NELA 2016: What I Wish I Knew When I Was First Starting Out As A Plaintiff's Lawyer

Top Ten Tips: Discovery and Depositions Top Ten Lists

Elissa J. Hobfoll
Hobfoll Law
247 East Chestnut St., Unit 701
Chicago, IL 606011
ehobfoll@gmail.com ■ (773)339-9005

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TOP TEN DISCOVERY TIPS

1. Start gathering documents from your client immediately and vet them, you have a duty to investigate. There are certain documents that are almost always requested and relevant, like resumes, mitigation/income information, email and text communications about the workplace and allegations in the complaint. Often these are helpful documents, but sometimes that contain bad facts for your client. You need to know about issues before the other side and front them. If you can get ahead of bad facts or information you can control the narrative.

2. Talk to opposing counsel early and often. I cannot emphasize this enough. So many potential conflicts and unnecessary motion practice can be avoided by talking to the other side about what you need, why its relevant, and how to best exchange the information. Follow my co-panelist's, Nina Pirotti, creative suggestions about interacting with opposing counsel.

3. Resolve potential conflicts about confidentiality and confidential information before they occur. Employment law litigation invariably involves the use of information that is traditionally deemed confidential, such as comparator information, company financials, and plaintiff's medical information. Do not let the other side delay production of relevant information by advising you of a need for a protective order or confidentiality agreement on the eve of a production due date. Draft and agree to the terms of a protective order before production is served. Some districts have model orders. Use them as a template.

4. Embrace rolling basis production for matters that will involve voluminous production. We focus a lot on deadlines in this line of work. Yes, the other side was supposed to produce in 30 days. But, do you really want 2,000-5,000 documents on the same day? Agreeing to rolling production allows you to manage the timing litigation. It also helps to prevent scorched earth production. With rolling production, you are in a better position to address potential issues, like mass production of irrelevant information, in a more direct and organized fashion.

5. Serve and share discovery by email or cloud based services like dropbox, google docs, or sharefile. Becoming "paper-less" is not just a trend, it is an effective tool for discovery management. With these programs, you do not have to spend the time, money, and effort converting the production to an electronic file. Electronic time stamps are helpful tools in establishing diligence and timeliness. Avoid the "lost in the mail" excuse.

6. Start drafting discovery requests in conjunction with drafting your complaint. Be proactive. The complaint itself can give you an excellent idea of what you will need to prove your case. Use the Answer, and affirmative defenses to close the loop. With this practice, you will be in a position to serve discovery promptly.

7. Use jury instructions and prima facie cause of action/defense elements help you to draft Interrogatories and Requests for Admission. Doing so will enable you to keep yourself focused on success at summary judgement and trial and avoid spending too much time on red-hearing issues. Also, you can get the other side to admit to the facts that you need to prove your case.

8. Have your client read and review all written discovery requests you make and seek their input. This should be intuitive, but attorneys tend to dominate and control the discovery process; often leaving their clients out. Clients are likely to defer to you as the legal professional and your use of language. Making sure your client is involved in this process may take more time, but will also help to avoid impeachment issues.

9. Send two rounds of Requests for Admission. Requests for Admission are often an underused discovery tool. They are great for isolating facts that parties can agree on and those elements necessary to prove. Send a first round out early so that you may be able to identify factual gaps in your case. Use a second set after document production has been made to authenticate documents for use in substantive motion practice and trial.

10. Use plain language in drafting your interrogatory requests and responses. Remember these are directed at people who do not practice law. You want to avoid the risk of different interpretations or misinterpretations and make it easy for the reader to give you what you want with the least opportunity for objection.

TOP TEN DEPOSITION TIPS

1. Re-read the applicable rules every time. Bring the FRCP and your state's rules with you to the deposition. The longer litigators practice, the more they tend to be over confident about their grasp of the rules. It never hurts to refresh your recollection on the requirements so that you may use them as a sword and a shield, when necessary, at the deposition. It can avoid conflict and prevent delay tactics.

2. Depositions should start at 10am. This is just good practical sense. There are so many moving parts at a deposition. Invariably someone is late, documents are missing or out of order, or attorneys want to talk to their clients, or each other, before a deposition. Give everyone some breathing room and preserve calm where you can during this often stressful exercise.

3. Take a R30b6 deps early. Use these depositions to figure out what documents exist, where they are maintained, and what the employer calls them, so that you can ask for them specifically in your document requests. With ESI, you may find out where electronic information is stored, in what format, and what preservation practices are in place. Early 30b6s can help you learn about relevant company policies and how they are implemented which can be a valuable impeachment tool.

4. Pick your first deponent carefully. Generally, you want to depose someone with a significant amount of information; that will help you decide where to go next and further develop strategy. A lot is "given away" at the first deposition, like how to prepare for cross, set-up impeachment, or identify other witnesses. Often we pick the alleged wrongdoer to start, but the HR manager, or a witness co-worker, may have a better breath of knowledge.

5. Take video of part of your client's dep prep session – then make them watch it. Most of our clients have no idea how they are actually presenting themselves. Now we have the ability to show them exactly what they are doing – WITH OUR PHONES! It is a valuable tool to use to train your client on the importance of cadence of speech and body language. However, do not ask substantive questions and remember to disclose it in the provide log.

6. Research your opposing counsel. Tap your legal community resources and NELA listserves. Knowing opposing counsel's deposition temperament will give you an opportunity to prepare a strategy to handle them. Sure you have been communicating with them for months already, but how they behave over the phone may be quite different from behavioral tactics at depositions.

7. Use deposition defense as a negotiation strategy. I advocate not hiding the ball or saving facts for trial. Get it all out there on the table at the deposition, if you have not already done so in earlier correspondence. Let the other side know how great all your facts are and gain credibility by owning weaknesses in your case. It can be an entree to renewed settlement negotiations.

8. Number deposition exhibits sequentially across all deps and use the same exhibits in subsequent depositions for both sides by agreement of the parties. This helps you stay organized, not just for future depositions in the case but for summary judgment and for trial.

9. Do not give your client too much information about objections, but teach your client the applicable law. The deponent has a lot to pay attention to during the deposition. Do not make your objections a big part of that. They do not have to understand the objections to give good testimony. It is improper to coach witnesses through objections and a well prepared deponent will not need this crutch. That said, explaining the applicable law can help the deponent understand the questions being asked of them and the value their answers impart. Helping them understand the law is key to getting them to be able to impart important information necessary for them to prove their case.

10. Don't be afraid to call your judge – you really can call them. Don't let opposing counsel intimidate you into permitting bad behavior. Lengthy speaking objections, coaching witnesses, and treating your client in a harassing manner should not be tolerated. Make your case on the record as soon as possible. Tell opposing counsel you will contact the judge seeking an immediate protective order, if the conduct does not stop. If it persists, you must follow through, stop the dep, and call your judge. Even if the judge does not intervene in a substantive way the first time you are making your record.

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Top Ten Tips for Trial

Whitney Judkins
Fiedler & Timmer, PLLC
8831 Windsor Parkway
Johnston, IA 50131
Phone: (515) 254-1999
Fax: (515) 254-9923
whitney@employmentlawiowa.com

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1. Be prepared (and don't forget) to educate your judge about your case. Keep in mind that the judge really does not know much about your case—he/she doesn't know what facts may come into evidence that make certain issues relevant or irrelevant. So, don't forget to lay some background for the judge at the pretrial conference when discussing motion in limine issues, for example.

2. Be prepared to educate your judge about employment law. The judge may not know much about employment law. Be prepared to educate him or her on the law. Be authoritative and be right. Let the judge know that she can trust you to have the right answers to questions on the law.

3. Smart concessions can be helpful. Concede points when needed—both to the judge and with the jury. You gain credibility. That may mean conceding a legal issue in a motion in limine or in jury instructions.
    a. This can go for your client's testimony as well—make sure they know not to fight silly little fights. If there is something that you know is going to be bad in their testimony on cross examination, bring it up on direct first, but have them calmly admit it on cross and don't fight it. It takes the wind out of defense counsel's sails on cross examination.

4. Get stipulations to facts when possible. Get the other side to stipulate when possible. This is especially helpful with lost wages. If they will stipulate to an amount that you feel is fair and accurate, do it!

5. Be yourself. Embrace your own style and do what is natural for you. Do not try to be just like someone else—whether it be your lead counsel, your mentor, or Perry Mason. You must appear genuine to the jury and you cannot do that if you aren't being yourself. For example, in opening/closing/voir dire, don't just recite lines that someone else wrote. If you like the idea, re-write it using your own voice.

6. Kindness counts. Be obviously nice to opposing counsel and adverse witnesses. (E.g., Get them a glass of water if they cough. Help opposing counsel pick up papers they dropped.) The jury notices. Also, make friends with the court reporter and the court attendant.
    a. Be willing to be flexible to the extent it does not prejudice your case. Work with the other side if they have (genuine) scheduling issues with a witness. Do this in front of the judge when possible.
    b. Just don't be so nice that you're stupid. Meaning, don't try to be so accommodating that you do something to hurt your own case or make it difficult for you to present your case in the best possible way.

7. Never waste the jury's time. Always be very conscious of the jury's time. They spend a lot of time waiting and they may hold it against you if they think you're wasting their time. Don't waste their time. If you know there is going to be a fighting issue on evidence that will come in that day, ask that everyone arrive early to discuss it with the judge or work through lunch. Don't send the jury out of the room to have that discussion.

8. Err on the side of making your record. Don't worry about being annoying to the judge or court reporter. You have a duty to preserve your record and you must do it.
    a. Make record on things you think could prejudice the jury.
    b. File written objections to the defendant's jury instructions that you can incorporate when making your final objections to the Court's instructions

9. Take care of your client. As the junior lawyer, you are probably going to be responsible for client control/management. Keep your client in mind and be prepared to answer lots of questions. You'll make your client feel a lot better if you can talk at the end of each day and answer any questions/explain what happened that day (they can come to some outlandish conclusions if you don't explain things to them).
    a. Interact with your client in front of the jury – act like you like them!
    b. Talk to the client about any motion in limine issues he/she needs to be aware of—be sure they know what they can/cannot say!

10. Cross examination. On cross examination, get the good stuff and be done! Don't think that you need to tell the whole story when you are cross-examining an adverse witness that you've called in your case in chief. Get in, make them look terrible, and get out.

WHAT I WISH I KNEW WHEN I WAS STARTING OUT AS A PLAINTIFFS' EMPLOYMENT LAWYER

By:

Nina T. Pirrotti

Garrison, Levin-Epstein, Fitzgerald & Pirrotti

New Haven, CT

Telephone: (203) 777-4425

Facsimile: (203) 776-3965

npirrotti@garrisonlaw.com

TOP TEN TIPS WHEN CONDUCTING INTAKE OF PROSPECTIVE CLIENTS

1. **Have a pre-screening process in place**. Our firm uses a questionnaire to help ferret out all of the potential legal issues which may be applicable to our prospective clients' situation. Not only does this enable us to quickly evaluate whether the client has one or more potentially viable claims, it also uncovers legal issues which the client may not have recognized were afoot. For example, a client may come to us because she believes she has a pregnancy discrimination claim and, while she may very well have, through our questionnaire we discover that she also has a viable wage and hour claim. Some clients are daunted by our multi-page questionnaire. In those cases, I invite them to provide me with a couple of paragraphs of narrative instead, explaining why they are seeking the advice of an employment lawyer. Both the questionnaire and the narrative also give the lawyer an opportunity to evaluate clients' abilities to express themselves in a clear and organized manner (given their level of education and fluency in English, of course).

2. **Be selective.** Don't meet with a client unless you are reasonably sure that you can at the very least give him/her meaningful guidance without further representation. Why not invite everybody in? Well, first, you would never get any work done. Second, it is very difficult to turn away someone with whom you have personally met, even if you determine that his or her case has little merit and/or does not make economic sense for your firm. Third, if you charge a consultation fee (and I strongly urge that you do, even if it is done on a sliding

scale basis based upon ability to pay. It separates those clients who are merely "curious" from ones who are committed to the process) you want to be sure you are not wasting the client's time or money.

3. **Do your homework.** Once you have decided to have the client in, take the time to prepare for your meeting. Review the key documents the client has provided to you. Research the client's employer online. Review the case law you believe may be implicated by the client's situation. Brainstorm with your colleagues about an unusual fact or legal issue.

4. **Ensure your first meeting with the prospective client is in person.** There are so many reasons why this is a good idea. First, it may not be apparent from speaking with clients over the phone or even reading their narratives that they are African American, over the age of 40, disabled, pregnant, transgender, etc. Even where prospective clients come to you because they believe they have been discriminated against based upon a protected characteristic, another protected characteristic they also possess may not be on their radar screen and that may be the one you ultimately conclude motivated the employer's conduct. Second, credibility is king. You must be able to evaluate clients' stories in full context and that includes facial expressions and body language. Is that pause before responding to your simple and direct question because they are making up what to say next or because they became momentarily distracted after the family hamster wandered into the kitchen? Third, even if you find a client credible, you may determine that a jury would not find your client likable (and therefore conclude that it was this lawful reason which motivated the employer's conduct). Such assessments are much easier to make in person. Finally, you want your client to have an ability to size you up as well. Your ability to listen, make eye contact, express sympathy non-verbally as well as verbally and otherwise personally connect with the client is key to bringing the client to the very reasonable conclusion that you are the best attorney for the job. I am as flawed as everyone else but I have never had a client with whom I wanted to work meet with me and then not want to work with me.

5. **Listen, listen some more. Ask follow-up questions and listen again.** Come prepared with questions, of course, but don't be so wedded to your agenda that you fail to pick up on critical information the client shares with you. If you listen carefully you may learn new facts that will either strengthen the client's case or prompt you to run in the other direction.

6. **Treat your prospective client as a human being.** For many prospective clients, you are the first lawyer with whom they have ever had to consult. For many more, prospective clients, they are coming to you at one of the most vulnerable and frightening times in their lives. It is essential that you acknowledge and validate what they are experiencing throughout the interview process. First and foremost, it is the right thing to do. Second, if they have a choice between the empathic (and perhaps even a tad less experienced) you and the cold (even somewhat more qualified) fish down the block, they will choose you every time.

7. **Be wary of failure to hire and failure to promote claims.** I am certainly not suggesting you do not take these cases. I am suggesting that you scrutinize them through the lens of the defense's best argument: that the other person who was hired/promoted possessed some "valuable" characteristic your client did not possess. Ask the client to tell you what the employer's best argument will be for why the hire or promotion went to the other candidate and not him/her and then carefully evaluate that answer.

8. **Discuss the prospective client's goals.** You must determine at that first meeting what prospective clients hope to accomplish by retaining you. Do they want a million dollars when their annual salary was $25,000 and they have no therapy to support their emotional distress? It is essential that you manage client expectations at the outset and that you do not agree to represent any client who is not willing to accept the reasonable parameters you set for them. Do they want "revenge" and do not care about the amount of their recovery? Make it clear to them that you are not in the revenge business.

9. **Discuss the prospective client's job prospects and evaluate his/her economic damages accordingly.** Explain to prospective clients the way economic damages work in employment cases. Many are shocked to know that, even in cases of clear liability, if they exercise due diligence (as they are required to do) and find comparable work, their economic damages are cut off as of the date they are hired for such work. For those clients who have reason to believe a job offer is imminent, time becomes of the essence to negotiate as quickly as possible and for them to moderate their recovery expectations accordingly.

10. **Think Ahead.** It is not too early to be asking yourself these key questions: What is this case going to look like at summary judgment? What trial themes will resonate with a jury?

TOP TEN TIPS FOR SUCCESSFULLY NEGOTIATING "SOONER RATHER THAN LATER" SETTLEMENTS WITH OPPOSING COUNSEL

1. **Consider writing a "kinder, gentler" demand letter.** The demand letter is your opportunity to make a first impression. How do you want to be perceived by your adversary? Smart? Yes. Well versed in the law? Of course. But how about also "Approachable" and "Reasonable"? You bet. That message should start with your demand letter. Indeed, NELA's immediate president, David Lee has consistently been a big proponent of the "kinder, gentler" demand letter. Why? Because not only does an attacking demand letter immediately put our adversary on the defensive, it sets up a dynamic that is almost impossible to reverse if it does not go well. We can always get more aggressive if our adversary does not respond in the way that we want. It is virtually impossible, however, to start out in attack mode and, when that does not go well, retreat to a more conciliatory approach. The "damage" to the relationship has already been done. The maxim you catch more flies with honey than with vinegar comes to mind and I have caught enough flies with my approach that I have redubbed my demand letters "Invitation to Negotiate" letters!

2. **The first conversation following the demand letter: Start by listening.** I know this is difficult for many of us, especially yours truly, but try to do very little talking during that first conversation. There is so much to be gained by listening to your adversary. First, you want to learn as much as you can about your adversary's take on your "facts," and you cannot accomplish that if you are talking over her, trying to make sure you get all of your arguments in. We all know how challenging it is to value a case in the early stages. If you play your cards right, listen, and ask the occasional probing question, you can learn information from your adversary during this first call that you would otherwise only learn through discovery, such as comparator or replacement evidence. For this reason, I never make a demand during that first conversation. Also, if your client does not want to litigate, you will need to learn as much as you can about how receptive your adversary is to your case so that you are in the best position to formulate a demand that is high enough to give you room to go down but not so high that your adversary walks away. Second, listening is the best way to size up your adversary. While you have of course done your homework in advance of that first call- - more about that later - - , in the end, you need to make your own judgment about her and figure out the nature of the relationship you will be able to have with her. Finally, if you wait and make your demand in that second call, your adversary is likely to believe (whether it is true or not!) that you have taken

into account his/her position in formulating your demand. You cannot do that without having that first conversation!

3. **Continue the positive relationship throughout negotiations.** I start every negotiation by giving my adversary the benefit of the doubt. I presume, in other words, that my relationship with her will be a positive one — unless she unequivocally demonstrates otherwise. Then I lay the groundwork to maximize the chances of forging that positive relationship. I start by tailoring my negotiation approach to my adversary. If I do not know my adversary yet, I will take the time to get to know her before we have our first conversation. First, I will avail myself of our invaluable CT-NELA listserv to get feedback from my colleagues about her style. Is she practical and reasonable or does she take a scorched earth approach? Is she prepared or does she just phone it in? My next step is to check out her bio on her firm's website, not to figure out whether she is a Super Lawyer or where she went to law school (unless, of course, she went to mine), but to learn what I can about what is important to her. Some websites will reveal hobbies, interests, or family life. Once I have a sense of who this person is, at some point during our discussions - - which will be by phone, not by the far less personal e-mail - - when it feels natural to do so, I find a way to *genuinely* engage her in conversation about something I know she values to which I can in some manner relate.

4. **Don't be afraid to be non-adversarial.** Skeptical about this warm and friendly approach to negotiations? Concerned that such approach will make you appear weak or - - even worse, "non-adversarial"? Consider this: I have settled two different cases in which my clients were accused of stealing from their employers. In one, she admitted to stealing. In the other, she was caught on videotape doing it. Obviously, I took on both cases because they otherwise had merit. But still, my challenge was getting my adversaries to see past the elephant in the room. In both cases, over several phone calls, I managed to work in personal conversations in between discussions of the merits of the case, which included, of course, acknowledging its weaknesses. And I do believe that because they connected with me as a reasonable human being, they eventually came to trust me and that trust had settlement value. Were there times during our conversations that I passionately argued the strengths of my case, and rebutted their position? Of course! But if you can hit that sweet spot and strike the right balance between zealous advocate and decent human being, you might be pleasantly surprised at what you can accomplish. In fact, perhaps the biggest compliment I have ever received in my career came following a negotiation with a Fortune 500 in-house counsel in which I unequivocally hit that sweet spot: Six

months after I settled my client's case with her for a very large sum, she asked me to represent her when her company let her go!

5. **Disarm the ornery adversary**. While the engaging and friendly approach I propose may not work on this bunch, you have nothing to lose by trying it. Responding with warmth to an unpleasant adversary can be very disarming! Should your warmth be met with frost and you nonetheless want to avoid litigation if possible, before you move on, you might want to consider testing your adversary's authority. Summarize in a letter to her the facts of your case, the law that is implicated by those facts, and your (very reasonable) demand that she has rejected. Then give her a way to save face if your letter inspires her to become concerned that her failure to negotiate with you now may come back to bite her later: advise her you will be filing a complaint with the EEOC (or state equivalent) but that you would be amenable to agreeing to extend the deadline for her client to respond if she is interested in continuing the negotiation dialogue with you.

6. **Don't let your ego get in the way.** An adversary once interrupted me mid-sentence during our first conversation to inform me: "Your fancy credentials don't impress me one bit!" That comment was just the tip of the iceberg during the course of our negotiations and despite my good advice to all of you, I ultimately let this mean spirited SOB get under my skin. In fact, he was so unpleasant, so personally insulting, that with my client's blessing I actually filed a lawsuit that was motivated in no small part by a desire to deliver the ultimate "go fly a kite" message (actually the message I hoped to convey was a bit stronger than that!) to him. Of course, the lawsuit had merit, but it was a failure to hire case that was very difficult to prove (see tip number 7 in the client intake section above) and the next six months of my client's life and mine were made pure hell by this guy until we got out. While we did ultimately reach a settlement, it was not enough more than what they were prepared to pay pre-suit to justify going down the litigation path. Always keep that ego in check!

7. **Get derailed negotiations back on track.** What could I have done differently in the scenario described above? Perhaps the result would have been the same but I could have at least tried harder to get the negotiations back on track or in that case on track at all. Since then, if I find negotiations getting too heated, I try to cool them down with some humor by saying: "Could we have a do-over?" Or even "Could we press the reset button on that one? I think I came on too strong and I apologize for that." It is called eating a little crow and, since this is not

about us but about our client - - and even though I am a vegetarian - - every once in a while I have to force myself to do it!

8. **Recognize that broaching settlement is not a sign of weakness.** Who is the culprit who perpetuated the myth that raising the possibility of settlement sends a message of weakness? It just ain't so. Unless your adversary is a novice, the message he or she will get if you raise the prospect of settling the case is that you are practical and realistic – some 95% of cases settle at some point before trial. Why not sooner rather than later when expenses, resources and emotional costs are still at their minimum levels? Raising the prospect of settlement has an added bonus of putting the onus on your adversary to convey your client's settlement interest to her client. Given that she earns a living on an hourly basis, she may not otherwise be chomping at the bit to dispose of the case at the earliest possible moment!

9. **Consider the potentially highly effective negotiating strategy of revealing your cards early on.** I have a hunch that the same person who perpetuated the myth that broaching settlement is a sign of weakness was also responsible for encouraging new lawyers to "save" their juiciest evidence for some magical moment when it will have a "devastating" effect. There is no question that at times this can be a sound tactic (for example, when we had recordings of retaliatory remarks made by our client's supervisor, we chose to wait until the client denied in its Answer that the remarks were made before we revealed them). I do believe those instances, however, are the exception to the rule. Your best chance of getting a significant settlement early on in a case is to reveal those cards early on so that your adversary can make an informed decision on whether to settle and for how much.

10. **Accommodate whenever you can, hold firm when you cannot.** As my highly esteemed co-panelist, Brian Rochel, admonished; "Trust but verify."

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Top Ten Tips: Summary Judgment

Brian T. Rochel
Teske, Micko, Katz, Kitzer & Rochel, PLLP
22 South 9th Street – Suite 4050
Minneapolis, MN 55402
www.teskemicko.com

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TOP TEN SUMMARY JUDGMENT POINTERS

1. You don't have to show that a jury *will* find in your favor, only that it *could*. You don't have to prove anything at SJ and don't take the bait to argue the merits of your case—show how jury could believe your case. Always couch your arguments in the rhetorical framework that "a jury can find and it would not be reversible error." You don't have to convince the judge that discrimination occurred, you just have to convince her that, if a jury found all of the facts in your favor, they could believe that discrimination occurred. Far too often briefs reach too far, trying to argue the merits, which invites a skeptical judge to reject those arguments.
2. Tell a convincing story, treat summary judgment like you are making an argument to a jury (briefing and oral argument).
    a. Don't rely too heavily on tests like *McDonnell Douglas* and doctrines from appellate cases (i.e. "3 months is too long to infer causation"). Unless you're making novel arguments about the SJ or *McDonnell Douglas* standard, keep that section very short, it's a waste of space.
    b. Use bullet points to highlight the essential facts that defeat SJ. Use this in the introduction to your responsive brief so the judge sees it right away. Use those same essential facts again early and often in oral argument.

3. Be on offense even on defense. Write your own brief, do not spend your presentation reacting to what the defendant says. Dying with defensive wounds is still death. Same for oral argument—you should be responsive to their argument, but you need to have your own argument about how your case wins in front of a jury. In many cases, this is the first your judge is learning about your case, make it a good first impression, not merely a reaction to the defendant's narrative.
4. You should be able to explain your case, how you win, using a very short explanation (ideally 1-3 sentences). This is true for the intro to the brief, at oral argument, and at trial. Practice, hone and refine until you can distill even the most complicated case down to a very short, simple story that proves liability. If you cannot do this, how do you expect the judge or jury to understand your case?
    a. Relatedly, develop a simple theme and stick with it. This theme should have trial in mind should be used early and often.
5. Prepare for SJ in advance. Remember, it would be borderline malpractice for an employer not to move for SJ. It is going to happen. Do not wait to prepare for it until you get their brief (you know what they're going to say for the most part). It helps to keep a working "hot docs" index (spreadsheet or document) where you index important (both good and bad) documents and deposition transcripts *as you get them* to save time when writing. This will really come in handy in those jurisdictions that require separate statements (see above).
6. Do not assume the defendant is correct on the law. They have cited cases that support their case, not yours. If you rely on their cases and just try to argue within that construct you will lose. Instead, read their brief to identify the issues; then do independent research, pulling your best cases on the issues; then deeply dive into their cases to see how they square with the ones you like. Include a section in your brief highlighting any significant misstatements of law or misinterpretations of cases so the court is aware that they are reaching.
7. Don't overreach! Don't stretch cases beyond their holding, don't mis-cite cases, don't misrepresent facts, and don't rely heavily on one small holding in a case that is overall bad for your case. Don't ignore bad cases, either, face them head-on. The judge with

either think you missed the case and are incompetent or, worse, know it but are trying to hide it from the court. Don't be afraid to concede the negative points of your case, every case has them. Instead, concede the weakness but explain why it does not result in dismissal. If you try to stretch too far you will lose credibility, which can last for an entire career.

8. Know your audience. Try to learn as much as you can about your judge, and about her or his clerks. These are the people you need to convince, and you will be telling them your story. And know your jurisdiction. Some courts allow you to just write your fact narrative, but lots require separate statements of fact/responses thereto that can be really, really time consuming. If it's the latter, be very mindful about scheduling adequate time to prepare your brief.
9. Don't distract from your argument. Do NOT use capitalizations, *italics*, underlining, **Bold font,** or exclamation points!!! Keep it classy. I have heard numerous judges and clerks say that overemphasis in briefing is distracting and assumes the reader is dumb because they cannot understand the argument—you don't want to tell the judge you think s/he is dumb. In limited circumstances, restrained emphasis is effective, but only if you don't overuse it. If the defendant is hyperbolic in its arguments, ignore it and remain clear and confident in yours.
    a. Visual aids can also be distracting; they can be very effective, but most of the time they aren't. I have rarely seen visual aids be helpful at oral argument for an SJ hearing, but when they are, they are very effective. If you have a single "smoking gun" document or damning testimony, use it and keep it up for most of the argument. But don't use a PowerPoint to cite to legal standards or do anything that is overly complicated. Oral argument should be a compelling story you tell to the judge, don't distract from that, supplement it.
10. Be concise, don't waste the court's time. The page and word limits are not a goal to try to get to; the same goes for the time limit at oral argument. If you get 15 minutes for oral argument, aim to use 14 (or less), it's like a mic-drop to the judge, and they rarely ever see it.