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Out-Preparing the Opposition in Class Action Employment Litigation: Hit Hard, and Hit Early

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It is tempting to simply conclude that the litigator's most important tasks in the early stages of class action employment litigation are unrelated to jury psychology, as class certification and various motions that require resolution well before trial appear to be the most obvious candidates for dominating the agenda. However, decisions made at early stages by the court when class certification and related motions are considered are, in some crucial respects, similar to those made by a jury later on the courtroom floor -- after all, judges are humans too, and they often react to the underlying human interest elements inherent in class action employment cases in ways that are similar to a jury's reactions. Therefore, the most astute trial team managers in class action matters will approach the bench in the pre-certification phase with similar types of preparation as those utilized when approaching a jury – especially since mistakes made in the early phases can, and usually do, haunt the trial team all the way to the courtroom floor.

We approach the topic of preparation with a three-dimensional framework representing a structure for optimal persuasion, consisting of (1) The Substantive Themes; (2) Witness Performance; and (3) Demonstrative Exhibits. Naturally, these three dimensions are interdependent, as (2) and (3) serve the goals and purposes spelled out in (1) the Themes; consequently, in the discussion that follows, consideration of these content domains will not necessarily be entirely separate from each other. The adage "You win by out-preparing the other side" appears to hold as strongly in class action employment cases as in any other type of litigation, from our experience – if not more so. Early phases of pre-certification discovery should not be instituted without a strategic plan, and this plan should include persuasive elements that are effective with both the court and the triers of fact.

Substantive Themes

One issue that seems to continue to resurface in litigation is the observation that plaintiff attorneys conduct exploratory research (often operationalized as "Focus Groups") much earlier than defendants. As is well-known to litigators, this initial type of exploratory research is what guides theme development, and provides an initial "temperature gauge" as to the apparent likelihood of a favorable versus an adverse verdict result.

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Why do plaintiffs conduct this research earlier? Because their own money is at stake – they are funding their own cases, and they cannot afford to invest in a loser. What is the tactical implication? Defendants should approach the case with the same urgency, since knowing at the beginning what works and what does not in terms of substantive evidentiary material will provide the trial team with a working

foundation on which strategy – especially themes for the witness testimony – may be effectively built.

Focus Groups do not need to use "mock jurors" to guide trial preparation – in fact, in the pre-certification stage, research design options are available to investigate which arguments and contentions will shape the conclusions of a *judge* to obtain a favorable ruling as well as a jury. Recruiting *judge-like* research participants as opposed to *jury-like* participants is often referred to as a "Mock Bench Trial." In this approach, arguments by both sides are presented in an adversarial setting to a group of three, four or five paid judges recruited to serve as research subjects. As a result of conducting such research, once the effective themes are revealed, the trial team is then in a position to start preparing and training the witnesses for the depositions that will be used in pre-certification discovery.

Employment cases are unique in the sense that jurors have a wealth of pre-existing background experiences – often referred to as "baggage" – which they superimpose on the contentions and responses within the case fact scenario, regulating their overall, ultimate dispositions in the case. The notion that "judges are humans too" means that their rulings will also be affected by this subjective backdrop to some extent (after all, if this were not the case, then judges would all rule similarly instead of differently on a given case).

The myriad unique features of a given employment situation for a specific defendant make the requirements for such early research even more compelling. Thus, wage & hour; donning & doffing; and race/sex discrimination cases each have their own inherent human interest elements that are made even more idiosyncratic by virtue of the specific circumstances within the broad context of the particular defendant's business setting and environment. Deciding which of these elements make a significant difference in the perception of the plaintiffs' claims constitutes a task that requires implementation of an appropriate research design in order to obtain a reliable foundation for an action plan.

For example, in wage & hour cases there are innumerable types of employment and work-related situations that create an impression as to whether a worker is really acting as a non-exempt employee. Is he/she doing "grunt work" (unloading trucks) or "higher level" (requiring executive decisions) work? Are the hiring and firing decisions "real" or "engineered" by someone else? Who is working under him/her? Does the person have an office? How hard does he/she work and what is the pay? How much does that work out to per hour? The enormous number of potential facets of the employment setting create a distinct danger of being "more clever than correct" in making inferences as to which features of the case are truly dispositive of a verdict decision – either for a judge or a jury. By the same token, removing the dangers of being "more clever than correct" is precisely the goal of exploratory research.

Unexpected perceptions of fine details in events within employment settings can make or break a case. Thus, in wage & hour cases, the degree to which a store manager appears to act autonomously can be outcome determinative. This perception of autonomy is regulated by day-to-day activities that

may slip under the radar screen in trial preparation. For example, one juror stated in a pre-trial research project, *"The Regional Manager did not visit the store very often because it was too remote. It seems to me the store manager had to make hiring and firing decisions on his own because of the absence of anyone there to supervise him."* In this case, jurors were coming to conclusions about personnel activities as a function of the rural, isolated locations of some of the stores. Other jurors opined that the store manager was not truly a manager because of the types of tasks in which he was often engaged, i.e., *"Managers are not supposed to have to stock the shelves."* The relative balance of time spent on each of various types of tasks were then weighed in making a final determination as to whether a worker is truly a manager and therefore an exempt employee.

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Perhaps most importantly from a thematic perspective, jurors begin a case with a "presumption of guilt" that can be a perceptual burden for a defendant in the Federal Court setting. The courtroom environment itself creates the impression among jurors that "if the defendant had not done anything wrong we would not be here" (especially if there is a class certification). Ordinary signs of nervousness and apprehension by key defense witnesses, once they are placed on the spot under cross-examination, are unfortunately construed as indicia of "guilt." These perceptions are exacerbated by negative perceptions of employers that are carried as "baggage" into the case by many jurors from their own work histories. Many jurors automatically assume that employers cannot be trusted; put profits over people; exploit employee vulnerabilities and take advantage of their lack of power or influence; discriminate against employees or create "glass ceilings" impeding upward mobility; etc. These assumptions tilt the playing field against defendants and make witness effectiveness training even more critical than it ordinarily would be.

Witness Performance

With the recent Supreme Court ruling in the Wal-Mart class action sex discrimination case, many litigators in employment cases expect pre-Rule 23 depositions to be more numerous and pervasive than they were in the past. In addition, the most damaging incidents occurring in witness testimony in class action employment matters almost invariably occur early, in depositions that occur even in the pre-certification stage. For example, in a race discrimination case in 2005, a senior manager at the defendant company with over 100,000 employees indicated in a rule 30b6 deposition that he believed that the "N" word could be considered as a "term of endearment." This statement would have been avoidable had the witness been adequately trained before the deposition, but once it went on the record, the case was essentially poisoned from the inside out and the defense trial team never fully recovered. As a result, the defendant was forced to settle for more than $150 million.

Witness effectiveness training involves components that are both verbal and nonverbal, the latter being comprised of "body language;" facial expressions; tone; mannerisms; and similar areas of conduct. Moreover, these nonverbal components of witness performance constitute the vast majority of the overall message that is ultimately delivered. The value of a case for settlement purposes fluctuates markedly based on the nonverbal performance of videotaped depositions, and witnesses typically do not know how they "play on tape" until it is too late to change it. Impressions of witnesses regulate the conduct and settlement posture of opposing counsel and similarly affect dispositions by the court, and can steer the case into a tactically unstable position well before a jury trial is on the horizon.

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In mock bench trials conducted over the years, the similarity of judges' and jurors' reactions to witnesses has been noted on multiple occasions, suggesting that the most potent forms of witness preparation are those which are conducted literally as early as possible with the reactions of both judges and jurors in mind. In short, persuasion of judges on many employment-related issues is not dissimilar to persuasion of the jury, and witness training in particular should not be relegated to a position following certification. (Indeed, when we receive a call for help in witness training for a *pre-certification* deposition, we know that the litigator is well-informed on how to use such services and adequately prepare his case).

Many trial team managers assume that the adequacy of witness testimony is a matter of verbal *content*, and that "sitting down and talking to the witness" is essentially the basic component of witness preparation. Experience with witnesses and their actual performance creates a markedly different perspective, however: In reality, effective witness training is more like teaching a 5-year-old how to ride a bike, and "sitting down and talking" in this task is about equally effective. Very few witnesses have the inherent ability to maintain composure in the pressurized context of class action litigation depositions, and implementing effective approaches to deal with their apprehension is not obvious or straightforward.

Research in employment cases generally points to the universal conclusion that when employment disputes are construed as arising from personality conflicts or subjective foibles among defendant supervisors, the defense in general is saddled with severe tactical vulnerabilities. By contrast, defendants are on much more solid ground strategically when employment decisions and regulatory matters that affect plaintiffs are linked to more *objective*, verifiable performance-based criteria. Nonverbal behaviors are, virtually by definition, a set of indicia connected with subjective states of the witness. When judges *or* jurors get a sense that defendant supervisors or managers have any type of personality problems, biases, prejudices or temperament flaws,

the strength of the defendant's position in the case is undermined accordingly, and the negative biases alluded to previously become fully activated.

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Once the toothpaste comes out of the tube with a witness, it cannot be placed back inside. Nonverbal behavior is translated into character assessment with lightning speed, and the first impression is difficult to dislodge. As one juror stated in a class action matter after watching the senior managers, *"The culture of the company is a 'good-old-boy' network – that's the first impression I got when I looked into their faces."* In other words, these assessments can be made just by observing facial expressions, before the testimony even begins.

Demonstrative Exhibits

It is also important to keep in mind that jurors do not deliberate based on what happens in the courtroom – they deliberate based on what they store and retain in memory, and then retrieve from memory later when the time comes to make a decision. What is retrieved from memory later to guide deliberations is a function of how strongly retained in memory the material is, and the manner in which information is presented has a pronounced, direct effect on such retention. In short, information that is graphically represented in a lucid and compelling visual context has a distinct advantage over competing material that is not similarly displayed insofar as creating an impact on the ultimate decision on the case. Again, this process occurs for judges in much the same way as jurors, although admittedly judges will have more information at their disposal in terms of legal briefs and other literary material on the applicable law surrounding the case.

It is important to keep in mind, however, that – again for jurors *and* judges – dispositions on a given case are made on the basis of a tiny subset of all the potential information available, wither it be data, evidence or legal parameters involved. The goal of effectively-developed demonstrative exhibits is to guide the decision-maker through a vast array of potential facts and issues, focusing the attention on those with the most favorable impact and deflecting the attention away from those creating the most severe vulnerabilities. This process then "shapes" the retained information on the case to regulate the ultimate decision.

For decertification, various means of analyzing and displaying summary data are required to create the impression of heterogeneity among the putative class in order to dissuade the court from concluding that the potential class members are similarly situated. Judges in many instances may need assistance in assimilating the importance of various types of analyses, requiring innovative approaches to graphics as a means to simplify concepts necessary

to obtain a favorable ruling at the certification stage. The effectiveness of alternative means of displaying and presenting data can, and should, be tested in a *mock bench trial* setting to ensure that when the time comes to make the arguments before the court, the most compelling visual case possible is ready to be presented.

Conclusion

For both judges and jurors, psychological processes involved in decision-making in employment cases can often be centered on key witness testimony. In our experience, it is difficult to overestimate the extent to which effective witness training procedures are overlooked by trial teams. This deficiency is in turn linked to a pervasive under-appreciation of the pivotal role of nonverbal behavior and in particular the practical means and specific procedures available for optimizing performance in this domain.

Testing a case with a pre-recruited group of judges or jurors almost invariably produces tactical benefits that cannot possibly be anticipated. Many of these benefits occur in the area of information *reduction*, not information augmentation. That is, within the virtually unmanageable amount of evidence and data available in the class action employment case, there will only be a handful of issues that are truly at the fulcrum of a verdict decision. Identifying these key issues early in the litigation not only makes the trial team more strategically focused, but it makes their efforts far more cost-effective as well.

About the Author

Dr. Speckart received his Ph.D. in Psychology from UCLA in 1984 with a specialization in personality measurement. He has been active in the jury consulting field since 1983, and has conducted over 800 mock trials and focus groups in pre-trial research for numerous types of litigation. Dr. Speckart has worked with litigators in over 300 jury selections, beginning with Dalkon Shields cases in 1983, the Agent Orange litigation in 1984, and Exxon Valdez litigation in 1994. His area of emphasis has shifted to employment litigation over the past decade as a result of increased demand for assistance in this complex area of jury psychology.