



Framing the employment case for MSJ and trial

A road map that begins at case selection, continues through plaintiff's deposition, documents, witnesses, and ends with you telling your client's story

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Trial and opposing summary judgment are two very different animals. However, preparing and framing your case to win at trial and defeat summary judgment require the same work, the same information and evidence. In this short article, I will provide a basic road map for both situations. The road begins at case selection, continues through plaintiff's deposition, documents, witnesses, and ends with you telling your client's story.

Case selection

Case selection is the single most important aspect of a successful case. Rare is

the case that gets better with time and evidence. After having gathered the basic background information from your potential client (name, contact information, name of employer, dates of employment, etc.) there are only two questions that need to be asked: 1) What was the employer's reason for your termination (why you are not working there anymore)? and then, 2) Okay, now tell me the *real* reason you were fired/are not there anymore.

It is my belief, that in the initial interview, the truth will come out. The answer to the first question will give you the employer's reason, the one that is likely to be their position at MSJ and at trial. More importantly, if there was a

discriminatory or retaliatory reason regarding race, religion, disability, medical leave, etc., then when answering the second question, the potential client will give you all the facts to set out your case.

Plaintiff's deposition

Plaintiffs' depositions are long. Rare is the defense counsel who takes a focused deposition. Rather, they start early in the morning and drag them out for a whole day and many times for multiple days. It is at the end of those days that the plaintiff will finally be asked those key questions about the basis for their case. "Why do you believe you were retaliated against?" or "Who discriminated against



you?” or “Why were you wrongfully terminated?” or other similar questions. No matter how much prep you go through with your client, when they are physically and emotionally drained from a day of questioning, the answer they gave to the “second question” above will be the answer they give at 4:30 p.m. when the hard and important questions come out. It’s the truth. Its easy to remember.

There are only a few questions the plaintiff needs to know how to answer in their deposition. Even though the client articulated a discriminatory/retaliatory reason in your intake, they still need to be able to deliver the goods at their deposition. Preparation is key. Answers of “I don’t know” or something similar to the following questions, will end your case:

Q: Why did your employer fire you?

A: I don’t know.

Q: How were you discriminated against?

A: I don’t know.

Q: Who retaliated against you?

A: I don’t know

Many lawyers will try to instruct the witness not to answer these questions as improper contention questions. However, at MSJ, and at trial, that leaves a gaping hole in your case. The plaintiff, of all people, must be able to answer these and similar questions.

Thus, I practice with my clients to make sure they know the answers to these questions. I word the questions every which way and try to trick them as much as I can. Frankly, in every deposition both sides are going to “score points.” However, the key points that need to be scored are in the plaintiff’s deposition being able to describe the how, when, why of the illegal reasons for their termination.

With that testimony in hand, the backbone to the MSJ opposition and trial preparation are in hand.

Gathering your evidence

Plaintiff’s testimony that they were fired for some illegal, discriminatory, or retaliatory reason is great, but the more

other evidence you have, the stronger. Here is where I try to gather information from the client to defeat summary judgment and prepare for trial:

- Similarly situated employees/former employees
- Defendant’s Policies and Procedures
- Emails

Find out the names and phone numbers of your client’s former co-workers. Call them. If you are afraid to call them, hire someone else to do it. I have yet to call a witness and be upset. Only one of two things happen – they either help your case or they don’t. If they are bad witnesses for your case, then at least you know about it and can deal with it. If they are helpful, then get a declaration or take their deposition (and video tape it).

Demand documents of how other similarly situated employees were treated in the past. Move to compel if defendant won’t produce these documents. Then, call these former employees. Chances are that if the employer discriminated here, then it has happened to others. If your client was sexually harassed, then it has happened to others.

Defendants typically have great policies and procedures. However, if you have a good FEHA case, chances are the employer failed to follow their own policies and procedures. Take the PMK deposition from the defendant about those policies and procedures and the reasons for the termination and other causes of action in your case. Get them first to confirm all their policies and procedures and how they do things. Then show how they failed to follow those procedures in this situation.

Demand, and make sure you get, all emails about your client. From before their termination and after their termination. This might result in thousands or even tens of thousands of pages. But there is gold in them thar hills. Dig for it.

Framing the case

Tell a story. Have a theme.

The case you sign up is not the case

that gets litigated, and is not the case that gets tried. The best summary judgment oppositions tell the whole story. Not just the cherry-picked facts that counsel for defendant wants the judge to see, but the whole truth. The best trials are those with a theme and a story told through witnesses and exhibits. The PMK who did nothing, the other victims, your client’s therapist and experts. Find the theme and message of your case and tell it to your jury. Armed with these items: plaintiff’s deposition, third-party witnesses, other victims of discrimination and harassment, and defendant’s failures, there is more than enough to create triable issues of fact. Armed with these witnesses and facts, you can put your theme on through your witnesses and evidence at trial. But you have to tell the story in a persuasive manner.

- What did the defendant do wrong?
- What did the defendant know? And then what did they do? (or not do)
- Are there others victims?
- Other instances of harassment or discrimination?
- Other violations of the law/employer’s policy?
- Where did defendant treat your client differently?

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Martin is a member of the Consumer Attorneys Association of Los Angeles, serving on the Board of Governors. As part of CAALA, Martin was a finalist for the 2015 Rising Star Award, received the Presidential Award in 2013, and the Steven C. Glickman Award in 2012. Martin has also served as chair of the CAALA New Lawyer’s Group and was co-chair of the 2015 and 2016 Annual Las Vegas Convention.



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