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Fundamentals of (successfully!) trying the employment case

By Bruce L. Atkins and Andrew M. Moskowitz

The overwhelming majority of cases settle without going to trial, but many are tried. Here's a primer on how to try one successfully, with a special emphasis on employment cases.

A. Motions *in limine*

Prior to trial, you may consider filing motions *in limine* to prevent the defendant from offering certain evidence.

Unemployment benefits

Defendants frequently seek to introduce evidence the plaintiff has received unemployment compensation. Under the collateral source rule, "a tortfeasor may not set up in mitigation of damages payments made to injured persons from collateral sources." *Long v. Landy*, 35 N.J. 44, 55 (1961). In personal injury cases, this rule has been partially modified. See N.J.S.A. 2A:15-97. The rationale is that courts "'have tended to permit what might appear as a form of **double recovery** by a plaintiff under such circumstances rather than allow reduction of the damages to be paid by the defendant wrongdoer.'" *N.J. Indus. Properties v. Y.C. & V.L.*, 100 N.J. 432, 448 (1985), quoting *Sporn v. Celebrity, Inc.*, 129 N.J. Super. 449, 459 (Law Div. 1974).

Accordingly, unemployment benefits may not be used to reduce a plaintiff's damages. The New Jersey Model Jury instructions provide that

> "Although the back pay award should be reduced by any actual earnings, it should not be reduced by any unemployment benefits or other unearned income the plaintiff may have received." § 2.33 (A)(8)

Defendant's "employability" expert

Defendants often seek to offer experts opining on whether the plaintiff has been "diligent" or demonstrated sufficient initiative in locating alternate employment. Both the federal and state rules of evidence provide that "[where] specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert … may testify thereto in the form of an opinion or otherwise. . ." Fed. R. Evid. 702; N.J.R.E. 702. Counsel may seek to exclude or limit such evidence on the grounds it will not assist the trier of fact and/or will waste time. See Fed R. Evid. 403; N.J.R.E. 403, noting that a court may exclude otherwise relevant evidence if it causes "undue delay [or is a] waste of time."

Accordingly, where an expert merely seeks to tell the jury what result to reach, this evidence may be excluded pursuant to the above provisions. For example, in an employment discrimination case, a court in the Southern District of New York permitted the defendant to offer expert testimony from an executive recruiter but prohibited the recruiter "from express[ing] an opinion as to whether plaintiff's particular efforts to find employment were reasonable. The jury is capable of making that determination on all the evidence and the Court's instructions, without the assistance of an expert witness." *Berk v. Bates Adver. USA*, 94 Civ. 9140 (CSH), 1998 U.S. Dist. LEXIS 16090, at *10-11, *11 n. 3 (S.D.N.Y. Oct. 13, 1998). The court noted that "whether an individual's conduct was reasonable under the circumstances is not a proper subject for expert opinion testimony." Similarly, an expert was prohibited from commenting on the credibility of witnesses because such testimony "constitute[d] a usurpation of the jury's role. It d[id] nothing more than instruct the jury on how they ought to evaluate witnesses' testimony." *Richman v. Sheahan*, 415 F. Supp. 2d 929, 936 (N.D. Ill. 2006).

B. Opening statement

Plaintiff's counsel speaks first. R. 1:7-1(a). In an opening, an attorney should begin with broad themes and then tie them into specific evidence. Avoid making promises you cannot keep. A related corollary: Do not refer to evidence that will not be admissible.

C. Direct examination

A fundamental question for the attorney at the outset is who to call as the first witness. Ideally the plaintiff will be the first witness. However, if he or she is not likeable, you may consider calling another witness first. As a general rule, call your best witnesses first.

Adverse witnesses

You may also consider calling an adverse witness as part of your case-in-chief. In such a situation, "interrogation may be by leading questions, subject to the discretion of the court." N.J.R.E. 611(c); F.R.E. 611(c). One important fact to remember is that defense counsel will then be able to cross-examine its own witness and utilize leading questions. See N.J.R.E. 611(b); F.R.E. 611(b).

Accordingly, you may find citing to adverse witnesses' deposition testimony a better option. Under both state and federal rules you may utilize deposition testimony of any party or officer, director, managing or authorized agent or corporate designee of a party as though the individual were present and testifying. R. 4:16-1(b); Fed. R. Civ. P. 32(a)(2). When reading excerpts from deposition transcripts, you should read the best citations last and then rest.

Expert witnesses

As with all phases of the trial, an attorney wants to quickly hit his or her points, not belabor them. The best practice is to put on your expert in the middle of your case. Do not call your expert as your first or last witness.

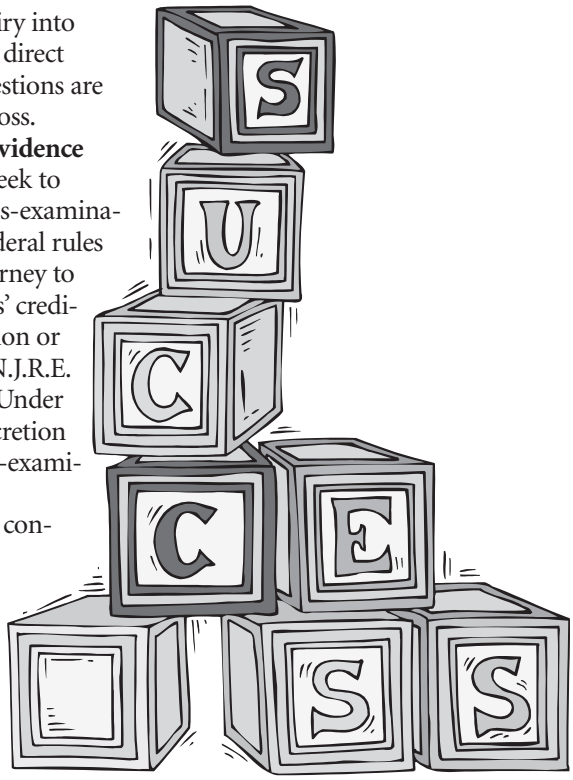
A recent New Jersey Supreme Court case addressed the issue of whether a party could retain his adversary's former expert to testify at trial. In *Fitzgerald v. Stanley Roberts, Inc.*, 186 N.J. 286 (2006), defendants sought to call a psychiatrist who had initially been retained to testify on behalf of plaintiff. The lower court refused to permit it, and the Appellate Division affirmed the ruling. The Supreme Court reversed, holding that "access to the testifying witness is allowed and the adversary may produce a willing expert at trial." The court noted such an expert's testimony could not be compelled.

The Supreme Court placed an additional limitation: Unless the "original retaining party opens the door, for example, by challenging the qualifications of the expert," its adversary could not elicit testimony regarding the "witness' initial retention." Finally, the court stated that absent exceptional circumstances a *consulting* expert could not testify on an adversary's behalf.

D. Cross-examination

A good rule of thumb for cross-examination is to make your points relatively quickly while the jury is still interested. Avoid belaboring issues or being repetitive. To the extent it is possible, start strong and finish with significant points.

Both state and federal rules generally limit cross-examination "to the subject matter of the direct examination and matters affecting the credibility of the witness." N.J.R.E. 611(b); F.R.E. 611(b). However, the court retains discretion to "permit inquiry into additional matters as if on direct examination." Leading questions are ordinarily permitted on cross.



State vs. federal rules of evidence

An attorney may also seek to impeach a witness on cross-examination. Both the state and federal rules of evidence permit an attorney to attack or support a witness' credibility "in the form of opinion or reputation [testimony]." N.J.R.E. 608; Fed. R. Evid. 608(a). Under the FRE, the court has discretion to permit inquiry on cross-examination concerning

> "[s]pecific instances of conduct of a witness … if probative of truthfulness or untruthfulness … (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified." Fed. R. Evid. 608(b); 405(b).

In contrast, in New Jersey state court, "[e]xcept as otherwise provided by Rule 609 [conviction of a crime], a trait of character cannot be proved by specific instances of conduct." N.J.R.E. 608. See also State v. Schlanher, 197 N.J. Super. 548 (Law Div. 1984), where the court declined to permit defense counsel to ask witness if his income tax returns accurately and completely reflect all of his income.

In *Fitzgerald*, *supra* — a case brought under the Law Against Discrimination (LAD) — the New Jersey Supreme Court described at length the manner in which a witness' credibility may be attacked. The court noted that, pursuant to Rule 608, a witness may testify "regarding a prior witness' bad character for truthfulness." To offer such testimony, a witness must be qualified at a preliminary examination outside the presence of the jury that demonstrates he or she knows the subject well and has formed "an opinion of the subject's character for truthfulness." During this preliminary examination, the witness can testify regarding specific act evidence that forms the basis for this opinion. However, at trial, specific instances of conduct may not be described.

E. Rebuttal evidence

An attorney should be very wary of leaving his or her best evidence or witnesses for rebuttal. Indeed, "the trial court has a wide range of discretion regarding the admissibility of proffered rebuttal evidence." *Weiss v. Goldfarb*, 295 N.J. Super. 212, 225 (App. Div.1996), rev'd in part on other grounds, 154 N.J. 468 (1998).

F. Closing statement

Unlike in the opening, the plaintiff's attorney makes his or her statement after the defendant's counsel. R. 1:7-1(b). A smart attorney will use this fact to his or her advantage by listening to defense counsel's statement and incorporating responses into his or her closing. Here are some practices to avoid:

1) Do not misstate or stretch evidence

An attorney's comments must be limited to the facts shown or reasonably suggested by the evidence adduced. *Geler v. Akawie*, 358 N.J. Super. 437, 466 (App. Div. 2003), cert. denied, 177 N.J. 223 (2003).

2) Do not ask jury to put themselves in plaintiff's shoes

A jury may not base its verdict on what it "would want as compensation for injury, pain and suffering, but [a]re instead required to base [its] verdict upon what a reasonable person would find to be fair and adequate in the circumstances." *Geler*, 358 N.J. Super. at 465, citing *Goodrich v. Thomas Cort, Inc.,* 80 N.J.L. 653, 657 (Sup.Ct.1910).

3) Do not attack defendant, its counsel or its witnesses

During closing, an attorney may not attack "[a] litigant's character or morals, when they are not in issue … Nor can parties and witnesses be made the target of invective and derogation." *Geler*, at 467 quoting Paxton v. Misiuk, 54 N.J. Super. 15, 22 (App. Div.1959). In *Geler* the court rebuked plaintiff's counsel for referring to defendants' case as "rotten" and as "garbage" and their arguments as "hogwash" designed "[t]o confuse, to muddle, put up smoke screens." The court also criticized plaintiff's counsel's characterization of defendants' testimony as a "joke," "bunk," "nonsense," and an "outrage"; referring to Defendant's expert as "wily and wiggly"; his opinions as "cute," "nonsense," "garbage," "absurd," and "not worth a hill of beans."

4) Do not bore the jury.

G. Jury charges

A jury charge must provide "an understandable and clear exposition of the issues." *Mogull v. CB Commerical Real Estate Group*, 162 N.J. 449, 464 (2000), quoting *Campos v. Firestone Tire and Rubber Co.*, 98 N.J. 198 (1984). A model charge exists for cases alleging disparate treatment under the LAD where proof is largely circumstantial. See N.J. Model Jury Charge § 2.21. As noted in *Mogull*, this charge is "not designed for discrimination cases where the Plaintiff produces 'direct evidence' of discrimination (so-called 'mixed-motive' cases)." At present, there is no model jury charge in New Jersey for "mixed-motive" cases. See *Myers v. AT&T*, 380 N.J. Super. 443, 457 (App. Div. 2005), cert. denied, 186 N.J. 244 (2006).