

Conducting Effective Witness Interviews: *Identification of Material Witnesses*

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I. Identification of Material Witnesses.

In the litigation world, the merits of the case are determined by the admissible evidence obtained by the parties during discovery and at trial. One category of such evidence is the testimony of the witnesses called by the respective parties.

The plaintiff will seek to establish the elements of the client's cause of action while the defense will seek to show that one or more of these elements are disputed by credible evidence or to establish defenses which absolve the defendant.

This is a practical seminar dealing with the very practical problems that exist in all cases - specifically, who are the witnesses whom you wish to testify on behalf of your client? A corollary question is which of these witnesses will place your client's case in the most favorable light before a jury?

We begin by exploring the following: where the practitioner finds the names of these individuals; a discussion of the process of determining where these witnesses fit into the mosaic that is your case; the preparation of witnesses; and a review of errors to avoid.

A. Records/Reports.

In some cases, a review of the allegations contained in the initial pleadings may reveal the key players in the case. In most cases, the action is being brought on behalf of an individual. This named party plaintiff may be the actual injured individual; a guardian of the injured person; a next friend of the

injured person; or the personal representative of the injured/deceased person's estate.

The defendants in a case may include the names of individuals whose acts or omissions allegedly subjected them to liability to the plaintiff.

Likewise, the Rules of Procedure typically require attaching copies of documents (contracts, bills, etc.) to the complaint which form the basis of a cause of action. A review of those documents will be helpful in determining the key witnesses.

In those cases where a corporation is the plaintiff or defendant, look to the allegations of the pleading to determine the nature of the action (auto injury; medical malpractice; legal malpractice; product liability; employer liability; breach of contract; etc.) to ascertain who the material witnesses may be. Litigation counsel to the plaintiff and for the defendant will rely upon corporate counsel in the discovery process to identify the individuals involved in the action or transaction at issue.

Where the material witnesses are not readily apparent in the pleadings, discovery requests in the form of interrogatories, requests for production, and requests for admission can provide the names of key witnesses. An interrogatory asking for the names and addresses of all individuals having knowledge of the allegations of the complaint or of all defenses asserted is appropriate. Documents and records received from the opposing party in

response to a request for all documents upon which the party is relying for the allegations of the complaint or for defenses asserted is equally appropriate.

A request for the medical records of the plaintiff, for the ten (10) years preceding the instant claim, as well as all medical records generated as a result of the incident in question, is appropriate and often quite fruitful.

The names of individuals involved in the transaction, investigation, health care provision, construction of the product or building, pronouncement of death, or other events surrounding the incident will be located through a review of the documents produced. A request to admit that certain individuals played certain key roles while others did not can shortcut the discovery process, resulting in shorter witness lists for trial.

Investigatory reports from law enforcement or other state agencies may not themselves be admissible, but can produce admissible evidence. These records contain a wealth of information, which, if nothing else, will help to flesh out the facts surrounding the incident. Also, the names of key individuals involved in the incident, as well as important information about these individuals, can be divined therefrom.

B. Chain of Command.

When defending, or defending against, an entity, it will be essential to ascertain the hierarchy of individuals who occupy that entity's infrastructure. Counsel should find out and chart the important officials in the organization, setting up a dossier on each one. This will be helpful should that individual be

someone of interest or a key player in establishing a defense. Information on the officers of a company can be found in the required reports of publicly traded entities and on the websites of almost all companies. Search engines such as Yahoo and Google are very helpful in this regard as well.

Corporate counsel can guide you to the appropriate person, department, or division during the pendency of the lawsuit. This will save you time and keep you from being a nuisance to your corporate client.

C. Current/Former Employees.

A typical interrogatory asks for the names and employment status of all employees who worked at or for the parties at the time of the incident alleged in the complaint. This is an appropriate request which courts uphold with few exceptions.

Depending upon the nature of the action, the key players involved in the incident can be efficiently narrowed down for discovery and trial purposes. Look at the law of your jurisdiction to see if you can speak to former employees directly without the need to involve the former employer's counsel. Typically, such interviews may occur without notification to company counsel, unless the former employee held a management position.

Conferences/interviews with these key players will be useful in determining who was involved in the transaction or incident, either directly or as a witness thereto.

D. Family/Friends.

One of the areas of inquiry by the defense to the plaintiff is which family members or which of plaintiff's circle of friends had any involvement or knowledge of the incident. Similarly, knowledge of the plaintiff's condition thereafter is an important issue. While these individuals may not be central to your discovery efforts at the outset, at some point in time they should be interviewed or deposed to see what they saw and how they look.

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