Tamara Freeze
WORKPLACE JUSTICE ADVOCATES, PLC

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Know your opponent

EIGHT DEFENSE TRICKS IN EMPLOYMENT LITIGATION

When you are dealing with a vulnerable client, prepare for a difficult battle with the defense. It seems that the vast majority of defense lawyers believe that all is fair in love and war (and litigation). Like a pack of wolves, they sense weak prey and strike with full force, expecting a quick surrender. Since most defense lawyers follow a predictable litigation protocol in almost every case, this article debunks the most common defense strategies and will show you how to mess with their script.

Document camouflage

A careful and detailed discovery request should, in theory, result in meaningful document production. This "fairy tale" scenario rarely happens. No one is going to serve responsive documents to you in a neat, categorized fashion on a silver platter. At best, you will be digging through a massive disorganized production, at worst – a partial production that does not include anything helpful for your client.

Defense lawyers use covert tactics to give you as little information as possible and minimize the damage. Or you might deal with an anemic defense lawyer, who has done minimal due diligence. One problem with the defense document production is promptly piecing together what they give you. It is not uncommon, especially in a large document production, to get only partial email threads or partial text messages. For example, you might get a copy of an email where a supervisor is asking human resources a question on how to handle your client, but the rest of the document production does not contain any email responses from the HR.

That's a red flag. Take your time reviewing each email and text message and pay special attention if it is a thread. It is up to you to follow up with the defense lawyer and ask for the rest of the email or text messages. However, this may not result in the additional document production, since the defense lawyer may simply deflect the request by claiming sufficient due diligence: "That is all my client gave me." Instead, you may want to serve a *new* request for document production, asking the defendant to produce all prior or subsequent messages and emails relating to a specific event or the subject of a partial email/text message thread you received.

The defense would have to take a grudging second look under such circumstances, or at least explain why a part of the conversation is missing. If you suspect foul play, get the court involved and follow up with Electronically Stored Information (ESI) document requests, asking for documents in the native format with metadata intact.

Another common problem is document-format manipulation by defense lawyers. The vast majority of the time, defense document production is in Portable Document Format (PDF). It is not unusual to receive a document production that includes emails that have been copied and pasted into a Word document, and then saved as a PDF. Some emails may not even have the recipients or dates listed, as they were forwarded to someone else. It is a pain, but you might have to follow up and get a copy of the original emails with that necessary information.

Photos in the document production deserve extra careful review. Most of the time, when you get pictures in your document production, it is unclear who took the photo, when and whether there are other similar photos out there. It is recommended to follow up with the special interrogatory, asking defendant to at least 1) identify the equipment used to take the photo, 2) state the date of the photo, 3) identify the individual who took the photo, 4) identify who has the current possession of the photo and 5) give the reasons the photo was taken. It might be helpful to serve a corresponding document request, asking for the production of the photo in the native format and all communications regarding the photo.

Remember, the defense will produce the *final* version of every document: the performance review that was given to plaintiff, warnings, Performance Improvement Plans (PIPs), termination letters, the summary of witness interviews, and employment policies. However, normally such documents go through several revisions, meaning if you do not ask for the *drafts* and *all versions* of these documents, you won't get them. Ask for all drafts of your client's performance reviews, PIPs, warnings, any documents that reflect disciplinary actions, the policies, and any critical writings in your case. The drafts may reflect employer's intent and motive and other decision-making process that the final versions would not necessarily include.

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For example, the draft may include information that was deleted in the final performance review that may strongly indicate pretext, such as references to gender stereotypes, age, disability or "attendance issues" while the employee was on a medical leave. Likewise, a draft of the termination notice may only include one infraction, while the latest version may contain a kitchen sink of new accusations – which may be helpful in your pretext analysis. It is recommended that you refer to a specific document in your document request, such as "All versions, modifications and drafts of DOCUMENT bate numbered XXX, in native format, with all metadata intact" or "All versions, modifications and drafts of the July 17, 2018 termination notice from J. Smith to Plaintiff."

Deceptive horse trading

Discovery is a psychological game at its core, where defense will put your character to the test. Many defense lawyers treat your discovery requests as a starting offer, to bargain on what to produce, rather than an obligation to produce all relevant information and all documents you are entitled to have. They treat the Code of Civil Procedure as an advisory statute, but will give you the personnel file and a few other useless case documents, to pacify you during the first round. The defense strategy here is to create the illusion that a defendant diligently complied with your discovery requests and, then to leave them alone.

If you push back with an effort to meet and confer, they will make a few more (usually minor) concessions. Defense treats the "meet and confer process" as an opportunity to compromise on a few other times, hoping that you will finally back off altogether. Under such circumstances, if you push back on your remaining discovery requests, they will turn it against you, accuse you of being unreasonable, not engaging in a meet and confer process in good faith and may even threaten you with sanctions. In other words, you are the "crazy" one if you do not back down.

While discovery is not designed to be an evidence market where you have to bargain fiercely for relevant documents and information, defense litigators will make it that way or use superficial compromise as a guilt tactic, to shame you for being too aggressive or unreasonable. Avoid such games with the defense. If you are dealing with an experienced defense litigator, they will push back on "me too" (evidence of harassment or discrimination against other employees) and comparator evidence (qualifications and performance data of other employees) during discovery. Most of the time, be ready to file your motions to compel and stand firm on your discovery requests. Take clues at the Informal Discovery Conference (IDC). If your judge is not pleased by your lack of cooperation, you might have to back off on some, hopefully minor, issues.

The delay game

"Justice delayed is justice," according to defense lawyers. When defense asks for extensions to respond to your discovery, be gracious, but not too generous. Give two extensions, then file your motions to compel or schedule an IDC. Promptly engage in a meet and confer with defendant once you get deficient responses or documents. If you experience significant stalling, fire off your motions to compel. Make sure to read the department rules regarding discovery disputes, as each judge may have a different protocol dealing with discovery matters.

The fear factor

The threat of hefty discovery sanctions sends a chill down the spine of new lawyers and paralyzes their legitimate discovery efforts. Discovery sanctions are the horror stories plaintiffs' lawyers tell each other during campfire get-togethers. And defense litigators count on it. The threat of discovery sanctions may work on a new and impressionable attorney, but should not dissuade you from pursuing proper discovery motion practice in court. Sometimes judges get it right and sometimes they do not.

In reality, if there is no risk, there is no reward. Hopefully, your motions to compel are well-reasoned and rely on solid California law. At the end of the day, the burden is on your client to prove liability and damages, so you might have to be aggressive about hounding the defense for relevant evidence. Also, think about the bigger picture. Motion practice (even if you lose) sends a strong message to defense lawyers and creates a reputation that you mean business. You may lose the motion or even the case altogether, but your reputation will remain the next time you face the same adversary.

The same logic applies to defending against unreasonable and intrusive discovery requests. Sometimes defense lawyers request evidence they are not entitled to, such as overbroad medical records, subpoenas to current employers and seek all kinds of private information about your client. The threat of discovery sanctions is a pure illusion in most such cases. File your motions to quash or for a protective order and have the court decide the limits of such discovery.

Deposition vampires

Prolonged, hostile, pointless depositions waste everyone's time, run the billable meter up and will exhaust your already traumatized client, emotionally and physically. There are a number of techniques to protect your vulnerable client from an abusive and hostile interrogation in deposition.

First, research your defense attorney, and do it early in litigation. Your local bar association may have a listserv that includes various comments about defense lawyers. CAAALA, OCTLA and CELA provide excellent resources to reach out to your colleagues for honest feedback about your opponent. See if anyone filed motions to compel or motions for protective order and got sanctions against the same defense attorney. This knowledge may come in handy later on.

Second, if your client has a serious mental-health issue or disorder, he or she

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may not be mentally strong to sit through a six- to seven-hour deposition, even if the defense attorney is on their best behavior. It may be necessary to request an accommodation, such as limiting the deposition duration to three or four hours a day, or to allow frequent breaks. If the defense attorney is not accommodating, get a doctor's note or even a protective order. Remember, it is your responsibility to protect your client and ensure he or she provides the best, most accurate testimony.

Third, get a protective order if you are dealing with a condescending, hyper-aggressive, unreasonable counsel. Code of Civil Procedure section 2025.420, subdivision (b) states that the Court, for good cause shown, may make any order that justice requires to protect any party or deponent from unwarranted annoyance, embarrassment, or oppression, or undue burden or expense. In addition, the California Attorney Guidelines of Civility and Professionalism ("Guidelines") specifically state, "An attorney should not use discovery to harass an opposing counsel, parties, or witnesses." Further, Section 9 of the Guidelines specifically states that "An attorney should treat other counsel and participants with courtesy and civility." If the deposition becomes harassing or oppressive, suspend the deposition and seek a protective order.

How about defense lawyer's favorite tactic of asking the same question numerous times, beating your client into submission? The Attorney Guidelines on Civility by Los Angeles Superior Court, Chapter 3, Appendix 3A(6), specifically state that "(6) Counsel should refrain from repetitive or argumentative questions or those asked solely for purposes of harassment." Witness browbeating is rampant in depositions, but it is considered abusive, warranting a protective order.

Excessive deposition sessions are equally oppressive and put tremendous emotional pressure on your client. More than two days of deposition is rare in employment cases, unless you are dealing with an unusually complex case. If you are on volume four of your client deposition, this may be the time to put a stop to the endless questioning. The Attorney Guidelines on Civility by Los Angeles Superior Court, Chapter 3, Appendix 3A (1) states that "Depositions should be taken only where actually needed to ascertain facts or information or to perpetuate testimony. They should never be used as a means of harassment or to generate expense."

Condescending remarks and badgering the witness are equally common in emotionally charged cases, but never appropriate. The State Bar of California Attorney Guidelines of Civility and Professionalism, 2007, Section 4, Communications, states: "An attorney should not disparage the intelligence, integrity, ethics, morals or behavior of the court or other counsel, parties or participants when those characteristics are not at issue. An attorney should avoid hostile, demeaning and humiliating words. An attorney should remember that vigorous advocacy can be consistent with professional courtesy, and that arguments or conflicts with other counsel should not be personal." Accusations at a deposition that your client is making up her story, or that you do not know how to practice law, are frequently subject to discovery sanctions.

In *Tylo v. Superior Court* (1997) 55 Cal.App.4th 1379, the Court of Appeal took issue with the condescending remarks by defense attorney toward plaintiff 's attorney, in the following exchange:

> Mr. Waldo: Just give the instructions and we'll go to court and you can be told how to conduct yourself at a deposition because you don't know your case.
>
> Ms. Leal: And I resent the fact that you're telling me I don't know my case.
>
> Mr. Waldo: You don't.

The Court of Appeal strongly condemned such disrespectful remarks towards Ms. Leal: "At best, the comments of Mr. Waldo set out in italics were in poor taste. At worst, they were an attempt to intimidate opposing counsel and her client. In either case, they were unprofessional and inappropriate. Unfortunately, it appears that such tactics are being exhibited more frequently now than in the past. Professionalism and civility are attributes still valued in the practice of law." (*Id.*) When faced with such conduct, suspend the deposition and seek a protective order and sanctions.

When you are *taking* a deposition, the most frequent violation by a defense lawyer is a speaking objection. The proper response here is to suspend the deposition and seek a protective order. California Code of Civil Procedure section 2023.010, subdivisions (c) and (e) prohibit "[e]mploying a discovery method in a manner or to the extent that causes unwarranted annoyance, ... oppression or undue burden and expense," and "[m]aking, without substantial justification, an unmeritorious objection to discovery."

It is improper for counsel to use speaking objections to coach the deponents, including through plaintiffs' counsel's constant interruptions of deponents' mid-sentence to attempt to suggest the right answer or warn them of potentially harmful answer. (*Hall v. Clifton Precision, A Division of Litton Systems, Inc.*, 150 F. R.D. 525, 530 (E.D. Pa. 1993); *Damaj v. Farmers insurance Co.*, 164 F.R.D. 559, 560 (N.D. Okl. 1995) [frequent and suggestive objections by opposing counsel can, and often do, completely frustrate a deposition's purpose). *Specht v. Google, Inc.*, 268 F.R.D. 596, 598 (N.D. Ill. 2010) ["Objections that are argumentative or that suggest an answer to a witness are called 'speaking objections' and are improper under Rule 30(c)(2)."].)

Rapid-dominance discovery

In military jargon, shock and awe (technically known as "rapid dominance") is a tactic based on the use of overwhelming power and spectacular displays of force to paralyze the enemy's perception of the battlefield and destroy their will to fight. Basically, a few days after you file your case, you are hit with hefty discovery:

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your client's deposition notice, 300 interrogatories and document requests, form interrogatories, a request for admission and a few subpoenas. Numerous RFPs for every allegation in your complaint, however minor, simply demonstrates that you are dealing with defense drones who operate under deeply ingrained, but mistaken assumption, that dropping too much discovery work on plaintiff's lawyers early in the game will make them back off and settle at a discount.

One way to fight against this discovery Chernobyl is to seek a protective order and ask the court to limit discovery to a set number of requests. However, keep in mind that two can play that game and the discovery limits may be used against you. As a plaintiff's employment lawyer, normally, you have a lot less information about what happened, so you have a lot of work to do. Which means that hefty discovery benefits your client the most. A better way to proceed might be to provide the responses, then turn the tables. Like in any relationship, your opponent's behavior often serves as a benchmark for what is acceptable. Defense just opened the door to the similar discovery blitzkrieg and practically unlimited discovery form you. Fight fire with fire and serve an extensive discovery set of your own. When handled correctly by plaintiff lawyers, rapid dominance discovery by defense is frequently counterproductive and backfires on defense lawyers, both tactically and financially.

Defense's phantom leverage

Defense lawyers often suffer from an incurable case of confirmation bias early in litigation. Confirmation bias is the tendency to interpret new evidence as confirmation of one's existing beliefs or theories. This affects both new and experienced lawyers and is a challenging mindset to deal with. The following defense tactics reveal that you are dealing with an overconfident lawyer, who is suffering from confirmation bias:

The summary judgment illusion

Unless you took a bad case, chances are you will survive a motion for summary judgment or summary adjudication, at least on some claims. This scare tactic is rarely successful, given numerous issues of fact in employment cases. When defense lawyers tell you that your case will be dismissed on the motion for summary judgment, without even taking your client's deposition or producing their own witnesses for the deposition, exchanging documents or throughout fact discovery, this tells you two things: 1) defense underestimates you and your client, and 2) you have to do a lot of work on your case to change this mentality. Treat it the way it is: A nice billable event for the defense and an opportunity for you to take a peek at the defense's future arsenal at trial. Losing some claims is common and expected at the motion for summary judgment. In most cases, the judge is most likely doing you a favor by cutting out unsuccessful claims.

A motion for summary judgment is a great opportunity to dive into your case in detail and structure your evidence to prepare for trial. Thank your opponent for filing the motion as have given you an excellent chance to analyze the defendant's case and evidence, right before trial. That is because, in most cases, defense outlines the key evidence or witnesses they will be relying on at trial *in their motion for summary judgment*. In the unfortunate event the judge grants defense motion for summary judgment, you might want to appeal and reverse. It takes time, but is worth it.

The demurrer time bomb

While a motion for summary judgment is like a direct shot at your client, careless mistakes on demurrer are like radiation – over time, they can damage or kill your case. Demurrer appears less dangerous than summary judgment on its face, but it could be an effective covert defense tactic akin to a radioactive fallout, destroying your case later on. If you are not careful, a demurrer may be a carefully planted defense time bomb.

When faced with a demurrer, plaintiffs often opt for amending the complaint and adding new facts. Or they fight it and then are told by the judge to amend. If you are dealing with an FEHA case, adding more facts, circumstances and new parties to your complaint may be a trap that destroys your case if your DFEH right to sue is not promptly amended to reflect similar changes. In *Alexander v. Cmty. Hosp. of Long Beach* (2020) 46 Cal.App.5th 238, employees amended their civil complaint to name a new entity as a defendant, but never filed a DFEH administrative complaint against that new defendant. The Court of Appeal reversed a jury verdict of almost $5 million against that new defendant, because plaintiffs did not mention the new employer entity in their DFEH complaint.

However, FEHA's exhaustion requirement should not be interpreted as a "procedural gotcha" that absolves an alleged perpetrator of discrimination from all potential liability, merely because a plaintiff makes a minor mistake in naming the respondent in an administrative complaint, when the intended respondent's identity is clear. (*People v. Matthews* (2019) 32 Cal.App.5th 792, 798.) In *Clark v. Superior Court* (2021) 62 Cal.App.5th 289, the Court of Appeal reversed a summary judgment against an employee in an FEHA case, even though Plaintiff made a minor mistake in the RTS complaint to the DFEH and named a wrong entity.

When faced with a demurrer, it may be the time to send your defense counsel a fruit basket. You now have a unique opportunity to fix obvious flaws in your case and educate yourself a bit more about your evidence, allegations, and your client.

Subpoenas galore

So, you just defended your client's deposition. Time to prepare for the next

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textbook move by defense: the onslaught of subpoenas to plaintiff's past and current employers, every medical provider your client has seen since birth and possibly other locations. It seems that nothing is off the table for the defense lawyer. We even had defense lawyers serve a subpoena on plaintiff's gym, community college and her plumber.

In litigation, you get points for resistance, but you also need to choose your battles wisely and not overwhelm your judge with 10 motions to quash (unless you are in arbitration, then I would say go for it). Write a meet-and-confer letter asking them to explain why they need all this information and provide you with the authority. Some defense attorneys will back off, some won't. An IDC may be the best way to resolve the scope of the subpoenas, but a motion to quash (to protect your fragile client) may be necessary as well.

When objecting to the subpoenas, make sure to contact each subpoenaing party, as soon as possible. Otherwise, they might produce the records well before the production date. Send a letter to each medical provider and each employer and talk to them on the phone. Make sure they clearly understand that they should not produce any records whatsoever until there is a court order or a compromise between counsel.

The endgame

Litigation is like a surgery – you have to be persistent, focused and precise. If not prepared, these eight defense tricks could make your and your client's litigation life stressful and miserable. Protecting vulnerable clients may require significant investment of energy, time, resources and mental strength. An already traumatized client looks up to you to protect him or her from unreasonable and harassing discovery. Like a seasoned chess player, map out your litigation strategy and take advantage of your opponent's confirmation bias, unreasonable aggression and short-sighted discovery tricks.

Tamara Freeze is a trial attorney and a founding partner at Workplace Justice Advocates, PLC *– an all-female plaintiff's employment law firm in Beverly Hills and Orange County. Ms. Freeze is a graduate of University of California Berkeley School of Law and a former BigLaw employment defense attorney. Email: tf@workplacejustice.com.*