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Preparing for plaintiff's deposition in a sexual harassment/assault case

ONCE YOU FINISH THE PRE-DEPOSITION WITH YOUR CLIENT, THEY SHOULD FEEL PROTECTED, EMPOWERED, AND READY TO FIGHT FOR THEMSELVES

When we went to law school, no one told us a large part of our job was going to involve being a therapist for our clients. This is never more true than in the case where our clients have been sexually assaulted or subjected to sexual harassment. Our clients are broken. They do not have the same coping mechanisms that you did, that helped you become the success that you are. They are no match for the defense counsel. They are in emotional turmoil over what happened to them, so the pre-deposition in a sexual assault/harassment case is very important. You want your client to trust you, and the only way that will happen is spending time with them face to face and letting them know you are there to protect them.

Plan for a full day of pre-deposition with your client in person at least a week before the date of their deposition. Then you can do a follow-up over the phone the night before. Do not have your client come for the full pre-deposition the day before; it's too much for your client. This is a very emotional and draining process for your client. They will need time to rest and be ready to give their best testimony at the deposition.

If your client requires an interpreter, you should provide your own interpreter for the deposition. Just inform the defense counsel that you do not need them to provide an interpreter. Make sure you hire a certified interpreter to appear at your client's deposition. This will take a few weeks to plan, so make sure you don't wait until the day before the deposition. There are so many different dialects, depending on where the person was born or raised. It is important for the interpreter to understand who your client is, and how they speak before the deposition begins so that they can do the best job interpreting accurately your client's feelings and emotions, especially in a sexual harassment case. If you want to have someone in your office interpret during the pre-deposition, you should still bring your own certified interpreter to the deposition.

If you do not have someone in your office to interpret for the pre-deposition,

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then hire the same interpreter for both the pre-deposition and the deposition if you can; that way the interpreter will become familiar with the client, their dialect, their education level and you will have a much smoother deposition.

Don't let defense make immigration status an issue

The defendants are not allowed to ask about the client's immigration status. Assure the client that the defendants cannot ask them about their immigration status and they should not volunteer the information. (*Rivera v Nibco* (9th Cir. 2004) 364 F.3d.1057.) In *Rivera*, the court issued a protective order to prevent the employer from asking about the plaintiff 's immigration status and eligibility for employment at their deposition in a disparate-impact discrimination case. Pursuant to Labor Code section 1171.5, subdividion (b), defendant is prohibited from inquiring about plaintiff 's immigration status.

California statutes make all state-provided worker protections, rights and remedies, except federally prohibited reinstatement, available to all individuals regardless of immigration status. (See Civ.Code, § 3339; Gov. Code, § 7285; Health & Saf. Code, § 24000; and Lab. Code, § 1171.5; *Salas v. Sierra Chem. Co.* (2014) 59 Cal.4th 407, 423, 173 CR3d 689, 699.)

Preparation is comforting for your client

The pre-deposition is the time to see what your client will look like on an eight-foot video screen, before you are faced with it at trial. I tell my clients when they are going to the deposition to dress as if they were going to a job interview or church.

- No tattoos showing
- Light colors
- Nails, neutral and short

When the client arrives in the office, take a video of them on your phone and play it on a big-screen TV so you and the client can see what they look like on the big screen… better to get the shock factor out now and address any issues that will help your client look their best. Don't wait until you are in front of a jury and have the video played for the first time to realize the client looks like they just rolled out of bed or left their sweatshirt on, or wore a shirt with an offensive message, or showed tattoos.

The client needs to know that at trial they will not be in front of a jury of their peers, the defense counsel will knock off anyone who looks like the plaintiff, who associates with the plaintiff because of their race or anyone who experienced sexual assault or harassment. We will, of course, fight it, but they have to know that the 12 people looking at them will not look like them and will not be able to relate to them just because of their appearance. We want them to dress and style themselves as if they were applying for a job at a big corporation. They want to appeal to the broadest audience in their deposition video.

Explain to the client who is going to be in the room and what their jobs are. Let them know they will be videotaped. Explain to the client that the defendant harasser will be there.

As a party, the harasser has the right to be present. This is always of concern for the plaintiff. This is where the therapist/protector role comes in for you. You have to let the client know you will be there to protect her; you will not let her be alone for a minute. Also, you should advise the client that if the presence of the accused harasser makes it difficult or affects her ability to give her best testimony, she should say that to the defense counsel.

Go through the admonitions with them

When you tell the client up front that the defense attorney is going to say, "a,b,c," and when the deposition starts, the defense attorney says "a,b,c," your client feels more comfortable because the client knows you knew what was going to happen.

Keep your client from over-sharing about medication at the start of the deposition. When the defense attorney asks: "Have you consumed any alcohol or medication within the past 24 hours that could affect your ability to testify," that does not mean the client should start taking medication bottles out of their purse, or list every medication they are on currently. The *only* issue is whether the medication affects their ability to testify. If the medication they are on does not affect their memory or ability to answer questions, then they should not identify it at the start of the deposition.

Explain that the defense attorney will likely be nasty and condescending. Sadly, many defense lawyers consider it a badge of honor if they intimidate a witness or make them angry. The client does not expect this hostility from a stranger and because of their broken state, the client may feel that she did something wrong. Let her know in the meeting that the defense attorney is nasty to everyone, (unfortunately) and the angrier the defense counsel becomes, the better your client is doing. Tell her the defense counsel is going to try to frighten her and make her feel small or accuse her of lying. Assure your client you are there to protect her and that the defense attorney just wants the client to become angry or hostile on videotape and they should not fall into that trap. Tell your client that she should also testify if the defense counsel's behavior is interfering with her ability to give their best testimony.

Explain that emotional distress damages are not recoverable because the client is upset by the deposition, or because bringing the lawsuit is upsetting. Talk with your client about making sure she can differentiate the trauma from the sexual assault/harassment that is causing the stress, from stress caused by the lawsuit and deposition process. Ask clients whether going through with the lawsuit empowers them, rather than the isolation of pushing down and denying what happened. They should be able to explain that at their deposition.

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Speaking tips for the client

In sexual assault/harassment cases, predators target and prey on victims they know will not speak out. If your client is not educated and speaks a different language, it can be hard for her to put into words what happened and how it felt. This is why going over this before the deposition with the interpreter is so very important. Some victims have been raised not to talk about things of a sexual nature in public and they could be very hesitant in giving details about the sexual assault/harassment. You need to get all the details out in the safe environment of the pre-deposition so that the client can talk about it in the hostile environment of the deposition. If they freeze up during deposition, you will know they are holding back and can work with them before the deposition concludes.

On the other edge of the spectrum from the reluctant client is the over-sharing client. This client wants to try to connect everything that happened in their life to the sexual assault/harassment. They sometimes blame physical ailments that have nothing to do with the sexual assault/harassment and that will open the door for the defense to delve into their medical records to see if those physical ailments existed before the sexual assault/harassment.

Lifetime medical history is not opened up

Let your clients know their entire lifetime medical history is not open for discovery at their deposition unless they start naming every ailment as related to their emotional distress. Plaintiff's right of privacy is protected as to physical and mental conditions unrelated to the claim or injury sued upon. (See *Britt v. Sup.Ct.* (San Diego Unified Port Dist.) (1978) 20 Cal.3d 844, 864, 143 Cal.Rprt 695, 708.) Code of Civil Procedure Section 2017.220 provides:

> In any civil action alleging conduct that constitutes sexual harassment, sexual assault, or sexual battery, any party seeking discovery concerning the plaintiff's sexual conduct with individuals other than the alleged perpetrator shall establish specific facts showing that there is good cause for that discovery, and that the matter sought to be discovered is relevant to the subject matter of the action and reasonably calculated to lead to the discovery of admissible evidence. This showing shall be made by a noticed motion, accompanied by a meet and confer declaration under Section 2016.040, and shall not be made or considered by the court at an ex parte hearing.

The defendants will claim that because plaintiff made a claim for emotional distress based on sexual assault/harassment, that the plaintiff has opened up her entire history. This is not true. Such claims do not waive privacy as to past or present sexual practices, absent any claim of damage to his or her present sexuality. (*Vinson v. Sup.Ct.* (*Peralta Comm. College Dist.*), *supra*, 43 Cal.3d at 842, 239 Cal.Rprt.3d at 299.)

The right to privacy is not absolute and must be balanced against other important interests. Any compelled disclosure, however, "must be narrowly drawn to assure maximum protection of the constitutional interests at stake." (*John B. v. Sup.Ct.* (*Bridget B.*), *supra*, 38 Cal.4th at 1200, 45 Cal.Rptr. 3d at 333.)

Advise your clients that they should not speak of relationships with others, as they have a right to privacy. A party's sexual practices are protected by the California Constitution's right of privacy. (Cal. Const. Art.I, § 1; *Vinson v. Sup.Ct.* (*Peralta Comm. College Dist.*) (1987) 43 Cal.3d 833, 841, 239 Cal.Rprt. 292, 298; *John B. v. Sup.Ct.* (*Bridget B.*) (2006) 38 Cal.4th 1177, 1198, 45 Cal.Rptr. 3d 316, 332.)

Assure your clients that the defense counsel cannot fish through their entire life and medical history. You should also be prepared to protect your client at the deposition.

Preparing for the defenses that will be raised

In an employment case, prepare your client to provide the specific facts to show that the harasser was your client's supervisor. The employer is strictly liable for sexual harassment by a supervisor in an employment case. (Gov. Code, § 12940, subd. (j)(1).) The factual issue of whether or not the harasser was a supervisor will be established by your *client's* testimony. The defendants will fight this issue vociferously, so make sure you and your client are well prepared before your client's deposition.

Some of the facts that give rise to a finding that a harasser is a supervisor include: if the harasser performed the annual performance evaluations, if the harasser had the ability to hire, fire, promote or transfer the plaintiff. The harasser does not have to exercise those abilities in order to be found to be a supervisor; the issue is whether *they had the ability to do so*. Your client may know that the harasser told her he could fire her or promote her as a means to threaten her into engaging in relations with him. Your client needs to show the day-to-day control the harasser had over her, so go through this in detail with her. She needs to testify specifically about this. (Gov. Code, § 12940, subd. (j)(1).) However, if the harasser did not have the ability to hire or fire the plaintiff, you can still show that the harasser was a supervisor. The case you should be familiar with is *Chapman v. Enos* (2004) 116 Cal.App.4th 920.

Chapman was a sexual-harassment case that involved a female investigator in the District Attorney's office against a deputy district attorney. Chapman performed her duties under the direction of the deputy district attorney assigned to her unit but was under the supervision of the senior and chief investigators. The senior and chief investigators, and the district attorney, were responsible for hiring and firing investigators. The senior or chief investigator approved vacation leave for investigators. An investigator assigned to a vertical prosecution unit worked as a team with the deputy district attorney assigned to that unit and received instructions from that attorney.

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Chapman conceded below that Enos did not have the authority to hire, fire, promote or transfer her. Her theory of the case was that Enos was her supervisor because he had the responsibility to direct her work.

In *Chapman, supra*, the court found the following significant to establish a supervisor:

> [i]t was undisputed that Enos directed her day-to-day duties to conduct investigations and trial preparation on cases, and outlined her role in meetings and trainings. Indeed, Enos testified that in the two-year period in which he worked with Chapman in the fraud unit, Chapman received only three assignments from others…The evidence also showed that Chapman always cleared her time off with Enos before having it approved by the chief investigator, and that Chapman believed Enos was her supervisor or "boss."

The *Enos* court further explained that the employee's reasonable belief that the harasser was her boss is important:

> Also useful here, although not controlling, is the Equal Employment Opportunity Commission's enforcement guidance construing title VII, which answers the question of who qualifies as a supervisor: "An individual qualifies as an employee's 'supervisor' if: [¶] ... [¶] (b) the individual has authority to direct the employee's daily work activities." (EEOC Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors (June 1999) ¶ III.A.) The guide also explains that a supervisor who does not have actual authority over an employee may nonetheless create vicarious liability for the employer "if the employee reasonably believed that the harasser had such power. The employee might have such a belief because, for example, the chains of command are unclear. Alternatively, the employee might reasonably believe that a harasser with broad delegated powers has the ability to significantly influence employment decisions affecting him or her even if the harasser is outside the employee's chain of command.

(*Id*., 116 Cal.App.4th 920 at fn 10.)

Spend time in the pre-deposition going through the facts upon which your client believes the harasser was her supervisor.

If the harasser is a co-employee, liability of the company will turn on your client's testimony about whether she complained about the harasser before, or whether she knows that others complained. Government Code section 12940, subdivision (j)(1) provides:

> Harassment of an employee, an applicant, an unpaid intern or volunteer, or a person providing services pursuant to a contract *by an employee, other than an agent or supervisor,* shall be unlawful if the entity, or its agents or supervisors, *knows or should have known of this conduct and fails to take immediate and appropriate corrective action.*

(Emphasis added.)

Find out from the client in pre-deposition if she complained before, and nothing was done. Also ask her if she knows whether others complained about the harassment and the employer failed to take any action.

Harassment by an independent contractor

If the harasser is not an employee, but an independent contractor, the liability of the company will turn on the amount of control the company exercised over the independent contractor. The employer is liable even if the harasser is not their employee, such as the harasser being an independent contractor, or someone working with the employer under a contract such as a doctor in a hospital. Pursuant to Government Code section 12940, subdivision (j)(1):

> An employer may also be responsible for the acts of nonemployees, with respect to harassment of employees, applicants, unpaid interns or volunteers, or persons providing services pursuant to a contract in the workplace, if the employer, or its agents or supervisors, knows or should have known of the conduct and fails to take immediate and appropriate corrective action. In reviewing cases involving the acts of nonemployees, *the extent of the employer's control and any other legal responsibility that the employer may have with respect to the conduct of those nonemployees shall be considered*. An entity shall take all reasonable steps to prevent harassment from occurring. Loss of tangible job benefits shall not be necessary in order to establish harassment.

In your pre-deposition, go over in detail the facts the client knows about the control the employer had over the harasser.

Prepare your client for a defense that their claims are time-barred and the continuing-violations exception. In the reality of the employment world, the victim of harassment faces concerns that if they speak out, they will lose their jobs. The harassers count on this and prey upon those who are susceptible. Thus, for example, a single mother who does not have an education and not a lot of options, may endure sexual harassment for years before she finally has the strength or the ability to risk losing everything to speak out. An actress who is relying on getting work and experience to support herself may not speak out for fear of being blackballed. The courts have recognized this reality.

The continuing-violations doctrine comes into play when an employee raises a claim based on conduct that occurred in part outside the limitations period. (*Richards v. CH2M Hill, Inc*. (2001) 26 Cal.4th 798, 812.) A continuing violation exists if: (1) the conduct occurring within the limitations period was similar to the conduct that falls outside the period, (2) the conduct was reasonably frequent, and (3) it had not yet acquired a degree of permanence. (*Dominguez v. Washington Mutual Bank* (2008) 168 Cal.App.4th 714, 721 citing *Richards* at 823; see also *Nazir v. United Airlines* 178 Cal.App.4th 243 at 270.)

Therefore, when you are doing the pre-deposition of your client, and

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there was an ongoing history of sexual harassment outside the one-year limitations period, make sure you review the three guideposts with your client so that the facts connect up to each of the three prerequisites for finding a continuing violation.

Once you finish the pre-deposition with your client, they should feel protected, empowered, and ready to fight for themselves. If you accomplish this in your pre-deposition, you have done the best job you can in helping your client prepare for the nasty battle that awaits at the deposition and your case will be much stronger for the time you spent with your client.

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