

LEWIS, FEINBERG, LEE, RENAHER & JACKSON, P.C.
ATTORNEYS AT LAW
1330 BROADWAY, SUITE 1800
OAKLAND, CALIFORNIA 94612-2519

PHONE: (510) 839-6824 • FAX: (510) 839-7839

**DIRECT EXAMINATION OF THE PLAINTIFF IN
AN EMPLOYMENT DISCRIMINATION CASE**

Bill Lann Lee
Lindsay Nako
Lewis, Feinberg, Lee, Renaker & Jackson, P.C.

I. I. PREPARING THE PLAINTIFF

The plaintiff will require two types of preparation. First, she will need to be prepared to testify effectively about the facts and evidence in support of her claims. Second, she will need to be prepared for the experience of providing this testimony in a courtroom.

- A. Preparing the Plaintiff to Testify.** Similar to preparing for a deposition, you should set forth the purposes of the testimony, describe what type of information the testimony will cover, help refresh the plaintiff's recollection as to relevant facts and documents, and prepare the plaintiff to provide information in an effective and accurate manner. Unlike a deposition, the effect of the plaintiff's testimony on the jury or trier of fact is of utmost importance. Therefore, the manner in which the plaintiff portrays herself and her memory of the operative events should also be a primary consideration. Your goals are to help the plaintiff remember all relevant details and prepare her to articulate them accurately, memorably, and in her own words.

Recommendations:

- Take the plaintiff to the site of the occurrence or otherwise help assure the accuracy of her recollections.
- Have the plaintiff read her deposition.
- Advise the plaintiff about the form and manner of providing testimony.
- Describe anticipated cross-examination questions and possible responses.
- Walk the plaintiff through any exhibits that you or the defense may use.
- Help the plaintiff carefully choose words and descriptions that are vivid and accurately convey her perceptions of her experience in her own words.
- Help the plaintiff refer to facts and observations, rather than conclusions.
- Conduct a "practice session" with the plaintiff.

- Videotape the “practice session” to help correct potentially distracting habits.
- Instruct the plaintiff on how to provide effective testimony, including:
 - Do not answer a question if you did not understand it.
 - Ask for a question to be repeated if you did not understand it.
 - Always answer questions politely; avoid sarcasm.
 - Speak loudly enough for the jury to clearly hear you.
 - Answer with spoken words, rather than gestures or inaudible noises.

B. Preparing the Plaintiff for the Courtroom. The prospect of testifying in a court of law will likely intimidate the plaintiff. Her nervousness and anxiety may negatively affect her ability to appear genuine and trustworthy to the jury. In order to avoid this, take steps to reduce the plaintiff’s anxiety about testifying and do all that you can to ensure that she connects with the jury.

Recommendations:

- Describe the courtroom in detail.
- Draw a diagram of the courtroom and where everyone will be located.
- Familiarize the plaintiff with courtroom procedures, such as when to stand and sit, when people will speak, how people will address the court, etc.
- Provide tactful advice on how to dress for the courtroom. Describe appropriate clothing, jewelry, and makeup.
- Instruct the plaintiff to make eye contact with the jury during her testimony.

II. II. PREPARING YOURSELF

Considerations for preparing the direct examination of the plaintiff include the facts required to prove the cause of action, resolution of contradictory evidence, and preparation for evidentiary objections. Your goals are to present evidence legally sufficient to support each claim you have alleged and to convince the fact finder of the truthfulness and accuracy of the evidence supporting those claims.

Recommendations:

- Determine what facts must be proved to support your cause of action.
- Compare the plaintiff’s previous statements to physical facts and other expected testimony.
- Meet with the plaintiff to obtain any additional information that may have become necessary after your trial preparation or to explain discrepancies in evidence.
- Prepare written questions or an outline of the direct examination covering the facts to be raised.
- Inform witness of what the outline will be, but discourage them from trying to remember or memorize this order.
- Prepare for objections by preparing responses to anticipated objections.

III. RULES OF THE COURTROOM

Outside of the Federal Rules of Evidence which govern admission of evidence in any forum, there are few rules specific to the direct examination of the plaintiff.

- A. **F.R.E. 611(a) (2007): Control by court.** The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.
- B. **1972 Proposed Rules, Note to Subdivision (a):** “Spelling out detailed rules to govern the mode and order of interrogating witnesses and presenting evidence is neither desirable nor feasible. The ultimate responsibility for the effective working of the adversary system rests with the judge. The rule sets forth the objectives which he should seek to attain.”

IV. PLANNING THE DIRECT EXAMINATION OF THE PLAINTIFF

- A. **How to Order Witnesses.** The plaintiff is generally called first. However, you should consider the specifics of the individual case before you make that determination.

Recommendations:

- Consider the logical progression in the story of the case and where the plaintiff lies in the progression.
- Note that opening and closing witnesses have positions of special prominence in the memory of jurors, so you will want to have your most effective witnesses (which may not be your plaintiff) in those positions.
- You may want to wait for the plaintiff to testify if other testimony is necessary to lay a predicate for the plaintiff.
- Watching other witnesses testify may help the plaintiff feel more comfortable and reduce her anxiety.

- B. **Creating the Right Mood.** Your goal should be for the plaintiff to dominate the courtroom during her testimony. You should remain unobtrusive and guide her testimony, as needed for maximum effectiveness.

Recommendations:

- Use short, open-ended questions that allow the plaintiff to tell her story her own way.
- Your questions should be simple, concise, and not redundant.
- Avoid compound questions by asking only one question at a time.
- Avoid using negatives in the question.
- Avoid leading questions, unless the plaintiff cannot remember testimony and needs to have her memory refreshed.

- Agree beforehand on a way to let the plaintiff know if she forgot a relevant fact without having to interrupt her with a lengthy redirect, such as a previously agreed upon, “Is there anything else you remember?” to jog her memory.
- Emphasize important testimony by changing pace, going into more detail, changing questioning pattern, changing your position, using visual aids, or having the plaintiff repeat herself.

C. Weaknesses in the Plaintiff’s Credibility. As a general rule, you should raise any vulnerability in the plaintiff’s credibility during her court testimony if you think it is likely that they will be brought up on cross examination. If the issue is unknown by opposing counsel, unconnected to main issues, or unlikely to come up on cross-examination, it may be best to avoid raising it in direct examination. However, if it is relevant to the case or could damage the plaintiff’s credibility, you should assume that your opposing counsel will raise it on cross-examination. Studies have shown that addressing the issue yourself leaves the witness appearing more credible than in opposing counsel raises it.

D. Using an Interpreter. You should employ an interpreter if the plaintiff speaks little or no English. However, even if the plaintiff speaks limited English, an interpreter may still benefit her testimony. An interpreter will help ensure that she fully understands the nuances of every question posed to her, on direct and cross-examination.

Recommendations:

- An interpreter may be useful if the plaintiff is nervous, anxious, or inclined to act as if she understands English when she may not.
- Instruct the plaintiff to cooperate with interpreter, i.e. not answer questions that she may understand before the interpreter interprets them.
- At the beginning of the direct examination, clarify the extent of the plaintiff’s language abilities and use of English or native language at work or in daily life.
- Continue to direct your questions at the plaintiff, not at the interpreter.
- Instruct the plaintiff to continue to speak directly to you, not to the interpreter.

V. DIRECT EXAMINATION OF THE PLAINTIFF

A. Background. Start with age, residence, employment history, marital status, children, education, and other background information. Your goal is to get the plaintiff comfortable and introduce her to the jury.

B. Transition to Operative Events. Ask the plaintiff about people, equipment, and/or locations involved in the relevant events. This provides a clean transition from background to the required facts. It also ensures that the plaintiff will not have to interrupt herself to explain the background as she is describing the operative events.

C. Establish that the Plaintiff's Testimony is Accurate and Reliable. The crucial portions of the plaintiff's testimony will be her descriptions of what she remembers perceiving and doing during the operative events. In order for this to be persuasive to the jury and resilient during cross-examination, you should preface it with testimony about the accuracy and reliability of the plaintiff's perception and memory.

1. **Plaintiff does recall the event.** Memories may be more accurate if they are important, exciting or sensational, pleasant, shameful, recent, or if the witness was charged with reporting the event at the time
2. **Plaintiff has a good memory.** This can be achieved by establishing that the plaintiff is young and/or in good physical and mental shape, and does not have a tendency to be forgetful.
3. **Plaintiff is in good health and has accurate senses.** You can make a note of good eyesight, good health, lack of fatigue or pain, age, knowledge, familiarity with surroundings, intelligence, interest in the events, motivation to remember, attention, expectation, or any special reasons for attention.

If applicable, you may also want to note favorable surrounding circumstances which allowed for the perception with particular accuracy, such as favorable position, unobstructed view, opportunity to observe, motion, illumination/visibility, atmospheric conditions, contrast to background.

4. **Plaintiff is educated and intelligent.** This can be established through background questions.
5. **Plaintiff's memory was refreshed.** If anything occurred to refresh the plaintiff's memory of the operative events, you may want to have her discuss it if it will make her appear more reliable to the jury.

D. Describing Operative Events. There are many ways to organize testimony about operative events. Most practitioners progress chronologically from the first relevant event to the last, but depending on the facts of the case there may be alternate methods which work better. It is also important to remember that juries will best remember the first and last facts presented.

1. **Chronologically.** If you choose to proceed chronologically, end with important facts to ensure that they remain in the minds of jurors.

2. **Cause & Effect.** If events occurred far apart from each other in time, you may want to explore events that affected each other consecutively in testimony, even if this has to occur out of chronological order.
3. **Start with Most Important Issues.** In order to take advantage of having the full attention of the jury, you may want to begin with the most important events and then supplement with lesser injuries.

E. Discuss Operative Events.

1. **Individual Disparate Treatment Cases.** The burden-shifting analysis required by *McDonnell Douglas* is not a guide for the order of proof that will be presented at trial in disparate treatment cases. The court may dismiss a case at the end of plaintiff's case-in-chief if the plaintiff was given notice of the defendant's nondiscriminatory reasoning and failed to rebut this reason persuasively. See *Diehl v. Tele-Solutions, Inc.*, 57 F.3d 482, 484 (6th Cir. 1995); *Sime v. Trustees of Cal. State Univ. & Coll.*, 526 F.2d 1112 (9th Cir. 1975). Therefore, your case-in-chief should include all of the evidence that makes up your case. Plaintiff's testimony should include, to the extent possible, both the evidence required for a prima facie case of discrimination and rebuttal that the employer's articulated nondiscriminatory reason was a pretext to mask unlawful discrimination. See *McDonnell Douglas v. Green*, 411 U.S. 792, 802-04 (1973).
2. **Individual Adverse Impact Cases.** Just as in individual disparate treatment cases, the *Griggs-Albermarle Paper* framework for adverse impact cases is not intended as a guide for the order of proof that will be presented at trial. See, e.g., *EEOC v. American Nat'l Bank*, 652 F.2d 1176, 1188-89 (4th Cir. 1981). Plaintiff's testimony should include, to the extent possible, the prima facie case demonstrating statistical disparities, rebuttal of the employer's statements of business necessity, and the availability of alternatives with less of an adverse impact. 42 U.S.C. § 2000e-2(k); *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 425-28 (1973).
3. **Class Action Cases.** The purpose of individual testimony by a plaintiff or class member in a class action usually is "[bring] the cold numbers convincingly to life" and to exemplify or illustrate class issues. *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 336 (1977)

Sources:

Barbara T. Lindemann & Paul Grossman, *Employment Discrimination Law* (BNA Books, 1976) (2007).

J. Alexander Tanford, *The Trial Process: Law, Tactics and Ethics* (The Michie Company, 1983)

William A. Brockett, John W. Keeker, *Effective Direct & Cross Examination* (California Continuing Education of the Bar, 1986 & Supp. 2003)

Robert E. Keeton, *Trial Tactics and Methods* (Little, Brown and Company, 1953) (2d ed. 1973)

Michael E. Tigar, *Examining Witnesses* (American Bar Association, 1972) (1993)