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Representing An Unattractive Plaintiff Against A Popular Defendant

Tips For Crafting A Great Argument

By Nora Lockwood Toohar

Martin Levin has a simple credo for all his closing arguments: Tell the truth.

In a landmark case against Wal-Mart in 1996, Levin used this principle to address his client's personal shortcomings. Levin represented the widow of a down-and-out ex-cop who was murdered while working as a clerk at an auto-parts store. The problem was that his client had severe emotional problems and an extremely rocky marriage with the victim.

Rather than trying to deny or ignore the subject in his closing, Levin chose to address the unpleasant facts head-on and explain to jurors why his client's personal problems shouldn't detract from the size of their award.

Levin had three other major challenges in the case:

- He had to convince jurors that, although the man was shot to death by a cold-blooded thug, damages should be paid by a store that had no malicious intent.
- The defendant store happened to be America's favorite retailer at the time.
- He was claiming significant damages for the death of a man who was homeless, chronically underemployed and an alleged drug user.

Who's Liable?

The lawsuit accused Wal-Mart of negligence for illegally selling ammunition to two minors. The bullets were used in the killing of a clerk at a Pensacola, Fla., auto parts store in 1991.

The victim, Billy Wayne Coker, was a former police officer who had fallen on hard times. Chronically underemployed and homeless, Coker had been filling in for a clerk at the auto parts store when three youths burst through the door, looking for another man who worked there.

As Coker pleaded for his life, one of the youths - Patrick Bonifay - looked him in the eyes, shouted obscenities at him and then shot him to death at point-blank range.

Wal-Mart claimed that it didn't sell the ammunition used in the killing. Levin said he was able to easily refute that contention, and produced evidence that an inexperienced, poorly trained clerk had sold the bullets to two of Bonifay's companions the night of the killing.

A far bigger challenge, Levin said, was convincing jurors that Wal-Mart - a prominent local employer and major contributor to local charities - caused Coker's death.

In 1996, Levin recalled, "Wal-Mart was the most beloved corporation in America, especially in Pensacola. Everyone on that jury shopped at Wal-Mart and loved their low prices."

The question facing Levin was, "How am I going to get [the jurors] to put any significant fault on Wal-Mart, when you have three kids who intentionally killed this person?"

"The issue wasn't going to be whether Wal-Mart was negligent in selling the ammunition. I knew I would be able to overcome that. The issue in my mind was how to convince this jury to somehow compare Wal-Mart with this kid who tells a man, 'F... you,' and shoots him execution style."

"These three kids went out and intentionally murdered my client. Yet I'm trying to have Wal-Mart held responsible for this thing," he recalled. "So, I had to come up with a simplistic, but extremely logical reason for the jury to find in my favor."

It would have been absurd to argue that Bonifay was not primarily responsible. So, instead he tried to tie Wal-Mart and the shooter together in a form of shared responsibility.

First he defined negligence, noting that it simply means that the defendant's actions are part of a continuous sequence of events that substantially contributed to the victim's death.

"It's the simplest test of all times. But for the negligence, violating the law, the death would not have occurred."

Then he went on to show how this applied to Wal-Mart in this case.

"What did it take to kill Billy Wayne Coker? It took three things. It took a gun, it took ammunition, and it took someone willing to pull that trigger. Bland had the gun, Wal-Mart had the ammunition, and Bonifay had the finger."

Levin immediately dismissed Kelly Bland (the person who supplied the gun) from responsibility because Bland had no knowledge of how the gun was going to be used. That left the shooter and the store.

"In regard to Patrick Bonifay, he is the person who murdered Wayne Coker, and he should be the most responsible."

With that inescapable fact acknowledged, the attorney trained his sights on the defendant retail giant. He noted that Wal-Mart made huge profits from selling ammunition and told jurors that the store was in the last position to prevent the murder, but failed to do so because the company failed to train employees who sell potentially lethal items.

"Wal-Mart, they had over 1,500 stores in January of 1991 selling ammunition. They possibly were the largest seller of ammunition in the country at the time. What are they doing to train their employees? An employee can be 21 and have no background experience at all. Wal-Mart simply shows them a videotape on selling guns and ammunition, and there is literally only one sentence in the videotape addressing age, and it says you must be 21 for a pistol, 18 for a rifle, and if it can be used for both, you may card. That's all it says. That's Wal-Mart's whole training video. And Ken Powell, the Wal-Mart employee who sold the ammunition to Bonifay and Fordham, had not ever viewed the videotape. Moreover, the employees are not even taught which ammunition is for pistols and which ammunition is for rifles."

Apportioning Liability

Part of Levin's task in closing was to ask jurors to apportion harm to determine damages. Although only Wal-Mart was named in the suit, five other names appeared on the verdict form. There were the three youths involved in the murder (Bonifay, Barth and Fordham), the man who hired them to commit a murder (Archer) and the person who supplied the gun (Bland).

As described above, Levin linked Wal-Mart to the shooter as the two parties that bore the primary responsibility for Coker's death.

"Wal-Mart was the adult here. They were the ones selling ammunition at 1,500 stores. They've got to take the responsibility to better train their people."

Levin emphasized that Wal-Mart left the responsibility for selling ammunition to an untrained clerk and that even the supervisor responsible for training these employees didn't know the ammunition in question was for a handgun.

"What happened this night? Wal-Mart had a 22-year-old with no experience selling ammunition on a Saturday night with no supervisor. It was late on a Saturday night; he is about to close, and he sold the ammunition out of ignorance in violation of federal law. Wal-Mart violated a federal law. What did they think was going to happen when they sold that ammunition? It was Saturday night at nine o'clock; two boys come in to buy pistol ammunition with no adult supervision. What did Wal-Mart think was about to take place?"

Levin's goal was to show that Wal-Mart was the professional organization here that had a duty to sell its products safely. He succeeded even beyond what he had hoped. Not only did the jury accept his assertion, it found the store more responsible for Coker's death than the shooter himself.

"Incredibly," Levin said, "jurors found Wal-Mart 35 percent liable for Coker's death, and Bonifay only 25 percent liable."

The jury apportioned liability as follows:

- Wal-Mart = 35 percent
- Bonifay = 25 percent
- Archer = 25 percent
- Barth = 8 percent
- Fordham = 7 percent
- Bland = 0 percent

Damages

Levin's next challenge was to convince the jury that his client should receive significant damages even though her husband was virtually indigent and had only marginal income over the last several years of his life.

Wal-Mart tried to limit damages by attacking the character of both the plaintiff and her deceased husband. This, according to Levin's father and law partner, was a fatal mistake that Martin Levin used to his advantage during closing arguments. (See accompanying story.)

Wal-Mart described Coker as a criminal, a drug addict, an adulterer, a wife-beater and a child-beater. Defense lawyers also said Coker committed tax fraud, was chronically unemployed, and that he and his wife were about to get a divorce.

During his closing, Levin addressed each allegation one by one, using a repetitive sentence structure to emphasize the defense distortions and create a cadence to his arguments that made the conclusion seem inevitable. With each point, he stated the defense contention and then asked, "What is the real fact?" He then dismantled the defense allegations one by one in a methodical, yet powerful fashion.

"Wal-Mart says Mr. Coker was a criminal. What is the real fact? Mr. Coker was arrested twice in his entire life, once for a bad check, and once for failure to appear because he was on the road truck driving, and yet Wal-Mart describes him as a criminal.

"Wal-Mart says Mr. Coker was a drug addict. What is the real fact? ... "

Levin continued on like this through each of Wal-Mart's characterizations - adulterer, wife-beater, tax fraud, imminent divorce, chronic unemployment. One by one he dismantled the defense allegations.

In keeping with his belief that a lawyer must always deal with the truth, Levin acknowledged that the harshest allegations came from Coker's wife - his own client.

"My style has always been to be as direct as possible about every negative issue in the case, and to be extremely sincere about everything I say," he explained. "In reading my argument you'll see that I don't try to hide behind the fact that my client (Sandra Coker) had severe psychological problems, that these people were living in a homeless shelter, and never made over \$10,000 a year. They weren't Ozzie and Harriet."

"What is true is that Sandra Coker is ill. She has a mental anxiety disorder. Unfortunately, she has problems dealing with stress and everything gets magnified. To her, yelling is abuse. Discipline is wrong. She can't drive. She can't go on the interstate. She can't go over bridges. She can't go over overpasses. She can't go in elevators. It's an illness. And Wal-Mart is taking advantage of it to mislead you."

In trying to minimize damages, Wal-Mart made a big deal about the couple's poverty, their character and the fragile state of their marriage.

Levin countered by emphasizing the dead man's commitment. He noted in his closing that Sandra and Wayne Coker had a hyperactive son with an IQ of 70. For years, the family had been living out of cars, failing to file tax returns and living in poverty.

"I would like you to consider the following when thinking about these damages. Mr. Coker met a woman for one month and married her. Over the next eleven years he had to deal with her illness, deal with his son's hyperactivity, deal with losing his job at the police force because of marital problems. He was homeless, and without food and clothes. He was living out of cars with his family. Yet this man never walked away or gave up on his family. ...

"He continued to try to assist his family and give them a better life, despite his enormous weaknesses. Sandra, Christopher and Michelle will never find such a loyal and understanding individual as Wayne Coker, a person who stood by them no matter what."

What Does She Deserve?

Sandra Coker was far from an appealing plaintiff and Levin knew it. He was concerned that jurors would decrease the size of the damage award because they didn't like her and didn't trust her to use the money properly.

But Levin emphasized that without her husband's support, no matter how modest it had been, Sandra Coker and the couple's two children were in danger of falling into a financial and emotional abyss from which they might never return.

"Sandra is not going to find someone else. She's 48 years old. She has a mental illness. She has a hyperactive son. She can't drive. She can't work. She can't go over interstates or overpasses. She's going to be alone.

And what about the money awarded to the children? Hadn't Sandra Coker proved herself to be incompetent and irresponsible enough to squander that windfall and leave the children penniless?

Levin addressed this potential concern in the final paragraph of his closing statement.

"Finally, I would like to talk about jury responsibility. The scale of justice is always blindfolded, and it's blindfolded because juries are not supposed to allow their personal beliefs or feelings to get in the way of a decision. Juries have to be superhuman beings to put all this aside and decide what the evidence was. One thing you can't consider is what's going to happen to this compensation. Don't go back there and start saying, I just can't give them the amount of money that I think they've really lost because I'm afraid what's going to happen. I'm afraid that maybe the children's money, after it gets out of guardianship, may be blown. I'm afraid Mrs. Coker may blow it. It's not a consideration. ... Figure out what the loss is and hope for the best. Thank you."

In the end, jurors awarded \$2.2 million in damages, which was reduced to \$900,000 (including interest) by the trial judge, who said Wal-Mart should be held 35 percent liable for non-economic damages and 100 percent responsible for economic damages. But the Florida Supreme Court upheld the jury verdict and ordered Wal-Mart to pay the full \$2.2 million in damages, plus post-trial interest and attorneys' fees, for a total of \$2.6 million.

"This was a complicated liability and damage case, so there were multiple issues to be addressed," Levin said.

What made his closing argument a great one, he said, is that he took the complicated facts, addressed them truthfully and won over the jury.

"I was being truthful and sincere, and the jury understood that," he said.

Questions or comments can be directed to the writer at: ntoother@lawyersweekly.com

Tips For Crafting A Great Argument

Martin Levin is on a sabbatical from the courtroom.

A veteran Florida trial lawyer, Levin, 39, has received 15 jury verdicts topping \$1 million each, including five jury verdicts in excess of \$20 million. But for now, he is devoting himself to more

scholarly pursuits. He recently earned a master's degree in theological studies from Harvard Divinity School in Cambridge, Mass., and will begin a Master of Law program this fall at Harvard Law School.

Levin's goal is to either teach legal ethics or become a federal judge. But he retains an appreciation for trial work and the importance of a well-crafted closing argument.

Here are some tips from Levin for creating great closing arguments:

- *Keep a closing argument folder in your case file.*

Levin starts thinking about his closing argument the day he signs up a client, and scribbles notes with ideas and points he wants to make in his closing throughout the case.

"Sometimes the note will be on a napkin because I'll be at a restaurant with my wife," he said.

All his notes go into the closing argument folder.

"If the case takes two and a half years to work up, I'll have two and half years worth of notes," Levin commented.

The week before the trial starts, Levin starts preparing his actual closing argument. He reviews his notes, and weeds out those that no longer seem relevant.

"I'll go back and say, that's not too great," he said. "And other times, I'll say, that's brilliant."

- *Use examples and analogies from everyday life.*

In his closing argument, Levin described Wal-Mart as "the adult," and the three youths who killed Coker as "the boys."

In a broader sense, Levin said, he used "common sense" as a form of analogy throughout his argument.

"Common sense is a form of analogy because I'm saying there is no other conclusion that can be reached," based on jurors' everyday experiences, he said.

For example, Levin told jurors:

"If these boys could have gotten ammunition from anywhere else, of course, they would have done it. You wouldn't wait until nine o'clock at night when you're about to do a robbery at midnight, to wait till the last second, go up to Kmart, not have enough money, have to go borrow money, and then go up to Wal-Mart to get it. This just would not make sense. It is clear that the boys had no other means to get the ammunition that night other than from Wal-Mart."

Levin said he is always on the lookout for examples from everyday life that he can use in his closing arguments.

"For example, the question of why Billy Wayne Coker (the deceased plaintiff in the Wal-Mart case) stayed in the situation he was in may have come to my mind one day when I was at an amusement park with my family and saw a disabled family and the poverty they live with," he said. "When I think of something like that, I write a note immediately, and put it in my folder."

In a case involving a child who lost a fingertip on an escalator, Levin asked the jurors how many times a day they look at their hands. He then told them that each time the young plaintiff looked at his hands and saw the tip of his finger missing, he relived the trauma of the escalator accident.

Levin then felt this analogy made it easier for jurors to understand the boy's mental pain and suffering.

- *Address jurors as if you were speaking to friends.*

Levin practices his closing arguments several times so that he knows the main points he wants to make and the order in which he is going to present them. When he actually addresses the jury, he uses one page with key words that remind him of the major points he wants to make.

"The sole purpose of that paper is for me to glance at it every once in awhile to make sure I have not forgotten one of the key points," he said.

"Other than that, I want to make sure I'm looking each of the jurors right in the eye, and that they're hearing me speaking as we do with a friend where there's some uhs, and a pause and some thinking," Levin commented.

- "Know Your Case Better Than Anyone Else Alive."

"If you do not know every single facet of your case, every single document, notation and photograph, you will end up creating a theme that can be penetrated, and therefore, you're now leaving the decision up to chance," Levin said.

"Nothing I say can be penetrated," he said. "Everything is developed around the facts of the case, and there is nothing that I am saying that is not supported by the facts."

For example, in discussing whether the youths who bought the ammunition used a fake ID, as the defense suggested, Levin told the jurors:

" ... Again, it has been five years, two people on death row, two life imprisonments, depositions, trials, recorded statements, and yet never, ever, has anyone ever suggested a fake ID. What did Trooper O'Neal say? He said, I arrested the boys and all their belongings were checked, including ID, and there was no fake ID found, none. What did Patterson say? He said, I've prosecuted all the boys, and there was never any evidence or suggestion of a fake ID."

Within that single paragraph Levin provided an abundance of information about the case, including the criminal sentences the youths received, the fact that there were several trials and a mountain of legal paperwork, and the fact that when you are arrested all your belongings are taken into evidence.

Levin said he was able to summarize all that information because he went through every record in the file.

"There is no substitution for incredible preparation," he said.

Additional tips on closing arguments are provided by Levin, his father, Frederic Levin, and Mike Papantanio in their book, "Closing Arguments: The Last Battle," by Frederic G. Levin, Mike Papantonio and Martin Levin, 217 pp. Seville Publishing, \$29.

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