2011

Taking Better Depositions by Thinking "Outside the Box"

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Taking Better Depositions by Thinking “Outside the Box”

by Maureen A. Howard

While there are reasons a lawyer may ask questions in a deposition to confirm what she thinks she already knows — nailing down facts for a summary judgment motion, confirming factual and legal theories, perpetuating a witness’s testimony, or facilitating settlement by flexing favorable facts — gathering information the lawyer does not know remains the primary goal of almost every deposition. Despite this, lawyers too often ask questions based on what they already know, limiting the universe of answers and undermining the goal of gathering information.

By the time a lawyer notes depositions, she has already built a “working model” of the case based on client interviews, informal fact investigation, and review of documents and other preliminary discovery. It is easy to structure deposition questions based on this construct, but it presupposes that the lawyer’s pre-deposition view of the facts is complete and accurate. The better practice is to think “outside the box” and imagine the universe of information that could possibly exist — both positive and negative — and then craft your questions in a way that allows the witness to provide information beyond the four corners of your understanding of the case. To do this, begin each topic with a series of open-ended questions that invite the witness to talk generally about the subject. This allows for the possibility of unknown information to be revealed because you haven’t structured the question too narrowly.

When I teach deposition skills, I begin with an exercise that illustrates this concept. I ask the lawyers to pair up, and direct one to ask questions about a car accident the other has experienced. The questioning attorney’s goal is to find out everything about the car accident. During the first round of questions, I tell the responding attorney/witness that they can give only one of three answers to any question asked of them: 1) Yes; 2) No; or 3) I can’t answer the question as phrased. I allow them to ask questions for about five minutes. The questions are always very specific, such as: “Were you driving?”; “Were there other people in the car?”; “Was it at night?”; or “Was anyone hurt?” At the end of the five minutes, I ask the questioning attorneys to take out a piece of paper and draw a picture of the accident based on the informa-

Using focused, narrow questions too early is like shooting torpedoes blindly into the ocean, hoping to hit a submarine without the use of sonar.

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**Out of Work, Out of Luck? Protections Against Unemployment Discrimination Under Consideration**

by Noah Williams

While writing this article, I came face to face with a legal writer’s nemesis: preemption. I had just finished a nice, concise article discussing recent U.S. Equal Employment Opportunity Commission (EEOC) activity related to unemployment discrimination. I posted myself on the back as I posted the timely and relevant discussion on my firm’s website. Then, much to my cynical surprise, U.S. Representative Hank Johnson (D) of Georgia proposed a bill that forced me to reanalyze the issues discussed in my article.

Luckily for me, the proposed bill, HR 1113, the Fair Employment Act of 2011, does not yet alter the legal landscape, and the bulk of my article could remain intact. Though 44 congressmen, including Washington state’s Jim McDermott, cosponsored the bill, there is no guarantee that it will become law.

Our state’s unemployment concerns are about to take on a new dimension. Employment discrimination claims are on the rise. Faced with grim job prospects, employees are beginning to enforce rights they would previously have let pass, or attempt to extract payment from an employer based on a perceived wrong.

Those of us in the Seattle area are not in a unique position with respect to the job market. The Puget Sound has an unemployment rate (8.8 percent) only slightly better than the national average. The Spokane area has comparable rates. Only the Columbia Basin area, with a large federal workforce, appears to boast an unemployment rate significantly below the state and national averages. Without the booming economy necessary to reduce employer and employee angst, the heavily populated Puget Sound area will likely continue to follow the forecasted trends of rising discrimination claims.

**What is employment discrimination?**

On February 16, 2011, the EEOC convened with experts in the employment field to address concerns related to discrimination against the unemployed. The EEOC heard statements regarding large businesses that blatantly advertised a policy against hiring the unemployed. In certain cases, these businesses advertised that unemployed applicants should not even apply.

Any employment policy or practice that has a disproportionate impact on protected classes of individuals (race, gender, age, disability, etc.) exposes an employer to claims of discrimination. The argument with respect to protection of the unemployed is that members of protected classes of individuals (race, gender, age, disability, etc.) are unemployed at a higher rate than others. Employers who deny positions or even interviews to the unemployed are acting on a policy that further reinforces this disparate impact on certain races.

One relatively clear-cut way of determining whether a policy or procedure has an adverse impact is to statistically compare the impact on protected classes. If there is significant disparity in how a policy affects one protected class versus another, a claim for discrimination can be made regardless of the underlying intent of the policy.

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**Remind the witness at the beginning of the deposition that although his lawyer is entitled to make objections, the witness still needs to answer the question asked because the objection is being made only to preserve it in the event the case proceeds to trial.** I do not remind the witness that the lawyer may instruct him not to answer, although he may, because I do not want to remind either lawyer or witness of this possibility. Then, when the witness’s knowledge is exhausted on a topic, ask him to guess: “Well, who might have heard this conversation?”; “Who else might have been at work that day?”; and “Who would be most likely to complain about that, in your opinion?” If he responds that he doesn’t know, direct him quite pointedly to “guess.”

These two simple approaches to expanding the universe of discoverable information — allowing the witness to expand the parameters of the factual landscape by using open-ended questions and by encouraging the witness to speculate — will help ensure that you are not surprised at trial by testimony that was there all along but that you “missed” by crafting your questions too narrowly. ☺

"Off the Record" is a regular column on various aspects of trial practice by Professor Maureen Howard, director of trial advocacy at the University of Washington School of Law. She can be reached at mahoward@u.washington.edu. Visit her webpage at www.law.washington.edu/Directory/Profile.aspx?ID=110.

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**Wyld at a Mariners Game**

Join other new/young lawyers and law students for pre-game socializing and a night at the ballpark. Appetizers and socializing at the Pyramid Brewery will begin at 5:30 p.m. The first pitch will be thrown at 7:10.

**When:** Friday, July 15, 2011  
**Where:** Pyramid Brewery  
1201 1st Ave. S, Seattle  
Safeco Field  
1250 1st Ave. S, Seattle  
**Cost:** $19

For tickets, contact Kristy Stell at kristy.stell@whitsonlaw.com or Kari Petrasek at kari@carsonlawgroup.com.

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