

What To Do When You've Been Sued: Part II: How to Help Your Lawyer Help You

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“Courtroom: A place where Jesus Christ and Judas Iscariot would be equals, with the betting odds in favor of Judas.”

-- H.L. Mencken

This article is the second in a series about lawsuits, with practical tips on how to handle some common issues that arise. In this article, we discuss ways you can help your lawyer, the discovery process and how to be a deposition witness.

Give Your Lawyer Early Access to the Unvarnished Facts

The best thing you can do to help your lawyer is to let him or her find out all of the facts. As business people generally focused on looking forward to predict the future and make a profit, many executives are not comfortable with the backwards-looking process of litigation that reconstructs the past. Some executives are so focused on looking forward to “win” the lawsuit that they do not want their lawyer to spend time on learning information, unless it supports the company’s position. This is a recipe for disaster.



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The Discovery Process

After a lawsuit is filed, the parties are allowed to “discover” the evidence that other parties have to support their claims or defenses. Parties can request the production of documents, send out written questions (known as interrogatories) and take depositions of witnesses. The purpose of such discovery is to make all facts known to all parties, to allow them to evaluate their respective cases, and to possibly facilitate settlement before trial. Many years ago, litigation was often “trial by ambush,” where parties would not disclose evidence until trial, and hope to score a win by catching opposing witnesses and others by surprise. Now the courts require advance disclosure of all evidence and witnesses. If disclosures are not properly made, evidence and witnesses may be excluded from trial.

Discovery of Documents

The courts tend to err on the side of more, rather than less, disclosure, which allows parties substantial leeway to discover documents. Discovery requests, however, are not without limits. A reasonable basis for the request must exist, and overly burdensome, abusive or harassing requests can be objected to and limited by counsel. Protective orders can be obtained to preserve the confidentiality of business and financial information, personnel records or medical information.

Unfortunately, many company executives do not take the time to thoughtfully

Upper management often delegates authority, relies on others for information and may not be aware of the actual facts that could impact the lawsuit. Documents, facts or witnesses may exist that could undercut otherwise meritorious defenses. Instead of asking the lawyer to simply support the company’s position, the savvy executive will provide open information access to counsel to gather all necessary data to weigh both the strengths and weaknesses of the case.

Your lawyer’s job is to learn all of the evidence -- good, bad or ugly -- to properly advise you on strategies to defend a case. Giving your lawyer full access to all evidence and witnesses (including former employees) will benefit you by allowing an early evaluation of the merits of the case to make better, financially sound decisions on whether to settle or proceed to trial.

respond to document requests. Some mistakenly believe that they do not have to disclose “confidential” documents. If relevant documents are not produced, concealed, hidden or destroyed, very serious adverse consequences can occur. In a recent high profile local lawsuit, Mesa Air Group was hit with an \$80 million damage award for improperly retaining confidential documents provided by plaintiff Hawaiian Airlines, and then destroying such documents when requested in litigation. Be aware that if your company does not have a clear existing document retention program, the purging of documents may appear to be deliberate concealment. In litigation, any and all documents that were ever created are potentially fair game for disclosure.

A potentially large pitfall can occur when the production of e-mails and other electronically maintained documents is requested. Once litigation ensues, a party is required to maintain and not destroy e-mails and electronic documents – a possibly troublesome problem with automatic document purging programs. Company-wide directives may be required to instruct employees not to destroy documents. Moreover, e-mail documents especially may contain inaccurate, careless off-handed admissions or provocative statements. In the antitrust litigation against Microsoft, some of the crucial documents that established liability were found in e-mails.

How to Be a Witness in a Deposition

Depositions are important interviews where testimony is taken under oath and a transcript prepared. The corporate witness may be called upon to “tell the company story” and thus becomes the face of the company. At the same time, the deposition of a company witness can often be an assault upon an employee witness’ integrity, methodology and competence. An improperly prepared witness’ deposition can have devastating consequences. And while a case will not be won in a deposition, it can certainly be lost there. For this reason, the company’s defense is only as good as the ability of these witnesses to explain what they do, why they do it and why their actions meet the legal standards in a way a jury will understand. The witnesses should put their best foot forward at the deposition.

You can help your attorney by allowing sufficient time for company witnesses to prepare for their deposition, an event which is outside the comfort zone of most business employees. Executives used to being in control may not be familiar with the skills of communicating with a jury. And many managerial and technical employees often do not speak publicly and will be understandably nervous about being cross-examined. All company witnesses must be able to explain their job duties, the limitations of their job, how information is processed, and how decisions are made in a human, caring manner. Multiple sessions with your lawyer may be necessary to get comfortable with this process. Videotaped practice sessions may help to show the witness how he or she comes across.

By taking the time to have these witnesses understand their role and review important documents, your company will benefit from employees who not only know how to testify in a prepared, knowledgeable manner, but also with an attitude of interest, not arrogance. In the Microsoft litigation, Bill Gates harmed the interests of his company by appearing petulant, arrogant and non-responsive. There is nothing worse than an angry, anxious, surly or uncaring employee who places profits above life safety, is oblivious to the human consequences of their actions, or tries to “pass the buck” of responsibility.

The following are some of the common, standard cautions for deposition witnesses:

Witnesses should tell the truth. This means refraining from relating deliberate

falsehoods, as well as being affirmatively accurate. Witnesses should not guess or speculate, but testify only from personal knowledge. “I don’t know” and “I don’t remember” are acceptable answers. Proper preparation is necessary so that the witness does not appear to be ignorant about matters that he or she should know about. A witness should always read a document that is the subject of questioning. Witnesses should avoid exaggerating and using superlatives such as “never” or “always.”

“The witnesses should put their best foot forward at the deposition.”

A witness should carefully listen to the question, and then answer that question, but only that question.

Many questions can be truthfully answered “Yes” or “No.” As a witness, if you do not understand the question, you should not be afraid to ask the questioner to repeat

or rephrase the question so that you do understand it. You should also listen to objections by your counsel. Such objections will often indicate a problem with the opposing lawyer's question. Do not volunteer extraneous information that is not called for in the question. After you have properly answered the question, stay calm and consciously refrain from the need to keep talking.

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A witness should be careful when the opposing lawyer seeks to put words in his mouth or paraphrase his or her answer.

Lawyers will sometimes make argumentative statements or characterizations and try to get the witness to agree. Care must be taken not to have the opposing counsel testify while the witness simply agrees. Many lawyers will also try to change the meaning of the witness' answer, so the best way to handle an incorrect paraphrase is to simply restate your original answer.

A witness should take breaks once an hour during long depositions to remain fresh and confer with counsel. Such consultation is entirely proper. If you become tired, you should ask to come back. A witness who is fatigued is more prone to make mistakes.

Finally, witnesses must be careful of hypothetical questions that call for opinions or assume facts. These questions are designed to have the witness agree with the opposing lawyer's theory of the case. Off-the-cuff opinions may be appropriate in casual conversation, but a deposition is not the time to give opinions that have not been well thought out. A witness should only testify to opinions about matters that he or she has dealt with in the past, and not guess or speculate about how a future situation would be handled. A good response may be to state that you have no opinion, and would have to think about the situation before giving one. Also be careful about giving any estimates of time, speed, distance or duration, because estimates are very difficult and often inaccurate.

In articles to come, we will discuss how to effectively manage litigation, settlement strategies, mediations, arbitrations and trials.

This article is intended to address issues of general interest, is not intended to be construed as legal advice, and does not take the place of consultation with qualified legal counsel.