

## Hidden themes, patterns to recognize when preparing plaintiffs for FCRA/FDCPA depositions

By Jim S. Calton Jr.\*

As most plaintiff's attorneys know, credit industry attorneys have been well-trained by their credit reporting agency and debt collector clients to attack specific themes during court-sanctioned interrogation sessions, otherwise known as depositions. But plaintiff's attorneys can help their clients recognize and anticipate those themes and patterns that they will likely encounter during Fair Credit Reporting Act or Fair Debt Collection Practices Act depositions. By identifying and uncovering these often hidden but recurring themes and patterns, clients will experience less stress and be able to present their best and most effective testimony.

The best approach is to reinforce that a deposition is not a nuisance but an opportunity. If the client understands the defense counsel's hidden tactics, they can be used to advantage in developing a compelling theme for the client's own case. Working as a team, attorney and client can prevail in this adversarial game of cat and mouse.

What follows are some of those themes and patterns, a list experience says will never be exhaustive. But their identification can serve as a road map to help plaintiff's attorneys and their clients to better prepare the record.

### 'The omnipotent defendant'

Defense counsel will try to subtly impress and intimidate the client with the wealth of client-specific private information at their disposal. It can be amazing, frightening and even overwhelming when the client realizes that debt collectors, credit bureaus and debt scavengers may know more about him than he knows or even remembers about himself. Credit bureaus probably know about every job at which the client's ever worked, every address at which he's ever lived, as well as most of his relatives and many of his neighbors. It is probably safe to assume that defense counsel, by virtue of who they represent, knows more about your client than you do.

Alert the client so that he is not awed and surprised by this Oz-like omnipresence. If the client fails to err on the side of honesty, then no matter how clear the liability, how egregious the violation, or how compelling the damage, a client whose credibility is tainted will torpedo a good case that has the potential of making good law.

### Ease of access to information

Defense counsel will want to establish who has had access to the client's personal/private information and how protective the client is of such information. The defense will attempt to paint a picture either depicting the client as someone who does not care that much about his credit and/or they will contend his credit was damaged by means other than the fault of the defendant. It is imperative that your client articulate how important he knows his credit history is and why.

In an identity theft theory, make sure the client is comfortable talking about everyone who may have had access to his personal information. Has he recently stayed at a relative's or a friend's place, or had anyone stay the night at his house within the last two years? Can the client recall who he traveled with his last few vacations? When analyzing and verifying your client's credit, identity theft and debt dispute claims, family members and friends should be the first people you examine.

### Information security, protection

Defense counsel will also want to know how the client routinely secures personal/private information. Can the client clearly articulate who handles the primary responsibility of the finances in his life/family? The client needs to be prepared to discuss how he protects his financial records such as pay stubs, tax returns, Social Security card, driver's license, passport, bank statements, and other financial and personal identifying information.

Most clients are aware of the media attention regarding computer fraud and identity theft, so they understand the importance of protecting their information. Make sure you discuss whether anyone has regular access to his personal information. The more proactive and concerned the client is with his security and protecting his personal information, the better your theory will be supported.

### Poor judgment

Defense counsel will explore the poor judgment theme as a possible weak point. Your client must communicate that he is credit-responsible and routinely exercises good judgment concerning his financial and credit reputation.

At every turn, the client should remind defense counsel that, just as he considers it important how he is perceived in his local community, he is equally concerned that the banks, credit card companies, and financial community holds him in high regard as a dependable and reliable customer. I am always impressed when a client answers that when he applies for credit, he tries to always ask for a copy of the credit report used, or he tries to find out how he can improve his credit score.

### Rigged dispute

The defense will try to nitpick technical violations alleged in the complaint. Don't let the client fall victim to the idea that he doesn't really know why he's suing.

(See **DEPOSITIONS** on page 4)

\*Jim S. Calton Jr. is a 1997 graduate of the University of Alabama School of Law. He practices in his hometown of Eufaula, Ala., with The Law Offices of Calton & Calton.

## Guest Commentary

### DEPOSITIONS (continued from page 3)

In preparation, keep to the broad strokes of why he sued the defendant. Since dispute letters are key notice-trigger requirements, defense counsel will try to get the client to "confess" who really wrote the letters. If I assisted a client during the dispute process, his best response is to answer without hesitation that he asked for and received the advice of his lawyer. If my secretary typed dispute letters, the client acknowledges that everything she typed was what he told me. The client should not be ashamed of such advice and assistance. After all, attorneys give pro bono advice, with no anticipation of litigation, on a daily basis.

#### 'The greedy plaintiff'

Towards the end of the inquisition, the client will be presented with the greed theme. That is, "You weren't really hurt, were you?" or "What will make you happy?"

My clients know to give bold answers. He wants his credit reputation repaired, and his credit report and credit score fixed. He wants everyone who received his compromised credit report or degraded credit score to know that the defendant was wrong. He wants assurance it will never happen again, and wants the defendant to be proactive in returning his credit reputation as if this never happened.

And, depending on the degree of damages or the extent of the violation, the client wants money. Defense counsel will try to pressure the client for a specific amount. Obviously, the client can harm the financial potential of the case by pulling a number out of the air. But I think defense counsel really asks the question because they are preying on the client's basic instinct *not* to be greedy.

No one wants to admit this is about money. But until time machines are invented, the only real way to help repair justice is to put a monetary value on the defendant's action. My clients are always completely at peace at leaving the important decision of "how much" up to a jury.

#### 'No intent to harm'

Traversing the minefield, the client will be asked: "You don't think my client intentionally harmed you, do you?" or "How has the defendant intentionally hurt you?"

The client should be prepared to pull the trigger. We are not talking about a personal conspiracy or paranoia (unless you can prove it). But the client needs to articulate that if the historical data of his life is going to be gathered and profited from by huge corporate intelligence agencies, the information should at a minimum be honest and accurate.

The client needs to point out he is not a customer of the defendant and he never asked to be in the defendant's database. The defendant profits from accurate and inaccurate derogatory information in the client's credit file. In my experience, the defendant's intent is to blackmail the client through collection actions, derogatory credit information, threats, coercion and fear.

Companies intend to make a profit with the client's credit information. Their intent also should be to guarantee maximum possible accuracy. By default, the defen-

dant intentionally chooses to believe the collected information is accurate. If that same company intentionally chooses not to correct erroneous information and knowingly reports inaccurate credit files to anyone who pays them, then the defendant has intended to harm the client. So, yes — the client should always be able to answer why he believes the defendant's acts were intentional.

#### Previous bad credit

Most clients have prior credit blemishes. The client needs to be able to address and discuss these with familiarity. Why were his accounts delinquent? Does the client deny he owes any of these derogatory accounts?

Letting defense counsel put the client on the "defensive" and catch him off guard with questions about other problem accounts will negatively affect the rest of the deposition. If there are any "pink elephants" in the room, discuss them with the client so they can be dismissed during the deposition. Also, the client need not be the Federal Reserve chairman to be able to intelligently discuss the specifics about his individual experiences with insurance premiums and interest rates with his mortgages, automobile financing or credit cards.

A solid, well-informed performance by the client can breathe life into most any case. I try to gauge early on if the client will waffle as to why he believes he has ever been denied credit. My goal is to then help him practice being firm in his commitment as to the causes of the denials.

#### No real emotional damages

If at all possible, as in any case where there are damages that are hard to quantify, the client needs to document the physiological, emotional and psychological impact of the defendant's actions. There is no magic laundry list of symptoms, but simply type the word "fear" or "anger" or "emotions" into a Wikipedia search and then discuss all of the possible scenarios with the client. This simple strategy will help the client define the adverse impact on his life and it empowers the client with descriptive answers when defense counsel opens this door.

#### Conclusion

Educate your clients about these common themes that they likely will face in depositions. Credit is a very precious commodity. The creditworthiness of your client, in a consumer-driven society, decides how he is perceived by people he will probably never meet.

Plaintiff's attorneys just getting started in this area must recognize that there is strength in numbers. Sharing our combined wisdom helps the whole and each of us individually.

Properly preparing a client for a deposition is an important tool. It can help us collectively make good case law and establish a mountain of strong, well-reasoned precedent. In any case, we can help the individual consumer succeed, and so remind those who take advantage of the history of our daily lives that we will hold the credit industry responsible and accountable for the profit made at our client's expense. □