

HRD Liability Update

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Pre-Trial Discovery for Information: Interrogatories, Depositions and Testifying

By John Sample, Ph.D. SPHR

As part of the pre-trial discovery process, an attorney may request written responses from a party to a complaint. *Interrogatories* are an initial attempt to assist the attorney in case preparation, to gather factual evidence, and to identify potential witnesses. Responses to *interrogatories* are not conditioned by oath, whereas a *deposition* is taken under oath. A training manager may receive the interrogatories from the plaintiffs' attorney which should immediately be transmitted to the employers' attorney for review. Examples of a few interrogatory questions are provided below:

1. Describe the nature of the supervision required by you of employees under your control in the offices where you and they work, and in any other areas of the premises where employees and the public have access, including class rooms (both on and off premises).
2. Had you received any complaints prior to 2005 by any employees or other third parties that they were being harassed by any employees?
3. If the answer to interrogatory No. 2 is yes, identify all persons who made such requests.
4. Had you observed or had any knowledge of harassing behaviors by any employees prior to 2005 of employees under your control.
5. If the answer to interrogatory No. 4 is yes, identify any employee that you observed or had any knowledge of such behaviors.
6. Did the human resources management unit for your employer investigate any complaints of harassment by any employees under your control?

It is likely that the response will be drafted by the training manager and must be reviewed the by the employers attorney before forwarding to the plaintiffs attorney. Note that requests of this nature have tight timelines that must be adhered to by all parties. Do not fail to be prompt in responding, lest the ire of the court be unnecessarily aroused.

A *deposition* is a pre-trial discovery procedure used to generate testimony from a witness. This proceeding takes place outside the court, usually in the office of the attorney taking the deposition, and the witness is under oath. Questions asked during the deposition may be based on responses from an interrogatory, but this is not always the case. Sometimes attorneys will schedule a deposition without having requested a response to a written interrogatory. It should always be assumed that the witness being deposed is being evaluated by opposing counsel as a potential witness for use in a formal trial. Given this presumption, it is incumbent that witnesses scheduled for a deposition be educated and prepared for this experience. More cases than not are decided on the strength of a series of depositions. Depositions are an early search for evidence that may mean the difference between a settlement and lengthy and costly court trial.

1. Educating the Witness. The attorney for your employer (or your personal attorney) should spend time with you – the witness - making sure that you understand the importance of your testimony. Your attorney will tell you what to expect – the rules of engagement – as it were. She will tell you that this is serious business and that small talk and chit-chat with opposing counsel is inappropriate. Appreciate the role you’re expected to play as a witness and take the effort seriously (McElhaney, 1992). TV dramas focus on trials; however the important and early action is with *depositions*. This revelation may surprise some witnesses and may help focus their attention.

Time permitting and the availability of video equipment, consider having the witness video taped in a simulated deposition. The attorney can play the role of opposing counsel who will ask expected and similar questions for a response by the witness. Reviewing the video will reveal nonverbal response patterns (hedging and evading questions, tendency to volunteer information, mannerisms). Such preparation is usually not discoverable as it will be protected by the attorney-client privilege (McElhaney, 1992).

2. Preparation by the Witness. Prepare by reviewing in depth all documents that you may be questioned. In the words of Bland (1999), “Review in the context of preparation for a deposition means you must read and understand every word on every single page of every single document” (p. 124). Have a creditable explanation for any extraneous marks or scribbles on a document, as you will be asked to explain anything and everything! Training documentation may include policies and procedures, lesson plans and study guides, instructional goals and objectives, program evaluations, flip charts and participant notes, videos, emails, voicemails, memos, letters, and personal notes made to or about the plaintiff.

3. You’re On the Record. Providing testimony in either a deposition or in a courtroom is a formal process in which statements by you (the witness) will be preserved by a court reporter or some other recording process. A deposition is likened to a conversation between the witness and the attorney who is taking the deposition. As a witness, be relaxed but mindful that the attorney taking the deposition, who may appear to be friendly, is not your friend, but an adversary who wants to elicit information that will support her clients’ legal position.

4. Hesitate Briefly Before Answering a Question. A brief pause by the witness will give his or her attorney an opportunity to object to a question by opposing counsel, and will enable the witness to form a deliberate and studied response. Respond only to the question, not some other question you may think the attorney is asking or to a question the attorney should have asked. Avoid statements such as “I think what your really asking is . . . “ If the question is not understood, ask for clarification until the question is clear. Don’t get rattled by the attorneys’ non-verbal behaviors (rolling of the eyes, facial and body gestures) when clarification is requested, as this may be a ruse to confuse or intimidate the witness.

5. Don’t Speculate, Elaborate, Volunteer or Guess. Speculating or volunteering information will provide opposing counsel unlimited opportunities for additional probing questions. Statements from witnesses that begin with “I think” or “I guess” or “Maybe. . . .” are speculative and must be avoided. Avoid commenting on motives or states of mind of those parties to the dispute. Witnesses are not mind readers, so simply state that you do not know. Avoid volunteering and elaborating your response; listen carefully to the proffered question, form a reasonable response, and wait for the next question. Questions are formed by attorneys to elicit more than a “yes” or “no” response. For example, if an attorney asks a trainer, “Did you ever hear Joe Blank say during your training program that women should not be hired by XYZ employer?” Answer: “No, I never heard him say anything like that, but we did have a discussion about the importance of hiring more minorities.” The response from the witness should have been “no” even though the trainer was trying to be helpful. In this instance, the volunteered information implies that the employer may have discriminated in the recruitment of minorities in the past. The attorney taking the deposition now has a new line of questions for you, the witness! If you don’t know the answer, say so – but don’t guess. “It is your job to give the answers you know – not to speculate about what you don’t know” (McElniney, 1992, p. 86) Do not be seduced by moments of silence by the attorney taking the deposition; extraverted witnesses should not be trapped into having to say something to break the silence.

6. Responding to Questions About Documents. The training and development function is often very document driven, especially if a rigorous instruction systems design (ISD) model is employed for high risk work. Additionally there are supporting policies and procedures, especially in OSHA and safety related training. Given the variety of documentation mentioned above, it is likely that opposing counsel will ask you to verify and comment on documentation. If handed a document, take your time to review the complete document, even if you reviewed the document as part of your planning efforts for the deposition. If asked by the attorney taking the deposition to comment on a document not in your possession, ask to be handed the document so that it can be reviewed before responding.

7. Be Truthful. Even if it may appear that a response is not in the best interest of his or her employer to lie – even a little bit. A slip of the dishonest tongue by the witness will be used later during subsequent proceedings, especially if the case goes to a formal trial. Being made a liar will impact the credibility of the employer as well as that of the witness. The attorney taking the deposition will likely ask if the employers’ attorney

worked with the witness in preparation for the deposition. It is expected that attorneys will prepare their witnesses for depositions and trials, so admitting that preparation took place is expected.

8. Don't Be Argumentative, Sarcastic or Defensive. Given that you are a witness, it is likely that you did something of interest or know something that may support the plaintiff's case. Witnesses who know their facts inside and out will have confidence, thus relying less on reactive defensiveness and sarcastic retorts. Opposing counsel who can push your button during a deposition may get the same response in front of a jury, and juries view such behaviors as counterproductive. As a witness, your testimony is part of an unraveling puzzle that likely has several key players – you are likely not the only party in this party! What ever you did at the time in questions was what you did; don't be trapped into hindsight analysis. Simply state the objective facts as you recall them and the actions that you took. State policies and procedures used to guide decisions. Avoid state of mind questions from opposing counsel – “What were you thinking when you did that?” Remember to pause briefly before speaking to allow your attorney to object.

9. Catch Your Mistakes Early. As a witness, you may discover during the deposition that you may have misstated a fact or was not clear in a response to a question posed by the attorney taking the deposition. Bland (1999) advocates correcting the mistake before the conclusion of the deposition; signal your attorney for a break and discuss how to fix the problem.

References

Bland, T. S. (1999). Say the right thing. HR Magazine, 44, 5, 122-128.

McEllhaney, J. W. (1992, June). Preparing witnesses for depositions. ABA Journal, 78, 84-86.

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