Tips for 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 toward producing good results. Assuming everything 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. All sides have 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 separate winners from losers is the mode of presentation to the trier of fact.

In-Depth Analysis

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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 preconceived notions of fairness and justice. Told at the end of trial that they must follow the instructions given them, jurors often ignore the instructions that 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 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. Selection of a jury panel gives counsel an opportunity to impress the panel with her own presence, memory and command of the courtroom. If a juror is impressed with what she sees, she is more likely to become receptive to the themes of the case espoused by the attorney.

One way to impress the jury is not to bore the jury from the outset. On too many occasions, I have seen attorneys do their voir dire examination in a lock step manner. For example, they will start with juror number one, ask five questions, do no, if any, follow up, and then proceed to juror number two and consecutively down the line with the same five questions. By the time the counsel has gotten to juror number three, the jurors have lost interest. Each has learned what the questions are and what an acceptable response would be. Nothing of significance concerning a juror's attitudes and

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beliefs have been elicited. This progression continues through to the last juror when the jury panel can then arise from their combined slumber. The process I have just described does not generate positive feelings in the jury towards the examiner. Often, quite the opposite.

There is a better way, however. An effective examination will keep all the jurors on their toes. This can be accomplished by bouncing from one juror to another in no predictable pattern. The jurors realize that they can be called at any moment. For example, going from juror number eight to juror number two, to juror number twelve, and back to eight, leaves them with the understanding that they can be called on at any moment. Also, the questions to the next juror may very well ask if they agree with an earlier juror's response to a prior question. Now, the jury knows that their name can be called at any time and they may be asked questions about another juror's response. The result is an attentive jury. This is in stark contrast to the boredom, the lock step approach produces.

Although some courts do not allow an attorney to refer to the jurors by name but only by their number, where courts do allow counsel to refer to the jurors by their name, it is good practice to memorize their names. With some practice this can be easily done when the jurors are first called to join the panel and during the court's obligatory instructions to the panel before counsel is allowed to voir dire them. As with all people, the jury is impressed when the attorney, not only bounces from one to another juror with the examination, but does so by referring to each juror by his or her own name. The impression now left with the jury is that the counsel is very competent, engaged in the process and someone they can rely upon to present an effective and interesting case.

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 willingness 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 more susceptible to supporting 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 that 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 the voir dire, pre-conditioning the jury is exactly what a good trial lawyer does.

Opening Statement

The opening statement also is extremely critical. After voir dire, this is the first time that 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 those 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 that is 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 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 the 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 and counsel's use of big words just to impress the jury will often have the opposite effect. 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

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facts, both chronologically and on an issue-by-issue basis. Presenting an opening statement is no more and no less than telling a compelling story. It is often said that a picture is worth a thousand words. A corollary to that is a video maybe worth millions. As we discuss in more detail below, use of technology in displaying evidence to the jury during the opening statement can have a lasting, positive impact. Often courts will allow exhibits to be shown to the jury during opening statement, especially if they have already been stipulated for admission.

Similarly, some courts will allow limited excerpts of video depositions of opposing parties to be shown during opening statement to the jury. You should seize upon this opportunity if available, as it functionally turns your opening statement into a presentation of irrefutable facts to support your case. In fact, presentation of video deposition testimony of your adversary during your opening, will often color the jury's view of this individual and affect his credibility as the potential witness approaches the witness stand. This is invaluable as a technique to undermine the credibility of some witnesses based simply upon an irrefutable presentation of factual evidence during the opening statement.

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 parties' opening statement because the jury has already been told that counsel's statements are not evidence. 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 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 from a certified transcript of the 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

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 picture 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' deposition, they unconsciously expect the deponent to be as polished as the actor they see onscreen. 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 that the witness is being deceptive and untruthful. Since trial counsel has the

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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's video deposition excerpts, possibly during the opening statement, the jury has a preconceived 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. The 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 of 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 that is not always 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 and it is trial counsel's duty to persuade all of the jurors to come to the right conclusion. Therefore, trial counsel must repeat themes and the relevance of evidence through different 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 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.