

How to Give an Effective and Stress-Free Deposition

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EXPAND YOUR EXPECTATIONS[®]

Why Are We Here?



The purpose of this seminar is to prepare you for two kinds of depositions, where your counseling, investigations and/or termination decisions are in dispute:

- (1) HR Fact Witness
- (2) 30(b)(6) Corporate Representative on an HR matter

We're going to discuss:

- Drafting and maintaining useful investigative and other notes for use in your deposition;
- Whether and how to prepare for your deposition;
- Policing the distinction between HR policy and the law during questioning;
- The use of HR exhibits; and
- How to interpret attorney objections and rules governing breaks during testimony.

How does your testimony get used:



- Discovery
 - Locate Electronically Stored Information
 - Identify Other Witnesses
 - Learn the Company's defense
- Summary Judgment
- Trial
- Subsequent Litigation

What is the difference between testifying as a Fact Witness and a 30(b)(6) Representative?

1. Fact Witness: Your testimony is typically limited to your personal knowledge on a Human Resource matter.
2. 30(b)(6) Representative: You have been designated by your Employer as a person with knowledge on certain HR-related topics. Your testimony will likely include information you are "taught" or "told." Your testimony binds the Company and will be used by the Plaintiff to establish the "Company's position."

Drafting and Maintaining Useful Investigative and Other Notes for Use in Your Deposition

1. Follow company policies and procedures to avoid papering the file or creating an impression of bias. Use examples of an employee's actual work product if possible.
2. Take notes during meetings and summarize them (removing shorthand) shortly after the event concludes.
3. If meeting with the employee, consider the usefulness of a witness who can take notes of your conversation to avoid a "He Said, She Said" recollection of the meeting by the employee later.
4. When and how to "privilege" communications.
5. Write down useful admissions from the employee (or lack thereof).
6. Maintaining files: Understand your company's document destruction policy, especially regarding emails.
7. Don't take the manager's word for it if you're not involved in the event. Get documentation immediately!
8. Witness statements: "Professionally" drafted v. ""Lay person" statements.
9. Remember the details. For example, write down dates, FULL names and don't paraphrase if the employee gives you something good.
10. Know what NOT to write down.

Whether and How to Prepare for Your Deposition

1. Fact Witness v. 30(b)(6)
2. The Deposition Rule: If you look at it, opposing counsel may be able to ask you about it and/or see it
3. Memorize important details
 - Dates, especially if the timeline is important
 - Witnesses
 - Relevant HR policies or procedures
4. Review any notes you made of your internal investigation to refresh your recollection
5. Meeting with the Company's attorney
 - Discuss facts and causes of action
 - Lines of questions opposing counsel is sure to ask
 - What else to expect
 - LISTEN, even if you've testified before and you think you "know the drill."

Preparing for a Videotaped Deposition

1. Dress appropriately and testify as if you are addressing a live audience.
2. Body language: Be aware of fidgeting, inappropriate smiling or frowning, and looking to counsel to verify answers.
3. Patience is important: Juries don't like argumentative witnesses
4. Take appropriate breaks: Your answer at 5 p.m. needs to look as polished as your answer at 9:30 a.m.
5. Wear comfortable shoes and eat a good breakfast.

Policing the Distinction between HR Policy and the Law During Questioning



1. Fight the urge to be a "Know It All."
2. It's okay to say "I don't know."
3. Beware terms of art, like "reasonable" and "ensure."
4. Don't let the attorney tell you what your company's policy says.
5. Give your attorney time to object so that he or she can warn you that opposing counsel is asking you a question that calls for a legal conclusion. Listen to your attorney's objection.

The Use of Exhibits

1. In Depositions:
 - a. READ the document.
 - b. Use them offensively by referring to past exhibits.
 - c. Just because you've authored it, you don't own it.
 - d. Does the document speak for itself? It depends...
2. What HR-specific documents can you expect to see and how should you handle them:
 - a. Policies: Be familiar with what they do and don't say.
 - b. Payroll Records: Use of codes, accuracy, what isn't there.
 - c. Investigation Files: Where does it end, gaps and delays.
 - d. Evaluations: Grade inflation, decision maker discipline.

How to Interpret Attorney Objections and Rules Governing Breaks During Testimony

1. Preserving Objections v. Giving You a Heads Up
2. Examples:
 - a. Asked and Answered
 - b. Attorney-Client Privilege
 - c. Calls for Speculation
 - d. Compound
 - e. Hypothetical
 - f. Calls for a Legal Conclusion
3. Speaking During Breaks
4. Correcting Testimony
5. Instruction Not to Answer

Examples of Good and Bad Testimony

- **The “Know It All”**
- **Refusal to Concede a Point**
- **Always, Never, Ever and Anything**
- **Appropriate Use of “Yes” and “No” Answers**

The Know It All

Q: Did you do anything to determine whether or not [they] were using any information from their prior employment in their employment with [your company]?

A: No.

Q: Did [the Company] take any steps that you're aware of?

A: No.

The Better Answers: "No, but that's not my job. That would have been X's job." "I can't speak on behalf of the Company, I can tell you what I did..."

Refusal to Concede a Point

Q: Are you aware of [the Company] ever failing to comply with federal government instructions with respect to the completion of a Form I9 form?

A: The failure to complete one?

Q: No, ma'am. Are you aware of [the Company] every failing to follow government directions with respect to the completion of a Form I9 form?

A: No, I'm not aware of it no.

Q: Are you aware of any Form I9 form that was ever filled out later than an employee's date of hire?

A: Your question is confusing. An I9 form can be filled out within 72 hours of a start date, either 72 hours before or 72 hours after.

Q: Are you aware that the federal government states, and I quote, This part of the form must be completed no later than the time of hire, which is the actual beginning of employment.

Refusal to Concede a Point

- Q: Now, let's try the question I asked you, which you've not yet answered. Are you aware that it says, quote, This part of the form must be completed no later than the time of hire, which is the actual beginning of employment?
- A: I -- I have overseen the completion of I9 forms many times in my past, and an I9 form is filled out within 72 hours of a start date.
- Q: And is that [the Company's] process?
- A: Our practice is to -- to follow all federal guidelines.
- Q: And are you aware, having overseen many of these I9 form completions, that the guidelines actually state that the employee must complete an I9 form no later than their time of hire, which is the actual beginning of employment?
- A: I have overseen many I9 forms in my career, not with [the Company]. I am not aware of any not being completed correctly, no.
- Q: That wasn't my question, ma'am.
- A: I guess I need clarification. Are you referring to I9 forms outside of [Company]?
- Q: I'm referring to your knowledge, ma'am.
- A: My knowledge is that I9 forms are completed within 72 hours of a start date.
- Q: So it would come as a surprise to you if the language that I just recited appears on the instructions portion of an I9 form?
- A: I don't have an I9 form here in front of me, but I do know in my experience in HR that an I9 form is filled out within 72 hours of a start date, either before or after.
- Q: Can you answer the question?

Always, Never, Ever and Anything

- Q: Did that **ever** happen?
- A: In that time period?
- Q: Yes, during your time as a regional sales manager?
- A: I can't remember.
- Q: Did you **ever** audit the sales of any of these six individuals to determine before you got -- other than the complaints that you got -- to determine whether they were complying with the sales restrictions contained in their employment agreements?
- A: No.
- Q: Did you **ever** take any steps to determine whether they were using trade secrets such as customer names, pricing lists, **anything** that might be deemed to be a trade secret of a confidential piece of information in their employment with [the Company]?
- A: Take steps as far as?
- Q: Did you do **anything** to determine whether or not they were using any information from their prior employer in their employment with [the Company]?
- A: No.
- Q: Did [the Company] take **any** steps that you're aware of?
- A: No.

Appropriate Use of “Yes” and “No”

Q: In preparation for your testimony today, did you review any documents?

A: No, I did not.

Q: Did you discuss this case with anyone?

A: No, other than my attorney.

Q: Do you know if he started work with the company before he signed his employment agreement?

A: No, I do not.

Q: Would [Name] know?

A: I cannot speak for her.

Q: Okay, if you don't know it, do you know anyone else who would?

A: No, I do not.



Questions?