Taking The Employment Plaintiff's Deposition[1]

Importance

The Plaintiff's deposition is among the more important events in an employment case because:

- It can determine the outcome of the summary judgment motion.
- It can establish factual issues.
- It is the Defendant's best opportunity to control the Plaintiff's trial testimony.

I. PREPARATION: BEGINNING WITH THE END IN MIND

A. Plaintiff's Counsel

1. Even *Before* Preparing For The Deposition

There are some steps required even before starting preparation for the deposition.

- Be certain that your document request and subpoenas to third parties for documents have been issued well before the plaintiff's deposition. Resist submitting your client for deposition before obtaining the pertinent documents, and especially the other side's documents, because otherwise the deposition provides an ambush opportunity.
- There are documents that probably have not been the subject of discovery that it will also be important to obtain from your client:
  - Documents relating to any other litigation, such as depositions the client has given and responses to discovery. You may not know about other litigation (bankruptcy, personal injury, worker's compensation) unless you ask.
  - Computer documents, especially if the client did work on the home computer. The client's computer may hold information transmitted from the company's computers, which the former employer will likely have checked. Other potentially relevant records may be on the computer that will be probed in the deposition and then requested afterwards. Records of on-line job hunting and e-mails

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or resumes are likely to be preserved on the computer and likely will be within document request of the former employer.

- Insurance claim forms, benefit applications and correspondence with insurers and benefit providers. This can include the spouse's medical insurance carrier.

- Loan applications, responses to mortgage questionnaires and communications with anyone extending credit in any form.

- Be certain to issue an interrogatory at the outset of the case seeking the identity of all persons who are believed to have knowledge concerning relevant issues in the case and/or specific issues. This is the most important interrogatory you can serve and it could lead you to investigative leads. You will want to ask the client what each witness identified in response might testify to.

- Investigate the client's claim, especially with third parties and former employees, to the extent possible. Get the EEOC File. The more that is known about what other witnesses will say, the easier it will be to anticipate the questioning.

- When drafting your pleadings and interrogatory answers, review each with the client and work on using the client's word choice and manner of expressing ideas. These documents will be put in front of the client to discuss in the deposition and if they reflect your thought process and syntax, the client often will not really understand what is being said. Using the client's own words makes is all but certain that the client will understand what the document is saying when asked about it.

- Ask about the client's medical condition, because if there is any concern about that issue, you want the client's physician involved and to have made a motion for protective order in advance. There are employment plaintiffs who have suffered heart attacks in the waiting room before the deposition starts. Protect your client's health above all else.

There is no reliable rule of thumb, nor any requirement in the Code of Civil Procedure or Federal Rules of Civil Procedure, concerning whose deposition is taken first, the plaintiff's or the defendant's. It *can* be preferable to have the defense take the plaintiff's deposition first because (1) other factual issues may emerge during depositions of the defendant's witnesses and the defense will have no opportunity to explore the plaintiff's testimony on them and (2) Job search details developed after the deposition will be less available to the defense, which may be important to the client.

2. Teach The Client How To Testify

Preparing a witness to testify is not only permitted, it is an element of the ethical duty of competence, *Christy v. Pennsylvania Turnpike Commission,* 160 F.R.D. 51, 53 (E.D. Pa. 1995).

The client is the one in control is the Plaintiff's deposition, which is always scary for an attorney. The lawyer's objectives of the deposition are typically as follows:

- Prevent summary judgment.
- Avoid making any statement that will be used for impeachment.
- Avoid being committed to specific factual assertions that can be proven to be inaccurate or misleading.
- Avoid saying things that will make the client appear foolish, unreliable or undeserving of the jury's support.

Most often, the *client's* objective is to tell his or her story, to show that the defendant has done wrong and to seize the moral high ground. This is very dangerous. It is antithetical to each of the above objectives, which are in the client's best interest. *The witness must understand that the deposition is not the time to tell the story or argue the case*. Easier said than done.

There is an art to giving testimony in a deposition and at trial; these arts are related but not the same. Among the important qualities of a good witnesses in either setting are:

- The ability to articulate points and explain in a direct and understandable fashion.
- The ability to be specific in providing information requested.
- The ability to discern subtle nuances of meaning and word choice in questions.
- The ability to provide specific information when asked a "why" question calling for the use of analytic reasoning.
- The ability to withstand bullying or persistent repetition of questions and continue to give the same answer.
- The ability to maintain emotional calm in a stressful environment and thereby give carefully considered answers.

These skills are easy for some, impossible for others, but teachable to most. For a deposition, there are some others, which the lawyer must help the witness to acquire:

- The witness should limit his or her answer to the specific question asked and avoid volunteering or elaborating on answers.

- Most especially, the witness must be on guard to give consistent, honest answers.

    - A good questioner will goad the witness to take an aggressive, self-serving position on a subject, intending to use the answer against the witness in a different context.

    - An argumentative, subjective approach inevitably leads the witness to assert things that turn out to be misleading or outright false.

- The witness needs to show special care lest she say something that is later contradicted by conclusive proof, damaging her credibility.

- The witness needs to give answers that are consistent with the documents, his or her prior assertions and most of all, with his or her own honest recollections.

- The witness needs to be give answers that actually respond to the questions asked when it is possible to do so.

- The witness must be prepared to acknowledge that he or she does not know or recall where that is the honest answer.

- The witness needs to be wary of slight variations in questions in a sequence that alter meaning, something lawyers regularly do, often without even being aware of it.

- The witness must be ready to concede gracefully and quickly things that are not genuinely contested, even if they are harmful to the case. Struggling against the inevitable only has the effect of emphasizing its importance.

- Ideally, the witness will have specific factual rebuttal to assertions and challenges to the plaintiff's position that are presented in the questioning.

- The witness especially needs to be attuned to the impact of certain "loaded" terms that have a meaning in common English, but which can also be terms of art having great significance to the case, such as "severe or pervasive," "unreasonable" and "good cause."

Answers that might be embarrassingly cryptic or combative, or which create the impression that the witness is being unhelpful, are less troublesome in depositions than at trial, although a witness who is unwilling to concede, for instance, the genuineness of

documents that are obviously genuine (such as documents with plaintiff's bates numbers on them) can lose credibility as a result.

Witnesses do not learn to testify effectively from being told what to do. They learn from examples based on the facts of the case and from practice. Witnesses who are intelligent and precise by nature will be effective; witnesses who lack a good sense of objectivity or analytical reasoning skills will have more difficulty.

Some suggestions for general advice:

1. You can only testify to what you know, that is, what you saw, did and heard personally. Sometimes testimony will stray into what you believe, but usually, it is about what you personally know, and there you can use the truth as your rock. As long as you are sitting on that rock, no lawyer can knock you off it. Just tell the truth as you know it.

2. This is *not* the time to tell your story. You are dictating a document for the other side to attack you with. The only risk of not saying something comes when it has been asked for by the question—then you don't dare leave it out now and testify to it at trial.

3. Your answers should be limited to the question asked, or as the traditional advice goes:

    a. LISTEN to the question.

    b. THINK about the question.

    c. ANSWER the question that was asked with a SHORT answer.

    d. STOP talking and wait for the next question.

    e. DO NOT volunteer information that you have not been asked about.

4. Pause before you answer a question—it gives your lawyer a chance to object and gives you a chance to consider the question, make sure it is one you can answer and give an accurate answer.

5. Don't be afraid to say you don't know or don't remember something. Before you testify to something, make sure you know it yourself. If you testify to something you just think is correct, be sure to qualify your answer carefully.

6. A general question calls for a general answer—not a story.

7. If the question is unclear, or your answer could mean more than one thing, or you just do not understand the question, ask for a clearer, more specific, question.

8. In a deposition, if you cannot fairly answer a question “yes” or “no,” then give an answer in your own words. Don’t be bullied into “yes” or “no” where that would be misleading or incomplete. Keep repeating your qualification of the answer.

9. Do not ask for permission to explain an answer that really needs to be explained, that is, that will leave a mistaken or distorted impression. Just start explaining, but try not to do it more than every five questions at the most.

10. Don’t shut up because the defense lawyer starts asking another question. If interrupted, the next words out of your mouth should be “I was not finished answering the last question.”

11. Avoid answering hypothetical questions. These are always a trap. Even if you think you understand the trap, you could be wrong. “I would only be speculating” may be an appropriate answer. “I don’t know, I suppose it would depend on the specific situation” and “I think that’s a legal question and I am not a lawyer” are other candidates.

12. Do not make broad, sweeping assertions of any kind—the words “always” and “never” are invitations to trouble. No one is “always” honest or anything else. Stick to giving specific facts that answer the question and don’t feel the need to justify yourself.

13. Think especially hard when the question is “Anything else?” Do not acknowledge that there is no document that could refresh your recollection on a point because you don’t know what document might be out there. Ask the lawyer if there is some document he or she has in mind.

14. Stick to your guns. Do not change your answer to any question in response to repetition of the question, no matter how persistent. A corollary: do not agree with a restatement of a prior answer without restating the entire answer. *e.g.*,

> Q. The criticisms your boss made about your performance were after this favorable performance evaluation, correct?
>
> A. Yes.
>
> Q. You don’t have any idea of what problems the boss encountered that led to these criticisms, is that right?
>
> A. I don’t believe that the boss encountered any problems, except for the fact that I was complaining about the discrimination.
>
> Q. But you do not actually know what led your boss to criticize your work, is that correct?
>
> A. I don’t know what led my boss to criticize my work after this except for my complaint of discrimination.
>
> Q. So the answer is you don’t know, correct?

A. I don't know of anything other than my complaint of discrimination.

Q. So you don't know, right?

A. I don't know other than my complaint of discrimination.

3. Protect Privilege But Get It Right

Defense counsel will likely at some point test attorney-client privilege. There is nothing improper about this, because there could be strategic reasons for you to decide not to assert the privilege. A lawyer who fails to force the issue, or at least make a record that the privilege is being asserted, runs the risk of being unprotected against being surprised by the content of privileged communications. Only if the privilege has been tested can there be a limitation on late waiver.

At the preparation stage, it is important to ensure that whatever blandishments may be hurled by opposing counsel, your instruction not to answer will be followed by your client. Explain that while the waiver decision is in the hands of the client, the privilege should be maintained unless the decision follows a conference between attorney and client. Also point out that if there are any untoward consequences of refusing to answer where you have given an instruction, the consequences will fall on you and not on the client.

The witness needs to be on guard against narrating a sequence of events which includes some spontaneous reference to the content of a communication with counsel. This is one reason to resist giving lengthy, explanatory answers. If asked a general question, give a short, general answer and wait for the follow-up questions to flesh out the detail.

It is also important to be sure that you, the lawyer, know the scope and limitations of the privilege. Information that is foundational to the privilege is outside the privilege, such as:

- ✓ the facts establishing an attorney-client relationship.
- ✓ the fact of that a privileged communication took place.
- ✓ the place, date and time, participants in and recipients of the communication.
- ✓ the general subject matter.

A direction by the client to the attorney to take some action, actions taken by the attorney and the entire subject of legal fees (except legal advice concerning fees), lie outside the scope of the privilege.

The substance of deposition preparation itself is privileged, including the instructions about testimony given to the witness, *Christy v. Pennsylvania Turnpike Commission,* 160 F.R.D. 51, 54 (E.D. Pa. 1995). But the fact that a conference with counsel during a

break concerned the testimony is discoverable, *Hrometz v. Local 550, Iron Workers,* 135 Fed.Appx. 787, 792-3 (6th Cir. 2005)(unpublished opinion).

The underlying information discussed does not become privileged as a result of being discussed between attorney and client; quotations from and descriptions of what the lawyer or client said about that information are what is privileged.

4. Should You Help The Client Understand Your Objections?

The Federal Rules of Civil Procedure were amended in 1993 to prohibit "speaking" objections designed to tell the witness what to say in response to a difficult or important question. Objections are to be brief, stated in just a few words, with the obvious intent being to prevent the lawyer from conveying suggestions about testimony to the client. But if the witness understands what some of the more common objections mean in English, the witness could get at least a hint of the landmine is.

The witness who knows what the objection "lack of foundation" means would hopefully stop and consider whether she has firsthand knowledge of the matter on which she is being questioned. For instance, defense counsel regularly ask the plaintiff whether the "pretext" being offered for their discharge is something that the plaintiff thinks the decision-maker mistakenly believes or if the decision-maker is actually lying. The true answer, in most cases, is "I don't know." But when the question appears in a sequence of questions that include points on which the witness does have firsthand knowledge, the client may answer without thinking. In an effort to sound reasonable, the witness might give the decision-maker the benefit of the doubt. This answer, which is essentially a manipulated response (how could the plaintiff ever *know* that the decision-maker genuinely believed the reason offered was true?), is a strong point in the summary judgment motion to come, even if you correct the problem in follow-up questioning.

Employee's counsel should, of course, object to the question on the basis that the questioner has not established a foundation for the question. A client who happened to be a lawyer would be tipped off by the objection to consider whether this is a question to which he or she knows the answer. This opportunity to avert disaster will tempt you to teach every client the equivalent of a law school course on the law of evidence. If you have great confidence in your witness—most especially in the witness's integrity and judgment—you can explain the meaning of the objections that will occur most often, such as "lack of foundation," "calls for speculation," "asked and answered," and "hearsay."

Before deciding to educate the witness about the meaning of particular objections, consider the very real possibility that the witness will make improper or unwise use of this knowledge. Most objections can have more than one meaning, depending on the context of a specific question. A nervous witness will often interpret an objection as requiring a particular answer. You might assert a "lack of foundation" objection to a question about a vital discussion because the questioner has failed to establish the persons present, date and place of the discussion. The witness thinks you are saying

that she should say she does not know about the discussion—many witnesses will do just this. Now you have prompted your client *not* to testify to something and leave a gap in the evidence that precludes you from disputing the defense version of this conversation.

The other problem is that this strategy could work just perfectly and put you into sanctions-land. Unless the witness has the discernment and independence to use the knowledge to be alerted to potential tricks and traps, and not to tailor her testimony according to the objection, it will become quickly obvious to defense counsel that the objection process is being used in contravention of the rules. So unless you are confident that your client is smart enough to understand what the objection means, and honest enough to give answers without regard to what objections might suggest, it is better simply to advise the client that you will make objections, and that when you do, the witness should not try to understand the objection, but simply to spend a few moments to be on guard against one of the traps and tricks discussed during preparation.

5. Show Your Client The Video "Giving Your Deposition In A Business Case"

Many years ago, Matthew Bender and the Debevoise, Plimpton law firm made a 24-minute videotape titled "Giving Your Deposition In A Business Case." It is far and away the best thing ever done to prepare a witness for an employment case, and can be used by either side in these cases. The program has actors playing the participants in a series of deposition vignettes that illustrate four key points:

(1) just answer the question and keep your answer short;

(2) pause before you answer so that you can listen hard for a "trick" question and leave your attorney time to object;

(3) don't answer an unclear question—interrogate the interrogator; and

(4) beware the foibles of memory and never guess.

Unlike a bland recitation of these bromides, the program demonstrates what will happen to the witness when each one is not followed, and then shows the same scenario with a witness who handles things properly and how this avoids the problems. There is no substitute for permitting the client to vicariously live through these deposition dilemmas before the deposition begins. Then, as the preparation proceeds, you can refer back to these problems in forecasting how the defense may try to attack the witness.

6. Practice The Deposition

Review the outline for defense counsel taking the plaintiff's deposition below and prepare by actually walking through the outline of the deposition with the client as if you were the employer's attorney. If there are two lawyers working on the case, it may pay to role-play the deposition from start to finish with one lawyer taking the deposition prepared as if actually taking the deposition. At periodic points during the mock

deposition, the questioning attorney can outline for the witness what was done well and what needs work, while the defending attorney listens and works on developing strategies for giving better answers and identifying the client's weak points as a witness. As you do a post-mortem on the practice session, you will be giving the witness specific examples of better ways to follow the suggestions for testifying listed above.

Anticipate the occupational tendencies in witnesses in this preparation. Sales people tend to have the big picture but to have difficulty supplying specific details to support their conclusions. Academics and teachers have problems giving short answers. Lawyers and accountants sometimes give overly precise or "cute" answers. Secretaries tend to be overly loyal to their bosses. Executives are absolutely certain of everything but often testify based on assumption rather than recollection—and often get it wrong as a result. Actors tend to be insecure and too easily led by the questioner.

Everyone is concerned about looking like a perfect human being. Explain to the client that it is okay to be human and that if they aspire to looking perfect, it will not be credible. At the same time, on a critical point, confidence in what the employee knows to be the truth is important.

Work with the client on what should be included in an answer when questions like "Why do you believe you were discriminated against?" are asked. The client should be clear on when to take the position of disbelieving the employer's story and prepared to defend the logical reasons for that disbelief.

Do not overlook preparing for damage testimony. Be sure the client understands that s/he is not required to offer up a number for the amount of "soft" damages like emotional distress. Get the client to open up about the emotional experience and to find words to describe the emotions and the impact on daily life and relationships, giving examples. Some people are loathe to talk about these things; they must be told that they need to open up or they are potentially giving away money. They also need to be warned that the defense's forensic psychiatrist will be able to detect anything that is fabricated or exaggerated—explain that mental illnesses have consistent patterns and that honesty is just as important on this subject as any other.

The client should be prepared—but only if asked—to talk about the day-to-day impact of the termination or sexual harassment. Defense counsel may overlook asking about this, and if so, hold it for trial. The client should be prepared, in response to a general question, with plenty of specifics: we had to skip family vacations, I could not afford to buy new clothes for six months, I was worried about paying the bills and losing medical insurance at the same time as I was ill, I was having a difficult pregnancy and the job situation had me stressed out even when I was on bed rest, and so on.

Videotaping the deposition practice will enable the client to see and hear how the testimony sounds, although this is not usually necessary for deposition preparation. If the client is not coming across well, this is probably worth doing. One of the things defense counsel will be looking for is how your client comes across and whether there is "jury appeal." Explain to the client that the most credible, sympathetic witness is the

one who does not argue, but just seems to be trying hard to get the facts right without regard to who is asking the questions or the subject of any question.

7. Prepare *Yourself*

Before you prepare the client to testify, you should know the case in depth.

1. Know and make a list of all of the applicable legal requirements for the claims you have pled and the defenses that have been raised.

2. Research the *disputed* legal points. You do not want to find out for the first time *after* the deposition has been completed that there is a critical case from the local Court of Appeals on a disputed issue. Do not rely on your general background knowledge.

3. Know the contentions that have been made to date by the defense, whether from a response to a demand letter, from a position statement to the EEOC, from the Answer and Responses To Interrogatories, or from depositions already taken in the case.

Going through this material before meeting with the client helps to ensure that no important legal or factual point will be overlooked in the preparation.

It is just as important to know everything you can about what the client is already committed to:

1. Review what has been alleged in the complaint and the answers to interrogatories. If you come across something that preparation discloses is untrue or misleading, do not wait for the deposition to clear up the point. A supplemental answer to interrogatory, amended pleading or letter to opposing counsel will avoid undue embarrassment.

2. Know every word your client has already said or written, whether in an e-mail message, a response to a job evaluation, a charge of discrimination, handwritten notes, an IDHR intake questionnaire, a loan application form, a resume or a job application. You need to anticipate the defense's impeachment ammunition and alert your client to it.

3. Review your own intake questionnaire, correspondence with the client and notes of client discussions

Develop a factual outline keyed to the disputed issues presented, showing what your evidence will be on each element of each claim you assert and what you can anticipate the defense will assert in response. Much of your evidence will come from your client, and that is the material you will need to review with the client most carefully.

Also prepare for potential disputes at the deposition. If you can foresee a privilege issue, come prepared with case law to back up your position. If you anticipate trouble

with abusive questioning or improper questioning, find out beforehand if the Judge is open to receiving telephone calls from depositions to resolve disputes arising at the deposition.

8. Teach The Client About The Applicable Law

It is usually not enough for an employment plaintiff simply to know the facts and have a refreshed recollection. So much of the case is premised on circumstantial evidence, and the legal standards are so frequently convoluted and complex, that it is crucial that the client know the legal impact of certain critical facts to ensure that it is impossible to distort the factual information being provided by the client in the deposition.

Some clients will be better than others in understanding the applicable law. Reinforce in practicing with the client for the deposition that answering questions about the law is dangerous by including a cross-examination focused on mixed factual and legal points that, if conceded by the witness, could spell summary judgment.

For instance, in a sexual harassment case with a *Farragher/Ellerth* defense, the witness should be aware that acknowledging that the employers' method of handling the complaint is "reasonable" is giving away one of the two elements of the defense, regardless of whether all the facts taken as a whole suggest the opposite conclusion. Likely the client does not even know all of the facts which would need to be considered in such an analysis—much less what the legal standard of "reasonableness" might be in the specific situation. But defense counsel will not point out these qualifications and the witness should be prepared to articulate them if they are accurate and apply. Unless you educate the witness to the importance of the common word, "reasonable," the client might testify to a legal conclusion based on the hypothetical facts that effectively assures summary judgment on the facts contained in the question.

Some other common terms that can be loaded are: "pretext," "cause," "legitimate reason," "meeting reasonable expectations," the employer's "knowledge," "conditions so intolerable a reasonable person would resign," "discriminatory intent" (or "racist," "sexist," etc.), "unwelcome," "substantial difference in age," and "willful." The only way to identify each and prepare the witness is to go through the legal issues in your case and be certain that your client fully understands all of the contentions being made on his or her behalf.

Not only does the client need to know that these terms can be the basis of trick questions, the client needs to be prepared to explain with specific detail the evidence in support the claim being made. These answers should be reviewed against all available evidence in the case, put in common-sense terms, and phrased in the words of the witness, not the lawyer. The witness needs to be able to provide comprehensive and compelling responses to questions like these:

- When did you first believe that you were being discriminated against, and why?
- Why do you believe you were discriminated against because of your [protected class]?

- Why do you believe that the employer acted out of improper motives rather than for business reasons, or even from a mistaken impression?

- Why wasn't it reasonable under the circumstances for the employer to believe that the problem was with your performance and not your supervisor's [recist, sexist, etc.] attitude?

- Did you consider [fellow employee who will give adverse testimony] a friend?

- What is it you contend that the employer should have done differently, and how would that have made a difference?

- How did you communicate to the alleged harasser that the conduct you are complaining about was unwelcome?

- How did you expect the employer to act to end the harassment you claim if you would not come forward and report it?

- What was it that made things so intolerable that you believe you were forced to quit?

Even if these questions are never asked directly, there is a good likelihood that somewhere along the way a question will be asked that calls for the answer you will prepare with the witness. The answer can take the wind out of the defense's sails.

The client must have these answers in his or her own words, not yours. They cannot be memorized effectively; many witnesses will forget your answer in the stress of the deposition. An answer phrased in the words of the witness will be much easier for the witness to remember.

More important, these answers are not usually the end of a sequence of questions, but the beginning. All of the supporting facts and details—which the witness lived—will become the subject of the follow-up questioning. This means that you also need to anticipate the follow-up questions and be sure the client has good answers. Then the substance of your response to the summary judgment motion will appear in the deposition transcript.

9. Prepare The Client For Opposing Counsel

Find out from others who have dealt with the attorney who will take the deposition what to expect. Some lawyers argue, bluster and intimidate, some charm witnesses, others just seem to go through the motions. Many will get angry and raises their voices when (1) they believe that the witness is lying and (2) when the witness is giving adverse testimony on a key issue, especially if it is unexpected.

For lawyers who argue, bluster and intimidate, the witness needs to learn to remain calm, and practice with someone who uses that approach will be helpful. Deliberately or not, the tactic tends to rattle witnesses and get them to adopt the same tone in

response. Pausing after questions and giving answers slowly will tend to slow down the intimidator's press. So will the well-timed "take the wind out of their sails" response to a challenging question—which will be made possible by exhaustive preparation.

Those who charm witnesses are more dangerous. We are all trained from early on to be polite and helpful to others, and a lawyer who takes this approach should be viewed as a viper who can at any time strike with a case-ending question on which the witness can give only one answer. The client needs to understand that the pleasant lawyer who seems interested in getting at the truth of the case really is setting traps and has no interest in obtaining anything other than admissions that will hurt the case.

10. Some Approaches To Identification of Difficult Problems

During preparation, you should encounter the potential problem areas of the case. If you have not located them, you need more preparation. Focus on what the most important points and evidence in the *defense*'s case are and you will locate them. It will be necessary to think through with the client these weak points so that the answers being given are tested.

Problems can be *factual or legal*—points that detract from the client's likeability or the equities or points that can be fatal or damaging in a legal sense. Similarly, each problem area can have a factual answer, or a legal answer, or both. Sometimes it is necessary to rely on just one or the other and take a hard stance; if so, this should come out forthrightly in the client's testimony. For instance, in an employment contract case, management's request that the Plaintiff accept a job transfer may have been perfectly reasonable from a business point of view, but if the contract prohibited it, the client should be ready to stand on the contract right and not try to argue about whether the transfer was reasonable.

The most difficult situations to counsel clients about are those in which the *client's ego* or desire to hold the *moral high ground* gets in the way of the legal claim. Clients must be educated to the fact that if you show the decision was stupid, unjustified by the facts, and the worst mistake the company ever made, the client still loses. Be sure the client knows not to take the bait when tempted to come off looking good at the expense of the case.

Contradictions are important signs of problems. For instance, an attack on the defendant for not communicating important information to the client will backfire if the client failed to provide information, unless there is a sound reason for the client's failure to do so.

Either-Or situations sometimes present themselves. An either-or response to a difficult question can be a highly effective device that defeats summary judgment. For instance, the client's strong point in a *McDonnell Douglas* case may be that either the decision-maker was influenced by a biased supervisor, or the decision-maker failed to consult the supervisor, who was the one person with knowledge about the client's performance, demonstrating that there was no performance-based reason for termination. By the

same token, being on the receiving end of an either-or situation can be devastating for the case. A common example is the argument that either the client did not report the alleged incident of sexual harassment because she was not subjectively offended, or if she was offended, she was unreasonable in failing to report.

There can be an aspect of the case that is partly helpful and partly harmful to each side. In the colorful prose of one Seventh Circuit case, this is referred to as a "*blooming cactus*," beautiful to behold but painful to embrace. If there is one of these in your case, face up to the problem, because it will not go away simply because the other side has trouble handling it as well as you. Search for a way that the situation helps you defeat summary judgment, and accept the downside, even if, for instance, it means acknowledging a limitation on recoverable damages.

Most of all, search for a way in which you can make the strongest points of the defense work for you. Did the plaintiff exhibit performance problems in the last six months of employment? Perhaps this flowed from the sexual harassment she was enduring. We (and our clients) typically challenge and defend against attacks of job performance. But your case may be one in which the performance problems can be accepted into your case and actually fulfill one of the elements of the claim—as well as taking the wind out of the defense's sails. When you can *wrap your case around the defense,* you have the best chance of winning the lawsuit.

11. Use of Documents In Preparation

A cross-examiner is generally entitled to any document that has been used to refresh the witness's recollection while testifying. Fed.R.Evid. 612. When used to refresh recollection before testifying at a trial, the rule makes disclosure discretionary with the court. *Id.* The rule applies as well to documents reviewed by a witness during deposition preparation.

There are likely to be documents that the client will need to review in preparation for testimony, particularly those that were authored by the client. It is likely that defense counsel will demand to see the documents at the deposition. There are a line of cases, not entirely consistent with one another, addressing this question in deposition practice.

The picture is complicated by two distinct ways that work product or attorney-client privilege may be involved. First, some courts have acknowledged that the selection of documents to show a witness for refreshing recollection during deposition preparation is itself akin to work product. Second, on occasion privileged documents are shown to witnesses in preparation—of course, once this is discovered, there is a battle over whether the privileged items have lost that status and are subject to discovery.

A word to the wise is simply not to encounter this latter problem—do not show privileged documents to the client during the preparation process. This ultimately may lead to an *in camera* inspection of the document and comparison of it to your client's testimony to determine whether to turn the document over to the defense.

In *Berkey Photo, Inc. v. Eastman Kodak Co.,* 74 F.R.D. 613 (S.D. N.Y. 1977), the court announced a rule that even without a calculated plan to exploit work product, the disclosure of privileged documents to a witness who uses them to refresh recollection waives privilege if they had an impact on the witness's testimony, although the court did not order it in that case because of the novelty of the issue at the time. It is not a novel issue today.

In *Wheeling-Pittsburgh Steel Corp. v. Underwriters Laboratories, Inc.,* 81 F.R.D. 8, 10 (N.D. Ill. 1978), citing a decision predating Fed.R.Evid. 612, *Bailey v. Meister Brau, Inc.,* 57 F.R.D. 11 (N.D. Ill. 1972), the court took this view of this issue:

> Under Rule 612 an adverse party is entitled to production of a writing used for refreshing recollection for use on cross-examination so that he may search out any discrepancies between the writing and the testimony. If the paramount purpose of federal discovery rules is the ascertainment of the truth, the fact that a document was used to refresh one's recollection prior to his testimony instead of during his testimony is of little significance.

Rule 612 Predicate Showing. The requirements for disclosure of documents used to refresh recollection is a showing that the document has been reviewed by (or read to) the witness for the purpose of refreshing recollection and that the witness's testimony has been impacted. In *Timm v. The Mead Corp.,* 1992 WL 32280, at *5-*6 (N.D. Ill. 1992), Judge Guzman found that the witness's testimony on the subject of the refreshed recollection must first be elicited to lay the foundation for production of the otherwise privileged items. In that case, the witness ultimately stated that he has simply "glanced" at the documents in question while copying them. Because it was not possible to tell if the documents affected the witness's testimony, the predicate for their production was not sufficient.

On the other hand, the court in *In Re Atlantic Financial Management Securities Litigation,* 121 F.R.D. 141, 143 (D. Mass. 1988) held that the witness's indication that he had reviewed the material for the purpose of refreshing recollection was sufficient to satisfy Rule 612, leaving only the question of whether disclosure was necessary "in the interests of justice." The court in *Hiskett v. Wal-Mart Stores, Inc.,* 180 F.R.D. 403, 407 (D. Kans. 1998) observed that "the court need not accept the self-serving statement of plaintiff that the review did not refresh her memory on any issue upon which she had testified. However, since it was clear that the review of the privileged document had impacted her testimony on two insignificant points, the court found that production was not in the interests of justice. *Accord, Baker v. CNA Insurance Co.,* 123 F.R.D. 322, 327-28 (D. Mont. 1988). *Suss v. MSX International Eng. Serv., Inc.,* 212 F.R.D. 159, 165 (S.D. N.Y. 2002), reviewing the legislative history of Rule 612, concluded that something more than mere reviewing of the document in question is required, and a showing of an impact on testimony is required.

Discretionary Rule 612 Determination. In contrast to the "full disclosure" approach evidenced in *Wheeling-Pittsburgh Steel Corp.,* other decisions have limited the finding

of a waiver of privilege to situations in which the privileged document provided unique access to information to the deponent, resulting in a greater risk of selective use of the information. *Derderian v. Polaroid Corp.,* 121 F.R.D. 13, 16-17 (D. Mass. 1988). Other cases look, for example, to whether work product is being properly invoked, whether the material is factual or consists of attorney mental impressions and whether the request represents a fishing expedition. *Awkwright Mutual Ins. Co. v. National Union Fire Ins. Co.,* 1994 WL 510043, at *16 (S.D. N.Y. 1994).

In *Sauer v. Burlington Northern RR Co.,* 169 F.R.D. 120, 123 (D. Minn. 1996), the discretionary determination was made by the court's review of the requested document *in camera,* which led the court to conclude that there was nothing in the document that would have refreshed the witness's recollection in an appreciable way or assisted defense counsel in questioning.

Work Product Protection For Documents Selected By Attorney. In *Stone Conatiner Corp. v. Awkwright Mutual Ins. Co.,* 1995 WL 88902, at *3-*4 (N.D. Ill. 1995)(collecting cases), the court held that where the documents shown to the witness were all items that had been provided in discovery, identification of the documents provided to the witness for review was not required. He court distinguished other cases holding to the contrary on the ground that in those instances, the documents were not already produced, citing *In Re San Juan DuPont Plaza Hotel Fire Litigation,* 859 F.2d 1007 (1st Cir. 1988).

By contrast, in *Nutramax Laboratories, Inc. v. Twin Laboratories, Inc.,* 183 F.R.D. 458, 467 (D. Md. 1998)(collecting cases), the court concluded that when otherwise discoverable documents collected by counsel for review by witnesses are put to "testimonial use" then there is an implied waiver of the work product doctrine and the deposing party may discover which documents were provided. The court enumerated several factors affecting the determination of whether there has been sufficient testimonial use to call for production, including (1) whether the witness is an expert ; (2) whether the evidence concerns a specific issue or the subject of the case generally; (3) when the events took place in relation to the deposition; (4) when the documents were reviewed; (5) the number of documents reviewed; (6) whether the documents was created by the witness; (7) whether the document contains attorney mental impressions or facts; (8) whether the documents have already been disclosed in the litigation; and (9) whether there are concerns with manipulation, concealment or destruction of evidence.

12. Consider A Pre-Deposition Protective Order Motion

The rules and cases severely limit the ability of counsel in a deposition to restrict improper questions by instructions not to answer, and suspending a deposition to make such a motion is a risky move, as there is a good prospect for sanctions on one side or the other in such cases. If the judge will not be available to take telephone calls to resolve disputed questions on sensitive points, consider whether it would be wise to make a pre-deposition motion on subjects that could come up and present serious issues, such as (1) identity of current prospective employers; (2) financial information

unrelated to damages; (3) intensely personal matters, such as personal sexual history of a sexual harassment plaintiff; (4) personal information about family members where not relevant to the issues; and (5) a subsequent employer's sensitive competitive information. Both to ensure that the motion is necessary and to establish a record of compliance with the requirement of a discovery conference, present the issue to defense counsel and seek agreement in advance of the deposition, if possible. This can also allow the issue to be framed for the judge.

13. Last-Minute Preparation: Reassure The Client

All this preparation will probably make the client edgy. That edge is important—keep it intact. But monitor the client's mental state to ensure that the stress is kept at a manageable level.

If appropriate, point out that the chances are that the other side is unlikely to be even close to being as well prepared for the deposition as the client. In most cases, the dangerous traps are not that difficult to avoid and then if the witness just sticks to the truth, the case will be fine.

The truth is that in most cases, there are a limited number of factual disputes once the dust settles and a particular answer to a particular question is not likely to be fatal to the case—where that that could be, you have prepared for the question. Remind the client that while you would prefer not to have to clarify anything, you will have a chance to fix anything that has gone wrong.

Ask about any particular needs—you do not want the client worrying about being in time to pick up a child from day care, or not having regular medication or nourishment during the deposition. Discuss with the client how to dress.

Discuss whether there is someone whose presence at the deposition would be calming—a good friend, spouse or significant other, perhaps someone from your office that has worked with the client closely. The rules are now clear that unless there is a protective order in place before the deposition, there are no restrictions on who can attend the deposition, even another potential witness. But be certain that if someone else attends, that person knows how to behave and in particular does not do anything that the defense attorney can point to as influencing the answers.

Tell the client to go to bed early and not to drink the night before the deposition. Be sure the client is in your office early and that you leave in enough time for the deposition to start on time.

B. Management's Counsel

1. Even *Before* Preparing For The Deposition

There are some steps required even before starting preparation for the deposition. There may be tactical advantages to taking the plaintiff's deposition before document discovery, if that is possible. Bear in mind, however, that using a document in a deposition that has not been included in a Rule 26(a) disclosure can create sanctions problems—and if plaintiff's counsel is on her toes, the ambush will be averted by a call to the court or halting the deposition to obtain a protective order.

2. Reviewing and Selecting Documents

Among the more important documents to review and become familiar with are:

- E-mail messages
- Performance evaluations and particularly self-evaluations
- Written complaints while the plaintiff was employed
- Charges and intake questionnaires with government agencies
- Investigation reports on the plaintiff's complaints, if any
- Examples of the plaintiff's actual work product
- Demand letters
- Court pleadings, interrogatory answers and documents produced

This review has two purposes: first, to become familiar with the evidence in the case and particularly any admissions that have been made by the plaintiff; second, to understand the plaintiff's personality and likely manner of responding to questions.

3. Legal Research

Legal research anticipating the summary judgment motion should be undertaken, if needed, to have a solid sense of the legal requirements that the plaintiff must satisfy to prevent summary judgment. Detailed analysis can disclose less-than-obvious defenses, as well as the exceptions into which plaintiff's counsel is likely to seek to squeeze the facts of the case. In addition, key words and legal standards can be incorporated into questions in a way that leaves little room for argument should the plaintiff provide the desired response.

4. In-Depth Interviews

Investigation is a critical part of preparing for the deposition. The third step of preparation is discussion with the individuals who knew and worked with or supervised

the plaintiff. The chances are that the information in the written record, even with the detail provided by an e-mail, will be less than comprehensive. The plaintiff was there, and has a spin to offer on the events of the case. Even with a supervisor or human resources person at the deposition to help, superior knowledge of the background facts will give the plaintiff an advantage unless you have the "rest of the story" from those who also know firsthand. You may also find a wealth of information in irrelevant facts that could provide clues on what the plaintiff might be prompted to say in a deposition.

These discussions should include obtaining information about the plaintiff, the plaintiff's personality, and things that the plaintiff can be expected to say in response to difficult questions. Co-workers and supervisors, including past supervisors, may have exceptionally helpful insight into what you can expect to hear at the deposition.

Finally, these discussions can be used to become familiar with the business background of the case, if you do not already have extensive experience with both the industry and the client. It is always vital to understand how the client's business works, to understand how the plaintiff and the plaintiff's job fit into the business and to understand the history of the key issues affecting the plaintiff's job. Knowing these background facts can give you a leg up on plaintiff's counsel, who is likely to understand less about this that you can. Knowing these basic background facts will provide opportunities for you to get admissions that plaintiff's counsel may not anticipate, and which can shape the case in significant ways. For instance, you may know that time or precision is always of the essence in some particular aspect of the plaintiff's job that is not obvious to outsiders; a seemingly small error may loom much larger as a result. Because the plaintiff also knows this background fact, the plaintiff may surprisingly admit the urgency or need for special care, especially if you demonstrate that you know why it is important.

5. Prepare Your Exhibits

Before the morning of the deposition, you need to have your exhibits in order and ready. They need to be selected, put in order, and at least three copies (more in multi-party cases) of each assembled together—one for the witness, one for opposing counsel and one for you. Marking the exhibits with exhibit numbers beforehand can save time during the deposition, which is a valuable commodity. If there are particular points pertaining to the document, it can be helpful to put a post-it note reminder and/or to highlight key text on your copy as a reminder.

The order of exhibits needs to be coordinated with your outline. As you prepare the outline, part of what will dictate the order in which you cover topics will be a desire to close off obvious escape routes on your more challenging questions by committing the witness to facts that preclude the use of those escape routes. The documents that will help you nail down those points need to be numbered to fit with the questioning you do.

Simply because you mark an exhibit does not mean you must use the document. If you get what you wanted from the witness on the subject without using the document, and you do not need the plaintiff's testimony to get the document into evidence, there is no need to use it, and plaintiff's counsel may not be alerted to other things the document

says because it does not appear as a deposition exhibit, and thus may not use it against you in subsequent discovery.

6. Developing An Outline

My outlines for depositions of plaintiffs are a mixture of short phrases and words to identify a subject to cover and specific, pointed (or carefully worded) questions to be asked specifically. The outline is generally a mixture of different organizing approaches. The order of what is covered earlier and later is generally dictated at least in part by a desire to ensure that easy escape routes on difficult points are closed off by questions that do not convey their purpose at the time they are asked, so the witness cannot guess the purpose to which the answer is to be put. There are usually at least some areas in which the plaintiff will believe that an answer exaggerated in one direction will help the case—and I may even egg the plaintiff on to make the point more aggressively. Only later—sometimes not until the summary judgment motion or at trial—does it become clear how the answer will be used to further the defense.

There are different philosophical approaches to the plaintiff's deposition. Some attorneys are seeking damaging admissions only, and prefer not to provide the plaintiff with an opportunity to "tell the story." While this approach may be appropriate with certain hostile third-party witnesses whose part in the case is both limited and clear, it is not a wise approach to a plaintiff's deposition. This only provides the plaintiff with an opportunity to craft the story that best defeats summary judgment, generally at least partly on grounds that were not obvious at the time the deposition was taken.

The most important objective of the deposition is to ensure that there is no room open for the plaintiff to provide new and additional facts that can be used to forestall summary judgment. Tightly controlled leading questions will likely miss points that could be controlled with good interrogation. Those points will not only become building blocks of the opposition to summary judgment, they also mean that there is little to work with in restricting the plaintiff's trial testimony on those issues.

7. Organizing Approaches

Here are some approaches to organizing the outline of the deposition to consider. Each will be useful in some situations, not in others; each may be used for the entire deposition or only in parts:

- Chronological: this is the most comfortable and easy to follow approach and avoids flashbacks that can leave you confused in the course of questioning.

- Allegations: The witness is shown a document setting out the claim(s) (usually the complaint) and walked through it paragraph by paragraph being interrogated about the basis in fact for each allegation. The plaintiff may be asked separately the basis for each allegation, for what firsthand

knowledge the plaintiff has of the subject, and for what other information the plaintiff is aware of (and how).

- Legal Issues: It may be easier to subdivide the case into the key legal issues and focus on the elements or facts associated with each issue separately.

- Business Topics: Rather than focusing on the legal significance of particular facts, it may be helpful to break down the case according to business subjects. For instance, a salesperson fired for performance problems could be questioned on a customer-by customer and/or product-by-product basis. A case depending on a defense of poor performance could be divided according to the specific job responsibilities with the plaintiff's testimony on each job duty covered separately.

- Exhibit Driven: Some cases lend themselves to an approach that is focused on key documents and the facts to which each is addressed.

- Confrontation With Defense Case: This approach is similar to the one that reviews allegations, but is organized around key points in the defense case. On each point, the plaintiff's initial version is elicited, keeping the plaintiff under control with documents and prior admissions, and then the defense case is put to the plaintiff with the challenge to deny it and to provide evidence that would support the denial.

- Random: A plaintiff who is likely to be aggressive in setting out the case may be kept off-balance by a deliberate strategy of jumping between unrelated subjects every few minutes. This can be effective in keeping the witness from becoming comfortable as well as making it difficult for the witness bent on making a point from being clear on what point is to be made on which issue.

There are doubtless other approaches. The key thing is to have an approach and organizing principle that serves the purposes of the deposition.

8. Introductory Questioning

Be sure the court reporter administers the oath before the deposition starts. Once I missed this critical omission until about two hours into the deposition.

There are certain questions that are no good unless they are asked at the outset. For instance, if one of your "clean up" questions is "What documents did you review in preparation for your testimony today?" you are likely to get the answer "Gosh, we have looked at so many exhibits today, I'm not sure any more, but all of them were in there." *But see Timm v. The Mead Corp*., 1992 WL 32280, at *5-*6 (N.D. Ill. 1992)(requiring document-by-document showing that witness recollection was refreshed).

Begin with some directions to the witness designed to close off some favorite, if flimsy, excuses that trial witnesses employ to excuse contradictory deposition responses:

- Don't answer questions you do not understand, just let me know you do not understand. (When the plaintiff claims not to understand a clear question, your follow-up can be "What is it about the question you do not understand?")

- Be sure to tell the witness that under the rules, questions about the meaning of your questions must be directed to you, not the witness's attorney. *e.g. Hall v. Clifton Precision,* 150 F.R.D. 525 (E.D. Pa. 1993); *Damaj v. Farmers Insurance Co., Inc.,* 164 F.R.D. 559, 561 (N.D. Okla. 1995).

- Wait for the question to be completed so that the court reporter can take down both the question and the answer.

- Answer orally, no head nods, and try to avoid uh-huh, because the meaning may be difficult to discern from a transcript—use "yes" and "no" instead.

- If you don't know the answer, just say so—you are under oath to do so. Same goes for not remembering—if you do remember, you must tell, but if you do not, just say so.

- Don't assume you are supposed to know anything about what the answer should be from the tone of the question. You are here to testify to what you know from your own observation.

- Don't let me interrupt your answer. If you are not finished with an answer when my next question starts, tell me that right away. I want you to finish each answer.

You want to establish that the witness is competent to testify. Ask if there is any reason that the plaintiff cannot understand questions and provide answers based on recollection. This question can be directed to both witness and attorney. Ask if the witness is under any medication or has ingested any drugs and if so, get the specific medication and dosage and when it was taken. Establish that the plaintiff is well-rested and prepared to give testimony, and not suffering from any emotional or physical condition that would interfere with testifying.

Ask the plaintiff is he or she has ever been convicted of a felony. You come across this from time to time and it's a proper question.

Has the plaintiff discussed the testimony or case with anyone? Get the details of the deposition preparation. Information on the dates and times and participants in the discussions is not privileged and helps defeat later claims that the witness did not understand what was going on. You never know, there may have been discussion about testimony with someone where there was no applicable privilege. Ask if there has been discussion with friends, co-workers or family and find out what was said. Occasionally you find out that a plaintiff has not been prepared for the deposition at all

and often it is for a very brief period. This is a hint that the plaintiff may not be prepared to deal with some of your loaded legal questions that are coming.

Has the plaintiff reviewed any documents or obtained any information in preparation for the deposition? Suggest to the plaintiff that the preparation must have jogged his or her memory on some things, then request that the documents reviewed be provided on the spot, citing Fed.R.Evid. 612. This is actually a complicated issue with contradictory case law, which is summarized in part I-A-11 above. You can take a break while plaintiff's counsel goes and gets them or has them brought over. This will tell you some things about both the extent of preparation and the topics that plaintiff's counsel considered important.

Review the document request. You may find that the plaintiff has never seen it before, or does not recall seeing it. Ask about what documents the plaintiff keeps, especially on the home computer and PDA. Find out if the computer was used to do work at home (usually the answer is "Yes.") and if it has been used in job-hunting (invariably). This can even open the door to a forensic examination.

Try to establish what documents have been sought that have not been produced—this allows you either to suspend the deposition until you have all the documents or to bring the witness back for more once you have them.

Walk through the persons identified in Rule 26(a) disclosures and interrogatory answers as having knowledge of particular subjects and quiz the plaintiff about what each one knows about.

9. General Topic Checklist

There are some subjects that should be included in every plaintiff's deposition because they can lead to useful information for the defense. Some topics, such as the family members and ages, should be available from documents and time should be spent on them only if the objective is to put the plaintiff at ease.

These subjects do not relate directly to the merits of the case but can lead to useful information. It is not necessary to ask about these at the start of the deposition, but they should be covered at some point.

- Educational history
- Military history
- Chronological work history—use the plaintiff's resume. Ask for supervisor's and co-worker's names, whether performance evaluations were performed and how they were, the plaintiff's reason for leaving, whether there was discipline or problems getting along with others or performing the job. Most people will tell of a fairy tale life, which documents, if not already obtained, will contradict to some extent.

- Marital history—ex-spouses can be useful sources of information.

- Job history with the defendant employer. This can be covered early in the deposition and used to cover some of the background facts about the industry, company and job that plaintiff's counsel may not see coming.

- Who were your friends/mentors when you were working for the employer? This enhances the credibility of anything these folks say that helps the defense.

- Who did you have conflicts with when you worked for the employer? This commits the plaintiff to a position on this issue before he or she necessarily knows if the person's testimony will be helpful or not. Get details of conflicts to which the plaintiff admits. These can turn out to be non-discriminatory reasons for adverse actions.

- Job search: find out if it was half-hearted or aggressive and push for details and specifics. Ask if there is documentation and if not, why not. See if the plaintiff will admit to throwing records away that would provide detail, and test memory of specifics if documents are not provided. Probe for and if possible, nail down that there is no reason to believe that the former employer is giving unfavorable references.

- The story of the plaintiff's being told of the termination, or demotion or denial of promotion or results of the investigation. You want this entire story on the record to avoid later embellishment.

- Damage claim: insist on knowing each element of damages claimed and how the plaintiff calculates the damages sought.

- Emotional injury: did the plaintiff seek counseling or treatment. If not, why not? Insist that the plaintiff recount each symptom, when it appeared and diminished, how his or her life and relationships were affected. Ask about the day-to-day impact of what the plaintiff claims was the wrongful act and be sure to put a *Q. "Anything else?" A. "No"* exchange at the end of that testimony. Get this testimony now, before the plaintiff has the benefit of an expert witness to shape the answers. Be sure to ask about vacations and find out if there are pictures or video from the vacation—this could be critical evidence of the lack of emotional distress.

10. Case-Ending Tools

The outline of what to cover on the merits of the case is necessarily case-specific. But there are certain things you can inquire about while reviewing the events that form the basis for the claim that might not be so obvious, but which can yield inadvertent case-ending answers. These must be used where they fit the evidence, of course, and in connection with challenging questions that imply that if the harassment was *really* bad,

the plaintiff would have taken more drastic action, or that if the discrimination was really that blatant, the plaintiff would have made more of a stink about it.

- At that time, what did you think about [discrimination/ retaliation/harassment]? (Witnesses will sometimes say they figured it would just pass.)

- What you would say was the decisive event that led to your being terminated? (Witness will sometimes identify an action that was morally proper but not protected activity as decisive)

- How did it make you feel when [harassment occurred]?

    - Looking back, would you say you were trying to minimize the problem?

    - Did it prevent you from doing your job?

    - Did it prevent you from coming to work?

    - But you did not like it, correct?

    - But you were also reluctant to make a big deal of it, right?

    - And so you did not, correct?

    - You would not call these [number] incidents severe, would you? And it did not seem severe at the time, correct?

    - This was not happening every day, was it? So you would not call it pervasive, would you? You did not perceive it as such at that time, correct?

- Did you believe that this was the real reason for termination at that time?

    - If not, what did you think was the real reason? Why?

    - What did you do about it?

    - Did you go to a higher level in the company? Why not?

    - Did you go to HR? Why not?

    - Has your view about the real reason changed? How and why?

- What steps did you take in response to [harassment]?

    - Did you call the police? Why not?

    - Did you report it to HR? Why not?

- Did you go to your mentor? Why not?
- Did you contact an attorney? Why not?
- Did you call the company hotline? Why not?

- When you discussed this with your friends, what did you tell them? What did they suggest that you do? Did you do it? Why not?
- What is your basis for believing [employer acted out of discriminatory/ retaliatory motive] ?
  - What documents do you have that support that belief?
  - What testimony or statements from witnesses do you have to support that belief?
  - You don't know firsthand, correct?
  - You are not in a position to prove that [defense testimony] is a knowing lie, correct?
- No one involved in the decision ever uttered a racist statement in your presence, correct?
- No one involved in the decision ever uttered a racist statement ever, as far as you know, correct?
- You were given a reason for the termination at the time, correct?
- I understand that you do not agree with the decision. But you don't have any basis to question that [decision-maker] really believed [explanation], correct?
  - What is the basis for your conclusion?
  - What documents do you have that support that belief?
  - What testimony or statements from witnesses do you have to support that belief?
  - You don't know firsthand, correct?
  - You are not in a position to prove that [explanation] is a lie, correct?
- You never signed an agreement of any kind with the company, correct?
  - There was nothing except this employee handbook that you claim limited the company's right to terminate you, correct?

- This language you pointed to here is the only thing you read that you thought limited that right, correct?

- You see this language in bold in the front of the handbook—would you read it into the record?

- It says the company had the right to terminate your employment, correct?

- This was not hidden somewhere in the back of the book, correct? It's right in the front?

- And you saw this as soon as you opened this handbook the first time, correct?

Lines of questioning like this, as obvious as they seem, sometimes elicit answers that form the basis for a summary judgment. Even if not effective to that end, it helps to nail down these answers to limit the scope of the claims and the trial testimony.

II. AT THE DEPOSITION: BEING MINDFUL IN THE MOMENT

A. Some Important Legal Points For Both Sides

1. Who May Attend

In federal court, absent a protective order, anyone. The rules were modified in 1993 to clarify this point. Formerly, it could be contended that the rule on exclusion of witnesses at trial, Fed. R. Evid. 615, should be applied to depositions. This meant that only one corporate representative was permitted to be present. No longer, although the court retains the discretion over discovery to order exclusion of witnesses in response to a motion for a protective order, and also to order that the witness not review the transcripts, 1993 Advisory Committee Note to Fed.R.Civ.Proc. 30(c). Fed.R.Civ.Proc. 30(c) now expressly excludes Evidence Rule 615 from those applicable in depositions.

2. Objections To Preserve The Record

The rules *permit* objections to anything that plaintiff's counsel believes violates the rules of evidence. Under the *Hall* decision [discussed below in the discussion of conferences between attorney and client during a deposition], attorneys are prohibited from making objections *other than* to the form of the question, but where objections to relevance and other objections not subject to waiver have been made properly and sparingly, there is no reason to prohibit them. *Birdine v. City of Coatesville,* 225 F.R.D. 157, 158 (E.D. Pa. 2004).

Succinct and Concise Objections. The rules lay down strict limitations on how objections are to be made. Rule 30(d)(1) requires that objections be stated concisely and in a non-argumentative and non-suggestive way. The court in *Breaux v. Haliburton*

Energy Services, 2006 WL 2460748, at *4 (E.D. La. 2006), the court provided an example of what the rule contemplates: "'Object to form. Compound. Calls for information beyond her personal recollection' succinctly and economically stated the objection." In that instance, however, the objecting attorney went on to elaborate on the objection, the court concluded that the objection became argumentative. The court in *State Farm Mutual Automobile Ins. Co. v. Dowdy,* 445 F.Supp.2d 1289, 1294 (N.D. Okla. 2006) directed that "If the form of the question is objectionable, counsel should say nothing other than 'object to the form of the question' and state the basis for the objection."

Objections Waived When Not Asserted. There is one type of objection that must be made at the deposition or it will be deemed waived, and this becomes a matter of utmost importance at trial if the witness becomes unavailable—suppose the client becomes disabled, for instance? The objection that *must* be asserted in the deposition is an objection to form that could be corrected to allow admissible testimony if the questioner was made aware of the defect. The logic of the rule requires that the objecting attorney spell out the nature of the objection with specificity. Do not assume that "object to the form of the question" will be sufficient to preserve your objection.

The court in *Couch v. Wal-Mart Stores, Inc.,* 191 F.3d 455, 1999 WL 623454, at *3 (7th Cir. 1999)(unpublished opinion) addressed an objection to a sequence of questions as leading, observing that the objection had not been properly made at the deposition, and that it would not be well-taken in any event because the adverse party is permitted to ask leading questions. In *Daubach v. Wnek,* 2001 WL 290181, at *1 (M.D. Ill. 2001)(Hart, J.), the court listed leading questions, non-responsive answers as objections that must be asserted during the deposition.

The court in *State Farm Mutual Automobile Ins. Co. v. Dowdy,* 445 F.Supp.2d 1289, 1293 (N.D. Okla. 2006) listed the following objections to form as being within the waiver rule: 1) ambiguous; 2) vague or unintelligible; 3) argumentative; 4) compound; 5) leading; 6) mis-characterizes the witness's prior testimony; 7) calls for a narrative; 8) calls for speculation; 9) asked and answered; 10) assumes facts not in evidence. The court also noted that Fed.R.Evid. 103 requires that objections include the specific ground if it is not apparent from the context. *Accord, Harpoer v. Griggs,* 2007 WL 486726, at *2, n. 1 (W.D. Ky. Feb. 12, 2007)(listing objections for questions that are leading, argumentative, overly broad, lack foundation, call for speculation, or are based on facts not in evidence as subject to waiver). The court in *Sequoia Property and Equipment Limited Partnership v. United States,* 2002 WL 507537, at *2 (E.D. Cal. 2002)listed hearsay, opinion evidence and materiality as objections that are not valid in depositions because of the scope of discovery. It may be, however, that a hearsay objection, if made in the deposition, could prompt further questioning that would permit admission of the evidence (for instance, by laying a business records foundation) and should be asserted at the deposition even though the question would not be improper as a discovery question.

"Speaking" Objections. Court universally regard "speaking" objections as offensive and improper, for several reasons. A "speaking" objection is one which includes an

argument or elaboration on the basis for the objection. They are prohibited for several reasons: (1) they tend to suggest answers to the witness; (2) they effectively turn the attorney for the deponent, rather than the deponent, into the witness; (3) they tend to waste time that should be spent on securing evidence on colloquy between counsel; (4) they are, or are viewed by courts today, to be an effort to obstruct the truth-seeking process. Indeed, the cases in which speaking objections are the subject of condemnation by the courts tend to be cases in which the deponent's counsel has been guilty of some or all of these improprieties, and often others as well. For example, in *McDonough v. Keniston,* 188 F.R.D. 22, 24 (D. N.H. 1998), the court quoted the speaking objections in the transcript and identified how the objection influenced the witness's answers. In *Morales v. Zondo,* 204 F.R.D. 50, 54-58 (S.D. N.Y. 2001), the court observed that the deponent's attorney appeared on 85% of the transcript pages with statements other than an objection to form or request to have testimony read back. The deponent's attorney criticized the manner of questioning, personally insulted opposing counsel, gave the witness interpretations of the questions and directions on answering and asked questions about the questions. All of this lead to sanctions for frustrating the examination, unnecessarily prolonging the proceedings and demonstrating bad faith. In *Armstrong v. Hussman Corp.,* 163 F.R.D. 299, 302-303 (E.D. Mo. 1995), counsel objected to a question, essentially for mischaracterizing the testimony, describing his version of what the prior testimony had been, which was immediately adopted by the witness. The court observed: "Because attorneys are prohibited from making any comments, either on or off the record, in the presence of a judicial officer, which might suggest or limit a witness's answer to an unobjectionable question, such behavior is likewise prohibited at depositions. *Birdine v. City of Coatesville,* 225 F.R.D. 157, 158 (E.D. Pa. 2004) branded improper a request by the deponent's counsel for a clarification of the question because it was up to the witness to seek clarification. The effect of this approach is to require the deponent's attorney to wait until the questioner has completed the questions before attempting to clarify the meaning of answers a witness gives to an unclear question.

Non-Monetary Sanctions. In *Wilson v. Sundstrand Corp*., 2003 WL 22012673, at *5—*6 (N.D. Ill. 2003)(Kennelly, J.), the court imposed an appropriate sanction on where the deponent's counsel asked a question of his own after an answer to a question, suggesting that the witness add to the answer. This might properly have been done when the interrogating attorney was done, but because of the interruption and improper suggestion to the witness, the court struck the witness's answer that adopted the suggestion of his counsel to add to his answer. This meant that if the witness offered the supplemented response at trial, opposing counsel could impeach the witness based on the original, more limited answer originally given.

Privilege. Objections based on privilege must be stated concisely and if no privilege is asserted, or the wrong privilege is asserted, the privilege is waived, *e.g., Moloney v. United States,* 204 F.R.D. 16, 20-21 (D. Mass. 2001). It is then incumbent on inquiring counsel to follow up to obtain a clear statement of the privilege being claimed and the basis, as well as the foundational information from the witness (date, parties, location of communication and a general statement of its subject matter). *Id.*

Blanket instructions not to answer questions based on privilege are improper and will be overruled and sanctioned, *e.g., Resolution Trust Corp. v. Dabney,* 73 F.3d 262, 266 (10th Cir. 1995); *Langer v. Presbyterian Med. Ctr.,* 1995 WL 79520, at *11-13(E.D. Pa. 1995). Nor are creative efforts to fashion a "privilege" out of a privacy interest a sufficient basis for instructions not to answer questions, *Gober v. City of Leesburg,* 197 F.R.D. 519, 520-21 (M.D. Fla. 2000).

3. Instructions Not To Answer

Objections are taken down and included in the record and testimony taken subject to the objection, Rule 30(c). Instructions not to answer a question are to be made only where necessary to preserve a privilege, to enforce a limitation on discovery directed by the court or to present a motion for protective order (when terminating the deposition).

The cases consistently find instructions not to answer for other reasons to be prohibited, even where the questioning is highly improper, *e.g., Redwood v. Dobson,* 476 F.3d 462, (7th Cir. Feb. 7, 2007)("Webber justifiably could have called off the deposition and applied for a protective order… Instead he told Gerstein not to answer, which was untenable as no claim of privilege has been advanced."); *Circle Group Internet, Inc. v. Atlas, Pearlman, Trop & Borkson,* 2004 WL 406988, at *2 (N.D. Ill. 2004)(Lefkow, J.)(questioning beyond the scope of Rule 30(b)(6) deposition notice improper but instruction not to answer also improper); *Nauman v. Abbott Laboratories,* 2006 WL 1005959, at *7 (N.D. Ill. 2006)(Brown, M.J.)(relevance objection insufficient to justify instruction not to answer); *Cabana v. Forcier,* 200 F.R.D. 9, 16-18 (D. Mass. 2001)(flimsy relevance objections and instructions not to answer "constitute the kind of frivolous delay of discovery that Rule 37 was designed to prevent."); *Langer v. Presbyterian Med. Ctr.,* 1995 WL 79520, at *9 (E.D. Pa. 1995)(calling for strict application of the rule prohibiting instructions not to answer questions based on relevance).

4. Conferences Between Deponent's Attorney and Deponent

Anyone who has taken many depositions knows the frustration associated with having the witness parrot the attorney's objections or observations on the record, or change testimony following a break in the action to contradict prior testimony favorable to the questioner. Aided by an attorney's acute appreciation of the implications of particular testimony, the witness gets a periodic—and privileged—'heads-up" that enables the witness to contract amnesia or "recall" brand new facts that will defeat or facilitate summary judgment. It is this concern that regards conference between deponent and counsel during a deposition as a barrier to the truth.

Anyone who has submitted many witnesses for deposition knows that the questioner, skilled in knowledge of the law and experienced in courtroom activity, has an advantage over the witness sufficient to pose unfair questions that can leave a less sophisticated, less intelligent, less quick-witted witness in a state of complete confusion and even to testify to (or appear adopt) inaccurate admissions. It is the desire to even this playing

field that prompts lawyers to coach deponents during breaks and sometimes prompts suggestive objections and intrusions into the questioning.

There is an apparent split in authority over whether deponents and their attorneys may confer with one another *at all* during depositions on subjects unrelated to privilege issues that come up. On one side is *Hall v. Clifton Precision,* 150 F.R.D. 525, 528. Pa. 1993), which is cited frequently because of this colorful language:

> The underlying purpose of a deposition is to find out what a witness saw, heard, or did—what the witness thinks. A deposition is meant to be a question-and-answer conversation between the deposing lawyer and the witness. There is no proper need for the witness's own lawyer to act as intermediary, interpreting questions, deciding which questions the witness should answer. The witness comes to the deposition to testify, not to indulge in a parody of Charlie McCarthy, with lawyers coaching or bending the witness's words to mold a legally convenient record. It is the witness—not the lawyer—who is the witness. As an advocate, the lawyer is free to frame those facts in a manner favorable to the client, and also to make favorable and creative arguments of law. But the lawyer is not entitled to be creative with the facts. Rather, a lawyer must accept the facts as they develop. Therefore, I hold that a lawyer and client do not have an absolute right to confer during the course of the client's deposition.

Under *Hall,* the deponent and attorney may not confer even during recesses of the deposition, except on matters of privilege. This blanket rule was justified by the *Hall* court by analogy to the courtroom setting, in which district courts have ordered lawyers and witness-clients not to confer even during lunch and overnight breaks because of a concern about witness-coaching, citing *Aielo v. City of Wilmington,* 623 F.2d 845, 858-59 (3d Cir. 1980). From this premise, *Hall* holds that the absence of a judge should not alter the landscape, so it imposes a blanket "no-conferences except pertaining to privilege" rule. *Hall,* 150 F.R.D. at 528-29. And if such conferences do occur, the court added, the attorney-client privilege does not apply to what is said by the lawyer to the witness. *Id,* 150 F.R.D. at 529 n.7.

Without discussion of the specific point here, Judge Castillo of the Northern District of Illinois has cited *Hall* with approval on this specific point of deposition practice, *Chapsky v. Baxter Healthcare Corp.,* 1994 WL 327348, at *1 (N.D. Ill. 1994). A number of courts have cited and followed *Hall's* "no conferences with the witness" rule, *e.g., United States v. Phillip Morris Inc.,* F.R.D. 418, 420 (D. D.C. 2002); *Plaisted v. Geisinger Med. Ctr.,* 210 F.R.D. 527, 532-33 (M.D. Pa. 2002); *Morales v. Zondo,* 204 F.R.D. 50, 53 (S.D. N.Y. 2001); *Frazier v. SEPTA,* 161 F.R.D. 309, 315 (E.D. Pa. 1995).

On the other side is *In Re Stratosphere Corporation Securities Litigation,*182 F.R.D. 614, 621 (D. Nev. 1998), which agrees that conferences for reasons other than privilege while a question is pending, but with respect to conferences generally, observes:

> It is one thing to preclude attorney-coaching of witnesses. It is quite another to deny someone the right to counsel. Even the court in *Hall* notes in footnote 5 that the right to counsel is an issue that has not been decided in this context. It is this court's opinion that the right to counsel does not need to be unnecessarily jeopardized absent a showing that counsel or a deponent is abusing the deposition process.
>
> . . .
>
> It is this Court's experience, at the bar and on the bench, that attorneys and clients regularly confer during trial and even during the client's testimony, while the court is in recess, be it mid-morning or mid-afternoon, the lunch recess, or the evening recess. The right to prepare a witness is not different before the questions begin than it is during (or after, since a witness may be recalled for rebuttal, etc., during trial). What this Court, and the Federal Rules of Civil Procedure seek to prevent is coaching the witness by telling the witness what to say or how to answer a specific question. We all want the witness's answers, but not at the sacrifice of his or her right to the assistance of counsel.
>
> . . .
>
> This Court will not preclude an attorney, during a recess that he or she did not request, from making sure that his or her client did not misunderstand or misinterpret questions or documents, or attempt to help rehabilitate the client by fulfilling an attorney's ethical duty to prepare a witness. So long as attorneys do not demand a break in the questions, or demand a conference between questions and answers, the Court is confident that the search for truth will adequately prevail.

This position has been adopted by other courts that have examined the issue, *e.g., McKinley Infuser, Inc. v. Zdeb,* 200 F.R.D. 648, 650-1 (D. Colo. 2001); *Odone v. Croda Int'l., PLC,* 170 F.R.D. 66, 68 (D.D.C. 1997); *State v. King,* 205 W.Va. 708, 520 S.E.2d 875, 881-83 (1999).

Lurking just below the surface of this problem are decisions, particularly criminal cases, dealing with trial instructions by judges to parties not to discuss their testimony, or even to confer at all, with their counsel while they are testifying. Blanket prohibitions on overnight conferences with counsel violate the Sixth Amendment, *Gedders v. United States,* 425 U.S. 80, 96 (1976), although prohibitions during breaks have also been upheld, *Perry v. Leeke,* 488 U.S. 272, 284-85 (1989). *Gedders* does retain its vitality, however, *United States v. Johnson*, 267 F.3d 376, 379-80 (5th Cir. 2001).

In *Potashnick v. Port City Construction Co.,* 609 F.2d 1101, 1118 (5th Cir. 1980), the Fifth Circuit extended this right to civil litigants, relying on Fifth Amendment due process. On the other side, Illinois courts have declined to extend the right in this manner, *Commonwealth Edison Co. v. Danekas,* 104 Ill.App.3d 907, 433 N.E.2d 736

(1982); *Stocker Hinge Mfg. Co., v. Darnel Industries, Inc.,* 61 Ill.App.3d 636, 377 N.E.2d 1978).

5. Suspending Deposition To Seek Protective Order

Except for privilege and enforcement of court-imposed limitations, the questioning attorney in a deposition is entitled to obtain answers to whatever questions are posed. But this leeway can be abused and the rules provide for a remedy—any attorney (or the deponent) may suspend the deposition for the time necessary to make a motion for a protective order. Fed.R.Civ.Proc. 30(d)(4).

The only acceptable basis for suspension is "a showing that the examination is being conducted in bad faith or in such a manner as to annoy, embarrass or oppress the deponent or party." An attorney is not permitted to terminate a deposition without promptly moving for a protective order pursuant to the rule, *Biovail Laboratories, Inc. v. Anchen Pharmaceuticals, Inc.,*233 F.R.D. 648, 653 (C.D. Cal. 2006). In that case, the interrogating attorney quizzed the witness, month by month, concerning the reasons for his failure to appear for a deposition, and the court did not regard this as an excuse for terminating the deposition. In *Southgate v. Vermont Mutual Ins. Co.,* 2007 WL 1813547, at *5—*6 (D. R.I. June 21, 2007), the court rejected an argument that the interrogating attorney's attempts to require the witness to offer an expert opinion he was not qualified to give justified interference by the deponent's counsel. Rather, it attributed the hostile environment to the efforts of deponent's counsel to resist the interrogation. The court observed that if the unqualified opinion was offered by the witness, the lack of qualification could be argued when the interrogating attorney sought to use the deposition.

It may be a sufficient alternative to call the Judge or, if the case has been assigned for supervision of discovery, the Magistrate Judge, from the deposition, for a ruling.

B. Defense Counsel

1. *Listen* To The Answers

This is the most important advise in this entire paper.

The official purpose of depositions is "discovery." It represents your only face-to-face pretrial interview of the opposing party and shame on you if you don't hear what the witness is actually saying. A deposition outline is as important as a war plan, but just as perishable. You must be prepared to eliminate some of your subjects depending on what you hear and establish is the plaintiff's testimony, and to expand your questioning into areas that you did not realize before the questions began would be important.

The plaintiff is going through a completely different experience from the one you are having. He or she lived through the events that are the subject of the testimony and likely takes it all personally. There are usually hints about potentially helpful facts that

are available if you are paying attention the same way you would be paying attention if you were outside a deposition and thinking of the events as a business matter rather than a legal problem. Open your mind to trying to understand the plaintiff's experience and ponder what facts that would be helpful to the defense are likely to be part of an experience of that kind.

If you are not listening, you will find yourself surprised by testimony at trial and go racing to the deposition transcript to find the point where the witness said something that you can use for impeachment. You will find only your own failure to ask the follow-up question that would have alerted you to the issue and opportunity to develop a counter-attack. You may even find some of the testimony being given at trial was actually part of the deposition testimony that you have overlooked. By the time you do this, of course, it's too late to do anything about it.

2. Using Documents

In a trial, foundation must be laid for admission of documents into evidence and they must be admitted into evidence before questions of substance about them are asked.

Not so in depositions. Witnesses generally are reluctant to contradict a document, and may readily testify to something—or assume that something is true—simply because it appears in the document. If not well-prepared, they may be ready to concede, for instance, that the decision-maker probably actually believed the legitimate nondiscriminatory reason in the document when the decision-maker wrote the document.

Documents are also an effective tool for challenging a witness to deny the truth of the document's statements. It's more difficult once the fact has been written down because it is tantamount to accusing the author of lying at the time the document was written. People naturally assume the statements are accurate, at least as a default, and look instead for a way to harmonize the recollection with the document. It can be less painful, and no less effective, to ask the witness simply to admit that he or she knows of no evidence that what the document says is false.

When a plaintiff provides self-serving argumentative unfavorable testimony, it is helpful to train the witness to stay on the straight and narrow with a document. Begin by leading the witness and insisting on the answer you seek that is helpful to the defense. If it is not forthcoming, present the document that impeaches the testimony just given and force the witness to concede that you were correct. Repeating this sequence a couple of times will teach most witnesses that when you assert a fact, it is dangerous to disagree. In this situation, the better approach may be to present the document to refresh recollection in the hope that the plaintiff will adopt what the document says and effectively wipe out the prior unfavorable statement.

3. Some Questioning Tips

Here are some tactical approaches to consider in questioning the plaintiff that may be effective

- To shame the witness into admitting knowledge of facts or into accepting general propositions that you can present to support the defense, invoke the plaintiff's job title: "As the chief engineer, did you consider it important to be certain that …?

- To secure an admission from a witness who might not be prepared to admit a fact or to "know" something (especially a conclusion), ask "Would it be fair to say…?" or "Would it be reasonable to assume…?"

- Distinguish between what the plaintiff knows firsthand (which is evidence) and what the plaintiff has heard or learned or surmised during the case to limit the damage of unfavorable statements.

- Emphasize the plaintiff's lack of firsthand knowledge by repeating "You weren't actually there yourself, so you don't know …?"

- Do not end assertive questions with "Isn't that right?" or "Isn't that true?" The negative form makes confusion possible and can allow the witness to escape at trial. Get used to ending assertive questions with "…correct?"

- Present witnesses with "either-or" questions in two steps. First secure the admission that there are only those two possibilities. Then explore each possibility, showing that both support the defense.

- Indirectly challenge/impeach/threaten the plaintiff by asking if she or he disagrees with another witness's statement. "I understand that [witness] will testify/has testified that …. Do you disagree with/deny that?" or "You can't swear that that is incorrect, can you?" Be prepared to mark a part of another witness's deposition and walk through the testimony if you draw objections.

- Use legal elements in ordinary questions and construct the questions to make your assertion sound reasonable. An ill-prepared witness may take the bait and thereby admit that an element of the claim is missing.

- If unjustified lack of communication is the point, try this: "It would have been a simple matter to reach over and pick up the telephone and tell you boss …., correct?" "But you didn't do that, correct?"

- If improbable or unreasonable behavior is the point, try this: "You say that you believe that you called the boss while he was in the hospital for heart surgery to tell him … Is it your usual practice to call people undergoing serious operations to discuss work issues?" "Don't you think it is more likely that you spoke with your boss's boss about it or left it until he got back?"

4. Handling Objections

If plaintiff's counsel tries to bait you into arguing about the objections, don't take the bait. First, listen for any objection that seems valid and modify your approach if appropriate, especially if the objection is to the form of the question. Otherwise, you risk losing the substantive testimony you obtain from the question and answer when you try to use it at trial.

If the objection is obscure, such as "object to the form of the question," and the defect is not clear to you, it pays to inquire further about what the specific objection is. If you do not get a meaningful response, point out on the record that the purpose of the rule that certain objections must be preserved by objection, and that if you do not have a meaningful specification, you will be unable to modify the question if it is appropriate to do so. You need not repeat this over and over, but if it is a problem make the point at least a few times.

Otherwise, once the objection concludes, even if it is argumentative, hostile and delivered in a loud, outraged voice, just ask for the answer to the question. You are under no obligation to respond to opposing counsel during your deposition time. No matter how wrong the objection is, responding to it is just going to prolong the disruption.

If a "speaking" objection is made, in which opposing counsel tries to rephrase the question and effectively counsels the witness about what testimony should be given in the objection, assert your own objection to what has been done and cite the Rule 30(d)(1)—read it into the record if necessary. Remind the witness (and counsel) that if he or she does not understand the question, you are the one to ask about it. Request that the court reporter mark the point in the transcript where the objection was made for future reference. Regardless of the nature of the objection, do not be drawn into a discussion of the merits of the objection unless there is reason to believe that a discussion between lawyers of the legal point will move things along.

If a second speaking objection is made, restate your objection on the record and advise counsel that if the conduct is repeated, you will call the judge or suspend the deposition until a protective order can be obtained. Consider speaking off the record with opposing counsel during a break to see if you can calm him or her down to avoid a confrontation. Then if it happens a third time, follow through on your threat.

5. Using Summarizing Questions

One important purpose of a plaintiff's deposition is to close the door—to limit the answers the plaintiff can give on summary judgment or at trial. As a result, when you ask the plaintiff, for instance, to state each reason s/he believes there was discrimination or retaliation, each answer should be followed up with "Anything else?" You want a "No" to that question. Sometimes you even want to follow up with "Is there anything that might refresh your recollection on that?"

When you get a long rambling answer or responses to an important point like this come out slowly over a sequence of questions and answers (and using several deposition pages to cover), you need to think ahead to trial. An impeaching question and answer cannot ramble on over multiple deposition pages. If you do not plan for this during the deposition, you can be caught short at trial.

When you get the "No" answer to "Anything else?" it is time to repeat back the full substance of what the plaintiff just said in a summarizing question. *Then* ask "Anything else?" again. Now you have what you need to control the witness at trial.

6. Arguing The Case With Questions

As preparation for both summary judgment and trial, once you have the plaintiff's story nailed down, you can assemble the key elements of your case into a sequence of questions that will sound very much like an argument. But it is just question-and-answer.

Stringing the points together means that when the testimony is read in ruling on the summary judgment motion, the most powerful admissions and key defense points are hammered home in a single line of questioning that is quick and easy for the court to read.

This segment of the deposition can be designated at trial to be read into evidence at the start of the defense case. It is like having a second opening statement.

It can also soften up plaintiff's counsel for settlement.

C. Plaintiff's Counsel

Defending a deposition can be stressful. You monitor your client's responses for potential problems and listen to opposing counsel assemble the building blocks of a defense to your case, waiting to see if there are any surprises.

On the other hand, defending a deposition can also be hopelessly boring—you already know most of the answers and many questions will be focused on trivial matters.

1. General Tips

Here are some tips about how to conduct yourself generally:

- Do your best to remain calm and alert to each question so you can interpose an objection if appropriate.
- Be careful not to give unconscious cues to the client, such as nodding or shaking of the head, sighing, and so forth.

- Observe the interaction between opposing counsel and the client and be prepared to offer tips to the client for dealing with the questioner's approach

- If you pay attention closely, you can get the most valuable discovery in the case, because the questioner generally conveys a great deal of information about how the other side views the case. Rather that attempt to do the court reporter's job in making notes, keep a running commentary of your impressions of where the other side may be going with a line of questioning.

- Listen with a critical ear, and when you hear something that may be problematic, make a note of it as specifically as possible, and wait to see if subsequent testimony clears up the concern or if you might need to rehabilitate the client on the point.

- On critical points, especially where you are concerned that the client may have slipped, don't hesitate to have the testimony read back so you can get the specific statement right in your follow-up notes.

- You can ask the reporter to mark the point where a particular statement was made and be ready to have it read back during your redirect. This can be done during a break.

- Keep track of the time if there could be an issue on that subject. In Illinois, depositions in State court are presumptively for only three hours unless otherwise agreed or ordered by the court, Illinois Supreme Court Rule 206(d). In federal court, it's a day, seven hours, although the court is required to permit additional time if needed for a fair examination of the deponent or if the deponent, other person or circumstances (such as the need for translation) impedes or delays the examination. Fed.R.Civ.Proc. 30(d)(2). If there are multiple defendants, insist that they work out beforehand how long each will take, and speak up for the time you may need at the end of the deposition. Continue this dialogue during the deposition.

2. Making Objections

You have a right to object, even on relevance grounds, to any question on any ground, but that does mean it is necessarily a good idea to practice your objection-spotting skills. Many judges will be annoyed if you get to trial and they are presented with a transcript showing that you made an endless stream of objections, sometimes even if they are all well-taken. So you have the option with most objections of making the objection or not.

Objections need to be concise and not suggestive of an answer to the question. If the circumstances call for an extended, potentially suggestive objection to make your record, offer to have your client step outside while you put the full objection on the record.

3. Rehabilitating The Witness

If you ask no questions when the defense is finished examining your client, the deposition is over and you can leave with no more damage done. Because of this, the conventional wisdom is not to ask any questions. You can clarify when your client testifies at trial.

There are two pitfalls that require more a thoughtful approach. Although the purpose of the deposition is not to tell the client's story, there are two legal principles that should temper the conventional view. First, once the deposition has been completed, your client has no opportunity to correct a mistake in testimony that will affect summary judgment. The case law is crystal-clear that a plaintiff is not permitted to correct mistaken deposition testimony in an affidavit opposing summary judgment, *e.g., Rogers v. City of Chicago,* 320 F.3d 748, 751-52 (7th Cir. 2003). Moreover, if the matter is something that could be significant to the summary judgment decision, your assessment that the correction is merely elaboration or explanation could be mistaken, with the disastrous effect that the case is lost due to this miscalculation. Err on the side of caution—if the client has said something wrong, correct it while it can still be corrected, because it could end up being significant to summary judgment in a way you do not foresee.

Second, Fed.R.Civ.Proc. 32(a)(4) provides that "if only part of a deposition is offered in evidence by a party, an adverse party may require the offeror to introduce any other part which ought in fairness to be considered with the part introduced…" Whether the deposition statement is being used to impeach, or is being introduced as the admission of a party-opponent, this protection will allow you to blunt the impact of mistaken testimony almost completely. If the client said something damaging, and then in the deposition itself corrected the error, you can require that both the damaging testimony and correction be read into evidence together. By the time the case comes to trial, the three hours between the time when the witness made the statement and the correction happened will seem like nothing.

Be prepared, however, for a vigorous follow-up by the defense if it is something important. And be certain that the client does not simply reiterate the prior testimony when you are asking the questions.

There are attorneys who make it a practice, following the defendant's questioning at the deposition, to put an affirmative direct examination on the record of the facts known to the plaintiff to be relief upon in opposing summary judgment specifically to avoid having to file an affidavit opposing summary judgment. The idea is that if you do not need an affidavit, there is no occasion for the defense even to argue about its contents being subject to a motion to strike.