



TRIAL TIPS 101

By Daniel E. Cummins

Seasoned lawyers know, and young lawyers will learn, that each jury trial experienced is indeed that — an experience. Mistakes are made, lessons are learned, cases are won, cases are lost and reputations are established.

Preparation Begins on Day One

Win or lose, the experience of each trial reminds one always to focus on the big picture of the case from the day the file is created in your office. Pleadings and discovery should always be conducted with an eye to the anticipated endgame come time of trial.

Review the Trial Management Order

When a trial management order is issued, read the order in its entirety. Judges expect such orders to be

followed to the letter. Immediately have all deadlines marked on your calendar.

Also mark a date on your calendar at least 45 days before the start of trial to reread the trial management order and get started on all materials that have to be filed by certain deadlines, such as trial briefs, motions in limine, proposed voir dire questions, proposed points for charge and the like.

Take the time to do repeated edits to draft an excellent trial brief that thoroughly advances your client's case and argues all anticipated legal issues in your client's favor. There may come times during trial when the judge may pick up your trial brief to skim or read to pass the time, all to the potential benefit of your client's case.

Prepare Exhibits/Questions

Not only is it usually ordered by the court that all exhibits be premarked, copied and exchanged prior to trial, it is advisable to have this task completed to

avoid the biggest stressor that can arise at trial — the embarrassing, time-consuming scramble to find a document at issue.

Make copies of the premarked exhibits for opposing counsel, the judge and the court reporter, and make an extra copy for yourself in case you have to hand an exhibit to a witness while reviewing a copy of that exhibit in your hands. Consider using an overhead projector to allow the jury to follow along with the exhibit.

The preparation of an outline or a rough script of your direct and cross-examinations of the anticipated witnesses is recommended. Create a folder for each witness to hold the outline/rough script of the questions along with the copies of the premarked exhibits placed in the order you intend to refer to them in the examination of that witness.

Always focus on the big picture of the case from the day the file is created.

After you create a folder for each witness, place the folders in the file in the order in which they will be used at trial. Add a folder containing your notes/outline for your opening statement in the file ahead of the witness folders and a folder containing your notes/outline for your closing argument at the end of the file. Include in your opening and closing folders copies of the exhibits you intend to reference in the order they will be mentioned.

Organize the individual trial folders into a “trial materials” file or box separated from the remainder of your file. Such organization will go a long way to reduce stress and prevent any scrambling in front of the jury.

Study the Case from the Opposing Viewpoint

In preparing for trial, be careful not to become so involved in your own case that

you forget the cardinal rule of thoroughly reviewing the claims presented from the perspective of your opponent. Only by honoring this rule can one fully prepare for a trial by not only realizing but actually addressing all opposing arguments that will be presented.

Use a Digital Trial Presentation Vendor

In this day and age of rapid-fire, visual Internet information — and consequently shortened attention spans — it is crucial to use PowerPoint and digital presentations at trial to maintain the jurors’ attention throughout the presentation of your case.

Technology should not be feared. The digital trial presentation vendor should handle all technical aspects. You just be the attorney and present your case.

Anticipate and Prepare Legal Arguments

Prior to trial, anticipate potential legal roadblocks and gather yellow-highlighted case law along with a supporting brief to maneuver around them.

Promptly handing up to the court and opposing counsel the law you have at hand on anticipated legal issues will go a long way against your opponent’s feeble request to the court for time to try to find opposing case law.

Prepare Your Client

Prior to trial, prepare your client by politely suggesting proper dress for court attendance.

Review with your client the anticipated direct examination and cross-examination. Emphasize to the client that he or she should avoid arguing with opposing counsel.

Repeatedly remind your client not to drop his or her guard, as the jurors could be assessing the client’s appearance and demeanor at any stage of the proceedings. In addition, advise your client to remain stoic and not to make any facial expressions in reaction to the trial proceedings.

Periodically whisper and pass notes to your client during the course of the trial in order

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to show the jury that the client has a vested interest in the outcome of the matter.

Arrive Early

On days of trial, arrive at the courthouse the minute it opens in an effort to avoid the long line of jurors going through security. When you are in a courthouse in which attorneys are allowed to move more quickly through security in front of that line of jurors, try to do so as politely as possible.

Engage Tipstaff

Upon arriving at the courtroom, introduce yourself to the judge's tipstaff and find out how the jury will be brought in for voir dire, whether the judge prefers sidebars, etc. Most tipstiffs will welcome the opportunity to be helpful.

Map Out Jury Seating for Voir Dire

Bring a yellow legal pad to jury selection to draw out a map of blocks to serve as a seating chart to keep track of information gathered from the potential jurors during voir dire. Number the blocks in accordance with how the jurors' seats will be numbered in the courtroom. When you get a numbered list of jurors to be brought in for jury selection, write their names in the boxes if time permits before they start coming into the courtroom to be seated.

As each potential juror is being seated, write down one distinguishing feature of each in the respective box on your map to



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help keep everyone straight. Use terms such as “red sweater,” “mustache,” “balding” or “plaid shirt.”

Have your client review the juror list to find out if he or she knows anyone in the panel. Engage your client in the process of voir dire.

In cases involving injuries, consider striking from the jury any medical professionals, particularly ambulance crew members, nurses and medical-office staff, as they may think they know more about such injuries than the expert witnesses.

Unless the rules of the road favor you in an automobile-accident personal injury case with a liability dispute, strike any jurors involved in law enforcement.

In the end, respect the jurors’ time by making your juror strikes quickly. Picking a jury is essentially a crapshoot based largely upon vibes and gut instinct. No need to ponder in a lengthy fashion.

Wish Opposing Counsel Good Luck

If the opportunity presents itself prior to opening statements, sincerely wish your opposing counsel good luck. This should be done not only as a professional courtesy but could be unexpected and, therefore, somewhat disarming. Any benefit, however small, could help turn the tide in favor of your client in the end.

Have a Conversation with Jurors

Begin your opening statement with, “May it please the court, opposing counsel, and ladies and gentlemen of the jury.” Follow immediately with a crisp one-liner that encapsulates your case and the result desired.

Follow that by thanking the jurors for the time away from their daily lives. Then address the jury as if in a conversation with your spouse or a good friend. How would you or have you already explained the case to that person?

By speaking to the jury in such a conversational, everyday tone from the get-go you convey that you are a down-to-earth, tell-it-like-it-is person who can be believed and trusted in comparison to your opposing counsel and his or her hopefully more formal, attorney-like presentation.

Appearances Matter

The appearance of your table at trial can symbolically convey information to the jury.

On the plaintiff’s side, it is recommended to have orderly stacks of records, file folders and yellow legal pads covering the table in a neat fashion. In addition to the client, you may wish to have an associate attorney or paralegal at the table. And you may wish to have files and file boxes readily visible to the jury to indicate not only how much work was put into the case but that it is a


big case requiring lots of paperwork and personnel to present.

On the defense side, a minimalist approach is better. Keeping the defense table completely free of materials other than a legal pad for you and one for the client and only the folder at issue (e.g., cross-of-plaintiff folder) from the trial file serves to show that the case is perhaps not as extensive as the plaintiff’s attorney may assert or attempt to exhibit. Place your unused file materials under the table or otherwise out of the jurors’ view. Whenever possible, do not have other attorneys or paralegals at the table or in view.

In all cases, sit up straight in your chair with your feet planted on the floor, and always look stoically interested, with your poker face. Never lean back in your chair, cross your legs or otherwise appear nonchalant. Don’t try to engage the jury with looks, eye rolling or smiles when winning an objection. Such actions not only turn off jurors, they may be considered to be unethical.

For the sake of appearances, if not for moral support, your client’s spouse, whether on the plaintiff’s side or the defense side, should attend the trial. There also should be some effort to show interaction between the client and the spouse so the jury is aware that this matter is indeed important enough to the client for his or her spouse to come and sit through the trial as well.

Always show respect by standing whenever addressing the court. Say, “Yes, your honor” or “No, your honor.” Remain stoic whether the court rules in your favor or against you on an objection. If the judge starts speaking when you are speaking, shut



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up. Keep requests for sidebars to a minimum — they can make it look as if you are hiding something. At any sidebars, appear stoic and make sure opposing counsel keeps his or her voice down, as the jury will be intently watching, some even trying to hear what is going on or read lips. Also, when questioning witnesses, ask the court's permission to approach the witness.

Chances are, in this day and age, your opposing counsel may not honor this required respect to the court, which will make you look like the more experienced and, therefore, the more trustworthy attorney.

Last but certainly not least, as refreshing as that water may appear on your counsel table, neither you nor your client should be drinking water while the parched jurors are trapped in the jury box for hours on end. Little, seemingly totally irrelevant things like that could rub some people the wrong way and shift the momentum of the case against your client.

Keep a Separate Pad to Record Objections

To ease the review of the file for appellate purposes after the trial is completed, keep a separate yellow pad on which to list all objections you have asserted and lost. Prior to trial, start that list with any summary judgment issues or pretrial motion in limine issues you may have lost. During the course of the trial, each time you lose an objection, make some quick, concise note of it on the pad to help you recall all such issues after trial as you determine which are worthy of taking up the appellate ladder.

Closing Argument

By the time of closing argument the jurors will have been sitting listening to people talk about the same liability and damage issues over and over as well as having sat through long hours of videoed expert depositions that sap the life out of people.

Closing argument is an opportunity to wake up the jury by bringing your case

alive through the compelling use of visuals such as a PowerPoint or digital presentation. Such presentations can use a large screen to show photos, yellow-highlighted records, timelines and outlines of the cogent points of your case.

Refer specifically to and point to your client at least once during the closing to remind the jury that real people have a real interest in and will be impacted by their important decision. Stick with the conversational tone of voice, but be more forceful and confident in your argument. Truly believe in your argument, because if you don't no one else will. Convey your belief in your client's case through periodic eye contact with each juror.

Never forget to raise your opponent's anticipated argument and tell the jury why that argument should not be accepted. Tell the jury that your opponent is an "excellent lawyer" who will be using all of his or her persuasive powers to convince them to ac-



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cept his or her side of the case. In a concise and quick manner, proceed to state why that opposing position should not be accepted. This tactic may serve to put your opponent on the defensive during his or her closing, which can only work to your client's benefit. The jury may wonder why opposing counsel is spending so much time defending against your arguments and attacking you rather than actively promoting his or her own case in a positive and compelling fashion.

Near the end of your closing, be sure to thank the jury sincerely (but not obsequiously) for their time and attention. Begin the actual ending of your closing argument by reiterating in some way the concise, one-liner theory of the case from your opening statement. End your closing by specifically asking the jury to enter a verdict in favor of your client.

Then — and this is hard to do given the relief you feel at the end of a long and

stressful trial — resist the overwhelming urge to rush back to your seat and breathe a sigh. Stand facing the jury for one last moment with your feet planted. Then slowly, calmly and confidently return to your seat and pat your client on the back or shake his or her hand.

Again, both you and your client should remain entirely stoic during the course of opposing counsel's argument.

Post-Verdict Conduct

After the jury is sent off to deliberate, shake hands with opposing counsel and, if appropriate, commend him or her on a job well done and wish him or her luck. Tell opposing counsel your plan to leave the courtroom after the verdict is read and the jury dismissed.

Pack up your belongings to be ready to leave and instruct your client that, win or lose, once the jury is dismissed, the plan is to leave the courtroom and be away from

the opposing party and counsel. Leave a copy of the verdict slip and a pen out to record the verdict when it is read.

If allowed and if possible, after the proceedings are concluded, consult with the jurors for feedback on what worked and what didn't work. Take lessons, learn from your mistakes, then move on to the preparation for your next trial. ☞

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