

DEPOSITION STRATEGY TECHNIQUES

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CHAPTER 15

TABLE OF CONTENTS

THE FIVE W’S GET A “C” 1

THE PROPHYLACTIC EFFECT 1

CLAMP OFF THE BLEEDERS..... 1

START WITH THE FUTURE; END WITH THE PAST 1

START PLANNING TRIAL NARRATIVES BEFORE DEPOSITION, NOT POST 2

CANONIZE YOUR WITNESSES 2

 (a) “Businesslike and professional” 2

 (b) “I’m not sure it’s important, but ...” 2

 (c) “They could have, but they didn’t.” 2

GET A COMMITMENT 2

CALL AN AUDIBLE 3

NEVER STOP NEGOTIATING 3

 (a) Use an equivocal answer to get a concrete one 3

 (b) Use an extreme example to get to the middle..... 3

MAKE IT MEMORABLE..... 4

THE MAGIC BULLET: TO BE USED SPARINGLY 4

THE DISNEY PRINCIPLE 4

BE CREATIVE..... 4

JUDO HUMAN NATURE 5

FLIP ON THE POWER OF CONTRAST..... 5

LEAVE THEM WITH SOMETHING TO THINK ABOUT 6

YOU CAN’T CHANGE PEOPLE, YOU CAN ONLY HELP PEOPLE 6

DON’T GIVE THEM THE ANSWERS, GIVE A MESSAGE SYSTEM..... 6

SCOPE OUT THE OPPOSITION 6

REMEMBER THREE POWERFUL WORDS: “MAY I EXPLAIN?” 6

AND REMEMBER FIVE POWERFUL WORDS: “LET GO OF THE ROPE” 7

DISARMING LOADED QUESTIONS 7

DON’T SUPERIMPOSE YOUR STORY ON THE WITNESS’ STORY..... 7

LIAR, LIAR..... 7

HARASSING QUESTIONS ABOUT HARASSMENT..... 7

WANT PUNITIVES? ASK THIS QUESTION..... 8

ASK PERSONAL QUESTIONS IN PREPARATION OR YOU’LL BE SORRY 8

ANSWER THE QUESTION, THEN EXPLAIN 8

FIVE POINTLESS QUESTIONS TO ASK IN A DEPOSITION..... 8

THE BEST PREP IS EMPATHETIC PREP 9

HR WRITES; LAWYERS EDIT 9

ONE FOR THE PLAINTIFF; ONE FOR THE DEFENDANT; AND ONE FOR BOTH..... 9

DEALING WITH “ I DON’T RECALL.” 9

DEPOSITION STRATEGY TECHNIQUES

So often, depositions are treated as routine. But they are anything but, whether of the plaintiff, the key defense witness, or a host of ancillary witnesses, each deposition counts. Here are some thoughts on making each deposition a work of art.

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: because 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.

Think, then question.

THE PROPHYLACTIC EFFECT

Who will come as a representative of the company 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 (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).

Bring the right representative for the right reason.

CLAMP OFF THE BLEEDERS

Remember that to a jury it's not always about legitimate, nondiscriminatory reasons. It's about several different things—two of which are 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.

Anticipate when questioning.

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 they say about their current employer will get back to it, so they feel compelled to describe a bright present and an even brighter future. I love it when they do; it cuts down or negates damages.

So, make sure these questions are covered:

- ✓ The names of the plaintiff's current supervisor and that person's supervisor.
- ✓ Do they like their supervisors?
- ✓ Do they like their co-workers?
- ✓ Are there possibilities for promotion?
- ✓ What is their current position?
- ✓ Do they believe they've found a home?

What should plaintiff's lawyers do? Advise their clients to follow the advice from *King John*, a little-known play by Shakespeare: "To gild refined gold/to paint the lily/ ... or add another hue/unto the rainbow/ ... is wasteful and ridiculous excess."

A lawsuit is also about minimizing damages, not just trying to defeat liability.

START PLANNING TRIAL NARRATIVES BEFORE DEPOSITION, 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 I defended, the plaintiff claimed that he needed a religious accommodation in order to observe the Sabbath, which was sundown on Friday through sundown on Saturday. He did not embrace this belief when he first went to work for the client (a restaurant chain) but after becoming employed as a manager. But, managers needed to work one weekend a month for rotational purpose. (i.e. to give assistant managers a weekend off). His beliefs conflicted with the client's operative needs. The plaintiff's manager, in deposition preparation, said the plaintiff loved playing basketball.

So, after asking the plaintiff his name, we started the deposition off by asking him, "We understand that you love basketball, is that right?" After he answered "yes," we asked him if he ever played on weekends and how often. Another "yes." He then proceeded to talk about every single thing he did of a recreational nature on the weekends, not just basketball. At the end of twenty minutes, it was clear that worship was well down on the list of Sabbath activities. These questions went to whether he had a sincerely held religious belief and thus was legally significant on summary judgment and a useful non-legal "story" for the jury—namely, that he just wanted weekends off.

Here is another example. Whenever the plaintiff has damages, figure out if he ever had to terminate an employee. Play with this line of questioning:

- Q: You were a manager?
 A: Yes.
 Q: Not always an easy job, is it?
 A: No, it's not.
 Q: Sometimes have to make tough decisions, don't you?
 A: Yes.
 Q: And you've had to let employees go haven't you?
 A: Yes.
 Q: And, just because you let someone go—even if they are [protected class]—mean that you are guilty of discrimination, does it?
 A: No.

Effective questioning often involves a series of short questions building to the important one.

Narratives start before discovery starts.

CANONIZE YOUR WITNESSES

If there will be a key witness for the company at trial, try to have that witness at the deposition. And then ask 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. They are like Play-doh and can be molded, as you see fit. Sometimes the witness fights. Be sure to keep counter-punching if he does.

Try this:

- Q: Did the manager treat you in a professional manner?
 A: I don't know what you mean by professional?
 Q: Well, you've been in the business world for several years?
 A: Yes.
 Q: You've observed managers and their conduct, haven't you?
 A: Yes.
 Q: So, in that context, did the manager treat you professionally?

Ask a series of short questions. Just asking back: "What does it mean to you?" cedes control of the deposition to the plaintiff.

(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 it's 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.

Sainthood can be conferred only by the plaintiff, never by you.

GET A COMMITMENT

We all are looking for the killer question. A silver bullet of sorts that gives us summary judgment (plaintiff or defendant) or will turn a jury our way. There are none. So, here's a trick: work your way up to

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