

Pre-trial Motions And Trial Strategy From The Plaintiff's Prospective

July 3, 2014 • Legal Updates & Insights

Litigating an employment discrimination case and getting ready for trial are two separate matters that require a completely different and unique skill set. Fortunately, for me, I spent three years in the District Attorney's Office and two years as a law clerk to a federal judge. So, while preparing for trial and actually trying a case may cause some people great fear and anxiety, I approach each trial as the ultimate experience to convince a group of individuals (the jurors) that your side is right and that your client should be awarded monetary compensation.

While I have tried many cases, preparing for trial has not gotten any easier. There are no short-cuts in trial preparation and the obvious goal is to know more about the facts and the law than any other person in the courtroom. Jurors will sense that and as the trial goes on, they will begin to trust you. Provided below is a brief outline of how I prepare for trial, pre-trial motions and trial strategy. It is important to note, however, that every good trial attorney builds his/her own technique and style. This is mine, so it may not suit your style – but it seems to work for me!

Pre-Trial Order:

Jury Charge and Verdict Sheet

In the weeks prior to your trial, many judges will frequently ask for a pre-trial order. This is a good time to begin honing your trial strategy. While it may seem counter-intuitive, I begin my trial preparation backward. I always start with the jury charge and verdict sheet. Drafting a precise and well researched jury charge can literally take days. The time that it takes though is extremely important as it will inform all of your decisions going forward. From the jury charge, a verdict sheet should be relatively straight forward – but this process can also be time consuming depending upon the number of claims and parties. As I am drafting the jury charge and verdict sheet I often think about whether there are any claims or parties that should be voluntarily dismissed. As I indicated earlier, credibility is crucial with a jury – I don't want to stand before a jury with weak claims or sympathetic defendants that will only undermine my good claims.

Document Review

After putting the finishing touches on the jury charge and verdict sheet, it is important to organize your documents. Unfortunately, there is no easy way of going about this process. In heavy document cases, I often enlist the assistance of trusted paralegals and associates to separate documents that have some relevance to the case (good and bad). Obviously, before they go about this, they need to understand the facts of the cases and the legal issues. It is also important for the lead attorney to go through the documents to randomly check to ensure that the correct documents have been located. Litigation software is often very useful in this phase as "key word" searches can be utilized.

Pre-Trial Motions

Once you have segregated the “universe” of documents it’s time to start thinking about pre-trial motions. While defendants often take the “kitchen sink” approach to motions in limine – often to burden you with having to prepare oppositions when you should be focused on other trial preparations – experience has taught me to try and pick and choose the “big issues” that truly warrant motion practice. Most of the time, Judges hold these motions in abeyance until they have learned more about the case and the issue is ripe for presentation to the jury – so, often the motion practice doesn’t resolve anything in any event.

Other than seeking to exclude certain documents, other motions in limine that frequently arise are motions to preclude certain topics such as a no probable cause determination from the EEOC, prior psychiatric treatment, prior arrests, prior lawsuits, etc. On the flip side, defendants typically seek to exclude prior instances of discriminatory conduct (prior bad acts), prior findings of liability, etc. Defendants may also move to bifurcate a jury trial into a liability and damages phase, bifurcate multiple plaintiff cases, seek to have the judge determine back and front pay, and move to preclude punitive damages.

Depositions

Depositions should be reviewed and thought should also be given to whether you intend on reading a deposition transcript rather than calling a certain witness. We typically video tape depositions and if you have gotten the witness to say what you need – often times it may make sense to simply show the jury the video. In any event, depositions need to be reviewed in order to assist in the preparation of direct and cross examination outlines.

Direct and Cross Examination Outlines

My direct and cross examination outlines do not contain questions that would simply be read to the witness. This is an ill-advised way to prepare for trial and does not provide for the flexibility necessary to do a proper examination. Rather, I have found that the best way to prepare for examinations is to simply list topics and exhibits that you want to cover. In my exhibit binder, I have my notes and highlighted areas that I can formulate questions as I examine the witness.

Preparing an Opening

Great thought needs to go into an opening as it will tell the story to the jury. As the plaintiff, you have the burden of proof and therefore have the first opportunity to address the jury. It is important to lay out the facts as well as the law so that the jury understands exactly what you are going to prove. It is equally important to acknowledge and address the case’s weaknesses and what defendants will likely say. Credibility is crucial. Therefore, never promise anything that you cannot deliver on. If you plan to ask for a large sum of money at the conclusion of the trial, you should also let the jury know that you will be doing that at the closing arguments.

Jury Selection

Depending on your venue, you may either play an active or silent role in the jury selection. If you are given

an opportunity to address the jury in voir dire, attempt to build alliances among the jurors that you like. This can be accomplished by asking other jurors to agree with a juror who has made a remark that you think is positive and important to the case.

As you will likely need a unanimous jury to obtain a positive verdict, you should be looking to exclude jurors who appear to be contentious and opinionated – those that may play “devil’s advocate” or take the opposing view are jurors as a plaintiff’s lawyer you want to avoid.

Douglas H. Wigdor

Partner

WIGDOR LLP

85 Fifth Avenue, New York, NY 10003

T: [\(212\) 257-6800](tel:(212)257-6800) | F: [\(212\) 257-6845](tel:(212)257-6845)

dwigdor@wigdorlaw.com

www.wigdorlaw.com