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Increasing Predictability in Employment Case Results – Part 2

This is the second in a two-part article on the management of employment litigation disputes. The first was about evidence considerations in employment disputes (See “Evidence Considerations in Employment Disputes” in the 2010 October Edition of The Metropolitan Corporate Counsel). This part is about increasing predictability in employment litigation results in order to make informed decisions on which cases to bring to trial, and on trial strategy.

Many attorneys fear bringing employment disputes to trial because they believe that juries are unpredictable and ruled by emotion. There is no question that juries get fired up about employment cases in particular and that their verdicts and damage amounts can vary drastically. That is not to say, however, that these verdicts and damages are unpredictable. It is quite possible to make the unpredictable predictable and to make decisions very early on in the life of a case based on what the likely result will be.

Making the Unpredictable Predictable

The quickest way to turn the unpredictability of a jury's response to an employment case into a predictable result is to run focus groups or a mock trial. In this type of research, multiple jury-size panels watch a summarized version of the case and then separately deliberate



while attorneys and jury consultants watch through two-way mirrors. Typically, these two or three panels will react similarly in terms of their reactions to understanding the facts and arguments presented to them. Even if the various panels respond differently from each other, the responses share enough similarities that the attorneys and consultants can make reasoned conclusions regarding what can be expected of the actual jury. The trial team is also afforded the luxury of making changes in trial strategy based on these responses.

This type of research thus makes the previously unpredictable response highly predictable. This gives the trial team the ability to:

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- Make reasonable assessments of whether a case is winnable or not;
- Make reasonable assessments of potential damage amounts;
- Make changes to trial strategy to strengthen their side of the case;
- Make decisions about whether to settle the case and for how much;
- Provide an insurance company proper notice of a likely claim.

Early Case Assessment to Increase Predictability

Too often, companies are making decisions that cases are unwinnable and should be settled based on typical early case assessments that fail to test how cases would look to the ultimate triers of fact: Actual trial jurors. Our experience as jury consultants has shown that many cases that look troubling to attorneys are quickly found to be winnable when put in front of mock jurors.



In one case on which we recently worked, defense attorneys were alarmed by the number of complaints made by the plaintiff against the company for which he worked. If there were something horrible that could be said to a plaintiff in the workplace, they were said to this plaintiff. To everyone's surprise, though, when the case was tested in front of three mock jury panels, all of the panels felt that the

same three pieces of evidence were particularly damning, but that most of the evidence was unimportant and overblown by an overly sensitive plaintiff. Each of these panels made assessments of the evidence that were similar to the other panels despite their segregation during the deliberation process.

Given this, the defense attorneys felt highly confident as they discussed the potential damages with their client, and jointly made decisions as to whether to settle, for how much to settle

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and whether to go to trial. This team decided to go to trial, and took advantage of all of the other aspects of the pre-trial research in that they made changes to the trial strategy as recommended by the jury consultants and developed a voir dire strategy based on the research results. Knowing what they knew, they scoffed at settlement offers of millions of dollars and ended the trial owing only \$10,000 in damages.

Increasing Predictability by Modulating Witness Emotion

In addition to doing focus group and mock trial research, there are methods of working with witnesses that increase the predictability of a positive outcome as well. One of the reasons for the high variability of verdicts in employment cases is that jurors generally get more emotionally riled up in these types of cases than in cases about contracts or patent litigation, for instance. Employment cases have strong narratives of compelling human drama that jurors relate to their own life and workplace experiences. Defense attorneys understandably fear this emotional connection and plaintiff attorneys try to ramp up the emotion.



From watching scores of mock juries deliberate (from our vantage point behind two-way mirrors) and interviewing actual jurors after their verdicts, we have learned that both sides actually do better harnessing the emotional reaction to these cases by preparing witnesses to provide more matter-of-fact, less emotional testimony.

Many jurors are put off by emotional displays by plaintiffs, for example. Some jurors are uncomfortable with emotionality in general which leads to a variety of unfavorable responses. This discomfort leads some jurors to view emotional witnesses with suspicion believing the emotional witnesses to be playing their distress up for court. In other jurors, this discomfort leads them to often unrealistically compare idealized views of themselves to the victimized plaintiffs (If it were me, I would have confronted the boss/ quit/gone to the police...).

In focus groups for the defense side of an employment case, for instance, we saw that a highly emotionally-charged plaintiff-side

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presentation of evidence turned off many mock jurors. At trial, the defense attorneys silently wished for a very emotional opening statement by the plaintiff's lawyer, and were pleased that he went all out. The eventual verdict was favorable to the defense.

In order to keep more jurors on board, it is more effective to provide a strong emotionally resonant narrative in the opening, and then to have the witnesses provide more factual testimony. When steered in the right direction, the jurors will imbue the witnesses with the emotions with which they would connect. Given this, it is important to prepare witnesses to provide more just-the-facts testimony rather than highly emotional grievances.

When working for the female sales representative plaintiffs in a class action discrimination case against Novartis Pharmaceuticals, we were concerned about jurors being overwhelmed by emotional testimony, and closing themselves off to it. We worked with the witnesses to provide a more factual account of their work experiences. When one woman had difficulty telling a particularly egregious story of being sexually assaulted without being overwhelmed, we worked with the attorney to create a direct examination that only touched the outlines of the story, so that the witness was able to tell her story that she needed to tell in a way that was more comfortable for her, and in a way that made the jurors more receptive to hearing it. To be sure, even with this work, the witnesses were often tearful, but the jurors considered the tearfulness to be appropriate to the facts the women were relating.

Working very closely with the witnesses and attorneys helped us to temper the emotionality of the presentation of the case throughout and helped us modulate the connection to the jury. With this prior work with the witnesses, we had more control over the emotional intensity of the trial which increased the predictability day-to-day. Throughout the trial, we watched the jurors' reactions to the testimony and saw where we were on each day. This guided informal settlement discussions, and the decision to proceed to a jury verdict which was highly successful.

Controlling Predictability with Targeted Preparation of Human Resource Witnesses

A relatively unknown factor that drives the unpredictability of employment litigation is the testimony of a particularly difficult type of witness: The Human Resources Worker. Testimony from people

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who work in human resources departments can throw off even the best defense-side case.

Human resources people are trained to defer many actions and decisions to other departments such as the company's legal department,

upper management or line supervisors. On the witness stand, it is fairly easy for a plaintiff's attorney to have even the best human resources executives speak in dispassionate, legalese terms about how they send decisions elsewhere. This quickly makes it look like the company's human resources department is ineffectual, takes no responsibility for anything that happens in the company, is purely a tool of management, and is of no use to the employees.

Understandably, this can kick the legs out of the best defense case in the midst of a trial in which the defense case is otherwise going in well. This unpredictability risk is remedied with highly targeted preparation of any human resources professional witness to ensure that they confidently take responsibility for the department's actions.

Increasing Predictability by Creating Hard Evidence with Analytical Graphics

Another, less predictable, area of employment litigation is how the jury will respond to the often ephemeral evidence on both sides. Plaintiff-side attorneys often worry that they have too little hard evidence of grievances and complaints, while the defense worries about whether it can directly prove that it did nothing wrong. We have found that jurors put a lot of weight on evidence that they can see. Both sides can benefit by creating what appears to be hard evidence by showing graphics to the jury.

Plaintiff attorneys can concretize their evidence by showing any and all emails, documents, photos of work areas, deposition testimony and quotations on a screen. With these elements, the plaintiff attorneys can create graphic timelines showing the responses or lack of responses to the plaintiff's mistreatment, attempts to get help from the company and retaliation by the company.

Defense attorneys can create evidence out of any technology at their disposal, which is often more than is immediately recognized. In a

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wage-and-hour case in which a travel agency had decidedly poor payroll and human resources records, we were able to help them create proof that the employees did not work long hours by showing hundreds of examples of when people did the routine procedures for ending their work day. In many companies, these types of records of start and stop times can be shown from computer log-ins, punch clock records, phone calls that end each day, key card use at entrances, etc. In the travel agency case, our hard evidence contradicted the plaintiff side anecdotal evidence leading to a defense verdict.

Increasing the Number of Winnable Employment Cases

Unpredictability of outcome leads to too much money being spent on settlements and misguided legal fees. With an increase in the ability to predict the outcomes of employment cases, defense attorneys and general counsels will be surprised at the number of cases that can go to trial and be won.

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