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LITIGATION

Preparing for Trial Like a Rookie

By Nancy J. Geenen

Experienced trial attorneys treat every case as if it is the one that will go to trial. These lawyers read jury instructions at the beginning of the case, practice public speaking, seize opportunities to make presentations, retain an experienced trial consulting team to assist in the trial, and approach a trial with child-like wonder instead of fear. Getting up to speed to try a case involves preparing like this is the ONE that will go to verdict. Less than 1 percent of cases filed actually get tried to verdict. This statistic has remained relatively constant since 2002. See *The Vanishing Trial,* Patricia Lee Refo, Litigation, The Journal of the Section of Litigation, ABA, Vol. 30 No. 2, Winter 2004. Successful trial lawyers utilize logical, linear reasoning to prepare, then employ creative, intuitive storytelling to persuade.

A trial is one method to resolve a dispute that parties are unable to resolve themselves. At the beginning of a dispute, client relationship attorneys have a long and detailed conversation with the client that describes the litigation strategy, the trial process, the budget for the phases of the litigation and for trial, and the specific goals the client wants to achieve. Winning at trial sounds great to the client; yet at this early stage of the case the client underestimates the emotional, psychological, and cultural toll on the involved individuals and the commercial enterprise. At every major event of the case, a client must consider the alternative to trial: putting the same money and energy toward winning in the marketplace, rather than subject the business to a public, long-running dispute that may not produce the desired result.

For litigation attorneys, a trial is the golden ring. Attorneys often stretch to claim trial experience. Is it a trial if the jury is sworn, but never hears opening statement? Is it a trial if the case settles after opening statement, during the presentation of evidence, after closing argument but before a verdict is rendered? Does an arbitration count? Every attorney who has given a closing argument to a jury, judge or panel that reached a verdict or decision earned the merit badge. Successful trial lawyers are experts at three things: trial preparation and strategy, working with evidence, and persuasive communication.

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Trial Preparation and Trial Strategy

Understanding the interplay between trial preparation and trial strategy is often the skill that differentiates great trial lawyers from good trial lawyers. Great trial lawyers engage in trial preparation personally and emotionally. There is a systematic approach to trial from the day the case lands on the desk. And, there is a constant search for the emotional factors that will affect the decision-making of the judge and jury.

There is no substitute for preparation. Getting to trial involves legal analysis and linear thinking: drafting pleadings, conducting fact and expert discovery, filing dispositive motion practice, and organizing documents and records as exhibits. Every seasoned attorney in the litigation group is experienced in these activities. The

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trial attorney touches every document, reads every deposition and declaration, identifies the key exhibits, and organizes the trial notebook from the outset. The trial notebook is revised and supplemented as the case moves forward to trial. Key provisions from the local rules and jury materials, including whether the verdict is majority or unanimous, are items for the trial book. One of the best secondary sources for trial preparation and organization is *Trial Techniques*, Thomas A. Mauet, 9th ed., Aspen.

At 100 days before trial, the trial team meets to discuss the case and the trial strategy, prepare schedules and take assignments. The most important strategy is focused and well-timed rehearsals. Early rehearsals are impromptu and segmented by key messages or issues. The lead attorney starts to connect the dots of the storyline driven by expected testimony and exhibits. Yet, all things being equal, it is the attorney who is authentic, credible and intentional who wins the case. Authenticity is self-awareness and confidence rolled up into a multitude of life experiences. Every trial strategy requires adjustment in the moment. The greater the self-awareness of the attorney, the greater flexibility to think, react and exercise good judgment in the moment. Tone, volume, cadence, physical characteristics, and non-verbal messages affect jury comprehension and decision-making. Each rehearsal improves the presentation and delivery style of the attorney. Using a communications consultant with experience working in high-profile litigation is an advantage to exploit early in the trial strategy process.

At 90 days before trial, lead trial counsel moves to the ''situation room.'' This is a different room from the war rooms where all documents are stored or where witness preparation takes place. The situation room is the place where the lead trial counsel prepares the case and where high-level strategy is discussed. Getting away from the personal office space separates the everyday activities from the trial preparation events. In the situation room, the lead attorney develops trial strategy, key trial messages, and the story of the case. An effective preparation technique for lead counsel is to sit through one to two days of a trial held in the same courtroom with the same judge. Watching a day of jury selection and a day of witness examination is not a luxury, but a distinct advantage. Observing the tempo and dynamics of the courtroom helps lead counsel envision the upcoming trial and motivates the trial team to work with the ''end in mind.''

Federal courtrooms are wired for multimedia production. Jurors and now judges expect to see visual depictions of the trial story. Lawyers traditionally use documents with highlighted call-outs to point out the rights or obligations of a party. Well-designed trial graphics orient the judge and jury to the background facts, the factual and legal disputes, competing damage theories, jury instructions and the verdict form. Spending time with the graphic consultant creates the story board that outlines the key messages of the trial. For background facts, timelines and photo-org charts identify the key events and actors involved in the dispute. Visual tutorials are useful to explain a complex development process or the inner workings of a component. Stringing together e-mail correspondence tells the story from a party's point of view. Attorneys, fact witnesses and experts become teachers when using photos, charts, timelines, drawings and animations to supplement the testimony heard by the jury.

Evidence in the Courtroom

At 60 days before trial, the trial team starts working with the ''evidence'': witnesses, exhibits and demonstratives, and trial practice.

Early identification and resolution of evidentiary issues informs the judge that the trial team is forward thinking and jury friendly. Making timely and proper objections at trial is a skill that must be practiced routinely. Skilled trial attorneys listen for key words that are tied to specific objections. For example, words like ''possible'' and ''conceivable'' ask the witness to speculate; ''heard'' and ''tell you'' reveal hearsay testimony. Practicing for evidentiary objections is a verbal, not a reading, test. Depending on the budget of the case, lead counsel may obtain transcripts of trials conducted by opposing counsel. Every trial lawyer has a cadence and pattern of speech that predominates an examination. Self-prepared flash cards of sample questions will train trial counsel to listen for improper questions and make proper objections.

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Exhibit lists and examination scripts are completed. Every attorney who plans to examine or cross-examine a witness requires practice time with the trial technology specialist who has prepared the exhibit database and who will project exhibits, graphics and video in the courtroom. With a properly prepared database and deposition clips, attorneys quickly understand the dynamics of presentation technology in the courtroom. For example, deposition designations, especially video clips accompanied by text, permit the lawyer to step away from a cross-examination so the words of the witness prove the fact (or the absence of the fact). An early practice session opens up a myriad of visual solutions for trial that guide the trial presentation strategy in the courtroom.

Attorneys and consultants mark the scripts or outlines with cues for the trial consultant to project a document or demonstrative, but rarely indicate a cue for the screen to fade to black. A constant visual slideshow on the screens and monitors in the room is a recipe for mediocrity. At opening statement, create an impact by keeping the screen black until an agreed upon cue. Until that cue, the attention is focused on the attorney at the podium, getting the jury ready to hear the story of the dispute. Using the black slide to identify transitions to new issues or to emphasize a specific theme creates space for the jury to internalize the key message. The jury gets needed rest from the constant input of new information that takes time to process. The black slide works throughout the presentation of evidence, including closing argument.

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Persuasive Communication

In the last 30 days before trial, the trial team is pulling out the stops to finalize the trial strategy and trial plan. Exhibits are reviewed; objections are filed. Trial subpoenas are issued to every witness. Deposition designations are reviewed until the early hours of the morning. Jury instructions are drafted and vetted against the claims and defenses asserted in the case. The opening statement is written and re-written; and then rehearsed and rehearsed and rehearsed with the trial team and consultants in the room, suggesting minor adjustments and revisions at each rehearsal. The outline of the closing argument is adjusted.

Scheduling senior executives for practice sessions is difficult at best and should be handled by the relationship attorney in the first instance. Witness preparation involves the examining attorney, the witness, the communications consultant and the trial technology consultant. Used effectively, deposition testimony and video clips help the witness ''see'' and ''hear'' themselves. Record and view practice sessions with the witness to improve both the physical and emotional presentation of the testimony. Practice direct examination with the expected exhibits projected on a large screen so that the witness gains familiarity with the technology. Cross-examination practice is a delicate balance of teaching the witness to agree or to disagree politely. Using a soft-cross that focuses on technique and then a second session of hard-cross better prepares the witness for the courtroom experience.

In the week before trial, jury materials are finalized and exchanged. The schedule for demonstrative exchanges and objections is finalized. Witness preparation continues and settlement talks begin, again. The technology consultant installs and tests the equipment in the courtroom. The trial team confirms the schedule and order of the witnesses. The lead attorney finalizes and rehearses the opening statement. The trial team comes together as a single unit prepared for battle.

On the first day in the courtroom, actions speak louder than words. As soon as the trial team enters the courthouse, the trial team should act the part of the experienced and prepared team to beat. If there is a conflict between the physical and the verbal message, the jury will be troubled by the conflict and is more likely to adopt the emotional message reflected by the physical cues. In 1981, Albert Mehrabian studied the impact of voice, tone and body language on the subjects' perception of trustworthiness of other people. Mehrabian, Albert (1981). *Silent Messages: Implicit Communication of Emotions and Attitudes* (2nd ed.). Belmont, Calif., Wadsworth. Mehrabian found that (i) 53 percent of the impression you make on another person comes from your behavior and body language; (ii) 40 percent of that impression comes from your credibility and competence; and (iii) 7 percent of that impression comes from the actual words you say.

Credibility with the jury is built through efficient and effective presentation skills during trial. The trial team influences the jury with its mere presence. The trial team sends the message that it is trustworthy and competent. Trial teams that demonstrate positive interactions and good relationships with each other earn respect from the judge, courtroom personnel and, most importantly, the jury. As the jury pool enters the courtroom, the physical presence and interactions of the trial team in the courtroom send a consistent message: we're ready; we won't waste your time; you're important to us.

After the jury is sworn and just before opening statements, the jury watches the trial teams with anticipation and anxiety. The lead trial attorney builds rapport with the jury because the trial team is organized and energetic.

Conclusion

Juries want to make sense of the facts of the case and then use the law to arrive at a decision: right v. wrong; yes v. no; guilt v. innocence; punitive damages v. general damages. Each juror will use personal experience to make sense of the ''why'' of the dispute. The lead attorney must use body language, physical cues, key phrases and multimedia to help the jury organize the documents, testimony and arguments made during the trial. Preparation and rehearsal are the keys to success in the courtroom. Embracing technology tools and principles of graphic design increase the odds of winning at trial because the trial presentation is both persuasive and memorable. The lead trial attorney tells the story with tools that arm the jury with the facts and beliefs to carry the day during deliberations. Preparing the case from the point of view of the jury and then delivering a clear, credible opening statement that addresses the emotional needs of the jury is the first step to the desired verdict.

Successful trial attorneys are made, not born.