

The background of the slide is a photograph of a vast blue ocean meeting a blue sky with light, wispy clouds. The horizon line is visible in the middle of the frame.

# Deposition Practice & Mock Deposition

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EXCEL 2009

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# Deposition Basics

- Why depose anyone anyway?
  - Discover information;
  - Lock witness into story;
  - Gather impeachment evidence;
  - Gauge credibility of witness;
  - Preserve testimony of “going” witness;
  - Encourage settlement.

# Deposition Basics

- Why depositions may not be a good idea in some cases:
  - Can give the opposing party insight into case tactics;
  - Allows opposing party/witness to evaluate you;
  - ROI may contain all the information you need from that witness.

# Deposition Basics

- Interviews with “friendly” witnesses may be more effective when:
  - Witness voluntarily agrees to interview and is unlikely to agree to same with opposing party;
  - Deposition would disclose information/strategy to opposing party.

# Notice of Depositions

- *FRCP* 30(b). Party wishing to depose must:
  - Give reasonable notice;
  - Specify date, time and place;
  - Specify person(s) to be deposed;
  - Can designate by general description if identify unknown.

# Notice of Depositions

- *Practice Tips:*
  - Plan to finish all paper discovery before depositions;
  - Coordinate scheduling and location of deposition with opposing party or representative.

# Notice of Depositions

- Example:
- Pursuant to 29 C.F.R. § 1614.109(d), the Agency in the above-captioned case hereby notices the deposition of the Complainant. The deposition will be conducted on a date, time and place to be mutually agreed upon or, in the absence of such agreement, at a date, time and place to be established by subsequent notice.

# Deposition Preparation

- Establish what you need from the witness.
  - General information;
  - Clarification or elaboration of information existing in the record;
  - Detail not included in the existing record;
  - Impeachment evidence;
  - Locking the witness into testimony;
  - Summary judgment evidence.

# Deposition Preparation

- Determine documents to be used at deposition.
  - Documents in the Report of Investigation are already part of the existing record and do not need to be appended to deposition transcript;
  - Whenever possible, number exhibits in advance. (Dep. Ex. 1, etc.) Then use that exhibit number throughout all depositions.

# Preliminary Matters

- Where will the deposition be?
  - Complainant can make Agency witnesses travel to a reasonable place and a reasonable distance, such as counsel's office.
  - Agency has same right to designate a reasonable place.
  - Better approach is for parties to mutually agree on locations.

# Preliminary Matters

- What if the witnesses are geographically dispersed?
  - Pay witnesses' expenses;
  - Consider telephonic depositions.

# Preliminary Matters

- Who can be present at deposition?
  - Complainant;
  - Complainant's representative;
  - Agency representative;
  - Court reporter;
  - Witness, if not complainant; and
  - Witness's representative if he/she has one.
- Others by mutual consent.

# Preliminary Matters

- What is the role of a witness's representative at deposition?
  - *FRCP* 30(c)(1). "The examination of and cross-examination of a deponents proceed as they would at trial . . ."

# Deposition Stipulations

- Review and signature.
  - Can be waived but unless time is of the essence, why would anyone want to?
- All objections except as to form.
  - Unnecessary. There has never been an EEOC case that hinged upon whether an objection was made at deposition.

# Deposition Instructions

- Copious instructions to the deponent are unnecessary and may be objectionable.
  - Do you understand that you are under oath today?
  - Do you understand what it means to be under oath?
  - Do you understand that being under oath means you have an obligation to the tell the truth today?

# Deposition Instructions

- Some suggested instructions:
  - If I ask you any question today that you do not understand, will you please tell me you don't understand the question and not attempt to answer it?
  - If I ask you any question today to which you do not know the answer, would you please tell me you don't know the answer and avoid speculating as to what the answer may be?

# Taking the Deposition

- If you're taking the deposition, you get to set the tone, tempo, etc.
  - You should be in control, not the witness.
- It is important to get a clear transcript.
  - Beware the witness who interrupts and begins to answer before a question is completely asked.
  - If necessary, repeat your question and understanding of the answer.

# Taking the Deposition

- You do not need to allow the witness to refer to documents.
  - You can ask for a witness's best recollection;
  - You don't need to allow opposing counsel to place documents in front of the witness.
- You can ask the witness about documents he or she has reviewed to prepare for the deposition.

# Taking the Deposition

- Dealing with objections.
  - “Please answer the question.”
  - There is no need to respond to an objection. There’s no one there to give a ruling.
- Instruction not to answer. Options:
  - Get AJ on the phone for a ruling.
  - Get transcript and file motion to compel/sanctions.
  - Withdraw the question.

# Taking the Deposition

- Discussions between counsel and witness during deposition.
  - Examination and cross-examination is to proceed as at trial.
  - Witnesses do not generally get to consult with counsel prior to an answer at trial.
  - Such consultations may be outside of attorney-client privilege.

# Taking the Deposition

- To lead or not to lead, that is the question?
  - Since examination takes place as at trial, leading is permitted if witness is adverse.
  - Whether you want to lead the witness is a tactical matter.

# Taking the Deposition

- It's your deposition, you get to control it.
  - You can determine when to go on and off the record.
  - If you go off the record, you may need to summarize what took place when you go back on the record.

# Defending the Deposition

- The main work in defending a deposition occurs prior to the deposition.
  - Prepare the witness;
  - Have the witness review any documents you know/believe will be used.
  - Let the witness know that you will have the opportunity to ask questions, if necessary.

# Defending the Deposition

- Your main task is to stay awake, alert and listen.
  - No matter how much time you have spent with the witness, you will undoubtedly hear something new.
- Keep track of:
  - Incorrect answers;
  - Incomplete answers;
  - Confusing answers.

# Defending the Deposition

- Questions should be confined to:
  - Correcting any incorrect answers given by the witness;
  - Clarifying any confusing answers given by the witness;
  - Allowing the witness to explain any answers that he or she was not given the opportunity to explain during direct examination.

## Concluding the Deposition

- You can ask the witness if there is anything that he or she hasn't been asked about but would like to add.
  - You might hear something you would just as soon not have on the record.
  - You do, however, build some defense to those things that a witness adds to his or her testimony at hearing.

## Concluding the Deposition

- Ask opposing counsel if he or she has any further questions.
- State that the deposition is concluded and instruct the court reporter to go off the record.
- Thank the witness.



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