GETTING THE ANSWERS YOU WANT:
EFFECTIVE DEPOSITION TECHNIQUES
EFFECTIVE DEPOSITION PREPARATION

By

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CHAPTER 14
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Rule No. 1: The Five W’s get a “C”

Just getting the who, where, what, when, and why from a witness gives you a grade of “C” but no more. All depositions, whether plaintiff, key defense witness, or cameo witness require strategic thinking and strategic questioning: What facts do we need to develop in order to have summary judgment granted or denied? Are there troublesome facts that need to be developed for a motion in limine? What facts do we need for a change in venue? Thinking strategically requires a review of the law before a deposition is taken: not all facts are created equal; they are filtered through the applicable law. Figure out pre-deposition which facts are legally, not just factually, significant.

Rule No. 2: “The Prophylactic Effect”

Who will come to the deposition? While a human resources manager and corporate counsel are fine, they are – for deposition purposes – extraneous. So, have a representative who knows what happened. Here’s a fundamental truth: It’s easy to lie when someone who knows the truth is not in the room; conversely, it’s a lot harder when someone is in the room who knows the truth.

Not only does having such help keep the deponent honest, but, if needed, you can always put your hand on the shoulder of the person whose conduct is at issue and ask, “Are you saying that Mr. Jones here is lying or mistaken or (fill in the blank)?” Most witnesses are not pathological liars. This technique helps to get to the “truth.”

Finally, federal court is different than state court. A company can have more than one corporate representative. The best Fifth Circuit case to cite on this is In re Terra International, Inc. 134 Fd.3d 302,306 (5th Cir. 1998), where the Court held:

Federal Rule of Civil Procedure 30(c)’s exclusion of depositions from the strictures of FRE 615 was intended to establish a general rule that other witnesses are not automatically excluded from a deposition simply by the request of a party. Rather, exclusion of other witnesses requires that a court grant a protective order pursuant to FRCP 26(c)(5).

Rule No. 3: Clamp Off the Bleeders

(a) What you and a jury think are important often do not match

Remember that to a jury it’s not always about legitimate, nondiscriminatory reasons. It’s not about the burden of proof. It’s about several different things: one of which is knowledge and control. Did the employee have knowledge of what was going on (deficiencies in his work, or a possible reduction in force) and did she have control over fixing them (accepting mentoring, remedial measures, retraining, etc.). So, if it was a reduction in force, and the witness is making a big deal about being terminated for lack of skills claiming that she never had training, pursue that line of questioning. It is often the small things that matter the most to the jury.

(b) Question for the tipping point

Here’s an example. We were defending a workers’ compensation retaliation claim where the plaintiff, a manager, was fired for manipulating employee time cards so as to make him look more productive. We had charts and graphs illustrating all of this. Do you think the jury cared? Not really. They were more enamored of the fact that, while on workers’ comp leave, the manager had played golf, which the jury concluded meant he wasn’t really injured. The point: look for the tipping point.

(c) Preparation is more essential than ever
Rule No. 4: Start with the Future; End with the Past

If a plaintiff has already found another job, it’s often a good idea to start with what they’re currently doing. First, most plaintiffs don’t expect it. Second, they are more likely to give you good information on mitigation before you get into stuff that’s going to work them up, such as their termination. Third, currently employed plaintiffs are always worried that anything bad they say about their current employer will get back to it, so they are extra optimistic. Use this factor to your advantage.

Rule No. 5: Start planning trial stories before depo, not post

And speaking of starting, it’s sometimes valuable to start with what a plaintiff doesn’t expect. Instead of going through name, rank and serial number, start with what the case is about. In one religious discrimination case, the plaintiff claimed that he needed a religious accommodation in order to observe the Sabbath, which was sundown on Friday through sundown on Saturday. His manager, in depo prep, said the plaintiff loved playing basketball. So, after asking him his name, we started the deposition off by asking him, “We understand that you play basketball, is that right?” After he answered “yes,” we asked him if he ever played on weekends and how often. He then proceeded to talk about every single thing he did of a recreational nature on the weekends. At the end of twenty minutes, it was clear that worship was well down on the list of Sabbath activities. Since this issue went to whether he had a sincerely held religious belief it was legally significant on summary judgment and a useful non-legal “story” – namely, that he just wanted weekends off.

Or, if a plaintiff, start with something that may not be expected. For instance, if an African-American manager is testifying for the company and it is a race discrimination case, ask the manager whether he or she has ever believed that they were the victim of race discrimination at their company.

Rule No. 6: Canonize the Witnesses

This rule blends together Rules 2 and 4. If there will be a key witness for the company at trial, try to have that witness at the deposition. That’s rule 2. As in rule 4, talk about what the plaintiff thinks of the witness before getting into the combustible issues.

(a) “Businesslike and professional”

For instance, ask the deponent whether the witness treated him in a business like or a professional manner. These are words that a witness often finds difficult to disagree with. And, in keeping with Rule No. 6 (which we’ll get to in a minute) they are like Play-doh and can be molded.

(b) “I’m not sure it’s important, but…”

The best sources of information to canonize a witness are from your side. Ask what favors the manager did for the deponent. Determine whether they socialized. In one race discrimination case, the manager accused of discrimination told us that he and his wife had foster children and they always asked for underprivileged African Americans.

(c) “They could have, but they didn’t.”

Sometimes its useful to go through a laundry list of what a company could have done to the employee but didn’t do. By way of example, suspend the employee instead of writing her up; terminate the employee instead of suspending the employee; and the like.

(d) Mirror image for plaintiffs.
Rule No. 7: Commitment

(a) Start with the general, and move towards specifics

(b) Do not start with the specifics and move to the general

(c) An Example:

Q: Working in criminal intelligence, did you develop any street smarts?
A: Some.

Q: And when I say street smarts, what does that mean to you?
A: Knowing where the crooks are, know what areas of town they live in, knowing how to deal with certain crooks, that sort of thing.

Q: Knowing how to handle yourself in a difficult situation?
A: Yes.

Q: Being savvy to determining whether tough situations are coming down the pipe?
A: Yes.

Q: And that’s what you carried back to patrol with you, isn’t that right?
A: Yes.

Rule No. 8: Take It to the Limit, One More Time

-The Eagles

(a) People seldom speak ill of others

(b) …and when they do, turn it to your advantage

(c) For example:

Uncontroverted evidence was presented by defendant suggesting that plaintiff’s poor performance was a result of his personality conflict with manager:

Q: Is there anything you liked about Mr. Benavidez?
A: No.

Q: He had no redeeming feature whatsoever as a manager?

Rule No. 9: Never Stop Negotiating

Always keep questioning, even if you have to loop back around. Here are two tactics: one shows how to use an equivocal answer to get a concrete one, and the second shows how to use an extreme example to get an answer more to your liking.
(a) *Use an equivocal answer to get a concrete one*

Q: Did you ultimately learn how to operate [the machinery]?
A: I was able to use it well enough to keep out of trouble.
Q: So you gained a certain amount of proficiency in it?
A: Somewhat.
Q: But were you able to use it for what it was intended for?
A: Yes.
Q: And did use it frequently, didn’t you?
A: Yes.
Q: And did until the time you resigned, isn’t that right?
A: Yes.

(b) *Use an extreme example to get to the middle*

Q: And Mr. Smith was listening intently to what you were saying?
A: I can’t read his mind.
Q: Well, was he rolling his eyes to the ceiling?
A: No.
Q: Was he staring at the floor?
A: No.
Q: So, to your observation, he was paying attention, isn’t that right?
A: Yes.
Q: And he treated you in a businesslike and professional manner?
Q: Yes.
A: And he seemed to sincerely be listening to what you were saying?
Q: Yes.

(c) *Several tips on the same theme*

Notice how in Rules 6 and 8, there are variations of the same question – the substance is the same but the expression of it is different. Jurors and judges are annoyed by repetition, but embrace variation.
Rule No. 10: Make it memorable

Think of ways to make the testimony pop off the page, or the video. Jurors and judges remember what’s graphic, and forget what’s bland. For instance, let’s say there’s a constructive discharge case. One of the issues in constructive discharge (following Rule No. 1 that all facts are not created equal) is whether the plaintiff acted as a reasonable person. Acting as a reasonable person means that an employee files a charge of discrimination if she believes she is being discriminated against and then keeps working. What I have just written is 100% true and 100% boring. Try something different. In one case, we asked the witness a series of questions: You know that discrimination is against the law; you know that there’s a federal agency that investigates discrimination; you know that they’re easy to find; you know that there’s a federal government section in the yellow pages; and it would have been easy to pick up the yellow pages and thumb to that page, isn’t that right?

By the same token, plaintiffs can make use of a memorable example. Let’s say the issue is whether the employer conducted a thorough investigation. There were some employees that should have been interviewed but weren’t. Again, factually true and legally pertinent but bland. What if the employees that should have been interviewed were in the same building but a few floors down? Ask the company witness what it would have taken to interview those employees, such as just getting in the elevator and pressing the button for floor nine when you’re on floor twelve.

Rule No. 11: The Claims of the Twenty-first Century: Perceived Disability, Age Discrimination and Retaliation

(a) Perceived Disability – the enemy within

Q: Have you or a family member ever suffered from XYZ?
A: Why, yes, my sister has had XYZ for several years now.

Q: I’m sorry to hear that; it must not be easy for you.
A: No, it’s not.

Q: Pretty tough to live day-in and day-out with XYZ, isn’t it?
A: Sure is.

Q: And someone with XYZ syndrome has a hard time doing a lot of things that many of us take for granted. I guess you know that all too well?
A: You can say that again.

(b) Age Discrimination

1 – Basis for opinion of co-workers

2 – What facts do you have?

3 – If commitment fails, utilize the “bum” principle

4 – Ask stereotype questions; do not forget questions on lauding youth

(c) Retaliation
Rule No. 12: The Magic Bullet: To be Used Sparingly

(a) Establish the importance of facts.

(b) What facts do you have?

(c) Always use for a double or maybe a triple but seldom a home run.

(d) Plaintiff can use as well.

Rule No. 13: The Disney Principle: use with plaintiffs, not with defendants

What do you do in the situation where the plaintiff is frustrated, comments that you’re not getting to the important stuff, and therefore isn’t paying attention to your questions because she is thinking about what she’s going to say later. Try following the Disney principle. When the Disney Company hires a new employee, they take the employee to key spots important to that employee - where the employee picks up his check, parks his car, clocks in and out. Disney finds that once they do this, there is a greater chance employees will later pay attention when Disney talks to them about its important stuff, such as policies against harassment. Same here. Say something to the plaintiff like, “Trust me, I promise we’ll get there, but it’ll be easier if you try to follow along now.” If so, you’ll get a more attentive plaintiff and an environment more conducive to getting the answers you want.

Rule No. 14: It’s a dialogue, not an interrogation

Always remember, a deposition is a dialogue, not an interrogation. The best dialogue – with our spouse, significant other, law partner or plaintiff – is when you keep your ego out of it. When I first started practicing law, a plaintiff asked whether she could ask a question. The reply was a reminder of who asks the questions, and an objection to nonresponsiveness. You know where that got my client – nowhere. A better response is simply to say, “Well, you can ask,” and then listen.

Rule No. 15: Don’t Fear an Answer You May Not Want

(a) Caveat: But know when to stop.

Rule No. 16: Misdirection is a Legitimate Tactic

Sometimes, acting as if you don’t want the answer you want is the best way to get the answer you want. Here is an example. We were defending an age discrimination case. The key issue was whether the EEOC charge was timely filed. If the plaintiff admitted that he believed he was being discriminated against at a certain meeting, then his charge was untimely and we would win. The context of the meeting was somewhat ambiguous. Rather than asking the plaintiff directly, “You knew you were being discriminated against on that date, isn’t that right?” we acted as if we didn’t want him to say that. Our question was along the lines of, “Well, I guess this is a hard thing to say, but I guess the comments of the company managers pretty much showed they believed that you were too old to have a place at the company?” If we had asked it the first way, we might not have gotten the answer we wanted; we asked the second and we did.
Rule No. 17: Leave Them With Something to Think About

(a) Costs

(b) Than you for your time, courtesy, and professionalism

(c) Do it differently

Rule No. 18: Literal v. Contextual truth

Truth and accuracy are not the same thing, and a literal adherence to the first always distracts from the second. As Steve Lubet points out in “Nothing but the Truth,” a lawyer’s role is to place the facts in context, not to blindly recite them. Thoughtful and planned depositions result in a story that is “truer than true.”
DEPO PREP FOR EXECS

When executives get deposed, they must be ready. But the math doesn’t add up: You need from them what they have in short supply- time. They’ll look to you to leverage to the max what time they do have. So here are 10 tips to help you get them ready, fast and effectively.

Tip No. 1: You can’t change people, but you can help people.

My mother taught me this, and she was right. A number of years ago I was assisting a more experienced lawyer prep a director of human resources for her deposition in a discrimination case. He was putting her through a practice deposition, and she wasn’t giving him the answers he wanted. He lectured; she resisted. The anxiety in the room was palpable- hers and mine. Finally, she burst into tears. The lawyer tried to force his view on someone else. Life just doesn’t work that way. The best you can do is arm witnesses with techniques. If the feel empowered, they will be better witnesses, generating their own stories not desperately trying to mimic yours.

Tip No. 2: Scope out the opposition.

Executives look at litigation like a business deal. Just like in any business deal, they want to know who’s on the other side- what makes him tick, whether he’s in it for the money or is a “true believer”, what’s his style of practice. So scope out the other side, and spend time in deposition preparation talking about the lawyer on the other side of the table. It’s what’s expected.

Tip No. 3: Remember three powerful words: “May I explain?”

You see it on television all the time. A plaintiff’s lawyer paints a witness into a corner, the witness keeps blurtling out, “It’s not that simple,” and tries to explain his answer. But in doing so, he looks argumentative and evasive, not like a truth-teller.

Here’s a powerful escape technique. In preparation, tell the executive that when the plaintiff’s lawyer is trying to box him in and a short answer would be incomplete and misleading, simply say, “May I explain?” The executive is then in a no-lose position. If the lawyer says “yes,” then the lawyer looks like he’s the one trying to hide the ball. This technique is especially effective because executives believe in their heart of hearts that they can convince the employee’s lawyer to drop the suit. You can’t change that impulse, but you can channel it.

Tip No. 4: Handling loaded questions. Plaintiff’s lawyers in employment cases make headway by asking a loaded question with a slanted word embedded in it. Here’s an example. A manager is in charge of a department for three months and is then transferred to a different one. The manager voluntarily left the first assignment. But, the plaintiff’s lawyer wants to make the transfer sound ominous, so he asks: “So after three months, you were relieved [slant word embedded here] of your responsibilities in the first department, isn’t that correct?” Bad answer. “Yes.” Good answer. “I don’t agree with the word relieved. I voluntary changed jobs.”

We like to put together what we call a “baseball drill” during which we anticipate slanted words or characterizations and quiz the executive using the characterizations. It’s sort of like hitting ground ball after ground ball in practice to the shortstop. The idea is to get executives to go on automatic pilot and ask themselves: “Do I agree or disagree with the characterization or slant? If I agree, I answer one way; if not, I answer another.”

While we’re at it, here’s another. An employee is terminated in a reduction in force. Company policy provides that six factors are considered in deciding whom to include in the reduction, including seniority. Because of compelling operational reasons, seniority is looked at but makes no difference in the decision. Question: “So in deciding whether to let Mr. Smith go, the company ignored [slant word embedded here] his seniority, isn’t that right?” If you don’t go through the drill, you may get your manager answering, “I guess so.” When you go through the drill, the manager will generate an answer such as: “No. We looked at seniority but decided that other factors controlled the decision.”
**Tip No. 5: Have you been discriminated against, Ms. Executive?**

We thought we’d done everything right. We’d prepared the witness; gone through our drills with her; empowered her with “May I explain?” But, we forgot to do one thing; actually, it’s more accurate to say we hadn’t thought of it than forgotten it. The manager was black, and it was a race discrimination suit. The deposition was videotaped, and the first question hurled at her by the plaintiff’s lawyer was: “Ms. Jones, you’re black. This is a race discrimination lawsuit. Do you think that you ever have been discriminated against at the company?”

Well, you can’t exactly call a bathroom break. But the witness (thank goodness) generated her own story, and it was better than we ever could have suggested: “There were times when things happened at the company that I was suspicious of or I thought odd in terms of promotions and job assignments. But I’ve always received satisfactory explanations when I’ve asked, and I have no problem with them.” End of story.

Here’s the point: Always get your witnesses ready for this question if she is in a protected classification. It’s a sensitive question, but ask it or you’ll get caught flatfooted.

**Tip No. 6: Three harassing questions about sexual harassment.**

They’re coming, so be ready. First, the plaintiff’s lawyer shows the witness the company’s anti-harassment policy and asks: “Did the conduct of the harassing manager violate the company’s policy prohibiting harassment, and if not, why not?” On this one, we like to go with Mark Twain, “When in doubt, resort to the truth.”

Second, the lawyer gives a hypothetical fact pattern and asks, “Do those facts violate the policy?” On this one, prepare the witness along the lines of the “c” word- “context.” As in “I need to know the context” or “I can’t answer unless I know the facts.”

Third, plaintiff’s lawyer asks this softball, “Whose responsibility is it to enforce the policy against harassment?” (Hint: It’s everyone’s, as opposed to “Well, that’s human resources’ job.”) But couple it with this hardball: “Are you telling the jury that there is nothing else you wish you had investigated in determining the validity of my client’s complaint?” Get ready for both barrels.

**Tip No. 7: Don’t superimpose your story on the witness’ story.**

Let’s tell you a story. A male gay bar was sued for sex discrimination by a female employee, claiming she was constructively terminated because the bar preferred young males to older females. In preparation, relying on the idea that you never should deny the obvious, we counseled our client to acknowledge, if it came up, that gay men were the target market. The client said, “No, the bar is a neighborhood one, open to everyone.” We fought them on this, but they were insistent and it turned out to be 100 percent correct. Their deposition testimony was convincing because they generated it and believed in it. Don’t second-guess heartfelt beliefs.

**Tip No. 8: Liar, liar**

They must teach this at plaintiff’s lawyer school, but it’s effective if the witness is not prepared. Let’s say there is a credibility issue: The plaintiff has one version of events, your witness another. Here’s the question: “Are you saying my client is lying?” We think the answer should be calibrated. If, for example, your witness saw the plaintiff stealing, the answer is “yes”; if, however, it’s simply a differing memory on a conversation, then think about preparing your witness to say, “That’s your word, not mine.” Figure out where on the continuum you expect the question to fall.

**Tip No. 9: It’s better to remind than to lecture.**

From time to time, a witness will suggest that, now that he thinks about it, his deposition testimony might vary from what he told you when the suit was filed. It happened to us. It was a he said/she said situation in a sexual harassment case. It would have been easy but disastrous to finger point, tell the witness he can’t do that and he’s unethical. Even if he backed off, our relationship would have turned antagonistic. But recalling Dr. Samuel Johnson’s wise admonishment “it’s better to remind than to lecture,” we wrote a letter to the witness, telling him we knew that he was frustrated with the long and lengthy legal process, that we shared these frustrations and that we knew his
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Comments were borne of it. We finished by saying we were confident he never would put us in an ethical dilemma where we even would have to consider withdrawing. Message received.

Tip No. 10: Ask personal questions in preparation or you’ll be sorry.

Just like with question on whether the executive was a victim of discrimination, you’ll need to ask other sensitive questions. Don’t shy away from doing so. Look at a claim under the Americans With Disabilities Act (ADA) for perceived discrimination; the employee is not ADA disabled, but wrongfully perceived to be and is discriminated against on that basis. As former President Jimmy Carter said about adultery, “It’s still a sin even if you only do it in your heart.” Same here. Let’s look at a plaintiff with XYZ syndrome. Here’s how plaintiff’s questions the executive in a perceived disability case. “Have you or a family member ever suffered from XYZ?” Answer. “Why, yes, my sister has had XYZ for several years now.” Lawyer. “I’m sorry to hear that; it must not be easy for you?” Answer. “No, it’s not.” Lawyer. “Pretty tough to live day-in and day-out with XYZ, isn’t it?” Answer. “Sure is.” Lawyer. “And someone with XYZ syndrome has a hard time doing a lot of things that many of us take for granted. I guess you know that all too well?” Answer. “You can say that again.” A simple trap to avoid, but only if you prepare for it.

Getting executives ready to testify is not easy. A good executive is always looking to the future. Employment litigation is always looking to the past. The key to a GC’s office meeting their needs is to make every minute of preparation count. Here are a couple of resources to help you do that. “The Story Factor: Inspiration, Influence and Persuasion Through the Art of Storytelling,” by Annette Simmons. Executives, many with strong egos, will reject being pounded with lots of facts, but will respond to a story that makes your point. Or, check out “Sun Tzu: The Art of War for Managers,” by Gerald Michelson. Both are useful in helping in a tough task.