

Deposition Strategies in Employment Litigation: Taking and Defending Depositions of Plaintiffs and Fact Witnesses

Leveraging Deposition Testimony During Discovery, Summary Judgment, Settlement and Trial

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Brief Overview of Federal Rules Governing Depositions

SECTION 1

Key Federal Rules

- **Rule 26:** Contains overarching provisions that define scope and limitations of all discovery devices
- **Rule 27:** Intended to permit the perpetuation of testimony – not a fishing expedition to “discover” a cause of action
- **Rule 28:** Requires depositions to be taken before an officer authorized to administer oaths under laws of US, the place where the deposition is taken, or before a person appointed by the court
- **Rule 30:** Governs the notice and taking depositions (frequently amended or changed by local rule)
- **Rule 30(b)(6):** Contains special procedures for organizational depositions



Determining Who to Depose

SECTION 2

A Starting Place –

What Do You Seek to Accomplish?

The Big Picture Drives the Little One

- Be strategic and specific to the particular case and your overall objectives.
- Partner and coordinate with your client (*e.g.*, corporate counsel and the business unit) to focus on key objectives.
- Consider the purpose for each potential deposition:
 - Is it consistent with the overall business objective and litigation strategy?
 - Will it contribute to the ultimate objective? How?
- Each deposition should be undertaken only if it contributes to the ultimate business objective and litigation strategy.

The Principal Purposes of Depositions

Obtain admissions
needed for motions
and at trial

Preserve testimony

Bind the witness to a
particular set of
facts

Discover information
relevant to the case
and issues likely to
arise at trial

Identify other
sources of relevant
evidence

Critical Deposition: The Plaintiff

- Almost always the single most important discovery tool in employment litigation with multiple purposes:
 - Essential for winning summary judgment and other key motions (*e.g.*, certification, limine)
 - Affords invaluable trial preparation
 - Critical for purposes of developing case evaluation and overall litigation strategy
 - Provides opportunities to:
 - Learn
 - Teach
 - Prove Ground

Critical Deposition: The Plaintiff *(cont.)*



Learn:

- How Plaintiff perceives the case
- Level of Plaintiff's involvement
- How much Plaintiff knows about the basis for the claims
- About Plaintiff's counsel
- Plaintiff's credibility/likeability
- Other avenues of discovery worth pursuing
- Holes in written/document discovery



Teach:

- Plaintiff and his/her lawyer about the problems in the case



Prove Ground:

- Test theories and strategies
- Find out where holes are
- Expose Plaintiff's weaknesses
- Find out what works and more importantly, what does not

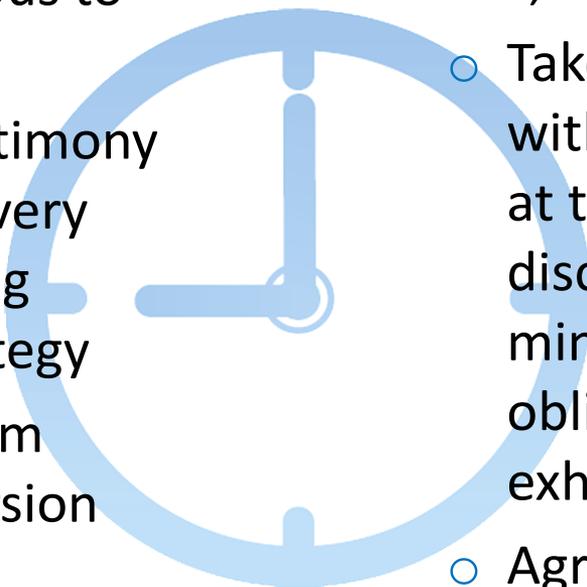
Timing and Order Considerations

Most often advantageous to depose Plaintiff first:

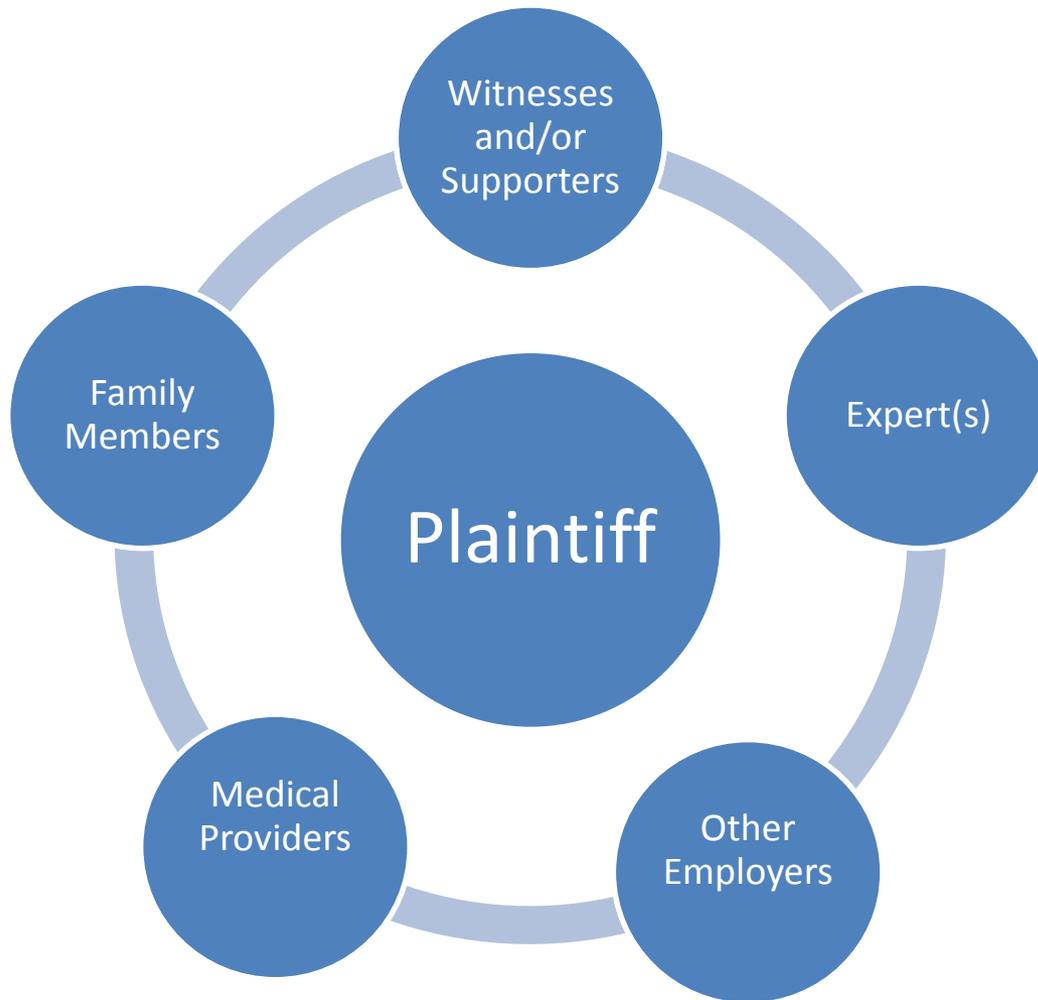
- Secure Plaintiff's testimony before further discovery can educate opposing counsel to as to strategy
- Prevents Plaintiff from adjusting his/her version of events
- Better positions defense attorney to prepare the employer's witnesses for their deposition

But, may make sense to:

- Take Plaintiff's deposition without any prior discovery, at the outset of the discovery period (but, be mindful of Rule 26 obligations when using exhibits during deposition)
- Agree to abbreviated depositions followed by ADR attempt or a succinct dispositive or certification motion



Who Else Besides Plaintiff?



Who Else Besides Plaintiff? *(cont.)*

- Witnesses who may be unavailable for trial, including those outside the trial court's jurisdiction
- “Affirmative” witnesses
- Evaluate how any such deposition will contribute to the overall objective and litigation strategy

Be mindful of “pulling in” witnesses through the deposition process who are not likely to otherwise become engaged in the litigation

Deposing EEOC Personnel

- EEOC generally seeks a protective order for such depositions, asserting deliberative process privilege
- But, Courts have been more open to denying motions for such protective orders, allowing EEOC fact witness and 30(b)(6) depositions to go forward and even including discovery into the EEOC's own employment practices:
 - *E.g., Little v. Auburn University* (M.D. Al. 2010) (permitting deposition of EEOC investigator); and
 - *EEOC v. Albertson's LLC* (D.Colo. 2007)
 - *Serrano v. Cintas Corp.* (E.D.Mich. 2007)
 - *EEOC v. Burlington Northern & Santa Fe RR Co.* (W.D.Okla. 2008)
 - *E.E.O.C. v. Kaplan Higher Educ. Corp.* (N.D. Ohio 2011) (all permitting EEOC 30(b)(6) depositions)



Goals of Depositions

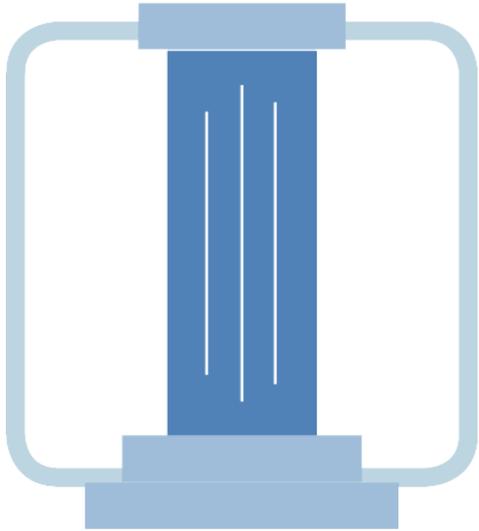
SECTION 3

Common Objectives for Opposing Depositions in Employment Cases

- Get and preserve testimony
- General fact-gathering – discover basis and facts surrounding claims
- Lay groundwork for certification motion, dispositive motion, and other pretrial motions
- Commit the Plaintiff or other opposing witness to specific factual assertions/explanations concerning key facts and theories:
 - *e.g.*, to whom did the plaintiff report harassment?
 - What was the nature of the adverse action?
 - Was anyone else treated more favorably?
 - What facts lead the plaintiff to believe there was discrimination?

Common Objectives for Opposing Depositions in Employment Cases *(cont.)*

- Develop litigation themes
- Demonstrate what Plaintiff or opposing witness doesn't know: *e.g.*, motivation of decision-maker and those who influenced the decision, discussions surrounding the decision, reasons for treatment of comparators, etc.
- Lay groundwork for trial
- Set tone for settlement discussions/ADR as appropriate
- Evaluate credibility and strengths/limitations of Plaintiff or other opposing witness



Preparing for Depositions

SECTION 4

Preparation Checklist Considerations

- 
- Develop your fundamental theory of the case
 - Know the applicable legal standards and burdens of proof

- 
- Conduct witness interviews (decision maker(s), other key supervisors, HR personnel, co-workers, others identified in key documents)
 - Review pleadings and other submissions (Complaint, interrogatories, document requests, Rule 26 disclosures, privilege log)
 - Evaluate documents produced by Plaintiff, employer, and any third parties

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- Review prior verbal, written or recorded statements of deponent
 - Prepare analysis of specific information/admissions needed for key motions
 - Prepare list of subject areas for possible examination

Key Documents for Collection from Employer



- Any documents, emails, memos, correspondence, etc. relating to the employment decision(s) at issue
- Plaintiff's personnel file, including application, evaluations and any discipline
- Plaintiff's time and attendance records
- Records relating to Plaintiff's productivity
- Investigation files, notes, emails, etc. relating to Plaintiff
- Any complaints about Plaintiff

Key Documents for Collection from Employer *(cont.)*



- Medical files relating to Plaintiff, including those relating to workers' compensation claims
- Plaintiff's salary and benefits records
- Plaintiff's unemployment insurance file
- Personnel files of other relevant witnesses
- Relevant records relating to comparators
- Relevant employment policies and procedures, and witness's acknowledgement of the same

Key Documents for Collection from Plaintiff



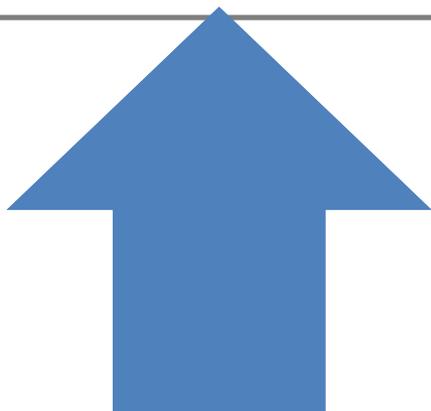
- Any documents, emails, notes, diaries, journals, calendars, etc. relating to his or her employment
- Documents relating to other lawsuits filed by Plaintiff
- Records regarding Plaintiff's efforts to obtain subsequent employment
- Medical records
- Educational records
- Prior/subsequent employer records
- Relevant social media, phone and text message records (may be particularly important in harassment cases)

Key Sources for Third-Party Document Collection

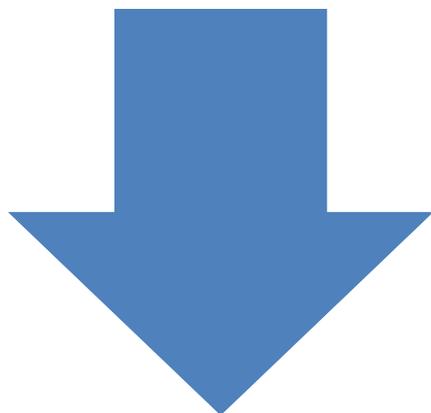


- EEOC and state administrative agencies – can be particularly helpful
- Social Security Administration
- Plaintiff's health care providers
- Plaintiff's prior/subsequent employers
- Plaintiff's educational institutions
- Social media

Considering Videotape



1. Helpful for jury research/case evaluation
2. May make impeachment at trial more effective
3. May help keep difficult opposing counsel in line



1. Expense, and trial judge may prohibit use at trial
2. Possibility of unfavorable “sound bite” for opposing counsel’s use
3. May create sympathy for and/or “victimize” the plaintiff if used at trial



Effective Preparation of Company Witnesses in Employment Litigation

SECTION 5

Areas of Focus for Most Company Witnesses in Employment Cases

- The who/what/when/where/why of the decision-making process.
- Comparators: those who were treated the same as Plaintiff and those Plaintiff asserts were treated more favorably
- Complaints or concerns raised by Plaintiff (or others) regarding discrimination, harassment, unfair treatment, etc
- The company's EEO policies, including discrimination, harassment, retaliation, avenues for complaint, investigation assurances and process – from the highest to lowest levels of company deponents

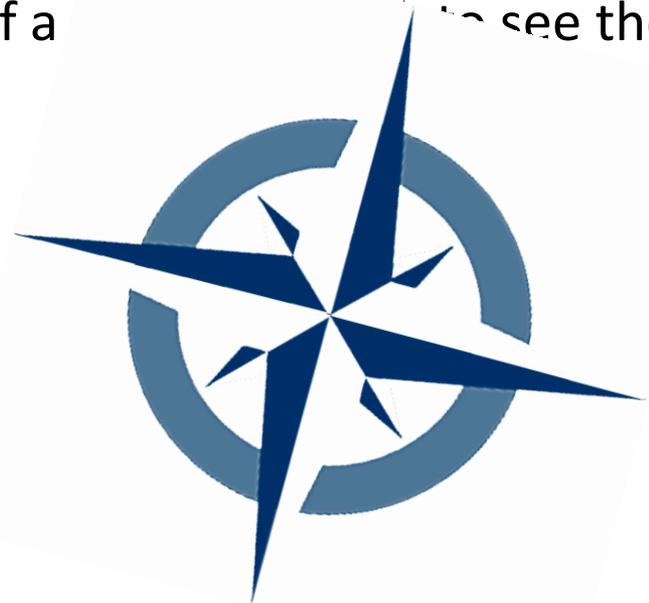
Areas of Focus for Most Company Witnesses in Employment Cases *(cont.)*

- Document preservation, legal hold, and document retention matters
- Privilege and deposition preparation matters
- The company's interrogatory answers
- Relevant documents that the witness authored or saw
- Other key documents in the case that the witness might be questioned about
- Case themes

Effective Preparation of Company Witnesses in Employment Litigation

General Guidance for Deponents

- Hear and understand the question
- Give complete answers
- Do not guess
- Keep case themes in mind
- Read a document before answering questions about it
- If asked to testify about the contents of a document, ask to see the document



Effective Preparation of Company Witnesses in Employment Litigation

Other Matters to Consider

- Be mindful of client protocols/sensitivities and avoid business disruptions
- Be sure that all responsive, non-privileged records from or relating to the deponent have been produced in advance of deposition
- Evaluate documents relating to any other litigation, such as depositions the witness has given
- Conduct mock deposition exercises
- Prepare the deponent for opposing counsel
- Consider whether a pre-deposition motion for a protective order is appropriate
- Anticipate 30(b)(6) notices early on to begin identifying appropriate deponent(s)



“Dynamics” Considerations

SECTION 6

Participant Personalities and Other Arrangements

Essential Players

- Deponent
- Plaintiff’s lawyer
- Employer’s lawyer
- Court reporter

Other Potential Players

- Individual or other defendants and their counsel
- Videographer
- Other plaintiffs’ lawyers (class counsel, local counsel)

Special Considerations

- Third party attendees (such as Plaintiff’s spouse or other family member)

Strategic Considerations

- Corporate representative at Plaintiff’s deposition (corporate counsel, Plaintiff’s former supervisor, other trusted manager, HR)
- Corporate representative at employer fact witness deposition

Taking and Defending Depositions

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Questioning Witnesses

Setting the Tone

- Be professional at all times
- Keep eye contact with the witness
- Control the pace of the deposition
- The art of conversation
 - Trust your instincts and don't let your outline restrict you
 - Don't read your questions, unless necessary to capture key terms or language
 - Develop harsh (interrogator) or soft (conversational) approaches and know when to use them effectively
 - Use a long pause to elicit a further response from the deponent

Questioning Witnesses

Executing Your Strategy

- Know your objectives, know the facts
- Think strategically when developing your deposition outline
 - Consider the world through the eyes of your witness (office layout, identity of trusted co-workers, pride of authorship, etc.)
 - Prioritize subjects and documents accordingly; proceeding chronologically may not be the best approach
 - Use timing to your advantage (late afternoon questions)
- Focus on what really matters
 - Don't waste time on irrelevant personal history, but explore all relevant employment history, even if obtained through a different employer

Questioning Witnesses

Achieving Your Objectives

- Trust your instincts and consider human nature
- Be prepared for unexpected answers and consider how you can use those answers to your advantage
- Credibility is paramount in employment cases; test the credibility and reliability of your witness
 - Be prepared to seize on a lack of credibility, even on the smallest issues
 - Be prepared to seize on a lack of recollection

Questioning Witnesses

Achieving Your Objectives

- Discovery depositions
 - Use open-ended questions that are wide ranging
 - Don't be overly preoccupied with unfavorable answers
 - Exhaust your deponent's recollection (who, what, why, when, where and anything else) regarding each of the topics about which you have a basis to believe the deponent has knowledge
- Depositions to support dispositive motions and trial positions
 - Deposition should be tighter and more focused
 - Proper use of leading questions (if deponent is an adverse party)
 - Use verbatim script for key questions where appropriate
 - Do not repeat or rephrase a question to which you have an answer favorable to your position (i.e., know when you are ahead and when to quit)

Questioning Witnesses

Making the Record

- Listen carefully to answers
 - Did the witness answer the question?
 - Did the witness raise issues that warrant follow-up?
- Think about what the record will look like
 - Rephrase or re-ask to get crisp Q&A
 - Be mindful of the video record
 - Leave an area and come back to it later if necessary

Questioning Witnesses

Managing the Clock

- The 7-hour rule (Fed. R. Civ. Proc. Rule 30(d)(1))
 - Prioritize your questioning and use your time wisely
 - Seven hours is actual deposition time, including time spent reviewing exhibits
- Videotaped depositions maximize the ability to use time effectively
 - Deponent will be faster in his response to questions
 - Opposing counsel will be less inclined to be obstructionist because an audio record is being made of his/her behavior
- Make game time decisions: revisit your deposition outline throughout the deposition

Raising and Responding to Objections

Dealing With Objections

- Consider the objection, but don't be distracted by opposing counsel
- Don't waste time arguing with opposing counsel about objections, legal points, etc.
 - Avoid speeches on the record
 - Ignore counsel's comments or arguments
 - If necessary, remind opposing counsel that objections must be stated "concisely and in a non-argumentative and non-suggestive manner"
 - Do not threaten to go to the Court unless you are prepared to do so
 - If you need to move the Court because of opposing counsel's conduct, wait until you have a sufficient record

Raising and Responding to Objections

Making Appropriate Objections

- Know your available objections
- Know your witness and know the facts
 - Prepare for the deposition as if you were the one taking the deposition
 - Anticipate issues that may be implicated by the question
 - Address any inconsistencies between the record and the deponent's testimony with the deponent during the break
- Always have the contact information for the Court in case you need to move for a protective order

Raising and Responding to Objections

The Rules of Engagement

- Know your procedural and evidentiary rules
 - Local and Federal Rules of Civil Procedure and Evidence
 - Scheduling and other Orders of the Court
 - Standing Orders of the Court
 - Protective Orders
- Keep copies of the rules on-hand during the deposition

Effective Use of Exhibits

Selecting and Preparing Your Documents

- Identify your documents and know them inside and out
 - Know which documents must be introduced/authenticated
 - Don't forget to use pleadings where appropriate
 - Consider calendars, meeting invites, and other documents that relate to timing
 - Use office/site maps and drawings as necessary
- Consider the quality of the exhibit
 - The quality of the exhibit reflects the quality of its author
 - Ensure that redactions are not distractions

Effective Use of Exhibits

Using Documents to Your Advantage

- Avoid using documents as a crutch—use only those documents that are necessary
- Using documents to keep the witness honest
 - Firing a shot across the bow (establishing your credibility/authority)
 - Do not feel compelled to show all documents to the witness
- If you decide to use the document, consider when to share it with the witness
- Consider using documents with individuals who may not have authored or received the document

Effective Use of Exhibits

Logistical Considerations

- Use breaks to pre-label exhibits
- Use a single continuous numbering system where Court rules permit
 - Allows same exhibit to have one number in all depositions and at trial
 - Avoids confusion if videotaped depositions are used at trial because the exhibit numbers will be the same
- Other considerations
 - Prepare working copies with your highlights and annotations
 - Bring multiple copies of clean exhibits to the deposition
 - Use separate folders for copies of each exhibit organized for quick identification
 - Anticipate shipping needs

Use of Social Media in Depositions

Social Media Considerations

- Always ask about social media (esp. outlets you may not have considered)
- Use the deposition to ask for permission to access those sites
- Consider conducting your own searches through non-U.S. sites
- Avoid pretexting and always consider rules of professional conduct
- Conduct your own social media diligence on your witness before he/she goes under oath

Use of Social Media in Depositions

Effective Use of Social Media

- Consider sites reflecting job duties/job searches
 - LinkedIn
 - Resume websites (Monster.com)
- Consider sites reflecting the physical/emotional state of your witness (cheaper than a private investigator)
 - Facebook
 - Blogs
 - YouTube
- Consider sites reflecting the financial status of your witness
- Consider the “After-Acquired Evidence Doctrine”

Post-Deposition Strategies

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Using Deposition Information During Discovery

- **Big Picture**
 - Key is to understand the pros and cons of each discovery tool
 - Integrate these various tools into an overall plan of attack
 - Use depositions to inform the rest of your discovery plan

Using Deposition Information During Discovery

- **Interrogatories**

- **Use the deposition to identify opportunities to:**

- substitute unequivocal responses for *ambiguous deposition answers*
 - resolve *unanswered questions or incomplete answers* (e.g., all documents, witnesses, damages, contentions, dates, evidence)
 - go beyond what the party knows to tap into all information *reasonably available to that party* including *what other people (counsel (subject to privilege assertions), witnesses) know*

Using Deposition Information During Discovery

- **Request For Production of Documents**
 - Propound production demands that:
 - *seek all material documents* identified during the deposition
 - seek evidentiary support for every material contention the deponent made in his deposition
 - confirm suspicions that *no supporting documents* exist for assertions made in the deposition

Using Deposition Information During Discovery

- **Requests For Admission**

- Eliminate *factual disputes* and disputes regarding the *admissibility of evidence* that arose in the deposition (exploit unlimited RFAs)
- *Distill* deponent's assertions to single, comprehensible factoids
- *Clarify* cluttered and confusing deposition answers (attach deposition transcript/reference page and line)
- Convert a factual admission into a judicial admission

Using Deposition Information During Summary Judgment

- **Most Effective Use To Win/Defeat Summary Judgment**
 - Show that there are *no important factual disputes* in the case *versus* use inconsistent or conflicting testimony to show that there *are important factual disputes*
 - Show that the *elements of a claim or affirmative defense have been established* as a matter of law *versus* show the *absence* of testimony on a key element or show testimony *negating* a key element

Using Deposition Information During Summary Judgment

How to Prevail on Summary Judgment	How To Defeat Summary Judgment
Show that there are no important factual disputes in the case	Use inconsistent or conflicting testimony to show that there are important factual disputes
Show that the elements of a claim or affirmative defense have been established as a matter of law	Show the absence of testimony on a key element or show testimony negating a key element

Using Deposition Information During Settlement

– Use the deposition to:

- Show your mastery of the record *to demonstrate your willingness and ability to go to trial*
- Highlight key admissions/testimony as a means to *preview the opposing party's pressure points*
- Explain how/why the scope of the case *has shifted, expanded or narrowed in a manner that militates in favor of settlement* (less or greater exposure, more or less expense and time)
- Inject some truth serum into the settlement discussions (trial by evidence rather than argument)

Using Deposition Information During Trial

- **Key Concepts and Rules – Fed. R. Civ. Proc. 32**
- **Rule 32(a)(1)**
 - At a hearing or trial, all or part of a deposition may be used against a party on these conditions:
 - (A) the party was present or represented at the taking of the deposition or had reasonable notice of it;
 - (B) it is used to the extent it would be admissible under the Federal Rules of Evidence if the deponent were present and testifying; and
 - (C) the use is allowed by Rule 32(a)(2) through (8).

Using Deposition Information During Trial

- **Key Concepts and Rules-Fed. R. Civ. Proc. 32**
- Rule 32(a)(2) Impeachment and Other Uses
 - Any party may use a deposition to contradict or impeach the testimony given by the deponent as a witness, or for any other purpose allowed by the Federal Rules of Evidence.
- Rule 32(a)(3) Deposition of Party, Agent, or Designee
 - An adverse party may use for any purpose the deposition of a party or anyone who, when deposed, was the party's officer, director, managing agent, or designee under Rule 30(b)(6) or 31(a)(4).

Using Deposition Information During Trial

- **Impeachment With A Prior Inconsistent Statement –Mechanics**
 - Need to explain to the jury what a deposition is and why it is important
 - Need to make sure the jury understands what a prior inconsistent statement is
 - Need to instill the jury with a sense that it is fair to confront the witness with a prior statement that was made several years ago
 - Need to convey to the jury a sense of why they should care about this entire exercise

Using Deposition Information During Trial

- **Impeachment With A Prior Inconsistent Statement –Mechanics**
 - *Hypothetical – the witness previously testified in a deposition that he had never complained about illegal activity to his supervisor prior to his termination:*
- You just testified that you complained to your supervisor about illegal activity prior to your termination?
- Do you recall having your deposition taken in this action?
- In fact, I took your deposition?
- And the deposition took place in my office?
- And you were represented by counsel during your deposition?
- The same counsel who is representing you today?

Using Deposition Information During Trial

- **Prior Inconsistent Statement –Mechanics**
 - And before I took your deposition, you swore an oath to tell the truth? the whole truth? and nothing but the truth?
 - That oath was just like the oath that you took here today?
 - And before I took your deposition, you made several promises to me?
 - One of those promises was that you would tell me if you did not understand my question (that you would give me your best testimony, there was no reason why we couldn't proceed with your deposition, etc.)?
 - And you had an opportunity to review and make corrections to the transcript?

Using Deposition Information During Trial

- **Prior Inconsistent Statement –Mechanics**
 - Your honor, may I have permission to read page 5, lines 10-11 of the deposition transcript? *The prior inconsistent statement*
 - Do not ask the witness to read the testimony – with or without you (*consult the rules of your jurisdiction/venue/court*)
 - Do not ask the witness if you read it correctly
 - Do not ask the witness anything
 - Move on to the next question

Using Deposition Information During Trial

- **Impeachment With A Prior Inconsistent Statement – General Thoughts**
 - Select true impeachment material only (stark contrasts, statements that cannot logically co-exist)
 - Critical to get clean sound bites for cross-examination fodder
 - Have copies of the precise page and line numbers of the impeachment material ready to publish (with relevant exhibits highlighted)
 - Don't sell past the close
 - Hunt big game not gnats

Using Deposition Information During Trial

- **Impeachment With A Prior Inconsistent Statement – It's Like Presenting A Great Meal**
 - Maximize the use of the transcript with attention to both size and highlighting
 - Carefully consider the ratio of video display to read back (pros and cons)
 - Do not simply mumble through the impeachment material – savor it and let it marinate
 - Break up good impeachment into digestible portions so that nuances and distinct notes are appreciated
 - If there is live reading of a transcript with someone playing the witness
 - carefully pick the reader to capture the essence of that witness and the tone in the room

Using Deposition Information During Trial

- **Impeachment With A Prior Inconsistent Statement – Do Unto Others . . .**
 - Rule 32(a)(6)
 - If a party offers in evidence only part of a deposition, an adverse party may require the offeror to introduce other parts that in fairness should be considered with the part introduced, and any party may itself introduce any other parts.
 - Rule 32(b)
 - Subject to Rules 28(b) and 32(d)(3), an objection may be made at a hearing or trial to the admission of any deposition testimony that would be inadmissible if the witness were present and testifying.
 - Consider the objections made during deposition in selecting excerpts

Using Deposition Information During Trial

- **Other Uses of Depositions At Trial**
 - Substantive Evidence (Admission of A Party Opponent-no need for prior inconsistent statement)-Fed. R. Evid. 801(d)(2)
 - Offer of Proof
 - Refresh Recollection-Fed. R. Evid. 612
 - Highlight Critical Testimony



Using Deposition Information During Trial

- **When to Use Depositions At Trial**

- *Early and Often*

- Opening Statement
 - Direct Examination
 - Cross Examination
 - Closing Argument