

Tips From the Bench

Lincoln's Advice on Winning Complex Cases Tips for Handling Business and Employment Cases

by Judge Jerome LaBarre
Multnomah County Circuit Court

I have now spent many years searching for the best approach to be used to effectively plaintiff or defend complex business and employment cases. I feel that my time on the bench has given me better insights than I had when I was a practicing lawyer. However, in recently reading about Abraham Lincoln's 25-year career as a trial attorney, I feel that I have gotten even better insights, which are particularly useful in complex business and employment cases.

The central problem an attorney faces from the outset on these cases is that they are usually a big mess. In many corporate and employment cases, the facts are convoluted and the documents and electronic data are massive. Things can be highly technical and confusing to the trier of fact. So whether you are on the plaintiff's side or on the defendant's side, what are some things you can do to improve your chances of success? It turns out that questions like this have always challenged trial lawyers. The inspiring movie *Lincoln* gives insights into the man when he was president. But before that he was a prairie lawyer in Illinois in the 1840s and 1850s, who honed his skills by riding the circuit and winning jury trials. Lincoln the lawyer can teach us a lot about winning cases today. Here are five tips from someone who was touched by genius both as president and as a trial lawyer. I have tried to apply his lessons to today's complex cases.

1. Get to the Heart of the Matter

On complicated cases such as corporate, securities or executive employment disputes there is almost always the problem of too many choices. An attorney must decide what claims for relief to plead, what themes to focus upon, what damages to seek, what facts to try to develop in discovery, and so on. The way most lawyers seem to decide these questions is to throw in every possible thing they find. The rationale in the beginning is that you need to keep all of your options open. And of course you tell yourself that you can always cut things out later. Strangely however, once the complaint is filed in the courthouse the ideas which were once merely afterthoughts tend to become cast into concrete. Lincoln's success as a trial lawyer and as president was a product of his getting to the simple essence of things. He never used



the kitchen-sink approach of dumping all of the facts in front of the jury. From the start in a complex case, you must aim for the final presentation at trial or in arbitration. It's all about narrowing and simplifying.

2. Let Your Theme Emerge From Your Key Facts

It's tricky but essential to come up with a good theme in a complicated case. Lincoln was gifted in putting his case into simple focus and in organizing his facts for clarity. He used directness of thought to great effect. After organizing his best facts, the theme he needed to win the case just naturally rose to the surface. Today we would call it an "elevator speech." But now, just as in Lincoln's time, what is needed is a compelling but short statement of why justice cries out for your client's side to win. This is especially true in the bone-dry world of business litigation.

3. Prepare, Prepare, Prepare

Lincoln had a capacity for hard work and preparation. In writing the Gettysburg Address, he spent many hours preparing a speech which took only a few minutes to deliver. Lawyers handling discovery in complicated cases get used to wallowing in the multitudinous. It takes a lot of hard work. Mostly one is met with the mundane. But by watching carefully, every once in a great while a lawyer will spot a "smoking gun" document or elicit a key admission in a deposition which makes it all worthwhile. To me, this is like digging for gold with an ice pick. If you are able to grab such a nugget, then hold onto it for dear life. When you get near final resolution, you can use this piece of gold in your settlement brief, in your case theme and in your final argument, all too winning effect.

4. Use Plain English

Complex business and employment cases are by their very nature filled with jargon, technical details and dense legal terminology. To win, you must clearly communicate and present a compelling case that has the ring of truth and justice. If your case is only filled with technicalities, this cannot happen. So the complex must be made simple. You must use plain-speak to translate the big words down to a level that the trier of facts can understand.

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News from the Courthouse

by Terry Wright
Court Liaison Committee member

Presiding Judge/Trial Court Administrator's Report

Judge Waller reported that over the weekend of February 2nd, 17 judges moved to new chambers and courtrooms in the courthouse. These courtroom shuffles arise as vacancies occur and seniority rankings among the judges change. Vacant courtrooms are claimed in seniority order. In any period of changes in the members of the court there will also be a related courtroom shuffle.

Judge Waller told the committee that Amy Holmes Hehn was sworn into office in January. Judge Holmes Hehn holds the position which was vacant due to Judge Richard Baldwin's election the Oregon Supreme Court. Judge Beth Allen was sworn in on February 1. Judge Allen holds the position which has been vacant since the retirement of Judge Michael Marcus. Governor John Kitzhaber has posted a third open judicial position which is vacant due to Judge Janice Wilson's retirement in January. In addition, Judge Michael McShane has been re-nominated by President Barack Obama to the 113th Congress to fill a vacant judicial position on the United States District Court for Oregon. If Judge McShane is confirmed by the Senate early in the 2013 year, it is probable that the Governor will use the current posting to fill both positions.

Judge Waller reported that on the surface things are going well at the court. All civil cases scheduled for trial on the presiding court's call calendar are being assigned out to available judges. However, due to the loss of staff from the funding reductions in the current biennium, the court is struggling to get filed papers entered in OJIN and made available in case files to for the judges, parties and the

public. The court is currently approximately three weeks out in getting civil judgments submitted to the presiding court signed, filed and entered. The judge noted there used to be two full-time clerks processing these documents, and now there is only one who must split the work time between courtroom duties and processing submitted documents.

Judge Waller reminded committee members that it would assist the court if lawyers would call presiding court if their cases are on the call calendar and the dispute is settled so that the case can be removed from the call calendar. Otherwise, if no party appears at call, her staff must spend time telephoning the parties to determine why there was no appearance.

In February, the board of county commissioners will receive a report regarding the feasibility of setting up a public/private partnership for building and maintaining a new courthouse.

The judicial department has begun its work for the Legislative session. The session begins with a gap between the Governor's recommended budget and the chief justice's recommended budget. For general fund revenues, this gap is \$57.6 million when all of the chief justice's packages above the current service level are included. The chief's priorities are to maintain the current service level, restore lost jobs, continue implementation of Oregon eCourt, funding the new court of appeals panel, and judicial compensation. During the session, individual legislators must be educated on the importance of funding adequately the Oregon's judicial branch. The legislature is particularly receptive to stories about how the courts and budget cuts have impacted individuals and businesses.

Judge Waller encouraged committee members and others to let legislators know of these stories. Judge Waller said that the appointment of Representative Jennifer Williamson to chair the Public Safety Subcommittee of Ways and Means is very

encouraging. Representative Williamson is an attorney with extensive legislative experience.

Lawyer volunteers from the OSB's program to match attorneys with volunteer opportunities are assisting judges at the courthouse. These volunteers help to reduce the impact on the court from the loss of five judicial clerks. Their service is appreciated greatly. Judge Waller also noted that volunteer assistance is needed in working with self-represented litigants and will be central to plans for a public legal resource center.

Doug Bray reported that is an evaluation of the new civil case management system underway. He noted that the initial case management conference and the trial readiness conferences take staff and judicial resources for this work but there are off-setting efficiencies in other areas. There will be a long-term look at this impact, the time to disposition for cases in the new system, and general acceptance by the parties of the new processes. Overall people seem satisfied with the system.

Beginning in March, civil cases may be sent to the East County Courthouse. In addition, jury summons are being modified to summon jurors directly to that courthouse rather than being summoned to the downtown courthouse and then assigned to the East County Courthouse, as is the current practice. Judges McKnight and Waller will be presiding over a new truancy court at night at the East County Courthouse, in conjunction with local school districts. This court will operate one evening each month and was developed with the school districts located in the eastern end of Multnomah County.

Doug reported that Referee Lewis Lawrence is retiring after serving for more than 25 years. His position will not be replaced immediately to help accumulate funds to restore some of the lost clerk resources

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Lincoln boiled everything down to simplicity and brevity. He never shot over the heads of the trier of fact. In my 14 years on the bench, again and again I have seen lawyers lose the attention of jurors when they do not heed this warning.

5. Concede The Small Points

Lincoln ignored the facts and arguments which did not matter. He counseled: "concede, concede, concede" when things were unimportant to his overall presentation. He always zeroed in on the winning facts and arguments that were central to his case. I see many lawyers in court who want to fight over every picky little thing. This is a mistake. Save your efforts for what really counts. Lincoln realized that it is more important to win the war than some trivial little battle.

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