

Obtaining Success at Trial

As all experienced trial attorneys know, success at trial does not come easy. It is the product of hard work, garnished with occasional splashes of brilliance. Preparation, preparation, and more preparation is the blueprint for success.

True, good facts and good law go a long way towards producing good results. Assuming everything else is equal, the trial team that is better prepared and more sensitive to jury attitudes and beliefs is more likely to prevail. For purposes of this article, assume that both sides have diligently prepared their cases for trial. Each side has deposed all prospective witnesses, collected the necessary documents, researched the relevant law, and arranged for competent witnesses to support their version of the facts. In this scenario, what often separates winners from losers is the mode of presentation to the trier of fact.

Develop a Theme

For the most part, jurors are everyday people, with basic everyday values, i.e., honesty, loyalty, stability, fairness, and a deep desire to do the right thing. Sometimes, these social mores conflict with the strict interpretation of the law. In such cases juries will often latch on to an argument that will allow the community's social values to prevail.

Attorneys should review the facts of their case and develop a theme to argue to the jury. This theme should be consistent with the jury's pre-conceived notions of fairness and justice. Told at the end of the trial that they must follow the instructions given to them, jurors often ignore instructions that

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FEATURE ARTICLE



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do not coincide with their fundamental beliefs. In such cases, jurors may choose to rely on only those instructions that justify a result which leaves them feeling they have done the right thing and fulfilled their civic duty. Thus, it is imperative to match one's arguments to the community's existing social mores. An attempt to change the jury's fundamental viewpoints, even through brilliant, well reasoned argument, is a sure ticket to failure. Rather than seek to change the jury's values, one needs to fit the facts of the case squarely into a theme falling within the jurors' pre-conceived notions of justice.

Do not wait until closing argument to develop a theme. By that time, the case has already been won or lost. The theme must be developed during the early pre-trial stages of litigation so supporting evidence can be elicited during the discovery phase. The theme should not be intricate or confusing. It should be simple and compelling, i.e., justifiable reliance v. an obscure technical legal defense; David v. Goliath; loyalty v. betrayal; honesty v. deceit. Once chosen, the theme should be presented to potential jurors immediately.

Effective Voir Dire

During voir dire, the jury is actively watching trial counsel, his or her staff, the court staff and everyone in the courtroom. This is the time when jurors eagerly search for an understanding of what is to follow. The questions attorneys ask during voir dire can alert the jurors to what is coming. Asking potential jurors if "they have ever had an opportunity to judge another person's credibility" and whether they believe they can "differentiate between a lie and the truth," makes jurors aware that the case is likely to have conflicting testimony. This becomes the foundation for the theme of honesty v. deceit. Questions to the jurors about "whether they had any moral, philosophical or religious reason that would inhibit their ability to award large compensatory or punitive damages" lets the jury

know they will be making decisions regarding high numbers and evil conduct. Later, the jury will be less fearful of making a high award and will be watching for evil conduct when it arises at trial.

This pre-conditioning alerts individual jurors to be on the lookout for evidence that may fall within a given theme. It can also be used by counsel to obtain a pledge from the jurors that they will act in accordance with counsel's wishes if the evidence comes forward as suggested. For example, counsel can ask the jurors "if the facts and law support one result, would you work during deliberation to convince the other jurors of your position's merit and factual interpretation?" In so doing, trial counsel creates allies and advocates during deliberations that can turn the tide in counsel's

favor. Likewise, if a juror states that he or she will follow the law as instructed, it empowers the other jurors to remind that juror later of the pledge made to counsel. The bottom line on jury selection is that it should be a pre-conditioning of the jury to the themes you feel will arise in your case. Then, when the evidence does appear, the jury will recognize its significance and will fit it neatly into counsel's case theme. While many treatises advise counsel not to pre-condition the jury during voir dire, pre-conditioning the jury is exactly what a good trial lawyer does.

Opening Statement

Opening statement also is extremely critical. After voir dire, this is the first time the jury fully learns what the case is about. Even though jurors are instructed that a

lawyer's comments during opening statement are not evidence, studies show that jurors overwhelmingly form opinions after opening statement. Moreover, nine times out of ten these opinions will not change. A juror, like anyone else, likes to be right. Based upon opening statement, jurors form opinions about what happened, who was right, and who was wrong. Jurors use those opinions to filter the evidence presented to them. In a typical trial, there are several issues in serious dispute with evidence going both ways. If the juror has made a preliminary determination after opening statement of the merits of the controversy, that juror will place greater emphasis on the facts supporting the juror's preliminary opinions and ignore evidence inconsistent with his or her pre-established viewpoint. Thus, opening statement is critical. True, a Perry Mason or Matlock-type confession on the stand will sway jurors to change their minds, but that rarely happens. Defense counsel does have a right to defer opening statement and deliver it at the commencement of the defense's case. This strategy, however, is an egregious mistake. By the time the defense has an opportunity to call its witnesses in its case in chief, the case is over in the juror's mind and nothing short of witness stand confession is going to sway the juror's opinions.

Since opening statement is so important, it must be delivered in a concise and compelling manner. Opening statements must be clear and to the point. The statement should be put in simple terms and rely on fundamental concepts. A lawyer should never seek to impress the jury with his apparent intelligence or wisdom. Jurors are turned off by pretentious attorneys who have a "better-than-thou" attitude and the client's case will suffer because of the jurors' distaste for the lawyer.

A good opening statement will lay out the facts, both chronologically and on an issue-by-issue basis. Presenting an opening

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picture these events in their minds, they will have nothing to assist them in recalling the significance of these events later when they deliberate.

Technology

Technology in trials has advanced remarkably in the last ten years. Depositions are videotaped and excerpts are shown to the jury during opening statement, witness examinations, and closing argument. Computer simulations, animation, and videos are often presented to the jurors so the juror can form a mental picture of the events underlying the dispute. Documents are scanned into computers and projected on screens so that during the testimony of the witness the jury can also look at the relevant portion of the contract, letter or e-mail in question during a witness's testimony. Relevant portions of the documents can simultaneously be highlighted while the witness testifies. Interactive audio and visual displays enhance the jurors' ability to remember the events at the critical time of deliberation. The audio and visual techniques employed by counsel can keep the jurors' attention correctly focused at the most critical points in the trial. Thus, the evidence should be choreographed in a way that would make a movie director jealous. The evidence must come in with substance and impact and play upon the jury's emotions, allowing them to feel sympathy or disdain for the witness consistent with the theme chosen.

Jurors are accustomed to watching television and movies. When the jury has the opportunity to view a witness's deposition, they unconsciously expect the deponent to be as polished as the actor they see on screen. In reality, most deponents fall well short of this mark. Deponents tend to squirm, sweat, twitch or blink in a decidedly unprofessional manner. As such, when viewing the witness for the first time on the

screen at trial, jurors can often form the opinion the witness is being deceptive and untruthful. Since trial counsel has the opportunity to edit the witness's video deposition during trial preparation and only present those portions that put the opposition's witness in the worst possible light, trial counsel can use these technological mediums to advance his or her theme. Once the jury has seen a particular witness' video deposition excerpts, possibly during the opening statement, the jury has a pre-conceived notion of whether or not they will believe that witness when that witness is later called to testify. That first impression is rarely overcome at trial.

A Winning Closing Argument

Closing argument is also very important, as this is the time the trial lawyer can sum up all the evidence presented over a prolonged trial and remind the jury of the facts elicited from each individual witness and the significance of each relevant fact. Trial counsel must be able to tell a story in closing argument consistent with the tale set forth in the opening statement. Now, the trial counsel can take great liberty in arguing any relevant inference from any fact set forth in the case. In so doing, trial counsel can and should funnel all the relevant facts into the themes counsel has been espousing from the very first moment the jury walked into the courtroom. At this stage,

emotion is trial counsel's strongest weapon. Emotion, coupled with a sincere belief in the merits of one's own case, will lead to a successful verdict if it is consistent with the jury's fundamental values.

In closing argument counsel should remind the jury of their earlier commitments obtained during voir dire. Counsel should also point out the key misstatements made by opposing counsel in his or her opening statement. This will wound, if not annihilate, opposing counsel's credibility with the jury. Real life examples can be used to illustrate similarities between the facts in the case and accepted societal norms in the community.

Repetition is often thought to be avoided in closing argument or during the trial, but the contrary is true. A jury is made up of twelve individuals. It is the trial attorney's job to convince at least nine of those persons of the merits of his or her position. Consequently, the closing, in a non-insulting way, must be directed to the least intelligent of the twelve. Theoretically, if you have a good case, the brightest on the jury will have already understood the significance of the evidence before your opportunity to deliver closing argument. The less sophisticated or intelligent jurors cast a vote equal to the smartest juror on the panel. It is trial counsel's duty to persuade all jurors to come to the right conclusion. Therefore, trial counsel must repeat themes and the relevance of evidence through different

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statement is no more and no less than telling a compelling story. Although you cannot "argue" the facts to the jury, there is a very fine line between argument and a persuasive factual recitation. Many judges discourage objections during another party's opening statement and many attorneys are afraid to object during opening statement out of fear of alienating the jury. Therefore, some liberties can be taken in opening statement so long as the gist of what counsel is portraying is what the evidence will show. After opening statement, the jury should have a clear understanding of all the facts and how each fact relates to the case themes. The jurors should be left feeling they fully understand the case and how they will vote. Afterwards, all counsel needs to do is fill in the blanks with the documents and witness testimony.

Some lawyers during opening statement make the mistake of overstating their case. This approach backfires during closing argument, when their opponent quotes them from a certified transcript of the opening statement, pointing out mischaracterizations of the evidence, misstatements of fact, and factual statements for which no evidence was ever introduced. When a lawyer's credibility is successfully attacked this way during closing argument, the task of rehabilitating the lawyer's credibility is akin to Sisyphus pushing a boulder uphill. Thus, careful attention must be paid to the accuracy of the statements. Counsel may stretch the implication of the facts no farther than the evidence will support.

Effective Presentation of Evidence

Nearly all evidence is introduced through witness testimony. Thus, witness examinations should be prepared in advance and tied into the documentary evidence available. Counsel should determine, in advance, how to properly lay a foundation for the evidence and anticipate admissibility issues.

Trying to address evidentiary concerns on the fly is courting disaster.

Counsel should format his or her examination so that it leads off with a brief introduction of the witness to the jury. This introduction should contain a description of why this witness could or would have relevant information to share, i.e., foundation. Once this foundation has been laid and

while the jury is still paying attention, elicit the most critical evidence from this witness.

Key evidence should be delivered early, when the jury is still interested in what this witness has to offer. Likewise, it should be supported with documentary evidence or descriptions of the surroundings of the event so jurors can draw a mental picture of what happened. If the jurors cannot

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subtle ways and distinctions. A carefully crafted closing argument will not bore or annoy the jurors that understand the facts, yet through repetition will make sense to those jurors that were slower to pick up on the significance of relevant evidence.

During the many post-verdict jury interviews I have conducted, I have learned any slight annoyance caused by repetition is overshadowed by the desire to do the right thing and reach the correct result. A juror will not penalize counsel and vote for the opposition simply because the relevant evidence was presented to him or her in two or three different ways during closing argument. But the juror who never really understood the point can penalize trial counsel through his or her ignorance and lack of a clear understanding of the interplay between the facts, the testimony, and the documents. For that reason, albeit reluctantly, I suggest some moderate repetition is called for when it comes to the key theories and critical evidence in your case.

In summary, adopt a theme consistent with the social mores of the community from the very beginning and rely upon that theme throughout the voir dire, opening statement, witness examinations, and closing argument. With the use of technology and an approach that exudes sincerity and a true conviction of the merits of the case, trial counsel will be in the very best position to win every trial. 