Preparing a Public Client for Trial

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The Policy Is Your Friend

I have worked for over a decade in the Employment Litigation Division of the City of Chicago Law Department. There I litigate employment discrimination cases and other lawsuits related to employment laws. Most of my witnesses are present or former City of Chicago employees.

In my cases, I rely heavily on City policies. Most City of Chicago employees have remarkably little independent discretion when it comes to employment decisions, including hiring, firing, promoting, demoting, transferring, and disciplining employees. In most cases they must follow a City policy and make a recommendation, rather than act independently. Even the head of each department must follow employment policies set by the Department of Human Resources, and must consult with the Law Department and the Department of Human Resources before firing a career service employee.

Most City employees are career service employees, and therefore have various rights not given to at-will employees. On top of that, most employees are also members of unions, with rights under collective bargaining agreements. And the individual departments or divisions often have additional employment policies which elaborate on the citywide policies.

The policies are there for a reason. They protect the City, and they protect the City's employees. If I can show a jury that the City had appropriate policies, distributed them to the employees, trained the employees, followed the policies when a conflict arose, and continued to act in accordance with the policies, then a jury is likely to find that the City did everything it could. The City cannot prevent all conflicts between employees, but it can make sure that there is an appropriate policy governing such conflicts, that the employees and supervisors know the policy, and that everyone reacts to a conflict in accordance with the policy. Follow the policy. The policy is your friend.

Preparation for Trial Starts When You Receive the Complaint

Preparation of a public client for trial begins when the litigation begins. In order to answer a complaint, disclose witness names and documents, respond to written discovery, take and defend depositions, and brief dispositive motions, the attorney will need to collect information from, prepare, and develop relationships with witnesses. From the very first meeting the attorney

should assess the strengths and weaknesses of each witness if the case should come to trial. And the attorney should keep in touch with friendly witnesses, letting them know about developments in the lawsuit so that they are not surprised to be called for trial. Few people are happy about being named as witnesses, but when called upon to testify most people take the process seriously and act professionally. The attorney should treat witnesses with courtesy.

Different judges set trial dates at different times. Those who set them early may move them frequently, so it's a judgment call whether to notify witnesses of a distant trial date that doesn't seem firm. If the date is a few months or weeks out, however, and especially if discovery is complete and dispositive motions have been decided, the attorney should notify his or her witnesses of the trial date and expected length and tell them that they will need to meet with the trial attorneys the week before the trial.

In fact, ideally the attorney should know the witnesses' schedules before the court sets the trial date in order to avoid conflicts. In many public entities employees ask for vacation or furlough days well ahead of time. The attorney should also know the witnesses' work schedules. Some employees may work morning, evening, or night shifts, and some may work weekends and take days off during the week. And of course, the attorney should know how to contact witnesses not only through an office email or memorandum and by phone but also, if possible, through a cell phone.

Preparation as the Trial Date Draws Near

Once the court has set a trial date that looks firm, notify all witnesses, including potential rebuttal witnesses who may not have been previously identified. Ask the witnesses to re-read their deposition transcripts and exhibits, affidavits and exhibits, any documents which may be used at trial, and any other documents which may refresh their recollection, sending copies to them if necessary. Set a date to meet the week before trial, and plan for the possibility of a second date the week before trial, just in case more time is needed.

If a conflict arises and cannot be worked out, the attorney may want to videotape a friendly witness's testimony to show at trial. This would work much like testimony at trial, except that it would happen ahead of trial and outside the presence of the judge and jury. The court could then rule on objections and the tape could be edited accordingly, which can take some time and money. It's much easier and usually more effective to bring the witness to testify live at trial, if at all possible.

Also make necessary preparations for displaying exhibits. In federal court I usually reserve a visual presenter system weeks ahead of time. The federal courts provide such systems free of charge on a first come, first serve basis. If the court does not provide such a system, you may want to rent one, or you may choose instead to rely on exhibit notebooks and posterboard blow-ups of key exhibits. Even if you do use a visual presenter, I also like to hand out exhibit notebooks to the jury, with instructions from the court not to refer to the exhibits in the notebook

until directed to do so, and instructions to leave the exhibit notebooks in the jury box when adjourning for lunch or breaks or at the end of the day. I just spoke to a jury after a trial this summer, and some preferred the visual presenter, some preferred the notebooks, and some preferred the combination.

Note that the visual presenter can also be used to examine a witness in another state, if you arrange ahead of time for that witness to travel to a nearby federal court in another district. You can show the witness exhibits on the visual presenter in your courtroom and he or she will see it in the other courtroom, and can testify about it on a television screen.

The Trial Preparation Session Begins

When the witnesses comes to the trial preparation session the week before trial, don't be surprised if he or she has not read or finished reading the deposition transcript or the other documents. Ask the witness to finish before starting the session, even if it takes an hour or more. Then go over the trial exhibits with the witness, along with any documents that may be used to refresh recollection and any key testimony in the deposition transcript.

There's also a chance, unfortunately, that undisclosed but responsive documents will show up for the first time at the trial preparation session. Maybe the witness remembered a personal file that was hidden away somewhere, or maybe it comes out during the session that such a file exists and was never produced. If it is responsive and not subject to a previously-raised objection the attorney must immediately produce such documents and hope for the best.

If you have a mock trial room available, put the witness on the stand. If you don't have a mock trial room, use a large conference room where you can put some distance between yourself and the witness, simulating the conditions in court. Explain the layout of the courtroom to the witness.

I don't like my witness speaking to the jury unless I specifically direct the witness to do so, as for example if I ask the witness to introduce himself to the jury. If the witness is constantly looking back and forth from the jury to the attorney it can be distracting, and the jury might even perceive the witness as shifty-eyed. Ordinarily, I want the witness to look at me when responding.

I used to stand by the jury box when asking questions on direct examination, so that the witness would be looking towards the jury. But in the past few years I've been using visual presenters provided by the federal courts to show documents to the jury, and those presenters are located near the center of the courtroom.

Some attorneys might ask a paralegal or trial partner to put documents on the visual presenter while standing in a different location, but I prefer to handle the documents myself so I can point and zoom and switch documents when I like. If you are confident with a visual presenter you can

use it like John Madden's telestrator, drawing circles and lines and arrows, but I usually confine myself to pointing and zooming.

Start with a Bang

Direct examination is not as exciting as cross examination. The attorney can help make it more exciting by starting with something important – an important exhibit, or an important piece of testimony. Start off with a bang. For example:

Q. Why did the City fire plaintiff?

A. Because she refused to return to work.

Q. Did you contact her first?

A. Yes.

Q. How?

A. Over a period of months our law department contacted her attorney, I sent her a letter, I talked with her on the telephone, I sent her another letter, our law department sent her attorney another letter, we sent her a notice of charges, her attorney responded to the notice of charges, and finally the Commissioner sent her a termination letter.

Q. What was the purpose of these communications?

A. We wanted her to come back to work.

Q. Did she come back to work after any of these communications?

A. No.

Q. Did she resign?

A. No, she refused to resign.

Q. What did she do?

A. She continued to be absent without leave.

Q. What were her rights after she received the termination letter?

A. She could have appealed to the Human Resources Board.

Q. Did she appeal to the Human Resources Board?

A. No.

Q. Okay, let's back up a bit and talk about your work history and job duties. First, please introduce yourself to the jury.[1]

The examiner can also help by headlining the next topic as I did just there. "Okay, let's back up a bit and talk about your work history and job duties." It wasn't really a question, but usually no one will object, and if they do object the court will allow it. If not, it's easy to turn it into a question by adding something like "Do you understand?" For example: "I want to ask you some questions about the Sexual Harassment Policy. Do you understand?" "I want to ask you some questions about your telephone call with the plaintiff. Do you understand?"

Ask About Work History and Job Duties

After starting with a bang, I like to ask the witness to talk about his or her work history and job duties because it is a topic they know well and can talk about with some enthusiasm. It helps the witness become comfortable talking in front of a jury, and it helps the jury identify with the witness. It also lays the foundation for later questions about specific documents or areas of knowledge.

Q. What do you do for the City?

A. I'm the Assistant Commissioner in charge of the Human Resources Division in the _____ Department.

Q. And what do you do as the Assistant Commissioner in charge of the Human Resources Division in the _____ Department?

A. I do X, Y, and Z.

Q. What do you mean by X?

...

Q. What disciplinary authority do you have?

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[1]The testimony in this paper is purely hypothetical and is not meant to be used as an explanation of City of Chicago policies or procedures.

A. The Commissioner has delegated authority to me to authorize oral and written reprimands and suspensions for up to 30 days, but has not delegated authority to terminate employment of career service employees.

Q. Who has authority to terminate employment of career service employees?

A. The Commissioner of my department, with the advice and consent of the Law Department and the Human Resources Department, decides whether or not to terminate career service employees.

Q. Do you play any part in termination of employment?

A. I make a recommendation and discuss the recommendation with the Commissioner. If the Commissioner decides to proceed and Law and Human Resources agree, I notify the employee of the charges and evidence and of the employee's opportunity to respond to such charges. If the Commissioner reviews the employee's response and still chooses to terminate employment, I may draft the termination letter for the Commissioner's signature and send it to the employee.

Turn to the Exhibits

After establishing the background, it's time to turn to the exhibits. I've attached a short excerpt from the City of Chicago's Personnel Rules. Here's how I would ask the witness about this Personnel Rule.

Q. Do you recognize the City's Trial Exhibit 5?

A. Yes.

Q. What is it?

A. It is an excerpt from the City of Chicago's Personnel Rules. It is Rule XI, Leaves of Absence, Section 1 – Leaves of Absence for Career Service and Probationary Career Service Employees.

Q. What are the City of Chicago's Personnel Rules?

A. Employment rules created by the City of Chicago's Department of Human Resources or its predecessor, the Department of Personnel.

Q. Do you work with these rules?

A. I work with them every day.

Q. Do you work with the Leave of Absence Rule?

A. Yes.

Q. What does the rule say about leave of absences for career service employees?

A. There are four types of leaves of absence, Duty Disability, Leave to a Non-Career Service Position, Personal, and Maternity and Medical Leave.

Q. Could plaintiff have applied for a Duty Disability leave of absence?

A. No, because that's for an on-the-job injury, and she did not suffer such an injury.

Q. Could plaintiff have applied for Leave to a Non-Career Service Position?

A. No, that's for City of Chicago employees who accept a non-career service position, usually an upper-management position, but do not wish to give up their career service rights. If they are on this type of leave of absence and get laid off from a non-career service position, they can return to their career service position.

Q. Could plaintiff have applied for a Personal leave?

A. Yes, and in fact she did apply for such a leave.

Q. Does the City of Chicago have to grant such a leave?

A. No, as it says in here, such leave "may" be granted. Not "shall," but "may." It is discretionary. Also, Personal leaves may only be granted if certain conditions are met. The purpose of the leave must be deemed beneficial to the City Services or is in response to a reasonable personal requirement, including family care responsibility and seeking or accepting public office.

Q. You said plaintiff applied for a Personal leave. Was it granted?

A. No.

Q. Who made that decision?

A. I did.

Q. Why did you decide to deny her request for a Personal leave?

A. Because she put down the reason as "hostile work environment," and I did not believe that she was in a hostile work environment.

Q. Could plaintiff have applied for a Maternity and Medical Leave?

A. If she had proof of the need for a medical leave of absence, yes.

Q. What kind of proof?

A. A certification from her doctor.

Q. Could she have sought a medical leave if returning to work was too stressful?

A. Yes, if her doctor certified that reason.

Q. Does the City of Chicago have to grant a medical leave to a career service employee?

A. Yes, if the employee provides satisfactory proof. As it says here, medical leave "shall" be granted – not "may," but "shall." I read that as non-discretionary.

Q. Did plaintiff apply for medical leave?

A. No.

That's just one portion of one document. It can take a while to get through all the necessary documents in a document-intensive case, and it's not always the most interesting part of the trial, but it is often necessary to explain the documents. When you get back to the point you made at the beginning of the direct examination, this time you can put it in context.

During preparation, I like to go through the entire testimony at least once, and if possible twice. Keep in mind that sometimes court rulings will eliminate exhibits or portions of exhibits, or will restrict the way the witness can talk about certain subjects, so even after the preparation it may be necessary to meet with the witness briefly the morning of his or her testimony to go over last-minute changes.

Finish with Punch

You may want to end the testimony with something that has punch. For example:

Q. Did you know plaintiff?

A. No.

Q. Did you feel any personal animosity or anger or other negative feelings about or towards plaintiff?

A. No.

Q. Did you want to see plaintiff fired?

A. No.

Q. What did you want plaintiff to do?

A. I wanted her to come back to work.

Q. Did you tell her that?

A. Many times.

Q. If plaintiff asked for her job back today, what would you recommend?

A. I would recommend giving her back her job.

Q. Why?

A. Because she was a good worker.

Q. Then why was she fired?

A. Because she refused to return to work.

A Taste of Cross Examination

In addition to direct testimony, it's also good to give the witness a taste of cross examination, or of examination as a hostile witness during plaintiff's case in chief. For example:

Q. You denied plaintiff's request for a personal leave.

A. Yes.

Q. You sent her a letter.

A. Yes.

Q. You said her request was denied.

A. Yes.

Q. Did you explain your denial?

A. No.

Q. Did you give her a reason?

A. No.

Q. Did you suggest a different reason for a personal leave?

A. No.

Q. Did you suggest applying for medical leave?

A. No.

Q. Did you offer any help with her leave request?

A. No.

It's enough to pick two or three subjects for samples of cross examination, rather than attempting to cover every possible subject. The idea is to make sure the witness knows what to expect, and knows not to pick fights with plaintiff's counsel, not to let plaintiff's counsel make him or her angry. Remind the witness about redirect, when you, a friendly attorney, will ask for explanations of anything that needs to be explained. Make sure the witness can remain calm under fire. You may want a colleague to conduct the cross examination, so that it's clear he or she is playing the role of the plaintiff's attorney, and so that you can object, and talk about what the witness should do if you object. The idea is to role play as much as possible, and to make sure they remain calm during cross examination.

Conclusion

This is one way to approach direct examination. It's certainly not the only way, but I hope it gives you some ideas. In general, I find it vital to role play the complete direct examination at least once and preferrably twice, and to role play samples of cross examination. And for a public client in employment litigation, employment policies can be a blessing and a shield. Show that the policies were reasonable, widespread, known to plaintiff, binding, and followed, and the jury should give your public client the benefit of the doubt. Good luck at your next trial.



City of Chicago

PERSONNEL RULES

City of Chicago
Richard M. Daley
Mayor

Department of Personnel
Glenn E. Carr
Commissioner

Revised May 13, 2003

CITY'S TRIAL EXHIBIT
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RULE XI - LEAVES OF ABSENCE

Section 1 - Leaves of Absence for Career Service and Probationary Career Service Employees

Leaves of absence may be granted to Career Service and Probationary Career Service employees provided that the reasons for such leaves are job-related, or are to relieve a hardship condition, or are in response to a reasonable personal requirement, and in all cases are deemed beneficial to the City Service. The City's leave policies will be in compliance with applicable laws. The granting of leaves of absence is a responsibility of the department heads, subject to review and approval by the Commissioner of Personnel. Leaves of absence may be authorized for the following purposes and under the stated conditions:

(a) Duty Disability - A leave of absence shall be granted to Career Service and Probationary Career Service employees for duty disability when the employee cannot perform assigned duties because of a job caused injury or illness. Upon providing an approval and release for return to work to the prior position from the City's designated health practitioner, the employee shall be returned to a position in the same class as the position formerly held, unless such position does not exist by reason of a reduction in force, including, but not limited to a lack of appropriated funds for such position.

(b) Leave to a Non-Career Service Position - A leave of absence without pay shall be authorized to enable a Career Service or Probationary Career Service employee to be elected or accept appointment to an elective office or to a compensated non-Career Service position. Failure to request such leave of absence shall be grounds for discharge. The leave may be extended for so long as the employee serves in that non-Career Service position. An employee seeking return from a leave for appointment or election to another City office or position will be reinstated to a position in the same class as the position formerly held, if such position exists, is vacant and the department head wishes to fill it. If qualified, as determined by the Commissioner of Personnel, the employee may be reinstated to a similar position of the same grade in the department, if there is a vacant position which the department head wishes to fill. If no vacancy exists as described, the employee's name shall be placed on the appropriate Reinstatement list.

(c) Personal - A leave of absence without pay may be granted to a Career Service or Probationary Career Service employee for personal reasons of the employee, provided that the purpose of the leave is deemed beneficial to the City Service or is in response to a reasonable personal requirement, including family care responsibility and seeking or accepting public office not covered by Subsection (b) of this Section. Said leaves may be granted for up to three (3) months provided they may be renewed for like three (3) month periods not to exceed a total leave of twelve (12) months.

An employee on personal leave of absence for one year or less will be reinstated to a position in the same class as the position formerly held, if such position exists, is vacant, and the department head wants to fill it. If qualified, as

determined by the Commissioner of Personnel, the employee may be reinstated to a similar position in the same grade within the department, if there is a vacant position which the department head wishes to fill. If no vacancy exists as described, the employee's name shall be placed on the appropriate Reinstatement list.

(d) Maternity and Medical Leave - Career Service and Probationary Career Service employees shall be granted leaves of absence without pay, upon request, for medical reasons including disability due to maternity. Said medical leaves of absence shall be granted for up to three months, provided said leaves shall be renewable for like three-month periods. The department head shall require satisfactory proof of the need for a medical leave of absence or the extension of such leave.

An employee who returns from a medical or maternity leave of absence shall be reinstated to a position in the same class as the position formerly held, if such position exists, is vacant and the department head wishes to fill it. Otherwise the employee's name will be placed on a Reinstatement list. A written release from the employee's physician will be required prior to reinstatement except in the case of maternity.

Section 2 - Administration of Leave of Absence

All leaves of absence shall be governed by the following procedures:

(a) Leaves must be applied for by the employee seeking the leave on forms prescribed by the Commissioner of Personnel. Before the leave begins it must be approved by the department head and, where required, by the Commissioner of Personnel. All leaves must be reported to the Commissioner of Personnel.

(b) The Commissioner of Personnel shall be responsible for giving both the employee and the department head timely notification of an upcoming expiration of leave of absence. The employee shall then be responsible for notification to the department head concerning her or his intention to return to work.

(c) If an employee fails to return to work upon expiration of his or her leave of absence, without making application for extension or without being placed on a Reinstatement list, it shall be considered that the employee resigned effective as of the last day of the authorized leave of absence. The Commissioner of Personnel shall notify the employee that the resignation has been effected by the action of the employee as authorized on the "Request for Leave of Absence" form.

(d) A leave of absence may be cancelled by the Commissioner of Personnel if the cause for its original authorization was fraudulent or has ceased to exist. A department head may seek to have an employee on leave of absence discharged, and the right to reinstatement withdrawn by action of the Personnel Board under the provisions of Rule XVIII, Disciplinary Actions and Procedures.