

#NELA 16
NATIONAL EMPLOYMENT LAWYERS ASSOCIATION
2016 ANNUAL CONVENTION
JUNE 25, 2016
WESTIN LOS ANGELES

**TAKING DEPOSITIONS:
TAKING CARE OF BUSINESS WHILE
“COLORING OUTSIDE THE LINES”**

KATHLEEN CAHILL
15 EAST CHESAPEAKE AVENUE
TOWSON, MARYLAND 21286

410.321.6171
KATHLEEN@KATHLEENCAHILL-LAW.COM

Introduction:

This presentation reviews the basics of preparing for and taking depositions in employment cases, and then delves deeper into creative, surgical and more potent approaches that elevate our effectiveness in this critical phase of litigation.

I. Primary Purposes of Depositions

- A. to learn what she knows;
- B. to size her up as a witness;
- C. to explore what you don't know and what you must know – good or bad;
- D. to test/confirm what you think is so;
- E. to button down admissions;
- F. to make an effective record for impeachment;
- G. to get everything essential to moving for or opposing summary judgment;
- H. to test your suppositions, theories and theme;
- I. to make a comprehensive record of any witness who might not be available for trial (if not sure, expressly ask so as to avoid late-game surprises)

II. Essential Preparation

- A. ALWAYS BE IMPECABLY PREPARED, as if it is Day One of Trial
- B. STUDY BASICS
 - 1. the industry

2. the employer
 3. the organizational structure
 4. the law
 5. the defenses
 6. discovery responses
- C. STUDY SPECIFICS
1. the players and the interpersonal/power dynamic
 2. what will this witness be like, in terms of personality and behavior?
 3. Where does she fit into the story and my case plan?
 4. How does she relate to the other players, formally and informally?
(this also influences batting order)
 5. tangential personal material (and even rumor)
- D. UNDERTAKE A COMPLETE, INDEPENDENT & THOROUGH INVESTIGATION – THE X FACTOR
1. GO INTO THE FIELD, as if it is an auto tort case
 2. site visits
 3. surveillance
 4. internet
 5. press
 6. all public record
 7. PI use in some instances

III. Essential Mechanics and Techniques

- A. be on time/insist on on-time starts
- B. no wandering
- C. no fumbling around
- D. exhibits tight
 1. copied (hand opponent his own copy so he and witness are not sharing or delaying for a “reading period”!)
 2. your exhibit book has all copies highlighted so you know exactly what you plan to ask (and no “reading periods”!)
- E. EVERYTHING IS HIGH-VALUE
 1. AVOID WASTING TIME ON BASICS if you have them “cold”
 2. Quickly test/confirm what you must have on record
 3. Quickly test/confirm what you think is so
 4. then get to “the goods”
- F. In areas of unknown, probe and press from an informed start-point – do not simply hand over the “Mike”
- G. PACE IS A THING! Move it
 1. Swift pace challenges the witness
 2. no breaks unless they ask (or reporter needs)
 3. no breaks where the opposing lawyer or witness asks for one at a suspicious or inopportune point (“not right now, just a few minutes, let me finish this part”)

4. But also use strategic pauses – even well-prepped, disciplined witness will re-start and fill void
- H. NOT CHRONOLOGICAL NECESSARILY
 1. Consider jumping right to heart of it - get to the key stuff while the witness is not acclimated and settled
 2. do not be predictable
 3. this is stressful and mentally taxing to the witness, so use that in planning
- I. ORGANIZE IN SEGMENTS OR “CHUNKS” LIKE CROSS
- J. MUST BE STRATEGIC TO MOVE WITNESS BEYOND HIS COMFORT ZONE, HIS PREP, HIS TAG LINES, MANTRAS OR CANNED REPLIES
- K. CHESS VS. CHECKERS: In key areas, come from the side, not straight ahead
 1. maybe can sneak up
 2. oftentimes witness is not prepared to guard from the side, only straight ahead
 3. maybe can get what you need and give little away

IV. *Watch your Manner(s)*

- A. generally, be cool and resilient
- B. S --- happens – and you still be cool and resilient!
- C. Client or co-counsel attending must be on that same page – prep them to sync up their behavior, expression, reactions!
- D. test a witness by using different approaches
 - a. to assess her reaction
 - b. to move her out of her prepped materials and off her “cool” place
- E. always be polite and professional with witness
- F. be very courteous and thoughtful toward reporter
- G. BUT do not shy away from being intense and doing hard cross in right places
- H. Do not avoid awkward questions
- I. Be impeccably prepared, then flexible and reactive
- J. Do not script or adhere too tightly to a plan
- K. Listen to answers!! Listen to answers!!! And adjust and flow!
- L. But do double-check to be sure everything is eventually covered

V. *Secondary Purposes of Depositions*

- A. Forging Relationships
 1. craft relationships/make impressions with internal employees
 - a. particularly applicable in employment cases
 - b. incumbent employee witnesses are persuadable (or conversely, adversely impressionable)
 - c. not all incumbent employee witnesses come equally biased or hesitant to speak the whole truth

- d. but your approach is key as incumbent employee witnesses don't just hand it over, especially in front of the company's lawyer
- 2. enlist/recruit former employees
 - a. theoretically free and independent
 - b. but avoid assumptions - they might be "outta there" and not willing to be in the center of controversy
 - c. and probe bias directly, of course
- 3. "work" opposing counsel
 - a. also sizing you up
 - b. it matters if they think you're super-serious about your case and if they discern you love your client (or not so much so)
 - c. avoid petty skirmishes or needless entanglements
 - d. take control, keep it, and dictate terms as much as possible
- B. Tee-up for Settlement overture

VI. Miscellaneous & Creative Tips

- A. "speed-dating" depositions saves money, helps on the fee petition and leaves less of your case strategy exposed to the other side
 - 1. cut background: beforehand, check LinkedIn, find a bio, CV or resume, even for ancillary players (also can investigate the resume then if appropriate) – saves 5-10 minutes and makes an impression
 - 2. PIA governments regularly – then spring from that (unexpected)
- B. go examine original documents – and probe any "finds"
- C. get transcripts of witness's prior deps – review to prep & use to impeach
- D. don't need to depose every witness listed in discovery replies – or take "drive-through" deps of bit players if you want to be sure
- E. be sure your legal research is done and down – don't risk realizing later that you missed asking about an element
- F. have an eye to admissibility – ex, if you found a "fishy" document in discovery, probe on the circumstances
- G. prepare for opponent's style and possible misbehavior – ex, speaking objections, coaching the witness, etc – have rules available and quote from them to make best record – and if you suspect unethical coaching during lunch, ask immediately when you resume
- H. watch opponent and witness interaction and assess – tight or not? arrive together? signs of extensive prep or none? watch and listen throughout

Have Some Fun!

**National Employment Lawyers Association
2016 Annual Convention
June 22-25, 2016
Los Angeles, California**

Panel Presentation

Taking And Defending Depositions –Tips For New Nela Attorneys

Renuka V. Jain
Law Offices of Renuka V. Jain
11377 West Olympic Blvd., Suite 508
Los Angeles, CA 90064
Tel: 310-476-5788
rvj@renukavjain.com
© 2016 Renuka V. Jain

I. Introduction - *Who, When and Why* of Depositions

Depositions are the most expensive of the discovery tools. To use them effectively it is essential to know who to depose, when to depose, and the reason for the deposition. The purpose of a deposition is to discover facts, commit witnesses to facts, and obtain testimony to use to impeach, discredit, and leverage a seven figure settlement. Here are some general tips on depositions.

Tip 1: Who To Depose

Decision makers, key witnesses, and any necessary witness who may become unavailable.

Tip 2: Be Selective

Once you identify the witnesses you think you need to depose, cull the list and then prioritize. Review the discovery you already have. Is the information you are seeking through a deposition already available in a document, in previous testimony, in an investigative report? Can you use alternative, less expensive, information gathering tools? Do you have to depose this witness? Do you have to do it now? Can you gather the information from other sources? Ask these

questions before you send out that deposition notice. If in doubt, notice the deposition, you can always cancel.

Tip 3: Timing.

The general rule is to depose witnesses after gathering documents and obtaining answers to interrogatories. But there is an *exception*. In cases where the termination is the product of an investigation, and you have access to the investigative report, an early deposition of one or two key witnesses is an excellent strategy. You can tie down testimony before the defense has the opportunity to create phantom facts.

Tip 4: Order Is Important.

Just as you learn defense strategy from your client's deposition, so does defense counsel. Depose those defense witnesses first who will be educated most by the depositions you take.

Tip 5: Be Organized

You can take several brief depositions if you are organized. Discover your client's story by speaking with your client, reviewing discovery responses, and read the key documents. Then get the jury instructions, identify the elements of your causes of action, and line up the facts you have identified. What facts do you still need? Who can provide them? Line up those witnesses, notice the depositions, and don't be redundant.

II. Preparing Your Client For Deposition

The key to preparing your client for deposition is to *control* how the story is told. Defense counsel has scheduled your client's deposition to BURY the client's story so deep it never gets told to a jury or to make it so slanted it is divorced from reality. Your job is to make sure it gets told to 12 (or 8), hopefully unbiased folks.

Defense counsel will try to secure admissions to discredit the client, to set up the case for summary judgment, and reduce settlement value. Your job is teach your client how to tell the story, to build an impregnable wall that can withstand the arsenal that is surely coming.

Here are the basic rules to prevent the defense from controlling how the facts are develop in a deposition

Tip 1: Preparation is Key

There is no substitute for intense, complete, and thorough client preparation. Spend at least two days preparing the client for the deposition. Break it up, role play, brain storm. If the deposition is being videotaped, videotape your client, review the videotape with the client. Granted you cannot change a personality or an annoying mannerism in two days, but you can certainly make suggestions to maximize positives and play down the negatives.

Tip 2: Review all Key Documents

Review key documents. Pay particular attention to documents, particularly those verified by the client. *Examples:* EEOC/State Administrative Charge, the Complaint, Answer, discovery responses, statements to investigators, prior depositions, trial transcripts, and any other key documents.

Caution: Documents reviewed in preparation for deposition are discoverable. Do not show clients your work product, notes of witness interviews, investigator notes or any other material you do not want disclosed. Instruct your client to NOT SHOW UP AT THE DEPOSITION WITH ANY DOCUMENTS INCLUDING NOTES OF YOUR PREP SESSION.

Tip 3: Explain The Deposition Process

Whether the client is a *Nervous Nellie*, *Idiot Savant*, *Master of Universe*, or *Looking for Love In All the Wrong Places* type, explaining the deposition process is essential. This explanation must include the purpose for the deposition, objections, breaks, conferring during breaks, and instructions not to answer.

Effective deposition preparation requires knowing the client. So here are the personality types I have come across and tips to deal with them.

i. Nervous Nellies:

This person is in a tizzy all the time. This client will answer a question, then explain, then change the answer, and generally provide contradictory testimony.

Tip: KISS and Preparation, are the keys in preparing this client type.

ii. Idiot Savants:

This client is intelligent, but misses nuances and is generally oblivious to nonverbal cues. This client type will take every question literally, require every

fact to be identified exactly so, and provide answers that are subject to impeachment.

Tip: Teach this client not to overanalyze. To distinguish between the substance of the question and a misplaced preposition. To resist the temptation to show how “smart” they are, or how “foolish” the defense counsel.

iii. Master of the Universe:

These client have usually held positions of power. They are used to being in charge, expect deference, and are not amenable to direction and guidance.

Tip: Client control is essential. But with this client, you must let the client “own” the process. Use techniques to guide the client to a place where the direction appears to be the client’s idea: invite the client’s suggestions and ideas, solicit their input, and send them a written outline prefacing it as a summary of their suggestions.

And be sure to **INSTRUCT THE CLIENT NOT TO SHOW UP AT THE DEPOSITION WITH YOUR OUTLINE.**

iv. Looking for Love In All The Wrong Places:

This client type is generally a gregarious people-person. This client is well-liked and unused to confrontation and hostility.

Tip: Use the strength of this disarming personality. Prepare the client to answer minimally and avoid unnecessary explanations. You need to control this client and instruct them that depositions are not playgrounds, it is OK not to be “loved” by defense counsel.

Tip 4: Identify The Opportunities To Hit A Home Run

In every deposition opportunities arise for the client to ‘gut’ the anticipated summary judgment motion. Teach the client how to spot and leverage those opportunities.

Tip 5: Insulate The Client’s Testimony From Becoming Exhibit 1 To A Motion For Summary Judgment

Defense counsel’s objective in deposing your client is to get testimony to move for summary judgment/summary adjudication. Insulate the client from providing damaging testimony. How? *By communicating with the client before and during the deposition.* See below.

Tip 6: Teach The Client To Own The Bad Facts

There are no perfect people and no perfect clients. The key to an effective defense deposition is to discredit your client. So, teach the client how to own the bad facts to minimize their negative effect.

Tip 7: Do Not Coach The Client During Breaks Or Review Documents

You are used to being in charge and have spent hours preparing a witness who is now imploding. You are beside yourself. STOP. First you are overreacting, but even if you are not, do not tell the client they have screwed up. Not only is it unwise, it is thoroughly unproductive. Do not criticize, critique or coach the client during the deposition process, particularly on breaks.

Tip 8: Correct Errors During The Deposition

Do correct factual errors on the record. Depositions are scary. Clients can forget dates. Dates can be important. If there is an important fact and the client simply forgot, misremembered or misstated, have the client correct it on the record. This is most effective if the “fact” is already in the reams of paper generated in the case. If not, you have to note it for the client and assure the client there will be an opportunity to correct it. Suggest the “opportunities” to correct the record. And, if necessary, create the opportunity for the client to make the clarification.

Tip 9: Teach The Client To Leverage The Admonishment

Go over the admonishments with client and teach the client to leverage the admonishments. A perfect example is when the client needs to correct the record. “Counsel you told me at the beginning of the deposition to ask for clarification. I think I may have misunderstood your earlier question.”

Tip 10: Do Not Get Upset

You have spent hours in deposition preparation. You have reviewed every document, identified every pot hole, and taught the client how to navigate around those pot holes. Yet, the deposition did not go as you had planned. Do NOT YELL, CUSS, OR DISPLAY ANGER before, during or after the deposition. Take a deep breath and wait for the transcript. Even if it is as bad as you thought, figure out how to minimize the negatives and amplify the positives.

III. The Deposition - *The Art of Communication*

Tip 1: Establish Control

At the deposition take control. Make your client comfortable. Switch out chairs if necessary, make sure the client has a glass of water, show the client the restroom, have some tissues with you or at least identify the location of the tissues/paper napkins. If it is a videotape deposition, make sure the lighting is good. Once the client is seated, go over to the videographer and see how the client appears in the picture, suggest changes. It's a deposition, not a mug shot. Take charge, *own it*.

Tip 2: Make Objections

Make objections to evidence, to a party's conduct, to the officer's qualifications, or any other aspect of the deposition, **on the record**, DO NOT STOP the deposition.

Exception. STOP the deposition if relief after the fact is inadequate. For example, defense counsel is violating a prior court order, insisting upon disclosure of privileged information, or is acting in bad faith or unreasonably. The bar is high. So provide defense counsel sufficient opportunity to demonstrate, on the record, that he/she is acting like a horse's 'patoot.'

Tip 3: Use Objections Effectively

Be familiar with your state's rules on objections. Create a deposition folder with rules and key cases interpreting the rules and highlight relevant sections. If necessary, quote key sections.

Tip 4: Do Not Engage, It Is A Deposition Not A Contact Sport

No matter the provocation, resist the temptation to react in kind. Yes, I know it can be hard, but do try.

Tip 5: Create A Record

Note obnoxious nonverbal conduct for the record. Grimaces, derisive laughter, snorts, over the top nonverbal gestures, or exhibits being flung at your client or you, must be noted on the record - politely, firmly, and without debate.

Tip 6: Communicate And Protect

Yes, I know you are not supposed to make speaking objections but, when defense counsel is intentionally misstating testimony, misleading your client, and

being a wily coyote, you must send up the necessary smoke signals. The Rules provide for objections. Use them effectively. If you have worked with your client, prepared them for the deposition process, and explained the types of objections, **OBJECTION IS COMMUNICATION**. If the client is imploding take a break and regroup.

Tip 7: Do Not Be A Showboat

Constantly objecting and correcting defense counsel may establish your “alpha” personality and your familiarity with the rules, but today is your client’s day to shine. Do not confuse the client. No matter the personality type, depositions are stressful. Do not make the process more stressful than necessary with constant debate.

Tip 8: Take Breaks

If your client appears tired or is getting confused, ask for a break. You are a busy lawyer, you just got a text, you need to make a call, your secretary just called with a crisis, you need to have your kid picked up...there are a myriad of reasons...use them.

Tip 9: Ask For A Break When The Going Gets Tough

Ask for a break if the client appears exhausted, and is getting confused. Time the request when it appears that a line of questioning is ending. Again remember, do not coach on the breaks, it is simply a time-out, be supportive.

Tip 10: Have Fun!

Depositions are tremendous opportunities for learning. You get to hear the client’s story, as told by the defendant! How does your client respond to this re-telling, handle the pressure, and what do you need to do to address any weaknesses. You also learn about defense counsel, their assessment of the case, and, you get a preview of the summary judgment argument. **Use it, relax, have fun!**

NELA 2016

Taking And Defending Depositions - Tips For New NELA Attorneys

Preparing Your Client

Depositions

by: Renuka V. Jain

Preparing your client

Control how the story is told...

- **Tip 1: Preparation is key**
 - There is no substitute for intense, complete and thorough client preparation
- **Tip 2: Review all key documents**
 - Discovery Responses, Statements to Investigators, Prior Depositions, etc.
 - **CAUTION:** Documents reviewed in preparation for deposition are discoverable
- **Tip 3: Explain the process**
 - Include: the purpose for the deposition, objections, breaks, conferring during breaks, and instructions not to answer
 - *Know your client!* There are generally four types of clients...

Types of Clients



- 1: *Nervous Nelly*

- Tip: Preparation, preparation, but NO OVERPREPARATION.

Types of Clients *cont'd*



- 2: *Idiot Savant*

- Tip: Teach client to...
 - not overanalyze
 - distinguish between substance of question vs. misplaced preposition
 - resist temptation to show how “smart” they are or “foolish” defense counsel is

Types of Clients *cont'd*



- 3: *Master of the Universe*

- Tip: Let the client “own” the process...
 - Guide the client so the direction appears to be the client’s idea
 - *N.B.* Instruct the client not to show up at the deposition with your outline!

Types of Clients *cont'd*



- 4: *Looking for Love in All the Wrong Places*

- Tip: Use their disarming personality, but...
 - Prepare them to answer minimally and avoid unnecessary explanations
 - Tell them it's OK not to be "loved" by the defense council

Preparing your client *cont'd*

- **Tip 4: Identify the Opportunities to Hit a Home Run**



- Teach the client how to spot and leverage opportunities to 'gut' the anticipated summary judgment motion

Preparing your client *cont'd*

Tip 5: Insulate the Client's Testimony

- Don't let what should be Exhibit 1 become a Motion for Summary Judgment.
- Communicate with the client before and after the deposition

- **Tip 6: Teach The Client To Own The Bad Facts**

- Teach the client how to Own the Bad Facts to minimize their negative effect.

Preparing your client *cont'd*

- Tip 7: During Breaks, DO NOT Coach the Client or Review Documents



- Even if your client is falling apart, do not criticize or tell the client they messed up

Preparing your client *cont'd*

- **Tip 8: Correct Factual Errors**

- During a deposition, if there is an important fact that the client simply forgot, misremembered or misstated, have the client correct it on the record
- Suggest “opportunities” to correct the record. And, if necessary, create the opportunity for the client to make the clarification



Preparing your client *cont'd*

- Tip 9: **Teach the Client to Leverage the Admonishment**
 - *Ex:* "Counsel, you told me at the beginning of the deposition to ask for clarification. I think I may have misunderstood your earlier question..."
- Tip 10: **Do Not Get Upset**
 - *So, it didn't go so well...*



- Do NOT yell, cuss, or display anger!
- Take a **deep breath** and wait for the transcript

The Art of Communication

The Deposition

At the deposition...

- **Tip 1: Establish Control**

- Make your client comfortable
 - *Ex:* Switch out chairs, get water, provide tissues, check the lighting (esp. if taped)

- **Tip 2: Make Objections**

- Make objections to: evidence, to a party's conduct, to the officer's qualifications, or any other aspect of the deposition, ***on the record***
- DO NOT STOP the deposition.
- ****EXCEPTION**** You should stop the deposition if relief after the fact is inadequate...
 - *Ex:* Defense counsel is violating a prior court order, insisting upon disclosure of privileged information, or is acting in bad faith or unreasonably

At the depo *cont'd*

- **Tip 3: Use Objections Effectively**
 - Be really familiar with your state's rules
- **Tip 4: Do Not 'Engage'**
 - It is a deposition, not a contact sport
 - No matter the provocation, resist the temptation to react in kind
- **Tip 5: Create a Record**
 - Note obnoxious, nonverbal conduct for the record
 - *Ex: Grimaces, derisive laughter, snorts, over the top nonverbal gestures, or exhibits being flung at your client*
 - Do so politely, firmly, and without debate

At the depo *cont'd*

- **Tip 6: Communicate and Protect**
 - Even though you're 'not supposed to make speaking objections,' the rules provide for objections and OBJECTION IS COMMUNICATION
 - Objections can send necessary smoke signals to a well-prepared client
 - If the client is imploding, take a break and regroup

However...

- **Tip 7: Do Not Be a Showboat**
 - It's your client's day to shine, not yours
 - Don't make the process even more stressful with constant debate

At the depo *cont'd*

- **Tip 8 & 9: Taking Breaks**

- If your Client appears tired or confused, ask for a break
- Time the request for when a line of questioning seems to be ending
- Make up a reason! You're a busy lawyer!
- Remember your Role - Protect and Defend the Client

And ...

- Tip 10: **Have Fun and Learn Something!**



- Hear the client's story, as told by the defendant!
- See how your client responds!
- Learn defense counsel's assessment of the case!
- Get a preview of their MSJ argument

What new NELA attorneys need to know about defending depositions

©2016 David L. Lee
LAW OFFICES OF DAVID L. LEE
53 W. Jackson Blvd., Suite 801
Chicago, IL 60604
312-347-4400
d-lee@davidleelaw.com

#NELA16
National Employment Lawyers Association
2016 Annual Convention
Los Angeles, CA
Saturday, June 25, 2016

Goals:

As a new NELA attorney, you have four goals in defending a deposition:

- Hinder as much as possible your opponent's summary-judgment motion,
- Don't let your client undercut his or her potential damages,
- Leave opposing attorney with the impression that your client will be a good witness (or at least that your client will not be a disastrous witness).
- Any goal(s) your supervising attorney specifically gives you.

Preparing your client for his or her deposition:

Don't use "one-size-fits-all"; rather, assess your client's amenability to preparation:

Clients are not equally amenable to preparation. Some clients will take well to preparation and learn you what teach them. Other clients will freak out to the extent that preparation will backfire. Yet other clients (like CEO's, other high managers, and ego-maniacs) have the brains and ability to engage in and benefit from preparation, but will resist it because they know better.

For that reason, a "one-size-fits-all" approach to deposition preparation simply does not work. Rather, you must assess how amenable your client is to deposition preparation and prepare your client based on that assessment.

Preparation points for all clients:

The following preparation points should be used with all clients:

Reassure the client

Even the most sophisticated client needs to be reassured. Tell the client that a deposition is a natural and normal part of every case that gets this far and that you are confident that he or she will do great. Give the client truthful reasons why he or she will do great, such as:

- He or she is very smart.
- People naturally like him or her.
- He or she is telling the truth.
- He or she has truth and justice on their side.
- Etc., etc.

Tell the client that the most important thing is to tell the truth

This should be hammered into the client. Tell the client that if they remember only one thing from the deposition preparation, that one thing should be “Tell the truth”.

Explain to the client that telling the truth includes:

- If the truth is “I don’t remember” or “I don’t recall”, then that should be the client’s answer.
- Telling the best truth you can tell, e.g. “I don’t remember when it happened, but it was cold and snowing”.

It’s very typical to tell the client something like “I can handle anything in your deposition except if you lie or simply start making up shit.”

Tell the client to know his or her story, which we will go over together

Many clients will tell their story by focusing on what is most emotionally compelling to them, like that they weren’t invited to the boss’s birthday party. However, that’s a set-up for a summary-judgment motion that characterizes your client claim as “not being invited to the birthday party”.

For that reason, you should work on your client's story with him or her. The story does not have to be long, involved, or complex. Often, a short paragraph is perfect. For example, this would be a good client story:

"I worked at the company for many years. I was always considered a good employee and got raises, promotions, and the like. I had never been disciplined or written up – my personnel file was totally clean. Then I told the company investigators that my co-workers were cat-calling the new girl. After that, everything changed, suddenly I was written up for a bunch of nonsense, and I was fired just two weeks after I talked to the investigators."

Often it helps to tell the client that your best shot at writing their story was (the Charge of Discrimination, paragraphs 5 through 21 of the Complaint, the Statement of Facts in response to the Motion to Dismiss, etc.), give your client that document or the relevant excerpt from the document, and ask them to read it three times a day until your next meeting (or until the deposition).

Tell the client not to talk when anybody else is talking

Reassure the client that he or she will have a chance to talk, but if the other lawyer is talking or the court reporter is talking or you are talking, the client should be quiet and patiently await his or her turn.

Tell the client that you may ask some questions at the end of the deposition

Explain to the client that whether or not you ask questions is a judgment you will make on the spot, but that whether or not you ask questions does not mean that the client has done anything wrong. Rather, your decision to ask questions will be in reaction to what the opposing attorney has done.

Remind the client that you are on the client's side and that any questions you ask the client will not be trick questions but will have obvious, easy answers that the client will immediately know.

Explain to the client that you may ask the client questions about the Charge of Discrimination, Complaint, etc., and that if you do so, you will show the client the document, read one or more important paragraphs from the document, and ask the client if what that paragraph says is true. Remind the client that he or she already approved (or signed off on) the Charge of Discrimination, Complaint, etc., so the client's answer should be that the paragraph is true.

Tell the client to keep his or her cool

Explain to the client that it would be very bad for the opposing attorney to

know that he or she is able to provoke the client into anger, sarcasm, etc.

Empower the client

Explain to the client that they have great control over the deposition by the amount of time they take to answer questions, by their tone of voice, by the answers they use, etc. Also explain that the purpose of all your preparation is to empower the client.

Important: Empowering the client is not giving the client license to be a jerk, a comedian, etc. Any such tendencies on the part of the client must be fought!

Preparation points you may or may not use depending on your assessment of the client:

(In rough order of importance)

Traits that will make the opposing lawyer think you are a good witness:

Explain to the client that know what traits lawyers consider to be traits of good witnesses, because you are a lawyer yourself, and that if the client does the following, the opposing lawyer will think that the client is a good witness, which will make the opposing lawyer more scared to go to trial:

- Remind the client to tell the truth.
- Tell the client NOT to use weasel phrases like “That’s all I remember right now” or “I don’t remember exactly”.
- Tell the client not to whine about what he or she is being asked to recall, so do NOT say something like “It’s been five years, how could anybody possibly remember [whine, whine, whine].”

Look for opportunities to tell your story as we have practiced it:

Teach the client that opportunities to tell his or her story usually come in response to two types of questions:

- Vague, general questions that give the client no idea as to what the opposing lawyer is asking about. Such questions are the equivalent of “start talking”. Typical examples of this type of question are:
 - > “Tell me what happened.”
 - > “Tell me what the company did wrong.”

- Questions that use the words “proof”, “evidence” or “facts” or that use legal terms like “discrimination”, “retaliation”, etc. Explain to the client that he or she does not have to be a lawyer – that’s what the client hired us for! Typical examples of this type of question are:
 - > “Why do you think you were discriminated [retaliated] against?”
 - > “What facts do you rely on to show that you were discriminated [retaliated] against?”

Teach the client that, in response to any of these questions, he or she should tell his or her story as the two of you have practiced it. Also teach the client that if the opposing lawyer asks basically the same question in response to the client telling his or her story, the client should simply tell his or her story again.

Answering mind-reading (heart-reading, soul-reading) questions:

Teach the client that clues that he or she is being asked a mind-reading, heart-reading, or soul-reading question are that the question:

- Asks you what was going on in somebody else’s head, heart, or soul (or maybe in the company’s head as a whole).
- Asks you what sort of person somebody is.
- Asks you whether or not somebody usually tells the truth or is a liar.
- Starts with “Why would...”.

Teach the client that typical examples of this type of question are:

- “Why would your supervisor discriminate against you when he had hired you just six months earlier?”
- “Doesn’t that sound more like a personality conflict than like sexism?”
- “Are you saying your supervisor was a racist?”
- “Do you think so-and-so usually tells the truth?”

Teach the client how to respond to this type of question:

- If you're asked why somebody would have done something and you have a strong suspicion why, then say so. ("My supervisor would have retaliated against me just six months after he hired me because in between I complained about racist comments he had made.")
- Otherwise, you should answer something like, "Well, I can't read anybody's mind [heart, soul], but here's what happened [and here tell your story just like we practiced it]".

Answering putting-words-in-your-mouth questions:

Teach the client that clues that he or she is being asked a putting-words-in-your-mouth question is that the question starts with something like:

- "Is it fair to say that....?"
- "Is what you're trying to say that...?"
- "Do I understand you to be saying that...?"
- "So, to summarize what you were saying...."

Teach the client how to respond to this type of question:

- Feel free to answer "No, that's not fair to say"!
- Be very, very careful about agreeing with anything the other lawyer says!

Answering weird-excuses-for-the-company questions:

Teach the client that the clue that he or she is being asked a weird-excuses-for-the-company question is that the question presents some weird reason that the company or the client's boss may have treated the client poorly, and the client knows that wasn't the reason.

Teach the client that typical examples of this type of question are:

- "Couldn't they have fired you because they didn't like the way you dressed?"
- "Couldn't they have fired you because they didn't like the perfume you wore that day?"
- "Couldn't it have just been a personality conflict?"

Teach the client how to respond to this type of question:

- Give facts showing the weird excuse in the question is ridiculous, like “Nobody ever complained about the way I dressed” or “Nobody ever complained about my perfume” or “My supervisor and I got along fine until I turned down his request for a date”.
- Say “Well, I can't read anybody's mind, but here's what happened [and here tell your story just like we practiced it]”.

Answering intimidate-you-with-a-document questions:

Teach the client that clues that he or she is being asked an intimidate-you-with-a-document question is that the question:

- Asks the client if something in a document is true.
- Shows the client a document that contradicts what the client just testified to.

Teach the client that typical examples of this type of question are:

- “This memo to file says you said Is that true?”
- “This report says the company had to cut one job in your department. Is that true?”
- “How can you say that when this document says something else?”

Teach the client that somebody writing something in a document is no more reliable than somebody just saying it. Just because something is in a document does not mean that it's true. Don't let a document intimidate you!

Answering where-is-the-document questions:

Teach the client that clues that he or she is being asked a where-is-the-document question are that the question:

- Asks the client if he or she has a document.
- Asks the client if he or her gave a document to the lawyer to give to the other side.

Teach the client that typical examples of this type of question:

- “Do you have [a document]?”
- “Where is [a document]?”
- “When was the last time you saw [a document]?”
- “Did you give this document to your lawyer to give to me?”

Teach the client how to respond to this type of question:

- The best answer to this question is something like “I’ll look for that document”. Remember, if you say that you have a document or you say that you gave a document to give to your lawyer to turn over to the other side, and it turns out that you’re wrong, both you and your lawyer can get in a lot of trouble!

Answering settlement questions:

Teach the client that clues that he or she is being asked a settlement question are that the question asks:

- whether or not you'd take your job back,
- what you want out of the case,
- what you'd settle the case for.

Teach the client how to respond to this type of question:

- If asked if you'd take your job back, either say “yes” or leave the door open, like “It would depend on the details” or “If there were guarantees that I would not be retaliated against”.
- If asked what you want out of the case or what you'd settle the case for, say something like “I'd like my lawyer to handle that.”

Answering tie-down, limiting questions:

Teach the client that clues that he or she is being asked a tie-down, limiting question is that the question:

- Asks you if something is more than something else or more than some number.
- Asks you if something is less than something else or less than some

number.

- Asks you if something is between two other things or between two numbers.
- Asks you if there's anything that could help you remember something.

Teach the client that typical examples of this type of question are:

- "Did you complain more than three times?"
- "Did you complain fewer than fifty times?"
- "Did you complain between five and ten times?"
- "Is there anything that could refresh your recollection as to the number of times you complained?"

Teach the client how to respond to this type of question:

- Tell the truth! If the truth is that you don't know how many times you did something, how big something was, how fast something was going, then say you don't know the number.
- Characterize instead of answering in terms of a number For example, "I don't know how many times I complained, but it was a lot (daily, weekly, whatever)."
- If you're asked whether anything could help you remember (lawyers usually say "refresh your recollection"), if you know of something that would, then say it. ("It would help me remember if I could look at the e-mail I sent HR.") If you don't know of something that would help you remember, then the truth is almost certainly that you don't know whether or not something could help you remember. Sometimes, long-lost memories return because we're eating cookies in our mother's kitchen!

Answering narrow, specific questions:

Teach the client that clues that he or she is being asked a narrow, specific question are that the question:

- Starts with one of the journalism words "who", "what", "where", "when", "how".

- Requests a piece of information.

Teach the client that typical examples of this type of question are:

- “When did that happen?”
- “Who was there?”
- “What did you say?”

Teach the client how to respond to this type of question:

- Give short, straight-forward, business-like answers, like “June 5”, “Me, Bill, and Bob”, “That I was being discriminated against and wanted it to stop”.
- Remind the client that if the truth is “I don’t remember” or “I don’t recall”, then that should be the client’s answer.

At the deposition:

Pay attention to your opponent’s introductory bullshit:

Many lawyers start depositions with instructions. Often, the lawyers make promises like, “Don’t interrupt me, and I promise I won’t interrupt you”, “If you need a break, just ask for one”, etc. Be alert for any promises your opponent makes, and write them down in your notes. You may be able to throw your opponent’s promise back in his or her face if, for example, your opponent interrupts your client.

Object to questions that invade privileges:

Don’t forget that there are privileges besides attorney/client. Be alert for confidential marital communications, spousal testimonial privilege, doctor/patient, therapist/client, any privileges under your state law, etc.

Object to questions that use language with technical, legal meaning:

Questions such as “What is your evidence of discrimination?”, “Wasn’t that response quick and effective?”, “Weren’t you an ‘at-will’ employee?”, and the like should always be objected to on the grounds of calling for a legal conclusion from a lay witness.

Be alert for areas that need to be cleaned-up on cross

If your client did not tell his or her story, use cross to have the client do so

Turn your pleadings into evidence:

It is black-letter law that unverified pleadings are not evidence for summary judgment. Therefore, turn your pleadings into evidence on cross-examination by reading the client one or more important paragraphs from the Charge of Discrimination, Complaint, etc., and asking the client whether what that paragraph says is true. You would have already alerted the client to this possibility in deposition preparation. See above.

Good luck!

David L. Lee
May 2016