CROSS EXAMINATION IN EMPLOYMENT CASES

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State Bar of Texas
19th ANNUAL ADVANCED EMPLOYMENT LAW COURSE
January 13 - 14, 2011
Austin

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Detailed Outline

I. Why is cross-examination critical in employment cases
   A. You often must prove your case with testimony of adverse witnesses
   B. In most cases, state of mind is the critical liability issue
   C. In cases involving employment actions such as demotions or terminations, you must prove the reason for taking action—and employee testimony is typically valuable in proving the validity of such action
   D. Most employment discrimination cases are tried in front of juries
   E. Many jurors are employees and judge the case based on fairness

II. Techniques for Effective Cross-Examination
   A. Strategies
      1. Thematic cross-examination
         1.1 Themes need to be planted at the time of the witness deposition with specific examples so the jury can come to its own conclusion about what facts fit the theme
      2. Mix it up
         2.1 Presenting your case through opposing witnesses breaks up your opponent’s presentation of evidence and allows you to set the tone
      3. Start and end with the strongest issues
      4. Funnel approach (apply to lay witnesses)
         4.1 Open phase (scope before depth): open-ended questions
         4.2 Clarification phase: closed questions
         4.3 Pinning-down phase: summarize the witness’s testimony
      5. Theory testing: leading questions and know the law/elements of cause of action
      6. Valid objections: vague and ambiguous, speculative, leading, already asked, compound, mischaracterizes, narrative, privileged, legal conclusion
      7. Obstreperous lawyer – typically not a good idea
         7.1 Objection: evaluate appropriateness of objection and, if inappropriate, ignore and continue
         7.2 Approach to regain control: warn, mark or certify, draw the line if you are really serious
   B. Preparation
      1. Prepare for trial, not just the witness
      2. Create witness outlines for cross-examination
         2.1 Key points the witness admits, impeachment points, key issues in case to take on with the witness
3. Train the witness to answer leading questions in one word responses
4. Know your impeachment evidence
5. Narrow your questions to key points
6. Decide if your cross-examination will be supportive, concession-based and/or destructive, discrediting in nature
7. Consider what limitations the rules of evidence and procedure place on the scope and nature of your questions
8. Prepare headlines and transitions phrases as a communicative tool for the jury

C. Mode/Delivery

1. Drama
   1.1 Do not read prepared questions
   1.2 Build your evidence to fit your theme in a logical conclusion
2. Do not repeat hurtful testimony if the issue is collateral to your main points
3. Use leading questions
4. Usually, do not ask a question when you do not know the answer
   4.1 Exception: If you do not care what the answer is
5. Listen to the witness’s answer
6. Be respectful
7. Resist asking that last question; save for your closing
8. Avoid allowing a witness to repeat direct testimony or to explain his answers
9. Look at the jury, maintain eye contact
10. Keep it moving, interesting and project your voice
11. Ask the questions the jury wants to know
12. Impeach early in the stages of the cross-examination

III. Employment cases

A. Use documents
   1. Policy or rule at issue is likely in written form; paper trail of poor performance appraisals or written warnings
   2. Consider use of overheads so jury can follow

B. Co-employees
   1. Often offer a more “neutral” voice on performance issues
   2. Can be highly unpredictable

IV. Control Method of Cross-Examination

1. Book primarily addresses criminal cases, although the control method applies with equal force to civil trial work, and to employment trials in particular. Both areas involve strong accusations of intentional wrongdoing, tend to be highly emotionally charged, and are heavily focused on the requirement that the plaintiff (or state) carry the burden of proof

1.1 Ideally suited for defense lawyers in employment trials

B. Witness control: 1) counsel should ask leading questions only in the form of declarative statements, 2) counsel should ask questions that establish only one fact at a time, thus leading to short cross-examination questions, and 3) counsel should ask questions in a logical progression, with only specific and defined goals in mind

C. Structure of cross-examination: 1) defense counsel’s theory of the case, 2) proceed chapter by chapter, or topic by topic, 3) content is determined by, and limited to, “facts beyond change”

1. Theory of the case: reasoning by which the advocate is entitled to the verdict he/she is seeking

2. Facts beyond change: facts that will be believed by the jury as accurate, honest and truthful, regardless of best efforts to dispute and modify them

2.1 The most obvious facts beyond change in employment trials will be the witness’s previously sworn deposition testimony or prior affidavits. Others in an employment suit will involve elements of the “employee paper trail”

2.2 Key is to develop momentum and rhythm

D. Three specific techniques and applications

1. Impeachment

1.1 Impeachments will become far less frequent. Control method diminishes greatly the need to engage in any kind of impeachment

2. Looping

2.1 “Loops” are questioning techniques designed to give emphasis to particular points; a method by which an important or favorable point is reemphasized by repeating the information to be emphasized in the body of another question

2.2 Depositions can be used as a fertile ground for the discovery of terms or phrases that can be looped into a series of questions; careful indexing is crucial

3. Sequencing of the cross-examination

3.1 Avoid beginning or concluding a cross-examination with a risky chapter. In employment cases, there are usually several chapters that can be addressed that do not involve risk

V. Examination of the Plaintiff

A. Overview

1. Attack the plaintiff’s credibility

2. Identify the plaintiff’s motive in bringing suit
2.1 Is the plaintiff angry with the company or his/her supervisors which may have motivated the allegations?

2.2 Is the plaintiff upset about a poor evaluation?

2.3 Does the plaintiff have a personal history with the alleged harasser?

2.4 What about the money— isn’t that the true motive?

3. Identify the plaintiff’s response to the “hostile work environment” or offensive comment (i.e. was the plaintiff offended, amused or indifferent?)

4. Determine whether the plaintiff suffered damages by the alleged harassment or discrimination

B. Addressing the plaintiff’s background

1. Identify the aspects of the plaintiff’s background which may be relevant and helpful to the defense

2. Investigate whether facts support that the alleged conduct was unwelcome

3. Has the plaintiff filed suit for similar acts after, or made similar accusations at a previous employer?

4. Did the plaintiff lie on his/her application for employment?

5. Does the plaintiff have a reputation for untruthfulness?

6. Has the plaintiff been convicted of a crime involving dishonesty (to the extent admissible)?

7. Has the plaintiff voluntarily engaged in joking or banter of an inappropriate nature, including at work, in e-mails, on-line, in blogs or on the telephone?

8. Has the plaintiff engaged in other offensive or discriminatory behavior?

9. Life stressors independent of incidents at issue?

C. Plaintiff’s awareness of the company’s anti-harassment/discrimination policies

1. Is the plaintiff aware of the company’s policies against harassment and/or discrimination?

2. Are the policies contained in the employee handbook or manual, or are they located elsewhere?

3. Did the plaintiff sign a copy of an anti-harassment/discrimination policy or similar document?

4. Are there multiple avenues for reporting an alleged incident of inappropriate behavior?

5. Was training provided to the plaintiff?

D. Plaintiff’s adherence to Human Resources policies

1. Did the plaintiff fail to report the alleged conduct?

2. Did the plaintiff delay in making a report?

3. Did the plaintiff fail to follow-up on the report?

4. Did the plaintiff utilize the policy’s multiple channels for reports?
5. Did the plaintiff otherwise fail to avoid harm?

E. Plaintiff’s response to the incident
   1. What was the plaintiff’s initial reaction?
   2. What did the plaintiff do immediately following the initial alleged incident? Was the plaintiff upset, amused, apathetic?
   3. Subsequent response to the Initial Incident
      3.1 Do the plaintiff’s actions demonstrate that he/she did not subjectively perceive the conduct to be harassment?
      3.2 Did the plaintiff continue to work for the company?
      3.3 Was the plaintiff’s job performance affected by the alleged conduct?
      3.4 What are the results of a private investigation of the plaintiff?
      3.5 What does the Rule 35 examination show? What do medical records show?

F. Inconsistencies in the plaintiff’s statements
   1. What did the plaintiff previously state to others including doctors, therapists, co-employees, management and other witnesses? Are those statements consistent with the plaintiff’s present position?

VI. Examination of Adverse Witnesses

A. Purpose for calling an adverse witness
   1. To establish certain basic facts that only the opponent has first-hand knowledge of
   2. To offer circumstantial evidence to support your case theme
   3. To establish admissions

B. Methods to introduce testimony of an adverse witness
   1. Introduction of written admissions, interrogatory answers or documents which can establish practices, procedures and damning evidence
   2. Introduction of deposition testimony
   3. Calling adverse witness for live testimony

C. Strategies for confronting adverse witnesses
   1. Calling an adverse witness involves risks; know what the risks are
      1.1 Federal Rule of Evidence 611: Mode and Order of Interrogation and Presentation
   2. Minimize risks
      2.1 Gather intelligence about the trial judge, raise the issue at the pre-trial, inform the court about your decision to call an adverse witness, prepare a brief trial memo if necessary, prepare a tight examination with impeachment material ready at hand for each point you intend to make, be prepared to conduct the exam through non-leading questions if necessary, be ready to raise objections to leading questions
3. Control the order, tempo, and dynamics of the examination
4. Gather corroborative evidence
5. Set up contradictions with other witnesses
6. Make the witness lie or concede helpful points in front of the jury
7. Work off the documents and not just deposition transcripts
8. Ask difficult questions in a calm, respectful manner

D. Human Resources Witnesses/Direct and Adverse

1. Direct
   
   1.1 Testimony is given by someone who, usually, is not a direct participant in the wrongs of which plaintiff complains and may be or appear to be well removed from an obvious wrongdoing
   
   1.2 The Human Resources role consists of attempting to resolve workplace disputes at the company, a role which clothes the witness in a neutral and credible light
   
   1.3 The witness has likely struggled with the same issues that the jury is now being forced to tackle
   
   1.4 Human Resources individuals are frequently likeable people who entered the field out of a sincere desire to be helpful

2. Adverse
   
   2.1 Consider whether is proper subject of expert testimony
   
   2.2 Make adverse witness your own
      
      2.2.1 Difference between best and reasonable practice
      
      2.2.2 Difficulty in administering within a work force
      
      2.2.3 Boorish behavior versus discrimination

VII. Expert Witnesses

A. Background: more flexible standards addressing admissibility of expert testimony coupled with the fact that virtually all employment discrimination cases are tried in front of juries since the enactment of the Civil Rights Act of 1991, contribute to an increase in the use of expert testimony in employment litigation

1. Expert opinion based on a scientific technique was inadmissible unless the technique was “generally accepted” as reliable in the relevant scientific community. *Frye v. United States*, 923 F. 1013, 1129-1130 (D.C. Cir. 1923)

2. Supreme Court abandoned the *Frye* framework, and adopted a less rigid test which focuses on the reliability and relevance of the testimony and, in turn, places a heavier burden on the trial judge to act as the “gatekeeper” for the admission of expert testimony. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993)

B. Defined: an expert is one who has specialized knowledge of the specific matters about which his expertise is sought and whose specialized knowledge may be derived from a study of technical works, specialized education, practical experience, or varying combinations thereof; what is determinative is that his answers indicate to the court that he possesses knowledge that will aid the jury in drawing inferences regarding the fact issues more effectively or reliably than the jury could do unaided. *Agbogun v. State*, 756 S.W.2d 1, 4 (Tex. App.—Houston [1st Dist.] 1998, writ ref’d)


1. Two-prong test:
   1.1 The expert must be qualified
      1.1.1 Federal Rules of Evidence allow expert testimony in scientific, technical or other specialized areas provided the witness is qualified as an expert by knowledge, skill, experience, training or education. *Fed. R. Evid. 702*
   1.2 The testimony must be relevant and reliable
      1.2.1 Relevance: under Rules 401 and 402, the evidence must fit the issues and must be sufficiently tied to the facts of the case such that it will aid the jury in resolving a factual dispute. *Fed. R. Evid. 401 & 402*
      1.2.2 Reliability: *Daubert* reliability test codified in 2000 amendments to Rule 702 requires that (1) the expert testimony be based on sufficient facts or data, (2) the expert’s testimony be the product of reliable principles and methods, and (3) the expert apply the principles and methods reliably to the facts of the case. *Fed. R. Evid. 702*

D. Perception by the jury

1. Courts have recognized that expert witnesses can have an extremely strong impact on the jury, in part because of the way in which the jury perceives a witness labeled as an “expert” and because of the inherent difficulty in evaluating scientific evidence. *E.I. Dupont de Nemours & Co. v. Robinson*, 923 S.W.2d 713, 722 (Tex. 1998)

2. Skilled cross can often neutralize this effect

3. Catch expert in errors, overstatements, or assertions outside area of expertise

E. Scientific vs. Non-Scientific Experts

1. Hard science experts
   1.1 Statisticians: prove discrimination by pointing to disparities in the number of majority employees to protected class employees
   1.2 Economists and accountants: prove damages and economic losses

2. Experts utilizing adapted methodologies
2.1 Medical and mental health experts: prove damages to show a person’s ability to perform the essential functions of a position under the ADA, for example; to show mental anguish or physical damages stemming from harassing or other discriminatory conduct

2.2 Mitigation experts (human resource directors, outplacement service counselors and recruiters): testify as to the reasonableness of the plaintiff’s efforts to find employment after termination

3. Employer Practices and Policies experts

3.1 Purpose: to testify on hiring practices, sexual harassment policies, sexual harassment investigations, affirmative action policies, reasonableness of termination decisions, and wage disparities

3.2 Human resource managers, professors of industrial relations management, personnel administration or attorneys

3.3 Harassment experts

3.4 Culture and Industry Practices experts

3.5 Experts on ultimate jury questions

F. Presenting expert testimony in cross-examination

1. Use of hypothetical questions

2. Have the expert state his ultimate opinions to the jury and then allow cross-examiner to explore the validity of the underlying assumptions

3. Impeach expert by demonstrating that his opinions are based upon erroneous factual assumptions

G. Rules of Cross-Examination

1. Rule 611(b): “cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness... the court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination.” FED. R. EVID. 611(b)

H. Challenging the expert’s credibility

1. Are the expert’s credentials subject to attack?

   1.1 Is he/she a graduate of the schools/programs of which he/she claims?

   1.2 Can all items on the expert’s curriculum vitae be verified?

   1.3 Has the expert been sued, disciplined, or otherwise investigated?

2. Prior Opinions

   2.1 Is any of the expert’s testimony inconsistent with prior testimony?

   2.2 Has the expert given opinion testimony previously which is inconsistent with his/her present opinion?

3. Bias of Expert

   3.1 Was the expert hired just for purposes of litigation?
3.2 Is the expert a practicing professional witness?

3.3 Is the number of times the expert has testified for plaintiffs disproportionately high, as compared to the times testifying for the defense?

I. Challenging the expert’s methodology

1. *Daubert/Robinson* based cross-examination
   
   1.1 Expert is likely to be very defensive about his methodology
   
   1.2 Cross-examining attorney must be familiar enough with the proposed expertise involved to be able to fairly criticize it
   
   1.3 Concept of methodology is not necessarily an easy one to grasp, and can sometimes result in an awkward cross-examination

2. *Daubert/Robinson* factors
   
   2.1 Can/has the theory/technique been tested
   
   2.2 Has the theory been subjected to peer review
   
   2.3 What is the known potential rate of error
   
   2.4 Are there standards that govern its practice
   
   2.5 Is the theory/technique generally accepted in the community
   
   2.6 What are the non-judicial applications of the theory/technique
   
   2.7 To what extent do the results rely on the subjective interpretation of the expert

J. Types of questions

1. Preliminary questions
   
   1.1 Billing, occupation, publications/lectures, frequency of expert testimony
   
   1.2 Scope of engagement

2. Assumptions
   
   2.1 Validity
   
   2.2 Source

3. Ask the expert things he did not consider or which you believe or know that your own expert has or will consider

4. Ask whether his end result would change if his assumptions change

5. “Cosmic experts”
   
   5.1 Ask an expert for every opinion he plans to give at the trial of the case, what he bases his opinions upon, why he is qualified to give an opinion in a particular area, what he was paid to do, whether he has investigated facts which could lead to other explanations, whether he has an opinion on why the other possibilities for the event are less likely than his theory

   5.2 Punitive Damages
5.2.1 Has the expert authored any articles, developed a method for determining how much punitive damages should be awarded, studied corporate decision making, received formal education in these areas; is he familiar with any case involving punitive damages, conduct of the defendants; does he have an opinion as to the actual damages which should be awarded

VIII. Types of Employment Law Cases

A. Wrongful Discharge Cases

1. Plaintiff employee will likely have a vivid recollection of the facts and the events surrounding the termination while the employer’s memory may not be as sharp. The jury does not expect perfect recall but a credible explanation of what happened

2. Recollection refreshment techniques under Federal Rule of Evidence 612

3. Plaintiff strategy
   3.1 Focus on:
       3.1.1 Evidence of discrimination
       3.1.2 Support for damage claims: Client must be prepared to describe all aspects of economic loss and lost advancement opportunity. Client must be prepared to support expert economist’s calculation of economic damages

3.2 Make sure the client does not admit that the employer had a legitimate business reason for its conduct or that the employer believed any alleged reasons for termination or discriminatory conduct

4. Defense strategy
   4.1 Choice of witness if the defendant is a corporation
       4.1.1 Representation of the corporation through presence of a corporate representative personalizes the “faceless” corporation and creates the image of one individual against another, rather than the lone plaintiff against the huge, impersonal company. *See Kimzey v. Wal-Mart Stores, Inc., 107 F.3d 568 (8th Cir. 1997)* ($500 mm sexual harassment verdict resulted, in some part, from the defense attorney’s poor behavior during cross-examination according to anecdotal evidence and juror responses to post-trial questionnaires)

   4.2 The representative must appeal to the jury and also symbolize the seriousness with which the corporation takes the charge against it

4.3 The fewer witnesses, the better
   4.3.1 The same corporate representative should explain the personnel procedures for disciplining employees and the reasons for them, as well as the company’s employment handbook and any rules or procedures in it, which are related to the case

   4.3.2 The jury expects the corporate witness to take proceeding seriously and be prepared
B. Sexual Harassment

1. Nature of the harm

1.1 Actionable harm under Title VII cases are usually quantifiable, however, in sexual harassment cases, the harm can be wholly psychological.

1.2 An unlawful hostile workplace is one where the sexual harassment is sufficiently severe and pervasive as to affect the psychological well-being of the complainant, thus affecting a term, condition, or privilege of employment. *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 67 (1986)

2. Definition: how does the jurisdiction define “sexual harassment”? 


3.1 Plaintiff belongs to a protected category

3.2 Plaintiff was subjected to unwelcome sexual harassment

3.3 The harassment complained of was based upon sex

3.4 The harassment complained of affected a term, condition, or privilege of employment; and

3.5 A respondeat superior relationship existed

4. Dual objective-subjective standard (*Rabidue v. Osceola Refining Co.*, 805 F.2d 611, 619 (6th Cir. 1986)): Complainant must 1) offer objective evidence that workplace conduct is so abusive that it would likely interfere with the reasonable person’s ability to perform work, and 2) offer subjective evidence of the actual effect of the offensive conduct on the complainant’s psychological well-being

4.1 See *Robinson v. Jacksonville Shipyards, Inc.*, 118 F.R.D. 525 (M.D. Fla. 1988) (court ruled that societal sexual norms were irrelevant with regards to defense seeking a psychological examination)

5. Cross-examination of expert (e.g. plaintiff’s psychologist)

5.1 Goals of expert testimony: 1) assess the subjective psychological impact of the conduct on the plaintiff, and 2) measure its offensiveness within the greater societal context

6. Cross-examination

6.1 Purpose

6.1.1 Secure admissions favorable to your case

6.1.2 Discredit the witness of his story

6.1.2.1 Cross-examination of the psychological expert witness usually can be divided into 1) the direct attack, which asks whether the expert’s conclusions are worthy of belief, and 2) the collateral attack, which asks whether the human being is worthy of belief

6.2 Beware of “professional witnesses” who know how to spot cross-examination subterfuges
6.3 Be careful not to open the door to unfavorable testimony on redirect

IX. Conclusion

A. Use common sense

B. Assess and use of all tools of the trade at your disposal

C. Do not try to do too much