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Employment wage-and-hour class-action trials

COMPLEX BY NATURE, IT'S YOUR JOB TO KEEP IT FOCUSED, TARGETED AND UNDERSTANDABLE TO A JURY

"No one ever tries class actions." We've heard that our entire career. But we recently conducted a wage-and-hour class-action trial representing more than a thousand employees, ultimately prevailed at trial and then reached a settlement to avoid appeals.

A wage-and-hour class action trial is complex – but the goal should be to keep it focused, targeted and easily understandable, particularly with a jury involved. Below we discuss how to do so, from voir dire, to opening statements, handling experts and culminating with closing arguments.

Voir dire

The first opportunity to start to develop a focused, targeted and easily understood trial theme is not with the opening statement as folklore would have one believe, but with jury selection.

Jury selection is the first opportunity the potential jurors have to get a taste for the claims, parties and attorneys in the action. It is also the first time that you have the opportunity to look a potential juror in the eye to determine if they will be receptive to your trial theme. But to be able to determine if a potential juror will be receptive to your trial theme you must: (1) have a clear and concise trial theme, (2) understand what type of juror would be receptive to your trial theme, and (3) develop a plan on how you will conduct voir dire strategically so that you clearly convey the trial theme while identifying your model jurors.

Develop your trial theme long before voir dire ever begins

Long before you ever start thinking about voir dire it is imperative that you develop a theme that will be the spine of your case . . . the storyline that flows through each and every part of your case. Something simple . . . something easy to grasp . . . something that the jury can see intertwined throughout

voir dire, opening statement, days of testimony, and closing argument. Think, "If the glove don't fit, you must acquit," "a deal is a deal," "company before profits," "broken promises," and "the law, is the law, is the law."

Develop a profile of your model juror

Once you have the theme that will tie together all of the evidence, it is necessary to take off your litigator hat and put on your profiler hat to develop a profile of the ideal juror who will be receptive to your theme. In this process it is important to wrestle with questions like:

- What type of person will be most receptive to my theme, and who will not?
- What life experiences, jobs, familial situation are relevant and important?
- Would a younger or older person be most receptive to my theme?
- Is our model juror an hourly employee, manager or business owner?
- Does our model juror view rules as something that must be strictly followed, or do they see rules as mere suggestions?
- How do emotions factor into our trial theme, and what level of empathy would we like in our model juror?
- What type of juror do I absolutely want to avoid?

Develop a voir dire strategy

With the model juror profile in hand, the next step is to develop a strategy for how you will ask questions during voir dire so that you (1) clearly convey your trial theme to the potential jurors and (2) identify jurors who encompass as many of the characters of your model juror as possible while at the same time identifying those who will not buy into your trial theme. But, how do you do that?

First, before you even begin to conduct voir dire, establish your trial theme by introducing yourself and making a short statement that explains the case, using your trial theme.

Second, develop questions that will force jurors to provide insight into their life experiences and their world views within the scope of your trial theme. For example, if your trial theme is "company before profits" questions to ask the jurors should focus on whether they or anyone they know has been involved in a mass layoff or reorganization and how they felt about that; or have they ever experienced a situation where procedural or safety procedures were eliminated or refined in order to save money, what was the impact of those cuts and how they felt about such cuts.

Third, know your theme, ideal-juror profile and voir dire questions so well that you can give the potential juror you are questioning your undivided attention. Keep eye contact and try to be sincerely interested in the person so that the interaction changes from one of examination to a conversation where you can observe and feel how a juror responds to your questions. Finally, get the juror to do most of the talking because you can learn a great deal about a person's preferences, core values, emotions and world view while chatting about his job, family, where he comes from, what school he attended, how long he has lived in the area.

Opening statements

There are two essential aspects to the opening statement in a class action trial – the technical evidence that will be presented, and, equally if not more importantly, the theme.

As to the technical, long before a class-action trial ever takes place,

Class Action *continues*

of course, class certification must be granted. A trial plan is required to show that it is really feasible for class-wide liability to be proven through representative evidence. The trial plan needs to be focused and specific – showing common evidence, common testimony, common factors that will establish class-wide liability.

Being able to pinpoint the statistical evidence that will show class-wide liability – in as simple and straightforward a fashion as possible – is critical. Showing specific witnesses in different sectors of the business is also crucial. The judge needs to understand this will not devolve into a hundred different mini-trials as the defense is sure to try to argue.

Once the technical is in order, the theme is crucial. To understand the theme, the jury first needs to understand how the law was broken so it can understand then what thematically happened and why it matters. While opening is more limited to evidence than legal argument such as closing argument, the jury first needs to understand the very basics of the law and how the evidence will show thousands of violations.

It is important to explain that this evidence will come from the employer's "own records" – not the employees', not some third party's, but their own documented evidence. Professionally but firmly pointing to the defense table when emphasizing this reinforces this. Then articulating that the presumption that these records are accurate is ideal if the judge will permit this (after all, opening statements are supposed to be about showing evidence and not argument, so be prepared to respond to an objection here).

Simplicity for a jury is paramount – there were thousands of violations in the employer's records, there were no (or few) premiums paid, there is no logical reason an employee wouldn't want to take a break. Done.

Then comes a more focused theme. While for some simply showing how the law was broken will be enough, many want to understand what happened,

why it matters, and why they should care enough to award damages. This can be dissected into different aspects. One appeals to those who think, plain and simple, rules should be rigidly and absolutely followed. So, here is the law, here are the records, and the employer broke the law – period. The law is the law; I have to follow it, you have to follow it, and yes, the employer must follow it.

But most folks then also want to hear a story – why does this matter, why is it justice that the employees receive money? For instance, in a restaurant – all seems wonderful on a Saturday night, the drinks are flowing, the food is coming, everyone is dressed nicely and having a wonderful time. But behind the scenes there are hardworking and proud folks, many in a hot kitchen, on their feet for hours at a time, rushing to please customers.

They need to eat at some point; they need to rest. They deserve it. We don't let employees go hour upon hour upon hour with no rest, on their feet, hungry. The law requires the employer to provide meal and rest breaks – and when the employer doesn't do that and perhaps chooses profit over proper working conditions, they break the law – and must pay for each and every time they do so.

The employees deserve it. Many think wage-and-hour law is boring and dry – but it isn't. These are laws that make getting through the workday – with food and rest – bearable for real-life people. Tell a real story, and mean it.

Expert testimony

In class-action trials, expert witnesses often determine whether a large and complicated case feels trustworthy or manufactured. That is especially true in wage-and-hour litigation, where jurors are asked to evaluate companywide practices through mountains of records, data, and competing interpretations.

The most persuasive expert is usually not the one with the most elaborate model. It is the one who can take the employer's own records, connect them

to the legal standard, and explain the result in a way that feels concrete and real. When experts fail in these cases, it is often because they drift too far into theory and too far away from how the work was actually performed.

A strong expert in a class-action case starts with the records that matter most. In a wage-and-hour case, that usually means timekeeping data, payroll records, schedules, and operational records. An expert who analyzes time punches to identify missed, late, or short meal periods, then cross-checks those findings against payroll data, is doing the kind of work juries tend to respect. That approach has several advantages. It relies on the employer's own systems. It uses one set of records to test another. It also gives the jury a clear reason to trust the result, because the analysis is tied to what was actually recorded, not to a theory about what might have been possible.

By contrast, weaker expert testimony often depends on proxy measurements. In restaurant cases, for example, a defense expert may study the number of open checks at a given time and conclude that servers had enough time available to take legally compliant breaks.

The flaw in that analysis is not necessarily that it lacks intelligence or technical skill. The flaw is that it answers the wrong question. A server may have fewer open tables for a brief period and still not be relieved of duty. A temporary slowdown does not establish that the employee was free from interruption, free to leave the floor, or actually able to take a timely meal break. A jury can understand that immediately.

In class-action trials, jurors are often more persuaded by evidence of what the records show happened than by an expert opinion about what could have happened under ideal conditions.

That is one of the most important lessons for trial lawyers handling experts in class cases. The expert has to be built around the legal issue, not just

around an operational theory. In wage-and-hour litigation, the question is not whether the workplace was sometimes quiet enough that a break might have been possible. The question is whether the employer actually provided compliant breaks under the law. A good expert should be able to keep that distinction front and center. Every chart, every summary, and every opinion should move directly toward the elements the jury must decide.

Another important lesson is that cross-checking is powerful. The more an expert can validate one data source against another, the stronger the testimony becomes. Time records alone may tell one story, but when time records match payroll records, and those records also fit scheduling patterns or point-of-sale activity, the analysis becomes harder to dismiss as selective or incomplete. In a class action, where the defense often argues that individualized issues overwhelm common proof, an expert who can show consistency across multiple record systems can be extremely effective. It is one thing to present a spreadsheet. It is another to show that several independent systems point to the same conclusion.

The best experts are also teachers. That matters more than many lawyers realize. Class-action trials are full of large numbers, recurring patterns, and datasets that can overwhelm a jury if they are presented poorly. An expert who cannot explain the analysis in plain language will lose the room, even if the methodology is sound. The most effective experts simplify without oversimplifying. They explain what a missed meal period looks like in the records. They explain why a payroll cross-check matters. They explain why assumptions based on workflow are weaker than proof based on recorded events. When the expert can teach the jury how to think about the evidence, the testimony becomes memorable.

This is also why demonstratives matter. In class-action trials, expert visuals should be clean, focused, and limited to one point at a time. A chart should not exist just because the data

is available. It should exist because it makes a single important idea clearer. Too many lawyers allow experts to bury the jury in dense summaries that look impressive but do not communicate anything useful. The better approach is disciplined. Show the rule. Show the relevant record. Show the comparison. Show the conclusion. Then stop. Simplicity increases credibility.

On cross-examination, the most effective attack on a weak expert is usually to expose assumptions. If an expert says employees had time available to take breaks, force the opinion down to its component parts. Was the employee actually relieved of all duties? Did the expert verify whether workers were interrupted? Did the analysis account for side work, customer needs, manager instructions, or coverage gaps? Did the expert test the model against time and payroll records? Did the expert speak to anyone who actually performed the job? The more assumptions buried inside the analysis, the less persuasive the testimony becomes. In class actions, the fight is often not over whether an expert can run numbers, but whether those numbers actually prove anything that matters.

Credibility also depends on restraint. Juries tend to distrust experts who appear to be advocates in disguise. The strongest expert is careful, measured, and willing to admit the limits of the data. That does not weaken the testimony. It usually strengthens it. A witness who acknowledges what the records can and cannot show appears more reliable than one who tries to claim too much. In a class action trial, where the scale of the case can already make jurors wary, credibility is everything.

Ultimately, expert testimony in class action trials succeeds when it stays tied to three things: the legal standard, the actual records, and ordinary human experience. A jury does not decide whose expert is more complicated. It decides whose expert is more believable. The lawyers who handle experts best are the ones who understand that data alone is never enough. The expert

must make the data feel true.

Closing arguments

Closing is the time to put all the pieces together.

Yes, reiterate the evidence. Thousands of facial violations in the employee's own records and no premiums – experts on both sides agree. Reiterate that witness after witness from sector after sector testified they didn't get a break. But be prepared for the defense to argue, "It was their choice to skip breaks." That's where records and common sense come into play. Give egregious examples right in the employer's records. For instance, why in the world would a dishwasher working 11 hours on a Saturday night not want to take a meal break? That doesn't make any sense. And the defense has not overcome the legal presumption that their own records are accurate.

Probably the single most important aspect of closing is very carefully going over the verdict form (and select jury instructions that follow the verdict form). And the single most important aspect of that form is the *Donahue* presumption – which asks whether the employer has rebutted the presumption that thousands of facial violations that exist in the employer's own records – and the jury should check the box that says "NO." That means employees win.

As to damages, there is no such thing as being overly thorough to explain and have evidence entered. Issues may arise in post-verdict motions. All that evidence is largely for the appeal to guard against hyper-technical arguments about lacking evidence in some regard, even if the jury may not even follow most of it. But you can explain it all and then display the number – ask the jury to write it down.

Finally, genuine passion cannot be overstated. Follow your gut and respond in the moment; some of the most powerful moments in trial are when the defense takes an unfounded

shot at employees and there is a passionate and reasoned response. Realize why it matters and say so from the heart. Employers who do not comply with the law are adversely affecting the well-being and even health (both physically and mentally) of thousands of employees and are making lives miserable daily – and profiting from it. That can't happen; now is the jury's chance to make it right. ♦

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