# Attorneys Today Need To Depose Like There's No Tomorrow

By **Anthony Argiropoulos and Maximilian Cadmus** (March 8, 2022)

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Breathless headlines warn of the "Great Resignation"[1] or a "resignation apocalypse"[2] that will soon empty cubicles all around the nation.

Exaggerated as these reports may be, there is a kernel of truth to these warnings about droves of people leaving the workforce, and they should affect the way lawyers and their clients view depositions.

For decades, the median number of years that a salaried employee stayed with a single employer remained relatively stable at about four years.[3] But this number is expected to decline in the years ahead.

Millennials have been called the "job-hopping generation"[4] because they display significantly higher willingness to switch careers than members of previous generations. By some accounts, employees belonging to Generation Z are even less inclined to stay in one place for long.

As older workers retire, these demographic groups will represent an increasing share of the workplace. Further, the growth of the gig economy and rise of remote work can only further disrupt traditional long-term employment.

What does all this mean for depositions? There is a significant chance that an employee who has crucial testimony for your case might not be around anymore when your case finally goes to trial.

In fact, according to the latest available statistics from the federal judiciary,[5] it takes approximately 28 months for a civil case to begin trial. As of June 2021, 11% of cases in federal court were over three years old. Based on statistics alone, your client and opponent will see some significant employee turnover in that time.

Now that you know about this risk, you need to take steps to protect your client and your case from it. To minimize the risk of losing crucial witnesses, consider the following lessons.

**1. There is no such thing as a pure discovery deposition.**

You might find that what you thought was a discovery deposition turned out to be the only deposition of a crucial employee. Therefore, every deposition should be treated as an opportunity to score points — or lose points — on the merits of a case.

This means there is some important ground you may need to cover during the deposition.

Will you need this witness to authenticate crucial documents at trial? Consider authenticating them during the deposition.

Do you need this witness to establish a critical element of a claim or defense? Consider covering it in your deposition.

It is all well and good to keep your strategy secret from opposing counsel, but it will do you

little good if your critical witness becomes unavailable for trial.

Ever since their amendment in 1970, the Federal Rules of Civil Procedure make no distinction between a discovery deposition and trial deposition; neither should you.

**2. Pay extra for the video deposition.**

Video depositions were once exotic expenses, reserved for complicated and well-funded lawsuits. Today, they should be regarded as standard. At trial, video testimony is far more effective than a drab read-in.

Video lets a jury put a name to a face. It assists jurors in remembering what was said. It also lets jurors evaluate the body language and truthfulness of the witness.

At one time, attorneys worried that juries would suffer from screen fatigue if they were presented with too much video testimony. Today, that should be less concerning.

People are accustomed to seeing screens, focusing on screens and trusting screens. If anything, the COVID-19 pandemic has familiarized nearly everyone with platforms like Skype, Zoom and Microsoft Teams, and has prepared jurors to receive information from talking heads on screens.

If your presentation is fatiguing, it is probably because it is too long, not because it is on video. Pay extra for the videographer, and one day you will be grateful that you did.

**3. Keep the client informed.**

It is not just your opponent's employees you need to worry about. Employee witnesses of your own client may also depart prior to trial. So what can you do?

Of course, the rules of professional conduct and federal law prohibit attorneys from offering any witness an inducement that is prohibited by law.[6] But you can provide your client with a list of important employee witnesses, and ask for advance notice of any witness's termination or retirement. This could give you critical time in which to schedule a deposition of that witness prior to their departure.

**4. Don't count on a de bene esse deposition to save you.**

A de bene esse deposition allows a party to perpetuate the testimony of a witness who, for whatever reason, cannot give live testimony at trial. But de bene esse depositions are more complicated than they appear, and any litigator should be cautious about relying on the prospect of a de bene esse deposition to get them out of a jam.

First, de bene esse depositions are not addressed by the Federal Rules of Civil Procedure. They are governed by common law and consigned to the discretion of the individual trial judge. So a party seeking leave to take a de bene esse deposition will find itself at the mercy of the court's discretion.

Second, courts will often impose strict limitations on a party's right to play de bene esse testimony in court. For example, certain judges require that de bene esse recordings — as opposed to regular deposition recordings — be played to the jury in toto, in an effort to recreate the conditions of real life direct and cross-examination. By contrast, a typical deposition can be edited considerably so long as it does not violate the fairness requirement

of Rule of Civil Procedure 32(a)(6).

Attorneys and witnesses also behave differently at de bene esse depositions. In typical deposition practice, attorneys are expected to keep their objections to a minimum, and witnesses are usually advised to give stilted "yes" or "no" answers and to elaborate as little as possible.

A de bene esse deposition is, for all intents and purposes, a proxy for direct and cross-examination. So the typical practice is thrown on its head: Attorneys object as they would at trial, and witnesses are advised to testify as they would to a jury.

Finally, as a practical matter, you may find that a de bene esse deposition of a former employee is undesirable. If you are taking a de bene esse deposition of your own witness, it is presumably because your witness no longer works for your client and could have very different personal feelings about your client.

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[1] Shawn Baldwin, "The Great Resignation: Why Millions of Workers Are Quitting," CNBC, October 19, 2021, https://www.cnbc.com/2021/10/19/the-great-resignation-why-people-are-quitting-their-jobs.html.

[2] Tom Bennett, "The Employee Resignation Apocalypse Is Nigh And What To Do About It," Forbes, August 11, 2021, https://www.forbes.com/sites/sap/2021/08/11/the-employee-resignation-apocalypse-is-nigh-and-what-to-do-about-it/?sh=4ac7484d321d.

[3] Employee Tenure in 2020, September 22, 2020. Bureau of Labor Statistics. https://www.bls.gov/news.release/pdf/tenure.pdf.

[4] Adkins, Amy. "Millennials: The Job-Hopping Generation." Gallup. 2016. https://www.gallup.com/workplace/231587/millennials-job-hopping-generation.aspx.

[5] National Judicial Caseload Profile, United States District Courts, §. 2016 - 2021 (2021), https://www.uscourts.gov/sites/default/files/data_tables/fcms_na_distprofile0630.2021.pdf.

[6] See Rule 3.4 of the ABA Model Rules of Professional Conduct; 18 U.S.C.A. § 201(b)(3) ("Bribery of public officials and witnesses").