste valuable time

asking questions about areas unrelated to those goals with the hope and expectation that a court will grant them additional time to complete a deposition.

Examples of typical goals include:

1. Get plaintiff to admit the conduct for which he was discharged. Alternatively, get plaintiff to admit that he has no reason to believe management was aware of his innocence.
2. Get plaintiff to admit that all others who engaged in the conduct were treated the same way. –Alternatively, –get him to admit that he does not know of anyone else who engaged in the conduct who was treated more leniently.
3. Get plaintiff to admit that no remarks were made by any member of management which arguably evidence discrimination. Alternatively, establish that the remarks were not made by the decision maker and/or were isolated and remote in time to the decision.

You should know any problems with your case before taking the plaintiff's deposition, and decide if there are concessions or admissions it would be desirable to obtain from the plaintiff with respect to those problems. If, for example, the plaintiff has asserted disparate treatment and his claim has surface appeal, you will wish to formulate a series of questions with the object of demonstrating that, when one looks closely, it is apparent that plaintiff is comparing dissimilar situations.

Simultaneously with setting goals, you should think about what you will do to accomplish them. It is rare for a plaintiff to simply admit that he or she was not treated differently from anyone else, for example, so you will want to consider what strategy you will employ to obtain an equivalent admission. Usually, you will want to build much of your examination around the "undeniable" (though that is a concept alien to some litigants). For example, if plaintiff has alleged that she was demoted because of her sex, and the company's

defense is that she was demoted on the basis of relative performance in a reduction in force, you can probably expect to obtain admissions that there was a RIF and that no one replaced her in her former job, if those are unquestionably the facts. (If plaintiff will not admit the indisputable, you will have excellent cross-examination material for trial.)

–You can also expect to get admissions of the names of other females in plaintiff's former job who were not demoted and of the names of males who were demoted. Conversely, you should not expect plaintiff to admit that her performance was substandard, so you will wish to consider what you can reasonably expect her to admit about her performance. If, for example, her last performance review was good, you may want to plan your examination with the hope of eliciting an admission that the evaluator was fair to plaintiff and that she has no basis for believing that the evaluator was discriminatory at that time.

- –Then you can elicit an admission that the plaintiff knows of no reason that the evaluator would have become unfair or discriminatory when it came to selecting persons for lay off. Ideally, you can piece together enough "undeniable" facts to support a summary judgment motion without getting plaintiff's agreement to the conclusion you wish the court to reach.

B. Be Patient. Listen.

Too often, attorneys fail to heed the advice that they give about the importance of listening. Nowhere is it more critical to listen than in deposition, to insure that the written record on which a summary judgment motion will be based and/or which will be used for cross-examination at trial leaves no room for the plaintiff to change or embellish his or her story. To that end, when the plaintiff is non-responsive or evasive, it is necessary for defense counsel to have the persistence to ask follow-up questions.

Be flexible enough in your approach to the deposition to follow threads you may not have anticipated but which are raised by the plaintiff's answers. Additionally, you should not be so anxious to move on to the next subject that you fail to "close the circle" by asking summary

questions such as "was anything else said in that meeting?" and "have you told us about every time you know of that someone at the company referred to age?"

C. Don't be afraid to get an undesired answer.

Occasionally, inexperienced attorneys fear that if they ask about a particular incident or statement, they may lose the opportunity for summary judgment even though the case is a good case for the employer. This, of course, assumes that the plaintiff's attorney will not raise the incident or statement by affidavit in response to the motion, which is a dubious proposition in most cases. You are far better off planning on the best way to deal with a difficult issue and "pinning down" the plaintiff rather than hoping to avoid the issue.

D. Vary your style and treat each plaintiff as an individual.

One of the most important things to remember is that people act and react differently, and one approach to taking a deposition does not fit all plaintiffs. Additionally, if you use the same approach in each case, opposing counsel whom you encounter regularly will be able to prepare their witnesses accordingly.

It is a good idea to spend a few minutes taking stock of the plaintiff by asking questions on relatively insignificant matters and adjusting your style of questioning according to the responsiveness of the witness. While you should conduct yourself professionally at all times, some plaintiffs respond more to a friendly, empathetic tone of voice, while others will only tell the truth if you catch them in a misstatement early in the deposition and adopt a skeptical demeanor. Others may respond to a little of both. (The best interrogators may be those who can move seamlessly from "good cop" to "bad cop" and back without missing a beat.)

Some plaintiffs are more likely to give you useful admissions if they are allowed to "vent," while others must be carefully kept within bounds. For example, it is usually obvious in the first few minutes of a deposition if you have a witness who will always try to tell the truth and be fair, even if it hurts him (or her). That is the witness you may ask questions (e.g.,

"Wasn't that said in a joking manner?") that you would never ask a plaintiff who would never concede a point, even if it helped his or her case.

Generally speaking, "closed end" leading questions (e.g., "You received an employee handbook, didn't you?") are more effective than "open end" questions (e.g., "What was your relationship with that supervisor?").— Leading questions are essential when dealing with uncooperative witnesses.

III. Preparing the Employer's Witnesses for Deposition

There is very little which is unique to the employment area when it comes to preparing a witness for his or her deposition. The usual admonitions and instructions apply and will not be repeated here. A few suggestions may be in order, however.

A. Make sure your witnesses are comfortable with their acts.

Because discrimination is such a pernicious act and no one wants to be labeled as a discriminator, sometimes persons who would have no qualms about being a witness in another type of case are extremely nervous about giving a deposition in an employment case. Accordingly, it is usually worthwhile to spend some time building the witness's confidence by explaining the law and (if it is the case) reassuring the witness that in your opinion, he or she has acted properly.

B. Tell your witnesses what the plaintiff's attorney's goals are likely to be.

Just as you spend time setting your goals and strategy, you should give some thought to what the plaintiff's attorney will try to accomplish and how he or she may go about it, and to prepare your client to respond properly. It is extremely gratifying to have your witness give you a look in deposition which says "you warned me about this," and extremely troubling to have your witness give you a look that says he or she has no clue about where opposing counsel is heading.

C. Prepare your witnesses for questions about disparaging remarks and slurs.

Even before the O. J. Simpson trial, competent counsel were preparing witnesses for questions in discrimination cases about whether they have used racial or ethnic slurs, made age-related comments, and the like. - If the answer is "no," then the witness will have had enough warning about the question to be emphatic in his or her answer. If the answer is in the affirmative, then you will have the opportunity to prepare the witness to truthfully answer the question or, where appropriate, to formulate an objection to the question.

IV. Conclusion

Some practitioners may take exception to some of the foregoing suggestions, and certainly could add to them. No experienced practitioner will argue, however, that a set of rules is a substitute for thought and preparation.