

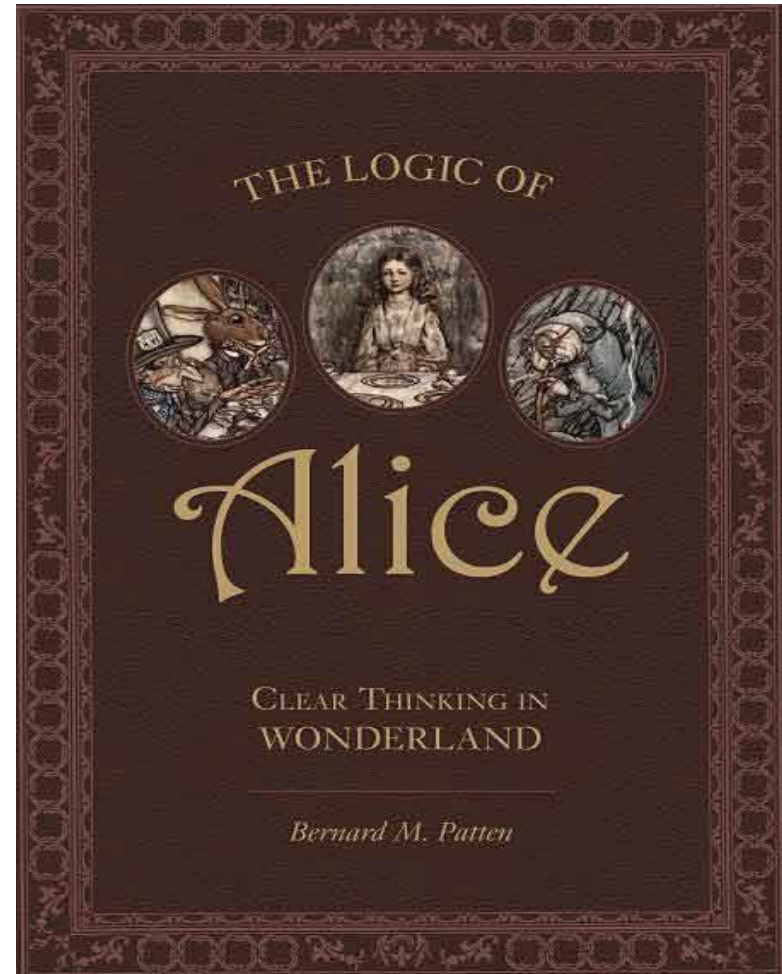
# **Alice Through the Looking Glass: An HR Professional's Guide Through the Litigation Process**

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# Introduction

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- Overview of each phase of the litigation process
- Role during each phase
- Tips to help you navigate your way through each stage of the litigation process



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**PREPARE A CASE TO TRY IT,  
AND YOU WILL LIKELY SETTLE IT;**

**PREPARE A CASE TO SETTLE IT,  
AND YOU WILL LIKELY BE  
FORCED TO TRY IT.**

# Lawsuits Have Five Primary Phases

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1. Initial Pleadings/Scheduling
2. “Written” Discovery
3. Deposition Discovery
4. Summary Judgment
5. Trial



# Phase One: Initial Pleadings/Scheduling

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- Complaint/Answer
- Motion to Dismiss?
  - Appropriate only if all or a part of the case should still be dismissed even if everything stated in the Complaint is true (these opportunities are rare in most employment cases)
- Scheduling Conference



# Your Role During Phase One

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- Compiling documents and data to assist your legal team
- Identifying potential witnesses
  - Both favorable and not so favorable
- Managing internal messaging/communications
- Issuing a “litigation hold”

# Litigation Holds

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- What?
- When?
- To Whom?
- How to communicate?

## Internal Memorandum and Notice

**To:** [            ]

**From:** [            ]

**Date:** June 16, 2016

**Re:** Litigation Hold Memorandum and Notice

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**\*\*\*DO NOT DESTROY SPECIFIED DOCUMENTS AND DATA\*\*\***

# Why is Litigation Hold Notice Important?

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- Monetary sanctions
  - After determining the degree of culpable conduct (i.e. bad faith), the relevance of evidence that has been lost, and the prejudice to the innocent part
- Jury Instruction on Spoliation/Destruction of Evidence
  - Allowed to assume that the evidence would have been unfavorable to the other party
- Discovery requests seek information related to litigation holds



# Phase Two: Written Discovery

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- Initial Disclosures (required in federal court)
- Interrogatories
- Requests for Production of Documents
- Requests for Admissions



# Your Role During Phase Two

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- Compiling documents and data requested by the Plaintiff
- Assisting counsel's preparation of responses to Plaintiff's interrogatories and document requests
  - May require a lot of time and effort
  - May include coordination with IT



# Phase Three: Deposition Discovery

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- Your counsel will depose the Plaintiff and any of his/her witnesses
- Plaintiff's counsel will depose your managers and employees
  - Including YOU

# What is a Deposition?

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1. Taking of oral testimony (before trial)
2. Under Oath
3. Record created (written; video)



# Transcript vs. Video

## SAMPLE TRANSCRIPT OF DEPOSITION TESTIMONY

**OPPOSING COUNSEL:** Remember earlier today when I asked you...

**WITNESS:** No.

**OPPOSING COUNSEL:** Why don't you listen to what I have to say first, and then maybe you'll tell me yes or no.

**WITNESS:** I don't have to listen to anything you have to say.

**WITNESS ATTORNEY:** Verify question.

**OPPOSING COUNSEL:** Do you have a question about my question?

**WITNESS:** Today...

**WITNESS ATTORNEY:** Do I not have the right to be clear for you to be able to be clear...

**WITNESS ATTORNEY 2:** Mr. Weir...

**OPPOSING COUNSEL:** Do you remember being in Australia ever?

**WITNESS:** I don't know if I've been to Australia. Have I been to Australia?

**OPPOSING COUNSEL:** Are you aware that Scooter Braun knows that your bodyguards have attacked photographers?

**WITNESS ATTORNEY:** Objection to form.

**WITNESS:** What kind of question is that? That didn't make sense.

**WITNESS ATTORNEY 2:** That's correct.

**WITNESS:** What kind of question is that? That doesn't make sense. That doesn't make sense. That's a weird question. That doesn't make sense.

**WITNESS ATTORNEY:** Can you just ask some foundation?

**OPPOSING COUNSEL:** I, I didn't hear your response. I again, sir...

**WITNESS:** You know, you know I didn't finish. I didn't finish my. I didn't finish...

**OPPOSING COUNSEL:** Oh, I'm sorry...

**WITNESS:** Oh, oh really? You didn't want to interrupt?

**OPPOSING COUNSEL:** Isn't it true that you know that your security guards will punch, grab, and push paps [paparazzi] if they need to?

**WITNESS:** I object.

**OPPOSING COUNSEL:** Would you please look at the film that's up there? Go ahead and start.

**WITNESS:** This is a film? This is a film?

**OPPOSING COUNSEL:** Pause it. Would you please watch the television?

**WITNESS:** You said it's a film. You said watch the film. Is this a film?

**OPPOSING COUNSEL:** Is this a, is there a difference between...

**WITNESS:** Is this a film?

**OPPOSING COUNSEL:** ... between a film and something else?

**WITNESS:** Yes.

**WITNESS ATTORNEY 2:** So, yes or no answer required, right?

**WITNESS:** I think my lawyer's asking you a question.

**OPPOSING COUNSEL:** [Inaudible]

**WITNESS:** I think my lawyer's asking you a question.

**OPPOSING COUNSEL:** I'm not here to answer his questions, you're here to answer mine. Have you ever disciplined Mr. Hesny?

**WITNESS:** Disciplined? What kind of question is that? Is he my son?

**OPPOSING COUNSEL:** Can you answer my question?

**WITNESS:** Guess what. Guess what? I don't recall.

# How is a Deposition Used?

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- The basis for virtually all dispositive motions
- The foundation for direct and cross-examination at trial
- Used to assess strength of case



# Example of Deposition Used to Assess the Strength of Case

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Q. Was Anne a good employee?

A. Anne was a good lady. She did a lot while she was here.

Q. Yes, but was she a good employee?

A. I know she was.

Q. You know she was? What is your basis for that statement?

A. She worked really hard while she was here.

Q. Do you regret the situation that's occurred with Anne?

A. Do I regret Anne not being here? Yes. I do.

# Your Role During Phase Three

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- Assist your counsel's efforts to prepare your witnesses for their depositions
- Attend depositions as the corporate representative
- In an employment lawsuit, you likely will be one of your company's most important witnesses, so:
  - Prepare, review and prepare some more
  - Know your files



# What is the Difference Between Testifying as a Fact Witness and a 30(b)(6) Representative?

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- **Fact Witness:** Your testimony is typically limited to your personal knowledge on a Human Resource matter.
- **30(b)(6) Representative:** You have been designated by your employer as a person with knowledge on certain HR-related topics. Your testimony will likely include information you are “taught” or “told.” Your testimony binds the Company and will be used by the Plaintiff to establish the “Company’s position.”

# Example of Less Effective 30(b)(6) Witness Deposition

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**Q.** Mr. Anderson, it is my understanding that you are the person designated as the company's 30(b)(6) witness, is that right?

**A.** I have been.

**Q.** Does your company provide harassment and discrimination training to its employees?

**A.** We have an employee handbook.

**Q.** I didn't ask you if you had an employee handbook, Mr. Anderson, do you need me to repeat the question?

**A.** Yes, please do.

**Q.** Does your company provide harassment and discrimination training to its employees?

**A.** I believe so.

## Example of Less Effective 30(b)(6) Witness Deposition

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Q. How often?

A. I believe its annually.

Q. Did John attend the harassment and discrimination training each year he was employed by your Company?

A. I believe he did.

Q. Well. Do you know that he did or not?

A. I do not know that for a fact, but I feel confident that he did.

Q. Ok, well what steps does the Company take to ensure that all employees attend harassment and discrimination training each year?

A. Um, I don't really recall all of the steps that the Company takes to ensure that employees are present at training. I know we have a sign up sheet.

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**DON'T LET YOUR ANSWER BE ...**  
**“UM, I DON'T REALLY RECALL.”**

# How to Prepare For Your Deposition

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1. Know important details
  - Dates, especially if the timeline is important
  - Witnesses
  - Relevant HR policies or procedures
2. Review any notes you made during your internal investigation to refresh your recollection
3. The Deposition Rule: If you look at it, opposing counsel may be able to ask you about it and/or see it
4. Meeting with the Company's attorney
  - Discuss facts and causes of action
  - Lines of questions opposing counsel is sure to ask

# Deposition Tips: Generalities/Rules

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- Tell the truth
- Don't answer if you don't understand
- Answer only the question asked, not what should have been asked
- Look at documents when asked about them
- Short simple answers (if possible) are generally better answers
- NEVER guess
- Be wary of rephrasing
- Don't let the attorney tell you what your company's policy says

# Phase Four: Summary Judgment

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- Brief filed with the Court asking that all or some of the case be dismissed because based on the evidence no reasonable jury could rule in the Plaintiff's favor
- Summary judgment is appropriate where a party establishes that there is no genuine issue as to any material fact and judgment may be rendered as a matter of law

# Your Role During Phase Four

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- Most of the work in this phase will be done by your legal team, but some assistance from you or others at the Company may be required (for example, supplemental affidavit)
- Affidavits (“Sworn Statements”)
  - Not limited to Summary Judgment Phase
  - Inaccuracies can be devastating
- Review Summary Judgment Brief



# Phase Five: Trial

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1. Jury Selection
2. Opening Statements
3. Plaintiff Proof
4. Directed Verdict Motions
5. Defense Proof
6. Closing Statements
7. Jury Instructions
8. Jury Deliberations



# Your Role During Phase Five

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- This is when people you've never met decide what really happened, whether they like your company and whether they think you are telling the truth
- And you thought preparing for depositions was hard ...
- The amount of time and energy that goes into preparing for trial can seem overwhelming
- Your role is everything discussed above times ten

# Settlement

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- Deciding when to discuss settlement will vary from case to case, but settlement talks frequently occur before discovery starts, after depositions, after summary judgment or before trial
- Settlement talks usually start when the strengths and weaknesses of the case are revealed or when one side's tolerance for expense or risk exceeds their desire for justice
- Another factor is that some courts order the parties to mediate

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# Questions?

