

Trying a Systemic Discrimination Case: Jury Selection, "Me Too" Evidence, Witnesses, Argument, Preserving Error

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Today's faculty features:

Douglas Brayley, Partner, **Ropes & Gray**, Boston

Christy E. Kiely, Counsel, **Hunton Andrews Kurth**, Richmond, Va.

Katherine P. Sandberg, Attorney, **Hunton Andrews Kurth**, San Francisco

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Trying a Systemic Discrimination Case

Jury Selection, "Me Too" Evidence,
Witnesses, Argument, Preserving Error

Douglas Brayley

ROPES & GRAY

Christy E. Keily

Katherine P. Sandberg

HUNTON
ANDREWS KURTH

INTRODUCTORY COMMENTS

Overview

- Most employment discrimination cases that go to trial result in the plaintiff winning. A 2009 Department of Justice study of civil trials during 2005 found that in employment discrimination cases:
 - Plaintiffs won 65% of jury trials, and 60% of all trials
 - 91% of employment discrimination cases that made it to trial were decided by a jury.

Overview

Having the law on your client's side is not always enough:

- Studies have shown that jurors construct competing narratives and tend to decide cases based on which narrative they find more persuasive, rather than merely based on the evidence and probabilities.
- Showing weaknesses in the plaintiff's case may not be enough if the plaintiff has a more compelling narrative that aligns with the prior beliefs and experiences of individual jurors.

EEOC Enforcement Activity in FY 2018

- EEOC field offices resolved 409 systemic investigations.
 - Obtaining more than \$30 million in remedies.
- EEOC filed 199 merits lawsuits alleging discrimination:
 - 117 individual suits
 - 45 suits involving multiple victims or discriminatory policies
 - 37 systemic discrimination cases
- At the end of the year, EEOC had 302 active cases.
 - 71 (23.5%) were systemic discrimination cases

JURY SELECTION

Jury Selection

Identifying the Right Juror

- **KEY POINT:** You do not pick jurors – you strike (reject) jurors.
 - **Focus on who you do *not* want on the jury, not on who you do want.**
- Identify life experiences affecting impartiality
 - Experiences/biases most harmful to your case
- Listen and learn
 - Less talking, more listening
- Get jurors to care about your case on a personal level
 - Employment juries will relate the case to personal experiences
- What will your judge allow?
 - Form of questioning
 - Number of challenges based on panel size
 - In federal court, jury selection is limited by time and ability to question jury pool
- Decide whether to use a jury consultant

Jury Selection

Identifying the Right Juror

- Get as much information about the entire venire as possible, as early as possible, to inform theme selection.
- If pool information is provided in advance, then research:
 - Social media.
 - Court records.
 - Property records.
 - Note: know the ethical rules on researching jurors and potential jurors
- Studies show that juries spend 50% of their deliberation time discussing general experiences, rather than procedural issues, jury instructions, or admissible evidence.

Jury Selection Process

- Court may permit parties or attorneys to examine prospective jurors or may do so itself.
- If court examines, it must permit parties or attorneys to make any further inquiry court considers proper, or court must itself ask any of the additional questions it considers proper.
 - Fed. R. Civ. P. 47(a)
- Jurors may be excused for good cause.
 - Fed. R. Civ. P. 47(c)

Juror Selection: Voir Dire

- Limits of voir dire
 - National Jury Project study
 - 71% of eligible jurors thought a defendant was guilty
 - 15% of the jury pool admitted this preconceived notion during voir dire
 - D.C. Superior Court study
 - 190 jurors who had served on criminal trials
 - 25% admitted they did not disclose on voir dire that they or their family members had been crime victims
- Request Supplemental Juror Questionnaires, if allowed
 - Views on discrimination are often based on stereotypes that jurors may not want to voice during voir dire
 - Jurors are more likely to be candid on a written questionnaire than in front of the judge, lawyers, and rest of the jury pool

Jury Selection: Topics for Voir Dire

- Juror's work experience
 - i.e. Employment history, loss of employment, supervisory experience
- Juror's attitude toward the parties
 - i.e. Group of people the plaintiff represents, group of people the defendant represents
- Juror's experience with employment dispute resolution
 - i.e. How do they handle disputes with management
- Juror's understanding of or experience with legal issues in the case
 - i.e. Disparate treatment, wrongful termination (more focused than work experience)
- Juror's feelings about awarding damages for economic losses, pain and suffering, punitive, etc.

Jury Selection: Voir Dire Tips

- Ask questions that will help with peremptory and for cause challenges
 - Important to ensure that challenges are supported by facts in the record
- Use mostly open-ended questions that encourage jurors to talk
 - 25% on result-focused questions
 - 75% on information-gathering questions
- Try to make the potential juror feel comfortable
 - Build a rapport with the potential juror
- Do not rephrase or reword a potential juror's answers

Jury Selection

Developing and Using Themes

General Questions:

- Too many lawsuits?
- Think most lawsuits are frivolous?
- Ever been party to a lawsuit?

Case Specific Questions

Jury Selection

Developing and Using Themes

- In employment case, HR has to make tough calls every day, without all facts
- HR is a person
- People make mistakes
- HR leaders aren't trying to break law
- HR has to decide things at the “speed of modern business” without much certainty or unlimited time/budget for investigation

Jury Selection

Plaintiffs' Tactics and Themes

- Having a work environment completely free of discriminatory comments, jokes, bias, and harassment, however minor, is the only way to protect employees.
- Employees are at the mercy of their employers.
- Employees have no control over their working environments.
- Employers, i.e., “big business,” have all the control.
- Employers should always act to address every discriminatory, biased, or harassing comment in the workplace, no matter how small.

Jury Selection: Strikes

Challenges for Cause

- No hard and fast rules; specific, disqualifying situation
 - Being fired likely won't cut it
- Reasonably be found able to render a fair verdict even in light of some factor suggesting possible bias?
- Categorical: Financial interest in litigation; relationship to party/attorney/witness; attorney in the field.

Jury Selection: Strikes

Preemptory Challenge

- A party's unspoken desire to strike a particular juror
- Number may vary with panel size/jurisdiction. Ask the judge.
- Subject to challenge by the other side
- In civil cases in federal court, parties get 3 preemptory challenges each
 - Fed. R. Civ. P. 47(b)
- In civil cases in Texas and California, parties get 6 preemptory challenges each

Jury Selection

Discriminatory Strikes

A “Batson” challenge is an objection to the validity of preemptory strikes based on argument it’s being used to exclude jurors because of race or sex (or other “cognizable” groups)

- Timing (don’t wait)
 - Establish prima facie case
 - Have a neutral explanation theory ready
 - Preserve error
- Note: 94% of *Batson* challenges occur in criminal cases, but *Batson* challenges can also be used in civil cases

Jury Selection: *Batson* Challenges

- *Batson* challenges prohibit peremptory strikes based on:
 - Race
 - Ethnicity
 - Gender
- 3-part *Batson/Edmonson* test
 - Challenging party must establish prima facie case of discrimination
 - Defending party must provide a neutral explanation
 - The court determines if the challenging party has established purposeful discrimination
- Practice tip: stay away from “gut feeling” justifications and be specific when referencing body language and demeanor

Opening Statement

General: Your Contract With the Jury

Opening statement is where you begin to establish your credibility with the jury. Everything you say can be tested for truth during the trial, and the more things you miss, the less credibility you will have at closing.

General: Your Contract With the Jury

- Emphasize the facts you are certain you are going to prove, so at closing you can say “I told you X, and X was proven by [insert the evidence].”
- When you address facts in controversy, do not overpromise.
 - Acknowledge the conflict.
 - Show the jurors you trust them.
 - “There is going to be a lot of testimony about ___. You are going to hear from [witness] who will tell you _____. Plaintiff will say ___. You are here today because of these kind of disagreements.”

General: Argument vs. Statement

- It is called an opening *statement* for a reason: you are not supposed to argue.
- Stick to facts.
- Don't declare the facts, present them through something / someone else.
 - "You are going to hear from _____, who will tell you _____."
 - "You are going to see a document called _____ which will show _____."
 - "There will be evidence showing."

General/Specific: Ask for What You Want

- Your part of the contract is to deliver on your promises.
- The jury's part is to give you what you are asking for when you do.
- For a defendant in a case like this, it is fairly simple.
 - A finding of no liability.
 - Findings necessary to support fee awards, if applicable.
- “We expect to prove our case. If we do, I am going to ask you to do something very simple – decide that my client is not liable.”

General/Specific: Introducing Your People

Use your introductions to establish credibility, not just to identify. Compare:

- “You will hear from Ms. X, the Sr. VP of Personnel.”
- “You will hear from Ms. X, the Sr. VP of Personnel. Ms. X has been with the company for 22 years and has risen through the ranks, starting in the mailroom. Ms. X implemented the company’s policy on this issue ___ years ago, and has constantly updated it ever since.”

Specific: Establishing Big Picture Themes

Tell the jurors how you want them to think about the case.

Specific: Rejecting Plaintiffs' Themes

Prepare the jurors to detect and reject the Plaintiffs' themes. Consider characterizing those themes as "tactics."

General: Essential Non-Substantive Content

- When you start, *thank the jury*.
 - *Generally* thank them for serving. “Our country asks four things of you: pay your taxes, defend the country if called upon, vote, and serve on a jury. Yet, you never hear anyone boasting about how they avoided the first three on the list.”
 - *Tailor your thanks* to the case. “Your presence here these next few days is an essential part of deciding whether ...”
- As the Defendant, explain your relative absence for the first half of the case, because the two things you will be doing could make you seem dislikeable.
 - Cross examination.
 - Objections.

Witness Examination: Direct and Cross

Witness Examination: Direct and Cross

Be ready to examine the Plaintiff on these issues, built from discovery:

- Educational history and job qualifications;
- Work history with prior employers;
- Involvement in prior litigation (if any);
- Performance history with the defendant employer;
- Details involved in the plaintiff's allegations, including dates and witnesses;
- Any internal notes, diary entries, or memos to file that the plaintiff took.

Witness Examination: Direct and Cross

Be ready to examine the Plaintiff on these issues, built from discovery:

- The plaintiff's history with the accused harasser or discriminator;
- For sexual harassment plaintiffs, any actions the plaintiff took that the defense might argue demonstrated "welcomeness;"
- Whether the plaintiff availed himself/herself of the employer's workplace reporting procedures;
- Subsequent job search and mitigation efforts;
- Emotional distress, including how a gap in jobs has affected the plaintiff's sense of self.

Witness Examination: Direct and Cross

Keep Trial Cross-Examination Controlled

- Don't ask a question you don't know the answer to
- Be prepared to impeach on the spot
- Use a matrix to tie the plaintiff's testimony to the rest of the case

“Me Too” at Trial – Applicable Rules

- FRE 401 - Relevancy
- FRE 403 – Exclusions – Prejudice, Confusion, Waste of Time, or Other Reasons:
Court may exclude relevant evidence if its probative value is substantially outweighed by danger of one or more of: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.
- FRE 404 – Character Evidence – Other Wrongs or Acts

“Me too” Admissibility

How closely related the “me too” evidence is to the plaintiff’s circumstances and theory of the case. “No per se rule applies to “me too” evidence.” *Mendelsohn v. Sprint/United Mgmt. co.*, 552 U.S. 379, 380-81 (2008).

Consider:

- Whether same decisionmaker(s) involved

- Whether same type of adverse action

- Temporal and geographical proximity

- Whether employees similarly situated in other relevant respects

Griffin v. Finkbeiner, 689 F.3d 584 (6th Cir. 2012); *see also Hayes v. Sebelius*, 806 F. Supp. 2d 141 (D.D.C. 2011).

Examination Strategies to Exclude “Me Too”

Proposed “me too” evidence is from employees not “similarly situated” to plaintiff. – *Reed v. Freedom Mortgage Corp.*, 869 F.3d 543 (7th Cir. 2017) (“similarly situated” means directly comparable in all material respects); – *Miller v. Love’s Travel Stops & Country Stores*, 2008 WL 2079961 (W.D. Okla. May 9, 2008).

“objective is to eliminate other possible explanatory variables such as differing roles, performance histories, or decision-making personnel, in order to isolate the critical independent variable of discriminatory animus.”
Reed.

***STRATEGY: GET PLAINTIFFS TO ADMIT (AND BRAG!)
ABOUT UNIQUE NATURE OF THEIR JOBS.***

Examination Strategies to Exclude “Me Too”

Is there a logical connection between the “me-too” evidence and plaintiff’s theory of recovery (undue prejudice and confusion)?

- Emphasize that decisions made by different supervisor(s) than plaintiff’s is irrelevant to discriminatory intent. *Mourning v. Ternes Packaging*, 868 F.3d 568 (7th Cir. 2017)(not same decisionmaker)
- Is the “me-too” evidence very remote in time or geographic proximity?
- Did plaintiff not learn of the “me-too” evidence until after the alleged discriminatory action occurred?

STRATEGY: JUXTAPOSE COUPLETS OF QUESTIONS

Witness Examination: Attacking Character

F.R. Ev. 609

- Through reputation evidence, introduced only if the proper foundation is laid:
 - Do you know the witness.
 - Do you know the witness's reputation for truthfulness or untruthfulness.
 - What is that reputation.
- Note 1: this is *reputation* evidence, not an opinion formed from observed actions.
- Note 2: Evidence of truthfulness can only be introduced *after* the witness's reputation has been attacked.
- Specific instances of conduct can be admitted in limited circumstances.

Witness Examination: Refresh / Impeach

F.R. Ev. 613

Establish the witness's testimony.

Receive the testimony once.

Lock it in through repetition.

Show opposing counsel the impeaching material before use.

Make the impeaching material credible.

Do you remember your deposition?

Do you remember being sworn.

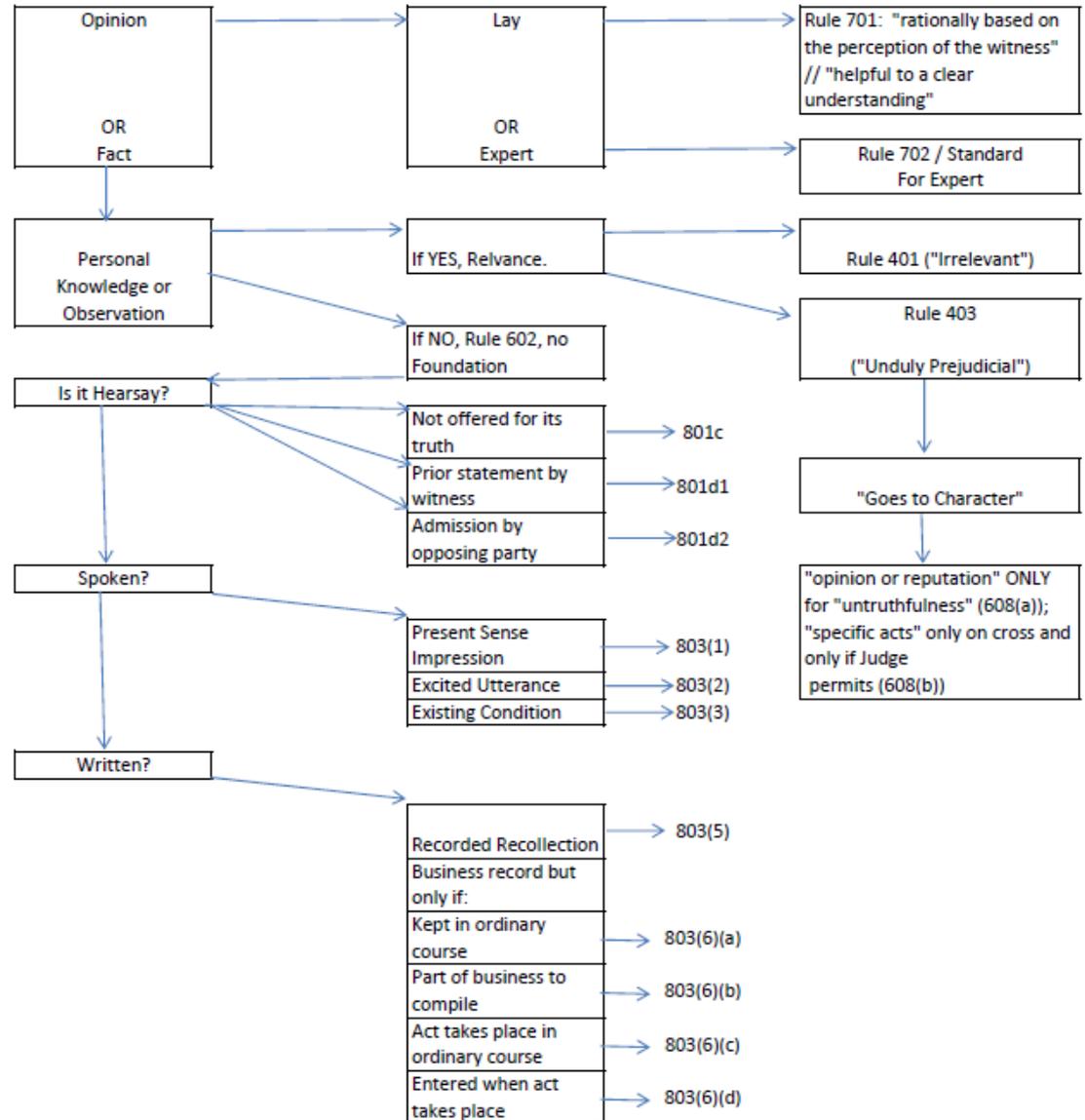
Ask the witness to follow.

Impeach by reading the testimony, then ask "did I read that correctly."

Ask, "does that refresh your recollection."

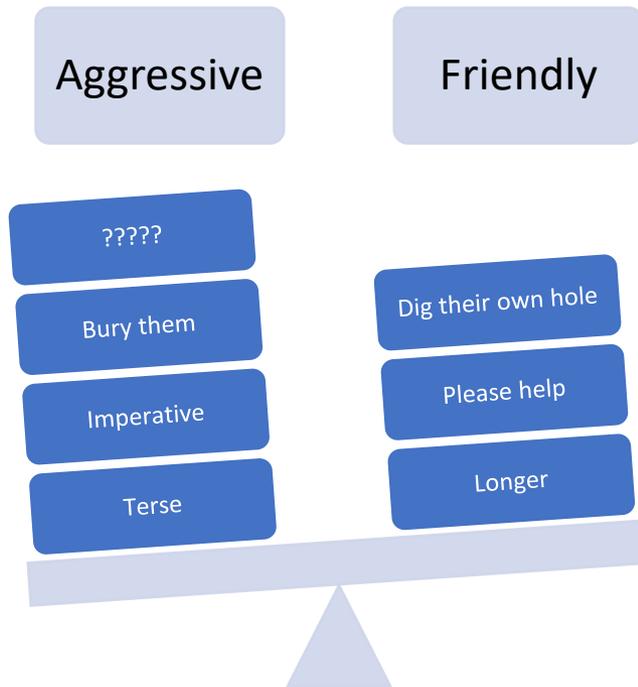
MOVE ON. DO NOT GIVE THE WITNESS A CHANCE TO FIX IT.

Trial Objection Flowchart



Witness Examination: Style

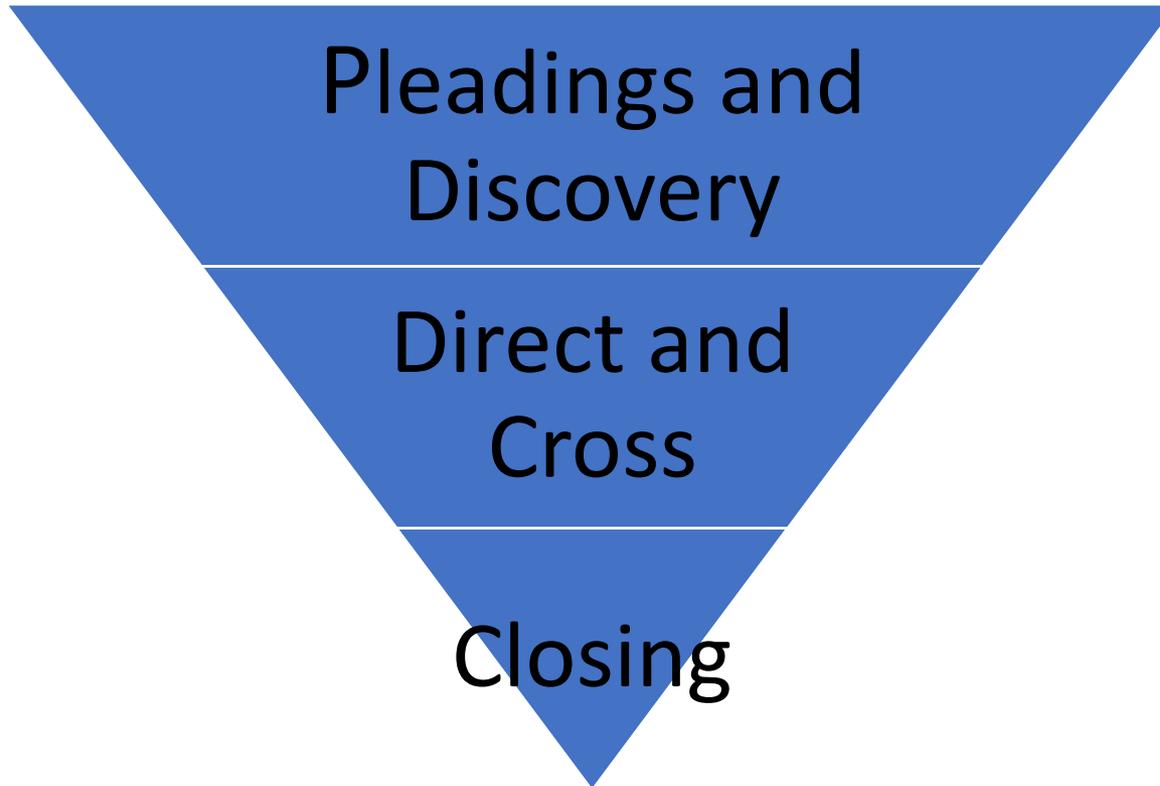
TOO MEAN
JURY MAY
SYMPATHIZE WITH
THE WITNESS



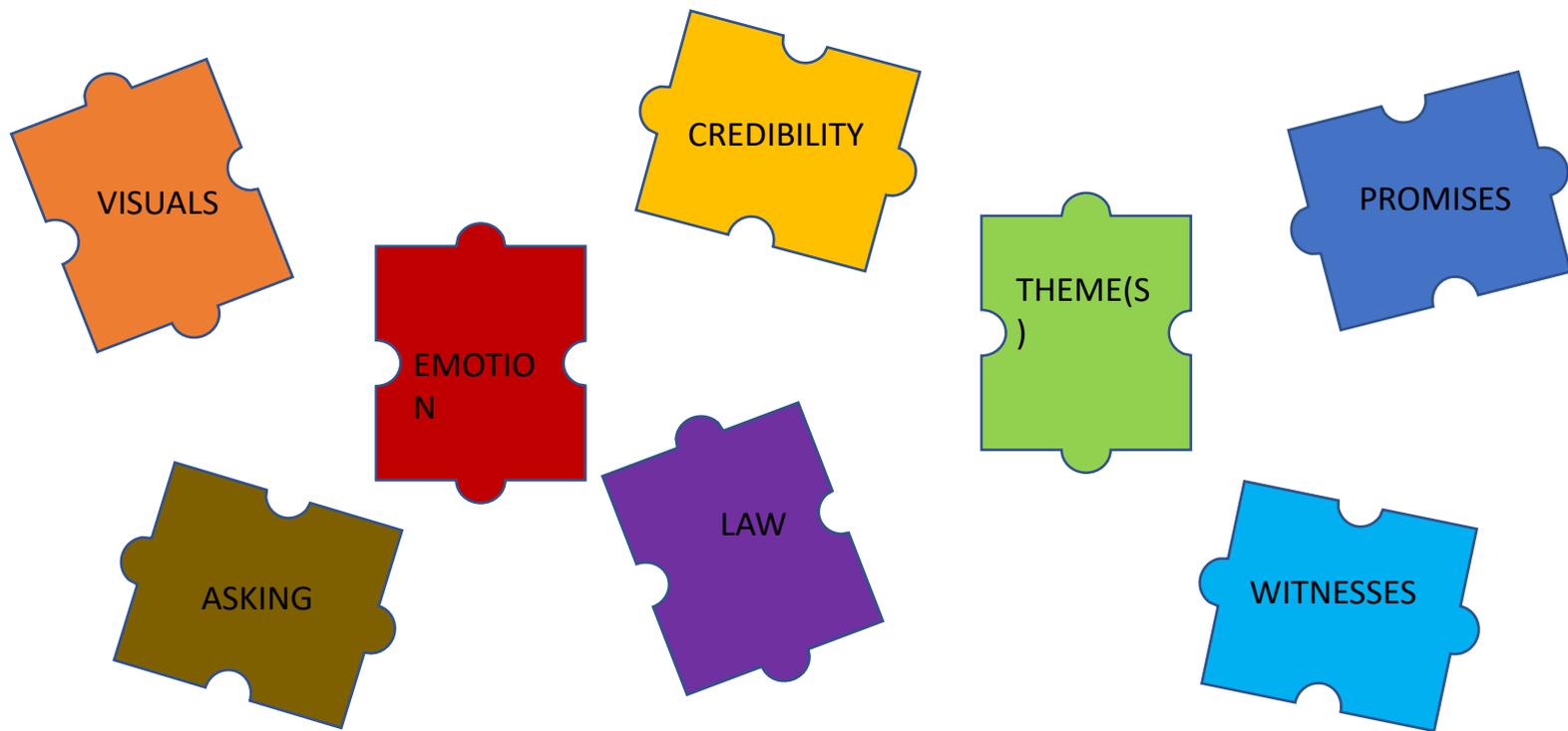
TOO NICE
YOU MAY NOT
ACCOMPLISH
ANYTHING

Closing Argument

The Narrowing of Facts From Start to Finish



How to Put the Pieces Together



Your Closing Has To:

1. Make the jury want to rule for your client.
2. Explain to the jury how to rule for your client.

Everything else is style.

Use The Rule of Three

- Life, liberty, and the pursuit of happiness.
- Of the people, by the people, for the people.
- Blood, sweat, and tears.
- Mind, body and spirit.
- Many, many, more.

Use The Rule of Three

Ladies and gentlemen of the jury, I am going to discuss three things:

First, before I delve into the law, this very important and separable thing that can be discussed first to get your attention.

Second, I will drape the facts over the jury instructions and tell you why, under the law, my client wins.

Third, I am going to play on your emotions such that you will want my client to win.

(DO NOT USE THOSE WORDS IN FRONT OF A JURY!)

Rule of 3: “This very important and separable thing that can be discussed first to get your attention.” -- Specific

There are many specific paths you can take in a systemic discrimination claim, depending on your case.

- “Before we get into the details, I want you just to focus on everything my client did to ensure a nondiscriminatory environment.”
- “I want to start out by discussing how statistics, without context, can warp reality.”

Rule of 3: “This very important and separable thing that can be discussed first to get your attention.” -- General

There are also general “first third” themes that are especially applicable in systemic cases:

- Witness credibility (discussed in detail later).
- Playing the “litigation lottery” / greed.
- Impossible choices: the defendant was going to be wrong no matter what it did, that’s just not fair.

Rule of 3: “drape the facts over the jury instructions and tell you why, under the law, my client wins.”

This “third” breaks down into three more thirds:

- What DUTY did is at issue (statute, tort, contract). Obviously in the discrimination environment, there is statutory duty but there may be other claims.
- How was the duty VIOLATED.
- What DAMAGE resulted.

Rule of 3: “drape the facts over the jury instructions and tell you why, under the law, my client wins.”

How to talk about the law:

- The Judge is going to read instructions and let the jury keep a copy.
- Do not rely on a collection of non-lawyers to interpret them.
- Find the most important points in your argument and explain the instruction to the jury in plain English.
- If you can relate specific instructions to specific evidence, all the better.

Rule of 3: “drape the facts over the jury instructions and tell you why, under the law, my client wins.”

How a defendant should address damages.

- Explain before and after discussing that in no way are you making a concession:
 - “Look, I don’t want to talk about damages, but I don’t want you going back there with only one side of the story.”
 - “We don’t think they deserve anything, period. But out of an abundance of caution, we’ve got to address this issue.”
- Focus on the legal standard governing damages, and use the words of the law, as opposed to your opinion, to create limits.
- Find the most important points in your argument and explain the instruction to the jury in plain English.
- If you can relate specific instructions to specific evidence, all the better.
 - For example in the 11th Circuit instruction on mental anguish: “You must determine what amount will fairly compensate [him/her] for those claims. There is no exact standard to apply, but the award should be fair in light of the evidence.” Emphasize the difference between fair as opposed to, say, disproportionate.

Rule of 3: “I am going to play on your emotions such that you will want my client to win.”

- This is where you drive home whatever theme you have been pushing since the start of the trial.
- “In opening I promised I would prove X, and I did.”
- “In opening I told you I would ask you to do Y, and I am.”
- “I just told you *how* to do it under the instructions you will be given, now let me tell you *why*.”

When To Address Credibility

- In a “me too” / “one said, the other said” case, you cannot ignore credibility as background. It is a, if not the, key issue for the jurors.
- If your side is strong on the issue, this may be your “part one” topic.
- If your side is less than strong on the issue, it may be best to address it only at the time you discuss facts where it applies.
 - “You don’t need to look to a witness to confirm that everyone was at that phone conference, because we have call in records.”
 - “There are controversies, there are disagreements, but Mr. X’s testimony on this issue should not be questioned because it is confirmed by (these other things).”

How to Address Credibility

- Calling someone a “liar” is risky, but you can point to objective indicators. We can tell when:
 - someone changes their story
 - people can't remember things
 - people give answers that are less than direct -- when people try to tell a story and not answer a question
 - people’s spoken word is different than their written word.
- Ask the Jury to look at those objective facts when making judgments about witnesses.

How to Address Credibility – “Refreshed” Memory and Impeachment

When witnesses doesn't remember deposition testimony, and tries to save themselves by noting “it's because I don't remember everything I said a year ago when I was deposed:”

- What that means is the witness sat down a year ago and swore to tell the truth and is sitting here today saying I don't remember that day a year ago when I swore to tell the truth.
- In and of itself is not unnatural, but when it is coupled with the witness coming up with sterling, clear memories of what happened two years ago and two-and-a-half years ago and three years ago, it could give you cause to wonder whether those memories are being accurately conveyed.
- Doesn't remember testifying under oath in a court case that she brought a year and a half ago; remembers other things earlier.

On Visual Aids -- General

- Auditory learners will comprehend what you say and do not need visuals. Too many visuals present a risk of losing this part of the jury.
- Visual learners will be left behind if all you do is talk.
- Presentation software (e.g. Powerpoint) should be used as a method to present words and pictures, *not* as a script.
- Less is more. Just because the software includes fancy transitions and animation does not mean you need to use those functions.

On Visual Aids -- Specific

- If your defense is policy-based:
 - Consider a visual showing “cover pages” of all the policy documents.
 - Use “call outs” of important language.
- If your case is statistics-based
 - Numbers themselves can be cold.
 - Pie charts / graphs can be better.
 - Pictorial representations are best, if available.

Jury Instructions

Jury Instructions: Overview

- You may be required to submit your jury instructions prior to trial.
- Accompany each proposed jury instruction with supporting statutes, case law, and secondary sources
- The judge can instruct the jury before argument, after argument, or both.
 - Fed. R. Civ. P. 51
- Special verdict forms may be required for separate claims, separate adverse actions, or for affirmative defenses.
 - Fed. R. Civ. P. 49

Jury Instructions: Sources (Federal)

- Applicable Circuit pattern instructions
- *Always* check Judge's website for variances
 - Note: check in "forms" area, and check under names that might not be intuitive.
- Use PACER for recent charges from Judge, in District.
- Look at instructions from comparable cases, which may be found in the transcripts of the cases.
- Go beyond substantive instructions, especially when credibility is at issue.

Jury Instructions: Sources (State)

There are often accompanying state law claims that will not be in federal sources:

- There *might* be pattern state instructions, but
- Don't count on it: you will have to research the leading case(s) setting out the elements of each claim.
- Note: the ABA and the EEOC both have model jury instructions for employment discrimination cases.

Jury Instructions: Key Instructions

- Key instructions for the defense
 - Plaintiff's duty to mitigate
 - Business judgment rule
- Other common instructions
 - Mixed-motive instruction
 - Not available for claims brought under the ADA or ADEA
 - *Faragher/Ellerth* instruction
 - Used in sexual harassment cases
 - Generalized fear of retaliation instruction

Jury Instructions

McDonnell-Douglas Instruction

- McDonnell-Douglas burden-shifting framework
 - Plaintiff must satisfy *prima facie* case of discrimination
 - Defendant must articulate a legitimate, non-discriminatory reason for the adverse employment action
 - Plaintiff must show that the reason articulated by defendant is a mere pretext for an unlawful discriminatory motive

Jury Instructions

McDonnell-Douglas Instruction

- Circuit split over whether jury should be charged on *McDonnell-Douglas*
 - First and Third Circuits permit the instruction
 - Second, Seventh, and Ninth Circuits do not permit the instruction
 - Concern that *McDonnell-Douglas* instruction would confuse the jury
- Practice tips
 - Consider the risk of confusing the jury
 - If you request a *McDonnell-Douglas* instruction, make sure to avoid legal jargon and to use simple language

Jury Instructions

Pretext Instruction

- Pretext instruction specifically charges the jury that it may, but need not, find for plaintiff if it (1) finds that plaintiff has made out a prima facie case and (2) disbelieves defendant's stated reason for taking an adverse action against an employee.
- Circuit split over whether a pretext instruction is required if certain facts have been established.
 - Second, Third, Fifth, and Tenth Circuits require that a pretext instruction be given
 - First, Ninth, Seventh, Eighth, and Eleventh Circuits do not require that a pretext instruction be given (with varying degrees of disapproval)

Jury Instructions: Preserving Error

- Two times to object
 - At the charge conference itself.
 - When there is a final reading before the case goes to the jury.
- In order to make a timely objection
 - Object on the record and out of the jury's hearing before jury instructions and final jury arguments
 - Fed. R. Civ. P. 51(c)
 - Or object promptly after learning that an instruction has or will be given.
 - Fed. R. Civ. P. 51(c)
- Avoid “cooperative consent.”
 - Do not let the record appear like you agreed to an instruction simply because you agreed to the language of an unacceptable instruction. Keep repeating the objection.

Jury Instructions: Not Just The End

- The judge's initial instructions will help shape juror perception. Though they are often "form," always review.
- During the case, do not forget to seek curative instructions (FRE 105).
 - Decide whether to request a limiting instruction during final instruction (balance curative force with risk of reinforcement)

Counseling Implications

Litigation and Employment Law Compliance Counseling

Clients may better be able to appreciate the consequences of their actions if linked to real world courtroom horror stories.

Litigation and Employment Law Compliance Counseling

When drafting with clients, speak to *both* these concepts:

What does the law demand.

How can this be presented to a jury.

Litigation and Employment Law Compliance Counseling

“How do you think that employee would describe this situation in response to a Plaintiff’s lawyer in front of a jury?”

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THANK YOU!

Douglas Brayley
Ropes & Gray
Boston, MA
617.951.7119
Douglas.Brayley@ropesgray.com

Christy E. Keily
Hunton Andrews Kurth
Richmond, VA
804.788.8677
ckiely@HuntonAK.com

Katherine P. Sandberg
Hunton Andrews Kurth
San Francisco, CA
415.975.3705
ksandberg@HuntonAK.com

ROPES & GRAY

HUNTON
ANDREWS KURTH