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Witness Examination Strategies in Employment Litigation

Best Practices for Direct and Cross-Examination of Lay Witnesses

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CHAPTER 6

PRESENTATION OF EVIDENCE

§ 6.1

A. INTRODUCTION

The parties have selected the jury and the jury has heard opening statements. Now the parties present evidence. In employment cases, evidence generally falls into two categories: exhibits and witnesses. It is important to select a few important documents to be exhibits in the case and to present those exhibits effectively to the jury. In addition, demonstrative exhibits, which are documents or other visual aids created for trial to assist the jury in understanding the evidence, can be essential in presenting the employer's themes. Counsel also must select witnesses from those individuals with knowledge of the case to present on direct examination, and prepare for cross-examination of the opposing party's witnesses. This chapter will address the heart of the trial — presenting evidence.[1]

§ 6.2

B. GENERAL STRATEGY FOR PRESENTATION OF EVIDENCE

By the time of trial, I tend to have a significant number of documents that could be used as exhibits and a number of witnesses that I could call to testify. I have a tendency, as do most lawyers, to want to offer a number of exhibits and witnesses

[1] The related topics of evidentiary issues and experts are addressed in Chapters 3 and 7 respectively.

to be sure that I present my trial themes thoroughly and comprehensively. This is a mistake. It is much more important to limit the number of documents and witnesses to those that are absolutely necessary and to avoid duplication of evidence. In addition, I do not present any exhibit or witness that is not favorable to my client and consistent with my theme of the case. This sounds like a truism, but in practice most lawyers do not do this.

Instead, most lawyers offer exhibits and witnesses that are duplicative or cumulative of other exhibits and witnesses that both parties present. Moreover, lawyers often present exhibits and witnesses who are not fully supportive of their client's position. For example, in employment cases, the employer sometimes offers the entire contents of the plaintiff's personnel or human resources file. This file often contains performance evaluations that are favorable to the plaintiff and personnel action forms that indicate merit increases or promotions. These types of documents may be inconsistent with the employer's position that it terminated the plaintiff for poor performance. Therefore, the employer should not offer such documents as exhibits. Plaintiff lawyers sometimes call company witnesses as adverse witnesses in their case in chief and this can be an effective tool. But rarely should a defense lawyer present evidence that is not wholly favorable to the employer. Surveys of juries almost universally indicate that juries are upset with lawyers because they are too repetitive and too dull.[2] This needs to be avoided.

Besides being repetitive and boring, offering evidence that is unnecessary or even harmful to the employer's position is credited against the employer by juries. Juries expect lawyers to offer evidence that is favorable to their clients. When a lawyer offers evidence that is not favorable to the party they are representing, this is given particular weight by the jury. As a result, I limit the documents I offer into evidence to important documents that I can emphasize repeatedly in the trial. If the plaintiff is offering a document, I allow her to do so and do not attempt to offer the same or a similar document. This way, the plaintiff bears most of the risk of presenting a document or witness that is inconsistent with her theme.

It is also important to insure that there is evidence to support every essential factual and legal issue in the case, and to rebut the opposing party's important evidence. I do this by preparing a trial brief that addresses the legal issues and presents my factual case. Drafting the trial brief is addressed in Chapter 3. I then go through the trial brief and list in the margin each document and witness that will address the facts and law stated in the trial brief. This exercise allows me to eliminate duplicative and cumulative documents and witnesses, and to note where I do not have any evidence to address an issue. This process is also helpful in preparing witness testimonies. Other lawyers use different techniques to be

[2] Judge Ross W. Foote, *Things that Bug Juries*, 58 TEXAS BAR J. 1038 (Nov. 1995), *reprinted in* 42 LOUISIANA BAR J., NO. 6 (1995).

sure they have evidence to support major factual issues. My mentor when I was an associate, Victoria Corcoran, had me draft an "allegations and defenses" document which essentially was a checklist of the factual and legal issues in the case with the evidence that we had available to address each issue. Either of these methods are effective in being sure that a lawyer has addressed all issues that may arise at trial.

These concepts are similar to "sponsorship strategy" advocated by Paul Colby and Robert Klonoff.[3] These authors assert that juries perceive lawyers as hired guns for their clients, and who are fundamentally biased. Thus, the jury views any statement or evidence that a lawyer offers in a trial with skepticism. Moreover, these authors note that juries will readily give credit to any adverse statement or evidence that a lawyer offers about the case believing that the lawyer would have no reason to make the statement or offer the evidence if it were not true. Therefore, they argue that a lawyer is always served by having the opponent offer as much evidence as possible in the case.

The authors identify three costs associated with offering evidence before a jury. First, the very act of introducing the evidence influences the weight the jury gives the evidence. The jury will minimize the weight of evidence that you offer unless it is harmful. Second, there is cost associated with the effort needed to secure admission of evidence or proof of a position. The more difficult the effort, the more it will adversely affect the value of the evidence to the party offering the evidence. This perhaps is best indicated with long, drawn-out cross-examinations, which a jury will see as an indication of the value of the direct testimony of the witness. Otherwise, why all the effort to try and undermine that testimony? The third is the cost of over-trying a case. A jury will discredit stronger testimony if the lawyer offers duplicative evidence on the same issue. For example, if you have two witnesses to testify about whether the plaintiff stole items from a warehouse, and the first witness is 100% certain that it happened and the second witness is only 60% certain; then the jury will reason that the issue is only 60% certain because there would be no reason to present the second witness otherwise.[4] Because of the costs of sponsorship, Colby and Klonoff advocate using only strong evidence, minimizing duplicative evidence, allowing the opposing party to present evidence as much as possible, and avoiding offering any evidence that is inconsistent with the theme of the case. My experience is that these points are valid. With these principles in mind, I turn to issues that present themselves repeatedly in employment cases related to documents and witnesses.

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[3] Paul L. Colby & Robert H. Klonoff, *Sponsorship Strategy*, 17 LITIGATION MAGAZINE, Spring 1991, at 1.

[4] *Id.* at 1-2, 47.

§ 6.3

C. DOCUMENTS

§ 6.3.1

Trial Exhibits

Employment cases typically are not document intensive. Most important documents come from the plaintiff's personnel file or are other employer-generated documents, such as: policy manuals, personnel documents indicating the treatment of other individuals, and work papers of the plaintiff (particularly in cases where the employer based adverse employment actions on performance or misconduct). Of course, some cases can be more document intensive, such as class actions. Generally even those cases involve similar documents for a number of class members. Thus, the documents generally are the same number of documents multiplied by the number of individuals involved.

As indicated in Chapter 3, I assemble a trial notebook at the beginning of a case. One of the tabs in the trial notebook is a fact memo. This is a chronology of the case that I update as I receive additional documents and information about the case. Once the fact memo is in chronological order, I insert relevant documents into the trial notebook that are the basis for entries in the fact memo. This has proved to be an effective way to keep important documents in one place and to have documents available that will be the exhibits at trial. Marguerite Walsh of Littler Mendelson's Philadelphia office, who has worked extensively on unfair competition and trade secret litigation, organizes documents for her cases in separate binders because her cases often involve larger numbers of documents. She assembles the binders by subject matter such as: "documents showing the defendant's access to confidential information," "documents showing plaintiff's trade secrets," etc.

Another tactic I have used with documents is to use consecutive exhibit numbers in all depositions. That is, I start with defendant exhibit number 1 at the plaintiff's deposition and follow with all other exhibits at the plaintiff's deposition and all subsequent depositions. Thus, I may have 20 exhibits for the plaintiff's deposition. If I take a fact witness deposition, the first document that I use with that witness is defendant exhibit 21, rather than Jones exhibit 1 as the court reporters often want to number the first exhibit. When it is time to make my trial exhibit list, I review all deposition exhibits in numerical order and delete all exhibits that I do not need for trial. This results in my trial exhibit notebook with exhibits 4, 7, 11, 15, 21, 23, etc. Although some lawyers do not like the fact that the trial exhibits do not start at one and are not numbered sequentially, I prefer this method provided the presiding Judge at trial does not have a rule or preference to the contrary. Another advantage of this system is if I have to present a witness by deposition at trial, the exhibit number used at the deposition

will be the same as the number used at trial. I first started utilizing this numbering system after a trial I had when the jury obviously was confused by testimony presented by deposition that referred to exhibits that did not have the same number at trial. A juror asked me about this after the trial and I explained how this had happened. I decided after that to make the exhibit numbering simpler by keeping consistent numbering.

§ 6.3.2

Selecting Documents to Be Exhibits

There will be a number of documents that may be relevant to the themes of the case that I intend to present. The selection of the actual exhibits will depend on whether or not the documents are essential for presentation at trial. I use two questions to determine whether the documents should be made exhibits:

1. Does the document provide essential support to a jury instruction?
2. Does the document have sufficient collateral importance to warrant presenting it to the jury?[5]

The answers to both of these questions must be "yes" in order for me to include the document as an exhibit.

The practical application of the first question usually is not that difficult, but the second question calls for more discernment. Take for example a race discrimination lawsuit resulting from the termination of an employee for poor performance. There will be a jury instruction on the employer's articulated, nondiscriminatory reason for its action. Therefore, the employer must present evidence of the plaintiff's poor performance to meet its burden of production in the case. There might be a significant number of documents that indicate aspects of poor performance but I try to use the documents that best demonstrate performance problems without also indicating adequate performance. If the employer has provided a written counseling of performance deficiencies, that usually is the best evidence to use. Also, an employee's actual work product with mistakes in the work can be very effective, particularly if the supervisor has written notes on the document relating to the problems. On the other hand, performance evaluations can create concerns for the employer. Often, performance evaluations will indicate performance problems but will provide a "meets expectations" or even better rating. Such a document may provide support for a jury instruction regarding the employer's articulated reason for its adverse action, but it may not warrant submission to the jury because it does not unequivocally support the employer's case.

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[5] Janeen Kerper, *Documents: Keeping Judge & Jury Awake, reprinted in* THE LITIGATION MANUAL: TRIAL 192 (3d ed. 1998).

§ 6.3.3

Making Exhibits Useful to the Fact Finder

It is important to make the documents selected as exhibits useful to the jury. Different jurisdictions have different practices or even rules about organizing and presenting exhibits. The key for the trial lawyer is to make those exhibits available and useful to the jury. Most courts do not allow the parties to pass exhibits to the jury for their review during the trial, primarily because jurors may not listen to a witness if they are reading documents. Therefore, I try to make documents available to the jury or other fact finder as the witnesses are testifying. Much of the effectiveness of the document is lost if the fact finder is not able to follow along as the witness testifies.

The traditional way to make exhibits available to the jury is to copy the exhibits to clear plastic sheets for use with overhead projectors, or to send the documents to a litigation support firm for printing or "blowup" onto a large poster board. I prefer the blowups because I can use several at a time as opposed to using an overhead projector where generally I can display only one document at a time. Blowups can be expensive, particularly if I need a significant number of documents enlarged. Usually the value of these exhibits greatly enhances the presentation and is worth the cost. It is also important to actually use the blowups during the trial. I use these exhibits during opening statement (if the court pre-admits exhibits), during examination of witnesses, and in closing argument. If there is a particularly important exhibit, I try to leave that exhibit on the presentation easel as long as possible (even during opposing counsel's presentation of witnesses) so that the jury can develop a good image of the document in their minds.

There are newer mechanisms to make documents available to fact finders. Many courts now have "document readers" that work somewhat like an overhead projector but do not require copies to clear plastic sheets. Generally, the document reader reads the image, then a data projector displays the image on a screen or monitor that all participants can see. These systems are quite valuable particularly if the court allows the parties to tie into the system with laptop computers. Allowing the use of laptop computers permits lawyers to access documents from computer files and use PowerPoint presentations for documents as well as opening statements and closing arguments. A competent paralegal sitting at counsel's table can access and present documents using this system in a quick and effective format. Of course, it is critical that the use of this technology be as efficient as using overheads or blowups. I have been in proceedings and trials where the opposing counsel did not have a good grasp of the technology he was trying to use and the distractions caused by the clumsy presentation diminished the effectiveness of the presentation. Thus, it is important to practice making presentations with such technology and to have a backup plan if the technology fails.

Lawyers often fail to use these same exhibit presentation principles with deposition testimony. For the jury to receive the full effect of an impeachment by a prior inconsistent statement at a deposition, the jury needs to be able to follow the process of the impeachment. Of course, a lawyer cannot give each juror a copy of the deposition, so it is important to present the deposition testimony via a document reader, overhead projector, or blowup of the relevant deposition pages. I usually have a paralegal put her finger on the page under the document reader and have her follow the words as I impeach the witnesses. This combination of oral and visual presentation of the impeachment is particularly effective.

An even more effective way to present the impeachment is to have the witness impeach herself with her own words. One way to do this is by use of audiotape. In Texas, unemployment compensation hearings are tape-recorded and under oath. Accordingly, an inconsistent statement can be played after the witness testifies to the contrary on direct examination at trial. During an unfair labor practice trial, I had a witness who testified at the unemployment compensation hearing that he did not make t-shirts that ridiculed the employer. But at the trial, he testified that he worked with others in concerted activity to make the t-shirts after a supervisor made what they believed to be anti-union statements. Of course, the legal standard in the two proceedings was different. In the unemployment compensation hearing the employer had to establish that it terminated the employee for misconduct. The employee's denial that he was involved in the t-shirts making made it difficult for the company to establish misconduct. But at the unfair labor practice trial, the plaintiff had to establish that he was engaged in the conduct that led to his termination in order to show protected concerted activity.

This unfair labor practice trial was several years ago, so all I had was the audiotape of the unemployment compensation hearing and a tape player. I made several different copies of the tape and advanced the different tapes to the places where the testimony began that I wanted to use for impeachment. I then played the different tapes starting at the appropriate point when I impeached the witness. I also have done this low-tech impeachment with a videotaped deposition. This impeachment is even more persuasive because the jury can actually see the witness's prior testimony that is inconsistent with his current testimony at trial. One problem with this method is that the lawyer has to anticipate where the witness will be inconsistent so he can queue the tape to that particular testimony. In addition, the witness may testify on other topics inconsistently with deposition testimony that is unexpected. Some court reporters now have a product that allows the video to run concurrently with the transcript which can be saved to a compact disk. This CD allows the lawyer to skip to the particular page where the witness made a statement and play the video as the lawyer impeaches the witness. This is another advantage of trying a case in a courtroom that allows laptop computers and data projectors. Note, however that it is important that this

decision to "sync" the videotape to the transcript must be made *before* the deposition is taken. It can be done after the fact but is much more expensive.

§ 6.3.4

Demonstrative Exhibits

In addition to the exhibits that actually come from the employer's files or the files of another company, demonstrative exhibits are an essential part of almost any effective trial presentation. As I addressed in the chapter on opening statements, people learn differently. Fifty percent learn primarily by visual input, 30% audibly, and 20% kinesthetically (touch or feel). Demonstrative exhibits help reach that group of potential jurors who learn primarily by visual and kinesthetic stimuli.

I classify demonstrative exhibits as summaries or interpretations of actual documents or other exhibits. Many of the principles stated in this section, however, also apply to the presentation of other exhibits. An example of this type of demonstrative exhibit is a time line of the employer's actions. The time line might identify the dates that the employer counseled the employee about her performance deficiencies, provided performance evaluations, placed the employee on probation, and terminated the employee's employment. If the employer has adequately documented these events, the time line can be a powerful tool to demonstrate that the employer gave the employee ample notice of performance deficiencies and time to correct deficiencies. Plaintiffs also use these time lines particularly in retaliation cases to demonstrate the connection between the complaint about harassment or other protected conduct and the termination of employment.

Lawyers often lag behind the rest of society in the utilization of the vast resources available for demonstrative aids for presentations. It is almost unthinkable for a corporate executive to give a business speech without an accompanying visual presentation, but lawyers do it all the time at trial. A good laptop computer and software allows everyone to make presentations that combine text and graphics in a way that is effective and which can be changed to address issues that arise at trial that were not expected prior to trial. I have addressed the use of demonstrative aids to some extent in the chapter on opening statements, and much of that discussion also applies to presenting evidence. The use of a flip chart or a PowerPoint presentation when presenting evidence can be extremely valuable in helping arbitrators, judges, and jurors understand and recall information.

For years, I was concerned about making my presentations too high tech. My concern was the inherent problem in defending an employer in an employment case relating to the relative size and resources of the parties. It is the familiar "David and Goliath" syndrome. I was hesitant to use too many resources in the

courtroom because I did not want to reinforce the notion of the wealthy corporation being able to afford such presentations and the individual terminated plaintiff not being able to do so. While this may have been true at one time, it no longer is. Fact finders expect to be shown, as well as told, the evidence and themes. Most plaintiffs' lawyers now have the means to obtain these demonstrative aids and are equally skilled at using them. Therefore, I have concluded that it is appropriate to use whatever demonstrative aids best convey the trial themes and the evidence.

Trial consultant and psychologist Richard Waites states that the two psychological principles relevant to the use of multimedia presentations for trials are the contiguity and modality principles.[6] The contiguity principle provides that the most effective presentations involve presentation of words and visual images alongside each other.[7] The modality principle provides that the words should be presented as auditory narration rather than just visual on-screen text.[8] A corporate PowerPoint presentation typically utilizes these two principles. The presenter conveys topics by giving a speech that is reinforced by on-screen text and visual images associated with the text. Lawyers should use similar presentations in opening statements and closing arguments, as well as in presenting evidence.

Waites identifies several types of demonstrative aids that can be used in trial. Some of these resources are more expensive than others and the more expensive may not be justified in the typical employment case.[9] Such resources, however, might be useful in a class action or multi-plaintiff case with significant associated damage and liability issues. It is important not to overlook the relatively low tech aids that have been available for trials for some time, even though lawyers typically have underutilized those resources. These include:

- flip charts;
- chalkboards;
- document enlargements or blowups;
- charts and graphs;
- overhead projectors; and
- models.

I summarized my use of flip charts in the prior chapter on opening statements. A flip chart also can be useful in recording significant evidence during the trial and

[6] RICHARD C. WAITES, COURTROOM PSYCHOLOGY & TRIAL ADVOCACY 359 (2003).

[7] *Id.*

[8] *Id.*

[9] *Id.* at 368-78.

can be referenced during closing arguments to help jurors recall what particular witnesses said or documents indicated. Chalkboards can be useful for similar purposes but have the inherent problem of not being permanent and being subject to being erased. Document enlargements, particularly of exhibits or charts and graphs, are useful to allow the jury to see the documents the witnesses may be testifying about and can be used in opening statements and closing arguments. Overhead projectors also allow the jury to see documents but are much less valuable than using document readers or computer presentations. Based on the technology available in the courtroom, however, an overhead projector may be the only option available. Models can sometime be used in employment cases particularly unfair competition cases involving claims of misappropriation of trade secrets.

Some courts allow juror notebooks which allow jurors to have their own copy of exhibits and in some cases to make notes of testimony and lawyer statements. Jurors who learn kinesthetically (touch or feel) find trial notebooks to be particularly helpful. I have addressed videotaped depositions above, but videotaped demonstrations or scene re-creations also can be used in some employment cases. Take for example a case involving the death of a worker and a subsequent defense of citations by the Occupational Safety and Health Administration (OSHA). A re-creation of the events leading to the death could be used to establish that the employer did not violate OSHA regulations. Computer-generated slides or animations also can be used. There is software available to image documents and highlight certain parts of documents to focus the fact finder's attention on the passage that is relevant to the lawyer's theme of the case. Non-case-related images can be added to the text to create interest with the fact finder and to aid retention of the employer's themes.

Of course, it is important to insure that these demonstrative aids can be used at the trial. I like to do a test run of the technology, in the actual courtroom if possible, to determine if all participants at the trial can see the presentation. It does not do much good if the jurors or witnesses cannot see the screen on which images are projected. In addition, the opposing party may object to the use of certain materials or demonstrative aids. The lawyer wishing to use them should raise the issue prior to trial. Sometimes the opposing party will not object, but when they do, I include the issue in my pretrial motion in limine to secure a ruling on the use of the presentation before the trial. Another very helpful resource to determine availability of a particular demonstrative aid is the court staff. They will likely know whether the court allows PowerPoint presentations, computer re-creations, or the other demonstrative aids at issue or if other lawyers have used them. Asking the court clerk, bailiff, or court reporter about the use of demonstrative aids can save significant time and expense.

§ 6.4

D. DIRECT EXAMINATION

Direct examination is the point at which a lawyer makes his or her case. The testimony of the parties' own witnesses must provide evidence to support each element of the case that will be presented to the jury. It is important not only to present the necessary evidence, but also to present the evidence in an effective way to assist in convincing the fact finder that your client should prevail.

§ 6.4.1

Selecting Witnesses for Direct Examination

I prepare for trial in the order of the trial. Most courts require the parties to file a trial brief, proposed jury charge, exhibit and witness lists, and motion in limine prior to trial. I prepare the trial brief first and address all factual and legal issues relevant to the case in that document. This process provides a framework for the jury charge and everything else to follow, including voir dire, opening statement, direct examination, cross-examination, and closing arguments. The direct examination usually is not difficult to prepare once I have drafted the trial brief, proposed jury charge, voir dire and opening statement.

I first read through the trial brief and note in the margins which witnesses and exhibits pertain to each factual and legal issue addressed. I then evaluate which witness will be most effective in presenting the factual information through testimony and documents. As addressed above, I try to avoid any duplicative testimony and use the most effective witness for each issue and exhibit. This, of course, requires meeting with the witnesses. I usually meet with the decisionmaker early in the case to learn the basic facts of the case in order to answer and respond to initial discovery requests. The opposing lawyer often will depose the significant witnesses prior to trial, which allows me to determine the knowledge the witnesses have and their likely effectiveness as a witnesses. However, in a simple employment discrimination case, it is not uncommon for opposing counsel to depose only one or two fact witnesses. Therefore, as I prepare for trial, it may require that I meet with other potential witnesses. These meetings are more helpful in eliciting factual knowledge than in establishing the effectiveness of the witness. If opposing counsel has deposed the person, I usually have a good idea how the witness will perform at trial on direct and cross-examination. If the opposing party has not deposed the witness, I usually practice with the witness using likely cross-examination questions to give me an initial feel on how the witness will perform.

I have found that certain occupations prepare witnesses well for testifying at trial. For example, in my experience, sales employees typically are very good witnesses. I usually explain to sales employees that testifying at trial is just like

giving a sales presentation, with the theme of our case being the product they are selling rather than the company's product that they normally sell. Good sales people grasp this concept immediately and use the same sales techniques with a jury as they do in attempting to make a sale with a customer. Some of these techniques include eye contact with the jurors and judge, effective body language (leaning towards the jurors, nodding and other positive motions), and clear and organized language.

Generally, managers and employees with more experience in their jobs and higher education levels make better witnesses, but technical types such as engineers and computer experts and entrepreneurs may not be as effective. I have special concerns about calling very high-level executives, particularly in large companies, as witnesses. The individual might be articulate, educated, and polished but often does not have the time necessary to allow me to adequately prepare them for direct and cross-examination. In addition, I have found presidents and CEO's of companies sometimes to be hard to control in the courtroom, and resentful of or even antagonistic with the opposing lawyer. All people are different, but this is something that must be evaluated prior to trial.

Personality, however, can compensate for the lack of polish, experience and education. For example, I represented an employer in an arbitration of a dispute regarding compensation due to a terminated executive under an employment contract. The company had terminated the executive, in part, because he falsified an acknowledgment of a company policy. The executive did not want to sign the acknowledgment because he believed that a policy would prevent certain personal investment activities. His superiors indicated he had to sign the acknowledgement if he wanted to retain his position. He then had a secretary in her early 20's retype the acknowledgment on identical paper with a few minor word changes that substantially altered the meaning of the acknowledgment. He had the secretary return the altered acknowledgment along with several other documents to conceal the fact that he had changed the acknowledgment. The company learned of the falsification when the secretary became uncomfortable with the assignment and told a fellow secretary, who then told a human resources representative.

The secretary left the company between the executive's termination and the arbitration and declined to meet with us on a voluntary basis. She did give us a statement that we used in certain pretrial motions and which clarified her factual knowledge of the incident. We subpoenaed her to testify at the arbitration but were unable to prepare her for her testimony because she would not meet with us voluntarily. I had an associate, Eve Mantell McFadden, greet her when she appeared for the arbitration and was waiting in the waiting room for the prior witness to conclude his testimony. During the hour or so before her turn to testify, Eve was able to explain the process and prepare her for her testimony. The secretary testified brilliantly. She was articulate, persuasive, and genuinely

offended by the conduct of the executive. She was our most important witness for establishing the executive's improper conduct even though we also had the president, chief financial officer, vice president of human resources, and a former vice president of the Fortune 500 company also testify. Therefore, the best witnesses are not always those that are the first choice.

§ 6.4.2

Preparing the Witness

After determining the witnesses and topics that each witness will present on direct examination, I then prepare initial drafts of testimony in a question and answer format. I make the issues that I plan to address "topic headings," and then draft questions that I plan to use with expected answers. An example of a witness testimony is included as Appendix G. These questions and answers need to convey the themes of the case and to humanize the client by showing the difficult decisions that the decisionmaker-witness had to make. After I have completed the draft testimony, I check that I have covered each issue that I identified from the trial brief that the particular witness would address. I also check the testimonies of all the witnesses against the trial brief to be sure that I have addressed all necessary issues and presented testimony relating to each exhibit with some witness. Once this is complete, I put each testimony in my trial notebook for use in preparing the witnesses.

I then meet with the witness and ask the prepared questions to see if they elicit the information I need for their trial testimony. I usually do not get the responses I am looking for on my first or second time through the testimony. I have found that it is more important to have the responses I need written on the draft testimony in the notebook than it is to have the questions. As I practice with the witnesses, I determine what questions elicit the information I am looking for. Of course, the responses are the important information to the factual and legal themes of the case. I have found that having the testimonies on my laptop computer is very effective in meeting with the witness. That way I can revise the questions as I actually meet with the witness to be sure I have a final version with which I am satisfied. Drafting testimony as I work with the witness results in fewer errors and practice runs.

One problem with preparing the draft testimony is that it can sound too formal or "practiced" with the jury. This makes the direct testimony of the witness less effective. It is very important for the witness to listen to my question, and answer based on his or her factual knowledge. Sometimes witnesses ask for copies of the testimony that they can take home and review prior to testifying. I do not agree to this because I do not want the witness's testimony to be stilted and formalistic. In addition, I always need to make minor changes in witness testimonies at trial because of trial developments, such as themes from the opposing party that I did not expect. If the witnesses is expecting a particular question and I change it in

some way, I want the witness not to give the answer he "practiced" but to give the answer necessitated by the question I ask. I also try to draft questions to be as direct and nonlegalistic as possible. It is amazing how many legalisms creep into our questions because that simply is the way we lawyers speak to each other.

I have found that it is extremely helpful to have as many witnesses hear other witnesses' testimonies as possible. A meeting can do a lot to jog the collective minds of witnesses into recalling the exact nature and timing of facts. This collective meeting will prepare the witnesses to testify consistently with each other and to have confidence in their recollection of the facts. This can be particularly helpful to prepare the witnesses for cross-examination. I usually conduct these joint meetings after I have had an opportunity to meet with and prepare the individual witnesses so that the testimony the group will hear will be relatively coherent. Sometimes this is not possible, and I have prepared witnesses initially at such group meetings. I have found that it is more important to have the group meeting with the witnesses than to practice the individual testimonies three or four times as I usually like to do. Thus, if I am faced with a choice between more individual practice and a group meeting, I opt for the group meeting.

There are situations where I cannot have a joint meeting of all witnesses because some witnesses have left the company. It usually is not prudent to have ex-employees attend such group meetings because the attorney-client privilege may not cover a meeting where third-parties are present. In those situations, I try to summarize the testimony of the other witnesses for the nonemployee witness to promote consistency. This also may not be privileged but if it is accurate, it should not be a significant disclosure that opposing counsel could discover. Also, never assume that a third-party witness will refuse to meet to discuss and even practice testimony. I always ask if I can meet with witnesses who are departed employees even if they have been fired by the employer. I may be able to meet only immediately before trial, or even at the trial in the hallway between witnesses. Any chance to meet with a witness is helpful to know what their response might be to relevant questions. One caution, however, is that once the trial has started, a party may invoke the "Rule." The "Rule" (codified at Federal Rule of Evidence 615) provides that witnesses may not be present in the courtroom to hear the testimonies of other witnesses. In most jurisdictions, the Rule also provides that counsel may not share testimony of witnesses who have testified with those who may yet testify.[10] If a lawyer tells a witness what a prior witness said, that may violate the Rule and result in the disqualification of the witness or even more serious sanctions.

Witnesses sometimes can be concerned or even intimidated by the legal process and their role. It is easy to forget how intimidating a courtroom can be the first time you visit one, particularly if your testimony is the key evidence for the

[10] FED. R. EVID. 615.

employer's case. Therefore, I usually visit the courtroom with the witnesses, if possible, before the trial. If there is a trial in process, I explain what is happening and what the witness on the witness stand is doing well and not so well. If the courtroom is empty, I have the witness actually sit in the witness chair and practice some of her testimony to the jury box and the judge's bench. This has proved to be very helpful in alleviating courtroom jitters.

§ 6.4.3

Presenting the Witnesses on Direct Examination

Once I have prepared the witnesses, I call the witnesses in the order that maximizes the good witnesses and minimizes the poor witnesses. I generally call my best witnesses first and last with the experts and weaker witnesses in the middle. Juries tend to be most alert at the beginning of the employer's evidence and it is important to present a good witness at that time to give as much of an overall presentation of the case as possible. The first witness must be able to explain the nature of the employer's business and the business conditions or the issues that led to the adverse employment action in question. If the witness was a decisionmaker they must be able to explain the reason for the decision itself. The last witness is often the ultimate decisionmaker or at least a participant in the decisionmaking. The last witness usually is the corporate representative who sits at the counsel's table throughout the trial. This witness is important because he or she will be the only witness who will have heard the testimony of all other witnesses and needs to be able to address any issues that arise during the trial that were not anticipated before trial. Moreover, this last witness may need to provide explanation or rehabilitation for points made by the opposition during cross-examination of other defense witnesses who may not have been as strong as I would have liked.

If the case involves a claim of unlawful discrimination I prefer to have the last witness spend more time during his or her testimony on the issues directly relevant to the case. This witness should be able to testify about other employees who are not in the same protected group who were treated similarly to the plaintiff. This witness may also testify about the company's policies and procedures against discrimination and efforts made by the employer to insure that unlawful discrimination does not occur in the workplace. Leaving the jury with information directly relevant to the issue of unlawful discrimination should refocus the jury's attention to that issue rather than the employer's business judgment or compliance with policies and procedures.

It is important to work with the trial witnesses to help them connect with the arbitrator, judge or jury. This involves speaking directly to the fact finder and presenting the testimony to that entity rather than speaking only to the questioner. This has to be authentic. Contrived testimony can undermine the credibility of the party's case. In one discrimination case that I tried, the plaintiff had the

annoying practice of listening intently to her lawyer's questions and then turning abruptly to the jury and flashing a broad smile that appeared to be painted on her face. This gave the impression of a disingenuous witness and hurt her credibility before the jury. Take whatever time necessary to practice with important witnesses so this type of inauthentic presentation does not happen. Jury consultants have witness schools that also can be helpful to prepare particularly poor witnesses.

§ 6.4.4

Redirect and Rehabilitation

The employer's case never goes perfectly. There typically are not too many problems with direct testimony if there has been ample time to practice, but sometimes unexpected events occur during cross-examination. I had a witness in one trial who simply froze on cross-examination. We knew the witness was not our best witness and worked very diligently to prepare her for her testimony. On cross-examination she simply was unable to speak after several questions in which the opposing lawyer scored points. Ronald Tisch of Littler Mendelson's Washington, D.C. office had a similar experience with a witness in a sexual harassment case. The case involved claims of hostile environment harassment by a particular manager. There were rumors within the company that this manager had an affair with another employee and had actually fathered a child born to this woman who was married to someone else. Ron met with the manager and the woman who both categorically denied such a relationship, both in private to the lawyers and at depositions. At trial, the plaintiff's lawyer asked the female employee whether the manager had fathered the employee's child. Despite Ron's objections the judge allowed this one question, and the witness completely changed her story and admitted that the manager was the father of her child.

What do you do in situations like these? The biggest concern is making matters worse. The more a lawyer may try to explain the situation or reason it away, the more of a hole the lawyer might dig. My response to the frozen witness was to make a few objections that the subject matter of the testimony was not relevant to the discrimination claims and eventually secured the dismissal of the witness (she could not testify any further anyway). Ron Tisch similarly did not try to rehabilitate the witness. He also avoided any extensive redirect that would only serve to prolong the damage of having this witness on the witness stand. In such situations, do not panic and try to end the testimony as soon as possible.

In less serious situations, some redirect can rehabilitate witnesses against whom the opposing party may have scored a few points. If there is a break in the examination, it may be possible to discuss with that witness the testimony that could resolve an apparent conflict. The witness also may be savvy enough to resolve the apparent inconsistency upon a few redirect questions even if I am not able to discuss the problem with the witness before redirect. Again, a few

well-placed objections may signal to the witness the correct path and allow her to extract herself from the problem. The concern is that the witness will not be able to explain the inconsistency and asking about it again may further ingrain the problem in the minds of the jury. The problem often is not as serious as it might first appear to the lawyers. In both the frozen witness and the lying paramour cases referenced above, the employer prevailed.

Plaintiff's lawyers sometimes use the tactic of calling the employer's witnesses as adverse witnesses during the plaintiff's case-in-chief. Competent plaintiff's lawyers can make the employer's witnesses appear to be bumbling and inconsistent with this tactic and it can be a very effective way to undermine the employer's themes in the case. The employer's counsel cannot prevent the plaintiff from calling the employer's witnesses as adverse witnesses if they live within subpoena range of the courthouse. I make it a point not to volunteer to allow the plaintiff to call witnesses in this manner if the witness is not within subpoena range or unavailable for some other reason.

Once the plaintiff has called an employer's witness as an adverse witness, the employer must make a decision on whether to present the witness's entire direct testimony or only ask a few redirect questions. This decision will depend on the circumstances. In some situations, I have asked all of my direct questions of the witness on cross-examination. This usually requires the approval of the court because, technically, cross-examination should not exceed the scope of direct. If the witness is no longer an employee or from out of town, the court will usually allow the completion of the witness's testimony at this point in the trial. This may cause some disruption of the employer's case but it also may give the jury the employer's version of the facts much earlier than would be required if the plaintiff did not call the adverse witness. Sometimes it is appropriate only to ask those cross-examination questions needed to clarify testimony and to save the bulk of the planned direct testimony for the employer's case-in-chief. This may be the appropriate tactic if the witness is the corporate representative and is needed to testify at the end of the employer's presentation of the evidence or if the plaintiff did not score too many points by calling the witness adversely. This decision is one that comes easier as the lawyer has more experience in trying cases.

§ 6.5

E. CROSS-EXAMINATION

Cross-examination is the part of the trial that all future lawyers dream about. The idea of winning a case by a well-crafted and intense cross-examination is why many lawyers went to law school. Yet, the reality of cross-examination usually is the opposite from this ideal. Actual lawyers dream about cross-examination, but it usually is in the context of a nightmare. Lawyers lose more cases on cross-examination than they win. The goal of cross-examination at trial should be

to minimize the importance of the witness's direct examination and to avoid actually presenting evidence that supports the opposing party's case.

Much of what I have presented above regarding direct examination applies equally well to cross-examination. Pretrial preparation is as crucial in cross-examination as it is in direct examination. The demeanor of the advocate on cross-examination should not be substantially different than on direct examination. Particularly in employment cases when a lawyer is representing the employer, counsel should be respectful and concise. A jury will view the lawyer as the embodiment of the employer. If the lawyer is arrogant and abusive, the jury will likely view the employer as being arrogant and abusive. This can have disastrous effect in a jury trial of a wrongful discharge case. The same can be said for lawyers who exaggerate. Juries think lawyers are trying to mislead them if counsel uses exaggerated facts or over-argues issues. Advocates on cross-examination, like on direct examination, should use words and language that the jury can understand. A critical admission has no effect if the jury does not understand the words used to secure the admission. The lawyer should also avoid objectionable questions. Of course, the attorney may and should lead the witness in cross-examination although this is not permitted in direct examination.

I use a relatively simple procedure for drafting cross-examination of the plaintiff or a fact witness that I believe the plaintiff will call as a witness. As the pretrial phase of the case proceeds, I place any document that could be the source of material for cross-examination under a tab for the plaintiff or other witness. Sources for cross-examination include:

- deposition transcripts (condensed versions);
- documents (particularly those authored by the witness);
- affidavits or declarations, other statements under oath (such as prior testimony in other cases or proceedings); and
- responses to particular admissions or interrogatories.

I then review each source document and draft leading questions based on those documents with specific reference to the source so that I can impeach the witness if she testifies inconsistently with the source material. A sample cross-examination from an employment contract case is included as Appendix H.[11] I draft the cross-examination on my computer which I have found to be very convenient for organizing topics for cross-examination in logical order and from different source materials. For example, I draft questions about damages issues such as lost pay,

[11] This cross-examination is an actual cross-examination from a trial. I have not used the hypothetical from the prior appendices because the actual example (with proper names changed only) is more helpful in understanding the concepts stated in this chapter.

lost benefits, the lack of emotional distress and similar items near to one another. Furthermore, I place impeachment efforts and general impeachment materials such as evidence of bias and character, at the point of the cross-examination where it is most effective.

§ 6.5.1

The Goal of Cross-Examination: Control the Witness

The essential difference between direct examination and cross-examination is that the witness's allegiance to the case is typically with the examiner in direct examination, and either neutral or hostile to the examiner in cross-examination. There would be very little reason to subject a person to direct examination unless I expect to secure information favorable to my theme of the case. Therefore, I usually have no problem controlling the witness. In the case of cross-examination, I typically do not want the witness to testify. Controlling the information elicited on cross-examination then is critical, or the witness may cause even more damage than occurred on direct.

§ 6.5.2

The Ten Commandments of Cross-Examination

Irving Younger has provided some classic rules for cross-examination.[12] Mr. Younger's rules with some explanation are:

1. **Be Brief.** Jurors are unfamiliar with the case until they hear all of the evidence. Particularly when a lawyer is cross examining the plaintiff's witnesses, the jury will not know necessarily the purpose of the cross-examination questions or the relevance to the case. Of course, the cross-examiner's purpose is to obtain information necessary to support an argument in summation about the credibility of the witness, but that will not be evident to the jury until the actual summation. Rarely do I expect to obtain more than a few important admissions or points in the client's favor during cross-examination. If I bury the important points in a boring and long cross-examination, the jury may never remember the questions that I want them to recall in summation. Therefore, I hit the important points and sit down.
2. **Short Questions, Plain Words.** I never have met a juror who understands the term "to wit." Lawyers insist on subjecting jurors to the language of our profession that only may have a purpose when arguing summary judgment motions and other legal issues to the court. Similar to the admonishment to be brief so as not to lose

[12] Irving Younger, *A Letter in Which Cicero Lays Down the Ten Commandments of Cross-Examination, reprinted in* THE LITIGATION MANUAL: TRIAL 60 (3d ed. 1998).

important points among much unneeded testimony, an examination loses its impact on a jury when the jurors do not understand the questions asked. Careful pretrial preparation and drafting allows me to ask questions that are understood by the jury.

3. **Ask Only Leading Questions.** Leading questions are forbidden in direct examination because they put words in the mouth of the witness. This precisely is the benefit of leading questions on cross-examination. An effective cross-examination involves "yes," "no," and "I do not know" answers from the witness. In addition, the leading questions I use are on only one point at a time so that the witness can be left with no option but the one-syllable answer. I address this issue more fully below.

4. **Never Ask a Question to Which You Do Not Already Know the Answer.** Trial is not a time for discovery. I depose or interview important witnesses before trial and ask questions about essential issues so that I can effectively cross-examine the witness. This interview may be in the hallway at trial if there is no other opportunity to discuss the case with the witness. This rule may be met by skillfully prepared preliminary questions that eliminate possible explanations and lead to a situation where the examiner knows the eventual answer. The only qualification to this rule is that there are certain questions that I may ask to which I do not care what the answer is. Unless I know the answer to the question, can eliminate other possible answers, or do not care what the answer is, I do not ask the question.

5. **Listen to the Answer.** One problem with careful pretrial preparation, particularly with less experienced lawyers, is over-reliance on the carefully prepared questions. It is not unusual in any cross-examination for the witness to make an extraordinary statement that the lawyer would not expect. Yet, the cross-examiner plunges on as if he or she did not hear the answer, which in fact, actually may be the case. The lawyer that does not listen to the answers may miss an important point that could be critical in the summation. Thus, I listen to the witness's answers very carefully and then ask the next adequately prepared question.

6. **Do Not Quarrel with the Witness.** It is only human for the cross-examiner to be tempted to respond to an absurd or false answer with some side-bar comment such as "How dare you say that?" or "Do you really expect the jury to believe such bilge?" It, however, is important not to succumb to this temptation. Asking such a follow-up question may allow the witness to explain the answer, and it may alienate the jury. As mentioned above, one of the worst mistakes an employer's advocate can make is to appear arrogant or

abusive to a plaintiff who has been terminated or otherwise suffered an adverse employment action. An employer's advocate must present the jury with a theme that the employer's actions were rational, necessary, or even passionate. Abusing the plaintiff can eviscerate this theme and result in a loss and significant punitive damages.

7. **Do Not Permit the Witness to Explain.** A witness sometimes will ask to explain an answer that he or she understands gives a negative impression. The witness typically does not have the right to launch into a dialogue that is not a response to a question. When faced with such a response from a witness, I politely respond that the witness may respond to the other attorney's questions, but it is my turn to ask questions and the witness only should answer the questions that I ask. The judge unfortunately may allow the witness to explain but that cannot be helped. I do not allow this to happen without court intervention.

8. **Do Not Allow the Witness to Repeat Testimony Given on Direct Examination.** Jurors are unfamiliar with the case; otherwise they would not be jurors. If the attorney has the witness repeat testimony given on direct, it has the effect of reinforcing that testimony and causing the jurors to be more likely to believe the testimony. This sometimes happens when the attorney wishes to place the next series of questions within the context of a particular portion of direct examination. I try to ask questions without the need to refer back to the prior testimony if at all possible.

9. **Avoid One Question Too Many.** Perhaps the most important word for the advocate on cross-examination is "stop." This problem is similar to the professional baseball pitcher who is throwing a no-hitter but gets careless, grooves a fastball, and suffers a stiff neck from watching the hitter round the bases after a home run. This rule is one of those rules that is learned by experience. I have asked one question too many a time or two and have learned to stop when it is time. This rule is similar to the rule against allowing a witness to explain. Anytime you ask the witness to explain why, or how the witness can say such a thing, that is an open invitation to explain. Asking one question too many destroys counsel's work to that point and may destroy the entire cross-examination. Avoid that question at all costs!

10. **Save the Explanation for Summation.** It is tempting when I know that the jury does not understand the importance of a witness's response to attempt to draw out the cross-examination to help them see the light. This tactic has the defect of burying the admission among a boring, longer testimony, and it offers the witness an opportunity to explain away or down-play a problem answer. The

> attempt to explain also may have the effect of alerting opposing counsel to the strategy and allow counsel to undermine the theory on redirect or direct examination of other witnesses. The key is to let the jurors wait. I have found that the jury's curiosity actually can help me to develop the effectiveness of my theory of the case. Obviously, this further highlights the need to know what my summation will be in order to plan cross-examination to provide sufficient evidence to support the summation.[13]

The unfortunate irony about cross-examination and the rules applicable to cross-examination, is that a lawyer only learns to be effective in cross-examination by doing it ineffectively. Younger claims that it is only after 25 jury trials that a lawyer begins to understand how to use these rules.[14] Few clients today are willing to allow lawyers to be trained on their cases for this length of time. With proper planning and supervision, a lawyer should be able to conduct effective cross-examination even without optimum experience.

§ 6.5.3

Asking Appropriate Questions

The rules stated above are easy enough to list, but difficult to implement. How does one ask appropriate leading questions? How does one control a difficult witness? How do you avoid allowing a witness to explain answers?

Leading questions are questions that suggest the answer. Leading questions have a factual statement and then a phrase that requires the witness to agree or disagree with the fact. For example, a fact may be "you were an employee at will." A leading question for that fact would be, "you were an employee at will, weren't you?" or "isn't it a fact that you were an employee at will?" The witness does not answer the statement "you were an employee at will" but answers the leading phrase "isn't it a fact . . . ." In order to appropriately control the witness, the attorney should not ask any question of the witness that contains more than one new fact and contains as few words as possible excluding the leading phrase.[15]

For example, the attorney may ask the witness, "Isn't it a fact that you were an employee at will and the employer could terminate your employment at any time for any reason?" The witness could answer "yes" to this question but more likely the witness would quibble with part of the question and end up denying the

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[13] *Id.* at 61-62.

[14] *Id.*

[15] Michael J. Walter, *Controlling the Witness on Cross-Examination*, *reprinted in* THE LITIGATION MANUAL 63 (3d ed. 1998).

whole question. But a series of short, leading questions such as the following should have the desired effect:

Q. You did not have a written employment contract, did you?

A. No.

Q. You were not employed for any specific period of time, were you?

A. No.

Q. You received an employee handbook at the time of your hire, correct?

A. Yes.

Q. You signed an acknowledgment form for that handbook, right?

A. Yes.

Q. That acknowledgment form indicated that you understood you were an employee at will, isn't that right (showing the witness the acknowledgment if necessary)?

A. Yes.

Q. The handbook had a policy that described the company's at-will policy, isn't that right?

A. Yes.

Q. That policy indicates that all employees were employees at will and could be terminated at any time for any reason, right (showing the witness the policy if necessary)?

A. Yes.

The last two questions were longer than one new fact (excluding the leading phrase) but each contained only one new fact. These questions did not actually ask the essential question, *i.e.*, that the witness was an employee at will, but the questions laid the basis for my argument to that effect in summation.

In addition to asking leading questions with one fact per question, it also is important in controlling a witness on cross-examination not to use such phrases as, "you testified on your direct examination that . . . ." This gives the witness the

opportunity to state that he or she does not recall that to be their testimony, deny the statement, or explain away the statement. This violates the commands against repeating testimony from direct and allowing the witness to explain an answer. Moreover, it is important not to ask the witness questions that include a modifier or generalizations in the leading question. Examples of such questions are:

Q. You got into a loud argument with your supervisor, right?

Q. You always showed up late on Mondays, didn't you?

Q. Your work performance wasn't very good, was it?

The problem with these types of questions is that these questions often provoke arguments with the witness about the meaning of the modifier or generalization. It is better to ask several questions that lead to the conclusion needed such as:

Q. Joe was your supervisor, right?

A. Yes.

Q. Joe did yearly performance evaluations of you, right?

A. Yes.

Q. Joe did five of these yearly performance reviews, correct?

A. Yes.

Q. Joe rated your performance on a scale of one to five with one being the lowest, right?

A. Yes.

Q. A rating of three was defined as "adequate" isn't that right?

A. Yes.

Q. A rating below three was defined as "less than adequate," isn't that a fact?

A. Yes.

Q. Joe rated you a one or a two in each of those five years, right?

A. Yes.

Notice that this series of questions does not actually ask the leading question that the employee's performance was not "very good" but it creates a word picture in the minds of the jurors that the former employee's performance was not even adequate.[16]

§ 6.5.4

Impeaching the Witness

Impeaching a witness with a prior inconsistent statement can be one of the most effective aspects of a trial. Confronting a witness with an inconsistent statement weakens the witness's credibility and may lead to other contradictions and admissions. In employment cases, there are many opportunities for such impeachment. In addition to the deposition of the plaintiff or company witnesses, most employment cases have administrative investigations prior to trial. Witnesses often give written statements in the investigation of claims by the Equal Employment Opportunity Commission (EEOC), the National Labor Relations Board, the Department of Labor and other government agencies. Moreover, testimony in unemployment compensation proceedings is frequently under oath and concern the circumstances of the employment discharge at issue in a subsequent wrongful discharge trial. The EEOC also suggests to employees claiming discrimination that they keep a diary of job-related events. These diaries can be quite useful in establishing the frequency and type of employer discipline of the employee. It is very important in pretrial discovery to make a diligent effort to locate and secure copies of these statements that can be used to impeach witnesses.

The most common method of impeachment is through the use of prior inconsistent statements from depositions. Rule 32(a)(1) of the Federal Rules of Civil Procedure permits a party to use depositions to impeach a witness. The deposition testimony of a party also can be used as substantive evidence against the witness under Rule 801(d)(1)(A) of the Federal Rules of Evidence or as an admission under Rule 801(d)(2). Furthermore, a deposition of one party can be used on cross-examination against other parties to impeach aspects of their testimony. However, a person's prior inconsistent statement may not impeach another witness on "collateral matters." It is important to note that the rule against impeachment of a witness on collateral matters applies only to impeachment on collateral matters from the testimony of other witnesses. A party may confront a witness with collateral testimony (but not impeach) or use another witness's live testimony to prove the prior statement. Rule 613 of the Federal Rules of Evidence does not require the examiner to show a prior statement made by the witness although it must be disclosed to opposing counsel upon request. A nonparty must be given an opportunity to explain an inconsistent

[16] *Id.* at 64-65.

statement proved by extrinsic evidence unless the interests of justice indicate otherwise.

Impeachment based on inconsistent statements in depositions, is easier said than done. What often appears to be an excellent opportunity to impeach a witness ends up being unsuccessful because the witness offers a plausible explanation for the apparent inconsistency or the inconsistency is insignificant either to the facts of the case or in the minds of the jury. For impeachment to succeed, I take several necessary steps. First, I lead the witness down a path to commitment to a particular statement or position. Second, I confront the witness with the impeaching evidence shortly after the witness commits to the position or statement. This allows the jury to understand the situation and the effect on the witness's credibility. If the witness admits the inconsistent statement, nothing further is necessary. If the witness denies the inconsistent statement, the attorney must then prove the inconsistency through the deposition testimony or other extrinsic evidence.

When using a deposition for the first time, I explain to the jury (with the court's permission) or have the court explain:

- what a deposition is;
- that it was taken under oath;
- that the witness was there by subpoena, if appropriate;
- that the witness had an opportunity to read the deposition and make any necessary corrections; and
- what the testimony actually was.

An effective method of impeachment is to have the witness read the prior statement out loud to the jury. This makes it clear to the jury that there is an inconsistency because it came from the same person as opposed to me reading the witness's deposition testimony. Similar predicate-laying is important with inconsistent statements taken from sources other than a deposition. Care must also be given to the type of confrontation used. If the witness is dishonest it may be most effective to dramatically confront the witness. If, however, the witness is a kind, older man in an age discrimination case, I make every effort not to humiliate the witness before the jury. Rather, I lead the witness through appropriate testimony from the deposition or other impeachment source. Finally, I have found it important to use impeachment sparingly and for important points. An involved effort on a minor point or a failed impeachment based on ambiguous deposition testimony may have the opposite of the intended effect. The jury may

actually give the witness more credibility and the attorney less credibility than prior to the effort.[17]

§ 6.6

F. CONCLUSION

The foregoing discussion regarding presenting evidence reinforces the fact that lawyers must prepare the case diligently from the first work that is performed. The lawyer must know all elements of any claim or defense and seek discovery to secure evidence about those issues. Once a lawyer obtains discovery and identifies relevant documents and subjects of testimony, it is important to use only those exhibits and witnesses that will provide the necessary facts to support the employer's theme of the case in a persuasive and effective manner. Effective presentation of evidence is difficult and time-consuming but if appropriate attention is paid to this phase of the trial, victory usually results.

[17] JAMES MCELHANEY, TRIAL NOTEBOOK 112-14 (1981).