

Evaluating and Preparing the EEO Claim Witness

EXCEL 2010
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EVALUATING THE WITNESS



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Evaluating the EEO Witness

- Purposes of evaluation:
 - Determine strengths/weaknesses of case;
 - Fully identify issues that may arise in the case;
 - Develop a realistic settlement posture;
 - Identify vulnerabilities for impeachment;
 - Begin the process of educating witnesses.



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Evaluating the EEO Witness

- Factors to consider in evaluation:
 - Witness' knowledge of facts of case;
 - How knowledge was obtained;
 - Ability of witness to communicate;
 - Possible bias of witness;
 - Demeanor of witness (nervous, hearing impairments, etc.);
 - Degree to which testimony of witness conflicts with other evidence in the record.



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Evaluating the EEO Witness

- Interviewing the client witness(es):
 - Not all agency employees are in attorney-client relationship with agency attorney.
 - Know who your client is.
 - Distinguish client witnesses from fact witnesses who work for agency.
 - Who witness can talk to.
 - What to tell witness.



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Evaluating the EEO Witness

- Interviewing the client witness(es):
 - Avoid including extraneous people who can jeopardize attorney-client privilege or distract from witness being candid;
 - Obtain all documents and insure that client understands documents includes all notes, logs, calendars, emails, etc. Remind witness of litigation hold.
 - Instruct client from the outset not to discuss his/her testimony with anyone but you.



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Evaluating the EEO Witness

- Interviewing favorable fact witnesses:
 - Determine if deposition is better. How likely is witness to change story at hearing?
 - If interview is used, consider whether to obtain a written, under oath statement. May be discoverable.
 - If witness is union member, beware of “formal meeting requirements” which require notice to union and opportunity to attend.



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Evaluating the EEO Witness

- Interviewing favorable fact witnesses:
 - Don't be afraid to confront witnesses with conflicting testimony/documents. Your opposing counsel won't (be afraid, that is).
 - Sharing conflicting testimony may lead to evidence being spoiled.



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PREPARING THE WITNESS



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Preparing the EEO Witness

- It may sound corny, but first rule of testifying is:
 - Tell the truth.
 - If the truth is not in your client's favor, the case should be settled.
 - Answer "yes/no" questions with "yes, no or cant answer yes/no."
 - Don't volunteer information in response to questioning.



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Preparing the EEO Witness

- What judge assesses in determining credibility:
 - Demeanor;
 - Responsiveness to questions;
 - Eye contact;
 - Don't be reluctant to say not sure (documents to refresh recollection);
 - Don't chew gum, tobacco, etc.



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Preparing the EEO Witness

- Counsel are expected to prepare witnesses. Make sure your witness knows that:
 - There's nothing wrong with admitting that he or she has spoken with counsel about his or her testimony.
 - If a client, what he or she has discussed with counsel may be subject to attorney-client privilege.



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Preparing the EEO Witness

- Best practices for witnesses. Tell the witness:
 - Do not discuss his or her testimony with anyone other than counsel;
 - Do not prepare notes to use during testimony;
 - If a witness feels he or she must prepare notes, do not bring them to a deposition or hearing.



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Preparing the EEO Witness

- Lose the attitude!
 - Counsel for the Agency/Complainant is doing a job;
 - It is not personal to the witness, don't let the witness make it personal for counsel;
 - Attitude can reflect on credibility determinations; and
 - Can lead to mistakes.
 - Attitude can distract judge from properly evaluating credibility.



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Preparing the EEO Witness

- Deposition testimony:
 - Opposing counsel will get to ask witness questions first.
 - He/she may ask leading or nonleading questions.
 - He/she may insist that witness testify without referring to documents.
 - He/she does not have to give witness an opportunity to explain his or her answers.



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Preparing the EEO Witness

- Deposition testimony. When opposing counsel is through, you can ask questions to:
 - Give witness a chance to explain answers;
 - Give witness a chance to correct or clarify answers;
 - Refresh witness' recollection with documents.



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Preparing the EEO Witness

- Deposition testimony:
 - Some counsel waive all objections to questions at deposition.
 - Tell the witness not to worry! There has never been an EEOC case decided on the basis that counsel did not object at deposition. (Yet.)



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Preparing the EEO Witness

- Deposition testimony:
 - If counsel does object, opposing counsel has the right to insist that the question be answered, unless privilege is asserted.
 - Again, tell the witness not to worry! Counsel did not lose the objection. That's just deposition practice because there's no judge to rule on objections.



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Preparing the EEO Witness

- Deposition testimony:
 - Many questions asked at deposition call for information which may not be admissible at hearing.
 - With rare exceptions, the judge/arbitrator never sees the deposition transcript, other than small portions used for impeachment purposes or refresh recollection.



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Preparing the EEO Witness

- Deposition testimony—Breaks:
 - Tell witness not to be afraid to ask for a break if he or she need one.
 - Counsel may ask witness to wait for a logical break point.
 - Learn about individual needs (disabilities, accommodations) prior to deposition.



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Preparing the EEO Witness

- Deposition testimony—Consultation with counsel:
 - Tell the witness that discussing the substance of his or her testimony with counsel during the course of a deposition may be a waiver of the attorney-client privilege at least with regard to the content of that conversation.



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Preparing the EEO Witness

- Deposition testimony:
 - Let the witness know that one of the purposes of a deposition is for the other side to evaluate the witness.



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Preparing the EEO Witness

- Basic rules of testifying:
 - Be on time! Counsel can be impatient with tardy witness, judges even more so.
 - Substantial lateness can result in sanctions.
 - Dress appropriately. Usually, business attire, *i.e.*, what the witness would wear to work or better:
 - Suits;
 - Uniforms;
 - Firearms.



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Preparing the EEO Witness

- General rules of direct examination:
 - Tell the witness that you can ask leading questions on preliminary matters.
 - Otherwise, must be done through nonleading questions.



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Preparing the EEO Witness

- Exceptions to general rules:
 - The adverse or hostile witness;
 - Leading questions can be asked on direct.
 - Leading is not permissible on cross.



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Preparing the EEO Witness

- Let the witness know that judges can, and do, ask questions to:
 - Clarify testimony that he/she didn't understand;
 - Bring out a point he/she thinks counsel has missed;
 - Complete the record.
 - Respond to judge not attorney.
 - Don't make assumptions because judge is asking questions.



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Preparing the EEO Witness

- Preparation, at a minimum, should consist of:
 - A review of the questions you will ask the witness on direct;
 - A review of all documents that will be used as exhibits;
 - A review of the questions that you anticipate the witness will be asked on cross examination;
 - Do mock cross examination of witness.



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Preparing the EEO Witness

- Inconsistent statements. If the witness has given what are, or appear to be, inconsistent statements, preparation should:
 - Include bringing those statements to his or her attention; and
 - Giving him or her a chance to explain.
- Be prepared for questions about how and why inconsistency was brought to witness' attention.



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Preparing the EEO Witness

- Give the witness a stop signal, such as raising your hand to:
 - Stop an answer that is nonresponsive;
 - Stop an answer that goes beyond the question;
 - Stop the witness from answering when there is a pending objection.
- Make the signal obvious



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Preparing the EEO Witness

- Communications with opposing counsel—fact witness:
 - Witness may communicate with opposing counsel.
 - Do not encourage or discourage it.
 - Ask witness to tell you if contacted by opposing counsel and what was discussed.



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Preparing the EEO Witness

- Communications with opposing counsel— client.
 - Instruct witness not to speak with counsel; and
 - To report contact to you immediately.



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Gary and Ernie's Twelve Rules for Being an Effective Witness



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Preparing the EEO Witness

- Rule No. 1. Listen to the question:
 - Wait for the complete question;
 - Don't anticipate the question;
 - Answer only the question you are asked; and
 - Wait for the next question.



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Preparing the EEO Witness

- Rule No. 2. Trust counsel to:
 - Know what testimony has to be elicited;
 - Determine the order in which the testimony should be elicited; and
 - Determine the manner in which the testimony should be elicited;
 - Determine what testimony needs to be brought out on redirect.



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Preparing the EEO Witness

- Rule No. 3. Do not discuss your testimony with other witnesses:
 - Never worry about minor inconsistencies—no two people remember things exactly the same.



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Preparing the EEO Witness

- Rule No. 4. Remember this is being done for the judge:
 - To the extent possible, direct your answers to the judge.



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Preparing the EEO Witness

- Rule No. 5. Stop if there is an objection:
 - Both counsel will be given an opportunity to argue the objection;
 - It is possible that you may be asked to leave the hearing room;
 - Wait until the judge rules before proceeding.



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Preparing the EEO Witness

- Rule No. 6. Don't answer any question you don't understand:
 - Lawyers sometimes ask confusing questions;
 - Don't be afraid to tell counsel or the judge you don't understand;
 - Don't use as a ploy on cross examination.



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Preparing the EEO Witness

- Rule No. 7. Don't answer a question if you don't know the answer:
 - If you don't know the answer, then "I don't know" or "I don't recall" is the answer;
 - Avoid speculating on the answer;
 - Again, don't use "I don't know" or "I don't recall" as a ploy on cross examination.



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Preparing the EEO Witness

- Rule No. 8. It's okay to actually think before giving an answer:
 - Listen to the question carefully;
 - Don't interrupt question;
 - It's highly possible the pause before answering is noticeable only to you;
 - Beware the question that misstates facts!



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Preparing the EEO Witness

- Rule No. 9. Treat opposing counsel and other witnesses, including complainant, with respect and in a professional manner:
 - This is cross examination; opposing counsel is allowed to ask tough questions;
 - The more you resist answering questions, the tougher the examination is likely to be;
 - If you can't manage respect, try civility.



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Preparing the EEO Witness

- Rule No. 10. Don't argue with opposing counsel:
 - This is cross examination. Counsel doesn't have to give you a chance to explain your answer;
 - Remember, redirect follows cross, so you will get your chance to explain.



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Preparing the EEO Witness

- Rule No. 11. If you've made a mistake, ask to correct it:
 - Witnesses do make mistakes;
 - Better to correct it yourself rather than have it exposed on cross examination.
- If you have finished testifying notifying counsel immediately.



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Preparing the EEO Witness

- Rule No. 12. When in doubt:
 - Forget the first eleven rules;
 - Tell the truth.



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