Preparing the Employment Discrimination Case for Trial

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I. VOIR DIRE

1. Generally

There are a number of ways to permit voir dire and counsel should inquire in advance what the court's particular practice is. Some courts allow the attorneys to conduct all of the questioning after the judge makes his initial remarks. The court then simply rules on objections when they arise.

Alternatively, a court may conduct all of the jury questioning. The district court usually requires that counsel submit proposed voir dire questions in advance in the Final Pre-Trial Order, and the court will rule on what questions it will ask.

Another approach is that the court will conduct the initial voir dire, and allow counsel to supplement it with non-redundant questioning. The court may ask about the jurors' backgrounds and about any preconceptions that they may have. Generally, the court will not permit counsel to question jurors which would indoctrinate them as to the law or the theory of your case.

2. Voir Dire Strategies

Even before being sent out to trial, counsel should determine the ideal jury for his or her case. Depending upon the discrimination claim, counsel should consider the following characteristics: age, gender, profession, ethnicity, family status, and socioeconomic background.

Further, once at trial and as a preliminary matter, counsel should be watching the jurors as they take their respective seats. Body language may provide compelling information which may not be revealed in the questionnaires.

It is also important to track the number of preemptory challenges which you and your opposing counsel use. Record each number in a separate diagram. In exercising preemptory challenges, the court may require that it be done outside the presence of the jury. If not, counsel should state simply, "With thanks, the Plaintiff would excuse Mrs. Jones." The request to excuse a juror should always be made to the court and not to the juror. The court may require that these challenges be made outside the presence of the jury.

Voir dire can often be a tedious task. During questioning, vary the questioning between the jurors. You may be able to ask the entire panel, such as "Have any of you made an employment claim before?" Try to get them to open up, like at a deposition. Odds are, you will get much more information.

Try to use the juror's name as often as possible. It is important that you establish a rapport with the jurors. When referring to your client, always refer to them by name as opposed to Plaintiff or Defendant. If you represent a corporation, try to refer to them as "we" or "us." You should always have a corporate representative present at counsel table.

In an employment discrimination case, the advocate will wish to explore the jurors' employment history, litigation experience, views about management, and thoughts on awarding compensatory and punitive damages.

Among certain strategies which counsel may be able to engage in are revealing some of the stronger points of the case. Are there key liability issues which counsel can alert the venire to? In a sexual harassment case, Defendant may not contest that the work environment was sexually hostile, but rather may take the position that the harasser's conduct was welcome.

Similarly, counsel may wish to "front" certain weaknesses in her case. Perhaps your client has a felony conviction, which you know will be admitted into evidence. How will the jurors react to this evidence? It is best to find out during voir dire. Further, if your client suffers from any handicaps or has speech difficulties, make the jury aware of this. Ask the juror, "Mr. Jones, my client stutters. You will not hold that against him in this case, will you?"

Explain key terms such as medical language. Repeat these terms or legal concepts such as preponderance of the evidence so that the jury is conditioned to the concepts. One example is the burden of proof. Counsel may ask a potential juror, especially if the juror has served on a criminal case, if he understands that there is a difference between the burden of proof in a criminal case which requires proof beyond a reasonable doubt, and a civil case, which only requires a preponderance of the evidence. It may also be possible to explain the concept of negligence to the venire.

Needless to say, picking a jury is not an exact science. Confer with your client as to who to keep and who you should exercise a preemptory challenge on. Your client may have picked up on something which you have missed, and in the event of an adverse verdict, they will feel like they were part of the process, and will less likely criticize you for any judgment calls.

If representing the Plaintiff, counsel should plan on addressing damages during voir dire. Depending if the court will allow the jury to consider backpay or front pay, you should tailor your questions accordingly. A common type of question is "Mr. Smith, you do not have any quarrel with the law which permits you to sue for legitimate compensation, known as damages, due to discrimination, if proven, by the employer?"

3. Jury Panels

Juries are often questioned in a group of 12, or more commonly, in panels of 4. For more general questions, the court may question the entire venire at once. Where questioning takes place with panels of 4, that panel will be questioned and selected before moving on to another panel. When the jurors are seated and two alternates are selected, the remaining jurors are excused.

It is often helpful to use diagrams to sketch out jury information. Some lawyers use Post-It Notes to record jury information, and remove the note from the panel if the juror is not selected. A sample diagram can be found below:

First Panel		Second Panel		Third Panel	

If the court uses selecting jurors using the panel method, Plaintiff's counsel will first be required to question all jurors on the panel, and exercise any challenges. Once Plaintiff's counsel is satisfied with the panel, he or she will accept it and tender it to defense counsel. Defense counsel will then question the panel. If new jurors are added to the panel, Plaintiff's counsel may question the new jurors on the panel. Counsel

should be aware that most courts do not permit backstriking, excusing jurors whom they previously accepted.

4. Jury Instructions

For any civil case tried to a jury, counsel will need to submit jury instructions to the court for consideration. The parties will have to incorporate their proposed jury instructions in the Final Pre-Trial Order. Counsel should check the Seventh Circuit Court website, http://www.ca7.uscourts.gov/7thcivinstruc2005.pdf, and the district court's website for instructions for their particular case. For pendent state law claims, such as common law retaliatory discharge, counsel should consult the Illinois Pattern Jury Instructions, or Illinois cases. Counsel should know which instructions she intends to use even before making her opening statement. Prepare two sets of instructions, one marked and the other unmarked. On the marked set, there should be a legend on the bottom as follows:

Given _____

Given over objection _____

Refused _____

Withdrawn _____

The marked set should also have the source or IPI instruction number. The clean set should not have the above legend or citations to any reference to an instruction number.

Counsel will attend a jury instruction with the court, an initial one perhaps at the Final Pre-Trial Conference, and another one, likely at the close of the trial. Your objections to your opponent's instructions may or may not be part of the Final Pre-Trial

Order. Be sure to have your arguments and legal authorities at hand at the Final Pre-Trial Conference to so that if a key instruction is refused, the actual instruction and your argument for its inclusion is made a part of the record.

Use key instructions when making your closing argument. I generally find it advisable to select two or three key instructions, and either paraphrase them, or read them verbatim to the jury. Counsel, may wish to start this part of their closing as follows: "As I believe Judge Jones will instruct you, you should take into consideration your ordinary experiences in the affairs of life when considering this case…"

II. LITIGATION TECHIQUES AND STRATEGIES

A. Deliver A Compelling Opening Statement

It is often said that 80% of cases are won on opening statements. This is your opportunity to present the jury with your theory of the case, key themes, and the key evidence that you anticipate will be presented. While opening statements can vary in terms of content and order, generally, the following elements should be included:

- Introduction
- The Parties
- A timeline of the events
- Key events, for example, incidents of sexual harassment
- Creating the Issue
- Basis of liability/nonliability
- Anticipating or refuting defenses
- Damages
- Conclusion

In presenting your introduction, you should first re-introduce yourself. Then, in one or two sentences, present your case. You may be able to do this with a rhetorical question, such as, "Ladies and gentlemen of the jury, why are we here today? We are here because the employer intentionally terminated my client on the basis of age." Some attorneys feel compelled to tell the jury of the purpose of an opening statement, and say things like, "The opening statement is like a bird's eye view of the case, and is not evidence…" This is a waste of time. Get right into the facts and what happened. The court will tell the jury what to consider.

Remind the jurors of who the parties are. If you represent an individual, tell the jury about the person's background, and how the alleged adverse action affected the Plaintiff's activities at work, home and play. If a corporation, tell the jury a little about the corporate history, what the company does, and attempt to relate it to the jury. For example, "Ladies and gentlemen, I represent the Acme Corporation, and Acme makes specialty food packaging such for products like a salad which you might buy at a restaurant…"

Next, provide the jury a timeline and who the key players are. It is often helpful to use a blow-up for the timeline and an organizational chart for personnel. Tell the jury how the Plaintiff fit into the corporate hierarchy.

Next, create the issue for the jury. Use a rhetorical question. "What is the issue that you will have to decide in this case? You will have to decide whether the defendant terminated Mr. Smith because of his national origin, or if he lost his job because he failed to meet his sales quota." If you represent the employer, you may want to provide the

following transition. "The Plaintiff has told you how my client was demoted because of her gender, however, that is not what the evidence will show…"

Finally, provide the jury with your version of how it happened. While a timeline may be helpful, Plaintiff's counsel may have to describe a series of incidents such as in a sexual harassment case: "The Plaintiff was subjected to a series of unwanted sexual advances. First, the harasser tried to kiss her, then…"

After you have told the jury the story of how the incident occurred, you must address liability. Use another rhetorical question here. If a Plaintiff, "Why should you award my client money damages? How did the Defendant discriminate against my client? Let me tell you…"

Plaintiff's counsel should next address the jury as to what the defendant's defenses will be, and how to appropriately refute them. Plaintiff's counsel may start by saying, "We expect that the defendant will argue that the Plaintiff welcomed the harasser's conduct…" Keep in mind that defense counsel may object on the basis that this part of the opening is argumentative in nature. If such an objection is sustained, keep using the mantra, "We expect the evidence to prove that…"

Prior to the conclusion, both Plaintiff and Defendant will wish to discuss damages. For the Plaintiff, and depending upon the court's ruling on backpay and front pay damages, you should discuss the Plaintiff's lost wages, emotional distress symptoms, treatment, prognosis/permanency, medical bills, past and future. Again, during opening, you may wish to use a flip chart illustrating Plaintiff's damages. If Defendant, you will likely deny that your client discriminated against the Plaintiff, or that Plaintiff has not sufficiently mitigated his damages.

Last, in conclusion, thank the jury in advance for listening to the evidence that will be presented, and state that the evidence that will be presented will support your version of the case. Tell the jury that at the conclusion of the case that you will return to them and ask them to return a verdict in your client's favor.

B. Presentation of the Evidence

1. Introduction

Now that you have your witnesses lined up, how do you effectively present your case to the jury? Should you call every witness, and what order should you present your evidence? This section will address some of these concerns. Prior to trial, counsel should thoroughly prepare his direct and cross examinations. I recommend using Mauet, Trial Techniques for template examinations.

2. Basic Considerations

While counsel may realize that she must call certain witnesses to prove her *prima facie* case, occasionally she may a choice to call more than one witness to prove the same point. Avoid overkill. Counsel would be wise to pick her strongest witness to testify and provide some corroboration. Oftentimes, attorneys call too many witnesses and simply bore the jury. Weak witnesses may subject to intense cross examination. Only call witnesses to prove a point. Do not wait to call a strong witness in your rebuttal case. First, it is imperative to win the jury as soon as possible. Second, depending upon your opponent's trial strategy, you may be precluded from calling the witness at a later time.

3. Themes

It is crucial for the advocate to develop a theme or themes to his or her case. Keep it simple. Plan on developing no more than three concrete themes throughout your

case. With more than that, the jury will either not remember the points you will be trying to make, or will be confused. Keep the language consistent. If a witness refers to a technical term, repeat it during examinations of other witnesses and during closing argument. Some themes which Plaintiffs may wish to use during a discrimination or harassment case include the following:

Accountability:

- The buck stops here

Breach of Contract:

- Let's put honor back in the handshake

Defamation/Discrimination

- When you throw a rock into a pond, ripples go out.

4. Adverse Witnesses

Either side may call the opposing party as an adverse witness. Plaintiff may wish to call the decisionmaker as an adverse witness in her case-in-chief. This is often Plaintiff's first or second witness. Calling the decisionmaker as an adverse witness to elicit admissions is surely one way to grab the jury's attention. In turn, the adverse witness may then testify in his or its respective case to rebut any testimony elicited as an adverse witness.

5. Demonstrative Evidence

At trial, Plaintiff should use demonstrative evidence during opening statements. A party is allowed to show the jury exhibits which will later be admitted into evidence. For key charts, have the witness lay a proper foundation. For example, if the document is a spreadsheet of Plaintiff's backpay and front pay, ask the expert economist: 1) if he

prepared an analysis of Plaintiff's damages, 2) if he prepared a summary of that analysis, and 3) whether the exhibit would help explain his testimony to the jury. Once admitted, Plaintiff's counsel should use the exhibits during closing argument as well. The key demonstrative exhibits are typically are an organizational chart of Defendant's employees, a timeline depicting the sequence of Plaintiff's employment history and the adverse actions which he sustained on the job, and key provisions of Defendant's employee handbook. Once the evidence is admitted, ask permission to publish it to the jury and then circulate the document among the jurors.

a. Plaintiff's Checklist of Demonstrative Evidence

While Plaintiff's counsel can spend thousands of dollars on demonstrative evidence, it is not necessary to do so. Selection of several low-tech (or no-tech) exhibits in addition to a few professionally made blow-ups of documents will usually suffice. Following is a checklist of the available demonstrative tools available for the Plaintiff:

- Counsel's own notes. If the decisionmaker has made a key admission during his testimony, write it in large letters on your legal pad, put a star next to the statement, and tape it to a flip chart on an easel. This way, in closing, when you argue that, "Remember when the Vice-President of Human Resources admitted that he failed to conduct a thorough investigation? I do, and it is right here in my notes." This way, you can bring the jury back to that specific point in time.

- Timelines. These are extremely effective documents to show the Plaintiff's employment history and adverse actions which he was subjected to. You can use icons such as an envelope for a letter, or a telephone to signify an important telephone call. There are programs available such as Timemap that will aid Plaintiff's counsel in preparing the sequence of events, but you will likely need a high quality graphics company to prepare the blow-up.

- Physical demonstrations. In a sexual harassment case, the Plaintiff's testimony can be highly compelling if she demonstrates what the harasser did to her. Be sure to identify on the record the actions that the Plaintiff takes so the record on appeal is complete, *e.g.*, "Let the record reflect that the Plaintiff has placed her right hand on her hip, and moved it in an up and down motion…"

- Flip charts. One of the least expensive no-tech exhibits is the flip chart on an easel. Things which Plaintiff's counsel can illustrate on the chart on the fly are key aspects of the Plaintiff's testimony, inconsistent points in the defense case, key personnel policies, Plaintiff's damages, Defendant admissions, and themes – *e.g.*, corporate accountability. This can be organized in a number of different formats: numerical, checklist, etc. For admissions of the Defendant, consider listing each of the defense witnesses, and next to the blurb of damaging testimony, used the word "ADMITTED," in bold face.

- Organizational charts. Very often in employment cases, there are numerous people who are identified in opening statements. The document can be used to help Plaintiff's counsel organize his opening statement. If more than a few people are mentioned, the jury will be lost without a visual aid. Having a chart depicting the individual, their position, and where they stand in the chain of command is instrumental if there are many people involved. The chart can be modified to have a blurb under the appropriate name – "supervisor who told the Plaintiff that we don't need old people around here." Plaintiff can use another cost saving measure if there are few key dates by combining the timeline and the hierarchy chart on one blow-up. Plaintiff's counsel should make frequent reference to the chart especially during examination of the Plaintiff and cross-examination of the Defendant's employees so the jury will understand the interrelationship of the parties.

- Charts of impeaching testimony. If there are several instances of substantive impeachment, Plaintiff would be wise to consider a chart illustrating the witness' trial testimony, and their earlier inconsistent testimony. The graphics company can also source the basis of the impeachment with a bubble – e.g., "Smith's deposition, page 17," or "Position Statement of ACME Corp. to EEOC."

- Summary of comparator evidence. In a disparate treatment case, Plaintiff may wish to illustrate how she as an older worker was treated more harshly than Jane Doe, an employee in her twenties. Plaintiff may wish to be listed on the left side, and the comparator can be listed on the right. In the middle, there can be a list of categories: pay, promotions, discipline, etc. to illustrate the differences between the two.

- Chart of events giving rise to sexual harassment. This document can be similar to a timeline. Alternatively, the evidence may be grouped according to the type of actions. For instance, there may be a category for "Overt Sexual Comments." Then each comment, along with the speaker and the date could be listed. Additionally, there could be a column for "Sexual Contact," listing all acts of inappropriate touching or fondling.

- Blow-ups of key policies. Plaintiff may wish to consider obtaining blow-ups of key policies of the Defendant. If the Plaintiff was not reviewed for a couple of

years in a row, enlarge the employee manual stating that employees will be reviewed annually. Similarly, if Plaintiff was not afforded corrective action prior to being discharged, the employer's progressive disciplinary policy may be very relevant.

- "Who is the decisionmaker?" A blow-up may be prepared concerning a particular decisionmaker if he made damaging admissions and took numerous adverse actions against the Plaintiff. This document may include impeachment of the decisionmaker. *See*, *e.g.*, *Lambert v. Fulton County, Georgia*, 253 F.3d 588, 594 (11th Cir. 2001).

- Statistical summaries. Testimony regarding statistics, for instance, during a RIF, is very laborious. Having a chart showing who was RIF'd and who was retained will be very helpful.

- PowerPoint presentations. This high tech tool may be used to display various charts and summarize key portions of testimony.

- Human Resources training tapes. This evidence may be particularly helpful to demonstrate that the decisionmaker deviated from specific training practices.

- Blow-ups of deposition transcripts. This may be very strong evidence to highlight impeachment. Obtain permission of the court before attempting to show the jury this evidence.

- Video depositions. Video depositions can be used for two purposes – to have the jury hear evidence of unavailable witnesses, or in the alternative to impeach a witness such as the decisionmaker or defense expert. If the video tracks the inconsistent trial testimony, this method of impeachment is far more effective than traditional impeachment. Certain companies like Yeslaw work with specific court reporters who use their technology. Yeslaw software will not only capture the video and will also have the transcript roll alongside on the left panel. Clips can be easily made to anticipate impeachment, or for use at mediation or closing. For use of any video deposition, Plaintiff should consider the following:

    - Make sure the jury can see the video evidence
    - Have a memoranda of law and cases ready to rebut any objections
    - Obtain evidentiary rulings at the outset of the case concerning the admissibility of the evidence and for what purpose it may be used
    - Use video exhibits during opening statement and closing argument
    - Have an assistant on hand who can work the necessary equipment
    - Keep it simple

- Day in the life videos. While traditionally used for serious personal injury cases to illustrate Plaintiff's injuries, the ADA Plaintiff may wish to use this

demonstrative evidence to show how he is substantially limited in a major life activity.

- Defendant's Annual Reports. Blow-ups of these documents can be used for a variety of reasons – age animus (we are entering into the next decade with a young management team), financial statements for purposes of net worth, or to rebut Defendant's assertion that it was suffering financially.

- Animations. Computer animations may be helpful in a sexual harassment case to demonstrate a hostile work environment. Since this evidence is very expensive to prepare, and Plaintiff may encounter a number of objections from the Defendant concerning the accuracy of the representations, Plaintiff's counsel may be best served showing this evidence to defense counsel ahead of time, or obtain a pre-trial ruling. Otherwise, if objections are sustained during the course of the trial, the animator may not have sufficient time to make the appropriate changes.

- Summaries of Plaintiff's damages. In the event that Plaintiff retains an economist, an excellent blow-up to consider is one of Plaintiff's backpay and front pay damages. Usually, this is very dry testimony, and the expert's testimony can be livened up with specific numbers showing damages totals. Plaintiff may have more success in getting the damages she seeks if the highlighted number is staring the jury in the face. In addition to a chart for the economist, Plaintiff may wish to get a separate global summary prepared, listing not only his backpay and front pay, but compensatory and punitive damages.

- Blow-ups of verdict forms. Depending upon the jurisdiction and the particular judge, Plaintiff may be able to blow up the verdict form. During closing, Plaintiff's counsel can go through each line item and ask for a specific award. Plaintiff should attempt to get as many line items on the verdict form as research has shown that the verdict will be higher with more lines on the form. Always seek permission of the court before using this piece of demonstrative evidence.

b. Defendant's Tactics

Defendant has its own arsenal of demonstrative weapons. These may include Plaintiff's personnel file, Plaintiff's medical records and diaries, letters to the EEOC and applications for disability benefits. Further, Defendant also may attack the Plaintiff's exhibits if they are not a fair representation of the evidence. Defendant may be able to attack Plaintiff's timeline, for example, if Plaintiff left out key dates. Similarly, if Plaintiff offers a medical illustration into evidence in an ADA case, Defendant may

object on the basis of foundation if a physician does not describe what is in the illustration.

To obtain demonstrative evidence for use against the Plaintiff, Defendant may wish to look to formal discovery with the Plaintiff, docket searches for other litigation, sending subpoenas to: Plaintiff's former and subsequent employers, medical providers, and disability carriers, and documents obtained from the Illinois Department of Labor for mitigation evidence.

In addition to making the appropriate objection in the Final Pre-Trial Order to any anticipated demonstrative exhibits used by the Plaintiff, Defendant may also wish to file a Motion in Limine to limit or exclude the evidence.

c. Defendant's Checklist of Demonstrative Evidence

Some demonstrative exhibits which the Defendant may wish to consider are as follows:

- Plaintiff's personnel file. Plaintiff's reviews may establish that he has failed to live up to the legitimate expectations of the company. Further, Plaintiff's self appraisals may alone show that Plaintiff realized his performance was subpar. Additionally, while on the job, or even after being terminated, Plaintiff may have written scathing memos or letters – depending upon the tone, these documents may show that either that the Plaintiff was hypersensitive, or not credible.

- Plaintiff's charge of discrimination. This traditionally innocuous document can be used for several purposes. One, since it is sworn, it could be used for impeachment purposes. Further, as many Plaintiffs check as many boxes to preserve their rights, a compelling argument at closing may be that, "Ladies and gentlemen of the jury, Plaintiff attempted to sue us for everything – age discrimination, sex discrimination, and retaliation. Did we hear any evidence of age and sex discrimination? Let me tell you what this case is really about…"

- Plaintiff's Complaint. Depending upon the factual allegations of the Complaint, if Plaintiff failed to produce certain evidence, a blow-up of the Complaint can be used to dent the Plaintiff's credibility.

- Plaintiff's diaries. In any kind of case involving an alleged hostile work environment, or where compensatory damages are at issue, Defendant may wish to use the Plaintiff's diary against her to demonstrate that a particular event was not bothersome enough to record.

- Plaintiff's medical records. Similar to the use of Plaintiff's diary, Plaintiff's medical records can be used against her to minimize any emotional distress damages where she did not complain to her physician about a hostile work environment. Plaintiff's medical records may also be used in an ADA context – to either demonstrate that Plaintiff is totally disabled, or that he is not substantially limited in one or more major life activities.

- Plaintiff's tax returns. A blow-up of Plaintiff's tax returns can be used to not only minimize Plaintiff's damages, but impeach him regarding the number of deductions that the Plaintiff took. This area can be highlighted on the blow-up. Additionally, if Plaintiff's spouse made a lot of income and the parties filed a joint return, this income may reflect poorly on the Plaintiff – *i.e.*, Plaintiff is wealthy and is not really in need of any money.

- Plaintiff's application for disability benefits. This document can be used to shore up the judicial estoppel argument in an ADA case – that Plaintiff represented that he was totally disabled for purposes of disability benefits and consequently cannot work at his present job. If nothing else, this document may be an effective attack on Plaintiff's credibility.

- Calendars. A simple blow-up, but an effective tool, may be a number of blank calendars. Defense counsel can then argue to the jury, "Plaintiff claimed that she was subjected to a hostile work environment. Did she report the incidents in January, February, March, or April…?"

- Polices regarding reporting harassment. Where Defendant has properly raised and pled an *Ellerth* and *Farragher* affirmative defense, the Defendant's policies regarding reporting incidents of harassment or discrimination are an appropriate tool. In conjunction with the policy, if Defendant has a signed acknowledgement of the employee handbook or manual, Defendant may wish to utilize this as well.

- Surveillance tapes. Often used in personal injury cases, this tool may be very effective at challenging Plaintiff's veracity concerning compensatory damages, or to contest that Plaintiff is substantially limited in a major life activity.

- Key jury instructions. Defendant may wish to blow-up instructions regarding Plaintiff's burden of proof, or defenses such as the business judgment rule.

- Plaintiff's mitigation documents. If Plaintiff contends that he has sufficiently mitigated his damages, but his records may contradict his assertion. For instance,

if Plaintiff has only looked for one or two jobs over a lengthy period of time, not only can Defendant score points on the mitigation front, but again, attack Plaintiff's credibility.

C. Direct Examination of Witnesses

1. Lay Witnesses

For either side, making the witness comfortable in the courtroom is paramount. For lay witnesses who have never testified, counsel should take the witness to court and show them the jury box, where you will be examining the witness. Take the podium behind the last juror's seat and run through your examination with the witness. If you cannot hear the testimony, not only will the witness' testimony fall upon deaf ears, but too soft-spoken a witness may negatively impact upon his credibility.

The jury will clearly assess the credibility of the witness in her ability to recall the particular events of the situation. It is imperative that the attorney prepare the witness in advance of trial. Prior to witness preparation, send the witness her deposition transcript, if applicable, Answers to Interrogatories, and any relevant documents. Review all of these documents with the witness during your trial preparation. During preparation, it is not enough for the advocate to discuss the subject matter of what the witness is expected to testify to. Rather, the attorney should run through the direct examination as many times as necessary before taking the stand. The lawyer should not, however, provide the "script" to the witness as the testimony will appear to be rehearsed. Maintaining a conversational tone with the witness will make the examination appear "live." Explain what documents that you intend to introduce into evidence through the witness. Advise the witness what a foundation is, and what questions will be asked to lay the proper

foundation. Counsel should also prepare a mock cross-examination, anticipating what the opponent will test your witness on.

Appearances of the witness are important and can have a profound impact on credibility. Have the witness dress comfortably, but appropriately in light of his station in life and role in the case. A blue collar worker need not wear a suit, but a police officer or fireman, especially since 9-11, should be in uniform. Plaintiffs in discrimination cases should avoid wearing expensive clothes and wear minimal jewelry. Advise the witnesses to be circumspect about their conduct, even when they are not testifying.

The witness should be given the following standard instructions when testifying, similar to that of providing deposition testimony:

- Take your time when responding to questions;
- Advise opposing counsel if you do not understand the question;
- Use simple words and your own vocabulary unless explaining something technical;
- Do not speculate as to an answer;
- Do not fight with opposing counsel;
- Do not talk over opposing counsel when an objection is made;
- Testify only as what you personally observed or heard;
- Do not volunteer information;
- Always tell the truth, even when it appears to be a damaging admission.

2. Expert Witnesses

Experts are often used to help the trier of fact to understand complex issues. In certain cases, like an ADA case, they may be required to prove Plaintiff's *prima facie*

case. Other times, they may be useful to establish liability issues (human resources), or matters that are germane to damages, such as psychiatrists, vocational rehabilitation experts or economists.

What affects the credibility of an expert witness? In addition to the same factors as a lay witness, a number of other issues come into play. If the witness lacks the requisite qualifications, the expert's testimony may be barred by the trial court. Alternatively, the trial court may allow the testimony but bar the expert from proferring one or more opinions. The advocate should explore the following areas which directly bear upon credibility before having direct or cross-examination:

- Educational background. While it is impressive for the expert to possess stellar academic qualifications, it may not be required for the expert to make a strong impression.
- Real world experience. A juror may make a much stronger connection with the expert if the witness has had substantial hands on experience.
- Bias. Does the expert physician always testify for the Plaintiff? No matter what the expert's academic credentials, and real world experience, if the expert's testimony appears to be biased in favor of one side, it is likely that the jury will entirely disregard the expert's testimony. Always check the Jury Verdict Reporter before your witness takes the stand, or conversely check your opponent's witness history.
- Professional expert. Perhaps more devastating than an apparent bias for one side or the other, is the appearance that the expert will testify as to anything, as long as he gets his fee. During the expert's deposition, explore what percentage of his

income is derived from expert testimony work. If the expert cannot recall the percentage, the expert may appear to be dodging the issue.

- Methodology. If the expert's methodology is in question, the district court may bar the expert from testifying in accordance with *Daubert v. Merrill Dow Pharmaceutical*, 509 U.S. 579.

Testing the expert's familiarity with the case. In certain circumstances, the expert may have excellent academic credentials and substantial work-like experience. He does not appear to be biased, so how does the advocate test the expert's credibility? Cross-examine the expert as to his knowledge of the case. Has the expert reviewed all of the depositions in the case? Is the expert familiar with all of the witnesses' testimony? Ask the expert if he thinks it would have been important to review a particular deposition. You will probably get a winning response regardless of the answer.

D. Cross-Examination of Witnesses

1. Plaintiff Strategies When Impeaching the Defense Witness

Plaintiff should obtain all documents where the defense witness may have made an inconsistent statement. At deposition or trial, ask the defense witness the critical question. If it is inconsistent with a prior written statement, ask the defense witness if he made the prior statement. Ask the defense witness to identify his signature if there is one on the document. Plaintiff's counsel should determine that the statements are inconsistent and are material, i.e., relate to a significant issue in case.

Set the foundation for the impeachment, and make sure that the defense witness has authenticated the impeaching document. At trial, Plaintiff may wish to call the defense witness in his case-in-chief to immediately show the jury that the defendant is

lying. To prepare for this impeachment, have a large blow-up made of the impeaching document.

The following sources may provide for valuable information to impeach the defense witness:

- Internal memoranda
- E-mail
- Letters
- Letters to third parties, such as vendors
- Responses to grievances
- Website pages
- Transcripts from administrative hearings
- Answers to Interrogatories
- Answer to the Complaint
- Depositions
- For an expert, learned treatises

2. Defense Strategies When Cross Examining the Plaintiff

Before confronting Plaintiff's witness on the stand, defense counsel should obtain any statement made by the Plaintiff, whether a deposition, sworn or unsworn statement made to a third party such as a police officer, or documents prepared or made by the witness such as letters or employment applications.

At trial, if Defendant seeks to impeach the Plaintiff, it is imperative that Defendant do so on a key issue in the case. Otherwise, Plaintiff may have a successful objection on relevance/collateral impeachment. Further, Defendant's tactics may

backfire in front of the jury who may perceive defense counsel as berating the Plaintiff. It is also essential that the impeaching testimony track the prior inconsistent statement.

The following sources may provide valuable information to impeach Plaintiff:

- Previous employers' job applications
- Employer's job application
- Resume
- Applications for short term or long term disability benefits
- Social Security disability applications
- Transcripts from worker's compensation hearings
- Applications for unemployment compensation
- Transcripts from unemployment compensation hearings
- Tax returns
- Subsequent employment applications
- Answers to Interrogatories
- Depositions
- The Complaint

3. Use of Video Depositions

In federal court, a party seeking to present a videotaped deposition to the jury must comply with the requirements of FRE 804(b)(1). According to the Rule, the witness must be "unavailable" as defined under FRE 804(a). The party whom the former testimony is being introduced must have had an opportunity to question the witness.

E. Deliver A Powerful Closing Argument

Your closing argument will incorporate many of the same elements that were present in the opening, and will not be repeated here. Rather, certain practice tips will be presented.

First, construct your closing to argue your theories/theme(s) of the case. If your argument is that the defendant was liable by dropping the ball, craft your argument around that. Keep in mind that to maximize the effectiveness of your argument, your theories or themes generally should be limited to a maximum of three or four. Otherwise, the impact of your closing will be lost.

Be sure to argue the facts of your case. In doing so, you should attempt to touch upon all of the witnesses. Use specific remarks made by the witnesses. If the court will allow it, and if there is crucial testimony, consider ordering a transcript of a particular witnesses' testimony, to argue the testimony to the jury. This can be very compelling.

Use exhibits during closing. If representing the Plaintiff, you may have exhibits that address damages and liability. Use as many as you can with the testimony of the witnesses. For example, if using a medical illustration to argue a particular surgical procedure, you may wish to argue, as you point to the exhibit, "Remember what Dr. Smith said? Dr. Smith told you that the Plaintiff's anterior cruciate ligament was impaired, causing him a substantial limitation in the major life activity of walking…" Other exhibits which you may wish to use during closing include blow-ups of documents, videos of the place of employment, enlargements of photographs, and relevant human resources policies.

Use favorable instructions during your closing. As mentioned earlier, pick three or four key instructions to use here. Either paraphrase them or read them verbatim. Link the instructions to the evidence.

Rhetorical questions can be a powerful tool to heighten the impact of closing. Depending on the question, you may wish to answer the question or leave it hanging for defense counsel/the jury. If defense counsel does not answer it, you can hammer the point home in rebuttal.

Use stories and analogies which will bring the case home for the jury. In a sexual harassment case, you may make reference to a movie, for example. "Ladies and gentleman, you may have seen the movie…what happened to the Plaintiff is far worse than what you saw on screen…"

Of course, it is important to argue the strengths of your case. Use different witnesses' testimony to hit these points. Similarly, you should also volunteer any weaknesses. Not only will this raise your credibility, but it will take the winds out of your opponent's sails.

If you represent the Plaintiff, you will have the opportunity to make an opening close and rebuttal. As a rule of thumb, your opening close will be twice as long as your rebuttal. Do not save your great arguments for rebuttal – make them all in your opening close. Be sure you stick to the court's guidelines to avoid running out of time. Your rebuttal is key because it is the last opportunity where you will get to address the jury.

F. The Verdict Form

Carefully draft the verdict form to avoid jury confusion and post-trial issues. Obviously, your opponent will have reviewed the verdict form, as well as the court, and

this may seem obvious, but in complicated cases, confusion over reading the verdict can happen.

If you are representing the Plaintiff, you will want to have as many lines for damages which the district court permits on the itemized verdict form. Research has shown higher jury awards in this instance. If permitted, have separate line items for each claim. For the Plaintiff, if the jury awards punitive damages far in excess of the statutory cap, it would be difficult for the Defendant to argue on a post-trial motion or on appeal that there was not sufficient evidence to support the jury verdict. Keep in mind that you will only be allowed an itemized line of damages if there was evidence on the issue. Consider using a blow-up of the itemized verdict lines which tracks the verdict which you can fill in as you go along in your closing.

In the event of an adverse verdict, have the court poll the jury to insure that this is their verdict.

G. Post-Trial Issues

In the event of an adverse verdict, the losing party may wish to bring a Motion For A New Trial, or a Motion for Judgment Notwithstanding the Verdict. In federal court, the Motion must be filed within ten (10) days. If bringing a Motion for a New Trial, point out the specific errors which the court made, supported by case law. If possible, provide the relevant passages from the trial transcript with citations. Keep in mind that the only issues that will be properly preserved will be those which a timely objection was made at trial. While a party need not file a post-trial motion to preserve an issue on appeal, the losing party should nevertheless bring it before the district court. First, the movant may get relief, and if not, it will impress the Seventh Circuit that you

tried to immediately correct the error. If bringing a Motion for Judgment Notwithstanding the Verdict, make your legal arguments that your client was entitled to prevail.

III. TROUBLESHOOTING OR HOW TO BE READY FOR ANYTHING

A. How To Handle Surprises When They Come Your Way

There is an old adage that says, anything can happen at trial. To avoid surprises, prepare, prepare, and prepare more. If you are trying the case with someone else, have them review every exhibit, direct examination and cross-examination. Do a rehearsal for your opening and closing. If you are trying the case by yourself, have another attorney in your office review these things. If that person is unavailable, show your spouse/significant other/friend your exhibits and get their opinions. Perform your opening and closing in front of them, and have them critique you.

Carefully organize all of your exhibits, motions in limine, key orders, direct examinations, cross-examinations, and key case law in a trial notebook. Have all depositions abstracted and flagged for possible impeachment. Have all exhibits pre-marked, and if the court will allow it, binders with tabbed exhibits for all jurors, defense counsel, the court, and for the witness. Make sure that you have properly served all of your subpoenas in a timely fashion. Serve a notice to produce at trial upon your opponent asking him to provide key original documents, updated records, and adverse witnesses for cross-examination.

Make sure that all audio visual equipment is in working order and have a back-up of all media. Little things can be equally important – have extra pens, legal pads, tape flags on hand.

Nevertheless, there is always something that may arise which you have not anticipated. A witness may have thrown a surprise answer your way, the court may have excluded a key piece of evidence, or perhaps a witness failed to show. The important thing is to never act surprised or flustered. In the event that a witness has thrown you a curve, and he is your witness, see if you can refresh his memory or rehabilitate him with a follow-up question or with his deposition. If the witness is adverse, have your impeachment material ready to go. If the court deals you a blow by excluding evidence or barring a witness, make sure that you have made an adequate record. Consider asking the court to reconsider its ruling before you rest. If the case does not go your way, be sure to include this point in your post-trial motion. If a witness does not show, be sure to have another witness ready to go. Advise the court of your situation and be prepared to serve a rule to show cause upon the witness.

B. How To Make Modifications During Trial

As noted above, even careful preparation can not prevent unanticipated events from occurring. Have your contingency plans ready. Have a plan ready if you expect that the court will bar a certain witness or exclude some evidence. Plan on using a static exhibit if your VCR fails and you cannot show video.

C. How To Project Confidence When Things Go Awry

Your own witness on direct has just dropped the ball – what do you do? You steamroll ahead without missing a beat. Do not alert the jury that you have been taken by surprise. Do not alter the tone of your voice or shake your head. Stroll confidently through the courtroom and project your voice louder and look to the jury as if you expected this all along.