SECRETS TO OBTAINING MILLION DOLLAR VERDICTS:
OPENING STATEMENTS, CLOSING ARGUMENTS AND USE OF LAY WITNESSES FOR DAMAGES

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I. INTRODUCTION: USE EVERY OPPORTUNITY TO EMPHASIZE DAMAGES

No matter what takes place in a case before trial, attorneys who get big verdicts at trial are consistent in their recognition of the fact that they must emphasize the client's damages from the first moment that a venire panel enters the room. There is a common misconception that before damages can be sought, liability must be established and that to do otherwise is to put the cart before the horse. After all, jurors will think of me as a money grubbing trial lawyer if I start asking for money without showing why the Defendant ought to be responsible for paying it won't they? Not so.

Damages are themselves an element of liability. If the Plaintiff suffers from depression or is injured in some manner, there must be a reason for it. The reason is that the Defendant caused an injury. In personal injury cases or police misconduct cases we can show photos of bruises, x-rays of broken bones, and present medical records of all manner of internal injury. But in employment cases, we are generally limited to two areas for compensatory damages: lost income and emotional distress.

Just like physical injuries, emotional distress must have a source. But one never arrives at the question of the source until one recognizes that there are damages. It is for this reason that damages can and should be brought before the jury from very early in the case.

There are five opportunities to address the jury: voir dire, opening statements, testimony, closing arguments, and jury instructions. By far, the opening statement is the best opportunity. But it will only be useful if the proper testimony is elicited. And the closing argument is where an attorney seals the deal.

II. TESTIMONY OF DAMAGES

The basis for any claim of damages is the testimony in the case. While documentation has its place the fact is that live testimony is always strongest. Live testimony will come in two forms: expert opinions and lay witness testimony.

A. Expert Testimony

Expert testimony can be helpful, but it is certainly not necessary. A professional witness can enter a courtroom and testify to a jury about the meaning of medical terminology and attempt to translate a person's reactions to stressors into a comment on the pain and suffering involved. But pain and suffering is a highly individual thing, and no expert can have the credibility in emotional distress cases to fully understand what a person is feeling. As a result, while they can be useful, the utility of experts is limited. Their greatest necessity is to cancel out competing experts.

Treating physicians are more useful than experts because they can testify to the statements of the Plaintiff made to that doctor under a hearsay exception Fed. R. Evid. 803(4) so long as they are pertinent to the diagnosis. But even more importantly, the treating physician has a certain credibility because he has been treating the patient.

Nonetheless, even if a Plaintiff has not sought medical treatment at all, he can recover significant damages for emotional distress. In *Lampley v. Onyx Acceptance Corporation*, a jury awarded $75,000 in compensatory damages for emotional distress. Consider the closing argument of defense counsel:[1]

19 Let's talk about the medical treatment. Emotional
20 distress. Jerry's poor shoulders are down. Where is the
21 medical treatment? Mr. Maduff mentioned a variety of factors
22 on why he didn't get any. Money? Couldn't be money. Look
23 at all the jobs he had in between. At Sutton's he is making
24 $5,463 a month. He has no money for medical care?
25 Did you hear one psychologist come in here, and if

Cybak - closing 726

1 this man has been suffering for two and a half years,
2 wouldn't you think that a psychologist would come in here and
3 tell you what his symptoms are and what treatment he has had
4 over two and a half years? You didn't hear that, did you?
5 How about a psychiatrist? You didn't see a psychiatrist
6 either, did you? How about a social worker? You didn't see

[1] The text that follows is copied directly from the transcript.

7 a social worker either. His wife said he was getting
8 treatment or counseling at the church. I sat here, you know,
9 maybe my vision has gone real bad, but I didn't see a witness
10 from the church.

In this situation, the fact that Mr. Lampley had no medical treatment at all was not a bar to compensatory damages. Why? Because his wife Johneatha as able to testify to his distress. The lesson is that lay witnesses can be a formidable way to present emotional distress damages.

B. Lay Testimony

In the Lampley case, Jerry himself testified to his emotional distress. But we did not rely solely on his testimony. Rather, we relied on the testimony of his wife. Unlike a doctor, Johneatha Lampley had a clear view of her husband day in and day out. She understood his motivation. She understood not only what was so upsetting to him but why.

7 BY MR. A. MADUFF:
8 Q. Can you describe the demeanor, emotional -- the
9 demeanor of Gerald Lampley in the time that you knew him
10 between when you started dating him in May of 1993 and his
11 getting, just before he got the job at Onyx in February of
12 1998?
13 A. He was fine, he was emotionally fine. He was a goal-
14 oriented young man.
15 Q. And did anything change from February of 1998 and what
16 you saw in him when he got the job at Onyx?
17 A. He was very excited, he was driven, and he had goals
18 that he wanted to accomplish.
19 Q. And between February of 1998 and February of 1999, did
20 his emotional state, as far as you could see, in terms of
21 what -- again, I'm asking for what you saw -- did that
22 improve in that time?
23 A. Yes, it did.
24 Q. And what were you seeing?
25 A. He walked with his shoulders up and out, he walked

Johneatha Lampley - direct by A. Maduff 500

1 with his chin up, he was happy, excited, and he was even more
2 driven.
3 Q. And did that affect your decision to get married --

4 your decision to get engaged in February of 1999?
5 A. Yes, he felt that he was more stable.
6 Q. And between February of 1999 and July 24th of 1999,
7 what was Mr. Lampley's emotional state, his appearance to
8 you, his demeanor?
9 A. He was excited about us getting married, and he was
10 excited about his future with Onyx. He felt that he would be
11 able to financially support a family.
12 Q. In November of 1998, Thanksgiving, did you have
13 Thanksgiving with Mr. Lampley?
14 A. I'm sorry, could you say that --
15 Q. Did you have Thanksgiving with Gerald in November of
16 1998?
17 A. Yes.
18 Q. And this is the year before?
19 A. Yes.
20 Q. Can you tell me what his appearance was at
21 Thanksgiving dinner in November of 1998?
22 A. We spent it with my family. He was very happy, he
23 spent time with my family watching the game, and spending
24 time with my nephew, very upbeat.
25 Q. In November of 1999, the 25th of November was

1 Thanksgiving, did you spend Thanksgiving with Gerald?
2 A. Yes.
3 Q. And can you tell me what Gerald was like that
4 Thanksgiving?
5 A. He was preoccupied, he was down. I didn't know what
6 was wrong.
7 Q. Now, when did you first find out that Gerald had filed
8 the charge of race discrimination?
9 A. November 26th, the day after.
10 Q. And how did he appear at that time?
11 A. He seemed uncertain. He seemed not as confident,
12 unsure.
13 Q. When did you find out that he had been terminated on
14 November 29, 1999?
15 A. What time of the day?
16 Q. I'm sorry, let me reask the question, maybe it's

17 confusing. We have an established fact he was terminated on
18 November 29, 1999. My question is when did you find out that
19 that had happened?
20 A. When I came home from work.
21 Q. On that day?
22 A. Yes.
23 Q. And what was Gerald like at that time?
24 A. He was devastated. He was -- he couldn't believe it.
25 He was in shock. He wasn't expecting it.

1 Q. Can you describe for me his physical demeanor?
2 A. He was depressed. He -- I had never seen him like
3 that before.
4 THE COURT: Ma'am, you have to keep your voice up.
5 THE WITNESS: I'm sorry. I had never seen him like
6 that.
7 BY MR. A. MADUFF:
8 Q. Can you tell me -- can you compare for me the kind of
9 person that Gerald Lampley was and the way he was with you
10 from basically the year of 1999 versus the year of 2000, the
11 time that he -- in other words, before and after the
12 termination?
13 A. Before the termination, he was -- before the
14 termination he was great, happy. After the termination he
15 has not been the same since that time.
16 Q. Before the termination did he say good-bye to you in
17 the morning?
18 A. Oh, yeah, always with a kiss, and you know, sharp on
19 his way out, just happy, and now it's just different.
20 Q. Have you ever seen him cry?
21 A. November 29th, 1999.
22 Q. When you and Jerry were engaged in February of 1999,
23 between- the two of you, who was the emotional support for
24 the family, the optimist?
25 A. He was.

1 Q. Did that change after November 29, 1999?
2 A. Yes, he was more needy, more dependent on me to tell

3 him that everything was going to be okay, that our future
4 would be fine financially and emotional.
5 Q. When did he finally stop feeling, being that needy way
6 to you?
7 A. He hasn't.
8 Q. You mean he is still that way?
9 A. Yes.

In total, Johneatha Lampley testified for more than 15 pages. While she was on the stand, her sole purpose was to talk about damages.

When Onyx Acceptance appealed this case to the 7th Circuit, it argued that the compensatory damages were excessive because they were not in line with the damages awarded in cases with similar facts. The Seventh Circuit stated

> Although Lampley found a new job two months after his termination, both he and his wife provided detailed testimony explaining the termination's negative effects on Lampley's emotional state, some of which linger today. The jury was also told that Lampley sought church counseling one year after his termination. Moreover, Lampley testified that because his wife was pregnant at the time of his termination, he was especially stressed about the ability to deal with costs associated with child-rearing in light of his unemployment. Based on this evidence, a jury reasonably could have believed that $75,000 was necessary to fully compensate Lampley for his pain and suffering.
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> Onyx points to cases in which the plaintiff received less than $75,000 in compensatory damages to show that Lampley's award is out of line. However, these cases are easily distinguishable. For instance, in *Avitia v. Metropolitan Club of Chicago, Inc.,* 49 F.3d 1219, 1227-29 (7th Cir.1995), we diminished an award from $21,000 to $10,500 because the degree of emotional distress was not proven; only 14 lines of testimony addressed emotional distress. By contrast, in the instant case, there were numerous pages of testimony regarding emotional distress.
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> A court should not substitute a jury's damages verdict with its own figure merely because a case with similar facts has not yet arisen, or because a plaintiff in a similar case was perhaps not able to plead his facts to the jury as well[2]

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[2] *Lampley v. Onyx Acceptance Corporation*, 340 F.3d 478, 484 (7th Cir. 2003).

Testimony of lay witnesses can therefore be particularly effective, and in many cases far more effective than experts. Therefore, even if an attorney chooses to use an expert, use of lay witness testimony should also be used. If an expert is not used, Plaintiffs' attorneys should not be concerned that they will be penalized by appellate courts.[3]

[3] I must here admit that in the 7th Circuit it helps to argue your case before a three judge panel consisting of all three female members of the Court and the only African-American. But then luck is another important asset to the Plaintiff's employment attorney.

III. OPENING STATEMENTS

An opening statement is worthless if there is no testimony to back it. This is the reason that we started with the testimony in spite of the fact that the opening statement is probably more important. The reason for this is that the opening statement is the first chance any attorney has to address the jury in free form. Although employment cases are almost always an uphill battle for Plaintiffs, we do have a singular advantage in that along with the burden of proof goes the right to address the jury first and last. It is this first impression which will be the strongest thing in a juror's mind as the case moves forward. Because of this, a good opening statement can put the Defendant on the Defensive – where it belongs.

A. Damage Elements of Opening Statements

There are many techniques for introducing damages into the opening statement. The most basic of these is simply stating what the testimony will be. Doing so will leave the jury looking for that testimony. When the testimony comes, not only are jurors checking it off in their mental check lists (which gives counsel credibility), but it reminds them that there are damages. For example:

> You will hear from Jonetha Lampley. Jonetha and Jerry got married and went on a honey moon in July of 1999 while Jerry was at Onyx. She will tell you how Jerry's income was good and had enough promise that she could give up her job teaching and raise a child. She will tell you that she planned to be a stay at home mother and Jerry would support the family. But when Jerry couldn't get the increased buying authority, and far worse when he was fired, all that changed.
>
> 1. Jerry's self-esteem went down hill.
> 2. He became obsessed, worrying about money, particularly with a baby on the way.
> 3.. He spent months looking for another job and when he found one he could take it didn't pay as well.
> 4. The fact is that this family could no longer afford for Jerry to be the bread winner. He could no longer function as they had wanted him to function, as the support for the family.
> 5. Jonetha finally had to take a job, and Jerry felt inadequate.
> 6. Worse, without a job Jerry was unable. to make mortgage payments and debt began to accrue.[4]

Checklist style opening statements are useful when the testimony of the witness is

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[4]While this is not the verbatim opening used in the Lampley case, it is an example of a simple checklist.

anticipated to be very strong. And where the emotional distress does not lend itself to graphic description, it is often the easiest and safest route to take. But it does place heavy weight on witness performance.

B. Experiencing the Opening

An even stronger way to present damages in an opening statement is to present it in present tense.[5] This is particularly useful in harassment cases. In *Emily Simpson v. Cupinos Pizzeria et al.*, the Plaintiff was a 17 year old girl subjected to a sexually hostile environment consisting of descriptions of masturbation, instructions on providing fellatio, viewing of adult magazines, physical touchings, exposing of male genitalia, and even an offer of money for sexual intercourse. The opening in this case was built in large measure on her damages. The following excerpt is a small demonstration:

> Now its mid December and things are getting worse. Emily tries to deal with everything and not every moment is so terrible. She is getting her homework done and there is the occasional flour fight when someone puts a hand print on her back and she returns the favor. But over all Emily really doesn't like coming to work any more. And as we approach Christmas, Emily is getting a bit frayed. Ventura's slapping and groping and Joey's comments are getting hard to deal with. Emily is short tempered. Her family is beginning to see changes in her personality.
>
> Its Christmas morning and the family is going to go downtown Chicago to see a show and stay at a hotel. Emily isn't feeling well. She can't find her hair gel and.. well she just doesn't have the emotional energy to deal with this. She crawls under her blanket and starts to cry.

The intent of this opening statement is to allow the jury to feel Emily's pain as she survives the five months of sexual harassment between November and May. By presenting the opening in the present tense, the attorney has the ability to control the presentation from intonation to cadence. So long as the attorney maintains credibility, this will stick with the jury throughout the trial. A

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[5] A word of caution: Where the evidence in a case is complex, particularly in cases where the Plaintiff must disprove a Defendant's pretextual reason of "poor performance", present tense opening statements can be dangerous because it can all be lost in the explanation of technicalities. For example, in *Lampley*, a significant amount of time had to be spent explaining the finer parts of automobile loan refinancing and refinancing of secondary loans – a topic complex enough for law school graduates let alone for a jury in a trial of a few days. In such circumstances, simple is better.

jury that can feel a Plaintiff's pain is more likely to make a larger damage award.

C. Use of Damages to Support Liability

While we are often taught that liability precedes damages, it need not and should not be that way. Damages themselves support liability. For example, one might ask "Why is it that on Christmas morning of all mornings Emily Simpson is crawling under her blanket to cry?" The obvious reason is the harassment that she is suffering at the pizzeria, which again supports the conclusion that the harassment is actually occurring i.e. that the pizzeria should be held liable.

Case selection is always an important part of success at any level and there are certainly times where damages will not support liability. But more often than not, the reason is that the damages themselves lack credibility. We have all seen the television courtroom where the plaintiff walks into court wearing a neck brace. But credibility is always an issue for every part of your case.

D. Never Ask For Money in an Opening Statement

The one point where the idea that liability must come before damages is didactic, is when it comes to requesting money. No plaintiff is entitled to money if she has not first shown liability and damages. But the key here is that money is *not* damages. Money is only compensation, and often poor compensation at that.

The goal of the opening statement is to bring the jury to the conclusion that the Plaintiff has been injured by the Defendant's illegal conduct. While a strong opening statement may lead many jurors to the conclusion that the Plaintiff was injured by the Defendant's illegal conduct, they will not want to admit to the fact that they have prejudged the case. And as we have been told many times, jurors often decide the case on the opening statements and change their minds many times during the case only to return to their original conclusions. Therefore, lead the jurors to the conclusion you desire, but wait until the juror is ready to accept that conclusion before requesting money. This avoids the problem of the apparent arrogance of requesting money before proving your case. Once the case has concluded, you can ask for money damages in closing. At this point you are asserting that they should already have concluded liability and injury.

IV. CLOSING ARGUMENTS

Closing arguments have many purposes. Recapping the evidence and reminding the jury of important points is a necessity. But a closing argument is precisely that, an argument. While it is the time to argue liability, it is also the time to argue damages. In arguing damages, there are three major points to cover: 1) Define money as damages; 2) Reiterate the injury; and 3) Request money.

A. Define Money as Compensation for Damages

There are many ways to define money as compensation for damages. How you do it is not so important as *that* you do it. A common mistake in many areas of the practice is to forget that counsel has worked this case for a period years and has worked many other cases such that each step of the trial is second nature. But the jury has only participated in this case for a matter of days or week.[6] And the jurors do not have the experience of working on many cases.

The first step in defining money as damages is to force the jury to recognize that you have no other recourse. Defendants knee jerk reaction in closing arguments is commonly to criticize plaintiffs as avaricious...only they tend to put it in slightly less polite terms:

> 11 You know, what he really has and what personal injury
> 12 defense attorneys, he has compensation neurosis. That's what
> 13 he has got. He is like one of these people who after he
> 14 walks out of a courtroom and gets into his car takes off his
> 15 neck brace and discards it. He is like the person who has
> 16 got a crutch and after his lawsuit is over, here is the
> 17 crutch and he is dancing a jig, okay?[7]

It is the plaintiff's attorney's job to disabuse the jury of these preposterous notions before the defense attorney even gets up. And because we have first crack at closing, we can:

> 23 Awarding damages is a hard thing. If Jerry had his
> 24 wish, he would ask you to undo what happened to him, give him
> 25 back his job in 1999, and give him his Level 2 buying
>
> A. Maduff - closing 709
>
> 1 authority so that he can move up through the ranks of the
> 2 company and embark upon a career, just like Michelle Bland
> 3 did. She is a vice president or something now.
> 4 Unfortunately, you can't do that. All you can do is award

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[6] If it is a matter of months, disregard – the attorney will make mistakes out of exhaustion anyway.

[7] From Defendant's closing argument *Lampley v. Onyx Acceptance Corporation*

5 money.
6 The problem is that this case isn't about money.
7 Money is just a measuring stick you're given to measure
8 Jerry's pain. That's a serious limitation in our system, but
9 one that we must work within.
10 So recognizing that there are damages is easy.
11 Identifying the money equivalent is much harder.

It is interesting to note that Defense Counsel in this case actually made the preceding argument in his closing after the Plaintiff asserted that this case was not about money. The result was that he lost credibility.[8]

Once again, it is important to note that the argument has to be supported by testimony. Jerry had carefully testified that he would really like for this not to have happened at all.

B. Reiterate the Injury

The next thing that must be done in a closing argument is to reiterate the injury. The jury heard about the injury in opening statements and heard the testimony of the witnesses. But the last thing to do before requesting money is to emphasize the injury in the juror's minds.

14 ...Jerry did his best to
15 hold it together last week, but as I promised, Johneatha got
16 on that witness stand and told you what he suffered. She
17 admitted that in December of 1999 he would go home and cry in
18 her arms. This Gerald Lampley is a different person,
19 certainly not the person she knew in July 1994. This Jerry
20 is needy, lacking in confidence, lacking in energy, less
21 communicative, and walks with his shoulders slumped.

Note also that if the Plaintiff has testified well, odds are that he did not show much emotion. A plaintiff who can testify well and show emotion without losing credibility as a whiner is impressive. But there is a balance that must be struck between cogent testimony and emotion. Here, the words "Jerry did his best to hold it together last week" operate to ameliorate any lack of emotion on his part while emphasizing the damage testimony of the lay witness, Johneatha.[9]

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[8]He lost so much credibility that two jurors were actually shaking their heads at him as he made the argument.

[9]Incidentally, this was also set up by the opening statement which ended with the following words just before the conclusion: "You will see here today the stiff upper lip of a man

C. Request Money

Now that money has been defined as compensation and the injuries have been reiterated, it is time to actually request money. Requesting money can be a dicey thing. Hard damages can be explained. But emotional distress is much more difficult. One way is to give the jury something to quantify:

22 How do you fix an award of damages? Perhaps Mr. Cybak
23 told us how when he said that Jerry should get therapy.
24 Perhaps you can consider what Jerry really needs and what it
25 would cost.

But when doing so it is important to add other elements of damage so that the jury can grab onto something else to enhance the damages:

A. Maduff - closing 710

1 But what about the effect it had on his lifestyle?
2 He was going to be the breadwinner while his wife raised
3 their child. Not everybody wants this lifestyle, but they
4 did. When she had to go back to work, his dignity and
5 self-esteem were annihilated.

Sometimes giving the jury a number is appropriate, if it is reasonable. More often than not, however, the jury is more likely to make a higher award if it is left to its own devices. In other words, asking for money still pins "greed" on the attorney, but asking the jury to decide can make them err in a plaintiff's favor. Here, a little humility can go a long way, while still making a demand for real money:

6 I admit that standing here now I don't know how to
7 translate that to money. To a certain extent you simply

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who is before you with the chance and hope of vindication, but she will tell you of the man she knows who in the privacy of her home sits quietly depressed."

8 can't. What I will do is leave that in your able hands and
9 trust you to do the right thing by Jerry, and when I do so, I
10 know that we are not talking about millions of dollars. It's
11 not as though Jerry spilled coffee in his lap, but we are
12 talking about something, something significant.

D. Remember Injury in the Rebuttal

Finally, because the plaintiff has a rebuttal, the injury (not money) should be re-emphasized. The money has been requested. The jury knows that. This is the time to take that last word and let the injury sink in.

13 Ladies and gentlemen, this man has not gone through
14 two years [of litigation] because he wants to make money. He has gone
15 through two or three years of this because he wants
16 vindication, he want his dignity back. I beg you, give him
17 back his dignity.[10]

V. CONCLUDING REMARKS

The attorney who obtains big verdicts emphasizes the injury throughout the case from the opening statement to the rebuttal. But the truth is that there is one other factor that always helps: LUCK. And there is no luck better than to have an opposing counsel who makes a series of mistakes:

2 THE COURT: Good morning.
3 MR. MADUFF: They're not ready, your Honor.
4 THE COURT: What, not ready?
5 MR. MADUFF: We tendered ours [jury instructions] absent headers and
6 footers last night. We asked Mr. Cybak for a meeting last
7 night to work them out. He refused. He insisted he would do
8 that with us this morning at 8:30. He arrived at 8:45 not
9 prepared to assemble the instructions in order, but rather to
10 state his objections to the instructions all over again.
11 MR. CYBAK: Did not get these instructions last night,
12 did not. This man is fantasizing.

[10] From Plaintiff's rebuttal in *Lampley v. Onyx Acceptance Corporation*

13 THE COURT: Mr. Cybak, I don't want a speech.
14 MR. CYBAK: Judge --
15 THE COURT: Mr. Cybak, I don't want a speech. What
16 instructions didn't you get? We did them all last night.
17 MR. CYBAK: I'm going through the instructions which he
18 handed me. It wasn't 8:45, it was 8:30. You didn't give me
19 anything. This man has lost touch with reality.
20 THE COURT: Mr. Cybak.
21 MR. CYBAK: Yes, Judge.
22 THE COURT: I asked you what instructions are you
23 talking about? We went through all of them last night.
24 MR. CYBAK: Right, and there were objections made and he
25 tendered instructions to which I'm objecting.

1 THE COURT: We did that last night. What are you
2 objecting to now? We already did that. I have decided what
3 instructions are going to be given.
4 MR. CYBAK: Fine. I just want to review -- I only have
5 a few left.
6 THE COURT: You should have done it last night. Give me
7 the instructions.
8 MR. CYBAK: He didn't give them to me last night.
9 THE COURT: Everybody had sets last night. You were
10 here when we did this. Where were you? You talk about
11 losing contact --
12 MR. CYBAK: I want to make sure that we get the same --
13 THE COURT: Mr. Cybak, I don't care what you want to do.
14 I want the instructions now.
15 MR. MADUFF: Your Honor --
16 MR. CYBAK: I have my instructions.
17 THE COURT: Give them to me.
18 MR. CYBAK: Okay.
19 MR. MADUFF: Your Honor, I have the complete set of
20 instructions without headers and footers as we tendered last
21 night.
22 THE COURT: Without what?
23 MR. MADUFF: Without headers and footers.
24 THE COURT: Okay, that's what I want.
25 MR. MADUFF: Which we had last night. We printed

781

1 those up last night and Mr. Cybak has seven instructions and
2 I have tabbed places where we would recommend his
3 instructions be inserted, and so I have, if I were to just
4 insert those, I have them in the order that we would propose
5 to the court. I can do that in about three or four minutes,
6 your Honor, if you want me to.
7 THE COURT: Do you have your seven instructions, Mr.
8 Cybak?
9 MR. CYBAK: Yes, I have my instructions.
10 THE COURT: Give them to counsel.
11 MR. CYBAK: I have given them a copy already and I have
12 got blank instructions for the court.
13 THE COURT: Give them to him so he can --
14 MR. MADUFF: I do need blank instructions. He has
15 made one change, your Honor, apparently. On two of the
16 instructions my understanding is that we had resolved those
17 and Mr. Cybak thinks that they should not have been changed,
18 and so I don't know that he is withdrawing them or
19 re-presenting them in his format or what. I can't speak for
20 him.
21 MR. CYBAK: What instructions are you talking about?
22 Instruction 1 had to do with the issue of promotion. I don't
23 agree. That was given over his objection with the word
24 "promotion."
25 THE COURT: That is not correct.

782

1 MR. CYBAK: I'm not taking it out. I'm not taking it
2 out.
3 THE COURT: That's not correct, Mr. Cybak.
4 MR. CYBAK: What is the fact on that instruction, your
5 Honor?
6 THE COURT: The fact is that I said you could give it,
7 but remove the word "promotion."
8 MR. CYBAK: I object to that.
9 THE COURT: Then don't give it.
10 MR. CYBAK: No, I object. That's one of the theories

11 of my case.
12 THE COURT: We talked about that yesterday, Mr. Cybak.
13 We talked about it both off the record and on the record.
14 MR. CYBAK: No, you said that I could amend it --
15 THE COURT: Mr. Cybak, I have put with about enough of
16 your business. I don't argue with you. I'm the judge, I
17 know what happened. You talking about losing reality, I have
18 heard you change stories so many times, I have seen
19 situations where I'm really concerned about the ethics by
20 which you practice and I'm tired of it.
21 I know what I said. We said it twice yesterday. I
22 said it off the record, then I said it on the record,
23 "promotion" is out because both sides agreed this is not a
24 promotion, it's an authority. Now, we are not talking about
25 that any more. If you want it with the word "promotion" in,

1 it doesn't come in. If you want to take "promotion" out,
2 it's in. That's it.
3 MR. CYBAK: I do not for the record agree.
4 THE COURT: I know you don't. You don't have to. I'm
5 the judge. You don't have to agree with me.
6 MR. CYBAK: Well, I'm entitled to assert my theory --
7 THE COURT: You did.
8 MR. CYBAK: I didn't take the word "promotion" out.
9 THE COURT: Fine. Then the instruction isn't given.
10 MR. CYBAK: Fine. Then my instruction -- your Honor,
11 you said given --
12 THE COURT: As modified.
13 MR. CYBAK: -- over objection. Now you're saying that
14 it's not -- that's okay.
15 THE COURT: Mr. Cybak, we are done arguing that point.
16 MR. CYBAK: Yes, we are. That's fine. I'm not going
17 to offer 1.
18 2 you didn't admit. That's fine. Here's 3 --
19 THE COURT: We have done this, Mr. Cybak. Give him your
20 instructions.
21 MR. CYBAK: He has got them.
22 THE COURT: He doesn't have a clean copy for me.