



Effective storytelling in employment trials for a post-COVID and pro-BLM world

Jurors will translate and interpret our clients' stories within the framework of the times

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It's March 15, 2020, and you are preparing for a trial set to begin the following week in a race discrimination case. Your client, an African-American woman who works at a bank was disparately treated by a new boss, a white man. He fires her after she complains about discrimination. The reason put forth by the employer is, of course, alleged bad

performance. You have written your opening and witness examinations. Your trial story is tried and true for employment cases: After years of devoted service to the Bank, a new boss comes in, scrutinizes her differently than white employees and retaliates against her for calling out discrimination. Your themes are solid: "Everyone Deserves Fair Treatment at Work" and "It Doesn't Add Up," the latter to emphasize pretext in the alleged non-discriminatory reasons

for the termination. You feel good about the case and are ready to go.

The next day, the world comes to a halt and courts effectively go dark. Over a year later, your case is back on calendar and it looks like it will go forward next month. Do you simply dust off your trial box and review all you prepared before? Should you try the case any differently after the year we just had?

The answer is yes. We are emerging from a transformative year due to a global



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pandemic that brought new shared experiences and a cultural tidal wave that propelled mainstream awareness about systemic racism. A jury is a cross-section of society and to understand how to reach them you have to understand where society has been and where it is going. We cannot effectively tell our clients' stories without an understanding of how they fit into the broader cultural experience. We also cannot effectively communicate to the decision makers without an understanding of how immense societal changes are affecting their thinking. This assessment is critical to developing case themes and narratives. Jurors will translate and interpret our clients' stories within the framework of the times.

Foundational elements of storytelling at trial

Effective storytelling is the trial lawyer's most powerful skill in the arena of persuasion. Every other skill that furthers your case is inextricably intertwined with, and in service of, the human story underlying the case. Evidence is infused with greater meaning if it is presented within an illustrative framework. Case themes illuminate along the curve of a compelling narrative arc. After jury selection, you may believe you have the most receptive jury to your client, but if you don't tell a story that makes sense to them, you will not prevail. The converse is also true, you can have a resistant jury, but if the story of your case reaches them, you can prevail. Ultimately, good storytelling at trial is the same as good storytelling otherwise: Make it universal.

Every good trial story has the following: good guys and bad guys, their motives, a progression of events, turning points, a crisis and a resolution to the crisis. In trial you leave the resolution to the jury. A compelling story inspires the jury to act to remedy the wrong. This is especially important in a time when so many things seem so out of control; remedying this wrong is an opportunity

for the juror to fix something in a world full of problems. You can inspire the jury to act to fix a wrong by contrasting the employer's bad acts with what they should and could have done throughout the trial, beginning with the opening statement, e.g., "Instead of conducting a thorough investigation into her complaints of discrimination, they just accepted her boss's statements about her."

Trial stories begin with motives, which are revealed in turning points. A turning point is where a witness or a party is confronted with choices. These are the key moments in any story since the choices that were made or not made are the focus of the jury's decision about your case and the people in the story. The employer's bad choices should be the center of your story. What did the employer do once they had received the complaint of discrimination? This is a turning point since they were on notice of the employee's concerns and had the choice to ensure fair treatment from that point in time.

Did they carefully review the performance metrics used for the comparators against those used for your client? Did they look at whether job resource allocation was equitable? Did they choose to support the boss because he brought in significant business? In other words, did they choose profits over fair treatment? Did they choose the word of a white person over a person of color without question? Different choices could have prevented the harm. Your goal in every employment trial is to put the employer on trial so that it is the employer's choices, rather than your client's choices, that are scrutinized and judged. Your client should be likened to an innocent bystander – if it can happen to her, it can happen to anyone.

Storytelling at trial for our times

The following themes/concepts are important to emphasize in storytelling at trial to draw upon recent cultural experiences and awareness:

Rules (more than ever) bring order to uncertainty and chaos

We all know the importance of emphasizing rules to jurors. The famous trial book, "The Rules of the Road" by Rick Friedman and Patrick Malone popularized the concept that we as members of society are obliged to follow the rules in order to promote safety. When someone breaks the rules, defendants need to be held accountable. Plaintiffs, those who suffer the consequences when the rules are broken, need to be compensated. In our current cultural climate, the need for rules is even more exaggerated than ever before. The overarching theme of this past year was uncertainty. The world felt chaotic and out of our control. Rules make people feel secure and bring order to chaos. Rules make a world of unknowns more predictable.

It is helpful to weave in the security of rules into every aspect of your case. With our sample case, establish how the employer had rules about evaluating employee performance that are in place to bring order to the workplace. The rules are supposed to be applied evenly and when they were not, the employer violated its (and society's) rules about fair, unbiased treatment of employees. Demonstrate how if the employer had followed its own rules, it could have prevented your client's mistreatment and distress. When the employer broke the rules, it allowed for disorder with no checks on racist motives and behaviors. If allowed to happen here without consequences, it can happen everywhere.

The role of power – transform its abuse to empower the jury

The role of power is always significant in a trial. Cases often highlight who has the power and how they use it. Every trial should be about empowering a jury to act to remedy a wrong. The key is to motivate a jury to recognize the abuse of power and transmit that power to the jury to correct the wrongs in the rendering of



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their verdict. In the wake of George Floyd's filmed torture and murder, many on your jury are highly sensitized to the abuse of power. Although your bad actors may not be police officers, as supervisors or HR employees with power to make decisions about your client, they are authority figures. Everyone who holds power has the choice to use it appropriately or to abuse it.

A theme to emphasize and base your narrative on regarding power dynamics is that the top managers who approved a bad decision had the power to undo it instead of ratifying it. It was their job to protect everyone in the organization down to the people with the least power. Did they properly train their managers regarding discrimination to help prevent it? Did they properly investigate or did they decide to defer to the bad actor manager who holds more power than your client? Parlay these abuses of power to empowering the jury by helping them understand that they now hold the power to do something about it and hold the powerful accountable. The concept of accountability for those in positions of power has been a powerful and widespread message in the verdict to convict Chauvin of the murder of George Floyd.

Essential workers as modern-day heroes

Perhaps the greatest shift in cultural perceptions that is relevant to employment cases is the concept of the essential worker. While the term has a legal definition – the class of workers who were exempted from the stay-at-home orders on account of the essential nature of their work – the pandemic has created a newfound appreciation for certain classes of workers. Many of these workers are low-wage earners like grocery store clerks, field workers who pick produce, delivery drivers and janitors. These workers, along with some higher paid ones like health-care workers and bank employees, have been recognized during the pandemic, as the heroes that they always have been. These are the workers we all rely on for

the day-to-day things we need to survive: food, healthcare, access to money and clean environments. These employees risked their lives for our ours while we safely sheltered in our homes, yet they were not afforded the basic protections every employee deserves – fair treatment at work. This is a powerful theme.

Seize on the specific real-life sacrifices your client made for her employer and the community at large during the pandemic. Use the word “essential” in describing your client's job and overtly describe her sacrifices for the job, which were for all of us as well. Returning to our sample case of the bank employee, refer to how no one was home to help her middle school child with remote learning while she went to work to keep banks open. Did she ride BART to get to work when COVID cases were surging? Contrast how higher bosses made no sacrifices yet cast your client aside for seeking fair treatment.

Even if your client was not classified as an essential worker by law during the pandemic or if your case timeline preceded the pandemic, find ways to highlight how it is essential work for the community. Describe how your client took great pride in her work putting food on the table for the community or keeping people safe in hospitals while emphasizing the impact of losing that sense of pride by the employer's unlawful actions. This will be readily relatable to present-day jurors – that certain work that furthers our basic survival needs has great value to society as a whole. The employer's unlawful actions against your client are heightened in the context of work you liken to being essential for society as a whole.

Emotional distress is the “new normal”

Fear, anxiety and depression have never been more relatable in recent times for Americans than during and following the pandemic. It is effectively the new normal to be worried about the future and how it may unfold. Everyone, no matter their station or privilege, can now relate to having their lives turned upside down

through no fault of their own and with no control over it. This should be capitalized upon in all cases, especially those where the primary damages are emotional distress, like sexual harassment cases. Many victims of sexual harassment pull away from friends and family during the height of their distress; they self-isolate, which translates to loneliness and a loss of enjoyment of life. Draw upon our recent experiences of isolation to drive home its attendant feelings of sadness and despair.

This time of unknown is also similar to being fired. Emphasize how fear for one's future permeates into all aspects of life and creates uninterrupted stress. Almost all jurors will relate to fears about the future simply due to unknowns even if they did not suffer a major loss during the pandemic.

There has always been cause for caution when it comes to how to present emotional distress damages, since, as with so many things that are close to a juror's experiences, it can cut the other way when it comes to awarding damages. While some jurors will certainly be more sympathetic to emotional distress given their own difficult experiences during the pandemic, others may be desensitized to it for the same reasons: they just went through it, they survived without anyone giving them a large sum of money and so should your client. This emphasizes the importance of identifying these “get over it; I did” jurors during jury selection. But it is especially important in presenting the case to emphasize that we are asking the jurors to require the defendant to compensate the plaintiff for damages the defendant caused. We are not asking the jury to award the damages; instead, we are asking the jury to require the defendant to pay the plaintiff for the harm the defendant caused them.

Racial discrimination cases – a new dawn (sort of)

It seems like there has been a shift in the mass culture consciousness about race for many, many people. This is not only due to the rise of the Black Lives Matter



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movement but also on account of outrage against the recent attacks on Asians/Asian-Americans. Phrases like “systemic racism” and “white privilege” are suddenly normalized and uncontroversial concepts in the public discourse and in the media. This allows for us to put race discrimination cases within a broader cultural framework that acknowledges racism as a system that rests and propagates on privileges based on race. As with the added scrutiny on your client’s performance in our sample case, you can highlight that the white employees enjoyed “privileges” with the new boss the plaintiff did not simply by being white, and the effect was systemic because the employer let it persist. Not only did the white employees enjoy the privilege of the presumption that their similar work was in line with performance standards, but tangible privileges as well such as additional training or resources for the job.

Since discrimination cases almost never have direct evidence of discrimination, seize on the recent awareness about the insidious nature of racism and how it is not always overt. Present the context that demonstrates its existence. Is this the first or only African-American employee the bad actor boss supervised? Is it a predominantly white workplace? This information is relevant in painting an overall picture of bias – the environment that is part of the story of the case. Comparators are also part of the environment, often objectively establishing different standards for different races. Since we must prove intent in discrimination cases, show how even though the white boss will not say he gave her lower scores because of her race, we know racism permeates people’s world view and all of the choices a person makes. This will help frame each of the acts that demonstrate disparate treatment into a broader context driven by discriminatory motive.

We need to be cautious here as well and not assume all jurors have made this cultural shift regarding race in this country. Look at age, life experience, especially contact with people of other races and cultures during jury selection. Are they retreating into the security of the old way in their life experience as well as their attitudes or are they open to new ways of thinking? These factors will inform the receptiveness of your jurors to a trial story that frames the race discrimination your client experienced in a broader cultural context.

Disability accommodations – There are different ways to get the job done

The widespread advent of many people working from home has expressly underscored for many workers that there are different ways to do a job effectively. The most conformist way or the employer’s preferred way is not the only way. Drive home the idea that it is unreasonable for employers to be rigid about adjusting a job to meet changed needs (like work restrictions) as long as the job requirements are met without undue hardship to the employer. This can be an important part of your trial story that your client was doing the job even though it was being done differently due to her need for accommodation. Did a new boss come in and require that your client can no longer sit during most of her shift as a cashier? Was there any difference in her productivity than those cashiers who stood during the entire shift? If not, the employer’s choice to deny the accommodation was unreasonable since differing circumstances require adjustments in how things get done.

Pay close attention in jury selection to identify those who are afraid of new ways, stuck in old ways. Those jurors will not be receptive to changes in the workplace that are not viewed as conformist ways to do a job.

Other considerations for employment trials

There are other issues that are likely to be affected by recent societal upheavals. For instance, whistleblower cases have always been about keeping people safe. Doing one’s part to keep others safe has never been more relatable and important. It will be important to emphasize how whistleblowing is designed to prevent future harm and if the whistleblowing activity was taken seriously, it would have prevented the resulting harm. This also ties into emphasizing collective action and responsibility. We have heard the phrase “we are all in this together” a lot during the pandemic. If everyone plays by the rules, we have the power to change the course of the future. For an employment case, play on that theme when specifically arguing that one manager’s actions infect the entire workplace and has a rippling effect or that one whistleblower was willing to take responsibility for all of us.

The economic downturn is another universal experience for most Americans. Explore whether the trial story can include reference to the people in power (bad actor decision-makers) who have been exempt from the economic struggles of this period and want to be exempt from following the rules. The difficulty in finding work during this time will also be important to emphasize regarding your client’s mitigation efforts. This will be a way to address the pandemic directly. This kind of evidence will be particularly compelling in age discrimination cases on account of the pronounced difficulty older workers have in finding a new job. In age discrimination cases, you may also find it useful to emphasize that older workers should not be sacrificed to make way for younger ones; that older workers have intrinsic value. These are concepts that came to the forefront during the height of the pandemic.

Conclusion

After a difficult year, while we continue to recover, we can use our recent



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collective experiences as an opportunity to better serve our clients. We have a new and heightened opportunity to hone the drama and intensity of our times to tell a compelling trial story with universal appeal. Effective and relevant storytelling gives us the ability to empower the jury to solve a real problem in society and accomplish the just result every client deserves.



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