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Section 1983: Preparing a Police Officer for Deposition Testimony

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A Practice Note explaining how to prepare a police officer defendant or witness to give federal deposition testimony in a Section 1983 action. Specifically, this Note discusses the purpose and governing rules of a federal deposition, roles of the various parties at the deposition, guidelines for testimony in a federal deposition, and likely areas of testimony in a Section 1983 action.

As members of law enforcement and the criminal justice system, most police officers have a basic familiarity with testifying under oath, either from testifying in criminal proceedings in front of a judge or a jury or from their training at the police academy. However, in those cases the police officer is usually testifying as a witness for the prosecution and the proceeding is generally a criminal proceeding governed by state and local law.

In contrast, police officers are typically less familiar with giving deposition testimony as a defendant in a federal civil action. This is an experience that can be challenging for even the most seasoned police officer. In fact, some police officers may not even be familiar with the term "deposition" or how it differs from court room testimony, let alone possess the skills and techniques needed to be an effective witness.

This Note provides guidance for preparing a police officer to give federal deposition testimony in a Section 1983 action, including:

- Explaining the federal deposition process (see Deposition in a Federal Action).
- Preparing to be an effective deposition witness (see Guidelines for Testimony).
- Prepping likely aspects of testimony in a Section 1983 case (see Areas of Testimony Preparation).

For more information on the requirements of a Section 1983 claim (including the substantive elements of a Section 1983 claim and guidance on defending Section 1983 claims), see Practice Note, Section 1983: Overview and Section 1983 Toolkit.

Depositions in a Federal Action

A deposition is sworn testimony taken and recorded before trial. The purpose is to discover facts, obtain leads to other evidence, preserve testimony of a witness that may not be available at the time of trial, and confirm a witness' version of events. While the testimony given at a deposition is sworn to under oath, deposition testimony serves a different purpose than trial testimony. Trials are about persuading the judge and jury of a party's version of events while depositions are about fact finding.

A typical police officer is likely familiar with giving sworn testimony in a criminal trial or hearing but has little experience with giving deposition testimony or even trial testimony in a civil action for damages. The best way for counsel to prepare a police officer witness or defendant for a deposition testimony is to:

- Make the defendant aware of the difference between a criminal and civil action.
- Explain the police officer's role as either defendant or defense witness in the case at hand.
- Explain the purpose of and rules governing a deposition in a Section 1983 case in federal court and the expectations of the party giving testimony.
- Provide clear guidance on the role of the defense attorney at a federal deposition.
- Prepare the police officer defendant or witness to answer deposition questions on all expected areas of testimony.

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Police officers may not trust attorneys due to interaction with them in the criminal process. This is sometimes exacerbated by plaintiff's claims that the officer committed wrongdoing. The officer also may not fully understand or appreciate the role of their defense counsel and may be suspicious of an attorney that works for the municipality and has been "assigned" to the case. Providing the officer clear guidance and instruction on what to expect from the deposition process helps build:

- Trust in their attorney as counsel and advocate.
- Confidence in themselves as an effective witness.

Rules of the Deposition

The Federal Rules of Civil Procedure (FRCP) provide that all parties have full access to all the evidence their adversary intends to use to prosecute or defend the action. A party is free to seek through discovery any non-privileged information related to a parties' claim or defense even if that information is inadmissible at trial (FRCP 26(b)(1)). While the FRCP does not allow a party to seek any information it desires without basis, the FRCP provides for broad and open discovery (see *Carr v. State Farm Mut. Auto. Ins. Co.*, 312 F.R.D. 459, 462 (N.D. Tex. 2015)). This is never more apparent than in a federal deposition.

At a federal deposition counsel can only direct a witness not to answer a question to preserve a privilege or otherwise enforce a previous discovery limitation imposed by the court (FRCP 30(c)(2)). As a result, the scope of the testimony is likely broader than simply the circumstances giving rise to the litigation. This can be surprising for most police officers. Counsel can still make several arguments to defend a police officer witness during a deposition and prevent the witness from responding to certain difficult or uncomfortable questions, such as:

- **Harassment.** The question seeks information that is of a such a personal nature and so far-removed from the facts of the case or any claim or defense that its only purpose is to harass and upset the witness. Most Section 1983 actions arise from a police officer's training and actions as a police officer and not in their capacity as a private citizen. Examples of topics that may be considered harassment by the court are:
  - marital status, divorce proceedings, or relationship with a spouse or romantic partner;
  - children;
  - personal finances;
  - unrelated medical history;
  - sexual orientation; or
  - other professional or personal sensitive issues to the officer.

  Because a large percentage of Section 1983 litigation judgment or settlements are indemnified by the municipality, counsel can further argue that the individual officer's personal life is not related to any claim or defense.
- **Privacy and security concerns.** Given the nature of police work, it is extremely important to keep personal information out of the public arena. In many cases even disclosing this information to the plaintiff may present security concerns if plaintiff has a criminal history. Examples of this information include:
  - home addresses;
  - telephone and mobile phone numbers;
  - Social Security numbers;
  - date of birth; and
  - names and contact information of close family members.

  The parties can usually come to agreement on disclosure of this information with defense counsel agreeing to:
  - provide business contact information in lieu of personal contact information for the officer;
  - accept service of process on behalf of the police officer; and
  - make the police officer available for testimony at trial, even if the officer is not a defendant in the action.

Role of Counsel

Counsel's attempts to control the testimony at a federal deposition can be more limited than at trial. While the FRCP empowers an attorney defending a deposition to object to questions they believe are improper, the FRCP clearly states that a lawyer making an objection to a question must make that objection in a concise, non-argumentative, and non-suggestive manner (FRCP 30(c)(2)). Counsel's attempt to coach or suggest to the witness how to answer or evade the question using their objections, also known as "speaking objections," is strictly prohibited in a federal deposition. See *Specht v. Google, Inc.*, 268 F.R.D. 596, 598 (N.D. Ill. 2010); *Deville v. Givaudan Fragrances Corp.*, 2010 WL 2232718, *6–8 (D.N.J.2010); *Jadwin v. Abraham*, 2008 WL 4057921, *6–*7 (E.D.Cal.2008).

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Due to the broad nature of discovery, with limited exceptions, unless counsel believes the question posed is likely to elicit privileged testimony, there is little counsel can do to prevent a witness from having to answer a deposition question (FRCP 30(c)(2)). Even if the witness believes the questions are irrelevant, uncomfortable, or too personal. Counsel should clarify to police officer witnesses they are not failing to defend the officers' interests at the deposition by limiting objections but rather counsel is abiding by the governing rules.

Responsibility of Deponent

The witness should understand that not only are they a party in the case, but they are also an essential part of the defense team. This is particularly true during the deposition, when counsel's role is dictated by the FRCP and the law. It is important that the officer understand and appreciate that the officer must be his or her own best advocate during the deposition. This means the officer must:

- Always be aware of what is being said in their presence, even if the comments are not directed at or involve the officer.
- Be conscious of the body language or non-verbal cues of both defense counsel, plaintiff's attorney, and plaintiff, if present.
- Actively listen to the questions asked during the deposition.
- Consider carefully every word the officer chooses, both on the record in response to a deposition question and casually among the parties while off the record.
- Not feel compelled to talk when there is silence or if the officer has nothing else to say.
- Ask for a break to speak with counsel, if at any time the officer feels uncomfortable or has a question.

Guidelines for Giving Testimony

Before reviewing the witness' answers to specific questions about the facts of the case, it is important that counsel review the guidelines for providing testimony in general (See Practical Guidelines). Police officer witnesses often have a level of familiarity with providing formal answers to questions from previous experiences, such as:

- Giving testimony in a criminal proceeding.
- Being interviewed or questioned by other police department personnel, prosecutors, or other government agencies.
- Conducting investigations and writing reports and other documents in support of arrests and prosecutions.

As a result, a police officer is naturally careful with word choices when answering questions. This can be both a benefit or hinderance as it can be a:

- Benefit because the officer intends to be thoughtful in word choice and not volunteer information that has not been requested.
- Hinderance because it can result in an officer that appears difficult or dishonest by giving confusing and awkward half answers and fractured statements.

It is important that the officer understands the difference between their previous witness testimony experiences to be an effective deposition witness.

Practical Guidelines

The goal of fully preparing a police officer witness is to prepare that officer to be a confident witness that is able answer questions on any topic, even surprise areas of testimony counsel may not have previously reviewed in the deposition prep session.

Defense counsel should direct the witness to:

- **Answer every question honestly.** In every answer the witness must give a truthful response. The officer is under oath and intentionally false answers may constitute a crime. Falsehoods on even minor or irrelevant points can be used to attack credibility on more important issues and may result in disciplinary action against the officer, such as loss of representation by municipal counsel or indemnification of any award or settlement. Being honest does not mean the witness needs to over-answer or volunteer information that plaintiff's counsel did not ask for or guess at what the questioner is asking.
- **Not bring any materials to the deposition.** The witness should not bring anything to the deposition, including personal notes, police memo-books, police reports or other police materials, unless counsel has specifically instructed the officer to do so.

  Counsel should instruct the witness that anything brought to the deposition must be turned over for review by plaintiff's counsel. If the officer remembers or locates some previously forgotten materials between the prep session and the deposition, the officer should be instructed to provide these materials to counsel before entering the deposition room, so counsel can decide if disclosure is proper.

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- **Listen carefully to each question and only answer a question the witness fully understands.** Counsel should prep the witness to listen carefully to the question. The witness does not have to answer a question that is unclear or was not fully heard. However, opposing counsel is likely to assume the witness has fully understood and heard the question unless told otherwise. Many questioners attempt to get the witness' agreement to inform them if the witness does not fully understand or hear the question. This prevents the witness from later claiming they did not understand the question because they failed to mention it, as they agreed to, at the time.

  While defense counsel can attempt to object to a question that is confusing, complex, or seeks multiple answers, plaintiff's counsel should instruct defense counsel to stop using speaking objections to coach the witness. The police officer must be prepped to understand that it is their responsibility to listen as carefully as possible to each question and be their own advocate if a question is not understood or fully heard.

- **Ask for a read back or clarification of a question if not fully heard or understood.**It is questioner's obligation to ask a question the witness understands. It is not the witness' obligation to understand the question. Therefore, it is the officer's responsibility to ask for a clarification or a read back of the question if the officer did not fully hear or understand the question. The police officer should leave the prep session understanding that he or she is fully empowered to challenge the plaintiff's counsel until the question is posed in a way that the officer clearly understands what is being asked.

- **Not volunteer information or over-answer the question.** When appropriate, a "Yes" or "No" is always the preferred answer to a deposition question. It does not provide any additional information and provides the questioner no follow-up. Restricting answers to "yes" or "no" ensures that opposing counsel is not obtaining any new information, but rather only getting confirmation regarding the truth of the information already known or suspected by the plaintiff.

  The classic example that provides an excellent demonstration during prep is:

  "Do you know the time?"

  Many witnesses answer by providing the time. However, "what time is it?" was not the question asked. The questioner simply asked, "Do you know the time?" to which the proper response is either "yes" or no."

- **Know that opposing counsel cannot compel a "yes" or "no" answer.** When a short answer is likely to be misleading, the witness should understand they may explain the answer so it is complete and unambiguous. The questioner cannot force the witness to answer a question "yes" or "no" if the witness is not comfortable doing so. The classic example of this problem is the following Q & A:

  "Do you still beat your wife?"

  "Yes," means the witness beats his wife. "No," means the witness previously beat his wife. The correct answer is "I never beat my wife."

- **Not be concerned whether the questioner is confused by the facts of the case or the answer.** Police officers are trained in specialized work. As a result, the officer may feel compelled to ensure the questioner understands the answer or has a complete picture of events. While it is imperative the witness gives a clear, accurate answer, there is no mandate that the questioner understand the answer. The officer does not need to explain or educate the questioner with the officer's answer.

  Sometimes the questioner feigns confusion to get the witness to keep talking. This is an intentional tactic used to get the witness to volunteer additional information. For example:

  - the questioner may remain silent and stare at the officer, making the officer feel uncomfortable and want to continue speaking and elaborating on the answer; or
  - the questioner may nod or look confused to silently encourage the officer to elaborate or further explain the answer.

  If the officer believes opposing counsel does not know or is confused about the facts of the case, the witness should understand that it is not their obligation to correct or educate opposing counsel. If the questioner does not understand the answer they can ask as many follow up questions as needed.

  However, the officer should be instructed that if their own counsel indicates a problem with the answer (by using a pre-determined signal), the officer should take a moment to rethink the response. The officer may even request a break and speak privately outside the room with counsel. If a clarification is needed, the officer should say so. While it is not ideal to give conflicting answers, it is better to correct the record with an accurate and clear response, than leave ambiguous or incorrect testimony in the transcript.

- **Avoid using amplifying or qualifying language.** The strongest answers are simple and unadorned.

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Adjectives can result in avoidable and potentially harmful lines of follow-up questioning. Do not weaken a strong "yes" or "no" response with qualifiers like "Yes, I believe so" or "No, I don't think so."

- **Give answers in plain English.** If an answer requires more than a "yes" or "no" answer, give answers in short, simple, plain English answers and avoid using police jargon or terminology, if possible.
- **Qualifying language if necessary (in limited circumstances).** A witness should be instructed that unless they are 100% certain of an answer they should respond, "I don't recall" or "I don't know" (as appropriate). A witness should never guess or speculate.

  However, there are limited circumstances where it may be appropriate to qualify an answer because a witness is not comfortable simply saying "yes" or "no" but "I don't know" or "I don't recall" are not appropriate either. In those situations, it may be appropriate to qualify the response with a phrase, such as "to the best of my recollection" or "I believe."

  In Section 1983 litigation this situation most commonly arises when asked about whether the officer followed routine administrative police procedures like:

  – filling out arrest paperwork;

  – safeguarding personal items;

  – transporting an arrestee; or

  – other ministerial tasks.

  In this situation, the officer believes the officer completed these tasks because they have no reason to believe otherwise, but they do not have a specific memory of doing so. If an officer answers "I don't recall", it may make the witness look disingenuous and discredit the rest of the testimony. If the officer affirmatively answers "yes" and later it is determined another officer performed these tasks or they were not done at all, the officer may be accused of lying at the deposition. Qualifying the answer leaves the officer an opportunity to further explain at trial or in an affidavit, if needed.
- **Understand the difference between "I don't recall" and "I don't know."** One of the most important instructions counsel can give a witness in preparation for a deposition is to be careful with word choice and to think carefully before speaking. This is especially important with the most common answers in a deposition, "I don't know" and "I don't recall." These two common responses may seem similar and witnesses often use them interchangeably during casual conversation. In fact, they are different answers with different meanings that become apparent in sworn testimony in the following ways:

  – "I don't recall (or remember)" is the proper response to a question that the witness may have known at some point, but now (possibly years later) cannot recall.

    "I don't recall" is an important answer because depositions often occur early in the litigation process but years after the events occurred. The witness may not have thought much about the events in the intervening years and their recollection may be hazy or spotty, even after deposition prep.

    In contrast, when this matter comes to trial, the witness is likely to have spent many weeks preparing for trial. The act of preparing for trial is likely to cause the police officer witness to remember additional details that the officer forgot at the time of deposition. When the officer is testifying in their case in chief, counsel may also be able "refresh the witness' recollection" on the witness stand.

    While it is not ideal for a witness to remember additional details at trial that they may not recall at their deposition, a witness can explain this effectively by stating how the witnesses' memory was refreshed.

  – "I don't know" is the proper response to a question that the witness never knew the answer to. The answer conveys to the questioner that it is information outside the scope of the witnesses' realm of knowledge and no amount of refreshing the witnesses' recollection is likely to cause the witness to recall this information.

    An "I don't know" response should effectively put an end to the area of inquiry and continued attempts by opposing counsel to continue to get the witness to recall the information may constitute badgering or harassment if brought to the court's attention.

    Counsel should clarify that this response is only used by a witness when the witness is certain they do not know the answer and never did.
- **Not guess or speculate.** The police officer witness must stay within the realm of their own knowledge. Witnesses should only testify to facts which they have personal knowledge.
- **Think carefully about word choice and how those words "read" on paper.** One aspect of a deposition that most witnesses, including police witnesses, fail to appreciate is that their testimony is transcribed onto paper. While the attorney conducting the deposition is

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attempting to evaluate the witness during testimony, the judge or jury evaluate the testimony in written form. The officer's tone, volume, emotions, and behavior are not recorded in the transcript. All that is recorded are the spoken words.

Police witnesses should be counseled to give constant thought to their word choice and how the answer is likely to "read" on paper. Things like sarcasm or wit usually do not translate well in a written transcript and can cause an answer to be misinterpreted by the reader.

It can be helpful to show the officer examples of bad testimony in transcripts so they can see how innocuous statements can be misinterpreted by a reader.

- **Be conscious of appearance and demeanor.** Plaintiff's counsel uses the deposition to start forming an impression of what kind of witness the officer is likely to be at trial based on appearance, demeanor, and performance. The officer always should be in control and believable. While none of the officer's behaviors are recorded in the transcript, constant fidgeting, or an inability to look the questioner in the eye when speaking, while maybe unintentional, can give the impression of dishonesty or distrust. The officer should be as courteous as possible and never argue with counsel. This behavior is a common tactic to provoke a witness in effort to cloud their judgment to affect the testimony.

  If the deposition is also being recorded by video, the witness must be conscious of their body language and physical behaviors because the video may be played before the judge or jury at some point in the litigation.

- **Speak slowly, clearly, and audibly.** The witness should speak slowly and clearly. Depositions are being recorded by a court stenographer. If the stenographer cannot clearly hear each word the witness speaks, it may create an inaccurate record. The first time a person says something is generally the most accurate way that person intended it to be said. Sometimes when asked to repeat an answer, a witness rephrases or embellishes the original answer.

- **Read all documents carefully and thoroughly.** If counsel presents a document to the officer and asks questions regarding it, the document should be read carefully and thoroughly before answering regardless of the length of the document. If the witness does not recall the document or never saw it before, the witness should state so. If the witness is not the author of the document, the witness should refrain from interpreting or guessing at the author's meaning of the document. The document speaks for itself.

- **Not respond to hypothetical questions.** There are simply too many variables in any given situation to provide an accurate answer to hypothetical events without knowing the entire universe of facts. This is especially true when dealing with issues like the legality of an arrest or use of force. Counsel should instruct a police officer to respond to such questions by stating that they cannot answer that question because there are too many unknown variables. If pressed on what such "unknown variables" may be, the witness should clarify that they are "unknown," so a response is impossible.

  If the plaintiff's counsel requires a police officer to answer a hypothetical question, the officer should clarify that the answer is strictly limited to only those facts in the hypothetical and any slight change in those facts may alter the response.

- **Not testify about police department or municipal policies and practices.** The deposition of a police officer defendant and police officer witness is as a fact witness. Simply being a member of the police department or an employee of the municipality does not qualify a fact witness to speak on behalf of the municipality regarding its policies, practices, and customs. If the plaintiff seeks this type of testimony they must notice the deposition of a witness under FRCP 30(b)(6) and the municipality designates the appropriate witness.

  However, a police officer and employee of the municipality should have familiarity with policies and practices that relate to the performance of their duties. Counsel should instruct the officer to respond to any questions about policies and practices only regarding the officer's own knowledge, experience, and training. To ensure that the witness' answers are not attributed to the municipality, counsel should instruct the witness to qualify any such responses in the following ways:

  - in my experience;
  - it was my experience; or
  - my practice was.

- **Pause before beginning each answer.** Counsel should instruct the defendant to pause and take a moment after the questioner finishes the question before answering. This allows:

  - the court reporter to hear and record the full question;
  - the witness to fully hear and process the question and choose the proper words for a response; and
  - counsel to fully consider the question and determine if an interposed objection is appropriate or if the question seeks privileged information and the witness should be directed not to respond.

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Witnesses often feel pausing makes them look less truthful or trying to think of an answer. While this may be a concern in live testimony, the witness should understand that the transcript does not reflect any pauses. The witness should also be reminded not to think aloud while preparing their answer to the question.

- **Immediately stops speaking if defense counsel speaks.** No matter what the witness is saying or wants to say, once defense counsel starts speaking, whether by simply saying "objection" or otherwise, the witness must stop speaking, even mid-sentence.

  The witness may not fully appreciate the legal implications of their words and once spoken the damage may not be repairable. If the witness believes what they want to say is likely to be helpful to the defense or is otherwise important to get on the record, the witness should speak to counsel privately off the record. The witness should not speak again in plaintiff's counsel's presence until specifically directed by counsel to do so.

- **Listen carefully to all objections and arguments.** Speaking objections are not allowed because they are considered coaching the witness (see *Specht v. Google, Inc.*, 268 F.R.D. 596, 598 (N.D. Ill. 2010)). However, many attorneys employ this technique to varying degrees when defending a deposition and interposing objections. For example:

  – "objection, asked and answered"; or

  – "objection, this is a complex question, you are asking the witness multiple questions at once."

  The witness should listen carefully to all objections and any explanation counsel gives for the objection, as well as arguments by opposing counsel. Listening to the different positions about the objection to a question may give the witness a better understanding of the problem with the question.

- **Not become involved in arguments between counsel.** The witness should never become involved in arguments between the attorneys, no matter how heated it becomes or the specific words said by either side. If the officer believes either counsel has said something that is factually incorrect or needs clarification the officer should speak with counsel privately.

  However, the officer may find that in listening to the argument, particularly by their own counsel, the parties present clues regarding the problem with the question. As a result, the witness may be able to tailor their answer accordingly.

- **Always ask for a read back of the last question pending after an exchange between attorneys.**

  Sometimes after an exchange between attorneys, the witness forgets the question or some part of the question. Therefore, it is important to have the question read back by the stenographer to ensure a full understanding of the question.

- **Take breaks and speak with counsel as needed.** Counsel should instruct the witness that they may take a break at any time and for any reason, whether to use the restroom, stretch their legs, or consult with counsel. However, counsel normally requires the witness to answer the last question asked before breaking.

  If the reason for the request for the break is to speak with counsel, the witness should refrain from specifically stating that reason and simply ask for a break.

- **Not agree to undertakings.** All requests by opposing counsel, including providing additional information, searching for or providing additional documents, or agreeing to appear again for further questioning should be directed to counsel. The witness should remain silent and not respond to any such requests.

- **Remember that opposing counsel is not a friend or enemy.** The witness should not be influenced by opposing counsel's friendliness, apparent cooperativeness, or courtesy. Counsel should instruct the officer not be concerned about convincing the officer of the merit or credibility of the testimony.

  In contrast, if opposing counsel is antagonistic, demonstrates aggressive behavior, or makes accusations of wrong doing, the witness needs to remain calm and professional. This is a common technique to see if counsel can provoke the officer when in front of a jury.

- **Not assume opposing counsel is telling the truth.** Counsel should instruct police defendants and witnesses that opposing counsel may be inaccurately describing prior testimony, a document, or the facts of the case. This may be an oversight by opposing counsel or an intentional lie to get the witness to change their testimony. If a witness believes that opposing counsel is not reciting prior testimony correctly, the witness should ask for a break and speak with their counsel privately.

  The witness also should not become upset by opposing counsel's insinuation or accusation that the testimony is inconsistent with a document, another person's testimony, or even the witness' own prior testimony. This is also a common tactic by counsel conducting a deposition to rattle a witness.

- **Discuss any potentially embarrassing or difficult information with defense counsel in advance.** While

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counsel must know all the facts of the case and the officer's history before beginning the deposition prep session, the officer may have some embarrassing or difficult history that counsel is unaware of.

Counsel should always ask the officer about any difficult or embarrassing situation from the past or present, whether personal or professional, that may come up during the deposition, even if it has nothing to do with case. Counsel should encourage the officer to speak frankly and candidly and reassure the officer that raising the issue with counsel before the deposition does not necessarily mean that questions about that subject are likely to occur at the deposition.

Counsel should also advise the witness that not raising or discussing embarrassing or difficult information at the deposition prep sessions is not likely to stop plaintiff's counsel from raising or discussing the matters at the deposition. Counsel must do everything possible to keep this information out of the case however counsel must know about all possible embarrassing or difficult information to prepare for the deposition.

Examples of this type of information may be:

- divorce;
- child custody issues;
- internet or social media usage;
- political activities;
- accusations of domestic violence; and
- bankruptcy or financial issues.

- **Keep in mind that the deposition is only one part of one phase of the case.** Often witnesses, especially police officers well versed in the law and legalities of arrest, are concerned that in a deposition the plaintiff's counsel did not ask the right questions to show they did not do anything wrong. Counsel should ensure that the witness understands the officer's deposition is not where the defense "makes it case." It is instead where the plaintiff's counsel can ask whatever they believe they need to make the plaintiff's case. The officer should not be concerned that all the relevant facts are not being elicited or that the questions create a misleading or incomplete picture. The officer is likely to have numerous other opportunities to present their version of events or the "whole story."

Areas of Testimony Preparation

When preparing a police officer for testimony it is important not only to focus on the facts at issue in the case, but also prepare the officer to answer more personal questions about family, education, and training as a police officer. These are areas of questioning that a police officer is likely to be unfamiliar with being questioned about and may be reluctant to respond to. If an officer has difficulty understanding why these areas may be addressed, counsel should focus on the nature of civil litigation, the role of the defendant in a civil action, and the purpose of civil discovery.

When preparing for deposition testimony in a Section 1983 case, police officers should be fully prepared to answer questions on the following topic areas:

- Personal pedigree (see Personal Pedigree Information).
- Police officer pedigree, history, and training (see Police Officer Pedigree Information).
- Standard police practices (see Standard Police Practices).
- The incident alleged in the complaint (see Circumstances of the Incident Alleged in the Complaint).

Personal Pedigree Information

Most plaintiff's counsel are likely to seek information regarding a police officer's personal identifying information, which is common for a defendant to provide in litigation. However, as a police officer defendant this obviously presents security and privacy concerns, especially if the plaintiff is someone the defendant has previously arrested or otherwise has a criminal history.

Counsel should make every effort to protect the disclosure of this information or restrict its dissemination. To that end, courts have frequently held that a police officer defendant is not required to provide this information or only provide it under a protective order or confidentiality agreement with attorney's eyes-only provisions. See *Donald v. Rast*, 927 F.2d 379 (8th Cir.1991); *McGee v. City of Chicago*, No. 04 C 6352, 2005 WL 3215558, at *2 (N.D. Ill. June 23, 2005).

Personal pedigree information generally includes the defendant's:

- Full name.
- Date of birth.
- Current home address.
- Previous home addresses.
- Phone number.

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- Social Security number.
- Marital status and family members.
- Education history.
- Military history, if any.
- Employment history before becoming a police officer, if any.

Professional Pedigree Information

In contrast to personal pedigree information, a police officer's professional pedigree and employment history is directly relevant and discoverable in a Section 1983 case. However, most police officers are not likely to be familiar or comfortable answering questions on these topics in depth because it is not typically the subject of testimony in a criminal matter.

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).
- Responsibilities of current assignment.
- Previous assignments as a police officer (including other police departments, precincts, squads, or specialized units within the current police department).
- Disciplinary history, if any.
- Civilian complaints, if any.
- Previous claims of excessive force, 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

Much of a police officer's work is procedural and administrative. This is a result of specific police department mandated procedures to preserve arrest evidence and standardize police practices to comply with the law or the individual police officer's own work habits, or both. Police officer witnesses should be prepared to thoroughly discuss:

- The proper or typical procedures relevant to the facts of the underlying case.
- The specific procedures that the officer and other participants followed in the underlying case.
- The reason for any break from the typical or mandated procedures.

Because paperwork is likely to be a large focus of this area of questioning during the deposition it is critical that counsel review any relevant paperwork with the witness, especially any paperwork created by the witness. Counsel should address any inconsistencies or irregularities between various documents and any previous testimony. 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, vouchering, and safeguarding.
- 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 probable cause and reasonable suspicion.

Circumstances of the Incident Alleged in the Complaint.

No witness ever remembers every detail of an event, especially years later when a deposition is typically conducted. Prepping a witness on the details of the events at issue is critical. Not only does this prep help the witness properly formulate responses to questions but it can also serve to refresh the witness' recollection.

The witness may even continue to recall new details of the events for days or even weeks after the first session. It is often helpful for the witness to come back for a second or third prep session and have an opportunity to meet with counsel before the deposition to review these refreshed recollections. If there is no time for a full second prep session, counsel should arrange to meet with the witness for an hour before the start of the deposition to discuss

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any new details the witness may have recalled since the initial prep session.

Section 1983 actions generally arise out of police officer's actions while on duty. This can sometimes present a recall issue for a police officer defendant or witness if:

- The incident arises out of similar police work that this officer does daily, for example, a traffic stop for a traffic officer, a drug-buy for an undercover narcotics officer, or a search warrant execution for a warrant squad officer.
- The officer denies the incident took place and states that the plaintiff is fabricating the encounter.

In these situations, it is helpful that most police officers must keep contemporaneous notes of their arrest and interactions with civilians. Use of these notes (often called a memo-book or spiral) can help refresh the officer's recollection of the specific events at issue in the case of or, in the alternative, the absence of any written record of the events may help prove that plaintiff has fabricated the allegations.

Counsel can use any documents to refresh a witness' recollection during prep. However, counsel must generally provide counsel with copies of any documents that the witness reviewed during prep, even if this document is not one which otherwise requires disclosure. If there is a recorded version of events, the witness should be fully familiar with the recorded version and keep testimony as close to the recorded version as possible.

When preparing an officer for testimony about the incident alleged in the complaint, it is important to cover the who, what, why, where, and when. For example:

- Who was present?
- What were you doing?
- What were they doing?
- Why were you doing it?
- Why were they doing it?
- Where did it take place?
- When did it take place?

Post Deposition Discovery

Once the deposition is complete, the witness is to be provided a copy of the transcript to review. If the witness believes there are errors in the transcript, they should make notations in the transcript. On completion of the deposition, plaintiff's counsel may also serve additional document requests, interrogatories and seek additional depositions.

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