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Preparing plaintiffs to speak their truth in deposition and at trial

WRONGFUL-TERMINATION PLAINTIFFS NEED TO TESTIFY AND YOU NEED TO PREPARE THEM

Employment trials are unique – instantly relatable and simultaneously burdened with twelve unretained subject-matter experts. A jury is composed primarily of employees who draw upon their lived experiences to understand and interpret your client's story while judging its veracity against that lived experience. This article focuses on preparing plaintiffs to speak their truth in deposition and teaching them the flexibility to adapt their testimony to jurors' lived experiences.

The deposition

In wrongful-termination cases, a plaintiff's testimony is integral to understanding the claims. You may use a human-resources expert to identify policy violations or an economics expert to prove wage loss. However, the plaintiff's testimony is necessary to establish the facts that anchor the policy violations and provide context for the economic and human losses.

Second, in most employment cases, the plaintiff must defeat a motion for summary judgment to move forward towards a just resolution. Failure to present a prepared plaintiff exponentially increases the chance of a summary judgment dismissal. Our job is to take the plaintiff on a journey to both own their truth and relate it consistently with the law. Here are some ways to do just that.

Give the plaintiff a map and a dictionary

Sitting through a two- or three-day deposition in a state of high alert is a challenging experience. The unfamiliarity of the experience compounds that anxiety. Make it easier by familiarizing the plaintiff with the process and the lingo. Set the stage, explain who is likely to be present, the documents on the conference table, and the different players' roles. Many people get intimidated by the setting. Address the fear. Explain that they will be in surroundings designed to impress and intimidate. At the deposition, walk around the room with your client, have the plaintiff try out

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the chairs, pick one, make sure the plaintiff is at a comfortable height, and move it if necessary. In other words, *own* the space.

To keep the plaintiff focused, try this. Tell the plaintiff to *forget* the lawyer asking the question and focus on the twelve people behind the lawyer – the invisible jury – and speak to them.

Explain objections, their purpose, and the instructions not to answer. If done correctly, a plaintiff will understand that the objections are a communication tool.

Explain the purpose of the deposition

A plaintiff experiencing termination is shattered by the experience. For many people, work is central to their self-worth. The humiliation from the rejection makes them defensive and voluble. That can be dangerous. When preparing a plaintiff to testify, give them a strategy to approach the questioning. Divide up likely questions into categories: a) those to be answered with single words; b) those that require a two-three sentence explanation; and c) questions that present an opportunity to swing for the fences.

Document review

Gathering up documents to prepare the plaintiff will necessarily include any complaint filed with an administrative agency, the court complaint, all discovery responses, key documents, and summaries of any deposition testimony. And *always* include the applicable Civil Jury Instructions.

Civil jury instructions

I often hear advice on making *Rifkind* legal contention objections because a question incorporates the term "discrimination" or "retaliation." (*Rifkind v. Superior Court* (1994) 22 Cal.App.4th 1255.) You can object, but recognize the question presents the plaintiff with an opportunity to hit one out of the park. Incorporating the CACIs into the deposition preparation allows the plaintiff to present facts to meet every element of a discrimination, harassment, or retaliation claim.

Preparing the plaintiff to identify facts supporting the claims

- Assemble all the sources of information: the DFEH Complaint, the lawsuit, discovery responses, documents.
- Set up the critical scenes of the story – the first day of the job, key achievements, a performance appraisal meeting, a disciplinary warning, any confrontations that support direct evidence.
- Identify the key facts from each of the "scenes." Let the plaintiff guide this part of the process. You want to understand, at that moment, what it felt like for the plaintiff. It is their truth; you are the recorder. You want to pay careful attention to those facts that seem to be troubling the plaintiff the most. Often, a plaintiff will focus on facts that, while painful, may not be legally relevant, and may even undermine the legal position. Understanding the emotion behind the plaintiff's focus will help you frame the issue to make those facts relevant.
- On an easel pad, using a marker, write out the elements of the claims in understandable bites.
- Now help the plaintiff to move the key facts into the columns of the different causes of action. For wrongful termination cases, many of the facts may overlap. However, this interactive exercise will focus the plaintiff to own their truth. It will also help the plaintiff recognize connections. Thus, if a plaintiff identifies a fact as retaliatory but does *not* identify the protected activity, the exercise guides the plaintiff to incorporate causality.

Preparing the plaintiff to create fact disputes on defenses

I primarily represent employees in cases with statutory causes of action for discrimination, harassment, retaliation, or whistleblowing. These are highly technical cases, fact intense and frequently complex. Answering the complaint, the defendant will file a general denial and throw in a laundry list of "affirmative defenses." Although the plaintiff cannot be prepared to address legal arguments, the plaintiff should be prepared to offer facts to undermine defenses.

Take, for example, the standard "legitimate business-reason defense" in the context of an investigation. Before the plaintiff's deposition, you should have obtained all the documents underlying the "business reason" for the termination. In the deposition-preparation session, discover why the plaintiff feels wronged. It could be as simple as the employer's failure to provide an interpreter, a selective application of rules, or the consideration of particular facts. Even if the evidence reflects the plaintiff's violation of a work rule, understanding *why* the plaintiff feels unjustly terminated is critical to seeding the plaintiff's deposition testimony with sufficient facts to create a fact dispute.

Another example may be a disability discrimination case where an employer terminates a plaintiff for a "business reason" and denies knowledge of any disability. To avoid an *Avila v. Continental Airlines* (2008) 165 Cal.App.4th 1237, "ignorance of the disability" summary dismissal, spend the time with the plaintiff to *identify* the universe of people who knew of the reason for the medical absence. The inability to remember names and the failure to identify facts to impute knowledge of the disability to the employer can be fatal. Contrast the testimony in *Avila*

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with *Soria v. Univision Radio Los Angeles, Inc.* (2016) 5 Cal.App.5th 570. In *Soria*, a well-prepared plaintiff provided facts and details of conversations with supervisors to reverse a summary judgment.

Other fact scenarios where a plaintiff's testimony is critical to undermining defenses include a situation where the purported decisionmaker is removed from the plaintiff. Discovering the plaintiff's truth may help you identify a) all the persons involved in the decision to terminate the plaintiff, b) the nature of their relationship to the plaintiff, and c) whether that relationship was "but-for" the termination. (See *Reeves v. Safeway* Stores, *Inc.* (2004) 121 Cal.App.4th 95, 108 [when an adverse employment action involves several employees, "the plaintiff can establish the element of causation by showing that any of the persons involved in bringing about the adverse action held the requisite animus, provided that such person's animus operated as a 'but-for' cause, i.e., a force without which the adverse action would not have happened"].)

Preparing the plaintiff for direct examination

In some circumstances, it may become necessary to examine the plaintiff. Prepare the plaintiff for that possibility. For example, if a skilled defense lawyer obtains testimony, which, without context, can be construed as an admission, you must question the plaintiff. Do not wait to counteract the admission. A declaration at the summary judgment stage will not create a triable issue of fact. (See *D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, 21 ["Where ... there is a clear and unequivocal admission by the plaintiff ... in his deposition ... [the trial court is] forced to conclude there is no substantial evidence of the existence of a triable issue of fact [notwithstanding a contradictory declaration in opposition to summary judgment].... [¶] [A]dmissions against interest have a very high credibility value"].)

Other circumstances requiring you to question the plaintiff include when it is necessary to correct the record, provide context, or identify excluded critical facts.

Preparing the plaintiff to testify on damages

There are two primary sources of damages in employment cases – economic or wage losses and noneconomic human losses. Occasionally, there may be the potential to recover personal-injury damages. (See, e.g., *Bagatti v. Dep't of Rehabilitation* (2002) 97 Cal.App.4th 344.) In disability discrimination/failure to accommodate cases, always evaluate the potential for a personal injury claim. Even if you decide not to bring the claim for strategic reasons, prepare the plaintiff to testify to the aggravation of the injury because of the defendant's failure to accommodate. It may help structure a settlement to maximize the plaintiff's recovery.

Lost wages

In preparing the plaintiff for deposition, it is essential to identify facts to prove up the effort made to mitigate wage loss. Understanding and teaching the plaintiff to explain the wearing search for a job, the resilience necessary to persist despite constant rejection, and the temptation to give up are more important than simply assembling and producing the job applications. It is critical to credibility. This is the one area where you can get easily tripped up by those subject-matter experts on your jury. Losing a job is part of the journey of gainful employment and is experienced by a majority of the jury. If the plaintiff has been unable to replace a job, spending the time discovering the *why* and preparing the plaintiff to explain the reason is essential to credibility.

Alternatively, if the plaintiff has replaced the job, work with the plaintiff to determine whether a new job is comparable or "substantially similar." In *Villacorta v. Cemex Cement, Inc*. (2013) 221 Cal.App.4th 1425, the court allowed the plaintiff to keep a $198,000 damage award, finding a longer commute made a new job inferior for purposes of mitigating lost wages. In a recent disability case, the plaintiff's testimony that he found a replacement job that paid more, and had the same job duties, was not "substantially similar" because the plaintiff was no longer a supervisor, his commute time had increased, and he was forced to work the second shift, helped the plaintiff to recover lost wages without any set-off.

Noneconomic damages and grief over job loss

The plaintiff's wages at termination define economic damages. While you can load the recovery by extending the front-pay losses, there is a limit. The only limit to noneconomic damages is a failure of imagination. It is possible to recover high six-figure noneconomic damages, and even seven figures with preparation. To do so, you must invest the time to comprehend the full impact of the plaintiff's job loss. Grief from job loss has a familiarity and a rhythm, but the underlying facts are always different. It is often difficult for a plaintiff to do the challenging work necessary to confront and articulate the pain. In this one area, it helps to have a more structured approach. Here are some suggestions:

- Ask the plaintiff to rank the top ten emotions they felt at termination, and how they would rank those emotions today.

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- Ask the plaintiff to keep a diary and write a paragraph or two describing each day.
- Take an easel pad and draw a circle with a figure inside it. Moving outward, continue to draw circles. The most immediate circle represents the plaintiff's familial relationship, the subsequent social relationships, community relationships, professional relationships, and so on. Discover the impact of the employment termination on the plaintiff's relationships, beginning with the family, and extending outwards to professional relationships. The closeness of the relationship does not necessarily correlate with the intensity of the loss. Often the plaintiff will withdraw into the family, drawing succor from its unconditional love. Depending on the facts, the trauma from the job loss may arise from the loss of professional relationships or the humiliation of losing community standing or both.
- Using the CACI 3905A factors, identify the relationships between those factors and the plaintiff's human losses. For example, you may assume a single man with no children may not have suffered impairment in his familial relationships. Through this exercise, you could discover the plaintiff has a mentally impaired adult stepchild he has raised as his own. The loss of income denied the plaintiff the ability to move the stepchild into a residential facility. Torn between loyalty to the child and the demands of a long-term partner for a more committed relationship, the plaintiff felt he had no choice but to terminate the long-term relationship. The human loss of the job is now exponentially compounded by the loss of the partner.

At deposition, prepare the plaintiff to focus on the most relatable of the facts. Remember, the subject-matter experts – the jury – have either suffered through termination or have close family members who have. A wrong note, a fantastical claim, will destroy credibility.

Often, I hear plaintiffs resist this part of the deposition preparation. They are reluctant to articulate deep-seated fears and give words to a profound sense of loss. Breaking down those barriers is essential to getting them to a place where they are comfortable speaking their truth in a deposition.

Much of the work done at the deposition stage, to give voice to the plaintiff's grief from job loss, is foundational for trial.

The trial

Preparing the plaintiff for trial testimony requires reviewing all trial exhibits, discovery responses, the testimony of preceding witnesses, and any other relevant material. But the most critical quality is to make the plaintiff understand the fluidity of the trial process and the necessity for flexibility. While the basic structure of the plaintiff's testimony may remain static, the plaintiff must be educated on the need to be flexible, whether it is to reframe the issues or alter the presentation of evidence. Here are some examples:

A long-term employee is terminated when she turns 65. Plaintiff claims the African-American supervisor harassed her and articulated specific examples of harassment. The plaintiff is terminated within days of her protected complaint of harassment. The case proceeds to trial with the individual supervisor and the employer. The seated jury includes two African-American supervisors. Through voir dire, you know these two jurors will not be receptive to the plaintiff's claims against the individual supervisor. From their lived experiences, the jurors know how much harder the defendant supervisor has had to work to be promoted to supervisor. Much of the trial prep work has prepared the plaintiff to testify on her harassment claim. Now you have to pivot. It may be too late to dismiss the supervisor, but you cannot let the defense leverage the jury composition to undermine the plaintiff's credibility on the retaliation claim against the employer. Preparing plaintiffs to reframe the story at this stage, while challenging, is not impossible if the plaintiff has been taught to be flexible.

In another example, you have a wrongful-termination claim arising from text messages purportedly sent by the plaintiff. Plaintiff denies she sent the messages. During voir-dire examination, a young woman breaks down crying as she describes a campaign of cyberbullying by co-workers. She begs to be excused, explaining it will cause her to re-live the trauma. The judge denies the request. You want this woman on your jury. Who better understands the pathology of the cyberbully? But this decision is risky and may require changes in presenting the facts and modifying the plaintiff's responses on cross-examination. Discuss it with the plaintiff, and if you decide to move forward, be vigilant in monitoring this juror's reactions.

In most employment cases, the plaintiff generally testifies after crucial defense witnesses. By this stage in the trial, you will have a summary of the critical witness testimony, know the admitted exhibits, and will have had the opportunity to observe the jury and their reactions to key pieces of evidence. Determining whether these data points require modification in framing the plaintiff's truth is essential. Do not hesitate to make the changes even if you have an outline ready to

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go. Making small changes or radical revisions because of unexpected events is part of the trial process.

Final thoughts

There are no shortcuts in preparing a plaintiff to testify in a wrongful termination case. In the cases that I try, the plaintiff has worked for the defendant for at least a decade. More often than not, they are in the 50-60 age group. Termination is devastating. They feel betrayed, used, cast aside. They are pessimistic about finding a substantially similar job. Helping them tell their story is incredibly empowering, and while challenging, a necessary step to justice.

Renuka V. Jain has tried more than forty employment discrimination, civil rights, whistleblower retaliation, and personal injury cases to verdict and has argued appeals before the Texas and California courts.