



# 22<sup>nd</sup> Annual EXamining Conflicts in Employment Law (EXCEL) Training Conference

## Preparing Witnesses for Deposition and Hearing

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“Respect • Opportunity • Inclusion”



# The Role of Witness Testimony

- Depositions:
  - Both sides
    - Fact-gathering
    - Assessing witness credibility
  - Defendant/Agency's Goals
  - Plaintiff/Complainant's Goals
- Hearings:
  - Presenting favorable and unfavorable evidence
  - Credibility determinations

# Depositions: What could go wrong?

- Depositions are one of the few aspects of litigation that attorneys cannot control.
- Depositions can make or break a case.
- An attorney's view of the case often changes during discovery.

# Preparing For Deposition or Hearing: The Attorney

- Before preparing the witness(es), the attorney/representative should:
  - Know the documents
  - Know your theory of the case
  - Consider where the witness's testimony fits into the case
  - Anticipate likely questions
  - Evaluate the witness
    - Level of sophistication;
    - Communication style;
    - Potential credibility concerns

# Preparing for Deposition or Hearing: The Witness

## Basic Instructions

- Behavior and Appearance During Deposition
  - What to wear
  - It's okay to be nervous
  - Depositions require a high level of concentration
  - Be courteous and polite
- Above all, tell the truth

# Preparing for Deposition or Hearing: The Witness

## Basic Instructions, Cont.

- Scope of Witness's Knowledge
  - Some questions only require a "yes" or "no" response
  - Do not guess
  - Do not speculate
  - "I don't know" and "I don't remember" are acceptable, if true
- Refreshing the witness's recollection
- Avoid hearsay testimony

# Preparing for Deposition or Hearing: The Witness

## Basic Instructions, Cont.

- Answer the Question
  - But do not volunteer information
  - A deposition is not a conversation
  - Do not explain or interpret, unless asked to do so
  - “Yes” or “No” questions that require clarification

# Preparing for Deposition or Hearing: The Witness

## Basic Instructions, Cont.

- Before You Answer the Question:
  - If you do not understand the question, ask for clarification
  - Pause before responding
- Don't cave into pressure from the deposing attorney
  - Direct the pace of the deposition
  - Stick to your answers
- Speak audibly and slowly
- Beware of leading questions
- Do not bring documents to the deposition (unless requested)



# Preparing for Deposition or Hearing: The Witness

## Deposition Logistics

- Who will be in the room
- Deposition *Duces Tecum*
  - “Bring with you” (Latin)
  - A notice advising a witness to bring certain documents to their deposition.
  - Practice tip: Representative should review and discuss the documents with the witness in advance of the deposition.
- Recording depositions
  - Why parties do it
  - Tips for the witness whose deposition will be recorded

# Preparing for Deposition or Hearing: The Witness

## Deposition Logistics, Cont.

- Objections during the deposition
  - Explain common objections in advance
  - Attorney-Client privilege
- Breaks During Depositions

# Reasonable Accommodations During Depositions and Hearings

- What is a reasonable accommodation?
- Identifying whether a witness requires a reasonable accommodation.
- What recourse does a complainant have when he or she is not provided an accommodation during litigation of a complaint?
  - *Davina W. v. Social Security Administration*, EEOC Appeal No. 0120162615 (Jan. 18, 2017): The Administrative Judge presiding over a complaint is responsible for addressing requests for accommodation.

# Preparing the Witness to Testify: Substantive Preparation

- Substantive knowledge of the case
  - The relevant law
  - Issues in the case
  - Supporting evidence
  - Evidence needed to prevail
- Witness's role in the case
- Relevant documents
  - Previous sworn testimony the witness has provided
  - Possible exhibits

# Preparing the Witness to Testify: Substantive Preparation, Cont.

- Practice, practice, practice:
  - Prepare for questions likely to arise
  - If preparing for hearing, review hearing examination questions and likely cross-examination
  - Role-playing to help witness learn how it will 'feel' to be deposed
  - Drawback to appearing over-rehearsed or glib

# Frequent Deposition Questions

Witnesses should be prepared for questions at deposition or hearing about the following topics:

- How the witness prepared
  - Communications with others (including other witnesses)
  - Communications with representative
- Ability to testify
  - Medical conditions or medication
  - Ability to testify fully, truthfully
  - Ability to recall information
  - What to do if witness is impaired

# Frequent Deposition Questions, Cont.

- Personal Background
  - Salient or embarrassing information (especially if it could impact credibility)
- Protected Activity/Litigation Background
  - Previous depositions
  - Previous litigation (as a party or witness)
  - Prepare witness to testify about:
    - When, in what forum, the parties, accepted issue(s)
    - Outcome (is disclosure barred, such as by Settlement Agreement?)

# Preparing A 30(b)(6) Witness for Deposition

- What is a 30(b)(6) deposition?
- Rule 30(b)(6) of the Federal Rules of Civil Procedure states:
  - *Notice or Subpoena Directed to an Organization.* In its notice or subpoena, a party may name as the deponent a public or private corporation, a partnership, an association, a governmental agency, or other entity and must describe with reasonable particularity the matters for examination. The named organization must then designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on its behalf; and it may set out the matters on which each person designated will testify. A subpoena must advise a nonparty organization of its duty to make this designation. The persons designated must testify about information known or reasonably available to the organization. This paragraph (6) does not preclude a deposition by any other procedure allowed by these rules.



# Unique Challenges With *Pro Se* Parties

- Requests for legal advice
- Refusal to answer questions
  - Build the record;
  - If needed, contact presiding Judge

# Ethical Considerations While Preparing & Questioning Witnesses

- Look to these sources for guidance:
  - Federal Rules of Civil Procedure;
  - State rules of professional conduct where attorney is admitted and practicing;
  - Ethics opinions in the applicable jurisdiction(s);
  - Applicable Court rules (Local Rules);
  - Applicable guidance or regulations
    - EEOC's Management Directive 110
    - 29 C.F.R. § 1614

# Ethical Considerations While Preparing & Questioning Witnesses, Cont.

- Federal Rules of Civil Procedures
  - Establish the framework for conducting discovery, including depositions.
- Some relevant rules:
  - Rule 30: Addresses the taking of depositions by oral examination
  - Rule 31: Depositions by written questions
  - Rule 32: Using depositions in court proceedings
  - Rule 37: Failure to...cooperate in discovery; Sanctions

# Ethical Considerations While Preparing & Questioning Witnesses, Cont.

- Fed. R. Civ. P. 37(b)(1): *Sanctions Sought in the District Where the Deposition Is Taken.* ...If a deposition-related motion is transferred to the court where the action is pending, and that court orders a deponent to be sworn or to answer a question and the deponent fails to obey, the failure may be treated as contempt of either the court where the discovery is taken or the court where the action is pending.

# Ethical Considerations While Preparing & Questioning Witnesses, Cont.

- Applicable Guidance & Regulations
  - **29 C.F.R. § 1614.109(e)** provides: “The administrative judge or the Commission may refer to the Disciplinary Committee of the appropriate Bar Association any attorney or, upon reasonable notice and an opportunity to be heard, suspend or disqualify from representing complainants or agencies in EEOC hearings any representative who refuses to follow the orders of an administrative judge, or who otherwise engages in improper conduct.”

# Ethical Considerations While Preparing & Questioning Witnesses, Cont.

- EEOC's Management Directive 110 ("MD-110"):
  - "All participants in the EEO hearing process have a duty to maintain the decorum required for a fair and orderly proceeding and to obey orders of the Administrative Judge. Any person who engages in improper behavior or contumacious conduct...at any time subsequent to the docketing of a complaint for a hearing is subject to sanction." MD-110, Ch. 7(V)
    - ✓ Includes non-attorneys
  - What is "contumacious conduct"?

# Ethical Considerations While Preparing & Questioning Witnesses, Cont.

- *In the matter of Arnold T, Respondent*, EEOC Appeal No. 1120160001, 2018 EEO PUB LEXIS 1517 (April 30, 2018): A participant in the EEO process may be sanctioned for misconduct “at the hearing stage of the case [and] also to all other actions taken by a representative in the course of an EEO proceeding, including the appeal.”
  - Affirming an AJ’s decision to exclude the complainant’s representative from the hearing process and to suspend the representative from practicing before the Commission for a period of 180 days due, in part, to the representative’s contumacious conduct relating to depositions.

# ABA Model Rules of Professional Conduct

- **Rule 3.3:** Candor Toward the Tribunal: “If a lawyer, the lawyer’s client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.”
  - What constitutes “reasonable remedial measures”?
    - Seek the client’s cooperation to correct;
    - If unsuccessful, the attorney may withdraw from representation, if able; or
    - Disclose the information to the tribunal “as is reasonably necessary to remedy the situation”



# ABA Model Rules of Professional Conduct

- **Rule 3.4:** A lawyer shall not:
  - (a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;
  - (b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;
  - Comment [1] to Rule 3.4: "Fair competition in the adversary system is secured by prohibitions against...obstructive tactics in discovery procedure..."

# Ethical Issues Arising From Preparing & Representing Witnesses at Deposition/Hearing

- Coaching a Witness
  - Definition of “coaching”
  - Coaching a witness at depositions is grounds for sanctions under Rule 37 of the Federal Rules of Civil Procedure. *See, e.g., Friends of Animals, Inc. v. United States Surgical Corp.*, 131 F.3d 332, 333 (2d Cir. 1997).
  - *Margotta v. Secretary of Veterans Affairs*, EEOC Appeal No. 01911253 (Aug. 13, 1991): Merely meeting with witnesses prior to the hearing does not necessarily constitute coaching a witness.

# Ethical Issues Arising From Preparing & Representing Witnesses at Deposition/Hearing, Cont.

- Waiver of Privilege During Witness Preparation
  - Presence of third person
    - Exception
  - Group Preparation of witnesses for deposition/hearing
    - Generally not permitted to discuss substance of testimony
    - Spoliation of testimony
    - Advisory committee's notes on Fed. R. of Evid. 615: “The efficacy of excluding or sequestering witnesses has long been recognized as a means of discouraging and exposing fabrication, inaccuracy, and collusion.”

# Ethical Issues Arising From Preparing & Representing Witnesses at Deposition/Hearing, Cont.

- Group Preparation of witnesses for deposition/hearing, cont.
  - Advisory committee's notes on Fed. R. of Evid. 615: “The efficacy of excluding or sequestering witnesses has long been recognized as a means of discouraging and exposing fabrication, inaccuracy, and collusion.”

# Ethical Issues Arising From Preparing & Representing Witnesses at Deposition/Hearing, Cont.

- Spoliation of Witness Testimony
  - Generally, representatives should not disclose information to the witness that the witness does not already know.
  - May be improper if counsel or a party discloses new information to witness.

# Ethical Issues Arising From Preparing & Representing Witnesses at Deposition/Hearing, Cont.

- Example: *Innospan Corp. v. Intuit Inc.*, 2011 U.S. Dist. LEXIS 72848 (N.D. Cali., July 7, 2011), motion granted by, claim dismissed by *Innospan Corp. v. Intuit, Inc.*, 2012 U.S. Dist. LEXIS 47870 (N.D. Cal., Apr. 4, 2012): Sanctioning Plaintiff for tampering with a witness's testimony:

“Having advised Yi of the need to be ‘very consistent,’ the night before Yi's deposition, [Plaintiff] gave Yi a detailed timeline to ‘refresh his memory.’ The timeline does no such thing. Rather, it is a transparent attempt to frame Yi’s testimony. It contains a detailed description, written by [Plaintiff], of *Yi’s* thoughts and actions relating to the most important issue on which Yi was to testify...”

# Ethical Issues Arising From Preparing & Representing Witnesses at Deposition/Hearing, Cont.

- Speaking Objections
  - What is a speaking objection?
  - Fed. R. Civ. P. 30(c)(2): “...An objection must be stated concisely in a non-argumentative and non-suggestive manner. A person may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation ordered by the court, or to present a motion under Rule 30(d)(3)...”

# Ethical Issues Arising From Preparing & Representing Witnesses at Deposition/Hearing, Cont.

- Discussions During Breaks
  - A witness remains sworn in during breaks in his or her testimony.
  - Witness could be subject to questioning about discussions that occur during breaks.
  - *Hall v. Clifton Precision*, 150 F.R.D. 525 (E.D. Pa. 1993): “Once the deposition has begun, the preparation period is over and the deposing lawyer is entitled to pursue the chosen line of inquiry without interjection by the witness’s counsel. Private conferences are barred during the deposition, and the fortuitous occurrence of a coffee break, lunch break, or evening recess is no reason to change the rules.”



# Ethical Issues Arising From Preparing & Representing Witnesses at Deposition/Hearing, Cont.

- Discussions During Breaks, Cont.
  - Courts routinely hold a party may inquire about these discussions.
  - *BNSF Ry. Co. v. San Joaquin Valley R.R. Co.*, 2009 U.S. Dist. LEXIS 111569, 2009 WL 3872043 (E.D. Cal. 2009), *citing Hall*, 150 F.R.D. 525 at 529 (if improper conferences occur during a deposition recess, they are subject to inquiry in further discovery)
  - Exception: Discussions to determine whether a privilege should be asserted.

# Conducting Depositions/Hearings By Other Means

- VTC and Telephonic options
- May arise if witness or representative cannot travel, or if travel is otherwise impractical
- Challenge: Evaluating Witness Credibility
  - May be difficult to do by remote means.
  - Avoid for witnesses for whom credibility determinations will be important.
  - Try to depose “adverse” witnesses in person, whenever possible

# Conducting Depositions/Hearings By Other Means

- EEOC prefers hearings be conducted in person
- In *Madaris v. Postmaster General*, EEOC Appeal No. 0120131585 (2013), the Commission explained the procedures for approving telephonic hearing testimony: “In *Louthen v. United States Postal Service*, EEOC Appeal No. 01A44521 (May 17, 2006)...the Commission [previously] concluded that AJs should not conduct telephonic hearings or take testimony by telephone, except where there are exigent circumstances or a joint and voluntary request by the parties. Where exigent circumstances exist, the AJ must find and document that the situation requires a hearing or testimony by telephone. If exigent circumstances are not present, to hold a telephonic hearing or take testimony by telephone requires that the parties submit a joint request to the AJ, and, prior to the hearing, the AJ must obtain a statement of consent reflecting that they have been informed of the limitations of taking testimony telephonically. Further, the AJ must be satisfied that it is unlikely that the credibility of any witness testifying telephonically will be at issue. The parties’ joint request as well as the AJ’s ruling on it must be documented in the record.”

# Conducting Depositions/Hearings By Other Means

- Challenge: How to swear in a witness
  - If court reporter not in same room as witness, may be unable to swear in the witness.
  - During preparations, remind witness they will still be under oath.
  - 18 U.S.C. § 1001: Fraud and False Statements: **(a)** Except as otherwise provided in this section, whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States knowingly and willfully—**(1)** falsifies, conceals, or covers up by any trick, scheme, or device a material fact; **(2)** makes any materially false, fictitious, or fraudulent statement or representation; or **(3)** makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry...shall be fined under this title, imprisoned not more than 5 years...

# Conducting Depositions/Hearings By Other Means

- Challenge: Technical issues
  - Before the deposition/hearing, try to conduct a “test run” of all equipment.
  - Warn the witness at the beginning of the deposition:
    - Stop speaking if you notice technical issues;
    - Speak clearly and slowly to ensure clear record;
    - Especially important to give verbal responses if testifying telephonically.