

LESSONS FROM SEASONED LITIGATORS

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**(IF YOU DON'T KNOW WHERE YOU'RE GOING,
ANY ROAD WILL LEAD YOU THERE.)**

I. Preparing Your Client and Witnesses for Trial

Any lawyer taking a civil case to trial must necessarily ask the questions: What is my strategy? What do I want or need to accomplish? Where do I want to go? How will I get there? What is the story of the case and how can I most persuasively deliver that story to the jury?

Any answer to those questions will necessarily involve thinking long and hard about *your* client and witnesses (expert and lay witnesses). Sure, you can accomplish great things for your case on cross-examination, but in a civil case, especially where you have the burden of proof, and where liability and/or damages are at issue, the credible testimony of your client and witnesses is essential.

Preparation should begin well before trial. Certainly you need to give thought to preparing your witnesses for their depositions too. There are few better feelings than leaving a deposition knowing that your client or witness just performed superbly. And if it's your client, it can be a very empowering, and healing experience for him or her to have fared well in deposition.

When you have come to the time for client and witness preparation for trial, keep in mind that in addition to good facts, jurors are influenced by credibility and likeability. Keeping these two intangibles in mind during every stage of preparation and examination will pay dividends.

Credibility can be said to consist of the following:

- Integrity;
- Competence;
- Sound Judgment;
- Relational Sensitivity; and
- Likeability

How well your client or witnesses perform at trial (as perceived by the jury) will be determined, in part, by the degree to which each witness manifests these qualities. And be assured, you can, with preparation, insight and sensitivity, improve your client's or a witness' chances of being perceived as credible.

The first step, I believe, after a thorough review of the facts (good, bad, and neutral) is learning the story of the case by getting to know your client or the witness. By that I don't just mean having a dry, polite or perfunctory conversation with him or her during a meeting in your conference room. I mean really getting to know that person. Crawling, as Gerry Spence says, into the hide of that person; digging around through the soft parts, and getting to know the world as the client or witness knows it; seeing through the eyes of the client or witness; standing in his or her shoes; and using your imagination and empathy to feel as he or she must feel in the given set of circumstances.

With clients, and some key witnesses, we use a variety of methods for doing that. One such method of preparing a client or lay witness is through scene setting and reenactment in action. Rather than just being a limited question and answer narrative, scene setting and reenactment in action involve using the as-if frame. In other words, have the client or witness set the scene and reenact the important events using all of the senses *as-if* he or she were actually experiencing the event, in the scene, and in the moment. Not only is this a powerful exercise for the client or witness to recall and re-experience the event, but

it is a rare and valuable opportunity for you, the lawyer, to gain a sense of perspective you would not otherwise have. Here you get the opportunity to view the event as-if it were happening before your very eyes. This will help you learn the key facts and emotions that are the heart of your story.

Not all witnesses are well-suited for this style of preparation however, and if that's the case, then you have to take what you can get, or what the client or witness can give you. Also, this technique of preparation is best suited for clients and less so for lay witnesses because of the potential argument by the defense that the lay witness was somehow tampered with. So you need to evaluate every potential witness individually.

A word about "emotion": I believe it is important for attorneys and clients to understand the place of emotion in the courtroom. In general, you want to avoid presenting an overly-emotional client or lay witness. Emotions can be perceived as a cloud over credibility. That is why, especially in a personal injury case, it is probably better to tell the client's damages story through other witnesses. Let the medical and damage experts tell the story, and also make a real effort to find credible lay witnesses (family, friends, and colleagues) who can each "briefly" offer some poignant anecdote about how the injury directly affected the client. This is likely to be viewed more credibly and persuasively than self-serving testimony from the client, and avoids the client being perceived as a whiner. Juries don't like whiners or complainers. Better your client appear stoic, but human; perceived as doing whatever it takes to overcome the injury, responsibly. Whiners are pitied. Heroes don't whine. Let your client be the hero.

Finally, be certain your client's story is consistent with the provable facts. Lack of consistency means that your client's credibility is likely to suffer. Be certain your client is familiar with all of the good and bad facts of the case, and, without appearing too rehearsed, can respond to the anticipated questions honestly, scoring on the strong points, and minimizing damage where there are weaknesses. That means, essentially, that the

client must know when to give in. A simple “yes” or “no” to a harmful question on cross-examination is generally the better strategy. You do not want your client to become argumentative with opposing counsel. However, there is nothing wrong with a client honestly asking opposing counsel to repeat, or clarify a question, especially if the question assumes facts not in evidence, is compound, or is otherwise objectionable.

A word about “spontaneity”: I believe it is important for the client, and any witness, to avoid appearing rehearsed. Remember, a trial is about real people, doing real things, for real reasons. Real people are natural. Real people are themselves. If you want the jury to identify with your client, empathize, or trust him or her, then your client needs to project that he or she is genuine, real and authentic, and therefore, credible.

Lay witnesses, when willing, can be powerful advocates for your client, and can offer testimony that the jury views as more credible and unbiased than the parties and the experts. At the same time, as with anything, they need to be used carefully. There needs to be a balance between too much and not enough lay witness testimony.

Make certain, before you ever call a lay witness, that you know what they can say that will help *and* hurt. Lay witnesses are notorious for being unpredictable, and letting things slip (probably because they are usually the least prepared, and the most honest), and because they are seen as being the least-interested witnesses, what they say can have long-reaching effects, good and bad..

Lay witness can be called to testify about factual liability issues and/or damages issues. Understand the purpose of this witness’ testimony. Keep it brief, limited to one or a few memorable and meaningful anecdotes that humanize your client and lend perspective for the jury about the nature and extent of the damages suffered by your client.

Obviously you need to conduct your investigations, and learn what the relevant lay witnesses can offer (good and bad). I like to interview witnesses at their homes, or someplace that is comfortable for them and where they can feel relaxed.

One way of gathering information from lay witnesses (especially damage witnesses – most often friends and family of your client) is the preparation party. If you can assemble all or most of these people in one place at one time, for the purpose of coming together on behalf of your client (their friend or family member) it can have a coalescing and cathartic effect. Everyone can have the opportunity to become a valued team member. Each person can help spur the recollection of the other, and you can see the dynamic of the group in action. This will help you identify the leaders, the followers, and the most credible of the potential witnesses for your case.

You may want to do this without having your client there as it can encourage the witnesses to be more forthcoming.

About experts: This is a topic that deserves its own seminar. Expert witnesses play a unique role in trial. Experts provide factual testimony, but they also offer “opinion” testimony. In order to offer an opinion there must be a foundation. The expert must be qualified to render the opinion, and must have reviewed enough of the relevant facts or evidence to come to that opinion. In short, the expert must provide a basis for his or her professional opinion to a reasonable degree of professional certainty.

Like any other part of the trial presentation, experts are simply telling the story of the case, but through a different, more experienced or qualified set of lenses. They can be the teachers of the jury, and they are also subject to the same scrutiny as any other witness in the case. They can be exposed for bias, for lack of qualification, and for basing opinions on incredible assumptions or inaccurate facts.

Like any other witness, credibility is important if the expert is to be believed and his or her opinions relied on and accepted by the jury. The same can be said for that component intangible, likeability.

Understand the difference between treating experts, and experts for hire. Treating doctors are generally perceived as the most credible witness (in damage cases) and therefore your relationship with him or her is essential. Just remember that these people are human beings just like you. They appreciate courtesy and professionalism the same as you.

II. Tips on Evidence Submission, Exhibits and Depositions

Evidence can come in the form of documentary exhibits, and testimony. For the purpose of this sub-section I am limiting discussion to documentary evidence and exhibits used for illustrative purposes.

First and foremost, become familiar with the Rules of Evidence. The Washington Rules of Evidence (ER) are currently found on page 225 of the 2008 Washington State Court Rules book. They are surprisingly brief, running only 15 pages (including the Table of Rules, and excluding the Index) so it shouldn't take you long to familiarize yourself with them.

Always ask yourself, do I really need this item of documentary evidence to prove my case? Be alert to inconsistencies in documentary evidence because inconsistencies can be used for impeachment, embarrass your client, and ultimately damage your credibility.

When using illustrative exhibits, always take care to keep each exhibit simple and readily understood. You want the jury to immediately grasp the point the exhibit is making, and each exhibit should speak to one critical issue. The exhibit really should explain itself.

Depositions have several uses in trial. First and foremost, they can be an effective impeachment device. Nothing makes a witness look worse than to be confronted with his or her own prior testimony that substantially contradicts or differs in some meaningful way from the testimony the witness just gave in court.

Depositions can also be taken in advance of trial, and perpetuated for use in trial. This is often done for cost considerations, or when a witness is, or is likely to become, unavailable. Perpetuation depositions can be video recorded, and played back to the jury, or they can be read to the jury.

My advice, if presenting perpetuated deposition testimony, either by video or by reading to the jury, is to make every effort to keep the presentation as short as possible. Jurors seem to get bored very quickly with video depositions. There is typically only one camera point-of-view of the deposition witness; there are no cutaways; no rousing theme music; and the audio is not always the best. Also, it can be a tricky exercise to use exhibits effectively in a perpetuated deposition.

III. The Art of Compelling Opening and Closing Statements

Opening statement is the time to introduce the jury to your case. You want the jury to hear and resonate with your case theme (ideally 10 words or less), and to have a roadmap for where you plan on taking them. It should be concise. A good opening doesn't have to be long to be persuasive and effective. Jurors are impatient, and they want to get to the evidence.

You are introducing the jurors to the important issues, facts, terminology, and witnesses, and with your case theme are providing a framework for which you hope they will view your case. You are also introducing the jurors to you. A good opening never sacrifices credibility. You must be genuine.

A persuasive opening is often told in narrative form, like a story. It is not argument. Save that for closing. It is not a time for emotionality, pleas for sympathy, or righteous indignation. The jurors haven't heard enough information to go there with you, and they are likely to react with suspicion or feel manipulated if you give them too much emotion, too soon.

A good story is engaging and invites the listener to follow along. It provides just enough information for the listeners to reach conclusions for themselves, anticipating what comes next, rather than having those conclusions force fed.

A good story is often best delivered without notes, spontaneously. Practice your opening enough times so that you feel confident presenting without notes. Three practice runs is a good number. And know that, if all else fails and you do need notes, they are available on counsel table.

The oldest and most memorable stories ever were told without the use of sophisticated technology. We all love our computers, and appreciate what they can do. But be very careful about the use of Power Point, slides, or any electronic technology during opening statement. You don't want to experience a technological misfire (or two or three) at the point in the trial where you have the jurors' greatest attention.

That's not to say you should avoid technology altogether. Just be certain if you do use Power Point, or some other technology, that you have someone helping you who really knows what he or she is doing, and that you have at least one redundant system in case of an emergency or failure. Ultimately, that redundant system would be you, pressing forward without the technology. Have a backup plan and remember Murphy's Law: whatever can go wrong, will go wrong.

Closing argument and rebuttal are the time for summation. Now is the time to look into your heart and find the emotion (especially if you are the plaintiff) and give the reasons why the jurors should follow your theory of the case, and return a verdict in the amount you are asking.

Well known commentators say that individual jurors have likely made up their minds about the case well before closing argument, and are unlikely to be moved to change their minds by anything you do or say in closing. For that reason, closing is a time to arm your favorable jurors with the ammunition they need to argue for your case when they return to the jury room for deliberation. An unfavorable juror may not be moved by you, the hired advocate, but they may be persuaded by one of their own.

David Ball in his excellent book David Ball on Damages illustrates this point, and offers some good advice about Closing Argument, and how to give you favorable jurors what they need to help you.

One example is to say something along these lines: “If one of your fellow jurors says (x) or asks (y) then you can say (z).”

IV. Secrets to Being an Effective Advocate

It might be more accurately stated that there are no secrets to being an effective advocate. As in all things, preparation, perspiration, and inspiration are key components of success. A little aptitude can also help, but not all of us are natural born orators. Still, skills can be learned. That said, here are some basic tips that seem to be common recurring themes among those who try cases.

- You can't overestimate credibility.
- Avoid overselling yourself, your case, your client or your witnesses.
- Don't try too hard.
- Be yourself.
- People love it when you make things look easy.
- Don't take yourself too seriously
- Learn your client's story. (This translates to caring.)
- Caring is contagious
- Get trial experience. (Just do it.)

V. Avoiding Pitfalls During Direct and Cross-Examination

Every stage of the case, from voir dire to closing, is an opportunity to tell your case story. Direct and cross-examinations are no different in that regard, though they are approached differently.

More and more, in all aspects of the trial, I am seeing the value in keeping things brief, limited only to what is truly essential for the jury to consider. Remember, today's jurors have much shorter attention spans than ever before, and with note taking, and the advent of written juror questionnaires, can ask the follow-up questions they need or want to know answers to.

Jurors have said, over and over, that the lawyers talk too much. To that end, I say "Get to the point".

VI. The Crowning Moments and Big Mistakes I've Seen in Court

I recall one crowning moment, a well-executed cross-examination, where the lawyer ended his questioning at just the right time. It is tempting to ask the one-too-many question when conducting cross-examination. This lawyer knew just when to stop. It was the turning point in the case.

In another instance, a colleague had a particularly apprehensive and self-conscious client who was very reluctant to take the stand on her own behalf in a personal injury case. After working with her using psychodramatic techniques of scene-setting and role reversal, she transformed. I'll never forget sitting in the first row, watching, as the young woman deftly handled one question after another during opposing counsel's cross-examination, and the look of confidence she gave at the moment of realization that she had overcome her fear.

Mistakes I have seen, or experienced, tend to fall in these broad categories:

- Showing too much emotion, too soon, before the jury is ready to follow;
- Arguing against the opponent's case rather than arguing in support of your own case;
- Trying a case without a succinct case theme;
- Trying a case with the wrong theme;
- Not ending questioning (or opening or closing) when stopping is the best thing to do;
- Objecting needlessly;
- Needlessly challenging a credible witness;
- Using demonstrative exhibits that are confusing;
- Asking questions about issues the jury isn't interested in (unless you must do so for the sake of the record);

- Allowing the adverse witness to talk too much;
- Fighting with a judge that the jury likes and respects (or any judge);
- Attacking a sympathetic witness; and
- Failing to appreciate that jurors are from Mars and lawyers are from Venus

VII. How to Use Mistakes in Your Favor (Bad Evidence Too)

Mistakes will happen, even with the best of intentions or the most thoughtful and thorough preparation. But mistakes can be minimized.

I have found it helpful to accept this fact, that for me at least, there are no perfect trials. There may be better outcomes in some cases than in others, but in any case, no matter the result, I will have made mistakes, and so will you. Even straightforward cases are complicated events, with all manner of emotion, inter-personal and group dynamics, and unpredictability factors at play.

It is important for me, first and foremost, to refrain from my ego's desire to beat myself up over a mistake. After that, I make every effort to learn from the mistake. Some mistakes are bigger than others. Sometimes we make a mistake and don't know about it until it's too late to remedy. Preparation can minimize mistakes, as can experience.

But if you are in trial, and make a mistake, **don't panic**. Consider the possibility that no one but you even knows a mistake was made. Consider also the possibility that even if your mistake is an obvious one, it may not seem like a big deal to the jury (especially if they are already leaning in your favor). Remember, a trial is a war, with many smaller battles. Your ultimate objective is winning the war. So your best bet is to shrug off the mistake, collect yourself, and move ahead toward your ultimate objective. Who knows, with recognition and genuine humility, making a mistake might even score points with the jury. Then, at least, they know you are human too.

VIII. How to Handle Surprises

You've just been surprised. Surprises can happen, good or bad, when you fail to anticipate something. Just remember, you are human. No one is perfect. More important, a trial is a battle of perceptions and impressions. How you handle and conduct yourself matters.

So when that inevitable surprise happens, it can be helpful to appear as a duck on the water; calm and collected when viewed from above, and paddling furiously below. And the same goes for good surprises. Be cool, calm and collected and remember, a trial is a war of attrition. It ain't over 'til it's over.

IX. Conclusion

Anyone can be a paper tiger, but paper is just a place for putting words. Actions speak louder than words. Experience is the best teacher. If you are going to learn to be an effective advocate, in court, in the trenches and trying cases, then you will only get better by trying cases.

It will probably help if you try only those cases that you can afford to try, either effort-wise, emotionally or financially. Otherwise, the pressure may be too much, leading you to try too hard, putting too much pressure on yourself, and setting yourself up for a failure. I believe if you feel good about what you are doing, are enjoying yourself doing it, then you are more likely to do a better job, naturally, and if the outcome is less than you hoped for, then at least you will be the better for the experience.

You can ease pressures by trying cases with trusted colleagues. I've always believed that if the synergy is right, then two attorneys can equal more than the sum of their parts. It's proven to be easier, sharing the workload and the financial pressures, and it can be just

downright a lot of fun. Trials are serious business, but there is no law that says you can't enjoy the process, no matter the ultimate result. Plus, a trusted friend can provide feedback, and points of view you may be blinded to. It's all too easy, after living with a case for years, to miss the obvious. Sometimes, in our zeal to do a good job, we are blind to the bad facts, or already invested in what may not be the better strategy. It's human to overlook the weaknesses in our cases. Your colleague can bring a fresh set of eyes, ears and feelings.

A colleague can also share costs. It is an unfortunate but all too true fact of our business that trials can be expensive. Even simple cases can run into the thousands of dollars because of the ever increasing costs of discovery (investigation, records, depositions) and experts (opinions in advance of trial, written reports, deposition preparation and depositions, and trial testimony). Be smart. Be creative. The temptation may be there to spare no expense, and if you have that kind of deserving case then that may be what you have to do. But costs can be contained, and it is important to bear that in mind as you develop your discovery plan and move forward through the process to trial and, perhaps, appeals.

A word about "feedback": Call it what you will, criticism, sharing, comments about you, your case or your client. My advice is to ask for and be open to all the feedback you can get, and listen closely to the feedback that hurts the most because that information will give you important clues for course correction and needed changes as you grow and mature in your practice. Put your ego on the back burner, and be open to the very real possibility that the feedback you receive is, indeed, an invaluable gift.

X. Bibliography

All of the books that follow have offered immediately helpful hints, tips and advice. They are listed as a starting point. Relax, dive in, and, above all, enjoy the journey.

- David Ball on Damages, by David Ball
- How to Do Your Own Focus Groups, by David Ball
- Theater Tips and Strategies For Jury Trials, by David Ball
- Facts Can't Speak For Themselves, by Eric Oliver
- Winning Medical Negligence Cases, by William Trine and Paul Luvera
- Winning Jury Trials, Trial Tactics and Sponsorship Strategy, Second Edition by Robert Klonoff and Paul Colby
- Acting-In, Practical Applications of Psychodramatic Methods, Third Edition by Adam Blatner, MD
- Cross-Examination: Science and Techniques, Second Edition by Larry Pozner and Roger Dodd
- Rules of the Road, A Plaintiff Lawyer's Guide to Proving Liability, by Rick Friedman and Patrick Malone
- The Inner Game of Tennis, by Timothy Gallwey
- Anything in the DVD and videotape Trial Skills series by Gerry Spence

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