

# ***SECTION FOUR***

## ***TESTIFYING***

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Now let's put it all together. We'll start by discussing preparation for your testimony and then we'll turn to the art of testifying.

### **I. Preparation**

Preparing for your testimony requires striking a fine balance. On the one hand, you should report to the witness stand or investigation in a reasonable state of preparation. On the other hand, you don't want to do too much for reasons we'll elaborate on below. Make sure that you do the following.

#### **A. Understand Where You Fit in the Case**

First, before you do anything else, make sure that you find out what your role is in the case and exactly where you fit in. This is far more than just a matter of knowing what questions will be asked, but what your involvement is in the overall scheme.

Are you just a witness to an ancillary event? Are you the key and only witness to the single event that lies at the heart of the case? Are you merely corroborating what somebody else is saying? Is your job merely to authenticate records? Are you expected to rebut the employee's assertions?

Sit down with the agency representative for an explanation of their expectations concerning your testimony and how you will fit into the overall agency case.

#### **B. Learn the Details of All Allegations Against You**

Find out exactly what allegations have been made against you personally. This is especially important in EEO cases and particularly at the beginning of the investigation. *Never* start talking with an investigator until he or she has told you all the details of any allegations that have been made against you.

Most of your internal agency EEO regulations require that during investigations supervisors be apprised of allegations involving them. For example, the Department of Justice and the Department of the Army require that supervisors and managers be told exactly what the allegations are and be allowed to see selected sections of documents that have allegations against them. Most EEO investigators are aware of this and spend whatever time it takes before the interview to lay out to the supervisor precisely what the employee has alleged.

However, you may not be able to rely on a regulation that gives you these rights and you might have to run a bit of a bluff. Unless your agency regulations require the investigator to tell you the charges and details, you don't have any legal authority to stonewall the investigation, and you're on thin ice if you do.

However, if you run your bluff right, you'll probably get away with it. EEO investigators are often not intimately familiar with agency rules because they're either contractors or collateral duty employees. So if you firmly insist that you have the right under "agency EEO regulations" to know the allegations, they'll probably fall for it.

Or even if they know better, they may not want to get into a lengthy fight that delays the investigation. Technically, you have to cooperate with both an investigation and hearing and it is possible for an investigator to go over your head and have somebody give you a direct order. However, they're usually under great time pressure to finish cases, and will go along with your belligerent and unreasonable demands just to keep the case moving.

And if it's an EEO investigation, there will have been a counselor's report, which you should have access to, under the Privacy Act, if it has your name in it.

Alternatively, if the case is going straight to a hearing without any preceding investigative steps, you should talk in detail with the agency representative to find out what the employee has alleged. Find out first the employee's "theory of the case." What is his or her basic argument about what the agency has done wrong? For example, if it's an adverse action, is the employee denying the facts and offering an alternate version of what happened in the event? Or is the employee admitting that the incident occurred but is offering some sort of affirmative defense for why the act did not constitute wrongdoing? Or does the employee challenge that any sort of disciplinary action is appropriate?

Then after you understand that, turn to finding out exactly where your name appears in all of this. Part of the reason you want to do this is to avoid your reacting emotionally at a hearing if you get surprised at this. Remember our discussion in the last section about personal attacks and how it's usually employees who commit these. In most of these, the attacks are irrelevant to the issues at the hearing and you need not worry about defending yourself against them. However, it's important to know about a potential attacker in advance so that it doesn't fluster you when it comes up in the hearing and so that you don't embarrass yourself with an inappropriate reaction during the hearing.

### **C. Review the Questions**

It is standard legal practice for attorneys and other representatives to go over the testimony of their witnesses before the hearing. In fact, opposing counsel will sometimes try to trick an unwitting witness by asking whether they have discussed their testimony with the management representative. The witness, thinking there's something wrong with that, denies it and now has done serious damage to credibility.

No matter how trivial your testimony, make sure that you collar the agency representative and have both of you go over your testimony. Many representatives will prepare themselves for the hearing by actually writing out a list of questions they will ask the witnesses. If the representative does not do that, then at least make him or her sit down with you and explain the nature and sequence of the questions.

If it's an important case and you are a central witness, the representative may even want to do a mock direct examination. The best representatives and lawyers do this regularly. Whether you do a practice examination or simply review the proposed testimony, you want to talk with the representative about the following:

- When should you give narrative as opposed to yes and no answers? It is impossible to tell a witness how detailed an answer to give. In some cases, the proper response is a long narrative of a sequence of events. In other cases, it's a simple yes or no or other short response. Talk this over with the representative.
- If you're giving a narrative answer, how far should you go? Good testimony on a witness stand has a rhythm and judges get bored just like everybody else — especially if you're recounting a long chain of events. You should talk with the representative about when he or she wants to break an answer up into smaller chunks. The representative might want to have your answer go only so far into one question, and then pose another question for describing the next series of facts.
- When going over the questions you'll be asked, you should tell the representative if the proposed question is either confusing or would elicit a different answer if he or she asked it a different way. Sometimes the representative will ask you a question that you don't understand or that could lead to a different response than what you would normally intend.
- Talk over how the representative should cue you or alert you to an unresponsive answer. Often, no matter how well you prepare with the agency representative, he or she may ask you a question intending to get a certain response and the answer you give is not quite on point. Different representatives have different ways of cuing you in preparation for asking the question again.

#### **D. Prepare for Cross-Examination**

The other part of working with the management representative is preparing yourself for cross-examination. You can do part of this on your own by simply asking yourself what weaknesses in your testimony you think could be best exploited and how you might handle them.

However, you should be working with the management representative to discuss topics that will arise during cross-examination and the way you should handle them. Many attorneys will also do mock cross-examinations — especially with nervous witnesses — to prepare them.