

DIRECT AND CROSS EXAMINATION OF EMPLOYMENT DISCRIMINATION *WITNESSES*: STRATEGIES AND PITFALLS

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What We Will Cover

- Plaintiff's view of direct and cross examination
- Defendant's view of direct and cross examination
- View from the bench of direct and cross examination




Plaintiff's View

Be Prepared

- DO know the case inside and out – Google defendants, company website, facebook postings of supervisors.
- DO have a handle on deposition transcript and all other discovery
- DO listen carefully to every answer, so you can spot an inconsistency
- DO have deposition sections prepared ahead of time, so you can attack the inconsistency

Focus On Your Goal: Discredit Direct Testimony or Develop Independent Evidence

- If witness strays, DO discredit witness – Unless, you want to develop inconsistency in defendant employees' testimony.
- DO ask short questions
- DO start and end on a High Note
 - Jurors will remember the beginning and the end more than the middle



Focus On Your Goal: Discredit Direct Testimony or Develop Independent Evidence ^(contd)

- DON'T ask compound questions
- DON'T ask convoluted questions
- DON'T use extrinsic evidence to contradict witness's statement on a collateral matter.
(Collateral Matter Rule)

Area of Inquiry

- DO stay within scope allowed (FRE 611(b))
 - DO ask questions within scope of direct exam
 - DO focus on Defendant's credibility
- Credibility (FRE 608)
 - DO use reputation for untruthfulness to attack credibility of defendant. FRE 608(a)
 - DON'T use extrinsic evidence of specific acts to attack Defendant's credibility. FRE 608(b).
 - (EXCEPTION: criminal convictions, FRE 609)
- DO call adverse witness in your case in chief, if useful.
 - If so, DO lead the witness (FRE 611(c)(2)) - MIL
 - DO impeach adverse witness you have called (FRE 607)

Lean On!

- DO control the examination
- DO use the Defendant as a prop to tell a story
- DO ask yes or no questions
- DO ask for only one fact per question
- Get Defendants to contradict one another
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- DO use the Defendant as a prop to tell a story
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Impeachment

- DO ask about Habit (FRE 406), to show actions in accord with habit
- Criminal Convictions (FRE 608/609)
 - DO Show Conviction for Crimes Punishable by Death or Prison > 1 Year
 - DON'T Show Conviction > Ten Years Old (generally)
- DO ask to see document witness uses to refresh their recollection (FRE 612(b))

Impeachment (contd)

- DO confront Defendant with prior inconsistent statement
- DO use depo transcript to impeach – keeping in mind the collateral matter rule
- Prior Inconsistent Statement (FRE 613)
 - **DO as you wish: read the statement yourself OR have the defendant read it**
 - You DON'T even have to show it to the defendant
 - You DO have to show it to opposing counsel if requested

Common Defense Witnesses

Most witnesses you'll need to cross-examine fall into one of these three categories:

- Plaintiff's Supervisor/Co-Worker ("MGR")
- Human Resources Representative ("HR")
- Expert Witness ("EW")

How you treat these individuals will be impacted by their role.

Show Bias / Prejudice

DO show the individual is PREJUDICED against your client or BIASED in favor of the company.

- DO Make them appear callous, insensitive. (MGR)
- DO attack c.v. (EW) or training. (HR and MGR)
- DO ask how often they represent Plaintiffs. (EW)
- DO ask if e'ees often make false claims. (HR and MGR)

Show Bias / Prejudice (contd)

- DO ask who is paying them. (EW, HR and MGR)

- DO ask who is representing them. (HR and MGR)
 - DO ask if represented personally by defense counsel.
 - DO ask to ask when they retained counsel.
 - DO ask how much they are paying for representation.
 - DO ask to confirm terms of retainer agreement.
 - DO show that the company is paying for their defense.

Discredit LNDR

DO cross-examine MGR and HR on the employer's affirmative defenses.

DO show that the employer's claimed legitimate non-discriminatory reason ("LNDR") is a pretext.

- Two main ways to go about this:
 - Destroy Witness Credibility
 - Develop New Evidence

Destroy Credibility

- DO get them to contradict themselves. (EW, HR, MGR)
- DO lead them down the path:
 - DO ask if they have anti-discrimination/retaliation policies, are familiar with them, trained on them, etc.
 - DO ask if they believe these policies are important.
 - DO ask if they understand the importance of documenting performance issues.
 - DO ask if investigating complaints is important.

Destroy Credibility (contd)

- DO make them confirm all the ways they violated their very important policies:
 - DO make them state no/inadequate investigation.
 - Do make them state no documentation of alleged performance issues.
 - Do make them state did not take complaint seriously.
 - Do make them state did not properly document investigation.

Develop New Evidence

If you can't beat 'em, DO get 'em to join you! (HR)

- HR may be likeable, and in the field because they want to help people.
 - DO get them to help you!
- They may really want to get rid of discrimination and retaliation.
 - DO use that to get them to talk about problems in the workplace, and how they want to fix things.
- DO get them to warm up and discuss what corrective action is needed.
 - DO get them to say what did not happen for your client.

Develop New Evidence (contd)

- DO show that complaint policy is not effective.
 - DO confirm policy's existence.
 - DO confirm that other employees made complaints.
 - DO confirm that no corrective action was taken.
 - DO confirm whether complaints were investigated.
 - If so, DO confirm that no corrective action was taken.
 - Overall, DO confirm that policy is not effective.



Defendant's View

What It Takes To Win a Jury Trial

- You need to work until you find:
 - A winning theme
 - Answers for every question and solutions for every problem
- Genius is 99% perspiration and 1% inspiration
 - We win because we outwork the other side from day one

Importance of The Theme

- Find a theme early
 - Develop and test it through discovery
 - Some discovery is theme driven
- Theme issues
 - Responsibility
 - Positive v. negative themes
 - Does it answer all of the important questions?

Find The Stopper Witness

- Every successfully tried case has one
- This is the witness that the case turns on



A View From the Bench


Questioning of Witnesses- Types of Questions to Ask

- Ask questions that are clear and concise
- Ask questions that are simple and precise
- Ask questions using commonly understood words
- Ask questions that are relevant to the issues before the court
- Ask questions in an organized and logical fashion to assist the trier of fact in understanding the witness' testimony
- Ask questions that will assist the trier of fact in evaluating the credibility of the witness

Direct Examination

Example: Qualifying a Medical Expert

- What is your name?
- What is your educational background?
- After completing your internship, did you engage in any postdoctoral studies or postgraduate training leading to a specialization?
- Upon completion of your medical studies and internship, where did you serve out your residency?
- Have you had any postgraduate studies or continuing education?
- Do you have a private practice?

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- In what states are you currently licensed and/or certified?
 - What hospitals do you have an affiliation with?
 - What professional organizations do you belong to?
 - Have you ever held an office in any professional organization?
 - Have you received any honors as a result of your practice and profession?
 - Have you ever written any periodical articles, studies or textbooks in your field?
 - Have you ever held an academic appointment or done any college or university teaching? Have you been found qualified to testify as an expert in court prior to this case?
 - Have you ever served as an expert in your field in a state, federal or local court?
 - Have you ever been appointed an expert by any one of the judges in this jurisdiction?

Types of Questions to Avoid

- Avoid asking questions that lack foundation
- Avoid asking questions that call for conclusions of law
- Avoid asking questions that call for speculation
- Avoid questions that call for testimony outside the scope of the witness' expertise
- and/or personal knowledge
- Avoid questions that call for disclosure of Attorney-Client Communications or
- Attorney Work Product
- Avoid argumentative questions
- Avoid questions that are too vague or ambiguous to answer
- Avoid repetitive questions

Be Careful What You Ask

Q: 'Officer – did you see my client fleeing the scene?'

A: 'No sir. But I subsequently observed a person matching the description of the offender, running several blocks away.'

Q: 'Officer– who provided this description?'

A: 'The officer who responded to the scene.'

Q: 'A fellow officer provided the description of this so-called offender. Do you trust your fellow officer?'

A: 'Yes, sir. With my life.'

Q: 'With your life? Let me ask you this then officer. Do you have a room where you change your clothes in preparation for your daily duties?'

A: 'Yes sir, we do!'

Q: 'And do you have a locker in the room?'

A: 'Yes sir, I do.'

Q: 'And do you have a lock on your locker?'

A: 'Yes sir.'

Q: 'Now why is it, officer, if you trust your fellow officers with your life, you find it necessary to lock your locker in a room you share with these same officers?'

A: 'You see, sir— we share the building with the court complex, and sometimes **lawyers** have been known to walk through that room.'

The courtroom EXPLODED with laughter, and a prompt recess was called.

The officer on the stand has been nominated for this year's 'Best Comeback' line — and we think he'll win.

Never Ask A Question If You Are Not Prepared For The Answer

In a trial, a Southern small-town prosecuting attorney called his first witness, a grand motherly, elderly woman to the stand. He approached her and asked, "Mrs. Jones, do you know me?"

She responded, "Why, yes, I do know you, Mr. Williams. I've known you since you were a young boy, and frankly, you've been a big disappointment to me. You lie, you cheat on your wife, and you manipulate people and talk about them behind their backs. You think you're a big shot when you haven't the brains to realize you never will amount to anything more than a two-bit paper pusher. Yes, I know you."

The lawyer was stunned! Not knowing what else to do, he pointed across the room and asked, "Mrs. Jones, do you know the defense attorney?"

She again replied, "Why yes, I do. I've known Mr. Bradley since he was a youngster, too. He's lazy, bigoted, and he has a drinking problem. He can't build a normal relationship with anyone and his law practice is one of the worst in the entire state. Not to mention he cheated on his wife with three different women. One of them was your wife. Yes, I know him." The defense attorney almost died.

The judge asked both counselors to approach the bench and, in a very quiet voice, said, "If either of you idiots asks her if she knows me, I'll send you to the electric chair."



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