
PROUT LEVANGIE

2021 N Street
Sacramento, California 95811
Telephone: (916) 443-4849 Fax: (916) 443-4855
www.proutlaw.com

Nevada Office
612 South Tenth Street
Las Vegas, NV 89101
t. (702) 562-4044
f. (702) 554-3272

Michael J. LeVangie
Michael.levangie@proutlaw.com

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WHITE PAPER ALERT

Discovery -
Employee Depositions and
Potential Conflict of Interest

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Yanez v. Plummer Cal. Ct. App. - Nov. 5, 2013

It happens every day in every law firm...an employee of the defendant is scheduled for deposition...does defense counsel have a conflict representing the witness? No...of course not...Are you certain?

This case is an overt example of an ongoing issue that easily rectified with a well-planned pre-deposition meeting with the witness and his/her employer and the execution of a pre-deposition waiver of potential conflict agreement.

A railroad employee is injured on the job and another employee witnesses the accident. The witness' boss asks him to sign two written statements summarizing events. The two statements are slightly contradictory. It is unclear from the written statements whether the witness actually saw the other employee fall in an oil and grease soaked pit or just noticed the employee fell.

The injured employee sues. The employee witness is scheduled for deposition. At the deposition, as one would expect, the railroad's lawyer represents the current employee witness. Prior to the deposition the witness tells the lawyer he is concerned his testimony might be bad for the railroad. This should be a warning flag to the attorney but the attorney takes no action other than telling the witness everything will be fine as long as he tells the truth.

The witness testifies consistent with his somewhat confusing written statements. At which point the railroad's lawyer, ostensibly also representing the witness then questions the witness on the record. The railroad's attorney introduces one of the two written statements, but not the other, and questions him in way that appears to paint the employee's testimony as contradictory to his written statement.

Not good...but it gets worse.

The employee's boss is at the deposition. Why? Perhaps to assure the "correct" version of events for the railroad? That'd never happen...So what happens next?

The employee does not testify favorably for the railroad, just as he tried to warn the attorney. Then his boss reviews the deposition transcript and...fires the witness for testifying falsely against the company. The employee's termination is based almost entirely on the alleged contradiction between the deposition testimony and his written statements.

Certainly does not pass the smell test...So - the employee sues the lawyer alleging the attorney set him up at the deposition and deliberately made him look bad, leading to him getting fired.

The trial court granted summary judgment to the attorney but here, the Court of Appeal reverses.

The attorney had a conflict. He represented the employer, but he also represented the witness. Especially in a case like this, where the witness voices a concern over the impact of their testimony on the corporate defendant, there is at least a potential conflict. There was no conflict waiver discussed with the employee or the railroad, let alone signed. That can create liability.

Make sure you do not generate similar problems. Evaluate each employee witness and discuss and execute a conflict waiver if necessary. When there is a real possibility of negative testimony by a current employee consider retaining independent counsel for the witness, it is often money well spent.

Call us with any questions.

Michael J. LeVangie

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t. 916.443.4849

f. 916.443.4855

e. michael.levangie@proutlaw.com

Las Vegas • Sacramento • Truckee

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