PREPARING A LAW ENFORCEMENT OFFICER FOR DEPOSITION TESTIMONY IN A FEDERAL CIVIL RIGHTS CASE

APRIL 2021

BETH HOFFMAN, Senior Legal Editor
IAN WILLIAMS, Senior Legal Editor
Practical Law
Government Practice

Practical Law™ A THOMSON REUTERS LEGAL SOLUTION

The Importance of Deposition Testimony

A well-prepared deposition witness may not win the case, but a poorly prepared one may lose it.

- First, many Section 1983 cases end in summary judgment.
- Second, often a winning summary judgment motion or other motion practice will turn on a single page or even a line from deposition testimony.
- Third, if the case does proceed to trial, deposition testimony can be used to impeach the credibility of the witness or defendant, discredit the entire defense, and/or present an alternate theory of the case.

Preparing the Witness

When preparing a police officer to be a defendant or defense witness in a federal deposition there are four main areas that should be covered with the officer to ensure they are prepared to answer questions and be an effective defense witness.

- Explain the Federal Deposition Process.
  - Its role, its purpose, and its function in a civil litigation.
- Review the Rules of a Federal Deposition.
  - The process and procedures of what will take place in the room.
- Describe the Role of Counsel.
  - What you can and can't do during the deposition and why.
- Explain the Responsibility of the Witness.
  - Why and how the officer needs to be their own best advocate.

Preparing the Witness

- Meet with the witness to prepare for the deposition at least one time before the scheduled deposition date.
- There is no specific amount of time you must spend with a witness (and it is possible to over prepare); however, generally the more time you spend with the officer to prepare, the more effective a witness they will be.
- After about two or three hours the session will lose effectiveness. Schedule an additional prep sessions before the deposition to review any new information.

Explain the Federal Deposition Process

Describe what to expect during a federal deposition by reviewing:

- The difference between a criminal and civil action.
- The officer's role as either defendant or defense witness in the case at hand.
- The purpose of and rules governing a deposition in a federal Section 1983 case.
- The expectations for the party giving testimony.
- The role of the defense attorney at a federal deposition.
- The likely areas of testimony.

Explain the Federal Deposition Process

Establish trust with the officer.

- Police officers may not trust attorneys due to previous interactions in the criminal process.
- Distrust may be exacerbated by allegations of wrongdoing against the officer.
- Police officers may not fully understand or appreciate the role of defense counsel, particularly if the attorney works for the municipality and has been "assigned" to the case.

Explain the Federal Deposition Process

Providing the officer clear guidance and instruction on what to expect from the deposition and everyone's role in the process helps build trust with your client.

Review the Rules of a Federal Deposition

Discuss the rules of a federal deposition:

- All answers are under oath and subject to a penalty of perjury for lying.
- A party may seek information or testimony on any subject matter that may relate to any claim or defense in the action, even if the information would not be admissible at trial.
- Counsel cannot interpose an objection that serves to coach or suggest to the witness how to answer or evade the question, also known as "speaking objections."
- A witness cannot refuse to answer a question and counsel cannot direct a witness not to answer unless the information sought is protected by privilege or a previous limitation on discovery set by the court.

Review the Rules of a Federal Deposition

Review the rules of a federal deposition with the officer to:

- Empower and educate the officer about the process,
- Allow the officer to properly assist in the defense of the action, and
- Ensure that the officer is aware of the legal constraints that control the actions of all parties in a federal deposition, including the witness, the attorneys, and the court.

Describe the Role of Counsel

Explain that counsel's role at a deposition may be different than what the officer is familiar with from a criminal trial.

Describe the Role of Counsel

For example, counsel can and will interpose objections to certain questions to:

- Defend the witness's interest.
- Ensure that an accurate record of the officer's testimony is created.

Describe the Role of Counsel

However, make clear that counsel cannot:

- Make speaking objections.
- Direct a witness not to answer unless the questioner is seeking privileged testimony or information protected by a previous discovery limitation set by the court.

Explain the Responsibility of the Witness

Empower the witness to be their own best advocate during the deposition by instructing the officer to:

- Be aware of everything said in their presence, even if the comments are not directed at or do not involve the officer.
- Be conscious of the body language or non-verbal cues of defense counsel, plaintiff's attorney, and plaintiff, if present.
- Actively listen to the questions asked during the deposition.

Explain the Responsibility of the Witness

- Consider carefully every word they choose on the record in response to a deposition question and casually among the parties while off the record.
- Ask for a break to speak with counsel if at any time the officer feels uncomfortable, has a question, or just needs a break.

Explain the Responsibility of the Witness

Plaintiff's counsel may employ several techniques to elicit helpful testimony or shake the witness.

- Do not to feel compelled to talk when there is silence or if the officer has nothing else to say.
- Plaintiff's counsel is not a friend or enemy.
- It is not the responsibility of the officer to educate the plaintiff's counsel or make them comfortable.
- If the officer (and you their counsel) is comfortable with the answer that is all that matters.

Guidelines for Giving Effective Deposition Testimony

Before reviewing the witness's answers to questions about the facts of the case, review the practical guidelines for providing testimony in general:

- Answer every question honestly.
- Do not bring any materials to the deposition.
- Listen carefully to each question.
- Ask for a read back or clarification of a question if not fully heard or understood.
- Do not answer a question she does not understand.

Guidelines for Giving Effective Deposition Testimony

- Do not volunteer information or over-answer the question.
- Know that opposing counsel cannot compel a "yes" or "no" answer.
- Do not be concerned whether the questioner is confused by the facts of the case or the answer.
- Avoid using amplifying or qualifying language unless it is one of several predetermined and limited circumstances.
- Give answers in plain English.

Guidelines for Giving Effective Deposition Testimony

- Never guess or speculate.
- Understand the difference between "I don't recall" and "I don't know“.
- Think carefully about word choice and how those words read on paper.
- Be conscious of appearance and demeanor.
- Speak slowly, clearly, and audibly.
- Read all documents carefully and thoroughly.
- Do not respond to hypothetical questions.

Guidelines for Giving Effective Deposition Testimony

- Do not testify as spokesperson for the police department about police department or municipal policies and practices.
- Pause before beginning each answer.
- Immediately stop speaking if defense counsel speak.
- Listen carefully to all objections and arguments.
- Do not become involved in arguments between counsel.

Guidelines for Giving Effective Deposition Testimony

- Always ask for a read back of the last question pending after an exchange between attorneys.
- Take breaks and speak with counsel as needed.
- Do not agree to undertakings.
- Remember that opposing counsel are not a friend or enemy.
- Do not assume opposing counsel are telling the truth.

Guidelines for Giving Effective Deposition Testimony

- Discuss any potentially embarrassing or difficult information with defense counsel in advance.
- Consider that the deposition is only one part of one phase of the case.

Review the Expected Areas of Testimony in a Section 1983 Case

Prepare the officer for testimony by reviewing:

- Personal pedigree information.
- Professional history and pedigree information.
- Standard police practices.
- Circumstances of the incident alleged in the complaint.

Review the Expected Areas of Testimony in a Section 1983 Case

Explain that the only information that usually is off-limits for questioning is:

- Privileged information.
- Information so far beyond the scope of the litigation and not related to any claim or defense that it may be considered harassment.

Protecting Personal Information

- Reassure the Officer that you will do everything within your power to protect their personal information and protect the privacy of their family.
- However, prepare the Officer for the reality that unless the Court intervenes or plaintiff's counsel agrees, they may have to answer personal questions.

Protecting Personal Information

Consider seeking a protective order from the court preventing plaintiff from questioning the officer about sensitive personal information because:

- Public dissemination of a police officer's personal information creates security issues for law enforcement.
- The officer is being sued in his professional capacity so the officer's personal information is not related to any claim or defense of any party.

Protecting Personal Information

If the court is unwilling to prevent plaintiff's counsel from questioning the officer on all personal matters:

- Consider seeking a protective order preventing plaintiff's counsel from publicly disclosing any information deemed personal during the litigation or sharing it with the plaintiff.
- In the alternative, enter into a confidentiality agreement with attorney's eyes-only provisions to protect the dissemination of this information.

Protecting Personal Information

Personal pedigree information generally includes the officer's:

- Full name.
- Date of birth.
- Current home address.
- Previous home addresses.
- Phone number.
- Social security number.
- Marital status and family members.
- Education history.
- Military history, if any.
- Employment history before becoming a police officer, if any.

Practical Law™ A THOMSON REUTERS LEGAL SOLUTION

Professional Pedigree Information

Prepare the officer to address all aspects of their education, training, and professional career as a police officer. This information includes:

- Pre-police service education.
- Police academy training.
- Field or probationary police training.
- Specialized police unit training, if any.
- Current assignment as a police officer (if it is a large police department, this includes location and name of specific police precinct, squad, or specialized unit).

Practical Law™ A THOMSON REUTERS LEGAL SOLUTION

Professional Pedigree Information

- Responsibilities of current assignment.
- Previous assignments as a police officer (including other police departments, precincts, squads, or specialized units within the current police department).

Professional Pedigree Information

- Disciplinary history, if any.
- Civilian complaints, if any.
- Previous claims of excessive force or other misconduct, if any.
- Previous involvement in Section 1983 litigation, if any.
- Previous involvement in litigation as a police officer, if any.
- Previous testimony as police officer unrelated to a criminal prosecution, if any.

Standard Police Practices

Explain that the officer is not a spokesperson for the municipality or the police department and the officer should not answer questions about police department policies except regarding:

- Proper or typical procedures relevant to the facts of the underlying case.
- Specific procedures that the officer and other participants followed in the underlying case.
- Reasons for any break from the typical or mandated procedures.

Standard Police Practices

Instruct the officer that any response regarding policies should be qualified by saying:

- "in my experience.“
- "it was my practice."

Standard Police Practices

- Review any relevant paperwork with the officer, especially any paperwork created by the witness.
- Address any inconsistencies or irregularities between various documents and any previous testimony.

Standard Police Practices

Common areas of questioning on police procedures are:

- Stop, question, and frisk procedures.
- Arrest processing, including names and types of paperwork and forms required by policy.
- Contemporaneous note taking and report writing.
- Evidence preservation such as vouchering, safeguarding and chain of custody concerns.

Standard Police Practices

- Communications with prosecutors.
- Weapons maintenance and safeguarding.
- Off-duty responsibilities and restrictions.
- Police department rules and procedures relevant to the case.
- Understanding of the legal basis for police action, such as the legal standard for probable cause and reasonable suspicion.

Circumstances of the Incident Alleged in the Complaint

Review the circumstances of the incident from beginning to end with the officer.

- Be prepared that the officer's memory of the events will be spotty and the officer will likely not recall some or all of the facts as described by the plaintiff.
- Explain that the officer may continue to recall new and additional details about the incident for days or even weeks after the prep session. A second prep session will likely be required.

Circumstances of the Incident Alleged in the Complaint

- Inform the officer that if new details are recalled between the final prep session and the deposition, counsel should be informed of these new details as soon as possible.
- Use documents to refresh the officer's recollection of the events, particularly any contemporaneous notes or reports written by the witness during the incident.
    - Review the distinction between a refreshed recollection and information obtained from reviewing documents or other materials.

Circumstances of the Incident Alleged in the Complaint

- Watch or listen to any recordings of prior statements made by the officer regarding the incident alleged in the complaint.
- Watch or listen to any recordings of the incident alleged in the complaint.

Circumstances of the Incident Alleged in the Complaint

Prepare the officer by covering the who, what, why, where, when and how of the incident, for example:

- Who was present.
- What was the officer doing.
- What were the others doing.
- Why was the officer doing it.
- Why were the others doing it.
- Where did it take place.
- When did it take place.
- How did the officer behave.
- How did the plaintiff behave.

Post-Deposition

Inform the officer that once the deposition is complete, a transcript will be provided. The officer will need to:

- Review the transcript.
- Make notes of any errors.
- Correct any errors.
- Sign and date the transcript and return to you.