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The Theatrics Of Deposing Employer Representatives (/Article/2023-March/The-Theatrics-Of-Deposing-Employer-Representatives)

You must rehearse for every deposition as if it was the role of a lifetime, and this requires a script

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To butcher Shakespeare to fit this article: “All the deposition’s a stage, and all participants merely players.” Everyone has their roles. The court reporter and videographer, and eventually the court and jury, are the audience. The questioning attorney and the deponent are the lead stars. And the defending attorney is the side character intent on usurping the spotlight if allowed to do so. But unlike the play that has already been written, a deposition is a dynamic and ever-changing battle of wits that requires the questioning attorney to listen, improvise, and perform to get to the truth of the matter. You, as the protagonist, must make sure that you get a standing ovation at the end of each deposition.

The rehearsal process

Even if you have played the role of the questioning attorney a thousand times, it is important to rehearse and prepare as intensely as if this deposition was the role of a lifetime. This requires knowing your client’s story. Spend time with your client so that you know the facts of the case as well as the characters that you will face. Your clients may have spent years with the people that you are about to depose. Do not let the opportunity to know who you will be deposing slip through your grasp by never even asking your client for some inside information.

It is essential to propound discovery as soon as reasonably practical so that you understand the employer’s theories and story. For cases based on the Fair Employment and Housing Act (FEHA), the Form Interrogatories – Employment Law asks essential questions that must be answered before you should begin any depositions.

Request documents, from the basics that are routinely provided such as the employer’s EPLI insurance policy, your client’s personnel file, payroll records, and documents signed by your client, to the documents that seem to always draw a discovery battle such as documents concerning me-too evidence, internal written communications like emails and text messages about your client, and even financial records if the reason given for the termination is undue burden. These are only a few examples of the groundwork needed to really be able to deliver a great act.

Writing the script

After conducting more than a hundred depositions, I still like to prepare written notes so that I have a script to guide me. Sometimes I write out questions exactly the way I want to phrase them, complete with commas and punctuations marks. Sometimes I just put a general topic. I annotate my notes with references to exhibits so that I know when to bring out the “prop” that I need.

Before the curtains rise and the bright lights go on, make sure to prepare your mind to make sure you are focused on the big picture. Here are some tips that are worth remembering:

Don't step over each other's lines. It prevents the audience from hearing what you need to say.

Let the deponents have their monologue. You want to get all that information. But if they do not answer your question, make sure you follow up so that you get the response you asked for.

Shine a spotlight on key admissions only when necessary. If the admission is hidden in a lengthy monologue, ask about the admission in a succinct way. But once you have the admission, move on to the next scene.

Be yourself. While others may have played the role of questioning attorney very well in the past, this is your time to perform.

The huffy HR representative

Now that you have made your script, done your research, and prepared your mind, it is time to encounter the slew of characters that are commonly encountered at depositions in employment cases. And first up is the Human Resources representative.

They don't want to be here. You can tell this from the beginning. From the moment the HR representative sits down, he or she is on guard, indignant, and ready to challenge you on every single point. They seem exasperated that you dare to question their investigation into your client's complaints about discrimination, harassment, or retaliation.

What do you do when you face the huffy HR representative? Do you channel your most combative characteristics to fight back? Do you do voice exercises so that you know that your voice will be the loudest one for the court reporter to hear? Do you pounce on every line so that the HR representative has no opportunity to improvise off-script? No, no, and definitely no.

Even if you start to feel your pulse quickening and your blood pressure rising, an attorney deposing a person must exhibit professionalism and civility throughout the process, even if the deponent is not reciprocating. The American Board of Trial Advocates' Principles of Civility, Integrity, and Professionalism states: "During a deposition, never engage in conduct which would not be appropriate in the presence of a judge."

Rather than butt heads unnecessarily, use the indignation shown by the HR representative to bolster your case. If questioned effectively, the HR representative can give you everything that you need to prove your case. For example, in a harassment case, ask the HR representative whether an employee engaging in certain behavior that your client experienced rises to the level of harassment, or at least violates the employer's equal employment opportunity policies. Most HR representatives will be forced by common sense to agree. If they are not able to answer such questions, then even better. It shows that the people in charge of enforcing an employer's equal employment opportunity policies are unable to explain or apply those policies.

The shifty decision-maker

In a wrongful termination case, the shifty decision maker can take many forms: your client's direct supervisor, some executive that your client barely knew, the human resources representative in charge of an investigation. But they play the same role: to justify the termination of your hard-working client for pretextual reasons.

Given that you conducted sufficient discovery, you know the employer's discovery responses cold, and can recite the employer's response to Form Interrogatory No. 201.1 in your sleep. You will be miles ahead of most decision-makers at the time of the deposition. Without referencing or showing the response to said interrogatory, question the decision-maker about the reasons for the termination, who participated in the decision to terminate, who provided information relied upon by the

decision-maker, and what documents were reviewed by the decision-maker in deciding to discharge your client. In the vast majority of employment cases I have handled, the decision-maker deponent has provided testimony that contradicts the employer's verified discovery responses.

The decision-maker is under extreme pressure to justify their unjustifiable decision. How do you get the decision-maker to let down their guard, so they answer the questions truthfully? A big part of communication is how one says something. While a stern, fiery cross may be what is seen in movies, more often than not a calm, unassuming delivery may yield much more useful information.

The conniving complainer

In wrongful-termination cases, employers seem to want to throw out as many reasons for why they fired your clients as they can. Many times, they will drag in some current employee who has one line to repeat: "It was the plaintiff's own fault for getting fired." Through the complainer, the employer will argue that the plaintiff was fired for a legal reason, and in the process, tarnish the plaintiff's work ethic, character, and likeability.

The complainer can seem like a formidable foe. You would love for your client to have worked their job for 20 years with no complaints whatsoever and glowing performance reviews. That is just not realistic. You want to get all information from the complainer because you can be sure that the employer will try to use the complaints made against the plaintiff as much as possible. The questions that scare you are the most important questions. Explore the bias of the complainer. How long has the complainer worked for the employer? Has the complainer been promoted since the time your client has been fired? Was there a backstory to the complaints, such as your client had made complaints about the complainer as well? If so, ask questions exploring whether the employer took sides or showed favoritism.

If the complainers present well, then their deposition should focus on the timing and investigation process to show that the complaint was not a reason for the termination. Explore the temporal proximity between the complaint and the termination. Explore whether the employer violated its own progressive disciplinary system, whether such system was formally implemented in a written policy or was the accepted practice known among the employees.

The villainous harasser

There are no shortage of ways for the villainous harasser to try to weasel out of their heinous conduct:

"It was all a joke."

"Plaintiffs gave as good as they got."

"I didn't do it and the plaintiff is making it up."

The importance of the deposition of the harasser cannot be understated. This is the person who caused pain and suffering for your client. They should be held to answer all questions that are relevant or reasonably calculated to lead to the discovery of admissible evidence. All depositions of harassers must cover the harassing conduct to see if the harasser admits that the events actually occurred. Then the reason behind the harassment must be explored. As a last resort, the employer may argue that the harasser is an "equal opportunity" harasser who is offensive to everyone and thus did not target the plaintiff based on a protected characteristic. Also, the deposition should cover whether the harasser was a supervisor, as defined by Government Code section 12926, subdivision (t), over the plaintiff.

Explore whether there have been other complaints about harassers in their deposition and other depositions. You should request the harasser's employment records concerning prior complaints of harassment. In the event that the employer argues that such records are protected by the individual right to privacy, you can cite *Bihun v. AT&T Information Systems, Inc.* (1993) 13 Cal.App.4th 976, which upheld the trial court's decision to instruct the jury that they could find that the employer's failure to produce the personnel file of the harasser may be considered willful suppression of evidence and the jury could draw an inference that there was something damaging to the defendant's case contained in that personnel file.

I ask about harassment training and get granular details such as who conducted the training, when the training was conducted, where the training was conducted, and how the training was conducted. Invariably, the harassers that I have deposed will confidently state that they underwent training but cannot remember a single thing about such training. Government Code section 12950.1 requires employers with five or more employees to provide at least two hours of classroom or other effective interactive training and education regarding sexual harassment to all supervisory employees and at least one hour of such training to all nonsupervisory employees in California starting on January 1, 2021. The Civil Rights Department (formerly known as the Department of Fair Employment and Housing) provides free online training that satisfies Government Code section 12950.1 as of the date of this article at https://calcivilrights.ca.gov/shpt/. An employer's failure to provide legally required training to the harasser is potentially valuable information.

The person most "knowledgeable" who knows nothing

For employers who are entities, rather than sole proprietorships, Code of Civil Procedure section 2025.230 authorizes a party to send a deposition notice requesting that the employer designate and produce at the deposition those of its officers, directors, managing agents, employees, or agents who are most qualified to testify on its behalf as to those matters to the extent of any information known or reasonably available to the deponent. I personally refer to these deponents as "Persons Most Knowledgeable (PMK)."

I like to start off the depositions by going through each category listed in my deposition notice to get confirmation that the deponent is the person most knowledgeable regarding every category. If the deponent states they are not the person most knowledgeable about certain categories, then you have a basis for moving to compel another deposition on that particular category. Once the deponent confirms on the record that they are the person most knowledgeable about certain categories and understands that they have been designated as the person who is speaking on behalf of the entire company, then it is go-time to ask questions.

Many times, the PMK is unable to answer important questions about the claims made in the case. You want those key admissions that can make your case, but the deponent seems unable to answer anything of importance. This can be frustrating at first, but upon reflection, the PMK who knows nothing has become the star of your case. If you can show that the person that the employer chose out of the entire company cannot answer even the most basic questions, then they have no one to counter the one person who does know the facts: your client.

I can only imagine how mortifying it is for the defense attorney to have a PMK who forgot all of their lines. How do you lock in the "know nothing" testimony? Whenever they say "I do not know" to a matter that falls within a designated category set forth in the PMK deposition notice, you can ask what they did to investigate to obtain facts necessary to be the PMK for the category.

You should also ask about what documents they reviewed. Code of Civil Procedure section 2025.280 allows the party noticing a deposition to also request for production of documents at time of deposition. Every deposition notice should at least request all documents that the deponent reviewed in preparation for deposition. Finally, you should ask whether they

spoke to anyone to prepare for their PMK deposition. If your case involved claims of harassment or wrongful termination, and the PMK failed to communicate with the harassers or the people who decided to discharge your client, that is a significant admission and shows that the employers are like the proverbial ostrich with its head in sand and your client is the one seeking the truth.

The monologuing defense attorney

A special note on defense attorneys who think they should object to every single question and improperly coach their clients on the record. More times than not, they are doing their client a disservice in addition to violating all known civility guidelines. Their repetitious objections are highly distracting for the deponent, who often just wants to answer the question and finish the deposition.

Remind the attorney that they should conduct themselves as if they were at trial and before the court. You can and should advise them that coaching on the record is highly improper. The Los Angeles Superior Court's Guidelines for Civility in Litigation states: "Counsel for all parties should refrain from self-serving speeches during depositions." If the defense attorney cannot help themselves, you may have to suspend the deposition and seek a protective order pursuant to Code of Civil Procedure sections 2025.420 and 2025.470.

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