

# PLAINTIFF'S COUNSEL

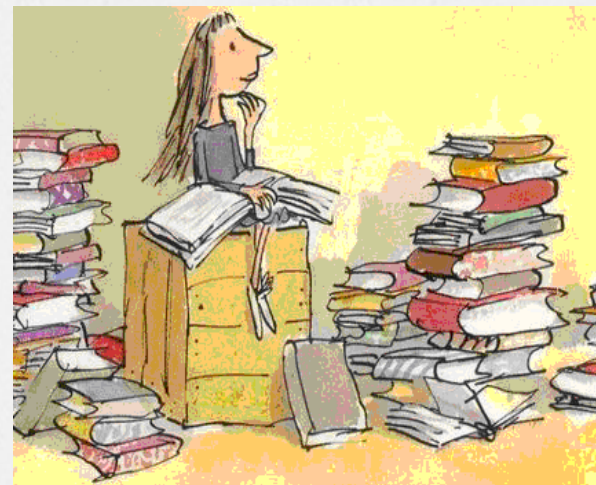
## DOS AND DON'TS OF

## CROSS-EXAMINATION

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# BE PREPARED

- ◊ DO know the case inside and out
- ◊ 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

- ◉ Unless you want to develop new evidence, DO discredit witness
- ◉ DO ask short questions
- ◉ DO start and end on a High Note
  - Jurors will remember the beginning and the end more than the middle
- ◉ 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 witness credibility
- Credibility (FRE 608)
  - DO use reputation for untruthfulness to attack credibility of witness. FRE 608(a)
  - DON'T use extrinsic evidence of specific acts to attack witness'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))
  - DO impeach adverse witness you have called (FRE 607)





# LEAD ON!

- \* DO control the examination
- \* DO use the witness as a prop to tell a story
- \* DO ask yes or no questions
- \* DO ask for only one fact per question
- \* DO get into a rhythm
- \* DON'T ask open-ended questions
- \* DON'T ask a question if you don't know the answer
- \* DON'T put the witness in the driver's seat



# 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))
- DO confront witness with prior inconsistent statement
- DO use dep 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 witness read it
    - You DON'T even have to show it to the witness
    - You DO have to show it to opposing counsel if requested

# COMMON DEFENSE WITNESSES

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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, cont'd**

- **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

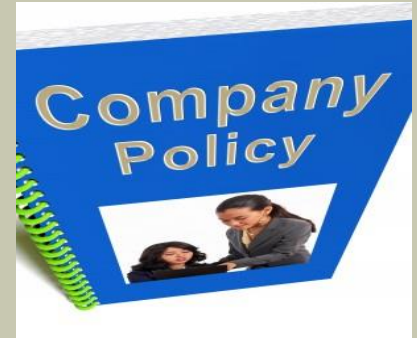
# DESTROY CREDIBILITY

- 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, CONT'D

- 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, cont'd

- 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.

