THE STAGING OF AN EMPLOYMENT DRAMA: WINNING TRIAL TECHNIQUES

By: Robert M. Goldich

I. INTRODUCTION

An employment case is inherently different from other types of cases normally presented to a jury. In the typical personal injury or products liability case, the plaintiff and defendant are strangers to each other whose lives intersect in some brief transaction or occurrence giving rise to potential liability. In commercial litigation, the parties are fighting over money.

An employment case is like a domestic dispute. The parties generally have lived together for many years, interacting on a daily basis. Somewhere in that relationship, something has gone wrong, leading to an adverse employment action (usually a termination of employment) having dramatic economic and emotional consequences.

Each employment case is thus a tiny human drama which must be captured and persuasively explained to a jury in a trial of anywhere from a few days to two weeks.

All of the skills which are generally necessary for successful trial advocacy are fully applicable to the trial of an employment case. These include, for example, the need to attain and maintain credibility with the jury from voir dire until the end of the case; the need for repetition of your key points throughout the case; the ability to frame open-ended direct examination questions which build on each other, and the need for sharp, leading cross-examination questions to which the answers are known.

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However, to be a successful trial lawyer in the field of employment law requires more than these basic advocacy skills. It requires an appreciation for human and behavioral dynamics, and a sensitivity to how those dynamics play out in the workplace. In the real world, as distinct from the abstract legal world, people do not act out of a sole or single motivation. Loyalty, ambition, greed, jealousy, animosity and personality clashes all powerfully animate behavior in the workplace. These human motivations operate side by side with more objective measures of individual performance and achievement which define success or failure on the job.

This paper will focus on those things which make the trial of an employment case different, recognizing that the techniques discussed must be coupled with generally effective trial techniques in order to achieve the maximum success.²

II. GETTING READY

As a good lawyer, you have been thinking about the trial ever since your client was served with the complaint. You have taken thorough depositions and discovered all of the relevant facts. Your adversary has done the same. You understand the applicable law, and know what instructions ultimately will be given to the jury. But your summary judgment motion has now been denied, and you must begin the task of final trial preparation. What should you do now that you haven’t done before? Here are some ideas:

1. **Check Your Summary Judgment Motion At The Courthouse Door.**

"The plaintiff failed to meet his the burden of showing that my client’s stated reason for his termination is pretextual." This may be a great summary judgment argument. It means

² Based on the author’s experience, this paper is written from the defense (employer’s) perspective. However, plaintiff’s employment attorneys should be able to profit from many of the same techniques discussed herein.
nothing to a jury. Jurors do not sit around talking about whether or not stated reasons are pretextual. Employment cases are not decided based upon burden of proof by a preponderance of the evidence.

The jury is going to decide who should win. They will reach their verdict by deciding whether the employer improperly and/or wrongfully took some action against the plaintiff or whether the plaintiff got what he or she deserved.

At trial, the employer’s stated reasons for taking adverse action against the plaintiff must be clearly and convincingly articulated as if the employer has a heavy burden of proof. In fact, in most jurors’ minds, the employer does.

On summary judgment, you are constrained to argue the case based upon the employee’s stated version of the facts. At trial you are liberated from this constraint. You are free to tell the story of what really happened to the jury by accepting from the employee only those elements of his story which makes sense, and putting them together with those elements of your witnesses’ explanations which make for a compelling and powerful rendition of the facts.

Be prepared to prove not only that your client was right, but also fair. Even in a discrimination case, juries will equate unfairness with discriminatory intent.¹

1.  **Ask The Why Questions.**

Juries need to understand why things happen. Unless the employee was fired in her first 30 days of employment, she has generally had some period of acceptable employment. Why did things go bad? Was the plaintiff a mediocre performer who finally ran into a boss of wouldn’t tolerate mediocrity? Did the plaintiff suddenly encounter problems in her personal life

¹ If your client was not fair, of course, don’t pretend that it was. Be prepared to tell the jury why your client was right even if not fair.
which interfered with her ability to meet the employer’s expectations? Did the plaintiff get promoted to a position which the plaintiff was unqualified or unable to perform? Was there a communications failure? Did the plaintiff fail to get the message from the company that her performance was unsatisfactory? Did the plaintiff fail to communicate to the company problems or issues in the workplace which might have altered how the company dealt with her?

Your job as the advocate is not only to figure out and present what happened, but also why it happened. You shouldn’t be looking to invent the answers; rather, you need to examine the motivations and behavior of all of the key witnesses and come up with credible answers to the "why" questions which will resonate and ring true with the jury. Answering these why questions will go a long way towards the ultimate development of your trial theme.

1. **Simplify And Streamline The Case.**

You can’t sandwich three years of workplace behavior into a one week trial. Not all facts are equally important. Not all deficiencies are equally important. Not all events are equally important. Too many inexperienced attorneys (and clients for that matter) feel they have to present all of the plaintiff’s deficiencies and address all of the plaintiff’s factual contentions. The result is a loss of focus and jury confusion.

At trial you must present convincingly and persuasively those incidents which most graphically explain what happened and why it happened. Don’t use two witnesses to prove what one witness can do. Remember that each witness you present provides an opportunity for your adversary to do a cross-examination and develop inconsistencies. You don’t want to leave out important facts, or important witnesses, but think about how you can streamline the case in order to focus the jury’s attention on those critical facts which will result in a verdict in your favor.

4. **Create Memorable Demonstrable Evidence.**
The typical employment case does not lend itself to slick animation or graphic evidence. The typical employment case is not tried on an unlimited budget. However, as in any other trial, you cannot effectively present your case based solely upon oral testimony from witnesses. Juries need to see and hear the critical evidence to fully absorb it. Try to find those written communications between the employee and the employer which most graphically illustrate the employee's character. Make sure they are constantly in front of the jury in big and bold print.² Create readable and visually appealing charts to summarize complex events. Think about what you can do to give the jury a visual chronology, be it a timeline or calendar on which you can selectively place key events and put them in context. If you can, write down critical admissions from the plaintiff on a flip-chart as you elicit them during cross-examination, creating a visual reminder that you can use during your closing.

5. **Prepare Motions In Limine.**

A motion in limine seeks a pretrial evidentiary ruling either allowing controversial evidence for your client to be admitted or seeking to bar unfairly prejudicial evidence of your adversary.

Think about that evidence which puts your client in a bad light, and which you can argue is tangentially relevant to the plaintiff’s claims. File a motion in limine to exclude that evidence. Even though in many instances, the trial judge may defer ruling on your motion until the evidence is presented in the context of the trial, you will at least sensitize the trial judge to the issue. In employment cases, a frequently litigated issue is testimony about co-employees’

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² Whether you use blown-up posterboards, overhead projections or power point presentations is a matter of personal comfort, but you need "props" which you can easily pull out and use repeatedly during the trial.
situations, especially witnesses. Most trial judges are receptive to the need to avoid a "sideshow" or collateral trial and will place reasonable limits on such testimony.

6. **Assess The Credibility Of The Witnesses.**

Your relationship with your client and your witnesses may have made you into a true believer for your cause. Preparing for trial requires you to examine from a critical perspective how the jury will react to the plaintiff and the key decisionmakers for the employer.

Many defense lawyers make the mistake of believing that only an all-out attack on the credibility of the plaintiff will win the case. It is true that some parties will blatantly lie about critical events in order to support their case. If you have been diligent in discovery, you will have enough ammunition to attack such direct lies. Many employee-plaintiffs, however, honestly but mistakenly believe that they have been the victim of unfair treatment or discrimination by the employer. Many plaintiffs are likeable and will be sympathetic in the eyes of the jury. If you are dealing with a likeable and sympathetic plaintiff, your trial strategy must be radically different than when dealing with the lying plaintiff. Efforts at attacking a likeable plaintiff may only inflame the jury against you and risk a higher damage award.

If you can’t discredit the plaintiff, or if the plaintiff is likeable and believable, you have to identify another character trait of the plaintiff other than credibility to support the basic theme of your defense.

Assessing the credibility of your own witnesses is equally important. Both in selecting which witnesses will make the final witness list as well as in developing the order of presentation of witnesses, you will want to give prominent roles to those witnesses whose credibility and likeability are unassailable, and attempt to the greatest extent possible consistent with the facts to deemphasize or eliminate testimony from witnesses who are more susceptible to attack or who will appear less sympathetic to the jury.

7. **Personalize the Corporation.**
Jurors are inherently distrustful about institutions like corporations, and willing to believe the worst about them. If you have sympathetic decision-makers, make them your client instead of the corporation. "This is the story of how Mary Jones, whose own job at the XYZ Co. was on the line, was forced to deal with a man who resented his female boss" is a much better theme then. "This is why the XYZ Co. fired John Smith," especially if jurors will like Mary Jones.

III. THEMES

The selection of a theme is the single most important aspect of trial preparation. The theme is the single overriding message which you intend to deliver to the jury at each and every stage of the proceeding.

A good theme incorporates both what happened and why it happened. "The plaintiff was a poor performer" is not a theme. It provides the "what", but not the "why."

Since each employment drama is different, no two successful themes can be exactly alike. There are, however, recurrent themes which should be examined for possible adaptation in your case:

A. Fault Themes

Jurors love to assess blame or responsibility for a particular occurrence. If the facts support blaming the plaintiff-employee for her own predicament, build a theme around the plaintiff's responsibility.

Responsibility can involve either intentional or unintentional conduct on the part of the plaintiff. Also consider how emotions or feeling can contribute to work place performance or behavior. Examples:

- Selfishness: The employee was only looking out for herself - she didn’t care about the company or her co-workers (or customers).
Stubbornness: The employee insisted in doing the job his way, not our way, no matter how many times we told her not to.

Loyalty: The plaintiff was not a team player.

Pride: The plaintiff was too proud to accept a lesser role after a reorganization.

Anger: The plaintiff had a chip on his shoulder.

Revenge: The plaintiff got what she deserved, given how she treated others.

B. Communication Themes

Many cases result from a lack of communication between management and the employee. Communication is a two-way street and there are many potential communication themes. Examples:

We tried to tell her what she was doing wrong - she never got the message.

If she had told us what was happening, we could have done something about it.

C. No-Fault Themes

If you can’t blame the plaintiff, you may need to blame a third party. This is particularly true in reduction in force or economically motivated cases. However, if you are going to blame an outside force, make sure the jury understands the "why" of that outside force.

With respect to any of these themes, you should try to articulate the theme in a memorable catch phrase, which you can repeat at critical points during the trial. While the catch phrase can be anything that summarizes succinctly the theme, the best themes are grounded upon memorable admissions of the plaintiff, exhibits, or specific anecdotes which best illustrate the plaintiff’s character or performance flaws.

For example, a single caustic e-mail prepared by the plaintiff may contain a memorable phrase which you can work into the theme. Or there may be a line in a performance appraisal which accurately summarizes the plaintiff. Consider also building a theme around the impact of
the employee on others, such as co-workers, customers, the community or the public at large. Relatively few jurors have experienced the frustrations of senior managers dealing with underperformers, but all of them have been frustrated by incompetent employees, as customers, clients, or consumers.

IV. SELECTION OF THE CORPORATE REPRESENTATIVE

Don’t underestimate the importance of who sits at counsel table. The jury will hear each witness testify once. The jury will see and observe you and your corporate representatives daily for the duration of the trial. Who that person is and how he behaves will influence the jury. Accordingly, your corporate representative needs to be somebody that the jury will like and respect. As a general rule, a more senior person is preferable to a junior person. Your first-line supervisor may have made the decision to terminate but may not be the best person to be in court day in and day out exhibiting hostility towards the plaintiff.

On the other hand, the corporate representative cannot be a "token" having no connection to the case, leaving you vulnerable to the question of where the person was at the time of the decision. Thus, you are really aiming for the most senior person having some reasonable and logical connection to the decisional process leading to the adverse action, unless for some reason some other person will have greater jury appeal.¹

Your client may be resistant to sparing a more senior person for the duration of a lengthy trial. Remember that the jurors are being asked to disrupt their normal lives to sit, and will regard the trial as a major event requiring an appropriate amount of corporate attention. In a

¹ As noted above, if you have personalized the corporation by asking the jury to put themselves in the shoes of a particular manager, that manager is the obvious choice to be the corporate representative.
lengthy trial, you can consider having more than one corporate representative attend at different times, but in such instances, you need to make the jury understand that this is a sign of importance which the employer attaches to the case, and not because the executive has more important things to do.

V. ORDERING OF WITNESSES

The plaintiff has the luxury of going first, and therefore controls in the first instance how the facts of the case will be presented to the jury.

Most good plaintiff’s employee attorneys will call at least some of the employer’s witnesses on cross-examination as part of their case, in order to exploit weaknesses in the employer’s case, and to control the testimony of adverse witnesses by presenting them in the first instance through cross examination. If plaintiff’s counsel is more articulate then the plaintiff, the adverse witnesses can be called even before the plaintiff testifies.

As defense counsel, you need to be sure that all of your witnesses are prepared to be examined as part of the plaintiff’s case if plaintiff’s counsel follows this strategy.\(^2\) If your witness is called as an adverse witness, you then need to decide whether you will use cross examination during the plaintiff’s case to present what would otherwise be your direct examination of the witness, or whether you will recall the witness during your case in chief achieve in order to present such testimony.

If plaintiff’s counsel has called your witness for a brief cross examination, there will be less pressure on you to do a full examination. However, if the plaintiff’s examination has been at all substantial, the jury will want to hear from your witness immediately, and may become suspicious if you regroup and present the witness later. Moreover, if you have a good witness,

\(^2\) In many jurisdictions plaintiff will have to list the witnesses in a pre-trial memorandum. However, plaintiff’s attorney can simply list all of your witnesses and leave you guessing as to which ones he’ll actually call. Some judges are more responsive in forcing plaintiff’s attorney to disclose the order of witnesses before trial.
presentation of the employer’s testimony in the middle of the plaintiff’s case may turn the tables against the plaintiff, and disrupt his own intended presentation of the facts. You can still later recall the witness to rebut facts that develop later in the plaintiff’s case.

If the plaintiff’s counsel has not preempted your strategy by calling your witnesses, and, if you have the luxury of completely controlling the order of testimony, your most important strategic decisions revolve around the selection of your first witness and the selection of your last witness.

First impressions are important, and therefore your best witness should ordinarily be your first witness. The first witness should be someone who is able to articulate the corporate justification for the employment decision at issue, playing to the theme which you have selected for the case. Follow up witnesses are then in a position of corroborating the testimony of the first witness or filling in specific gaps.

If the first witness has done a good job of setting the stage, you can in questioning later witnesses make reference to the earlier witnesses’ testimony.

The last witness is the person who will linger in the memory of the jury. Your corporate representative may be an ideal last witness if he or she is not a principal decision maker, but rather someone whom the employer designated to review the fairness of the decision and/or to approve it. A good human resources professional may also play this role.

Don’t get caught in the trap of thinking that a story must be told chronologically. Many great dramas use the "flashback" technique. There is nothing wrong with presenting first the story of the termination and then presenting witnesses to testify to earlier events.

In selecting the corporate representative, and ordering the witnesses, be conscious of the demographics of the jury pool that will be deciding the case. Since half of your jury will be female and half male, consider how jurors of both genders will react to your witnesses. On the other hand, jurors will resent the use of women or minorities either for the corporate
representative or as witnesses if they have no real involvement in the case and are being used strictly for diversity purposes.

VI. THE OPENING STATEMENT

The opening statement is your single most important contribution to the trial. While there is some dispute among the experts, many jury analysts believe that the majority of jurors consciously or subconsciously make tentative decisions on who should prevail based upon the opening statements.

The opening statement must integrate all of the elements discussed above. First and foremost, you must openly state your theme to the jury, and then explain to them how they will hear the theme played out through the testimony of the various witnesses and exhibits that you will be presenting. Tying the witness and the exhibits to the theme allows you to give the jury a road map without boring the jury.

During the course of your opening, you should not only introduce yourself and your trial team but also your corporate representative to the jury, explaining the person’s connection to the case.

Realize that the opening statement truly makes you the first witness for your client. You have a chance to tell the story to the jury for the first time. You need to introduce the characters (witnesses) to the jury. You need to introduce your client to the jury. Don’t assume that the jurors have seen or remember your client’s television commercials. Tell them what your client’s business does, and what its importance is to the local community. Tell them why the case is important to your client and in particular to the people who made the decisions for your client.

While background information about your client will not become evidence unless a witness actually testifies to it, as long as you are careful, nobody will object to your opening, and nobody will even remember later if you don’t cover these subjects with your witnesses.

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If your opposing counsel has ignored facts or stated half truths, point that out to the jury. Tell them they’ll get the whole truth from you and ask them to judge which side told them the whole truth at the end of the trial.

At the end of your opening statement, the jury should understand who your client is, what they did to the plaintiff, and why. They should be convinced not only that your client did the right thing but the fair thing. They should understand what personality characteristics or traits of the plaintiff, help to dictate the outcome, and how those traits will evidenced throughout the trial.

VII. PRESENTATION OF THE THEME AT TRIAL

If you have selected the correct theme, you should be able to return to it with each and every witness. If your theme is illustrated by a particular exhibit or set of exhibits, make sure those exhibits are constantly before the jury. If you theme revolves around a particular character trait of the plaintiff, make sure that character trait receives emphasis throughout the case.

Generally, cross examination of the plaintiff and other witnesses is tightly controlled. Every question is a leading question, and most questions have been asked at deposition, so that you either know what the answer will be or can impeach the witness if you get a different answer than you expect.

If you have selected your theme based upon a damaging admission or document which was the subject of extensive deposition questioning, hammer that admission relentlessly. Pay attention to how the plaintiff reacts when you have scored your best point. In almost every case, there is at least one priceless moment where the plaintiff or the key witness blurts out something or makes some statement which reveals their true motivation or attitude about the employment decision being portrayed in the courtroom.

Don’t be so engrossed in your trial strategy that you miss that moment. When it happens, use it later in the case. Develop questions to later witnesses which make reference to how the
plaintiff or other witness reacted in the courtroom to your question. Fit the reaction into your theme.

Only through such repetition will the jury fully appreciate the significance of the incident. Nothing is more effective in closing argument than a reminder to the jury of how the plaintiff reacted to a particularly devastating question put by you during their examination.

VIII. CLOSING ARGUMENT

Your closing argument provides you one last opportunity to tell the jury how your theme played out at trial. You are now in a position to remind them how what each of the witnesses they heard and each of the exhibits they saw fit with your theme. Remind the jury of what you told them they would see in your opening statement, and how the trial proved the truthfulness of your opening statement.

If the proof deviated from what your opponent said it would be, point out the discrepancies between the testimony and what your opponent said he or she would prove.

It is important in your closing to give the jury reason to feel good about rendering a verdict for your client, and not to feel bad that they are sending away the plaintiff empty handed. Once again, ask the jury to put themselves in the shoes of your manager or your witnesses instead of in the shoes of the entire corporation.

IX. CONCLUSION

The vast majority of the jurors will have had employment at some time in their life. They will recognize the type of behavior and human interactions which take place in the workplace. They will apply their own experiences in judging the facts of the human drama which you have presented them. Without proper explanation or justification, they will not accept what to you may be objectively reasonable grounds for an employment decision. However, if you have done a consistent, credible and persuasive job of explaining to them what happened and why things
happened, they will render a verdict in favor of your client regardless of how they may otherwise feel generally about how businesses treat employees.