

FROM THE *ABA JOURNAL*

Putting on a Good Face

There are ways to help the jury see beyond your big client's nasty image

By James W. McElhaney

Angus walked into my office and put two cups of dark mountain roast, a bag of blueberry scones and a letter on my desk. "What do you think of this?" he said.

"I'm in favor of coffee and scones," I said.

"I think I already knew that," he said with a grin, "so read the letter."

Dear Angus:

I am not a happy camper. I'm a defense lawyer who specializes in representing large companies in employment cases. It's a part of the practice of law that's getting tougher—and more disheartening—every day.

For example, a few months ago a federal jury gave a 68-year-old woman a \$21 million punitive damages award. My client had let her go (with all the other bookkeepers) when it outsourced their work.

The judge let us talk to the jurors to see why they gave her such a huge verdict. Several of them noticed that one of our documents said the defendant had paid \$11 million in interest the same year they let the plaintiff go. The jurors said if we paid that much in interest in one year we could certainly afford \$10 million more than that in punitive damages.

[T]he jury said that even if she wasn't a very effective [employee], they felt they ought to "give her something." And one of the jurors mentioned that the head of Home Depot got hundreds of millions with his pink slip.

It seems like the whole system is totally out of balance. I can see how you can make an appealing case for some poor underdog who has been unfairly pushed around. But how do you put a good face on the big, impersonal business client?

*** I would appreciate your suggestions.

Deeply Distressed in Delaware

After I finished the letter, I said "I remember reading about [this] case. "And Mr. Distressed is not telling you the whole story. There were 22 employees in the department, and all of them were terminated when the company outsourced its bookkeeping.

"But then everyone under 55 years old—all the other bookkeepers—got offers of positions in other departments. "The plaintiff begged for any other job, but they refused to even consider it. They threw her away."

[WHAT TO DO?]

“So the first lesson,” said Angus, “is **try the case you have, not the one you wish you had.**”

”[Second,] **a trial is not a legal puzzle; it’s a morality play.** Satisfying the law just gets you into court—it doesn’t win the case.”

“Still, most lawyers tend to be highly legalistic, even when they’re talking to juries,” I said.

“Of course,” said Angus. “It makes them feel special, authoritative.”

“And talk like insufferable twits?” I said.

“Now, Jimmy,” said Angus, “be nice.”

“It seems Mr. Distressed’s biggest problem is he thinks there must be some magic words that will ‘put a good face’ on a big, impersonal client,” I said.

“Jackpot!” said Angus. “He thinks there must be some way—with the right line of talk—that he can make his clients look different from what they really are.

But the trouble is, the harder you try to make your client look like something he or she or it is not, the more the judge and jury reject you and what you say.

“So **the starting point** for Deeply Distressed,” said Angus, “**is to understand what the ‘real law’ is in employment cases**—that is, what jurors think the law ought to be. That’s what will guide their thinking in the morality play of the trial.”

PUT THE OTHER SIDE ON TRIAL

“Next,” said Angus, “no matter what kind of case—or whether you represent the plaintiff or the defendant—you should **put the ‘focus of judgment’ on the other side.** If you represent the plaintiff, put the defendant ‘on trial.’ If you represent the defendant, put the plaintiff on trial.”

“But in what part of the trial?” I said. “Opening statement? Final argument?”

“The whole trial,” said Angus. “Opening, closing, direct and cross. Of course, you have to introduce the positive evidence about your side of the case, but the basic focus is on the injustice that the other side is engaged in. Either for wronging you or trying to make you pay for something you didn’t do.”

“But why look at it that way?” I said.

“Because the sense of injustice is at the heart of how we make decisions,” said Angus. “We may not agree on what justice requires, much less be able to define it. But we know what injustice is. We know what’s unfair. Even a dog knows the difference between being kicked or stumbled over.”

“So how should Distressed start his opening statements for the defense?” I said. “Say, ‘There are some important points I want to add to what Mr. Reynolds said for the plaintiff?’”

Angus laughed. “No,” he said. “You don’t have to dignify anything the other side says. In fact, my favorite defense opening is to start by saying, ‘Ladies and gentlemen, this is my opportunity to give you what’s called “the rest of the story” ’—a famous technique used by Paul Harvey in his

radio broadcasts.

“It tells the jurors that what they’re about to hear is going to change their minds—give them a completely different point of view. And then you proceed to paint a verbal picture with a series of incidents that puts the focus of judgment on the plaintiff.”

“What about final argument?” I said. “It seems to me that when you are trying to paint the picture of an unsatisfactory employee, there may be one or two strong points on your side and then a whole series of little picky points.”

“Right,” said Angus. “And the ‘lowest common denominator effect’ tends to make everything look like it’s minor. Putting too much stress on weak points tends to undercut all the others.

“So here’s one way to handle a list of minor points in final argument: ‘Ladies and gentlemen, I’m going ask you to do something that later on Judge Garvey is going to tell you that you must not do: Forget about more than half of the evidence concerning the conduct of Edna McCormick—showing the kind of an employee she was at Federal Motors. I want you to do that so we can focus on what’s at the heart of our case.

“ ‘First, I want you to forget about the 14 times during her last 12 months with Federal Motors that Edna McCormick just didn’t come to work on Thursdays or Fridays.

“ ‘Second, I want you to forget about how Ms. McCormick hurt employee morale when she wrote a memo to everyone in sales saying that the new management was planning to replace all of them.

“ ‘Third, I want you to forget about Edna McCormick talking to other employees about putting Crazy Glue on the CEO’s toilet seat. Ms. McCormick told you it was just a joke—but someone actually did it.

“ ‘I want you to forget about these things for now so we can concentrate on the impression that Ms. McCormick made with the new head of sales.

“ ‘Remember? Five times during Cathy Freeman’s first three months as head of sales, Ms. McCormick told her, “Look, if you want me out of here, all you have to do is give me a golden parachute like you gave Mike Reagan, and I’m gone.”

“ ‘The question is whether this is the kind of player the new coach should have to keep on the team.’ ”

“Wow,” I said. “That really makes the jury identify with your client. Virtually everybody understands the role of the coach in trying to create a winning team.”

Angus smiled.

I am grateful to Pat Maher, Esq., of Fort Worth, Texas, for suggesting this topic. —JWMcE