SPEAKING TRUTH TO POWER: PREPARING THE PLAINTIFF FOR DEPOSITION IN A HARASSMENT CASE

By

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The deposition of the plaintiff is one of the most crucial moments in an harassment case. It is one of few opportunities before trial for the plaintiff to give evidence regarding her case and for defense counsel to assess the plaintiff as a witness. The deposition is also one of the most challenging experiences, short of trial, the plaintiff will experience in the course of the litigation. Depositions are an inherently unnatural experience. They challenge the plaintiff’s experience with normal conversation, in which the give and take of information is expected, replacing it with the more robotic interplay of question, followed by answer.

Depositions can be challenging for any deponent. For a plaintiff in a harassment case, however, the deposition can be fraught with difficulty. Experiencing harassment can make one feel powerless. It can bring back old traumatic experiences. It is often difficult to discuss and difficult to relive. Being questioned about such experiences in a circumstance where the person asking the questions is at best skeptical and at worst purposely trying to undermine you can be a horrible experience. Plaintiffs who have been the victims of sexual assault or other physical harassment are particularly vulnerable, as the emotional trauma may be particularly acute. Preparing a harassment plaintiff for deposition means keeping one eye on developing the case for trial (and preparing to defend against summary judgment) and one eye on looking out for the emotional well-being of your client.

Preparing for the Deposition

There are standard methods for preparing a witness for deposition, and those methods certainly apply when the plaintiff claims harassment. There are, however, particular issues to consider in a harassment case.

Is the plaintiff well-grounded in the facts of his or her story?

Occasionally, there are witnesses to harassment, but more often than not, the plaintiff will be the only one who can tell the story of what happened. It is crucial, therefore, that the
plaintiff be grounded in her story. To me, this means that she can talk about what happened in a way that is thorough, detailed, and convincing. This comes naturally to some plaintiffs. To others, however, some work is needed. I have found that the best way to prepare a plaintiff in this regard is to have her tell you the story, as often as is required for her to become comfortable – or as comfortable as is possible – with telling that story. This can be difficult because harassment – particularly some forms of sexual harassment – can be difficult to discuss. To that end, I will usually plan at least two sessions to prepare the plaintiff and will try to limit the amount of time in each session to a couple of hours. It is crucial, however, to push past generalizations to specifics, to require details when details are available. Telling the full story – and being pushed to tell more when appropriate – to someone who has the plaintiff’s best interests at heart may better prepare the plaintiff to provide details of her story under much more difficult circumstances. It helps revive the memory, often causing the plaintiff to recall forgotten details as the story is discussed. The exchange of information also builds trust and comfort between the plaintiff’s attorney and the plaintiff, which makes the deposition, as well as further litigation, easier for both the attorney and the client.

*How is the plaintiff going to answer the question “tell me all the times X harassed you”?*

Most frequently, harassment cases evolve over time. They usually involve a course of conduct that takes place over months or years and often involve several encounters. It has always seemed to me to be inherently unfair to expect a plaintiff in such circumstances to be able to recount every instance of harassment experienced, but that is, obviously, an appropriate deposition inquiry. Frankly, I have little hope that a client, who has been harassed almost daily over a several year period will be able to faithfully recount in deposition every detail of every encounter. Still, the plaintiff should be as prepared as possible to provide as much information as possible during the deposition. The plaintiff can and should say, assuming it is true, that she cannot remember every detail, but going over the story and making sure the plaintiff is grounded in that story may help the plaintiff to more specifically recall details during deposition. Helping her, as she recounts the story to you, to fix place events in time also helps. For example, I try to get plaintiff’s to place the harassment by relating them to other memorable events, rather than focusing on specific dates. How close to when you started working there did this event occur? Did this happen before or after you had your baby? How close in time was this to when you transferred to the day shift? This can help order the events in the plaintiff’s mind, which may make the events easier to recall later. Another method is, rather than concentrating on time, to focus on particular types of behavior and to prepare the plaintiff to talk in detail about each category – e.g., all the times when the harasser touched you, all the times when he propositioned you, all the times when he made inappropriate jokes, etc. While this may not help the plaintiff remember dates, it may assist in helping her to remember instances of harassment.
As a back-up to preparing the plaintiff to provide as much detail as possible, complete and comprehensive discovery responses are also key. If the client forgets to testify to a particular incident but has provided a discovery response that includes the information, the defense will have at least been put on notice as to that information and will be limited in their ability to call the plaintiff’s credibility into question at trial.

Is the plaintiff prepared to answer tough or hostile questions?

Attorneys, obviously, have a range of styles for taking depositions. Some attorneys believe that you can catch more flies with honey than with vinegar and try to encourage cooperation from the deponent by being friendly. Other attorneys, however, see it as their job to challenge and discompose the deponent. In a harassment deposition, particularly when the plaintiff claims sexual harassment, this can take the form of degrading and insulting questioning. It is important for the plaintiff to respond to either type of questioning with equanimity.

A bit of reconnaissance prior to the deposition can be one useful tool in preparing the plaintiff. Some attorneys’ reputations will precede them, but others may be unknown. Ask other plaintiff’s counsel if they are familiar with the opposing attorney and if they know their deposition style. If you receive intelligence that the opposing attorney is likely to be hostile or aggressive, you can specifically prepare the plaintiff for that experience. You should always, however, prepare your client for the possibility of such questioning because, even if an attorney is known to be laid-back and friendly in other circumstances, there is no guarantee that he or she will continue to be so when deposing your client.¹

It also important to prepare the plaintiff to respond to tough questions. Early on you should try to discover any skeletons that might live in your client’s closet. It is also important to review all documents, including the plaintiff’s personnel file, to discover any documents that might raise difficult subjects or challenge the plaintiff’s version of events. In a sexual harassment case, for example, a plaintiff had signed something stating that she had not been subjected to sexual harassment. While, given the factual circumstances, I was not particularly concerned that she had signed the document, defense counsel was certain to question her about it. Unprepared, she might have responded to the question in a manner that was defensive and made the document into a bigger problem than it actually happened to be. By discussing the document with her and exploring her reasons for signing it, she was prepared to calmly respond to questions about the document, including efforts to undermine her credibility.

¹ Friendly attorneys also pose other dangers that cannot be ignored, such as lulling the plaintiff into a false sense of comfort.
Is the plaintiff prepared to deal with any emotions that may come up during the depositions?

As discussed above, talking about past harassment can be very difficult for the plaintiff, particularly if the harassment involved a physical assault of some kind. It is possible, if not likely, that the plaintiff will become upset and may have difficulty responding to questions. Ensuring that the plaintiff is grounded in her story, as discussed above, can help with this. Additionally, however, it is important to prepare the client for the possibility that she may get upset during the deposition and to let the plaintiff know that she can take a break if things get too difficult. If the plaintiff has manifestations of emotional distress or other conditions that may be triggered by the stress of the deposition, find out from the plaintiff what she needs you to do. I want to be prepared, for example, if my client has a panic attack during the deposition. Only by discussing this with the client beforehand can you and she be prepared if such an unfortunate event should occur.

Is the plaintiff prepared to talk about the impact the harassment has had on her?

At base, the point of a lawsuit is to recover monetary damages for alleged wrongdoing. It is crucial, therefore, that the client be prepared to discuss the impact that the harassment has had on her life. Discussing these issues with the client prior to the deposition is important for a number of reasons. First, it helps the client to provide specific testimony about their emotional distress, rather than speaking in generalities. It helps her to think about the emotional impact of the harassment, as well as the different ways in which it has changed the way in which the plaintiff goes about her life. Second, it helps the plaintiff explore the different ways in which different types of trauma have impacted her. Any person who has lived in the world will have arguably suffered something the opposing party can point to as an alternate stressor. Sometimes those alternate stressors will be significant, and it will be important for the plaintiff to be able to explain how she can say that emotional distress should be attributed to the harassment, as opposed to the other stressor. In my experience, plaintiffs often have very poignant ways of explaining why they believe the cause of the distress is the harassment as opposed to something else. Discussing this before the deposition can draw this out. Third, discussing the emotional impact of the harassment with the client can help you assess what kind of witness your client will be on emotional distress and help you plan accordingly. Some plaintiffs will be very good about talking about emotional distress, but others may have difficulty expressing emotion. Realistically, there may be little you can do to make some plaintiffs better witnesses on emotional distress, but it does prepare you to start thinking of other ways to present the client’s emotional distress damages, such as through the testimony of a therapist, friend, or family member.
Will the harasser be present and how will your client react if that happens?

It is very possible that the opposing attorney will want the alleged harasser to be present during the deposition. This is particularly true if the harasser is named as an individual defendant. It is important to anticipate this problem and to deal with it accordingly. Find out how the plaintiff feels about the harasser being present. In most instances, the plaintiff will likely prefer that the harasser not be present, but you could be surprised. In a recent deposition I defended, the plaintiff originally said that she did not want the harasser to be present but, upon reflection, decided that she would feel some personal empowerment from having him there. As it turned out, while she initially had a negative reaction to his presence during the deposition, she did, ultimately, feel empowered from facing him down while she talked about what happened to her.

If the plaintiff does not want the harasser present, you will have to raise the issue with defense counsel. Defense counsel may agree that the harasser will not be present, or the parties may reach an alternate agreement for allowing the harasser to be present, such as being on the phone or viewing the deposition remotely from another room. If all else fails, you could try to obtain a protective order.

Have you thought through issues of privacy?

In most harassment cases where the plaintiff is seeking emotional distress damages, the plaintiff will be required to waive some degree of medical and personal privacy. The degree to which the plaintiff must waive her right to privacy depends, largely, on the degree and type of emotional damage claimed. This will likely be different in every case, but it is important to think through, prior to the deposition, the extent to which you are prepared to waive your client’s right to privacy and to gather any legal authority in support of your position. Issues of privacy are often the most contentious during the deposition, particularly if you chose to instruct your client not to answer some of those questions. This -- both having opposing counsel inquiring into very private areas and being present while counsel battle it out -- can be unsettling for the plaintiff, so you should prepare them for this possibility.

Defending the Deposition

Protection and Support

In any deposition, but most certainly one in which the plaintiff is going to discuss difficult issues such as harassment and/or physical assault, it is important for the plaintiff to feel

2 Depending on the forum you are in, there may be procedural rules that will enable you to keep the harasser out.
protected and supported. During the deposition, I make it a point to let the deponent know that my job is to help and protect her, whether that means ensuring that she gets regular breaks, getting her Kleenex when she needs it, making sure her water glass is full, and forcefully defending her from improper questioning from the opposing attorney. I try to make her physically aware of my presence during the deposition to continually remind her that I am there and that if she needs anything, I will do what I can to provide it. Depositions in sexual harassment cases are also one type of deposition where having more than one plaintiff’s attorney may be justified. If more than one attorney is working on the case, and the plaintiff is used to and comfortable with dealing with more than one attorney, it can make her feel even more protected to have all the attorneys on her team present. Plaintiff’s counsel can certainly consider discounting, for billing purposes, the presence of attorneys other than the one actually defending the deposition, but if having more attorneys present is possible and it makes the client feel more comfortable – thereby increasing the chance that they will give good testimony – it is worth it.

An important part of protecting the plaintiff during the deposition is paying attention to the plaintiff’s mental and emotional condition. If the plaintiff is significantly distressed, it may be necessary for plaintiff’s counsel to insist on a break. If it appears that the plaintiff is too distressed to respond to questions appropriately, it may be necessary to suspend the deposition. I try to pay attention to the plaintiff’s emotional condition as it approaches the end of the day. If the plaintiff seems tired or to be losing focus, I will find out whether the deposing attorney intends to finish that day (assuming a reasonable basis for continuing another day). If not, I will often request that the deposition end earlier, as the plaintiff is just going to have to come back anyway.

Be Diligent Regarding Inquiries into the Plaintiff’s Privacy

If the opposing attorney is doing her job, it is almost certain that she will make inquiries that touch on the personal and sometimes medical privacy of the plaintiff. As discussed above, it is imperative that plaintiff’s counsel come to the deposition prepared to draw whatever lines are necessary – and to provide support for those decisions – regarding the private areas into which inquiry will be allowed. Once that decision has been made, counsel must be diligent to ensure the plaintiff answers no questions that invade areas in which plaintiff’s counsel believe the plaintiff maintains a right to privacy.

Plaintiff’s counsel should also be acquainted with the limits regarding inquiries into the plaintiff’s sex life in sexual harassment cases. In California, for example, Plaintiff’s past or present sexual conduct is protected from disclosure by her right to privacy, and claiming emotional distress does not waive that right. See Vinson v. Superior Court, 43 Cal. 3d 833, 841 (1987). In addition, inquiry into the plaintiff’s sexual conduct with individuals other than the
alleged perpetrator is prohibited by statute, unless the plaintiff opens the door. Cal. Civ. Proc. Code § 2017.220; Cal. Evid. Code § 1106(a). Under federal law, evidence of the plaintiff’s sexual behavior or sexual predisposition is admissible only if it would otherwise be admissible under the Federal Rules of Evidence, and its probative value substantially outweighs the danger of harm to the plaintiff or unfair prejudice to any party. Federal Rule of Evidence, Rule 412(b). Evidence of the alleged victim’s reputation is inadmissible unless it has been placed in controversy by the alleged victim. Id. Counsel should understand the rules of the forum in which the claim is filed to protect the plaintiff as much as possible.