

DEFENDING THE DEPOSITION OF THE ELDERLY FORMER EMPLOYEE

(WITH FORMS)

Helen L. Marsh

The need for historical business information is becoming more acute, so you are likely to have to defend the deposition of an elderly witness. Be sure to plan your approach in advance.



MANY INDIVIDUALS will spend an entire career in middle or upper management without ever suffering the misfortune of having their depositions taken. Yet in certain kinds of litigation, including toxic tort, products liability, and related insurance coverage litigation, there is frequently a need for information relating to corporate activities that occurred years or even

decades ago. In these cases, there is often a search for former employees who may be able to provide key evidence, place documents in context, or simply add a human face to the factual picture. If so, it can often come as an unpleasant surprise to such individuals that they are being asked to become a part, however, small, of a large and complex legal matter.

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THE IMPORTANCE OF THE FORMER EMPLOYEE IN LITIGATION • Some attorneys decide, without investigation or inquiry, that their clients' elderly former employees will not be of use to the development of their case. They assume the employees are deceased, in poor health, or unwilling to cooperate. In reality, these assumptions are often false. Of course, people are living longer and staying healthier. Even some seniors with short-term memory loss may have vivid and detailed recollections of events occurring in the distant past. And, in any event, they may at least be able to establish the authenticity and business record status of key documents.

Moreover, even if a lawyer is aware that certain former employees departed from a company involuntarily, they should not assume that those former employees still hold a grudge against the company. Although some may initially see a deposition as an inconvenience or intrusion, many actually enjoy the opportunity to reminisce and to be of assistance in litigation that they may find of interest. They have often maintained contact with other former employees and feel that they are giving back to a company that "took care" of them for a number of years.

Rules That Permit Contact

There is another pressing reason to contact a client's former employees. The law and rules of ethics in many jurisdictions allow another party's attorney to do so. For example, the ABA Model Rules of Professional Conduct allow opposing counsel to contact former employees. ("Consent of the organization's attorney is not required for communication with a former constituent." Rule 4.2, Comment 7.) Similarly, a lawyer may "communicate about the subject matter of the representation with an unrepresented former employee of the corporate party without the consent of the corporation's lawyer.

ABA Comm. On Ethics and Prof'l Responsibility, Formal Op. 95-396, n. 47. (Note that state rules or statutes may be different.)

Thus, even before a corporate client has been asked through interrogatories to disclose a former employee's last known address, opposing counsel may have used resources such as the Internet or a private detective to locate the witness so that contact may be made without any advance notice to the former employer. Although opposing counsel must clearly disclose their party affiliation when contacting a witness, there is frequently some confusion on this point.

For example, a witness in an insurance coverage case may be correctly told that he is speaking to the attorneys for his former employer's insurance company, and understandably assume that there is a unity of interests between his former employer and the insurance company. Although former employees are free to talk to counsel for other parties (except with regard to matters of privilege or trade secret), they are not obligated to do so, and they should be given the whole picture in making this decision. Few former employees wish to act in a way that is adverse to their former employers. Thus, getting to them first can prove critical.

THE INITIAL CONTACT • It is best, when possible, to make the initial contact with a former employee through a current employee, or another former employee already involved in the litigation. This will add credibility to an attorney's position as being friendly to the former employer's cause and may reduce some witnesses' natural reluctance to deal with that attorney. For some witnesses, it may be enough to conduct an initial telephone interview, explaining the case and the interest of the former employer. The attorney should advise the employee that his name and last known address will or has been provided to opposing counsel, or that

opposing counsel may seek the witness out on his or her own.

Advise Witness To Alert You When Opposing Counsel Calls

Although an attorney should not instruct a former employee to refuse to talk to opposing counsel, except as to confidential matters such as privilege and trade secret, that attorney may legitimately request that the employee decline to talk to opposing counsel without notifying the employer's counsel first. This will usually result in a deposition being taken if the witness has important information, but it will allow preparation in advance of going on record. Although the opposing counsel may attempt to convince the witness that a deposition will not be necessary if the witness speaks to him voluntarily on an informal basis, the reality is that witnesses with important information will be deposed in any event.

The defending attorney should explain that these scare tactics seldom result in protection for the witness but only serve the needs of the opposing party. The deposition procedure, although cumbersome, allows for a full and fair explication of relevant facts with all interested parties present and will generally prevent subsequent attempts to involve the former employee in the litigation through further interviews, incomplete and misleading affidavits, or the inevitable deposition.

Ask About Any Previous Contacts

In some instances, one may find that opposing counsel has already contacted the witness. If so, ask about the extent of the contact, whether the witness was shown any documents, and if the witness was asked to sign anything. If so, it is essential to obtain a copy of that document, and to expedite efforts to contact other similarly situated former employees.

In one case, opposing counsel contacted a former employee who had moved to Taiwan and who was not fully proficient in English. The opposing counsel sent the former employee an affidavit, which the witness signed simply because she thought it was from her former employer and that it, therefore, must be accurate. When the affidavit was filed with the court, her former employer's counsel had to obtain a counter affidavit addressing not only the factual misstatements in the first affidavit but challenging the deceptive circumstances under which the first affidavit was obtained.

Make A Personal Visit When Needed

If a witness is key to the issues in the case, a personal visit is warranted. Nothing will substitute for the establishment of a one-to-one relationship between an attorney and a witness. Former employees often have a wealth of information about their employers, and although only some of it may be directly relevant to the facts in the case, much of it may provide interesting history, a useful backdrop, and leads to other relevant witnesses. If you schedule a personal visit, confirm the date and time of your arrival by letter, so that the witness has an easy way to reschedule if necessary. As an added precaution, remind the witness of the visit by telephone call a day or two beforehand. The witness may be feeling ill but reluctant to postpone the appointment. The call also provides another opportunity to reduce any nervousness on the witness's part.

Ask If The Former Employee Took Along Any Documents

Be sure to ask the former employee if he or she took any documents upon leaving employment. Witnesses often do not recall doing so, but then invariably discover the odd box of memorabilia in the garage. Assure the witness that the attorneys in the case have no interest in

pension information or personnel evaluations, but even "memorabilia" can be relevant in certain cases. Review these documents while visiting the employee and determine whether the document would be responsive to a deposition subpoena, or otherwise producible by agreement between the parties. If it is necessary to make copies, assure the witness that he will receive his originals back in a timely fashion, because these types of materials often contain old photographs of coworkers and may have great sentimental value to the former employee.

Thank You Letter

Regardless of whether the initial contact is made by telephone or in person, follow up with a thank you letter. Not only will this gesture be appreciated, it also means that the witness will have a written record of the attorney's contact information if he thinks of additional information or if another party to the litigation contacts him. You can also instruct the witness on the need to retain any relevant documents he may have, and offer to assist in that process if necessary. See Appendix 1 at the end of this article for a sample thank you letter.

Contacting Other Witnesses

If there are a large number of potential witnesses who may or may not be involved in the litigation, there may be a temptation to notify them by form letter. If feasible, a telephone contact with a follow-up letter is still the preferable way to establish contact with these former employees. However, if circumstances prohibit this approach, consider having a senior client representative send a letter to the more peripheral witnesses, advising them of the litigation, the company's need for their cooperation, and the potential that they may be contacted by opposing counsel. This letter should provide them with a contact person who they can call with any concerns or questions, or if they are con-

tacted by opposing counsel. See Appendix 2 for a sample of such a letter.

If a number of former employees who worked together over the course of many years are going to be deposed, you may find that they have stayed in touch or wish to renew acquaintances now that they have a mutual involvement in the litigation. Be sure to caution these witnesses not to discuss their deposition preparation or testimony with one another, because it will no doubt be an area of inquiry by opposing counsel.

MEDICAL ISSUES • During the initial contact with the witness, attempt to ascertain the witness's mental and physical health. Often, this will be easy to detect; in other instances, witnesses will readily volunteer information about their health conditions because of their own concerns about the stresses of participating in a deposition. When a witness raises a health concern, this provides the opportunity to tactfully inquire about medication that may affect the witness's ability to recall information or withstand the rigors of a deposition. One should also assess whether a deposition should proceed with special limitations, for example, only a limited number of hours per day or with frequent breaks.

The health of a spouse or other family member may also be an issue. A witness may be serving as primary caretaker for an ailing relative and have limited availability to meet with a lawyer, much less be available for preparation and a deposition. These cases need to be addressed with sensitivity. It may be possible to arrange for another family member to assist, or one might ask the opposing party to bear the cost of home health care for the days on which the deposition takes place. In this instance as well as the case in which the witness himself is frail, a witness may be available only for a shortened day.

Be Mindful Of The Stress

Do not underestimate the stress that a deposition may cause a witness. In one set of related cases, two witnesses suffered non-fatal heart attacks during their depositions. In addition, there are situations in which elderly witnesses have collapsed in tears under the emotional strain of accusations of conduct that opposing counsel attempted to portray as heinous.

CONTACTING THE FORMER EMPLOYEE'S DOCTOR OR RELATIVE

• In some instances, opposing counsel may be insisting on examining a witness who is simply too ill to withstand the rigors of a deposition, or to give valid and useable testimony. Generally, the witness will refer an attorney to a relative, typically a spouse or child, to assist in obtaining information sufficient to prevent the deposition from going forward. However, it may be necessary in some cases to obtain an affidavit from the prospective witness's doctor. An attorney will obviously need the witness's consent to speak directly to the doctor, but it may be sufficient to write a letter to the doctor explaining the circumstances under which the deposition will be taken. The doctor can then opine on whether the deposition should go forward at all, or proceed with certain restrictions.

In some cases involving an elderly or infirm witness, counsel should explore the possibility of a joint informal interview. Although an interview will not substitute for a deposition, it may convince opposing counsel that a deposition is not required, or that the deposition should take place on a strictly limited basis. In addition, as a result of such a joint interview, the parties may stipulate to some basic facts such as those relating to admissibility of documents.

PREPARING FOR THE DEPOSITION

• Consider whether it is necessary to require opposing counsel to subpoena a witness. Al-

though it may be desirable to do so for many reasons, elderly witnesses may be uncomfortable or anxious with the process. In addition to the stress for the witness or his family in confronting the process server on the doorstep, there are also the rather intimidating formats of the subpoena, and usually, the subpoena duces tecum themselves. One witness who was the target of numerous, repetitive deposition subpoenas, became so angry at wording of the Federal Court subpoena that stated "you are commanded to appear" at a certain place and time, without regard to his own schedule or convenience, that he (unsuccessfully) lobbied his congressional representatives to make changes in the form. If it is necessary to require opposing counsel to serve a subpoena directly on the witness, be sure to review the process and anticipated substance with the witness in advance, and if possible, arrange for process to be served by appointment.

If Possible, Depose The Witness Close To Home

When deposing the more typical witness in a multiparty case, it is common for the witness to travel to the city in which most of the lawyers reside, to save time and travel costs. With the elderly deponent, one should consider carefully whether the witness is best served by having the deposition close to home. When asked, the witness may not object to traveling, but this may be based on a lack of appreciation of the stress of a deposition coupled with the stress of traveling. Thus, even with a relatively healthy older witness, it is preferable to have the deposition near the witness's home.

This provides an additional advantage. The witness will have the opportunity to visit the location of the deposition and become familiar and comfortable with it. Whether that location is a hotel conference room, a court reporter's conference room, or facilities made available by

a local attorney, use the same location for witness preparation as will be used for the deposition itself.

Showing Documents To The Witness Before The Deposition

There are many theories about whether to show one's own witness documents before his deposition. With an older witness, there are special considerations. If the former employer is relying on the testimony of the witness to establish facts from many years ago, refreshing his recollection with documents may be essential. Although it will be necessary to provide opposing counsel with documents used to refresh the witness's recollection, this approach will generally help the witness, in that he will not be as likely to be surprised or taken aback by questions.

Generally speaking, and in accordance with the usual standards of civility, even the typically more aggressive attorney will often modify his or her deposition style when dealing with an elderly or infirm witness. If not, then the defending attorney must intervene, and insist that the deposition proceed in a fashion designed to elicit accurate facts in as short a time as possible while producing the minimum amount of distress for the witness.

Some Things To Look Out For

There are particular infirmities that a defending attorney must look out for. Many elderly individuals have some degree of hearing loss, and may or may not wear hearing aids, even if they have been prescribed. During deposition preparation, test the witness's hearing by speaking while not facing him, rapidly, or at some distance.

THE DEPOSITION • If the former employee witness has a physical infirmity, consider raising it with opposing counsel before the deposi-

tion. Consult with the witness before doing so, however. An elderly individual may be embarrassed or want his privacy respected with regard to certain conditions or medications, so you should talk with the witness about the best way to approach these matters. A defending attorney may choose to advise opposing counsel by letter or telephone call of the medical issue and agree on an unobtrusive way of making a record of the issue without unduly embarrassing the witness.

Medications

On the other hand, if opposing counsel is going to ask the witness to identify every medication, its purpose, and its dosage, the witness should at least be prepared for those questions. The defending attorney could then consider working with the witness to prepare a written list of medications that could be provided when and if these questions are asked, and that list can be marked as an exhibit, thereby perhaps saving a modicum of embarrassment to the witness.

Hearing Loss

If, during preparatory sessions with the witness, hearing loss has been identified as a problem, obtain the witness's permission to advise opposing counsel. At the beginning of the deposition, point out the witness's hearing loss and provide instructions to the inquiring attorney regarding ways in which problems can be avoided. It may be appropriate to adjust seating arrangements as well. Although the defending attorney can encourage a deponent to ask the examining attorney to repeat a question if he does not hear it, many people who are hard of hearing do not realize that they have not correctly heard a question. This places a burden on the defending attorney to listen for incongruous question and answer pairs, or instances in which the testimony given seems to be very dif-

ferent from what the defending attorney knows to be the facts. Ask for clarification immediately, or if appropriate, after the next break.

Prepare A Written Work History

Preparing a written educational and job history is another way in which the defending attorney may shorten the deposition and therefore ease the burden on the elderly deponent. The witness may need help constructing the approximate dates during which he held certain positions at particular locations. A written document that can be provided to opposing counsel and marked into evidence will ensure accuracy and speed things along. The witness will be able to refer to it throughout the course of his or her testimony, preventing errors due to confusion about dates. Of course, a written work history will also make opposing counsel's job easier, but one must weigh the need to make the process easier for the deponent against the usual desire to avoid helping the opposition. See Appendix 3 for a sample work history.

Witnesses generally appreciate having these handy references as it shortens the proceeding and prevents confusion at the earliest stage of the deposition. If a witness gets flustered because he cannot accurately remember his work history, it may affect his confidence when more substantive topics are addressed. Conversely, because biographical information is generally covered first in a deposition, a smooth recitation of job history will help the witness become comfortable with the format of the proceeding and the ebb and flow of the deposition process.

Take Breaks

Be sure to take adequate breaks. Although important in any deposition, it is sometimes the case that elderly deponents want to prove that they can keep up with the younger attorneys and plough through an entire morning without interruption. Explain to the witness in advance

that periodic breaks are part of the process, not only for the benefit of the witnesses, but also for the court reporter, videographer, and lawyers. Let the witness know there will be breaks every hour or hour and a half.

Anticipate That The Witness Might Not Be Available For Trial

Before the deposition, it is essential that the defending attorney determine if he or she will need the witness's testimony for trial or summary judgment motions. If so, be mindful of the fact that an elderly witness may be unable or unwilling to provide further testimony at a later date. If the witness has key, extensive evidence important to the case, the employer's counsel may want to consider a two-step process:

- First, opposing counsel will be allowed to take a discovery deposition;
- Second, trial testimony with direct and cross-examination can be conducted as a separate proceeding and videotaped, if desired.

Depending on the health and stamina of the witness, and the extent of the testimony, these two events do not need to take place back to back. There might be a break of a week or a month between the two. Opposing counsel may object to increased travel costs, but if it is in the best interest of the witness, most judges or magistrates will defer. It may be necessary to obtain verification from the witness's doctor on any restrictions imposed on the deposition, but it is well worth the trouble in terms of protecting the health of the witness and obtaining the most accurate testimony possible.

Authenticating Records

Even if the witness has quite poor recall of events or is unwilling to cooperate to any significant extent, it may be sufficient that he or she is able to establish the authenticity and business records status of certain documents

that might otherwise be difficult to have admitted into evidence. Witnesses will generally remember letterheads, the format of internal memoranda, forms used for particular purposes, and signatures of coworkers. These indicia will generally result in establishing authenticity, and perhaps also the business records exception to the hearsay rule. In a case in which the facts revolve around decades of old documents, the need for admissible documentary evidence alone may justify the deposition of an elderly former employee.

CONCLUSION • Working with elderly former employees presents unique challenges for

the litigation attorney. There are also great opportunities to hear first hand not only about the facts relevant to the immediate case but also to many interesting historical events that come alive in the telling as attorneys work with these witnesses.

Moreover, the lessons learned in accommodating the special needs of these witnesses will serve you well in dealing with all witnesses. The deposition process, while familiar to lawyers, is stressful and foreign to the witnesses themselves, and we should take whatever steps possible to make the process easier on those in the hot seat.

APPENDIX 1

Sample Letter To Multiple Former Employees

[CORPORATE LETTERHEAD]

[DATE]

Dear _____:

I am writing to advise you that Acme Corporation has been sued in a number of lawsuits claiming that the widgets manufactured by Acme from 1950 through 1975 at the Harrisburg facility contain a substance that may have caused injury to certain individuals. The company firmly believes there is no merit to this allegation and is vigorously defending itself in these lawsuits on both factual and legal grounds.

We believe that you may have knowledge of possible relevance to these claims. Because of this, the company is required to disclose your name and last known address to the plaintiff's attorneys suing it. Thus, you may be contacted by one of these attorneys or by a private detective acting on their behalf.

The Acme Corporation would also like to speak to you with regard to these matters, and will be contacting you through our in-house attorney, Laura Lawyer. If you do not hear from Ms. Lawyer shortly, please feel free to contact her by calling her collect at 555.555.5555.

Although Acme Corporation cannot instruct you to refrain from speaking to any plaintiff's lawyer or private detective who contacts you, the company prefers that Ms. Lawyer arrange any such contacts. Moreover, you should know that if you are contacted by anyone other than Ms. Lawyer, that individual is NOT contacting you on behalf of Acme Corporation. Furthermore, you are required to refrain from discussing matters that are privileged or that constitute trade secrets.

Acme Corporation appreciates your cooperation in the investigation of this litigation matter and asks that you contact Ms. Lawyer if you have any questions or concerns, or if any other person contacts you regarding this matter.

Thank you.

Sincerely,

Company Executive

APPENDIX 2

Sample Thank You Letter After Initial Contact

[LAW FIRM LETTERHEAD]

[DATE]

Dear _____:

Thank you so much for meeting [speaking] with me recently regarding the widget litigation against Acme Corporation. You were able to provide me with invaluable background information regarding the history of the company.

If you have any questions, or any further thoughts regarding these cases, please give me a call. In addition, if you are contacted by anyone other than me regarding this litigation, I would appreciate hearing from you before you agree to talk to that person. Finally, please ensure that you retain the documents you currently have in your possession that relate to your employment at Acme. If you should need assistance in storing these records in a safe location, let me know so we can make arrangements to do that.

It was delightful to meet with you and I look forward to talking to you again.

Sincerely,

Law Firm Lawyer

APPENDIX 3

Sample Work History To Be Provided To Opposing Counsel

John J. Witness

DOB 3/7/35

B.A., University of California, Mechanical Engineering, 1956

Acme Corporation Employment, 1956 - 1985:

1956 – 1959	Trainee, Corporate Headquarters, New Haven, CT
1959 – 1961	Plant Engineer, Wheeling, WV
1961 – 1965	Plant Engineer, Oakland, CA
1965 – 1972	Senior Plant Engineer, St. Paul, MN
1972 – 1980	Vice President, Engineering, New Haven, CT
1980 – 1986	Senior Vice President, Engineering, New Haven, CT
1986	Retired

PRACTICE CHECKLIST FOR**Defending The Deposition Of An Elderly Former Employee**

- Make contact through a current or former employee who knows the deponent.
- Make your initial introduction by telephone call.
- Consider making a personal visit.
- Ask about documents in witness's possession.
- Follow up with a letter.
- Reconfirm your visit with a telephone call.
- Minimize stress and inconvenience to the witness.
- Assess health issues or limitations, if any.
- Address any medications that the deponent might be taking.
- Familiarize the deponent with the location at which the deposition will be taken, if possible.
- Advise opposing counsel of the witness's health or other limitations.
- Prepare a list of medications, if the topic is unavoidable.
- Prepare a written educational and job history to admit into evidence.
- Be especially alert to signs of fatigue or confusion.
- Be especially alert to signs that disability is affecting the course of the deposition.
- Assist in reading, correcting, and signing the deposition.
- Remain in contact with the witness if trial testimony is a possibility.