Depositions 101:

Setting Up the Win at the Plaintiff's Deposition

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I. Introduction

When preparing to depose the plaintiff, begin with the end in mind – the goal of the case. What is the ultimate objective, not just in the deposition, but for the lawsuit? To win, you may say, but how do you define a win? Or more importantly, how does your client define a win? More often than not, a win for the client is to get rid of the case as quickly and inexpensively as possible. Trial lawyers savor the experience of the trial ritual, the competition and the opportunity to showcase advocacy skills, but clients facing exposure to significant damages and defense costs most certainly do not. For most clients, the greatest win is a summary judgment or a nuisance value settlement. And nothing advances the prospect of a summary judgment or a favorable settlement like an effective plaintiff's deposition.

The road to litigation success typically runs through the plaintiff's deposition. Why? Because important admissions are won there. Once a critical fact is either established or disproved through the plaintiff's own deposition testimony, the plaintiff cannot dispute that fact. Yet sometimes we squander the opportunity to gain admissions in the plaintiff's deposition. Like doctors taking a history of the patient, we occasionally go through the motions of an indiscriminate fact-finding mission. "Tell me what happened," we ask, and "what happened next?" We can do better. Think about it: we already know what happened in the case – our client's version of the facts "happened." As advocates, our job is to *prove* it. Not just with our own witnesses (anyone can do that), but through the plaintiff. If our witnesses say one thing and the plaintiff says another, factual disputes will preclude summary judgment. But if we gain admissions from the plaintiff in deposition, that is a different story. Admissions are the key ingredient to the summary judgment recipe.

So how do we gain admissions from the plaintiff? By following this simple piece of advice: stop defending the case and start attacking it.

II. Preparing for the Plaintiff's Deposition

The focus of this article is leveraging the opportunity for summary judgment through the plaintiff's deposition, but not all cases can be won by motion. Most cases will be settled, and a rare few will be tried. Therefore, the plaintiff's deposition must cover all possibilities: posturing the case for summary judgment, leveraging a favorable settlement and laying the groundwork for trial. Here are the basics for preparing for these contingencies.

A. Information Gathering

1. The client's documents and witnesses. By far the best sources of information in most employment cases are the client's own documents and witnesses. Employment plaintiffs typically find themselves in an evidentiary deficit while employers have a surfeit of information. Personnel files, handbooks, policies, manuals, payroll records, write-ups, emails, performance evaluations, co-workers and supervisors all reside with the employer. Needless to say, defense counsel should meet with the key company witnesses and study relevant company documents well in advance of the plaintiff's deposition. The documents and information will be used to obtain admissions in the plaintiff's deposition.

2. Interrogatories. I prefer *not* to propound interrogatories about the substance of the plaintiff's claim. Since the interrogatories will be answered with the assistance of plaintiff's counsel, the responses, at

best, will have limited utility and, at worst, will create fact issues precluding summary judgment. Consider leaving the substantive matters for the deposition and limiting interrogatories to areas that will serve as a basis for further discovery.

Topics for interrogatories include the plaintiff's:

- Past and subsequent employment
- Arrests/convictions
- Other litigation and administrative filings, including bankruptcies and unemployment, workers compensation and EEO claims
- Past and subsequent medical and psychological treatment
- Witnesses
- Witness statements
- Collateral source receipts
- Damages calculations
- Social media

3. Requests for Production. Unlike interrogatories, document requests to the plaintiff should be robust. At a minimum, the requests should include:

- Signed authorizations to obtain records from plaintiff's past and subsequent employers, health-care providers, insurers, the Social Security Administration, the IRS, the military, the state unemployment and workers compensation commissions, the EEOC and the state counterpart, OSHA, etc.
- Documents in plaintiff's possession regarding the foregoing.
- Documents regarding plaintiff's employment with the defendant.
- Documents relating to each allegation of plaintiff's substantive allegations, which can be referenced by specific quotations from the complaint.
- Documents relating to damages, including efforts to mitigate damages, such as employment applications and resumes submitted to prospective employers post termination, if applicable.
- Copies of social media profiles, messages and photographs.
- Diaries, calendars, logbooks and journals.
- Documents indentified in answers to interrogatories.
- Documents, including emails and text messages, related to the lawsuit.
- Documents, including emails and text messages, exchanged with current or former employees of the defendant.
- Pleadings from other lawsuits, claims and administrative charges.

4. Third-Party Discovery. Once third parties who may possess relevant information have been identified, they should be served with records subpoenas pursuant to local practice. If signed authorizations have been obtained, the documents can be requested without a subpoena.

B. Legal Research

The legal research should begin upon receipt of the new case assignment. After any deficiencies in the complaint have been resolved, the elements of each of plaintiff's claims, starting with the jury instructions,

should be analyzed. Why? Because setting up a summary judgment in the plaintiff's deposition requires a thorough knowledge of the substantive law.

Many discrimination and retaliation claims, for example, come down to causation. Depending on the type of claim, the plaintiff must prove that protected status or activity was either the cause or a motivating factor in an adverse employment action. Defense counsel would be well advised to have a thorough grasp of the plaintiff's burden of proof, especially as it relates to causation, *before* deposing the plaintiff. Causation typically is a focus of the summary judgment motion and, in turn, the plaintiff's deposition.

III. Deposing the Plaintiff

Once the pleadings have closed, relevant information has been obtained, discovery objections resolved and the elements of the claims and defenses researched and digested, the focus should turn to the plaintiff's deposition. The goals of the plaintiff's deposition can be divided into two main categories: discovering information and obtaining admissions.

A. Discovering Information

One objective of the plaintiff's deposition (perhaps the more obvious one) is to discover information through open-ended questions: who, what, when, where, how and why? The goal is to pin down the plaintiff's claims and their factual bases. Establishing the absence of knowledge can be as important as affirmatively establishing a fact. In addition, witnesses or information (written or digital) disclosed in the deposition may lead to additional defense discovery. Much has been written about the discovery aspect of the plaintiff's deposition, which need not be repeated here. Cases are won not so much by discovery, but through admissions.

B. Gaining Admissions

Admissions obtained from the plaintiff in deposition are critical both for summary judgment and for trial. For summary judgment, the plaintiff's admissions can mean the difference between a genuine factual dispute and an uncontroverted record. At trial, the cross-examiner is well advised to ask only questions as to which the answer is known. The ability to "know the answer" comes primarily from admissions gained in the plaintiff's deposition. The trial cross-examination of the plaintiff can be viewed as a distillation of the "greatest hits" from the deposition. For that reason, my preference is not to hold back in deposition. Unlike their Hollywood adaptations, real life trials lack surprise witnesses and concealed documents. Pre-trial orders requiring the exchange of witness and exhibit lists ensure that. The best chance to catch the plaintiff unawares is in deposition. Once the deposition testimony is locked in, the plaintiff is stuck with it.

So if admissions are the golden nuggets of the plaintiff's deposition, how best to mine them? By following three simple rules (1) ask leading questions; (2) ask only one fact per question; and (3) sequence questions from general to specific facts.

1. Leading Questions. Admissions in a deposition are gained primarily through leading questions. "The examination and cross-examination of a deponent proceed as they would at trial under the Federal Rules of Evidence . . . ." Fed. R. Evid. 30(c)(1). That means that the examiner can ask the deponent leading questions if leading questions can be asked of the witness at trial. And leading questions are always available at trial when examining the adverse party. Fed. R. Evid. 611(c). Ergo, defense counsel can ask the plaintiff leading questions in deposition.

So what are leading questions? They are the opposite of open-ended questions, which call for the witness to explain the answer. Leading questions, in contrast, are declarative statements to which the witness is asked to agree. Consider the following questions:

a. What color was the light?

b. Was the light red?

c. The light was red?

Most recognize the first question as non-leading because it does not suggest the answer. On the other hand, many believe that the second questions is leading because it can be answered "yes" or "no" and is suggestive of the answer. In my view, only the third question is leading because it does more than suggest the answer – it declares it. If the question mark is removed, the question would be a declarative statement.

How is defense counsel able to make declarative statements to which the plaintiff must agree? By basing the questions either on logic, common sense or on source material to which the witness should assent. The source material could be company documents, the plaintiff's own documents, emails, materials produced by third parties, etc. The ideal leading question is one that evokes 1) an admission or 2) a refusal to agree that exposes the plaintiff as a liar or a fool.

Of course, not all deposition questions can be leading, nor should they be. But in my experience, many opportunities have been squandered in deposition by asking "what happened next?" instead of "telling" the plaintiff what happened (based on the defendant's version of the facts) and attempting to solicit agreement. Even information elicited through open-ended questions usually can be improved by following up with leading questions.

2. One Fact Per Question. Deposition questions should be as simple as possible, preferably containing just one fact. Compound questions containing multiple facts give the witness wiggle room to deny the question and opposing counsel fodder to object. By the same token, the fewer adjectives in a question the better. The witness can more easily deny qualitative statements or conclusions than hard-edged facts. Facts also are more persuasive than conclusions. The more factual detail established during the examination, the more difficult it will be for the plaintiff to change course later. And short sound bites rather than long-winded diatribes provide the best source for impeachment at trial.

3. Sequencing Questions from General to Specific Facts. The progression of questioning can be thought of as an inverted pyramid, beginning with general facts and concluding with specifics. Plaintiffs will more readily agree with general questioning before being confronted with specific facts, *i.e.*, before they "see you coming." Once the plaintiff has agreed to general facts, the escape hatches are closed and the plaintiff must then agree to the specific facts.

4. Example. Assume an age discrimination claim against XYZ Company in which the plaintiff, a computer programmer, was passed over for promotion to a supervisory position in favor of a younger employee, John Doe (similar questioning would apply in a failure to hire case).

Q. Why do you believe you were subjected to age discrimination by XYZ Company?

A. Because I was passed over for promotion to a supervisor position in favor of John Doe, who is ten years younger than me. John is a nice young man, but I'm way more experienced than him.

Q. That's the basis for your age discrimination lawsuit?

A. Yes, that's the basis.

Q. You believe that you were more qualified for the supervisor position than John Doe.

A. Absolutely!

Q. And that is the only fact that supports your claim of age discrimination.

A. Yes, that's enough.

Q. Now, if you're comparing your qualifications to John's, you would have to know John's qualifications?

A. Yes, and I know for a fact that I'm way more qualified than John to be a supervisor.

Q. Where did John attend college?

A. College? How should I know that?

Q. John has a college degree?

A. I have no idea.

Q. You aren't aware that John graduated with honors from State College with a degree in management?

A. No, but that doesn't matter.

Q. You don't have a college degree?

A. No, I didn't finish college. I got bored with it so I went to work instead.

Q. John worked before joining XYZ Company?

A. Yes, I think so.

Q. Tell me every place John worked before joining XYZ?

A. How should I know that?

Q. You can't name one place that John worked before XYZ?

A. No.

Q. So you would have no way of knowing how John performed at any of his prior jobs?

A. No.

Q. Tell me every position John has held at XYZ Company?

A. I only know about his last position as computer programmer, and I'm a much better programmer than him.

Q. You never supervised John?

A. Well, I could see his work, and he would always ask me questions. I would have to tell him how to do his job.

Q. But it was not your job to supervise John?

A. Technically, no.

Q. Technically or otherwise, you were not John's supervisor.

A. No, I wasn't his supervisor. We were co-workers.

Q. It was not your job to follow John around and monitor his work?

A. No, I had my own work to do.

Q. You never gave John a performance evaluation?

A. No.

Q. It was not your job to give performance evaluations?

A. No.

Q. You've never seen John's performance evaluations?

A. No.

Q. You have no idea if John's performance evaluations were better than yours?

A. No.

Q. You've had two write-ups during your employment with XYZ.

A. Yes, but I didn't sign them because they weren't true.

Q. Both write-ups were for insubordination?

A. Yes, but I was just giving my opinion to try to help the company. I wasn't being insubordinate.

Q. John never received a write-up?

A. I would have no way of knowing that.

Q. Because you weren't John's supervisor?

A. I wasn't his supervisor.

Q. Supervisors in your department don't program computers?

A. No, they don't.

Q. Supervisors supervise?

A. Yes, they supervise.

Q. The job of supervisor requires leadership skills?

A. Yes.

Q. And interpersonal skills?

A. Yes.

Q. The ability to get along with others?

A. Yes.

Q. The ability to get along with subordinates?

A. Yes.

Q. And upper management?

A. Yes.

Q. Those skills are subjective?

A. Yes, I suppose so.

Q. They are more subjective than computer programming?

A. For sure.

Q. Speaking of upper management, Bill Jones is the head of the department?

A. Yes, he's the boss.

Q. As the boss, Bill had the opportunity to supervise both you and John?

A. Yes.

Q. As the boss, Bill had the responsibility of evaluating your performance?

A. Yes.

Q. And John's performance?

A. Yes.

Q. As the boss, Bill decides when a write-up is appropriate.

A. Yes.

Q. And the boss, Bill, is the same person who issued your write-ups?

A. Yes.

Q. And as the boss, Bill makes promotion decisions in the department?

A. Yes.

Q. As the boss, Bill made the decision to promote John?

A. Yes.

Q. The boss, Bill, made that decision alone?

A. As far as I know.

Q. The boss, Bill, is older than you?

A. Yes.

Q. In fact, the boss, Bill, is 10 years older than you?

A. Yeah, about that.

Q. So the boss, the person who you claim discriminated against you based on your age, is 10 years older than you?

A. Yes, I suppose so.

The bottom line is this: in preparing for the plaintiff's deposition, consider the likely avenues for summary judgment. Then seek as many admissions as possible on those issues through leading, succinct, general to specific questioning. If the plaintiff is unwilling to admit to a fact, seek an admission that s/he lacks knowledge to deny it. The fact can then be established by defense affidavit, and the plaintiff will be hard-pressed to rebut it.

C. Damages

Not all cases can be won on summary judgment, so defense counsel must treat the damages aspect of the case with as much vigor as liability. The same probing style should be employed when examining the plaintiff about damages.

For financial loss, all efforts the plaintiff has made and, more importantly, has not made to find alternate employment should be explored. All potential collateral source payments and set-offs, such as government benefits, should be plumbed. Again, these documents, along with plaintiff's employment records before and after s/he was employed by the defendant, should be obtained well before the deposition.

As to noneconomic damages – emotional distress and the like – an effective examination is particularly helpful given the more amorphous nature of the injury. Defense counsel should inquire about all medical and psychological treatment the plaintiff has received as a result of the alleged discrimination/retaliation/harassment and compare that to any medical or psychological treatment received earlier in the plaintiff's life. As with financial records, all relevant medical records should be obtained long before the deposition. In addition, other "stressors" in the plaintiff's life should be explored. Has the plaintiff been divorced? Broken up with a significant other? Lost a loved one? Been in a car accident or suffered illness? All alternative explanations for the plaintiff's emotional distress should be evaluated through probing inquiry.

D. Miscellaneous

The following are suggested questions to close off the plaintiff's ability to disavow deposition testimony at trial:

- At the beginning of the deposition: If you don't understand any of my questions, please let me know. I am happy to explain or rephrase them to ensure you only get questions you understand. Does that sound fair?
- At the beginning of the deposition: If you answer the question, I will assume you understood it. Is that fair?
- At the end of the deposition: Have you understood my questions and answered them truthfully? (this is question is intentionally compound to leverage the chance of a "yes" answer)
- At the end of the deposition: For any questions you said you did not know or did not recall, if you learn more information, will you write it on the errata sheet?
- At the end of the deposition: Is there anyone you have not indentified who has knowledge of any issue in your lawsuit?

IV. Conclusion

Deposing the plaintiff takes work, but the payoff can be substantial. A favorable plaintiff's deposition can set up a summary judgment, a favorable settlement or, if necessary, a win at trial. To achieve these results, begin long before the deposition by gathering information both from the client and through discovery. Research the legal issues surrounding the claims and defenses. Consider the possible avenues for summary judgment. Then, in the deposition, seek as many admissions as possible through leading, succinct, general to specific questioning. In short, don't just defend the case, attack it!