

Being a Good Wingman: How HR Professionals Can Assist Lawyers

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Did You Know?

- Sometimes a case is won or lost well before any trial of the matter.
- What happens **before trial** is **IMPORTANT!**
- Consider:
 - From 2008-09, there were 64,296 cases filed in TN Circuit Courts
 - Of these, there were only 345 jury trials and only 9,187 non-jury trials.
 - Overall, only **0.05%** of cases that are filed nationwide actually make it to trial!



Pre-Litigation Tips



Achieve Your Compliance Goals

- **Educate** yourself on current laws.
- Create an **HR policy manual** and regularly update it.
- Train your **managers**
 - Review policy manual
 - Make sure they understand the expected standards
- Train your **employees**
 - make sure they know the policy manual
 - Provide periodic retraining on important issues, such as sexual harassment.



Document, Document, Document!

- Memories fade over time, and a lack of documentation can leave you vulnerable to HR noncompliance claims.
- Document all key decisions and employee evaluations, establish written policies, keep a written record of important communications, and maintain all personnel files.
- Documentation is critical!



Don't Wait! Think About It Now

- The wrong time to decide whether an issue is worth fighting about is when you face litigation.
- The **pressure** and **emotion** inherent in litigation can cloud ordinarily clear judgment.
- The result is that litigation decisions control the organization, rather than the organization controlling the litigation decisions.



Decide Now What You'll Fight for Later

Proactively identify and prioritize legal problems into three categories:

- Those you are willing to **litigate at all costs**
- Those you are willing to settle **only upon favorable terms**
- Those you will manage on a **case-by-case basis**



Know When to Call an Attorney

- Not every decision you make as a Human Resource Professional requires consultation with an attorney, but there are plenty of decision that have hidden legal dangers.
 - Distinguishing between the two can be difficult.
 - Rely on experience, or if possible, talk to an attorney about a monthly, low-cost retainer that provides you with unlimited telephone or e-mail consultations.
- In the end, it is better to spend a relatively small amount on legal fees to prevent what could turn into an expensive litigation process.



Preventing a Claim Against an HR Professional

- Conduct termination meetings in a **closed door** environment
- If a witness is to be present at the termination meeting, select a witness with **legitimate business reasons** for being present.
- Be able to articulate **concrete facts** that support the allegations made against the employee.
- Be able to explain the **reasonable steps** the employer took to investigate the allegations against the employee
- Be able to prove the employer **did not** conduct a one-sided investigation.

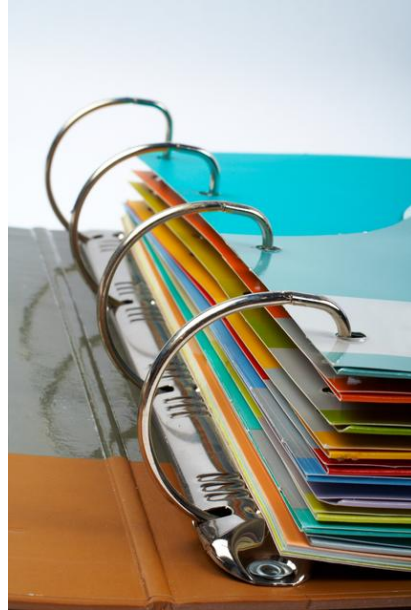


Launching an Investigation



Review Your Policies

- EEO/Harassment
- Workplace Searches
- Discipline/Discharge
- Code of Conduct/Ethics
- Privacy
- Violence
- Technology



Develop an Investigation Plan

- Who will conduct the investigation?
- Who will be interviewed?
- What documents or other evidence must be reviewed?
- What policies are relevant?
- What follow-up will be done after the investigation?



What the EEOC Says About Investigations

- The employer should set up a process for a **"prompt, thorough and impartial"** investigation.
- Where an investigation is necessary, **"it should be launched immediately."**
- The employer should be prepared to **"undertake intermediate measures* before completing the investigation"** to ensure that further problems do not occur."
- The employer should "ensure that the individual who conducts the investigation will **objectively gather and consider the relevant facts**...and should be **well-trained** in the skills that are required for interviewing witnesses and evaluating credibility."



What to Do With the File?

- You've interviewed your witness, reviewed your evidence, drafted a memo to the employees in question, and now you have a **large file** containing witness statements, piles of paper, and various notes and reports. Here's what to do:
 - Take the notes, which are not complete, and **summarize them** into a logical format. BUT keep the notes just to be safe.
 - Make sure you have **everything you need** in the file to document your actions and upon which you based your interviews and questions.
 - Put the file in a **separate locked cabinet** away from the employee file.



Role of HR Professional During Discovery

- HR professionals may not appreciate how important they are the defense team during **discovery**.
- **Discovery** is the point in the lawsuit where each party's legal team sends requests for documents and written responses to questions, and takes **depositions** from the parties involved.
- HR professionals are fundamental in fact gathering:
 - Know location of important documents
 - Can identify important witnesses
- Overall, HR Professionals can **save the company money!**



A lawsuit has been filed, and you (the HR Professional) have been called to give a **deposition**. What should you expect, and what should you do/not do?



DON'T GO BANANAS!

Good Retention Policies

- First, make sure you protect all documents related to the employee in question.
- Keep any **emails, personnel folders, or any other documents** pertaining to the employee in a safe area.
- Any destruction of information related to the employee could lead to legal complications, like **spoliation** of evidence.



Spoliation of Evidence?

- **Spoliation of evidence** is the intentional or negligent withholding, hiding, alteration or destruction of evidence relevant to a legal proceeding.
- Spoliation has two consequences:
 - the act is **criminal** by statute and may result in fines and incarceration for the parties who engaged in the spoliation
 - evidence which might have been altered by the spoliation may be interpreted under a **spoliation inference**, which means the jury can view it in favor of the opposing party.



How Devastating Can Spoliation of Evidence Be?

- Consider:
 - In 2005, Morgan Stanley continued its policy of overwriting e-mail every 12 months, despite the SEC requirement to retain e-mails for 2 years.
 - In a case against Ronald Perelman, Morgan Stanley was unable to produce pertinent information, which led to the court to give Perelman an "adverse inference."
 - This led to a **\$1.45 BILLION** award!!!



What is a Deposition?

- A **deposition** is a legal proceeding at which the lawyer for the plaintiff will ask you questions.
- Your answers to all questions will be **under oath**.
- While the proceeding will be relatively informal, there is little difference between the effect of testimony at a deposition and testimony in the courtroom.



The Purpose of a Deposition

- The plaintiff's lawyer is asking you questions for the following reasons:
 - He/she wants to **find out what you know** regarding the issues in the lawsuit
 - He/she is looking for **evidence** favorable to his/her side's case
 - He/she wants to **commit you** to statements under oath so you will have to tell the same story at trial
 - He/she may be looking for ways to **discredit** your testimony or to discredit the testimony of other defense witnesses through you.



Practical Suggestions for Being an Excellent Witness



Prepare for the Deposition

- Concentrate and reflect on the facts in the case
- However, do not review any documents or discuss the facts of the case with anyone, unless you have checked with your attorney first.
 - Avoids confusion and “fixing your stories”
- If you want to make notes, check with your attorney first.
 - The plaintiff’s lawyer has a right to look at any notes or other materials you review in preparation for the deposition.



Give Full Disclosure



- Tell your attorney **everything** before the deposition.
- If your attorney does not know every fact about the case, he or she will be unable to effectively represent your rights during the deposition.
- When in doubt, disclose it!

ALWAYS Tell the Truth, and Do Not Exaggerate

- You are under oath. If you lie, you will be committing perjury.
- Even with regard to a small issue in the case, a false statement will be very damaging to your credibility.
- Do not try to improve upon the facts by **stretching** them. Such efforts are easily exploited by the other side.

True



False



Correct Your Answer

- If you discover during a deposition that one of your answers was inaccurate or incorrect, you may correct your prior answer.
- You should say, for example, "I previously gave that answer, but I was confused. The correct answer is..."



Do Not Volunteer Information; Answer Only the Question Asked

- Volunteered information cannot help the employer's case, and may actually *hinder* it.
- Do not give long-winded or rambling answers. **Short, concise** and **responsive** answers are best.
- If the plaintiff's attorney asks the "wrong" question, **do not** help him or her by suggesting the "right" question or "right" answer.



Take Your Time in Answering a Question

- Never answer before the plaintiff's lawyer has finished asking his or her question.
- Once the question has been asked, consider the question carefully and **think through** your answer.
- Take as much time as you need to phrase your answer.
- The deposition transcript does not show the length of time you use to answer. Also, the pause gives your attorney a chance to object, if needed.



Keep Your Emotions In Check

- In some respects, a deposition is a game of wits.
- The opposing lawyer may try to get you **ANGRY** or **excited** in the hope that you will lose your cool and say something that can be used against the employer.
- Be aware of this tactic, and try to stay calm and collected.
- Also, NEVER argue with the plaintiff's lawyer.



Never Joke in a Deposition

- The humor in a deposition would likely not be apparent on the cold transcript
- Making jokes may make you look crude or scornful about the truth.



Conclusion – HR Professionals are Vital!

- **Early coordination** of efforts is key
 - Ask questions early and often!
- **Don't assume** your own expertise
 - When in doubt about a topic, ask a lawyer!
- **Don't add or subtract** information
 - Refrain from filtering information for outside counsel
- **Have a familiarity** with the law
 - Keep up to date on important changes



Questions?

