THE LUTI LAW FIRM

TRYING THE PLAINTIFF'S EMPLOYMENT CASE

Anthony N. Luti

Trying cases can be exhilarating. They can also be massively stressful. Employment cases raise this ire exponentially--both ways. The following is a primer on trying employment cases in general.

MOTIONS IN LIMINE

Well placed motions *in limine* can significantly affect the outcome of the evidence at trial – particularly in employment cases. Thus, you should always consider filing motions *in limine* to prevent the defendant from offering certain prejudicial evidence.

For example, Defendants frequently seek to introduce evidence the plaintiff has received unemployment compensation. Under the collateral source rule,"a tortfeasor may not set up in mitigation of damages payments made to injured persons from collateral sources." Accordingly, these attempts should be fought. Similarly, Defendants often seek to offer experts opining on whether the plaintiff has been "diligent" or demonstrated sufficient initiative in locating alternate employment. Both the federal and state rules of evidence provide that "[where] specialized knowledge will assist the trier of fact to understand the evidence or todetermine a fact in issue, a witness qualified as an expert … may testify thereto in the form of an opinion or otherwise. . ." Fed. R. Evid. 702. Thus, one should try to limit such evidence on the grounds it will not assist the trier of fact and/or will waste time. See Fed R. Evid. 403.

Accordingly, where an expert merely seeks to tell the jury what result to reach, this evidence may be excluded pursuant to the above provisions. For example, in an employment discrimination case, a court in the Southern District of New York permitted the defendant to offer expert testimony from an executive recruiter but prohibited the recruiter "from express[ing] an opinion as to whether plaintiff's particular efforts to find employment were reasonable. The jury is more than capable of making that determination on all the evidence and the Court's instructions, without the assistance of an expert witness." *Berk v. Bates Adver. USA*, 94 Civ. 9140 (CSH), 1998,U.S. Dist. LEXIS 16090, at *10-11, *11 n. 3 (S.D.N.Y. Oct. 13, 1998). The court noted that "whether an individual's conduct was reasonable under the circumstances is not a proper subject for expert opinion testimony." Similarly, an expert was prohibited from commenting on the credibility of witnesses because such testimony "constitute[d] a usurpation of the

jury's role. It d[id] nothing more than instruct the jury on how they ought to evaluate witnesses' testimony." *Richman v. Sheahan*, 415 F. Supp. 2d 929, 936 (N.D. Ill. 2006)

Once you've got the proper limitations and parameters, you case actually start the fun part – the trial. However, never forget why you're there – you are there to persuade a jury to find for your client. Indeed, noted trial attorney Thomas Mesereau once said the following: *"Persuasion is key to any jury trial. One can meticulously prepare but communicate poorly and lose. Conversely, a lawyer with less factual knowledge may be a genius at presenting the themes that win."*

VOIRE DIRE

Many cases are won (and lost) in voir dire. Accordingly, while there are many ways of conducting voire dire, there are some universal thoughts that one should think about.

1. ***Do They Like Me?*** Trust tracks likeability. People trust who they like. While you are picking a jury, they are picking a lawyer. Another key reason to be more likeable is that you need these uncomfortable and inconvenienced folks to open up to you about some occasionally sensitive, personal stuff. And asking them to do it under oath in front of a bunch of cranky strangers. They'll do it more easily if you are appropriately warm and inviting.

2. ***Do I Really Care About These Folks?*** Every time you try a case, you are engaged in a unique process and experiment in the lives of people. You are not just dealing with their intellect; you are trying to reach their hearts, souls and spirits. You need to do your best to learn about the hopes, fears, dreams and aspirations of ordinary human beings who are doing their best to be responsible citizens, serve as jurors and to lead a good life. You need to know what excites them and what disappoints them. Insight into human nature is extremely important to the trial lawyer. Accordingly, don't just *act* more curious about people, their lives, their experiences, their mental processes, their quirks, their filters, their biases, their tastes... but actually BE more curious.

3. ***Show Them Your's, They'll Show You Theirs.*** Research on eliciting honest answers from strangers shows that it works better if the questioner discloses something about himself or herself first. So be ready with your standard intro pitch, whatever it might be.

4. ***Get Ready To Cement Cause Challenges.*** Simply obtaining answers that show bias or prejudice are not enough. We have to get an answer that reveals bias, ***and*** that this is a view that is unlikely to change, ***and*** that it has been held for awhile. And we have to ask a sequence of questions that will get this information in such a way that the judge can't just say: "Nevertheless, Mr./Ms. Juror, you would put that aside and follow the law and the instructions I give you,

wouldn't you?" Too often, lawyers get some information that could probably be developed into a solid cause challenge, only to fail to ask those final couple of questions that really get the person to commit to their belief/attitude, admit that it's not going to change, say that it has been held for a long time, and say that there are better cases in the courthouse for them to serve upon.

OPENING STATEMENT

You've got the perfect jury. Now comes what many attorneys think is the most crucial part of the trial – the opening statement. Your opening statement should relate to the emotional circumstances surrounding your particular employment trial case. It is a conversation, not a speech. Talk to your jury – not at them. Research shows that many jurors form strong opinions after opening statements and interpret all of the subsequent evidence in light of those initial impressions. Your goals should be as follows:

- introduce the case theme to the court and jury. Always remember your story is the centerpiece of your case. A cohesive opening statement can help establish this.
- because trials can come across as disjointed – and sometimes out of order from a plaintiff's perspective, take this opportunity to put an entire story in a compact package so that the jury will be able to get a bird's-eye view and better comprehend and appreciate the issues and the evidence.
- establish rapport with the court and jury
- get jury to identify with your cause
- come across as sincere, honest, understanding, intelligent, dependable, considerate, warm, kind, friendly, and cheerful

PUTTING ON YOUR CASE AND FIGHTING THEIRS'

Many plaintiff attorneys – particularly in employment cases, consider calling adverse witnesses as the first part of their case-in-chief in order to establish liability through the defenses witnesses. This does two things if done correctly: (a) it communicates to the jury you have nothing to hide by telling your story through defense witnesses, and (b) makes the jury dislike the defendant before they can even put up their case. In such a situation,"interrogation may be by leading questions, subject to the discretion of the court." F.R.E. 611(c). One important fact to remember, however, is that defense counsel will then be able to cross-examine its own witness and utilize leading questions. See F.R.E. 611(b). Accordingly, you may find citing to adverse witnesses' deposition testimony a better option. Under most state and federal rules you may utilize deposition testimony of any party or officer, director, managing or authorized agent or corporate designee of a party as though the individual were present and testifying. Fed. R. Civ. P. 32(a)(2). When reading excerpts from deposition transcripts, you should read the best citations last and then rest.

A good rule of thumb for cross-examination is to make your points relatively quickly while the jury is still interested. Avoid belaboring issues or being repetitive. To the extent it is possible, start strong and finish with significant points. Most state and federal rules generally limit cross-examination "to the subject matter of the direct examination and matters affecting the credibility of the witness." F.R.E. 611(b). However, the court retains discretion to"permit inquiry into additional matters as if on direct examination."Leading questions are ordinarily permitted on cross.

An attorney may also seek to impeach a witness on cross-examination. Federal rules of evidence permit an attorney to attack or support a witness' credibility "in the form of opinion or reputation [testimony]." Fed. R. Evid. 608(a). Under the FRE, the court has discretion to permit inquiry on cross-examination concerning "[s]pecific instances of conduct of a witness … if probative of truthfulness or untruthfulness … (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified." Fed. R. Evid. 608(b); 405(b).

With respect to experts, as with all phases of the trial, an attorney wants to quickly hit his or her points, not belabor them. The best practice is to put on your expert in the middle of your case Do not call your expert as your first or last witness. Indeed, your last witness as the Plaintiff's counsel should be your client – he/she, by this time, has sat through your entire case-in-chief, listened to the defense witnesses, your experts, your damage witnesses, and should be able to simply tie up any loose ends and help the jury identify with them.

THE CLOSING

Unlike in the opening, the closing is argument. So argue! That notwithstanding, here are some practices to avoid:

- **Do not misstate or stretch evidence**
- **Do not ask jury to put themselves in plaintiff's shoes**
- **Do not attack defendant,its counsel or its witnesses**

Make your case, not their's. Trust your jury to do the right thing and give your jurors the power to do so.
It is in this setting that each juror has more power than the President, all of Congress, and all of the judges combined. Congress can legislate (make law), the President or some other bureaucrat can make an order or issue regulations, and judges may instruct or make a decision, but no juror can ever be punished for voting in favor of a plaintiff.

Trying plaintiff employment cases can be, and should be fun. It is not often a lawyer really gets to obtain justice for a regular person whose civil rights have been violated at trial.

Anthony Luti is a founding member of The Luti Law Firm, where his practice focuses on Labor and Employment And Civil Rights Trial work. During the last five years, he has obtained millions of dollars in settlements, verdicts, judgments and awards for his clients. He was nominated by his peers in 2008 as Trial Attorney of the Year by the Consumer Attorneys Association of Los Angeles. Mr. Luti is a lifetime member of the Million Dollar Advocates Forum. The Million Dollar Advocates Forum is the most prestigious group of trial lawyers in the United States. Membership is limited to attorneys who have won million and multi-million dollar verdicts and settlements. There are only 3000 attorneys nationwide who have been acknowledged to join this exclusive group of advocates. Similarly, Mr Luti is a Platinum Member of the Verdict Club. Platinum Membership is limited to attorneys who have obtained jury verdicts in excess of $1,000,000. Membership in The Verdict Club is coveted and reserved for only those lawyers who have a reputation of extraordinary verdicts.