Trial Tips for Plaintiff Employment Lawyers:

Strategies and Common Mistakes: Preparation, Preparation, Preparation.

Prepared for:

National Employment Lawyers Association-Houston Chapter
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i. Send discovery to the company, as well as individual defendants. These should include RFDs, ROGs, RFPs and RFAs, and potentially DWQs.

ii. Also think about depositions on written questions for things other than just document subpoenas. That is, issue them to certain witnesses and document custodians with more than merely business records questions. Ask some substantive questions about document retention policies and whether they were followed in this case or not, and why or why not, if known.

iii. Even if the defendant quashes the deposition, their motion to quash and the hearing on same can often be a treasure trove of information for you about records custodians, policies, trade secret and confidentiality issues, sensitive points that the company or individuals have, etc.

d. It is a huge problem to not have undertaken discovery early and aggressively in the case. Invariably, I see cases where the defense attorney at pretrial or trial says that the plaintiff never asked for this or that. Or, that the plaintiff's attorney never moved to compel in the face of objections to discovery. If they object and don't produce responsive documents and you do not move to compel, they are not required to produce the documents and you may not have them for trial. Then when you ask for a continuance, you may lose credibility in the courts' eyes.

e. **Don't be blindsided by Facebook posts.** It is not enough to ask your client for their own social media posts & emails. You have to see what the other side has. In an employment case, social media posts can be a killer. You need to have thoroughly asked for these documents from the defendant. If you do no ask for and obtain these documents over defendants' objections, and you see them for the first time at trial or pretrial, it is too late. The picture of your client drinking or celebrating right at some relevant time period when the hostile work place was at its worst, will gut your case. Alternatively, if there are posts about how sad you are about your workplace because it's such a hostile workplace, how they're retaliating, etc., in real time, they may bolster your case (they can potentially be used to counter a claim of recent fabrication under TRE Rule 801(e)(1)(B) if nothing else.)

i. Know the law in Texas and the 5th Cir. about using web page information. Title VII has protections: Impermissible classifications found on web pages may be just as protected as non-internet classifications. And, under the Stored Communications Act, an employer cannot necessarily obtain the web page information through deception. So take discovery on how

gets to say, about the defendants, "They promised you a,b,c, and x,y, and z, and they only showed you a and b. Where's the rest? They have failed and you must find for the Plaintiff because by Defendant's own standards, they have not proven their case." Not the reverse.

i. For example, in a retaliation case, if the Defendant claims that the Plaintiff was terminated for being late, having stolen from the company, etc., make sure to emphasize in closing that there was no credible evidence of tardiness or a theft. Alternatively, show that the tardies resulted from the harasser's conduct, and the company never investigated as much. Query why the defendant did not bring that part up in their opening. Paint the defendant as an entity that is being less than forthright, and you will impact the jury more significantly.

ii. The reverse is also true. Do not tell the jury that your client was a boy scout, if he is not. If you make that representation up front, it can only come back to hurt you in closing. You can also expose some of your weaknesses up front to show the jury that you have a strong case. Juries are compassionate, but will typically not tolerate a less than honest attorney or client.

4. Objections: Objections serve two purposes: (1) to keep out evidence that is inadmissible, and (2) to educate the judge and jury. Here are some tips on *responding* to common objections from the defendant and making objections and otherwise *limiting the defendant's evidence*.

a. The best advice I can give about objections is preparation and anticipation. If you mock try your case (which you should, more than once), or at least give it careful thought about how you will get EACH piece of evidence in, then you will be more successful with objections.

i. One common objection I hear from defense attorneys is *lack of foundation* or lack of personal knowledge, or speculation. Invariably, I ask the plaintiff's attorney to lay the foundation and sometimes they look at me like a deer in the headlights and move on to a new topic. When the jury sees that, they probably can sense that you've given up on that topic. You need to have anticipated this objection and to have laid the groundwork for the witness's testimony. Ask yourself as you're writing your questions, "How does this witness know that?" Just like in a summary judgment affidavit, run through the witness's basis for having personal knowledge of the topic. "I know about ABC Company's records retention policy because I received training on it, and I worked in that department that was

are (1) admissions by a party opponent (Rule 801) (with this rule, you need to plan carefully to show which of the defendants' employees had authority to make and bind the defendant in a given circumstance so that their statements would be admissions by the party.) (2) remember, also, that admissions by a party opponent do NOT have to actually be admissions *against interest*. They are just statements. (3) get your business records affidavits in on time, or be prepared to call a custodian live at trial. They must be filed at least 14 days "*prior to the commencement of trial in said cause.*" TRE 803(10)(a). Not 14 days prior to the time they are to be offered into evidence, but 14 days prior to TRIAL. Billing records affidavits have to be filed at least 30 days before THEY ARE USED at trial. Note the difference.

3. *Best Evidence*: A lot of lawyers get tripped up with "best evidence" objections when they try to either (1) have a witness testify about the contents of a document, or (2) using copies instead of originals. Rule 1007 allows you to elicit testimony about the contents of a document of the party AGAINST WHOM the document is offered, so put the defendant on the stand and ask them about the document all day long. Otherwise, if you want to overcome or avoid a best evidence objection about a missing document, be prepared to show under TRE 1004(d) (among other methods) that the original is in the possession of the defendant and they knew it would be used (send express notice out well before trial if it's likely to be an issue) and they have not produced it, or under TRE 1004(e) the matter is collateral or not closely related to a controlling issue.

4. *Rule of Optional Completeness*: This is really two rules in common legal parlance, TRE's 106 & 107. These rules allow the plaintiff to read additional portions of a document or deposition, or to ask about the remainder of a conversation if, in fairness, it ought to be read (TRE 106), or if it is necessary to make the conversation fully understood (TRE 107). You can possibly get an otherwise admissible responsive letter, for example, into evidence with these rules.

5. *Pleadings as Evidence*: It is common "knowledge" that pleadings are not evidence. Generally, a plaintiff cannot offer the defendant's answer or counterclaim as evidence in the case.

b. Remember, it's not that something is just "prejudicial," but rather, that its probative value is *substantially outweighed* by the danger of (i) unfair prejudice, (ii) confusion of the issues, (iii) considerations of undue delay, and (iv) the needless presentation of cumulative evidence. Rule 403 may be just the tool the court is looking for to get things moving in a slow-paced trial.

c. Rule 401 can be useful when you don't know where a line of questions is going. Make a relevance objection (sparingly, please) and try to force the defense attorney to spill his or her line of thought. Or, the line of questioning may just not be relevant, and you can move things along, and keep out potentially damaging, but collateral information, especially if the judge or jury appear tired or bored.

5. Presentation of Your Evidence:

a. *Technical Issues*: At pretrial, the judge is assessing your readiness to go to trial and early impressions about your organization matter a great deal. If you're the side with your documents organized, marked, exchanged, and your objections to the other side's documents well practiced and ready to go, you will gain credibility in the court's eyes.

b. To that end, I suggest you ask the court, in even cases of moderate complexity, for a pretrial conference well in advance of trial. In that way, you can obtain rulings on motions *in limine*, motions to exclude, and pre-admission of exhibits. Having that information as far in advance of trial makes a big difference in your preparation. That way, you are not planning for 3 different outcomes for each piece of evidence. Of course, it makes sense to gain agreements with opposing counsel as much as possible prior to any pretrial conference.

c. At pretrial and trial, the best way to present your evidence, from a technical standpoint, is to be organized and prepared. You want to have everything at your fingertips. To that end:

i. Do not show up at pretrial with an exhibit list with three items on it and expect to admit another 47 documents that have not been previously disclosed in the trial preparation documents as potential trial exhibits. Many judges like to pre-admit as much as possible to speed up the trial and reduce jury idling while the parties argue about admissibility. Have

ix. *Do not run out of witnesses before the end of the day*: One thing that can frustrate the court is when you tell the judge that you're out of witnesses for that day. *See*, section immediately above. Either have enough witnesses lined up to testify to fill up the day, or have video depositions ready to be played to fill up the time. Some really mean judges will consider you to have "rested" your case if you run out of witnesses before 5:00 p.m.

x. Do not argue with the judge in front of the jury even when you're right! Jurors worship the judge, rightly or wrongly, and you will lose points with the jury. Period.

xi. Do not ask for a mistrial in front of the jury. They will assume your case is falling apart.

xii. Have concise legal memos for the judge on important issues with (a) pinpoint case citations, (b) with parenthetical explanations of what the case says, and (c) highlighted copies of the cases for the judge and opposing counsel.

xiii. Finally, **stop repeating yourself.** The biggest complaint I get from jurors after a trial is, "why did they ask the same question so many times?" I know it's scary to make your point and move on, because you are afraid they won't get it or won't remember it, but 2-3 times over the course of the trial is enough. You make the point in opening. You show it a couple of times in trial, and you make it in closing. Enough! The jury will love you for your efficiency more than they'll punish you for not making your point enough times.

d. Substantive Presentation: In an employment case, an important issue is *mitigation of damages*. One of your biggest tasks as the plaintiff's lawyer is proving that your client did everything in his or her power to get another job and mitigate damages. These days, it's more believable that the person was unable to find work, but it's still a big hurdle to overcome (and it's not, by my research, an affirmative defense, but rather, part of your case in chief):

i. The prepared and skillful plaintiff's employment attorney should be sure to have evidence (in admissible form – business records affidavits, perhaps) of the following. Of course, this requires careful instruction to the client at the earliest possible moment. Further, it has to have been produced in discovery if it's (1) responsive to a RFP, and (2) likely in response to RFP issue re: calculation of damages:

replace your expert, or salvage your case, on the eve of trial. In our Court, we really encourage parties to hold these hearings well before trial so that they have time to deal with the results of the hearing. A well prepared expert can go a long way towards persuading the judge of the merit of your client's claims, which can make a difference in close calls at each stage of the trial.

b. *Presenting the Plaintiff's Expert*: The following is a brief discussion of important issues to think about in presenting these types of experts:

i. *Loss of earning capacity/lost wages*: It is important to remember that under TCPRC 18.091, evidence of loss of earning capacity and lost wages needs to be presented in the form of "net loss after reduction for income tax payments or unpaid tax liability pursuant to any federal income tax law." However, I have, on more than one occasion, been asked to grant a directed verdict when this evidence is absent from the plaintiff's case. It is important to ensure, then that you and the expert and know about The Civil Rights Tax Fairness Act, 26 U.S.C. §§62(a)(20)(removing from gross income certain costs involved in "unlawful discrimination" suits, and (e) (defining "unlawful discrimination") and the Supreme Court's decision in *Commissioner of Internal Revenue v. Banks*, 125 S.Ct. 826 (2005) and the alternative minimum tax so that he or she may use that to his or her advantage to encourage the jury to award more rather than less to cover the tax liabilities. Familiarize yourself with the issue by reading: "Won the legal battle, but at what tax cost to your client: Tax consequences of contingency fee arrangements leading up to and after *Commissioner v. Banks, Leah, Witcher, Jackson*," 57 BAYLOR L. REV. 47 (2005).

ii. *Medical*: Medical experts are tripped up quite often on the following issues: (1) they have not seen the plaintiff lately, if ever, (2) they are not aware of the other medical or psychological treatment the plaintiff is receiving, (3) they are unwilling (or unable) to say whether the issues involved in the suit were caused by the tortious conduct of the defendant, and (4) they are not comfortable testifying and come across as too timid or too defensive. These issues need to be addressed thoroughly with the testifying doctor before (a) any *Daubert* hearing, and (b) trial. Finally, be sure to know how that trial court treats the "paid or incurred" issue under CPRC §41.0105. In our court, I deal with it post-verdict if necessary. Most courts appear to do it that way, too, but not all of them.

iii. *Attorney's Fees*: Most often, the plaintiff's attorney will testify about attorney's fees. If you are waiting until testifying to "prove" the value of

iii. They have testified repeatedly for this company or this defense law firm.

iv. They have said the same thing repeatedly in trial after trial.

1. As to this last point, careful and diligent discovery requires that, in state court, you obtain the style and cause number of each case in which the expert has given a deposition or testified at trial. That is, at the very least, each case on which the expert has worked for this corporation or law firm.

2. Then get and study those transcripts for inconsistencies. Or, even if the expert is as consistent as a Swiss clock, stack the depositions on top of each other on counsel table and threaten to go through each one to show that the witness never says anything different no matter what the facts are.

v. Do not be shy about pretrial *Daubert* hearings as to defense experts. It seems that *Daubert* challenges are largely one-sided affairs, brought by defense attorneys. Plaintiff's attorneys can use them to (a) actually strike unqualified experts or irrelevant, unsubstantiated opinions, or (b) get free discovery.

7. Jury Charge Issues: The key to winning your case is hard work, and that starts with drafting the jury charge at the same time you draft your original petition. The more thoroughly you've thought it through and provided an almost-complete draft to the court prior to trial, the more likely you are to get the issues you want submitted. Now let's talk about the charge conference:

a. *Instructions*: Pay attention to not only the questions, but also to the preliminary instructions. The Texas Supreme Court recently promulgated new standard jury instructions and these should be incorporated into your proposed charge. I have emailed them to Mr. Petrou to forward to all of you.

i. One thing that is often overlooked is the inclusion of the definition of circumstantial evidence. I think this is important in employment cases because often there is little direct evidence. Without this instruction, when the defense lawyer gets up to argue the whole case is flimsy & circumstantial, you can argue on rebuttal that there's this nice handy instruction that the judge has approved to allow them to find in your favor based upon circumstantial evidence. Use the snow metaphor.

ii. Be sure to ask for the proper definitions of your damage elements, too. No juror can really understand the difference between loss of earning capacity

8. Damages: You all know the elements of damages that are allowed in employment statutory and common law cases. I do not have much to add to that. I will discuss, instead, what I have seen work in the courtroom in terms of ideas for maximizing those damages.

    a. *Don't Give Damage Testimony Short Shrift*: Too often, the plaintiff's side works hard on liability, and then throws in damages as an afterthought. They'll spend 2 hours having the plaintiff testify about the defendant's bad conduct, and then the last 5 minutes stating a figure or asking if the plaintiff is asking the jury to award some amorphous measure of damages to him or her.

        i. In the cases with marginal facts where the plaintiff has been the most successful on damage recovery, the plaintiff spent a lot of time explaining their damage claim. The plaintiff's attorney carefully went through each aspect of the impacts on plaintiff's day to day routine. Sometimes a short day in the life video is good, but it's not always necessary. Rather, use concrete examples about the things that the plaintiff liked to do before, and why they loved their job until it went sour, and why they always wanted to be a file clerk, hospital orderly, or waiter.

        ii. Let the jury get to know the person's desires, dreams, how they felt while pursuing their favorite activities and how their depression has, at least temporarily, taken that away from them. Have them talk about the vacation they wanted to take with the money they've now had to spend on groceries. In short, develop your hard AND soft damages at least as much as your liability case.

    b. *Be Creative with your Damage Witnesses*: Do not just have the plaintiff come testify about damages. If there is mental anguish and pain and suffering, embarrassment, depression, etc., consider having your client's friends, spouse, adult children, parents, siblings, clergy, etc., testify. They may be somewhat more detached and therefore more credible. Make sure they are completely aware of the allegations in the case and that they are thoroughly and carefully woodshedded for cross-examination. But, at the same time, do not program them to sound like robots who cannot acquiesce to reasonable critiques or logical arguments by the defendants. It's important to have credible witnesses back up your client's injury claims. The side benefit of this, of course, is that if your client was complaining in real time about their job, there is a witness to bolster it under the guise of talking about how depressed or affected they were.

9. Closing Argument: *See*, the discussion about opening statements, *supra*. Further, take the following steps to ensure an effective closing argument:

have been fired, fired others, been disciplined, been "right-sized," been unionized, etc. Many have been harassed, discriminated against, and retaliated against.

b. So, when you're asking them questions, you have to have a plan and know how to deal with their likely responses. Can they actually be fair to one side or the other or will their experiences, good or bad, affect them too much?

c. Do not forget the "jury shuffle" tool in your toolbox. It works both ways. Remember, all parties are entitled to 1 shuffle, total, with a given jury panel.

d. I used to think that *voir dire* was about showing how your case is a good one and asking if the jurors can be fair and keep an open mind in *this* case. That was a mistake. Instead, you need to attack potentially bad jurors head on, without reference (at all!) to the facts of your case, and get them to conclusively admit they cannot follow the law or their oath as jurors. Embrace their inability or unwillingness to be fair to your client and use it to your advantage. Period.

    i. The cases of *Cortez v. HCCI San Antonio, Inc.*, 159 S.W.3d 87, 91-94 (Tex. 2005) and *Hyundai Motor Co. v. Vasquez*, 189 S.W.3d 743, 759-60 (Tex. 2006) are your friends. If you study those cases, you will find a roadmap for identifying and striking-for-cause jurors who cannot follow their oath as jurors or the law. It may very well be that those jurors are not qualified to sit on the jury, and cannot legally be rehabilitated.

    ii. More concretely, before speaking about the facts of the case <u>at all</u>, identify jurors who dislike lawyers, frivolous (or meritorious) lawsuits, pain and suffering, the mere preponderance of the evidence, etc.; things totally divorced from the facts of your case. Get them to admit they cannot under any circumstances award pain and suffering damages, or follow the preponderance of the evidence standard. Find out who could not award attorney's fees, or exemplary damages (on a clear and convincing standard). You want to strike the jurors that will kill your case, and you can do so with *Cortez & Hyundai*. At a minimum, you want to identify those people so that even if they are not struck for cause, you can use your peremptory challenges on them if you have no other choice.

    iii. What are the variables in your case that will be important? Is it an age case? Do you want baby boomers who will be self-interested in protecting their own careers as they approach retirement? Is it a discrimination case? Minorities? Young people? Do you want people who've been fired recently? Never fired? Repeatedly fired? Do you want a young manager type who deals with older workers? Reverse? Do the jurors' thoughts