Trial Tips for Plaintiff Employment Lawyers:

Strategies and Common Mistakes: Preparation, Preparation, Preparation.

Prepared for:

National Employment Lawyers Association-Houston Chapter
June 16, 2011 Luncheon Meeting
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I have created the following outline specifically for this presentation based upon the description of the topics I was asked to speak about. I hope you find it useful and that there are some interesting nuggets of strategy and mistake-avoidance that you are able to employ (ha!) in future Texas state court litigation. As always, I am happy to visit with you and give answer any questions I can. Feel free to call me at 713-298-9460 (cell) or email me at mengelhart0@gmail.com.

Trial Tips for Plaintiff Employment Lawyers

1. Jury Charge: It starts when you sit down to prepare your EEOC complaint. It continues with preparing the original petition. At that time you should also prepare your first draft of your jury charge. Unless and until you know what you have to prove at trial, you are not optimizing your discovery, motion practice and trial preparation.

    a. The draft may change many times as you approach trial, but your research should be substantive enough to give you a good working draft.

    b. This will guide your discovery, so you know that you have asked for the relevant depositions, and subpoenaed or asked for the right categories of documents.

    c. This will also assist you in lining up your witnesses to ensure you have all of the elements of your cause of action and each element of damages accounted for.

    d. We'll talk a little later about the substance of the charge & preserving objections.

2. Discovery: As a litigator and as a judge I see the best results for plaintiff's attorneys when they prepare & undertake discovery right away in the case.

    a. Prepare your discovery with your original petition and your jury charge.

    b. Be creative & aggressive with your discovery to keep the defendants on their heels. Craft your interrogatories to the case, and ask "why" and "how" questions in addition to basic ones. Make them explain themselves in writing. Why did they do this? Why did they fail to do that? If you're out of interrogatories, consider depositions on written questions.

    c. Learn how to take effective electronic discovery to gather emails and other documents. *In re Weekley Homes, L.P.*, 295 S.W.3d 309, 314-15 (Tex. 2009) and TRCP 196.4 are essential. Ask for them on a disc, please, rather than on paper. *Tip*: To get deleted emails in addition to other emails, you must specifically ask for them.

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

the employer obtained the information to help keep it out of evidence. Use Rules 401 and 403 as well to exclude harmful posts.

ii. Of course, warn your client IN WRITING to stop posting things to the web. Think about having a prepared handout to clients with guidance about how they should and should not use the internet, and have them acknowledge receipt of same.

3. <u>Opening Statements</u>: Hallmarks of an effective opening statement:

   a. I heard this advice recently at a luncheon from Jim Perdue, Sr., though I have not seen it used much at trial. I think it would be effective. Start your opening by discussing the defendant, the "bad guy," and not your plaintiff/client. Jurors are already skeptical of plaintiff's cases and if they hear something right off the bat that the plaintiff did that sounds questionable, or that the plaintiff is playing the victim without first hearing why, they can get turned off.

   b. So, instead, start with the defendant's conduct. Something like,

   On June 16, 2011, Steve Supervisor woke up and drove to work. He was well versed in ABC Company's anti-discrimination, anti-harassment policies because he will tell you he had read them, and will tell you that he'd recently been to a meeting discussing them. And this is what they are. Rule 1, 2, and 3. These are the rules that he was required to follow. He got to work, and he had a choice. He could go to his office and begin his work, or he could go to Patty Plaintiff's office and tell her a "wetback" joke. He knew it was wrong and he knew it was against the rules, but he did it anyway; just like he had done every day for the last two weeks. Then he went and told his buddies over at the water cooler about it. Steve Supervisor's boss, Mark Manager, received an email from Patty Plaintiff on July 5, 2011 about Steve's conduct. Mark Manager knew the rule about what to do (here it is) and knew what he was supposed to do in that situation. He had a choice. He could investigate, document and potentially discipline Steve Supervisor. But Steve was his friend and he didn't want to get Steve in trouble. So, Mark Manager deleted the email, and in violation of the rules, did nothing, and told Steve Supervisor that he'd received the email from Patty, but did not investigate or discipline him. Two weeks later, Steve Supervisor fired Patty Plaintiff. We will show you the email that Patty sent to Mark Manager that we recovered from Mark Manager's computer after he tried to delete it.

   Sounds good, no?

   c. Another problem with opening statements is overpromising. It is far better to under-promise and over-deliver than the reverse. Be the attorney in closing who

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. <u>Objections</u>: 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

responsible for retaining records for five years. I responded to records requests including requests for documents that were older than our policy required, and my job was to determine if we still had responsive records . . .". If the witness is prepared properly, this will not be a problem. Moreover, being able to easily recite information like this bolsters the witness's credibility before the jury.

ii. Other common objections are *authenticity*, *hearsay*, and *best evidence*. A good tip is an obvious one: Learn the rules about authenticating documents, hearsay & best evidence.

1. *Authenticity*: This is part of preparation and discovery and will solve 99.9% of your authentication problems. TRCP 193.7 is the "self-authentication" rule that people talk about. In my experience, very few lawyers know where it is or what it actually says. Very often, attorneys respond to the authentication objection by stating that the defendant produced it, so it's authenticated. That's only ½ of this rule. The other ½ requires that you give actual notice to the other side of your intent to use the document and they then have 10 days to object to its authenticity. So, defeat this objection in advance of trial by routinely (make a template for your assistant to easily use) sending a letter to the other side that the following documents (preferably by Bates Stamp number) will be used at trial. That starts the clock and eliminates the authenticity objection when the document is used at trial or even at a motion hearing. Finally, with respect to authenticating documents, whenever you are dealing with *government documents* (including tax returns, police reports, corporate records, etc.), do the work to get them CERTIFIED if possible and this will eliminate a lot of authenticity AND hearsay AND best evidence objections because once you have a certified copy, you have satisfied TRE 902 regarding authentication, TRE1005 regarding authentication, and TRE 803(8) (hearsay exception). A little elbow grease here goes a long way.

2. *Hearsay*: Despite its constant use, attorneys have very little working knowledge of the hearsay rule it would seem. This paper cannot cover that expansive topic. The only help I can be in this short paper is to encourage you to have a hearsay "plan" and backup hearsay "plan" for each document and out of court statement you plan to bring into evidence. Key rules to remember

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.

However, statements contained in live and even **superseded pleadings** may be admissible as rebuttal evidence and non-hearsay admissions of a party opponent (even when not inconsistent).

iii. *Objecting to the other side's evidence*: The objections discussed above work well against defendants, too, of course. However, sometimes evidence comes in over your objection.

1. Sometimes it's used only for impeachment even though it would otherwise be inadmissible. That is, it may only be admissible for, or relevant to, a limited issue. In that case, an underutilized tool is **TRE 105**, titled "Limited Admissibility." In short, you can ask for a limiting instruction from the judge that the evidence be considered for the limited purpose for which it is offered, and for no other purpose (such as evidence of notice, knowledge, or for impeachment). I've given it multiple times in the same trial as to a piece of evidence or a given topic. If you do not ask for this instruction, and the evidence is admitted, it is admitted for all purposes and can allow the court of appeals to uphold the jury's adverse verdict.

2. I mentioned above in the context of web pages, that you can take discovery on how the social media/web info was obtained, and potentially, under federal law, object to its use based upon how it was obtained.

3. Further, do not forget about the types of privileges that exist, including TRE 502 statutory privileges. And, under TRE 512, and TRCP 193.3(d), inadvertent disclosure of privileged material and privileged material produced under "compulsion" or without opportunity to claim the privilege is not necessarily waived. So be sure to assert privilege objections at trial where appropriate. More importantly, move to have privileged material reclaimed well prior to trial or immediately after disclosure if possible.

4. Finally, as counterintuitive as this seems, TRE's 401 (relevance) and 403 (prejudice) are underutilized.

    a. You may be so close to the case and so conditioned to bad facts that you lose perspective, but the judge has not lived this case like you. Don't be shy about using Rule 403.

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. <u>Presentation of Your Evidence</u>:

   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 <u>pretrial conference well in advance of trial</u>. 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

all of your exhibits or potential exhibits in a list that is ready to be discussed and ruled upon. Agree with opposing counsel as much as possible ahead of time. Agree not to try to pre-admit documents that obviously will require significant evidentiary foundations (absent agreement as to their admissibility, of course).

ii. If you're using *paper* (and it's a good idea to have organized paper backups regardless (unfortunately)) be sure to have copies for all sides and the Court.

iii. Learn to use the *courtroom technology* well in advance of trial. There is nothing more painful than a full, silent courtroom waiting for the attorney to figure out how to attach the laptop to the overhead, or how to turn on the ELMO projector.

iv. Invest in your presentation. Often, the parties will *share an AV person* who sits in the back of the room and has all the exhibits and can easily pull them up by number, blow them up and highlight them. This is really effective when done well.

v. *Or, go retro*. An effective technique for explaining something to the jury is a yellow-lined piece of paper & blue, red or green felt tip pen on the ELMO. Write out the numbers or one-to-two word ideas. These make an impression because the jury is seeing it done as the testimony comes out, which reinforces the auditory information with visible cues.

vi. A lost technique is **publishing a document or picture to the jury**. In Harris County, they usually see it on their screens and on the large screen. But, it's sometimes effective for them to see and hold an important document or photo in their hands. It's a different sensory experience. Caution, however, not to let that interrupt your next set of questions, or the next exhibit.

vii. Make sure your documents are legible. I know, it's basic, but it happens a lot. Parties put something on the overhead and it's indecipherable, and then they have to scramble for a readable copy.

viii. Be sure to have your witnesses ready to go and video depositions edited in advance. Another reason it is important to have pretrial well in advance of trial, where possible, is to get rulings on deposition excerpts. In that way, you have time to get your videos edited. Some videographers are editing on the fly in the courtroom, which helps, of course, as rulings are made.

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. <u>Substantive Presentation</u>: 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:

1. The plaintiff's resume;
2. Signed copies of correspondence/cover letters sent to all potential employers with dates and proof of mailing or faxing/emailing;
3. Documentary evidence of each position for which the plaintiff applied, and its duties, pay rate, etc.;
4. Offers received by the plaintiff;
5. Rejections received by the plaintiff;
6. Wage and tax evidence from all post-termination employers;
7. HR paperwork from all post-termination employers regarding salary and benefits.

6. Expert Witnesses: Expert witnesses in the employment cases include experts on workplace policies, medical issues, benefits, tax issues, loss of earning capacity/lost wages, attorney's fees, and even exemplary damages (defendant's net worth). In this section, I will briefly talk about (1) *Daubert* challenges, (2) presenting the plaintiff's expert, and (3) challenging and cross-examining the defendant's experts.

   a. *Daubert* hearings:

      i. Sometimes, the expert's testimony is perfectly acceptable and admissible, but the defense attorney wants a preview without necessarily paying for a deposition. Depending on the expert, this is an excellent opportunity for the plaintiff's attorney to (1) educate the judge on the issues, and (2) persuade the judge with a credible, well-prepared expert.

         1. Be sure that your expert is not merely the same old guy or gal you always use, but is the right one for this case. Put some effort into finding an expert who is credible and qualified by training AND experience (though both are not *required* under Rule 702) to (a) testify, and (b) be persuasive.
         2. Consider allowing the expert to be somewhat knowledgeable about the whole case, and not just their small part. They need the bigger picture to be able to not get caught saying something contrary to your strategy & positions.
         3. Embrace the *Daubert* hearing. Try to encourage the defendant to schedule it earlier rather than later so you are not scrambling to

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

your legal services, it's too late. In my experience, the jury will either find the lawyer credible or not and award the fees he or she has asked for or they will cut them a lot if they don't. My advice is threefold:

1. First, find an experienced, respected attorney who is familiar with the work necessary for employment cases to testify. A former judge, or a very experienced employment attorney.

2. Second, whoever is testifying about fees, don't just slap a number up there in front of the jury. Talk about what you've done in some detail. Talk about how the client came to meet with you, and brought their family. Talk about how you rolled up your sleeves & got to work. Talk about the late nights and times away from your family working on this brief, or that discovery, or some important motion because of your duty and loyalty to your client & their cause.

3. Third, and finally, do not forget about segregating your fees. In an employment case, you may have statutory claims that entitle you to attorney's fees, and you may have common law claims, like defamation and false imprisonment, which do not. The legal work may be inextricably intertwined, but DO NOT rely on that notion. Instead, provide at least some testimony about the segregation of your fees. The risk in not doing that is a directed verdict or JNOV motion contending that you have "no evidence" of attorney's fees because they were not in the proper format. (In that regard, be sure you have produced your time records (even if they are redacted) up to the time period right before trial to avoid supplementation objections.)

iv. *Exemplary Damages*: Many employment law statutes and common law employment torts allow for the recovery of exemplary damages. For mid-sized corporate defendants, it may make sense to have an expert testify about the defendant company's net worth to give the jury a go-by for the jury instructions about determining an amount of exemplary damages.

c. *Challenging the Defendant's Expert*: Every expert is vulnerable to cross-examination. The key to effective cross-examination of the defendant's expert is to show that, like most defense experts, they

i. Are charging a fortune to be there.

ii. They have not met with or spoken to the plaintiff.

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

and physical impairment based upon a 30 second description in closing argument. Ask for your definitions of these elements rather than allowing the jury to try to decipher these terms alone. The other side may not have the definitions in their proposed charge, and I, for one, would like to give the jury more helpful and accurate information rather than less.

b. *Preserving Error at the Charge Conference*: Rather than write a treatise on this issue, which is do-able, I will say this: Belt and suspenders. You cannot go wrong by (a) objecting to the other side's questions/instructions, or objecting to the failure to include your proposed questions/instructions AND ALSO, (b) submitting (in writing) your own proposed questions/instructions that were refused and getting the court to include the style and cause number, the date, and sign them as "refused." They must be in substantially correct form to preserve error. Most attorneys do one or the other (at most). So make the objection on the record AND submit your own proposed proper instruction or question, even if you do not want that issue submitted. It is better to have the option to argue for reversal based upon an incorrect submission than risk waiving it.

c. *Mixed Motive vs. Pretext Submission*: Title VII cases and others, as you know, may be submitted as either "Mixed Motive" cases or "Pretext" cases or both. I would make sure at the outset that you have decided whether yours is a mixed motive or pretext case. There is no need to turn every case into a mixed motive case even though you may feel like you only have to show that the protected characteristic was a "motivating factor" and can rely on circumstantial, rather than direct evidence for the adverse employment action. But in a case where you have a solid termination reason, if it is submitted as a mixed motive case, the defendant gets a second bite at the apple on your remedies by employing the "same decision defense." In that event, you are limited to declaratory relief, attorney's fees and costs, but no back or front pay or reinstatement. It's a tough decision in some cases, but the default position should not always be mixed motive submission.

d. *Agree!*: In many cases, it is a good idea to agree with the defendants on the charge as much as you can get away with. And vice versa. If the issues are somewhat straightforward, it does not make too much sense for either side to have a pyrrhic victory that is readily reversible based upon invited error or an otherwise erroneous jury instruction or question. At bottom, it makes sense in most cases to eliminate potential charge error by agreement if you are mostly getting what you need in the charge. Both sides have an interest in doing it right the first time, or at least in not having to repeat it.

8. <u>Damages</u>: 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. <u>Closing Argument</u>: *See*, the discussion about opening statements, *supra*. Further, take the following steps to ensure an effective closing argument:

a. Do what you can to ensure you have enough time for your initial closing argument. Many judges can be persuaded to allow sufficient time for closing. Explain with specifics why you need a large amount of time. In our court, unless the parties want to put time limits on closing, I do not, unless we're racing to finish that day. That said, if you've done your work in *voir dire*, opening and the presentation of evidence, your closing argument should write itself and can be brief.

b. Reserve time for rebuttal in a time-limited argument, and practice your closing enough to know that you'll actually have that rebuttal time left. Also, practice with family, friends, colleagues, and even strangers, if they'll listen. Focus groups are good for this, too.

c. Fully open in closing. That is, plaintiff's attorneys often forget to fully address damages in their closing, believe it or not, and then the defendants object, and I have to give the plaintiff's attorney a few more minutes to sheepishly get back up, out of context and rhythm, to talk about damages. Do not allow that to happen.

d. Incorporate what you said in your opening about what you were going to show during the trial and demonstrate how you showed that.

e. As importantly, show how the defendant promised to show certain things and failed to deliver, and hence, failed to prove their case.

f. A big mistake I see with some frequency is that the plaintiff's attorney will forget, in closing, **all of the things their case is about** – namely the conduct of the defendants and its impact on plaintiff. Instead, they will focus on squashing rabbit trails & red herrings. They'll tell the jury not to be distracted by this, or by that trick of the defendant. They get so wrapped up in the defendant's trial strategy that they forget to tell their story. Stay focused on what's good about your case and trust that the jury can "get" it. When you make your case about the mean defense attorney, you are playing into their hands.

10. *Voir Dire*: I saved this section for last because it is a CLE all unto its own. It is true that cases are won and lost in *voir dire*. I know that's potentially intimidating, but it is also an opportunity for the prepared, competent lawyer to improve their client's odds.

    a. The employment law case poses an existential risk and challenge for Plaintiffs' attorneys. Employment law trials are unlike almost any other case because everyone on the panel has had a job. They've all been employees, bosses, managers, executives, team leaders, gophers, or peons, etc. They've all had first hand experiences trying to navigate the system. They've all been hired. Many

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

about the legal system, good or bad, outweigh their own experiences as employees/employers?

iv. The corollary to moving to strike jurors for cause is knowing how to preserve that error. The easiest way to do that is to read the instructions and script on pages 606-07 in O'CONNOR'S TEXAS RULES * CIVIL TRIALS 2010. I could expound on this, but that's your best resource. Feel free to find a more recent version in the 2011 book, of course. The failure to grant a challenge for cause, when error is properly preserved, is automatically harmful error. So, if you do it right, you may get a free new trial that you might not otherwise be entitled to have.

v. Learn how to identify and make a *Batson* challenge. Learn when and how to preserve the error if the challenge is overruled. In a Title VII case, minority jurors can be especially important.

11. Conclusion: Please keep these tips handy and review them next time you sit down to prepare your original petition in an employment law case. Winning jury trials are about hard work and continual vigilance. Your chances of winning are maximized long before you get into the courtroom, and peak immediately after *voir dire*, when you are striking jurors. Thereafter, your chances of winning depend on the preparation you have done with your opening statement, your documents, your witnesses, and your carefully crafted jury charge. Trial success is not the product of mystical powers of special lawyers. It is the product of preparation.