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**REPORT**

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## Conference Report

### Litigation

#### NELA Speakers Share Tricks, Techniques For Locating, Interviewing Bias Witnesses

ATLANTA--When Ellen S. Simon, an employment and civil rights plaintiffs' attorney based in Cleveland, takes a case, the decision to do so often is based on finding corroborating witnesses for her client--a job she does herself and does in person--and whether she is convinced that the complaint can survive summary judgment.

Simon, of counsel to McCarthy, Lebit, Crystal & Liffman, made her comments June 26 during a session on witness interviewing techniques at the National Employment Lawyers Association's 19th annual convention.

Simon, who has 30 years of experience trying employment discrimination cases, advised the attorneys in the audience to ask potential plaintiffs if there are witnesses who like them and will stick up for them. Often, a plaintiff is lucky to get one or two such witnesses, and really lucky to get five or 10, she said.

"This subject is so important to ultimately winning your case," Simon said. The areas of employment law and civil rights law are "hard," and plaintiffs' attorneys are "so overwhelmed by lawyers on the other side" in writing briefs and trying to overcome summary judgment. "There is no amount of time that is too much time to spend on case selection," she said.

Simon also tries to envision how a plaintiff's story will appear at trial. Many attorneys, she said, concentrate only on surviving summary judgment and forget about developing the case for trial--winning the battle but eventually losing the war.

#### Performance Will Be Attacked

A plaintiff's job performance inevitably will be attacked during cross-examination--even if he or she was not fired for poor performance, perhaps for two days depending on what the judge allows, Simon said. It is important to begin the trial with friendly witnesses, not the client, setting the stage for telling a story to the jury, she stressed.

"Once people form a belief it is very hard to shake it," Simon said, and throughout the trial they will accept information that they believe and reject information that they do not believe. Accordingly, she strives to put likeable people on the witness stand "who will say nice things about my client," she said.

The most credible witnesses will be current employees, who carry the most weight because they still are working for the company and have a lot to lose by testifying, Simon said. But she cautioned the audience of the need to be aware of the ethics rules governing which current employees may be contacted and which ones may not be contacted. Former employees and supervisors also can be good witnesses, she added.

During closing arguments, Simon said, she has a list of people who said positive things about her client. She will not take cases when she, or even a paralegal or someone else in her office, does not like the potential client, Simon said.

But corroborating witnesses are the key to any case, Simon said, and she spends a lot of time developing them before even deciding to take a case. "Do it yourself and do it in person," she advised. It also helps if the client can approach potential witnesses initially and ask them if they will speak with her, she said.

"Try and get a statement and have them sign something," Simon said. If they are deposed by opposing counsel, serve them with a subpoena immediately after the deposition to ensure their appearance in court--it saves time and hassle trying to re-contact them just before trial, she said.

If a witness's testimony is critical to a case, take the deposition yourself, just in case something happens to the witness, Simon advised. Also, at defense depositions, she asks questions to make sure that key testimony is in the deposition transcript, she said. Opposing counsel usually protests, but any attorney present at a deposition is allowed to ask questions, she said.

It is important to present witnesses on damages, such as how the job conditions affected the client's health, Simon said. That way, the client will not be the sole "complainer or whiner," she said.

### **Locating Potential Witnesses**

Donald Richards, a former FBI agent who now works as a private investigator, said that he starts creating a potential population of witnesses by trying to find people who worked for a company at the same time the plaintiff did.

Richards and the attorney he is working with will list the topics they want witnesses to address. He starts by cold calling potential witnesses and has about 12 to 15 seconds to establish his credibility and develop their trust. Most people have a story to tell, he said, and the challenge is to get them to open up.

"It's a matter of identifying the fact that these people really want to talk about it but they've got mixed feelings," Richards said, explaining that potential witnesses may feel vulnerable and fear losing their jobs or being singled out. He tries to ease their initial apprehension by saying that he is an investigator working for an attorney, not an attorney himself. Most potential witnesses will talk to him, he said.

From a list of perhaps 100 potential witnesses who worked for the company during the same time period as the client, Richards said, about 20 will talk to him and that will be sufficient to result in about five to 10 witnesses. He tries to take thorough notes during his telephone interviews and get as many direct quotes as possible. He writes a memo on every call he makes, and direct quotes from his interviews often appear in the complaint that eventually is filed, he said.


"Try to transition from one topic to another and develop a relationship during these interviews," Richards advised. And set up a call for follow-up questions from the attorney involved, he suggested.

To find former employees, Richards said, he usually starts with Monster.com. Individuals post their resumes on the Web site and he searches key words such as the name of the company.

But Richards also uses about a dozen different databases to locate individuals and said he is effective 90 percent of the time. The databases include Securities and Exchange Commission filings, such as Form-4's when executives sell stock, and press release

searches. If he does not have a city, state, or middle name on a potential witness, and the witness is a married man, he sometimes has success searching for the witness's wife, if she has the same last name.

Richards also recommended doing a criminal check on potential plaintiffs and witnesses. Simon concurred.

In one case, Simon said, she found out that a potential client had served time in prison for murder and had not mentioned it on his employment application. "It's a simple thing to do but it's forgotten too many times," Richards said. 

*By Barney Tumey*

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