"GETTING EVIDENCE IN AT TRIAL OR KEEPING IT OUT"

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Assuming you have done your job at the case selection and pre-trial preparation stages, as you approach trial you have a winnable case. Nevertheless, you have a long way to go to convert that potential into the reality of a plaintiff's verdict. This, in mm, will hinge to a great extent on your ability to identify the necessary evidence and get it in, while preventing your opponent from introducing inappropriate evidence. This requires competently dealing with witnesses, appropriately handling documents and demonstrative evidence, and the offensive and defensive use of motions in limine. In the course of this paper, I will touch upon each of these areas.

Apart from knowing the controlling legal theories and having convincing evidence, success at trial hinges on you, the plaintiff and your other witnesses achieving certain goals. For you a principal objective is to be confident, in control, and unflappable. The key to this is thorough preparation and organization, which minimizes surprises and best prepares you to respond to those that inevitably arise in any trial, despite the amount of preparation and organization you bring to it. Your witnesses, and particularly the plaintiff, must present a credible and persuasive story to the jury. In the case of the plaintiff, he or she must also come across as sympathetic, i.e., someone with whom the jury identifies emotionally. Here, too, a key is preparation and organization.

I. Pretrial Preparation.

A. Know What You Need to Prove and Make Sure You'll Remember To Get It All In

Successful presentation of testimony and the exhibits at trial begins long before that proceeding begins. While the first step should be obvious, it is often overlooked or not given enough attention. That is, to research thoroughly and understand the law governing the various claims you have brought. You must be able to identify the essential elements of the claims to produce appropriate proof in the form of testimony or exhibits. In addition, you must anticipate the likely defenses, i.e., what will the defendant seek to establish and where will it attack you and your client?

You should next prepare an outline of the proof of each of your claims. This should include a list of the key elements of proof, and the testimony and exhibits which you will need to prove each. You should begin this in the early stages of your case preparation, because it will be an extremely important guide during the all-important discovery stage (which is the subject for another paper). By trial, however, you should have identified not only the legal elements of your claim and the facts you have to prove, but have an outline, listing for each fact the witnesses and exhibits you will use to make that

proof. Before trial, I suggest preparation of a checklist to which you can return during the trial to be sure before you rest that you have introduced all the necessary proof through the appropriate witnesses and by the appropriate exhibits. You may also want to include in the outline of proof and in the checklist, a column or place to indicate when and how the item of proof has been disclosed to the opposing party, if required in response to discovery requests or the pretrial order. That way the defendant cannot object to the evidence on the basis of surprise or lack of notice.

Now that you have identified what you need to prove and how you are going to go about doing so, the time has come to prepare and organize yourself for trial to ensure that it all goes as smoothly and confidently as possible.

II. Working With Witnesses.

A. Trial Preparation

One of your objectives here should be to reduce your anxiety as well as that of the plaintiff and the other witnesses (apart from adverse witnesses). This will go a long way toward helping you and your witnesses project the image you need to convince the jury of the righteousness of your cause. Anxiety reduction arises from preparation and organization.

1. Know your judge's preferences

First, become familiar with your trial judge's predilections concerning (a) courtroom etiquette; (b) approaching the witness; (c) marking exhibits; (d) showing them to counsel and the witness; (e) publishing copies to the jury or using enlargements or overheads; and (f) making objections, responding to objections and colloquy with the court concerning evidentiary issues. This will allow you both to focus your attention on what you need to prove, rather than worrying about procedure, and to avoid embarrassing admonishments from the court over what amounts to stagecraft.

2. Courtroom Orientation.

You should then begin to orient the plaintiff and other key witnesses to the courtroom. This should include the obvious: written identification of its location and its parking facilities. It is also a good idea to identify for the witnesses facilities at which they can eat, and to recommend that they bring along materials to occupy themselves during the customary downtime associated with trial. You should also make sure the witness knows when to show up and, if the witness is to be on call, that he or she has provided you a reliable means to contact him/her and understands the importance of reporting promptly to court once called.

You should also carefully explain or show the witness the layout of the courtroom itself, including where they will sit, if they are not the plaintiff, and explaining that they may be sequestered. You should also explain to the witness how to approach the witness box and handle the swearing in once called. If possible, it is a good idea to have the plaintiff watch a trial in the courtroom. If you are

particularly lucky, have him/her view one conducted by the same judge and/or in which the same defense counsel is participating. While this is not always possible, it is a very effective means of preparing your client.

3. Courtroom Attire and Demeanor

Before getting down to actual preparation of testimony, spend some time with your client and other witnesses on attire and behavior while at the courthouse before he or she is on the witness stand. The witness should dress in a manner which shows the jury they made an effort to get dressed up. The object is to show the jury respect for the process and to meet their expectations about the witnesses' attire. The witness should be well-groomed and dressed in a neat, professional and businesslike manner, avoiding expensive or ostentatious jewelry or clothing. Denim jeans, T-shirts, and work clothes are not appropriate. Ordinarily, they should dress as if they were heading to an important business meeting. At the same time, you do not want the witness to overdress or wear something which looks obviously out of character, or in which they will appear ill at ease. For example, a factory worker usually should not show up in a three-piece suit

Remind the witness that he or she is on view at all times and in all places in the courthouse by jurors, potential jurors, defense counsel, defense witnesses and defense representatives. This includes time spent in the parking lot, in the lobby, in elevators, in the hallway and in the cafeteria. Emphasize to the witness that a stray, misguided remark can have severe consequences for the case, particularly if made by the plaintiff and overheard by one of these parties. At all times, the witness should act in a dignified manner, and refrain from discussing the case, important or sensitive information about the case, or the testimony of others, in locations in which they might be overheard. The witness also should avoid making comments about the case to court personnel. Your client should never speak to jurors or potential jurors, the defense attorneys or defense witnesses and representatives. Remind a non-party witness that he or she has no obligation to speak to the opposing party or its witnesses, representatives or counsel. Of course, it is appropriate to nod or say hello to a potential juror or jury if the witness passes the juror in the hallway.

4. Preparation for Direct Examination

First, be sure to arrange well enough in advance for the witnesses' preparation and appearance at trial. Get your subpoenas out early, and send along a note asking the witnesses to call to confirm the dates on which they will testify, and their availability for preparation sessions and trial. You should try to arrange appointments to prepare the witnesses to avoid last minute rushes. If you are arranging to meet with an adverse or hostile witness for the first time, schedule the appointment a few weeks in advance, to allow you time to deal with surprises. Adequate advance notice is especially important when dealing with experts whose availability is limited and with whom you may need a lot of time to prepare. Send your expert his/her report and a reminder to reread it before your meeting. If a witness was deposed, send the transcript and ask him/her to read it carefully before meeting with you.

In the context of discussing preparation of witnesses, I will focus on preparation of the plaintiff, although many of my remarks apply to non-party witnesses. Based on the outline of proof, you should know the evidentiary points you wish to make and the exhibits you will use with this witness. I frequently use a folder for each witness on which I have written the number of the exhibits I intend to use with the witness. I also include within the folder, or with my notes, the checklist of the proof I expect to offer through this witness. Before beginning to prepare the witness yourself, spend some time reviewing these and thinking about your goal with this witness. What are you trying to teach the jury about your case with this witness? What is his or her piece of the story? How do they fit into your theme, or help prove a key element of your claim?

Also give some thought to what type of person the jury will see when this witness testifies; that is, how will this person impact the jury? If your client or the witness has problematic aspects of his or her personality, work hard on these matters before the trial to minimize their negative impact as much as possible. When preparing the plaintiff, an important objective is to humanize him or her, i.e., make him or her sympathetic, credible, and persuasive. Your objective with other friendly witnesses is to make sure they will be able to articulate clearly and persuasively the important evidence you need from them.

As part of focusing on what you hope to prove and what you anticipate the defendant will cover, you should go over the documents written or produced by the witness, including correspondence, memoranda, grievances, other documents filed as part of an informal company grievance process, administrative complaints, affidavits, the pleadings, responses to interrogatories or requests to admit, and carefully study the witness' deposition transcript. When reviewing the deposition, you should focus in particular on identifying areas in which the witness performed well and in which he or she exhibited weaknesses. Identify problem areas and formulate your approach to handling them with this witness.

Before sitting down with the witness, you also should be sure to update, correct, or clarify answers to written discovery and the transcript of the deposition if that is necessary. It is particularly important to focus on the issue of damages and mitigation, if a lot of time has passed since the written discovery responses were filed or the deposition was taken. You want to be sure that you will not be prevented from getting key testimony or exhibits in through this witness by virtue of inconsistency between the testimony or the exhibits and the responses to prior discovery.

When you first meet with the plaintiff or other witnesses to prepare for their testimony, spend some time putting them at ease and attempting to ameliorate their anxiety. It is a good idea to begin by pointing out to them that anxiety is normal and the preparation process will alleviate it somewhat. Tell them that preparation for testimony is a necessary part of the trial process. If asked at trial, they should not hesitate to admit that they have met with you to prepare, and simply point out that they were not told how to answer any particular question, but only that they should tell the truth.

You must also emphasize to the witness, particularly the plaintiff, the importance of their testimony to the case. Here, it is a good idea to review with the witnesses, especially the plaintiff, the

legal and factual issues you'll cover, what issues you expect the Defendant to cover, and how you anticipate it will do so. Point out that this is their chance to tell their story, and that they are the only one who can do so.

Reemphasize to them that you need to know all the facts, even those they consider harmful, embarrassing, or irrelevant. If you ask a question in the preparation stage, they should not hold back such information. They are better off to err on the side of telling you too much, and let you separate the wheat from the chaff. Explain to your client again the attorney-client privilege, and emphasize that not everything they tell you will come out at trial. Where necessary to reassure a reluctant client, you can also touch upon motions in limine and other devices to preclude admission of improper evidence.

You may also point out that it is not necessary for the witness to undergo a significant personality change or to become an Oscar-winning actor to appear sympathetic and convincing to a jury. Emphasize as well that they are not expected to memorize their testimony or have it carefully scripted. Advise them that the preparation will help them identify and deal with weaknesses or problems with their case or testimony, and likely cross-examination. This will minimize confusion, and increase their confidence and yours, making both of you more credible and persuasive. It will also ease their efforts to communicate with the jury.

I usually then begin the actual preparation by going over general guidelines for responding to questions. I point out to them that while waiting to testify, they should not react to, or comment upon, any other witness' testimony or any statement made by counsel or the court. Nor should they speak to anyone or comment on anything on their way to or from the witness stand.

I advise them that while on the witness stand they must listen, listen, and listen some more, to be sure that they have heard and understood the question. I suggest that they ask that the question be repeated or rephrased if they have not heard some part of it or they do not understand counsel's question. I also usually point out to the witness that testimony at trial is not a conversation. There are formal rules which govern it, and certain procedures which make it flow more smoothly. For instance, I remind them to wait until the question has been completely asked. To avoid the natural tendency to anticipate the direction of the question, and jump in with an answer before the question has been finished. This is especially important on cross-examination when the defense counsel is attempting to put words in the witness' mouth.

I also suggest that they pause briefly and think before answering. This should not be an inordinate pause which makes the testimony appear staged or rehearsed, but enough to allow them to collect their thoughts and to permit me or other counsel to interpose an objection if appropriate. I always remind my witnesses to stop speaking immediately if I make an objection, and not to speak before the court has ruled on it. I then advise them to ask that the question be read back or repeated or rephrased, if they have forgotten the question during the course of colloquy between counsel and the court on the evidentiary issue.

Review with the witness the importance of sitting up straight, appearing relaxed and natural, avoiding certain undesirable body language, like crossed arms, scowling, clenched teeth, or leaning too far forward in the witness chair. Remind them to avoid fidgeting, or other nervous habits which undermine credibility. You should also work to root out any "tics" in their speech such as "like" or “y’know” or "uh huh", or qualifiers or weasel-words which make them appear to equivocate.

Remind the witness, especially your client, to be polite at all times. Answer defense counsel by saying, for example, "yes sir" or "no sir", not "yeah". Always address the court as "your Honor". When the jury and/or judge enters the courtroom, stand up and do not sit down until the jury or judge has done so. (If the witness is on the stand and the jury is excused to permit the court to hear arguments, the witness should not stand as the jury leaves and reenters.)

It is also a good idea to spend some time with the witness fi particularly your client fi on the focus of their attention during questioning and testimony. It is generally best to have the witness focus on counsel while the question is being asked and then, in a natural rather than obvious manner, turn and direct their attention to the jurors while answering. To facilitate this process, where the judge will allow it, I usually try to stand near the end of the jury box so that the witness is looking at or across the jury when listening to my question, and can look at me and the jury at the same time while answering. This also has the advantage of assuring me that the last juror in the box is able to hear the witness' answers clearly. When this is not allowed, you and the witness can agree on a cue to remind him/her to direct his/her focus to the jury when delivering important testimony. One such device is including in a question a reminder to speak to the jury, such as "please tell the jury what you did next".

Emphasize the importance of always telling the truth, even when the answer appears harmful. Explain the hazards of lying, equivocating or evading the truth. Remind the witness to restrict the response to first hand personal knowledge. He/she should speak of what he/she did, said, saw or heard. The witness should not provide hearsay 6 what they were told or overheard 6 unless it is clear that the question calls for it, and there is no objection to the question, or the court has allowed it.

I also explain to the witness the importance of speaking clearly, deliberately, and loudly enough for the jurors and court reporter to hear. If you or a witness have a tendency to mumble, or speak too rapidly, or have some other habit that may make it hard on the reporter, arrange ahead of time with the reporter to let you know when he/she is having trouble hearing or understanding, such as by raising his/her hand. You want the record to be clear.

Also, review with the witness the virtues of brevity, clarity and focus. I also emphasize that they should strive to use simple, everyday language with which the jurors will be familiar and comfortable. Avoid street language and slang. I point out to them that if a question can be answered with a simple yes or no, that should be the answer. They should not feel compelled to explain or justify their answers or defend them unless they have been asked to do so, usually on cross-examination.

I tell them not to answer defense counsel's question with a question. If they have a question, such as whether they can put their answer in context or provide an explanation, they should ask the judge for that opportunity, not counsel.

I stress that they should never guess at an answer to a question or feel obligated to have an answer. I point out that it is acceptable to testify that they do not know the answer to a question or do not remember it. It is far better that they admit this than to provide an answer which is based on a guess that can later be proven to be wrong. Tell them to use simple language to make this point. "I don't know" is better than "I don't recall"; "I don't remember" is preferable to "I have no recollection". That sounds like lawyer-talk. I also advise my witnesses that in certain circumstances it may be appropriate or necessary to estimate or base an answer on best recollection. But I ask them to make clear to the jury that that is what they are doing, so that such an answer does not come across as a categorical statement of fact, which can later be shown to be not entirely accurately.

I also tell the witness to be sure to review a document before answering a question from defense counsel which is based on it. In this way, the witness makes sure the counsel has properly summarized, paraphrased or characterized the substance of it. It's also a good idea here to remind the witness to try to refer to an exhibit by its number when providing testimony relating to it. This ensures a clear record.

I tell my witnesses not to volunteer information that has not been asked or to anticipate that counsel will go into another area of inquiry. He/she should stick to answering the question that has been asked.

It is also important that the witness concede graciously what he/she must. It is very damaging to argue or equivocate over matters which are not subject to reasonable discussion, given the other evidence in the case and their answers in discovery, or to become hostile or antagonistic because counsel has moved into these areas. I remind witnesses that they should never otherwise become argumentative, belligerent, or hostile, and should avoid outbursts, sarcasm and inappropriate attempts at humor.

Point out you may make limited objections. You may only jump in on the big stuff or if you feel that defense counsel is engaged in particularly inappropriate or outrageous lines of inquiry. I advise the plaintiff and other witnesses that they should not be alarmed if I do not object repeatedly, or if I allow counsel for the other party to become somewhat aggressive in cross-examination. It makes a better impression for the client to withstand such efforts without my interceding, if I can do so without suffering major damage to my case.

Before reviewing the anticipated testimony with a witness, I ask whether he or she has carefully reviewed any documents with which they are likely to be confronted or to which I will direct their attention during direct examination. At a minimum, this includes correspondence or memoranda pertinent to the case, grievances, memoranda or correspondence submitted to the company, other documents submitted to the company as part of an informal company grievance Process, notes of

conversations with defense decision-makers or other players, administrative complaints, affidavits, the pleadings in the case, discovery responses filed by the witness, the transcript of the deposition, if applicable, and any exhibits with which the witness will be dealing during direct or cross-examination.

I then review with the witness an outline of his or her testimony, pointing out the areas of proof to which the examination will be directed. At this point, it is necessary to go over in detail the examination which you will conduct, particularly if the witness is your client. You should do so as often as necessary to ensure that the testimony will be as smooth and convincing as possible. Avoid using a script or having your client memorize responses. Remember that the documents you show the witness, including experts, to prepare for testimony will probably have to be disclosed to the other side, if they learn during cross-examination that the client or witness has relied on these documents to refresh his or her recollection or prepare for testimony.

Do not forget to tell your client or other friendly witnesses that you will be there to help if they forget testimony or have other problems. It's a good idea to explain the rules governing, and process for, refreshing a witness' recollection. Remind the witness that he/she must affirmatively indicate in response to your question that reviewing the document would or might refresh his/her recollection. Go over the rest of the questions by which you'll try to refresh his/her recollection. Remember that a witness' recollection can be refreshed with anything suited to the task, even if it is not an exhibit or is not admissible. Also touch on the past recollection recorded exception to the hearsay rule, and the ground rules for getting the document in, if this is likely to come up. Rehearse with the witness the questions you'll ask to deal with any weaknesses or problem areas. It is always best to cover these areas yourself on direct examination to take as much of the sting as possible out of them.

5. Preparing for Your Witnesses' Cross Examination

While preparing the witness, also anticipate and cover likely areas of cross-examination. Explain the areas defense counsel is likely to cover in an effort to impeach the witness or counter the testimony. Consider bias, motive, and interest. This includes relationships to the parties, their interest in the outcome and their attitudes toward certain issues in the case. If appropriate, deal with the possibility of impeachment by criminal record, bad acts, prior inconsistent statements, or a reputation for dishonesty.

With the plaintiff, a good place to focus next is on the pleadings, interrogatories, depositions and exhibits prepared by your client. These are the most likely sources of cross-examination, because defense counsel knows the areas into which he can safely inquire, because he/she can tie your client or witness to the statements in these documents. I also advise witnesses not to argue over areas in which they must concede certain points, given what is in these documents, and the weaknesses in the case itself.

Where the witness is impeached through deposition testimony which appears to be, in fact, somewhat consistent with the witness' testimony at trial, it is a good idea to suggest that the client try to avoid appearing startled or concerned. One useful response is simply to say something along the

lines of "isn't that what I just said." Where the testimony is inconsistent, but requires an explanation or placement of the statement in context, the witness should admit the statement, but ask the court for an opportunity to explain it or set forth the context. While counsel and the court may not allow this to occur, it will take some of the sting out of the answer and the jury will perhaps reserve judgment on the matter until hearing redirect. The jury may also resent defense counsel for objecting to your client's attempt to explain the matter.

It is also a good idea to go over with the witness how he or she will handle hypothetical questions. Assuming they are not expert witnesses, I recommend that they respond that they cannot say how they would respond to that type of imaginary situation. It is dangerous for a lay witness to head down the path of hypotheticals.

Another area that I typically review is how to respond to unfair leading questions, in which the defense attorney attempts to force the witness to answer "yes" or "no" to a question which cannot fairly be answered in that fashion. The witness should be advised to point out that the question cannot fairly be answered that simply and that any answer provided would need clarification or explanation.

It is also important at this time to explore with your client or other witnesses any developments which may have occurred since the written discovery responses were filed or the deposition taken. For example, you may ask the Plaintiff or the witness whether they have discussed the lawsuit or any important issues with other persons, to be sure that they have not made admissions to defense representatives in the interim. You might also explore whether they have exchanged with anyone any correspondence or memoranda or other documents concerning the lawsuit or any other issues in it. Another fruitful area to explore is Plaintiff's efforts to mitigate his/her damages, including updating job search efforts.

It is also useful to reiterate to the witness in the context of reviewing cross-examination the appropriate demeanor in response to defense counsel's question.

Practice the cross-examination and the witness' responses in a realistic manner. This requires you to be ruthless in exploring the weaknesses of your client's testimony, and to push him or her to the limit of his/her ability to respond. You need to know how he or she will handle vigorous cross-examination and impeachment as well as the weaknesses or problems. The main reason for doing so, obviously, is to give the client and yourself an opportunity to identify and practice the best method of responding to these areas. Sometimes it is a good idea to use a colleague for this process, especially if it may be difficult for you to approach the cross-examination with the necessary vigor given the relationship that you have developed with your client. If possible, you may want to videotape these sessions so you can review the tape with your client and point out inappropriate body language, answers which could be handled more appropriately, and the like. Be cautious about doing this if you think your witness will irrevocably lose confidence as a result of viewing his/her "weaknesses" on tape.

6. Dealing With Redirect Examination

It is also a good idea to explain to the witness that while you have an opportunity to conduct redirect examination, there is no guarantee that you will do so. When conducting redirect, do your best to rehabilitate the witness quickly by focusing in on key areas in which the defense has scored some points and concerning which you can credibly improve your position. I advise the client and other witnesses that they should not be alarmed if I engage in little or no redirect.

B. Presenting Your Witnesses' Testimony Order

1. <u>Order</u>

After you have prepared your witnesses, submitted your pretrial report, put together your trial notebook and bench book, if applicable, it's time to present your case. One of the key decisions you have to make is the order in which to present your witnesses. One question to be decided is whether you should always present the plaintiff's testimony first. In some circumstances, it might be better to present family members, friends or colleagues to humanize a difficult plaintiff, or to deal with some significant weakness in his or her anticipated testimony attributable to the impact of the events at issue. In other cases, it may be advisable to begin with certain adverse party witnesses to provide necessary background concerning the company's policies and procedures and the actions taken and the stated reasons therefore.

In deciding the order of your witnesses, remember that jurors tend to best remember the witnesses they hear first and last. You should also pay attention to the time of day or week at which the witness will testify in deciding upon the order of the witnesses. You want to put on your strong witnesses at a time of day when the jury is likely to be energized and interested. It is best to put on dull witnesses or cover weaknesses or problem areas at times of the day when the jury will be less likely to focus in on testimony, such as mid-afternoon or toward the end of the week. It is also advisable not to begin examination on an important area if you anticipate a lengthy interruption to the proceedings before you can conclude that area of inquiry, such as a weekend or non-trial days.

Also, you should spend some time determining when to present any expert witnesses whom you have decided to use. One school of thought suggests placing them toward the end of your case, since their testimony is more complex and the jury may be required to put more energy into remembering and understanding it. If the testimony is particularly important, there also is an increased chance the jurors will remember it if it is presented at the end. In any event, it is always a good idea to try to balance the proceedings by putting on good witnesses after dull ones or difficult ones. Where you have had to put on some dull or difficult witnesses, it might be a good idea to follow with a particularly lively or interesting expert witness. Remember, however, that a trial is not a theatrical production. No matter how well you plan the order, you will not always be able to follow these guidelines in practice.

2. Direct Examination

When it comes to formulating your direct examination of your client, in particular, do not overlook the importance of personalizing him or her. It is usually a good idea to spend some time on the client's education, training, experience and family life and background. You should also attempt to have the client establish the importance of the work to him or her and the satisfaction he or she derived from it, particularly if they have lost their job.

In formulating the questions to use, there are basically two approaches: the question and answer format, and the narrative format. The former can become somewhat wooden and uninteresting if not handled properly. The latter gives your client a chance to stand on his or her own two feet more, but increases the risk of objection. It is probably a good idea to attempt to mix the two as much as possible. Do not be afraid to test the limits of how far opposing counsel and the court will allow you to proceed in terms of utilizing questions calling for a narrative response, or even leading your witness in certain areas, particularly on preliminary matters. When you reach important areas from time to time, use questions which remind the client or witness to speak to the jury. For example, "Please tell the jury what your boss said or did".

Give some thought to whether you should stick to the relatively easier chronological approach to the examination, or use a different, but perhaps more effective, technique. If you have a witness who has trouble remembering details or is especially anxious, he/she may find the chronological approach more soothing. In some cases, however, you can grab the jury's attention by quickly touching on, highlighting or previewing a significant, interesting or emotionally charged area. You can come back to it later to explore it in detail.

Try to start and finish on a high note, and put the difficult, or weak points of your testimony in the middle.

Just as it is important for the client to listen to the question, it is equally important for you to focus carefully on the answer the client has actually given to the question you asked. Resist the temptation to be focused on the next series of questions you plan to ask, the exhibit you are about to offer, or the argument you just lost before the judge on an evidentiary issue. Just because you have a checklist or a series of notes which indicates that you expect the witness to provide a certain piece of testimony in response to a certain question, it does not mean that he or she will actually pull it off. You must listen to the question and make sure that you have gotten the answer you need. If not, follow up and ask the witness to clarify or expand upon the answer before moving on to the next avenue.

If necessary to support a proffer of evidence, make a motion to amend the pleadings to conform to the proof you want to offer. This can be done without too much ado if there's no prejudice. Also, consider whether you otherwise need to amend the pleadings at some time to conform to proof that's already gone in.

If you have lost an evidentiary argument on a key piece of evidence, and later think of some additional argument to support its introduction, do not be afraid to ask the court, outside the jury's presence, to reconsider its ruling. At a minimum, this will create a better appellate record. Be sure, however, that

Be prepared to come at things from a number of perspectives. Even friendly and well-prepared witnesses generally do not give you exactly the answer you want or need. If you have the luxury of a partner, associate or paralegal who is assisting you at the trial, it is a good idea for them to keep track of the proof checklist to make sure that the witness has in fact covered the areas you had planned for him or her to cover.

Anticipate likely objections which defense counsel will make to the areas of inquiry you plan and/or to the exhibits you wish to offer. Be prepared with your responses to those objections. If the anticipated objection concerns a particularly important piece of evidence or involves unusually complex evidentiary issues, have a memorandum prepared, citing points and authorities in support of your offer. Also do not overlook your obligation under the rules to make an offer of proof if the objection is sustained. See p. 15 infra.

C. Cross Examination of Adverse Witnesses or Presentation of Direct Testimony From Adverse Party Witnesses

Many of the points discussed up above apply equally here. In addition, it is important to carefully plan your cross-examination, focus on area in which you can score points, and avoid muddling around in areas in which you are not scoring points or in which you risk the danger of an unanticipated harmful answer to which you cannot respond appropriately. The key here is to anticipate that adverse witnesses will provide false, misleading, self-serving and/or evasive responses to questions, even if they have previously given you helpful admissions in discovery or in a deposition. When outlining your cross-examination, make sure that you have identified the exhibit, pleading, interrogatory response, request to admit or the portion of the deposition at which the answer you want the witness to supply is located. Also, make sure that you have those sources of impeachment readily available so that you may quickly turn to them if the witness evades your question or gives a clearly untrue response.

I tried a case against a lawyer who had a notebook in which his cross-examination questions were outlined on the right side of the notebook and copies of the highlighted impeachment materials related to those questions were located to the left. While this type of obsessive organization may not suit your style, being able to quickly and efficiently put your hands on the appropriate impeachment material has a positive effect on the jury, and quickly cures the opposing witness of the inclination to avoid the concessions you seek. I have found that it only takes a few instances of quickly directing the witness' attention to specific statements in his or her deposition which contradict the testimony he/she has given you, to convince the witness that it is best to admit things he or she has already conceded elsewhere. After a few instances of shoving the deposition testimony in the witness' face, it usually has been necessary for me only to reach toward the transcript to provoke a clarification from the witness or a sudden recollection of the early contradictory testimony. Nothing makes a worse

impression, however, than attempting to impeach a witness with a prior inconsistent statement, while forcing the court and the jury to wait while you fumble through your file looking for it.

In cross-examination your goal usually should be not to score the knockout punch, but to inflict a number of small wounds. You can then use these concessions in closing to support the inference or conclusion you want the jury to reach on the important stuff. Do not waste time on unimportant stuff, do not go into areas in which you cannot control the witness, and do not go for too much if you cannot get it. Know when to stop. If you get the concessions you need, take them and move on. Attempting to hammer it home or reach for more, can blow up in your face. Also, try hard to finish on a high note.

Here too, it is critical to anticipate objections which are likely to be made to the areas into which you inquire, and to have your responses organized and prepared in advance as much as possible. Where you anticipate evidentiary objections to any area of cross, have a memorandum or other list of authorities available for the judge to review.

Finally, do not overlook the steps you must take to preserve an evidentiary issue for appeal in the event that an objection to your cross-examination is sustained on a basis which you believe may be improper. If you missed the chance to make the objection before the evidence came in, or did not handle it as well as you would have liked to, do not overlook the motion to strike and the appropriate instructions to the jury.

III. Handling Exhibits at Trial

With the common use of pre-trial statements and trial management orders, each party is usually aware before trial of most of the exhibits which the other party intends to offer. These exhibits are typically pre-marked and the parties stipulate to the admission as full exhibits of non-objectionable documents, and specify at least the general nature of objections to those which are in issue. This pre-trial preparation assists counsel to prepare and organize the exhibits with which he or she will be dealing at trial. Nevertheless, in a complex case with many documents, you need a system which will work well for you to handle your exhibits. This system should allow you to track which exhibits have been offered, admitted, excluded, and to put your hands on them quickly at any time during the trial. It may not be possible to keep all the exhibits in a trial notebook. The following is an approach which has worked well for me, although it is far from the only one, particularly in today's technologically-advanced environment.

I begin a list of potential exhibits as I prepare the case. These are usually numbered and kept in separate folders. I prepare a comprehensive list of them, which I update and edit as the preparation continues. I often annotate the list with important information about the source of the exhibit, the witness(es) with whom I will use it, and the purpose for which it will be introduced. As I get to the trial stage, I pare this list down into a list of (a) the exhibits which I know or reasonably anticipate I will offer as Plaintiff's exhibits; (b) the defendant's anticipated exhibits; and (c) other documents which may be important as the trial unfolds, but which I am not sure will be marked by either side as exhibits. At the trial, I typically keep these exhibits in this order, each contained in a folder with the exhibit number on it.

I usually keep them in copy paper boxes or some other container, which will allow me to sort through them quickly and find the ones I need. Within each folder are sufficient copies of the exhibit for the judge, the adverse party, myself, and, in some instances, the jurors. I anticipate that the original will be used by the witness. Upon concluding my handling of a particular exhibit during the trial, I return my copy to the appropriate folder in the box as soon as possible, so I can find it again quickly when I need it.

One interesting approach I have seen one opposing counsel use is to group the exhibits by topic and number those relating to a particular topic sequentially. For example, all memos or letters by the plaintiff to his boss on a certain topic are numbered in the 300 series, and all 300 series exhibits are in one notebook. In closing, he was able to emphasize to the jury the ease with which they could find particular notes, letters, or memos on the topic in question. "Just go to the 300 series notebook. There they are filed chronologically."

As noted above, I usually have a folder for each witness which also notes the number of exhibits I anticipate using. I also have the checklist to be sure that I have covered all of the exhibits with the witness before I excuse him or her from the stand.

Another Prerequisite to handling documents appropriately is to be familiar with the particular requirements of the judge before whom you are practicing concerning the marking and handling of the exhibit. When questioning a witness about a particular exhibit, I often position myself between the witness box and the jury box so that I can direct the witness' attention to pertinent sections of the document without obstructing the jury's view of the witness. (Not all courts will permit counsel to approach the witness in this fashion). If the exhibit is a particularly significant one, I may also place before the jury a foam-backed poster which contains a substantial enlargement of the exhibit. In this fashion, the jurors can follow the text as I am walking the witness through it at the witness box. If it is a particularly helpful exhibit, I may leave the enlargement up for the jury for a reasonable period of time, even after I have concluded my examination of the witness on that subject.

In working with exhibits, as in the case of witnesses' testimony, it is important to anticipate the objections likely to be raised and to frame ahead of time your response to the objection. Similarly, you must be prepared to articulate coherently and convincingly the objections you have to the opposing party's exhibits. Objections which frequently arise include foundation, authenticity, relevance, hearsay, and those based on Rule 403. Where the issue is particularly involved or the exhibit particularly important, it is important to prepare in advance a brief memorandum or other document, setting forth authorities supporting your position on the evidentiary issue.

If a particular exhibit is either novel or you recognize that some aspect of it makes its admissibility questionable, such as a graphic, it may be advisable to show it to opposing counsel before trial to learn whether he or she has any objection to it. This will permit you to accommodate reasonable objections, and possibly obtain a stipulation or at least increase the likelihood of getting the exhibit in. Of course, there are some circumstances in which it is not appropriate to display the exhibit to counsel beforehand, because to do so would damage your case.

As others before me have pointed out, there are also circumstances in which it may be appropriate to seek a hearing before trial, by filing a motion in limine or otherwise, to determine the admissibility of key evidence. See K. Spriggs, Motions in Limine, 1999 Annual Convention Materials, Volume I, p. 26 et seq; S. Stark and A. France, Common Motions in Limine and Supportive Authority for Plaintiffs, 1999 Annual Convention Materials, Volume I, p. 62 et seq. The benefit of this approach is that a ruling is obtained before trial, which may permit you to modify or otherwise adjust your presentation of the exhibit to make it admissible.

It is as important to focus on preserving your appellate record when handling objections to exhibits as it is when dealing with testimony. If an objection is sustained to an exhibit you seek to offer, make sure that you have it marked for identification, and have complied with the requirements of the federal rule concerning a proffer. See the excellent discussion of this by Professors Edward J. Imwinkelried and Louis A. Jacobs, Evidentiary Issues in Employment Discrimination Cases, 1999 Annual Convention Materials, Volume II, pp 842-847. Conversely, if you oppose the introduction of a particular piece of evidence, clearly state your objection and the bases for it on the record, even if the court has ruled upon it at a pre-trial hearing or in connection with a pre-trial motion in limine. While there are some circumstances in which a definitive ruling by the court in a pre-trial setting will obviate the need for an objection during the trial, to preserve your right to appellate review caution dictates restating the objection on the record, unless you risk unduly provoking the judge. See Id.; see also K. Spriggs, Motions in Limine, supra, pp 57-59.

If you are focusing on an evidentiary issue on appeal be sure to identify and articulate the appropriate appellate standard of review. See Evidentiary Issues in Employment Discrimination Cases, supra, pp. 845-47. The article by Professors Imwinkelried and Jacobs also provides a useful review of the types of evidence which are probative of discrimination claims.

IV. Demonstrative Evidence

The legal standards governing the admissibility of demonstrative evidence are adequately reviewed by my colleague, Wayne Kenas. There is no purpose to be served by my elaborating on that discussion. Rather, I thought it best to focus on the manner on which I have used such exhibits, although less "high tech" than Wayne's.

Demonstrative evidence has many uses as all of us are aware. Some of the more important ones that I focus on are based on the well-established principle that people remember best what they not only hear, but also see. With this in mind, I have generally used this type of evidence to highlight, summarize and make more interesting important, but sometimes complex and often dry, material that is necessary to sustain certain types of employment claims and to document damages. Perhaps the best way to illustrate this point is to use examples from a trial I conducted.

First, let me give you some background on the case. My client was employed by the Electric Boat Division of General Dynamics Corporation (the nation's premier submarine builder) as its Director of Nuclear Quality Control. His position was a high level, high profile executive position, which made him responsible to oversee the company's compliance with the vast array of technical and other specifications governing the construction of the nuclear reactor and associated systems on the submarine. My client had worked for the company for over 14 years when he was promoted into this position in 1988, and for over 18 years when he was removed from the position in June, 1992. He was demoted to a non-supervisory position in early 1993. He claimed the company took these actions because it was unhappy with the cost and delay associated with his vigorous enforcement of nuclear quality control standards. The company argued that he was removed from his position because his performance was deficient.

A central issue was whether he and the company were parties to an implied contract under which the company was required to provide him written annual performance evaluations on a specific form, known as a Salaried Personnel Accomplishments and Development Review Form (SPADR), written notice of deficiencies, if any, and an opportunity to improve, before removing and demoting him based upon claimed performance problems. A related issue was whether his performance was, in fact, deficient in the manner claimed by Defendants, or sound as he claimed. The company had a well-documented and detailed personnel evaluation system, involving the use of the SPADR form and a summary performance and potential rating and ranking (PPR) card, which was not shown to the employee. This evaluation system was described in numerous handbooks, memos, a video and in supervisory training materials. The company also had similar documentation concerning the procedure and documentation requirements applicable to disciplining a salaried employee.

The client never received a SPADR at any time while he was Director of Nuclear Quality Control or any other written warning concerning his performance. However, his supervisor did fill out PPR cards each year, which Plaintiff never saw, rating his performance as above average and concluding that he had potential for advancement to the next level. The last such card was filled out only a few weeks before he was removed from his position. In short, he had no notice of any claimed performance deficiencies, including any notice of the specific incidents which allegedly led to his removal and demotion. In addition, the company never followed its prescribed procedures for disciplining a salaried employee.

Another important feature of the case was that the Plaintiff suffered no loss of salary as a result of his removal and demotion. Instead, he lost eligibility for a specific form of compensation known as incentive compensation paid as a bonus each year, and his salary grade was reduced 3 levels. His salary was nearly at the maximum allowed for his new salary grade. Earlier, he had the opportunity for substantial additional salary growth. I needed to convince the jury that this change in his salary grade caused him real damage even though his salary remained the same.

One of the other issues I faced was how to focus the jury's attention on key documentary evidence concerning the performance evaluation and review process in a manner which would be memorable and not tedious. Although we put into evidence the many manuals, memos and the like, and had witnesses testify concerning them, I thought that something more was necessary to focus their attention on the key elements of this part of the case.

With the help of a consultant, we devised a series of poster-sized color enlargements of key excerpts from the important documents. I found it very helpful to place these before the jury and point to the excerpts while examining various witnesses who were themselves referring to a normal sized copy of the document.

Exhibits Al.0 through Al.1 are good examples of this format. On the poster, we included a color copy of the front and back of the handbook using the actual color of the document to ensure jurors remembered where this information came from. We then included the specific description of the relevant rating (above average) highlighted in yellow. To further emphasize that point, we blew that language up and emphasized part of it in a large box at the bottom of the chart. We did the same thing for the next lowest rating which was fully satisfactory, to emphasize that my client exceeded those criteria at all times. Finally, we did the same type of thing for the "potential" rating. It was important to emphasize to the jury the Defendant's own description of an employee who was performing as my client's supervisor concluded he had been performing. We then put on one board all 4 of my client's PPR cards to emphasize the secret ratings he had received, having earlier explained their significance in Defendant's own words. Exhibit A1.2.

A similar example is Exhibit Al.3 which contains highlighted, enlarged excerpts from a key policy memo on the SPADR process. Exhibits Al.3 through Al.4. We used a similar technique to emphasize the documentation and procedure requirements applicable to disciplining a salaried employee, none of which were met here. Exhibit A1.5

Another use we made of these enlarged type exhibits was to emphasize key sections of technical specifications and correspondence exchanged between EB and the Navy, concerning errors in construction of key parts of the reactors for two Trident submarines, for which EB blamed my client after-the-fact. This exhibit showed that my client was not responsible for the error, and not surprisingly, he was not blamed when it happened, although the Defendants were claiming that he was responsible by the time the matter came to trial. Exhibits A1.6 through Al. 10. We used another similarly-treated enlargement to rebut Defendant's claim that the Naval Reactors' 1992 audit of the shipyard's nuclear work had gone poorly, another claimed indicia of my client's poor performance. The chart shows that my client's successor, Kevin Murphy, who had nothing to do with the audit, actually was rewarded in late 1992 by my client's supervisor, because the audit was "very successful". Exhibit A1.13. My client's supervisor had sworn in an interrogatory response and at trial that he believed the audit to have gone "very poorly". Having this enlarged document, which he signed, in front of the jury not only forced him to read his earlier characterization of the audit as "very successful," but also had a powerful effect on the supervisor's credibility in the jury's eyes.

We used another type of chart to summarize and graphically depict the discriminatory treatment of our client in the Spring of 1992 in connection with the company's merit raise process. Exhibit Al. 18. While I offered testimony concerning this matter and the backup documentation concerning the raises provided to various employees, I thought that showing the matter graphically would be more effective. Each figure on the graph represents a salaried supervisory employee who was rated the same as plaintiff in 1992. The location of each figure indicates the specific raise the employee received. We also used different colors to differentiate the size of the raises earned. Each $1,000 range had its own color. The chart showed quite clearly that the plaintiff, and one person whose job was to be eliminated, were the only supervisory, salaried employees rated 3P who did not receive a raise. The Court excluded this chart because it thought evidence of treatment of comparable personnel is not relevant in an implied contract case like mine.

We used another colored chart to depict graphically the steady growth of plaintiff's salary until he was removed and demoted. This chart also shows for each year the type of raise, bonus or other award plaintiff received. (Attached)

We also used a timeline, which depicted above the line the escalating disagreements between plaintiff and his supervisors relating to nuclear quality control issues which we believe culminated in his removal and demotion. Below the line, we listed the alleged performance issues which the defendant asserted were the reasons for the demotion, many of which occurred at or near the time of the quality disagreements. This too was excluded, but I could have used it in closing.

charts to summarize the various ways in which defendant's explanation for the adverse action changed as the litigation progressed. (Too large to include.) This chart demonstrated that each time we disproved a reason articulated by the defendants, they manufactured another one. I argued that this was proof that the real reason was not performance as defendant claimed, but an improper one which they desperately tried to avoid articulating. (I have included a small copy of a similar exhibit we offered into evidence which the court excluded, erroneously I believe.) Exhibit Al. 11. Other lawyers have used similar charts and have stricken or torn off each reason after rebutting it in closing.

We used another chart simply to list and total the various elements of plaintiff's out-of-pocket damages. (Too large to copy.) We had prepared other charts as exhibits to depict and detail the basis for calculating each of these elements of damages. (Attached hereto.) The jury awarded plaintiff a few thousand dollars more than the total shown on the chart used in closing arguments.

I am convinced that this demonstrative evidence helped focus the jurors' attention sharply on important sections of crucial documents which may otherwise have been lost in the mass of documents they received from both sides. I also believe these exhibits greatly assisted the jury in following the testimony about key documents, performance and other issues in the case. They helped me to present a complex and, at times, dry case in an entertaining and memorable way. While I have no proof, I am sure that the size, highlighting and other eye-catching features of the large exhibits made them stand out as the jury sifted for several days through boxes of ordinary exhibits each side had offered. The jury awarded my client $775,000, although he still works for the company and his salary was never reduced.

V. Motions in Limine.

Little purpose would be served by my elaborating on the presentations on this subject contained in last year's Convention materials. See K. Spriggs, Motions in Limine, supra, and S. Stark and A. France, Common Motions in Limine and Supportive Authority for Plaintiffs, supra.

One final point is a caution about side bar and chambers conferences. Do not participate in discussion of important issues in these contexts, unless it's on the record. If something important unexpectedly occurs at one of these which is off the record, summarize what happened on the record.

VI. Conclusion.

To prevail you must first convince the jurors that you believe passionately in your client's cause. Second, you must project competence and confidence in presenting your evidence. The keys to this are preparation and organization both in dealing with witnesses and exhibits.

When in doubt use Nelanet, the Nela National Brief Bank and the Advocate. It also would not hurt to get your),elf a copy of McElheney's Trial Notebook and read it frequently.

Good luck!