ABA SECTION OF LABOR AND EMPLOYMENT LAW:

LITIGATION CHECKLIST FOR AN EMPLOYMENT CASE©

By

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I. INTRODUCTION

In order to be successful, a trial lawyer must have a comprehensive and effective litigation plan. Many winning trial lawyers firmly believe that the key to success starts with extensive preparation commencing at the inception of the legal matter and continuing through with unwavering commitment until the matter is final. The trial strategy should be outlined early in the case-handling process, and it should be repeatedly refined and enhanced as the case-handling process proceeds through key phases like discovery.

In light of the fact that most employment lawsuits settle short of trial, it might be natural to be skeptical of the benefit of preparing your case from Day 1 as if it is going to trial. But history shows that the likelihood of achieving a favorable settlement is enhanced by your opposition's true belief that you are ready and willing to try your client's case. Only then are you bargaining from a position of strength for your client. Further, if the case you are handling is the case that actually gets tried, your client is best served by your trial readiness and preparation from the outset.

This seminar paper is for educational purposes only, and it does not contain legal advice. This paper outlines considerations and concepts for the lawyer for the plaintiff, union, and management. Although each side will, no doubt, have unique perspectives that require a

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generic outline to be tailored to the particular type of client (*i.e.*, plaintiff/employee, union representative, employer, etc.) and the specific facts and circumstances of the matter, a basic checklist, nevertheless, serves the valuable purpose of providing a framework for handling a case from its inception to the ending appeal. The tips and traps that are discussed in this paper are worthy of consideration by any trial lawyer, regardless of the particular client type. There are occasions where the issue at hand is unique or peculiar to one perspective, and, if such is the case, the article typically notes the respective viewpoint(s). No checklist is all-inclusive, and, as a prudent lawyer, you are cautioned to adjust/supplement this checklist to suit your particular situation.

II. INITIAL CONTACT WITH THE CLIENT AND RECEIPT OF THE CASE

The initial contact with the client is very important. Although the exact steps that must be taken will depend on the facts and circumstances, there are some basic steps that a lawyer should take.

When the plaintiff's counsel is first undertaking to decide if he or she will represent the plaintiff (who is usually an aggrieved applicant, existing employee, or former employee) in an employment lawsuit, the plaintiff lawyer must make an initial assessment of the merits of the case.

A. THE INITIAL MEETING(S) WITH THE PROSPECTIVE PLAINTIFF

1. Fact Gathering

Many plaintiffs' counsel will use a questionnaire to gather the initial facts about the prospective employee. Others will conduct detailed interviews (either by himself or herself or through a paralegal). The purpose of the fact-gathering effort, regardless of how it is conducted, is to gather key facts about the prospective employee including but not limited to:

a) Name, address, and other contact information (including email address).

b) Age, sex, race, date of birth, and other distinguishing characteristics (including other protected classes such as a disability).

c) Educational background.

d) Work history including names of employer(s), title(s), period(s) of employment, salary and benefit information, supervisor(s), and other important employment history.

e) Criminal history, including all detailed information.

f) Relevant financial history, including whether the prospective employee has filed for bankruptcy as that may impact ownership of the cause of action. *See, e.g.,* In re Senior Cottages of America, 482 F.2d 997, 1001 (8th Cir. 2007), citing 11 U.S.C. § 541(a)(1) ("The property of the estate includes 'all legal or equitable interests of the debtor in property as of the commencement of the case. * * * Causes of action are interests in property and are therefore included in the estate* * *.'"); *see also*, Harvey v. Southern Minnesota Beet Sugar Cooperative, 2004 WL 368471, *2 (D. Minn. 2004) ("An asset that is the property of the bankruptcy estate is no longer the property of the debtor and the bankruptcy trustee must determine whether to pursue the asset.").

g) The prospective party's ability to pay/fund the claim and/or litigation.

h) The individual's past and present involvement in civil litigation, charge-filing, and/or informal assertion of a claim(s). It is wise to know if the individual has asserted other claim(s), whether formally or informally, and/or has been a defendant and/or key witness in any other matter(s). If so, it is important to gather all relevant information relating to such matter(s) that could impact the instant matter (*e.g.*, if the prospective plaintiff made the same or similar claim against another employer).

i) Emotional and mental history. It is important to gather all of the facts that concern the individual's emotional and mental history. Key medical records should be gathered and examined.

j) The facts and circumstances in the present disputed information. Names of key individuals (*e.g.*, the perpetrator, supervisor, co-worker witnesses, etc.) should be gathered, as well.

k) The desired goal of the prospective plaintiff. From the outset, it is advisable to identify what the party desires to achieve and then to review periodically what the party's goals and objectives are.

l) Other.

2. Document Gathering

a) Key documents should be gathered, including but not limited to the personnel file, the company handbook, any documents related to performance (*e.g.*, an award), etc.

b) Many plaintiffs' counsel do not want the individual to remove documents from the employer's business, particularly if the employer has written rules governing the removal of documents. As set forth immediately below, there is a solution for ensuring that documents are preserved.

c) If appropriate, it may be wise to send the prospective defendant a letter warning the individual or corporation to preserve and maintain all potentially relevant documents. An anticipated list of the types of such documents may also be provided (*e.g.*, personnel files, emails, contracts, supervisor files, investigatory files, etc.).

d) Litigation holds should be issued, as appropriate, to preserve all of the prospective plaintiff's potentially relevant documents in tangible and electronic form. Documents should be defined broadly, just as the word is broadly defined under the Federal Rules of Civil Procedure.

B. The Initial Meeting(s) With The Prospective Defendant

1. Fact Gathering

The lawyer for the union, the employer, and/or the individual defendant should conduct a similar fact-gathering exercise to that set forth in Section II(A)(1) above.

It is important to identify any additional history with similar and/or related litigation, particularly in order to issue spot any concerns that may raise issues of an alleged pattern or practice.

2. Document Gathering

As in Section II(A)(2) above, key, potentially relevant documents should, likewise, be collected and reviewed, just as was the case with the prospective plaintiff.

Appropriate litigation holds should also be sent (and resent later, as appropriate).

C. The Initial Credibility Assessment

Recognize that the results in an employment lawsuit often turn on the credibility of the party, particularly when compared to the other side. For example, in a sexual harassment suit, it is frequently a case of she said/he said. Thus, it is prudent to examine your own prospective client's

believability. If you don't trust what you are hearing is true, you must recognize that a judge or jury may have the same reaction or concern.

D. Additional Procedures Relating to The Initial Intake

1. Conflicts Check

Conduct a conflicts check within you firm immediately to ensure your firm's ability to represent the potential client.

2. Send Acknowledgement Letter To Client/Insurer

Acknowledge receipt of the file from the client/insurer. Identify your rates or fee arrangement (*e.g.*, contingent fee arrangement in the case of the plaintiff) and the conditions of representation as appropriate. (*See* other subparts in this section below).

3. Written Representation Agreement

It is wise to document the agreement to represent the party in writing and to obtain an executed written fee agreement.

4. Multiple Representation

If you will potentially undertake to represent more than one person or entity, conduct a review of the positions of the various potential clients and determine the appropriateness of joint representation. Review the situation not just for actual conflicts, but also for appearance issues. If optically it is not advisable to represent more than one party even though you may ethically do so, it may still be appropriate to reject the joint representation.

i) If you undertake to represent more than one individual and/or entity, it is wise to have a written agreement signed by all respective clients consenting to the joint representation, setting forth the fee and/or other financial agreements, and addressing any issue(s) of real or potential conflict(s) of interest and appropriate waivers. You should instruct the parties to obtain independent advice about whether to agree to joint representation.

ii) If different law firms will represent the related parties, review the facts, circumstances, benefits, and conflicts, if any, of engaging in a joint prosecution/defense and obtain an appropriate written joint agreement.

5. Potential Insurance And/Or Sources Of Indemnification

Check for insurance coverage. If available, make sure your client tenders the case for defense and coverage.

Check also for sources of indemnification and/or contribution, and take appropriate steps to obtain/preserve the rights to indemnification and/or contribution.

III. Identification Of Claims/Defenses And Forum And Jurisdiction Issues

The initial assessment of the case is very important. It will help you determine the appropriate forum (*e.g.*, agency, arbitration, federal court, or state court), the necessary parties (*e.g.*, employee, employer, union, supervisor, alleged harasser, third parties like vendors, etc.), and the proper venue (which court location, such as which state or county). Although the exact steps that must be taken will depend on the facts and circumstances, there are some basic steps that a lawyer should follow, whether representing the plaintiff or the defendant:

A. Identification Of The Claims And Defenses

1. Identify The Claims And Defenses Under Federal Law, State Law, City Ordinance, and Any Other Source

The prudent lawyer will conduct a complete review of all of the legal issues in the case.

The plaintiff's counsel should study the potential applicable statutory, regulatory, and common laws to identify potential claims. Obviously, it is key to review federal and state law. The prudent plaintiff's counsel will also examine and anticipate the potential defenses that may be raised by the defense, in order to strategize how to proceed.

The defense lawyer will study the applicable law relating to the claims asserted by the plaintiff. This process will help identify potential defenses and affirmative defenses. It will also highlight potential deficiencies in the plaintiff's pleading, including the absence of the requisite elements of each claim asserted by the plaintiff, which may be a basis for a motion to dismiss, a motion for a more definite pleading, a motion for judgment on the pleadings, and/or a motion for summary judgment.

2. Remember To Look For All Sources/Documents That May Give Rise To A Claim And/Or Defense

The careful lawyer will remember that handbooks, contracts, and other sources and documents may provide an alleged basis for a claim (*e.g.*, breach of contract) or a basis for a defense (*e.g.*, failure to follow a complaint procedure and/or exhaust remedies).

B. Identification Of The Appropriate Forum

Initiating a claim in the proper forum is essential.

The plaintiff's lawyer must remember that certain claims must commence with a charge before an agency such as the Equal Employment Opportunity Commission. *See, e.g.*, Title VII.

Additionally, the employee may have signed a binding contract that requires the arbitration of his or her claims.

Further, if the matter may proceed in court, the issue of whether to bring the claims in federal or state court should be decided. Some plaintiff's counsel believe that there is an advantage of bringing a claim in one court vs. another. For example, in some states, there is a perceived benefit to bringing the claims in state court because the particular state court is less likely to grant summary judgment than the federal court or the relief available under state law is better than under federal law and the plaintiff plans to plead only state claims. If there is a perceived benefit to bringing a claim in state court, the plaintiff's lawyer will need to decide if federal claims will not be asserted, as federal claims will provide a basis for removal to federal court.

C. Identification Of The Proper Venue

Venue issues should be considered. *See, e.g.*, 28 U.S.C. §§ 1391-1412 (federal statutory provisions relating to venue).

Venue issues typically involve factors such as where the cause of action arose, where the defendant resides or does business, etc.

For the defense, if the plaintiff has chosen a venue that is not appropriate and/or there is a more preferable venue, as the defense lawyer, you may first attempt to obtain consent of plaintiff's counsel to change venue, as that will make the change of venue by the court more likely. If necessary, you may need to move for a change of venue. *See, e.g.,* 28 U.S.C. § 1412 (regarding venue changes).

D. ARBITRATION REQUIREMENT

If the plaintiff has commenced the suit in court even though the plaintiff had a legally enforceable obligation to raise the dispute in arbitration, it will be necessary to address the arbitration issue. The first step may be to seek the agreement from the opposing counsel to dismiss the suit and bring the claim in the proper arbitration forum. If that step is not successful or alternatively, it may be necessary to bring a motion to compel arbitration. The issue of arbitration must be addressed promptly, as there is a risk that if there is delay, the court will hold that the arbitration requirement has been waived.

E. REMOVAL ISSUES

If the plaintiff's counsel brings the claim in state court and there is a basis for removal on diversity or subject matter grounds, the issue of removal must be promptly addressed.

1. Study The Removal Statute

It is important to study the requirements for removal. *See* 28 U.S.C. §§ 1441-1451 (removal provisions).

2. Remember The Deadline

The deadline to remove is 30 days. 28 U.S.C. § 1446.

3. Assert All Grounds

Assert all bases for removal (federal question and diversity) that appear in the pleadings.

a) Federal question under 28 U.S.C. § 1331

Remember to answer or move for summary judgment before or at the time of removal to join the federal issues in the case and, thus, to prevent plaintiff from voluntarily dismissing the federal claims under Fed. R. Civ. P. 41.

b) Diversity under 28 U.S.C. § 1332

There is a one-year, absolute deadline for removing diversity cases under 28 U.S.C. § 1446. Do not confuse this one-year deadline with the 30-day requirement, which still applies.

c) No diversity removal where defendant is a citizen of the state

No diversity removal may be had if any defendant is a citizen of the state in which the action is brought. *See* 28 U.S.C. § 1441 (setting forth limitations on removal).

IV. IDENTIFY THEMES IN YOUR CASE AT AN EARLY STAGE

It is advisable to start identifying themes in the case from the outset. Obviously, you will need to adjust the themes to comport with the evidence as the discovery proceeds. But the early identification of themes will help guide the discovery of the case.

On the subject of themes, there are a number of concepts and strategies for developing the themes of the case. A general rule of thumb, though, is to make sure that you do not have too many themes in your case. You want to develop a story that will resonate with the fact-finder whether the finder is a judge or jury.

One way to tell the story may be to identify three concepts that tell the story (*e.g.*, the plaintiff was a responsible and good employee, the company failed to advance her because she was a woman, and she has suffered economically and emotionally as a result). Then, you should identify the key facts you will need to introduce to prove your story.

Although it is a very hard thing to do, the good trial lawyer will be able to tell his or her client's story in one paragraph. Forcing yourself to do so will result in a compelling story. It will help you to focus on what is really important as you tell your story. As you write the paragraph, you may want to attempt to identify approximately ten points that get you logically from A to Z in your story telling. That will help you write a concise and compelling story.

Remember that jurors want to get the right result. They strive to understand what happened. They like to assess blame or responsibility and to reward the non-culpable party. Many jurors may have an inherent distrust of the employer. But they will likewise be able to recognize the malingering plaintiff.

Typical themes in an employment case include the following: selfishness; selflessness; fault; acceptance of responsibility; insubordination; stubbornness; ineptitude; loyalty; pride; failure to communicate; dishonesty; anger; rage; revenge; etc.

V. THE BEGINNING STEPS OF WORKING THE CASE

A. CONDUCT DETAILED FACTUAL INTERVIEWS

Conduct detailed factual interview(s).

You should not only conduct an in-depth interview of your client, but you should also interview other available witnesses early in the case.

For the plaintiff's counsel, this means that you should talk with any co-workers or other employees (provided you can ethically contact them), the significant other(s), friends, family, medical care providers, and others with relevant information.

For the defense counsel, interview not just the human resources personnel and the supervisor, but interview co-workers, third parties like consultants, and others with relevant information. Be mindful that your interviews will not all be protected by the attorney-client privilege and that the opposing counsel may discover your line of questioning.

Gather all potentially applicable documents as you are conducting the interviews.

B. SEARCH FOR RELEVANT DOCUMENTS AND STUDY THEM

You should collect and examine relevant documents. Do not forget to follow the rules regarding retention of documents. Issue litigation holds as proper.

For the plaintiff's counsel, you must remember to collect and retain not just the obvious documents like the personnel file, company handbook, medical records, diaries, and the like. But also, you should remember that your client's computer, cell phones, and other electronic devices may be a source of relevant information.

For the defense, remember to collect relevant tangible written documents, electronic documents from all sources (computers, laptops, personal computerized devices, etc.) and other potential evidence (*e.g.*, photographs, recordings, etc.). Again, pay attention to discovery obligations, including electronic discovery obligations, and proceed accordingly (*e.g.*, litigation hold, repeated periodic search for documents, etc.).

C. CONDUCT RESEARCH

Conduct the necessary legal research at the outset of the case. It is wise to also obtain and know the cases that the assigned judge and/or magistrate judge authored in the subject area. It may also be advisable to obtain and know the cases in which your opposing counsel was involved in the subject area.

It is prudent to review the anticipated jury instructions as they will help you shape your discovery.

D. Conduct An Initial Case Evaluation

Conduct an initial evaluation of the case based on the initial, detailed factual interviews, examination of the documents, and your review of the applicable law.

Discuss your initial evaluation with the client on a timely basis. Discuss the strategy for proceeding and the anticipated costs (both human and economic) associated with various steps in your discovery plan. Agree upon an initial strategy. Document your discussions with your client.

E. Do Not Forget The Duty To Mitigate

As the plaintiff's counsel, you will want to remember to instruct your client on his or her duty to mitigate damages. You should tell the plaintiff/employee to keep a detailed record of his or her mitigation efforts and copies of the related cover letters, resumes, newspaper ads, and other such documents. As the defense counsel, you will not want to forget the importance of examining mitigation issues.

F. Discuss The Case With The Opposition

It may be wise (or required) that you discuss the case facts, evaluation, and initial settlement demand/offer with the opposing counsel. *See, e.g.*, Rule 26(f) (setting forth Rule 26(f) conference requirements). Even if such a discussion is not required, it may be beneficial to conduct an early discussion.

Although Rule 26 or the Court's pretrial order typically requires the plaintiff to make a settlement demand, it is, nevertheless, a good idea to know, at the earliest possible moment, how the other side values the case. That information assists the client in determining the strategy for proceeding. For example, if the plaintiff's counsel admits that the plaintiff has insignificant damages, your client may decide to spend some time early in the case discussing settlement for purely economic reasons. Conversely, if defense counsel indicates the company is "not willing to spend one dime," such information may make it clear that your time is better spent preparing a vigorous defense.

G. Consider Whether It Is Appropriate To Engage In Some Early Resolution Process

An employment lawsuit is expensive. It may also take an emotional or other non-economic toll on your client. It may, therefore, be wise to discuss the potential of early resolution with your client, and then with opposing counsel following your client's informed consent.

Although many lawyers believe that cases cannot be resolved at an early stage, particularly without the benefit of some formal discovery, that is generally not the case. With proper informal gathering of factual information from witness interviews and document examination and an early assessment of the legal claims, a party may typically become sufficiently armed with the information necessary to resolve a case at an early stage. Early resolution may not be possible in class, representative, or multiple plaintiff cases or when the evaluation depends on discovery of facts largely within the control of the defense.

In federal cases, remember that the magistrate judges are generally willing to become involved at an early stage to assist in settlement discussions.

Additionally, consider early mediation or other alternative dispute resolution process.

VI. THE INITIAL PLEADINGS

A. DRAFTING THE COMPLAINT

Follow the rules for drafting complaints. Make sure you set forth the requisite information. Remember that, in some courts such as federal court, you need only notice plead. *See*, *e.g.,* Fed. R. Civ. P. 8 & 9 (governing pleading). If your jurisdiction allows notice pleading, it will still be necessary to provide sufficient facts on each element of the claim.

Consider the impact that your complaint may have. Although notice pleading only requires you to provide the basic details of the claims, some plaintiffs' counsel choose to draft a very fact-specific complaint for some other reason (*e.g.*, to get the employer's attention, to attract media attention, etc.). If, as plaintiff's counsel, you plan to serve and file a fact-specific complaint that sets forth all the potentially embarrassing details of, for example, the alleged sexual harassment, you should warn the client and obtain the client's consent. Some plaintiffs are private and will choose to make the details public only when required.

B. DRAFTING THE ANSWER OR OTHER PLEADING

1. The Corporate Disclosure Form

When the corporate entity makes an appearance in federal court, the entity must file a corporate disclosure form that details its ownership. The purpose of the form is to provide information so that the presiding judge is able to ascertain potential conflicts.

2. The Answer

Remember to include all available affirmative defenses, paying particular attention to Fed. R. Civ. P. 8(c) and 12(b). Consider using a catchall affirmative defense, reserving the right to add defenses available under Rule 8(c) or the law should additional facts come to light. Remember court-imposed deadlines for adding parties and/or amending pleadings.

3. Counterclaims, Cross-Claims, Adding Parties

When answering, you should consider whether to assert a counterclaim or cross-claim, or to add any parties. *See* Fed. R. Civ. P. 13, 14, 15, 17, 18, 19, and 20 (applicable rules). Remember to review the appropriateness of asserting claims against the plaintiff and/or co-defendants. Analyze whether any necessary parties are missing.

4. Motion To Dismiss

You should consider whether you have grounds to seek an immediate dismissal of the complaint. *See*, *e.g.*, Fed. R. Civ. P. 12(b) (setting forth grounds for seeking dismissal, such as failure to state a claim). Consider using this motion: to reduce the number of counts in the complaint that you will have to proceed to discover; to educate the court at outset of case; when it would result in a dismissal of entire complaint; or to signal your opponent regarding some legitimate matter.

5. Motion For A More Definite Statement

Consider whether you have grounds to move for a more definite statement. *See, e.g.*, Fed. R. Civ. P. 12(e) (providing procedure to seek more information to be in a position to respond). Remember that a plaintiff need only notice plead. *See*, *e.g.,* Fed. R. Civ. P. 8 & 9 (governing pleading). Thus, the Rule 12(e) motion is a disfavored motion. However, if the notice pleading is unintelligible or is too insufficient to enable the defendant to formulate a response, consider filing a motion for a more definite statement.

6. Motion For Judgment On The Pleadings Or For Summary Judgment

Consider whether there is a basis to seek judgment on the pleadings or summary judgment. *See, e.g.,* Fed. R. Civ. P. 12(c) (judgment on the pleadings) and Fed. R. Civ. P. 56 (summary judgment). Consider using one of these dispositive motions at the beginning stage, when the deficiency entitling the defendant to judgment in its favor appears on the face of the complaint or when there is an easily obtained, uncontested fact that entitles the defendant to judgment as a matter of law (*e.g.*, statute of limitations).

VII. THE RULE 26(F) CONFERENCE[1]

The Rule 26(f) conference is an important conference at which the parties' counsel should discuss key topics relating to the pleadings and discovery.

A. SCHEDULE THE RULE 26(F) MEETING

In federal cases, a Rule 26 meeting must be conducted before commencing formal discovery.[2] Get it scheduled in a timely fashion, as you and your opposing counsel are "jointly responsible" for scheduling the conference. Fed. R. Civ. P. 26(f).

B. PREPARE ADEQUATELY FOR THE RULE 26(F) MEETING

You must prepare for the Rule 26(f) meeting. Prior to the meeting, it will be necessary to address a number of items. You should know what documents you will use to support your client's claims and/or defenses, and you should also examine what documents the other side will request. At the Rule 26(f) meeting, you are required to address, among other things, issues concerning "preserving discoverable information." Fed. R. Civ. P. 26(f). Because the report that you and your opponent create must address views and proposals concerning the handling of electronically stored information ("ESI"), you must know and understand what ESI your client has, what is not "reasonably accessible" and why, and what information your client no longer has, *e.g.*, because it was lost in the routine operation of your client's computer system before your client was aware of a claim.

[1] This seminar paper is prepared hereafter on the premise that the litigation proceeds in federal court.

[2] Depending upon the state, there may be similar early reporting requirements. For example, in Minnesota state courts, the Informational Statement is required.

You should ascertain the substance and format for the Rule 26(f) Report. Although the Rules were intended to be uniform, some courts, judges, and magistrate judges, nevertheless, have their own set of requirements. If so, you must follow the particular court, judge, and/or magistrate judge's requirements, as well as Rule 26(f).

Typically, the Rule 26(f) conference and report should cover:

- the nature and basis of the claims and defenses;
- the possibility for early resolution;
- arrangements for disclosures under 26(a)(1);
- "issues relating to preserving discoverable information";
- the plan for discovery, including:
    - any changes in timing and requirements of the Rule 26(a)(1) disclosures;
    - discovery to be had, including the subjects, the cutoff dates, and "whether discovery should be conducted in phases or be limited to or focused upon particular issues";
    - "any issues relating to disclosure or discovery" of ESI, "including the form or forms in which it should be produced";
    - "any issues relating to claims of privilege or protection of trial-preparation material";
    - "what changes should be made in the limitations on discovery imposed under the rules…and what other limitations should be imposed"; and
    - any additional items that merit court consideration at the Rule 16 conference.

Fed. R. Civ. P. 26(f).

Practice Tips:

Take time to know and identify for the other party(ies) how you plan to produce ESI, what ESI you will produce, the format in which ESI will be

produced, and what ESI you will not be producing. It is wise – and may be necessary and/or advisable depending on the forum – to reach agreement regarding the production of ESI at an early stage. If an issue arises regarding production of ESI, federal courts are less likely to issue a harsh order affecting your client if you have been straightforward and attempted to resolve the matter directly and promptly with your opposing counsel. It is also advisable to propose and address protective order issues during this meeting to avoid delay when discovery starts. Any issues may be brought to the court's attention tin the report or during the scheduling conference.

VIII. RULE 26(A)(1) DISCLOSURES

You must prepare and serve the Rule 26(a)(1) disclosures in a timely fashion. You will want to ensure that they are complete and correct. The disclosures include providing, among other things, information concerning:

- the name, address, and telephone number of witnesses likely to have discoverable information that supports your client's claims and/or defenses and an identification of the subjects of information known;

- a copy or "description by category and location" of all types of documents (including ESI) that supports your client's claims and/or defenses (except purely impeachment materials);

- if your client asserts a claim for damages, a computation of all categories of damages; and

- any applicable insurance contract.

Fed. R. Civ. P. 26(a)(1).

There is a time deadline for submission of the report – *i.e.*, "at or within 14 days after the Rule 26(f) conference, unless a different time is set by stipulation or court order, or unless" the party lodges an objection during the conference and repeats the objection in the Rule 26(f) report.

The Rule 26(a)(1) disclosures are not necessary in certain cases (*e.g.*, an action seeking review of an administrative record). *See* Fed. R. Civ. P. 26(a)(1)(E) (listing exclusions).

Practice Tip:

Take your Rule 26(a)(1) disclosure obligations seriously. Federal courts may limit your discovery if you failed to make timely disclosures in the

Rule 26(a)(1) disclosures and/or in your client's answers to interrogatories.

IX. THE RULE 16 CONFERENCE WITH THE COURT

At the Rule 16 conference, the court will discuss a number of matters with the parties' counsel. As the Rule notes, following the Rule 26(f) report, the court shall confer with counsel and enter an order governing scheduling concerning the time to:

- joining parties and amending pleadings;
- filing motions; and
- completing discovery.

Fed. R. Civ. P. 16(b).

At the Rule 16 conference, the court may also discuss modifications to disclosures required under Rule 16, provisions of discovery of ESI, protective orders, privilege issues, conference dates for the pre-trial conference, and the like. Id.

X. CALENDAR MATTERS

Calendar all dates from the scheduling order. Comply with those deadlines. Generally, modification of the court's scheduling order requires a showing of good cause. Id.

Practice Tip:

Remember that courts are very busy. You may need to schedule hearings, such as a dispositive motion hearing, months in advance. Respect the deadlines. Courts may not be willing to change them, without good reason. Pay attention to whether the dates refer to filing of a motion, or the filing and hearing of a motion, as there is a big difference between the two deadlines.

XI. CONFIDENTIALITY STIPULATIONS AND ORDERS

It may be important to protect the confidentiality of your client's information. In an employment lawsuit, usually both sides care about confidentiality. For example, the plaintiff may wish to keep his or her medical records confidential. As another example, the employer may wish to keep the personnel records of its employees, its business records, and its financial information confidential.

The court in which your matter is pending may have a standard confidentiality and/or protective order. If it does, you will want to use that order and do so early in the process. If not,

you will want to obtain a confidentiality stipulation and order early in the process, preferably at the Rule 26(f) conference stage. The stipulation should govern the disclosure of proprietary or other confidential information (*e.g.*, personnel information about other employees, non-public financial information about the company, etc.). If you cannot obtain a mutually agreeable stipulation, you may need to move for a protective order. *See* Fed. R. Civ. P. 26(c) (governing protective orders); *see also*, Fed. R. Civ. P. 32 (depositions) and 37 (discovery motions).

XII. THE IMPORTANCE OF CHRONOLOGIES AND SUMMARIES

You should start preparing a chronology and/or summary of events and documents.

Make a timeline of important information. This timeline will be extremely helpful.

In addition to timelines, summaries are valuable. You should prepare summaries of records and interviews as you receive/take them. Keep a list of the case's cast of characters, with a summary of what the importance or relevance is for each character.

Update the chronologies and summaries on a regular basis as the case continues.

XIII. THEME DEVELOPMENT

You should start outlining themes of the case that will carry through discovery and trial. It is wise to periodically review and refine the theme(s).

Determine whether to involve a jury consultant. It is often helpful to involve a jury consultant at an early stage in the litigation, so that all discovery may be tailored to the ultimate presentation of your case. As mentioned above, attempt to tell your client's story in one paragraph. This exercise forces you to compress your case into an easily understandable set of facts and to focus on what is important for the jury to know. You may want to try to select no more than three themes for your client's case, and then try to summarize the key points in a series of 10 bullet points. Or you may wish to develop your story in a different fashion. Regardless of the method you use, you will need to develop your theme(s) so you can tell a compelling story.

However you decide to develop your theme(s), it is important to identify the theme(s) of your case. This is a key step for ultimately being prepared to present your opening statement to the jury.

Themes that are selected should resonate throughout discovery, *voir dire*, opening statement, questioning of witnesses, closing arguments, jury instructions, etc.

XIV. DOCUMENT COLLECTION

Obviously, document collection is important. It is critical to remember that the word "document" means more than just a piece of paper. Under Fed. R. Civ. P. 34(a), documents include ESI and may be "writings, drawings, graphs, charts, photographs, sound recordings,

images, and other data or data compilations stored in any medium from which information can be obtained".

You must take your discovery obligations seriously. Generally, the duty to preserve documents arises "when the party has notice that the evidence is relevant to litigation or when a party should have known that the evidence may be relevant to future litigation." Zubulake v. UBS Warburg LLC ("Zubulake IV"), 220 F.R.D. 212, 216 (S.D. N.Y. 2003).[3]

Depending on the type and size of your client, it may be prudent to take the following steps:

A. A Litigation Hold And Preservation Plan Should Be In Place

A litigation hold alerts the recipients to preserve specific types of documents relevant to a particular matter. People responsible for collection of the data should be identified. It may be advisable to appoint an IT liaison.

B. Communicate The Litigation Hold And Preservation Duty

You and/or your client should consider sending document preservation letters to all key employees, instructing them not to delete any pertinent data. In addition, the lawyer should also consider sending a separate "Systems Preservation Memo" to IT personnel that lists the responsibilities of the systems administrators and includes specific examples of the information to be preserved. Finally, there should be individual communication with IT staff and any employees reasonably believed to have relevant information.

C. Identify Relevant Information

To identify relevant information, there should be communication with the employees directly implicated by the litigation and with the client's IT personnel. The goal is to learn what relevant tangible and electronic data has been created and to learn where it is stored.

D. Preserve The Relevant Information

Preserving relevant information requires extensive communication with IT staff to understand the company's destruction policies. It may be best to suspend destruction policies until preservation has been effected. To ensure preservation and establish a chain of custody, forensic imaging technology can be used to take pictures of computer hard-drives. Also, the lawyer may want to instruct the employees to produce electronic copies of their relevant files to a limited-access central location. Forwarding email

[3] The requirements of compliance with document preservation is beyond the scope of this paper.

to counsel is not advised, as it will alter the meta-data associated with the communications.

E. SEGREGATE RELEVANT BACK-UP TAPES

Production of back-up tapes (created for the purpose of disaster recovery) is not automatically required. Under the rules, a "party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost." Fed. R. Civ. P. 26(b)(2)(B). Nevertheless, it may be a good practice to segregate any back-up tapes containing relevant data by taking them out of the back-up rotation. The tapes should then be kept in a temperature-controlled environment to preserve their content and to ensure they can be found when needed.

F. RECOMMUNICATE THE LITIGATION HOLD AND PRESERVATION DUTY

Periodically, you should recirculate notices about the litigation hold and preservation duty to reach any newly-identified key employees and to remind others. Similarly, you should revisit the document preservation issues with "key players."

XV. DOCUMENT CONTROL

Just as document collection is important, so too is document control. You will want to ensure that you have controlled all documents, regardless of the source. If the volume is large, you should determine whether the case warrants computerized document control. If so, select the appropriate computer software.

A. YOUR CLIENT'S DOCUMENTS

You or your staff (*e.g.*, a paralegal) must start to control and index all documents produced by your client as soon as you receive them. You must maintain the original documents in their original format. It is also advisable to keep a master set of copied documents that remains untouched and then make a second set of copies that you will use as your working copy, on which you may make highlights and notations. Make sure you number and keep track of the documents that you produce as you provide them to the other parties. You should also mark confidential documents prior to their production.

B. DOCUMENTS FROM YOUR OPPOSITION OR THIRD PARTIES

Similarly, it is important to control and index documents from other sources (*e.g.*, the opposing party, a third-party such as a medical care provider, etc.) in the same fashion as you control your client's documents.

Use separate numbering systems (*e.g.*, different prefixes) for documents emanating from the opposing party (if they are not already numbered) and/or third party sources, such as federal or state civil rights agencies, medical care providers, other employers of the plaintiff, etc. Again, consider keeping a master set of all documents that remains untouched and a working copy on which you may make highlights and notations.

XVI. WRITTEN DISCOVERY

Written discovery is a valuable tool for learning about your opposition's case. Use it well and wisely.

A PREPARE AND SERVE FORMAL WRITTEN DISCOVERY ON THE OPPOSITION

1. Document Production Requests

See Fed. R. Civ. P. 34 (governing written document requests). For the plaintiff, you should remember to request from the employer all corporate documents that may be relevant, including personnel records, a handbook other policies, key business documents, etc. For the defense, you should remember to request from the employee prior and subsequent employment records, tax returns, diaries, medical records, calendars, and the like. Remember to use the broad definition of "document".

2. Interrogatories

See Fed. R. Civ. P. 33 (governing written interrogatories). Ask relevant questions. There is a difference of opinion on how a lawyer should use interrogatories. Some lawyers use them only to obtain the bare minimum of information (*e.g.*, to discover mitigation efforts of the plaintiff). Other lawyers use them to obtain key information including the facts supporting every element of a cause of action. The major reason why some lawyers do not ask detailed questions (and instead follow the format of asking only the bare minimum of information) is that they believe that you provide the other side with an opportunity to craft the answers with the benefit of counsel, as opposed to getting an unvarnished answer in a deposition. You will need to decide for yourself which style you like.

Make sure the opposing party signs the responses. If not signed, insist upon receiving a signed copy. If necessary, move for a signed copy or ask the opposing party to verify the answers at the deposition. You do not want to rely upon answers that are not

signed, as they allow a party to attempt to wiggle out of the response.

Remember to review Fed. R. Civ. P. 33(c) to analyze how the interrogatories and responses may be used at trial. Draft the interrogatories with these rules in mind.

3. Requests For Admissions

See Fed. R. Civ. P. 36 (governing admissions). It is often appropriate to use this discovery tool for authenticating documents or obtaining critical admissions about dates, etc.

4. Medical Records Authorizations

See Fed. R. Civ. P. 35 (governing medical records). Remember that under Fed. R. Civ. P. 35, if the plaintiff's counsel does not agree voluntarily to produce authorizations to obtain the plaintiff's medical records, it will be necessary to move the court to obtain them. Also, remember to seek records from both standard medical care providers, psychological care providers, and alternative medicine care providers. Review records as you receive them to ensure that there are no medical care providers disclosed therein for which you have not previously obtained authorizations.

5. Academic Records Authorizations

6. Authorizations For Records From Other Employers

Remember that important information may be obtained from other employers.

7. Military Record Authorizations

8. Tax Records And Other Financial Records Of The Party, As Appropriate

In the case of the plaintiff, you may obtain tax records directly from the plaintiff and/or the plaintiff's tax return preparer. It may also be wise to obtain authorizations for receiving records directly from the taxing agencies (*e.g.*, Internal Revenue Service, state department of revenue, etc.).

In the case of the employer, you will want to receive financial records as appropriate (*e.g.*, for a punitive damages claim).

9. Freedom Of Information Act Request ("FOIA")

A FOIA request is a valuable way to obtain agency records, such as EEOC charge documents. Recognize that the response will not include certain records (*e.g.*, EEOC investigative notes), and determine whether there is a legitimate legal basis for a motion to compel those records.

10. Stipulation For Agency Records

Obtain stipulations from the opposing party enabling both parties to receive agency records available by stipulation, such as the state civil rights agency records, unemployment compensation records, etc.

11. Subpoenas

It is critical that third-party document requests are sent with a subpoena. *See* Fed. R. Civ. P. 45 (governing subpoenas of third parties). Obtain subpoenas for records of third parties. Without a subpoena, the third party may send all, part, or none of the requested documents. Send a subpoena later delays discovery. Even when the third party complies with the request, you should attempt to ascertain that you have received all that you requested. Depositions of the third party will assist in ensuring compliance with the third party subpoena. When compliance is lacking or incomplete, bring appropriate motions to compel to obtain such records.

B. PREPARE AND SERVE FORMAL WRITTEN RESPONSES TO YOUR OPPONENT'S DISCOVERY

Obviously, you need to respond to your opponent's discovery in a timely and complete fashion. If you need additional time, obtain an extension to respond as immediately as possible. Do not wait until the last minute; get the extension before the deadline passes. Document the extension.

Your client's answers to interrogatories must be in writing, full and complete (unless you lodge an objection), and signed by the party. Fed. R. Civ. P. 26(g)(2) and 33(b)(1).

All objections must be timely stated, and any ground not stated in the discovery response is waived unless good cause is shown. Fed. R. Civ. P. 33(b)(4) (governing interrogatory responses) and 34(b)

(governing document production responses). Therefore, preserve all objections.

Start early. It takes time to provide good answers. Make certain that every answer is complete and correct. Remember to review Fed. R. Civ. P. 33, so that you keep in mind how your client's answers to interrogatories may be used at trial.

Supplement your discovery responses as necessary and appropriate (*e.g.*, to add names of potential witnesses). *See* Fed. R. Civ. P. 26(e) (setting forth the obligations to supplement with additional and/or corrective information).

Practice Tip:

Before the close of discovery, check to make sure your answers to interrogatories list all potential witnesses and all necessary information. Also, check to make sure that you have disclosed all documents and that your expert disclosures are complete. You should ensure that you have complied with all of your discovery disclosure obligations, including the obligation to supplement. Also, check to make sure that you have all of the discovery necessary to refute the opponent's claims or defenses and to carry your burden of proof, if any.

XVII. EXPERTS

Search for and hire your experts. Make sure you disclose experts in a timely fashion. Pay particular attention to the requirements of Fed. R. Civ. P. 26(a)(2) and any court orders, in addition to the written discovery concerning experts. Failure to observe deadlines and make full disclosure may result in an inability to call a particular expert at trial.

Under Fed. R. Civ. P. 26(a)(2)(A), a party must disclose the identity of an expert "who may be used at trial".

Under Fed. R. Civ. P. 26(a)(2)(B), an expert's report must disclose: the expert's opinions and the underlying reasons for them; the data used; any exhibits to be used as a summary of or support for the opinions; the expert's qualifications; compensation; and a list of cases in which the expert has given deposition or trial testimony within the last 4 years. There is a duty to seasonably supplement the report. Fed. R. Civ. P. 26(e)(1).

Make sure your expert receives all necessary evidence and information. You may need to provide your expert with the pleadings, discovery responses, deposition testimony, documents, the opposition's expert report, and the like. Document what you provide the expert. You want to ensure that your expert has all the information that he or she needs to opine, and that your expert is not the subject of a Daubert motion, for example, because he or she did not consider all of the relevant facts in reaching an opinion.

The types of experts that may appear in an employment case include but are not limited to the following:

- Physician. Remember you may need a medical doctor (*e.g.*, in a disability case) as well as a psychiatrist (*e.g.*, for emotional distress damages).
- Rehabilitation expert. A rehabilitation expert may speak to issues including disabilities and reasonable accommodation.
- Reasonable accommodation expert. This expert may testify regarding what accommodations would have enabled the plaintiff to perform the essential functions of his or her job.
- Economist or other damages expert.
- Occupational specialist (*e.g.*, an expert to discuss reasonable ways to look for a job, how quickly the plaintiff could have obtained a job if he/she had diligently attempted to mitigate damages, etc.).
- Statistician, particularly in class or representative actions.
- Legal or human resources expert (*e.g.*, if appropriate, to attest to the insufficiency or sufficiency of the company's policies and/or response).
- Other.

XVIII. INDEPENDENT MEDICAL EXAMINATION

The independent medical examination ("IME") is a key tool to demonstrate the plaintiff's medical (physical, mental, or blood relationship) condition. Fed. R. Civ. P. 35.

If you represent the plaintiff, you should determine whether you will engage an independent doctor to conduct an examination of your client or whether you will rely on treating physicians to establish your client's medical condition. There are pros and cons of both approaches.

If you represent the defense, you will want to schedule the adverse IME. Remember, in federal court, if the plaintiff's counsel does not agree voluntarily that the plaintiff will submit to an IME, it is necessary to move under Fed. R. Civ. P. 35 to obtain an IME and the medical records.

You will likely want to prepare a medical chronology, regardless of which party you represent. It is helpful, not just for tracking the potential sources of emotional distress or

physical manifestations, but also, it may provide information that explains a certain circumstance in the workplace.

When making IME determinations, considerations and potential steps include the following:

- The requested IME may involve a medical specialist, *e.g.*, where there is an alleged disability or claim of physical injury.
- The requested IME may involve a psychiatrist, *e.g.*, where there is a claim of emotional distress.
- Send the IME doctor the necessary documents. For example, it may be appropriate to forward the complaint, the answer, discovery responses, necessary deposition transcripts (*e.g.*, the plaintiff's deposition), the plaintiff's medical records, any journals from the plaintiff, the medical chronology (but remember that will make the chronology discoverable by the other side), etc.
- If the plaintiff is a minor, you should review whether it is appropriate/necessary for the parent or guardian to attend.
- For the defense, you may choose to have the IME of the plaintiff conducted after the plaintiff's deposition and to provide the IME doctor with a copy of the plaintiff's transcript prior to the IME.

XIX. DEPOSITION DISCOVERY

Deposition discovery is one of the most valuable weapons in a trial lawyer's discovery arsenal. Preparation is the key to conducting a good deposition wherein you obtain valuable information.

Assemble documents you will use for the various depositions. Make sufficient copies for yourself, the witness, the witness's counsel, etc.

Make a checklist of areas of inquiry (or if it is your style, write out your questions). For example, in the case of the plaintiff's deposition, make sure your checklist includes all of the elements of all of the plaintiff's claims.

If the witness speaks a different language, hire a qualified interpreter. You may also want to have a bilingual court reporter who records all that is spoken in both languages.

Likewise, make all reasonable accommodations for deponents with disabilities, in order that such deponents are able to provide testimony.

Decide whether you are going to use real-time transcription. Also, decide whether you will conduct a videotape deposition. Review the applicable rules to ensure that your deposition notice contains all of the necessary information.

Decide whom you will depose. Depositions in employment lawsuits include but are not limited to the following:

- The opposing party (*e.g.*, plaintiff, union president, supervisor, etc.).
- Helpful or hostile witnesses (*e.g*., former employees).
- The corporate representative. Fed. R. Civ. P. 30(b)(6).
- Former employers.
- The other side's expert(s).
- The plaintiff's treating physician(s).
- Third-party witnesses (*e.g.*, vendors, customers, etc.).

Listen to the deponent's answers. This rule cannot be overstressed. All too often, lawyers forget to listen to what the deponent is saying. Ask the necessary follow-up questions.

Make sure the deponent reads and signs the transcript. This will be valuable when you wish to use the transcript for impeachment purposes – for example, when a witness changes deposition testimony claiming the court report recorded the wrong answer, you may use the errata sheet to remind the witness that he or she had the opportunity to review the transcript and make changes, but that no changes were made.

XX. INFORMAL DISCOVERY

The seasoned trial lawyer also conducts informal discovery. Informal discovery can assist in obtaining information and gathering facts without alerting your opposition to your efforts. Your opposition will only be able to obtain the fruits of your informal discovery to the extent permitted by the Federal Rules of Civil Procedure.

The timing of your informal discovery may be important. In the case of the defense counsel, it is advisable to conduct at least some informal discovery prior to conducting the plaintiff's deposition, as that informal discovery may provide important impeachment information. It may be wise to repeat the informal discovery prior to trial.

- Search the Internet. Important information can be located regarding your opponent on the web. For example, you may learn about the plaintiff from facebook, myspace.com, or other websites

on which the plaintiff (or a third party) has entered information about the plaintiff. As another example, some message boards may be a source of information about the corporate employer.

- Where appropriate, conduct background checks (including criminal records).

- Where appropriate, consider surveillance.

- Check bankruptcy records. Depending on the timing of the filing for bankruptcy and the time that the claim arose, the plaintiff may not own the claim against the employer, but rather the claim may be an asset in the bankruptcy estate. *See above* Section II(A)(1)(f).

- Check other federal and state civil court filings involving the opposition. Conduct this check in appropriate venues, *e.g.*, where the plaintiff has lived, worked, owned property, etc. This may provide important information (*e.g.*, in the case of the professional plaintiff; where the plaintiff has a personal injury lawsuit in which he or she is asserting the same lost wages; where the defendant employer is facing similar claims by another employee; etc.).

- Check other government records. Use a FOIA request as appropriate.

- Conduct a driving record background check.

- Other.

XXI. CONDUCT LEGAL RESEARCH EARLY AND OFTEN

As set forth above, you should conduct your legal research at the beginning of the case. Then, periodically, you should review the law that you collected earlier and update your legal research. Outline critical case law for deposition and other purposes, paying particular attention to the elements of the claims and defenses. It is advisable to review the anticipated jury instructions again, as they will help you further shape and refine your discovery.

You must know the elements of every cause of action and/or defense on which you bear the burden of proof. But you must, likewise, know the same information for the claims and defenses on which your opponent bears the burden of proof.

You will need this information to conduct meaningful discovery, to prepare and respond to discovery motions, to draft or respond to dispositive motions, to prepare motions *in limine*, and to prepare jury instructions.

XXII. DISCOVERY MOTIONS AND PROTECTIVE ORDERS

A. DISCOVERY MOTIONS

Although it would be wonderful if discovery flowed smoothly, a large number of cases involve some sort of discovery motion or motion for protection of the court.

If you are aggrieved by your opponent's failure to comply with the discovery obligations under the Federal Rules of Civil Procedure, you may move the court for an order compelling discovery. *See* Fed. R. Civ. P. 37(a) (governing motions to compel discovery). You must bring the motion in good faith and provide a certification that you have attempted, without success, to resolve the disputed discovery. *See* Fed. R. Civ. P. 37 (governing the bases upon which a motion to compel may be made).

You can bring a motion to compel discovery for, among other things, the deponent's failure to answer a question, evasive or incomplete discovery answers or disclosures, failure to provide the relevant documents (including ESI), providing misleading information, refusing to admit certain facts, failing to attend a deposition, failing to participate in a discovery plan, and the like. Id. You may seek relief including but not limited to provision of the missing discovery, expenses of bringing the motion, and other sanctions (*e.g.*, an order striking pleadings). *See* Fed. R. Civ. P. 37(a)(4) (regarding failing to comply with discovery) and 37(b) (regarding failure to comply with a court order).

B. PROTECTIVE ORDERS

As set forth above, absent a standing court order governing confidentiality, the most efficient and cost-effective way to obtain confidentiality regarding your client's private, confidential, and proprietary information is to reach a stipulation governing confidentiality with the opposition and to have the court enter an order mirroring the parties' confidentiality stipulation. Sometimes, this is easier said then done. But Fed. R. Civ. P. 26(c) permits a party to seek a protective order, including that the discovery may not be had and/or that it shall occur only on specified terms and conditions. Regarding protective orders, you should seek a protective order early in the case, including at the Rule 26(f) conference stage. You will want to check the local rules, forms, and practice of the court in which your case is pending, as many courts have a form order governing confidentiality protections.

You may also seek a protective order if your opponent is seeking discovery to annoy, embarrass, oppress, and/or place undue burden or

expense on your client. *See* Fed. R. Civ. P. 26(c) (setting forth the bases for seeking protection and the relief available should the court agree with the need for protection). You should seek protection as soon as the need for the protection is foreseeable.

XXIII. DISPOSITIVE MOTIONS

A summary judgment motion is an effective tool for streamlining the issues or ending the case when the pleadings, the deposition testimony, the documentary evidence, interrogatory answers, admissions, and the like show "there is no genuine issue" of material fact and the moving party is entitled to judgment as a matter of law. See Fed. R. Civ. P. 56(c).

You should discuss with the client whether a summary judgment motion should be filed. Provide an analysis of the likelihood of success, the benefits of filing the motion, the costs of filing, the requisite timing, and the necessary involvement of the client. Remember, Rule 56 is available to all parties.

The cost of a well-prepared motion may be significant. Make certain your client knows the potential cost, so that it may make a cost-benefit analysis.

Reasons to bring the motion include: to resolve the case entirely; to reduce the number of issues that proceed to trial; to educate the court as to the facts of the case, provided that there is a legitimate basis for granting summary judgment on at least one issue; etc.

One word of caution is appropriate. A failed Rule 56 motion may be more expensive to settle. Do not bring the motion if there is not a real possibility of success – a case may become incapable of being settled if the defendant loses the summary judgment motion, because the plaintiff's settlement expectations often increase and may become unreasonable.

XXIV. ALTERNATIVE DISPUTE RESOLUTION; OFFERS OF JUDGMENT

Some courts require some form of alternative dispute resolution ("ADR"). In federal court, it is not unusual for the court to order the parties to appear before the magistrate judge with their counsel for a settlement conference.

There are benefits of ADR, especially when it is successful. Successful ADR ends the matter with certainty; it may be cost-effective; it may avoid adverse publicity or media scrutiny; and it may produce a result you could not obtain in trial (*e.g.*, the plaintiff's commitment not to compete for a specified period of time).

If you decide to engage in some type of ADR process, you should review and select the ADR method that you believe will be most beneficial. Further, you should check local rules, court orders, statutes, and case law ton ensure compliance with the requirements of the ADR forum, including regarding issues of the people required to attend the ADR process (e.g., insurers, decision-makers, etc.). Once you have selected the process, you will want to give the neutral third party (*e.g.*, the mediator or the magistrate judge) a confidential submission that

summarizes the critical facts and relevant case law. The more thorough your submission is, the more you will enable the neutral third party to assist you in resolving the case successfully, short of a dispositive motion or trial.

Moreover, bring a checklist of important settlement terms to the ADR session. If appropriate, bring a laptop and portable printer so that you and the opposing counsel may agree upon language, finalize the written document, and obtain signatures on the written settlement agreement at the session.

If an ADR process is not successful in securing settlement, another tool that may enhance the likelihood of settlement is an offer of judgment. See Fed. R. Civ. P. 68 (governing offers of judgment). An offer of judgment may put pressure on the other side to settle, because "if the judgment finally obtained is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer." Id.

XXV. PRETRIAL PLEADINGS

The court order typically dictates what pretrial pleadings you will be required to file. *See* Fed. R. Civ. P. 16 (governing pretrial conferences and orders). Generally, you will be required, among other things, to provide a list of witnesses, a list of documents you intend to introduce, a list of deposition testimony you intend to introduce (*e.g.*, in the case of an unavailable witness), a list of stipulated facts, proposed jury instructions, and updated information regarding how long you expect the trial to take.

Some courts have rules about pre-marking exhibits and providing a copy to the opposing party and the court.

You will want to make sure that you comply with the applicable Federal Rules of Civil Procedure and the court's order.

XXVI. MOTIONS IN LIMINE AND THE PRETRIAL BRIEF

As soon as the case begins, you should start to create a list of issues on which you anticipate making a motion *in limine* to limit or exclude testimony or documents on those issues. You should continue to update that list as discovery proceeds. Indeed, it is wise to keep the list readily accessible and to add to even as you are deposing a party or witness. Review and revise the list periodically. It is hard to create the list as you are preparing for trial. You might forget a point, and you might also forget evidence that will help you convince the court that something should be excluded.

You will need to make your motions *in limine* within the time required by the court. Typically, such motions are heard right before the trial begins. Therefore, it is important to keep them short and to the point and to move only on items that you seek to exclude before trial commences. If your case is complex or you have a number of legitimate motions *in limine*, you should attempt to obtain a hearing on the motions well in advance (*e.g.*, one week to a month) of the trial.

Motions *in limine* should not be used to educate the court. That is the purpose of the pretrial brief. The pretrial brief should explain your case briefly, list key witnesses and what testimony you expect to elicit from them (in the most basic of terms), identify important issues for resolution at trial, and provide a summary of key research for the court's benefit.

Do not be surprised if the court defers its ruling on your motions *in limine* until the trial has started and the court has had the opportunity to observe how your motion relates to the evidence.

You can enhance your likelihood of success on the motions *in limine* by making a strong showing that the subject evidence is highly irrelevant and prejudicial, that it will waste the court and jury's time, that it will result in a useless sideshow, and the like.

XXVII. PROPOSED JURY INSTRUCTIONS

In all likelihood, you will be required to submit your proposed jury instructions prior to trial. This task should not be as daunting as one might expect, because you will have done your research well in advance and you will have collected sample jury instructions for use at trial. The prudent lawyer may also work on the jury instructions as the discovery proceeds, tailoring them as necessary to accommodate the facts and circumstances of your case.

There are some good model instructions, including model instructions that the ABA has issued for employment cases. The prudent lawyer will also collect instructions that the presiding judge has used in other cases.

There are some key instructions that will likely be a part of every employment trial, particularly for the defense (*e.g.*, the plaintiff's duty to mitigate, the business judgment rule, etc.).

Each proposed instruction should be accompanied by statutes, case law, and secondary sources that support the proposed instruction.

You must also study your opponent's proposed instructions and be prepared to object to such instructions, as appropriate. Again, the research that you have conducted along the way will help you in this task.

XXVIII. PREPARING YOUR CASE FOR TRIAL AND TRYING YOUR CASE

There is no substitute for preparation, preparation, preparation. Presuming you have good facts for your side, it is the one key to success.

You have been getting your case ready for trial since the day your client retained you. You know the facts. You know the law. You have developed and refined your themes as the discovery of your case has proceeded. You know your story. Now you just have to get everything in order to tell your story.

The judge or jury will decide who should win. The fact-finder wants to know not only that your client was right but also that your client was fair.

Most trial lawyers will tell you that burdens of proof and persuasion are important concepts, but largely for the court. Jurors typically do not focus on burdens in the same manner and intensity that a judge and lawyers would.

A. Polish Your Story And Themes; Test Your Story

In the weeks before trial starts, sharpen your themes and your story. Test your story with the help of your jury consultant. Use:

- Mock trials
- Focus groups
- Individual reaction to evidence (like video-taped depositions)
- Web-based research (like surveys and questionnaires)
- Other

Adjust your story and themes, as appropriate, based on the information that you learn.

B. Prepare Your Witnesses; Make A Direct Examination Checklist For Each Witness

Make sure your witnesses are prepared. Give them their depositions and key documents to examine. Do a trial run of their testimony. Have another colleague do a test cross-examination. Consider video taping the examinations so that the witness can see how he or she comes across, but be careful not to make the witness so gun-shy by the process that he or she freezes during the real trial.

Consider using the jury consultant as a coach to help your witnesses become good or better witnesses who are comfortable with the process and telling the facts.

If you represent a corporation or union, you will want to personalize your client. Make your entity human through its witnesses.

Outline the direct testimony of the witnesses. Make a checklist of facts and documents for each witness to use at trial to ensure that you know and receive the information that you need from that witness. Get the

documents ready in a witness folder. Use a system that enables you to readily access the witness's deposition testimony for use at trial. There are many software packages available that will assist you.

Check again to make sure that there is no impeachment evidence for your witnesses. Work with the impeachable witness to help him or her minimize the effect or impact of the impeachment material. Know evidence, including deposition testimony, that you may use to rehabilitate the witness.

For the defense, warn your client that he or she may get called by the plaintiff's counsel pursuant to cross-examination rights under the rules. (The same is true for presentation of a counterclaim.) You do not want a good witness to be flustered because he or she was not forewarned that this could happen.

C. PREPARE YOUR CROSS-EXAMINATION OF YOUR OPPONENT'S WITNESSES

Outline the cross-examination testimony of your opponent's witnesses. Make a checklist of facts and documents for each such witness to use at trial to ensure that you know and receive the information that you need from that witness. Get the documents ready in a witness folder. Use a system that enables you to readily access the witness's deposition testimony for use at trial.

Gather all impeachment evidence for your opponent's witnesses. Check again to make sure that there is no impeachment evidence for witnesses.

D. IDENTIFY THE WITNESSES AND THE ORDER OF YOUR CASE AND ASSESS CREDIBILITY

Determine the order of your case. Figure out whom you will call, for what purpose, and when. Avoid calling cumulative witnesses. It annoys the court and the jury. Similarly, do not elicit more from a witness than you need.

If you represent the plaintiff, you will want to give a lot of thought to when you call the plaintiff. Some lawyers call the plaintiff after some other witness has started the story-telling process. But the conventional wisdom is such that the first person to testify is usually the plaintiff.

Also, if you represent the plaintiff, you will likely want to call some of your opponent's witnesses for cross-examination in your case. You may even decide to call these adverse witnesses before you call your client, the

plaintiff. But do so carefully, because if you have a difficult time with these adverse witnesses, your case starts out on a rough note.

If you represent an entity, determine who will be the corporate representative at counsel table to give your client a human face. In making your determination, do not choose someone for window dressing purposes only. Make your selection rational and meaningful. Remember that person should be present at the trial table the entire time the jury is present, so do not select a person who does not have the requisite availability. Selecting the proper representative is often a delicate balance between picking a person who is senior enough so the jury knows the corporation takes the trial seriously, but not so senior as to place undue emphasis on the matter.

If the plaintiff's counsel has called your witnesses in his or her case in chief, as the defense counsel, you will have the difficult task of determining whether you conduct your full examination at the same time. Your determination may depend on how long the plaintiff's counsel cross-examined your witness and on what subjects. But you may decide to conduct a full-blown examination so you can get your client's entire story out earlier in the process. Alternatively, you may decide to wait until you know more about how the trial is proceeding so you can regroup and determine what you desire to elicit from this witness.

Assess the credibility of particular witnesses, including your client. Avoid using a witness who does not seem credible to you, because that witness will, in all likelihood, crumble under cross-examination. Try to shape the questioning so that the jury feels the opposing side is either discredited or less likeable.

Remember, first impressions are very important. Jurors' first impressions of a witness may be lasting impressions. Thus, as set forth elsewhere, work with your witnesses to help them make a good impression. In deciding the order of your witnesses, you may decide to wedge a bad but necessary witness between two good witnesses, hoping that will take the sting out of the poor witness.

Your witness-ordering may change as the trial proceeds. For example, if the trial is proceeding more quickly than expected on a given day, you may decide to call a quick witness (out of your pre-established order) to keep the trial moving at a good pace and to avoid delay, downtime, or annoying the court or jury.

In telling your story, you do not have to tell it chronologically. Although it feels awkward as you tell the story out of order, jurors get it. For example, as defense counsel, you may start with the termination first, and

then go back to introduce witnesses who will discuss the repeated performance issues that led to the termination.

E. IDENTIFY DOCUMENTS THAT YOU WILL INTRODUCE AT TRIAL AND PLAN FOR THE FORMAT IN WHICH THEY WILL BE INTRODUCED (*E.G.*, A PAPERLESS TRIAL)

Examine the documents and select the relevant documents that prove or support an element of a claim or defense or that otherwise assist you in telling the story. Try to keep the number of documents to a minimum. Jurors are never going to read and comprehend all of the documents in the case. Select the ones that you really need, and determine if you will use electronic method(s), blow-up, or some other method to introduce them and show them to the jury. But try to have the documents in a form that makes them easy for the jury to take back to the jury room for examination in connection with their deliberations.

Create demonstrative exhibits. Plan to use documents in a fashion that makes them memorable. If possible, use computer technology so that you have a paperless trial. Certain judges often expect – or even require – as much. Further, jurors expect the use of technology at trial. After all, they see it every day in use on television in real trials and situation-comedies or dramas.

Practice Tip:

If you plan to use technology, pre-test it in the courtroom, with the approval and/or assistance of the court personnel. Make sure it works. Make sure you know how to use. Consider employing a technology person to assist you at trial, so that you can focus on the witness and do not have to be bothered with the administration of the technology.

F. IDENTIFY EVIDENCE (TESTIMONY AND DOCUMENTS) THAT WILL BE INTRODUCED BY STIPULATION

Stipulated facts introduced at trial streamline the trial. It is good, and, indeed, in some courts required that you identify the facts and documents upon which you believe the parties may stipulate and that you enter into a stipulation with the opposition. For example, you may stipulate both as to foundation and/or admissibility regarding the plaintiff's performance evaluation or the corporate employer's handbook. Aside from the fact that stipulations are a cost-effective way to introduce evidence, you may choose not to use a stipulation if you believe that live testimony at trial has an added benefit (*e.g.*, showing the jury that your client is reasonable).

Deposition testimony may also be introduced by stipulation.

G. IDENTIFY TESTIMONY THAT WILL BE ADMITTED BY DEPOSITION

Witnesses may be unavailable, *e.g.*, they are outside the subpoena power of the court for trial, are deceased, etc. You will, therefore, want to review the depositions to ascertain which witnesses may appear by deposition as provided under the rules. You will also want to identify the testimony you seek to introduce and either reach agreement regarding what will be introduced or place the issue before the court for resolution.

If you think a deponent's testimony might be admitted by transcript rather than live testimony, it is advisable to consider video taping the deposition. It is far easier for a jury to watch a deposition and comprehend than it is for the jury to hear the deposition testimony read by a third party in the courtroom.

H. PREPARE YOUR *VOIR DIRE* OR YOUR PROPOSED JURY QUESTIONS, INCLUDING A JURY QUESTIONNAIRE, AND BE READY FOR JURY SELECTION

See Fed. R. Civ. P. 47 (governing selection of jurors) and 48 (governing number of jurors).

With luck, you will be in a jurisdiction where you are permitted to *voir dire* the witnesses. *Voir dire* is one of the most fun events at a trial. It allows you to establish rapport with the prospective jurors, Carefully done, it enables you to begin to tell your story (and even argue your case, although you are not supposed to do so). It enhances your ability to cull out jurors who may be unfavorable for your side. Preparing effective *voir dire* can take hours and even days. Get started early.

If you do not get to *voir dire* the prospective jurors, you, nevertheless, typically get to ask the court to make certain inquiries of the potential jury (*e.g*., have you ever sued your employer and if so, for what, why, and what was the outcome).

You may also succeed in getting the court to use a jury questionnaire, a writing designed to elicit information from the jury so that you can know their potential viewpoints and biases.

With jury selection, you may wish to use the help of a consultant. The selection process often happens quickly. Thus, you will need a good system to prioritize the jurors you do not want to sit for your case. Before entering the selection process, you need to know how many jurors your side gets to strike, how the striking process proceeds, and what the bases are for striking (*e.g.*, for cause).

When your jury is selected, study who is going to sit to hear your case, and determine whether there is anything you need to do to tweak your story in light of the fact that you now know the identities of the jurors in your case.

I. PREPARE AND DELIVER YOUR OPENING STATEMENT

Preparing your opening statement should be, in some respects, easy. After all, you have gone through the exercise of reducing your story to one paragraph, of identifying three themes, and of finding ten points to get you logically from A to Z in your story-telling process.

As the plaintiff's counsel, you will have the good fortune of going first. You will get to tell the story to the jury for the first time. Do not waste this opportunity. Tell a compelling story, in a factual, non-argumentative manner. Do so in short order. Do not make your opening too long.

The same concepts are true for the defense. Tell a compelling story. Do so in a factual manner. Be concise. And, give the jury an explanation of why the plaintiff's story (as told in the plaintiff's opening is wrong). Discuss the key evidence that responds to and answers the plaintiff's main points.

Depending on the jurisdiction, the defendant may wait until its case in chief starts to give an opening statement. That is rarely advisable. Most trial lawyers believe you want to get your story told as soon as possible.

Opening statements are very important. Some jury research shows that certain jurors will consciously or subconsciously decide the case after the opening, even though that is wholly contrary to the judge's instructions.

In the opening, you will introduce yourself and tell your story. You will explain what happened to the jury without arguing your case. You will introduce the jury to your themes and let them know the ten points that get you from A to Z. You may introduce the names of key witnesses and tell the jurors what they should expect to hear from these people. But be careful. Do not overstate your case. Do not promise more than you can or need to deliver.

Use demonstrative exhibits, but them sparingly and appropriately.

Give the jury a road map. And be prepared to deliver on the road map at trial. Recognize that your opponent is taking copious notes on your opening. Your opponent will use your statements against you – for example, "the plaintiff's counsel told you in opening that during the trial,

you would hear Sam tell you that he heard the defendant defame the plaintiff, but Sam did not say that at trial".

At the end of the opening statement, the jury should know your client, your client's position, and the major evidence that you have to support your client's position. The jury should have some sense of whether they like your client's case and believe in it.

Do not worry about being Perry Mason or Matlock. Just tell the story. Get the words out in your own way. It is more important to be deliberate, accurate, and thorough than it is to have a glitzy courtroom style.

J. TRY YOUR CASE

You have done all the work. You are ready to try your case. So, try your case.

Get your witnesses' key testimony heard by the jury. Examine your "facts and documents" checklist for each witness to make sure that the requisite testimonial and documentary evidence is introduced through each such witness.

Conduct effective cross-examinations. Again, examine your "facts and documents" checklist for each adverse witness to make sure that the requisite testimonial and documentary evidence is introduced through the adverse witness.

Know the evidentiary rules and use them wisely.

Do not object every time you can. You will annoy the judge, and the jury will come to despise you. Choose your objections carefully, using them sparingly to exclude the evidence that really hurts your case.

Show appropriate respect for the judge, jury, and witnesses throughout the trial. Watch to make sure that your demeanor does not adversely impact your client's case.

Hammer certain facts home relentlessly. Carefully selected repetition reinforces the key points of your story.

Watch the jury's reactions to your presentation and your opponent's presentation. Jurors will sometimes signal (*e.g.*, yawning, giving you an annoyed look, etc.) you that, for example, they get it and are bored by your cumulative presentation. If you can see the signal (and are reading it right), you will recognize that it is time to move on long before you have to suffer the embarrassment of the court telling you to speed your delivery.

Remember the steps that you must take to preserve your case on appeal. For example, as the defense counsel knows, you must move for a directed verdict at the close of the plaintiff's case and again at the end of your case.

K. UPDATE YOUR JURY INSTRUCTIONS AND YOUR PROPOSED VERDICT FORM; ARGUE FOR YOUR PROPOSED INSTRUCTIONS AND VERDICT FORM TO BE THE ONES PRESENTED TO THE JURY

See Fed. R. Civ. P. 51 (governing instructions) and 49 (governing special verdicts).

The court will set a jury instruction conference near the close of the evidence. It is important to reexamine your proposed jury instructions and your proposed verdict form; to submit amended proposals, as appropriate, to comport with the applicable law and the facts; and to be prepare to advocate for your proposals.

Remember to preserve your objections to the court's jury instructions and verdict, or you will have likely waived your objections and, thus, failed to preserve the instruction and verdict form issues on appeal. *See, e.g.,* Fed. R. Civ. P. 51 (governing waiver of an error claim if objections to instructions are not made).

The defense often believes that the more questions that are on a verdict form, the more difficult it is for a plaintiff to prevail. But you must be careful not to create a confusing form, as that could cause an appealable issue.

L. PREPARE AND DELIVER YOUR CLOSING ARGUMENT

Your closing argument is your last chance to address the jury and bring the win home!

Tell your story again, this time weaving in the specifics of what the jurors heard and saw and arguing the significance of that evidence. Hit your themes hard and remind the jury how the witnesses and documentary evidence delivered what you promised in your opening.

Weave your facts into the law, and show the jury how the law dictates a finding in your client's favor based on the facts and circumstances of the case.

Point out the key weaknesses in your opponent's case. Highlight the discrepancies.

Use the key exhibits and show the jury the exact words that matter in the documents.

Tell the story in a convincing fashion, with appropriate passion. In your delivery, show your conviction to your client's case, and give the jury a reason to feel good and just about deciding for your client.

If you are the defense counsel, because plaintiff's counsel typically gets to close last, you may want to anticipate the plaintiff's closing points and tell the jury why they do not matter and why the jury should decide for your client.

End on a strong note.

M. SUFFER THE PAIN OF WAITING FOR THE JURY TO DECIDE THE CASE

It is hard to wait while the jury deliberates. Do something useful to amuse yourself.

When the jury verdict is delivered, if you have lost, consider whether to ask the court to poll the jury individually to ensure that the result was each person's considered verdict.

If you want to speak with the jurors post-trial, you must obtain prior court approval.

N. PREPARE AND DELIVER YOUR POST-TRIAL MOTIONS; ENTRY OF JUDGMENT

After the jury verdict, it is important to make all necessary and/or appropriate post-trial motions to preserve the issues on appeal. *See, e.g.*, Fed. R. Civ. P. 59 (governing motions for a new trial and amendment of judgment), 60 (governing relief from judgments or order), 50 (governing judgment as a matter of law and alternative motions for a new trial), and 52 (governing amended or additional findings). If certain motions are not made, issues of error on appeal are not preserved.

The clerk of court is to enter judgment promptly. *See* Fed. R. Civ. P. 54(b) (governing judgments) and 58 (governing entry of judgments).

XXIX. YOUR CASE ON APPEAL

Whether you win or lose, you may find yourself before a Circuit Court of Appeals. Employment cases constitute a not insignificant percentage of the decisions emanating from federal appellate courts.

The prudent lawyer will carefully study the applicable Federal Rules of Appellate Procedure. Deadlines and requirements for listing issues, briefing the appeal, and related matters must be followed with precision.

It is not unusual, and, indeed, it may be advisable to associate with, or alternatively, let an appellate lawyer handle the case on appeal. There are pros and cons. One major pro is that the appellate lawyer will not have the blood, sweat, and tears poured into the case. The high level of emotion following a trial may make the trial lawyer less objective and too invested on appeal. The appellate lawyer may bring a new level of objectivity to the case and should likely be more skilled at appeals. The con is that the addition of a new lawyer adds to the cost of the appeal.

In addition to following the requisite form, the appeal brief must be concisely and persuasively written and must rely on strong facts and the correct law. A proper appendix must be prepared.

In preparing for the oral argument, you may wish to conduct a dry-run of the appeal hearing, similar to the way you pre-tested your trial issues. You should be prepared for the tough question that an appellate court may ask and have a good response ready.

Naturally, what happens on appeal will dictate your next step in handling the matter.

At some point, the matter will be final.

XXX. CONCLUSION

In closing, although the above checklist of information is important as you prepare, try, and handle the appeal of your case, no generic checklist can provide a good and comprehensive litigation plan for your particular case. Indeed, only you can do that after having a keen understanding of the facts and the law. But there is one tip on the above checklist that is the seminal tip for any trial. It is: There is no substitute for preparation, preparation, preparation. No substitute. Plain and simple.