Professional Development for Litigators

BY NICK GAFFNEY ON APRIL 14, 2015 ·

Efficiently and successfully litigating a lawsuit in today's rapidly evolving legal landscape requires a deeper and more diverse skill set than ever before. Whether your litigation career is just getting off the ground or you've spent countless hours in court and out, it may seem that staying not only on top of a case, but one step ahead of the opposition, is a perpetual challenge. What can you do to get a leg up? In our April roundtable, trial experts who have clocked thousands of courtroom hours, and boast deep experience advising both new and seasoned trial attorneys, reveal their tried-and-true tips and insights.

Round Table Moderator: Nicholas Gaffney **(NG)** is a member of the *Law Practice Today* Board and veteran public relations practitioner.

Our Panelists

Allan Anderson (AA) is a litigation and intellectual property partner in the Los Angeles office of Arent Fox. His practice encompasses trademarks, trade dress and trade secrets, patent infringement, copyright, and false advertising. Allan represents clients in the entertainment, manufacturing, real estate, sporting goods, and technology industries.

Nancy J. Geenen (NJG) is co-founder of Suann Ingle Associates in San Francisco and a trial consultant and attorney. She is an engaging teacher working with clients in persuasive presentation, jury selection, trial and litigation management, and attorney training. She has more than two decades of experience as a BigLaw trial attorney, including two years as prosecutor for the United Nations, preparing and trying high-stakes cases involving commercial and intellectual property law.

Justi Miller (JM) of Berens & Miller, PA in Minneapolis has extensive experience handling litigation cases from intake through trial as primary counsel. Her practice includes a diverse client base and a wide range of legal matters such as antitrust, breach of contract, business torts, employment discrimination and termination, intellectual property, false advertising, FCRA, FDCPA, wage and hour, and UCC claims.

Nancy E. Pritikin (NP) is a San Francisco-based shareholder with Littler, a leading global employment and labor law practice. She has extensive courtroom experience and specializes in employment discrimination, wrongful termination, investigations of employee conduct, and sexual harassment matters. Regarded for her experience as a trial attorney, Nancy is well-versed in high-profile employment class action matters. She has successfully served as lead trial counsel for multiple class action cases, including wage and hour and discrimination claims.

Michael Sitzman (MS) is a partner at Gibson Dunn and a member of the firm's Intellectual Property and Life Science Practice Groups. He has extensive trial and litigation experience concentrated in the pharmaceutical and biotechnology fields; has handled many high-profile patent cases for Johnson & Johnson, Gilead Sciences, Novo Nordisk, Merck-Serono, Allergan, and Medicis. He represents brand-name pharmaceutical companies in ANDA litigation, advising on all facets of the Hatch-Waxman Act, and in other drug patent litigation. In addition, he has litigated a wide range of other high technology cases, as well as commercial, financial, and real estate disputes.

Rudolph A. Telscher (RT) is a partner at Harness Dickey in Saint Louis, Missouri. Mr. Telscher has litigated for 25 years a wide array of intellectual property disputes in district and appellate courts throughout the United States. His cases have included disputes over patents, trade secrets, trademarks, copyrights, Internet rights, rights of publicity, First Amendment issues, and matters involving antitrust.

NG: What can litigators do to avoid mistakes commonly made early in a trial attorney's career?

AA: A common mistake litigators make early on is focusing on the trial itself. Do not assume you will get trial experience without excelling in case development and trial preparation. Make yourself invaluable to the trial team, such as having a complete understanding of the relevant exhibits. Young litigators must prove themselves by providing substantive and timely contributions to the case to improve their opportunity to participate in the actual trial.

NJG: I advise all our clients to visit the trial court well in advance of the pretrial conference and watch several different proceedings: hearings on dispositive motions, pretrial conferences, jury selection, and trials. Knowing how the judge and clerks conduct these proceedings helps the trial attorney move smoothly and efficiently through the trial.

Additionally, like *Alice in Wonderland,* it does not matter much which road you take if you don't know where you want to go. More often than not, trial attorneys fail to start with the end in mind. Knowing what goals the client wants to attain and the means to achieve those goals is critical to success at and during trial.

Also, early in the case analysis, litigators are chasing down many avenues to a win. Most of these are rabbit holes that are intellectually interesting, but not the best use of a client's resources. I remind new trial attorneys that we only have to win once, not five different ways.

JM: Always keep in mind your client's needs and goals. Keep a close eye on the court's orders and instructions. You will learn much if you can find your judge's personal pointers and tips from the local bar association or law library. Ask other attorneys about their experiences with your judge to learn the judge's preferences. Treat the judge's staff with respect; they will assist you because it will make their lives easier, too.

Prepare for trial from day one. Begin preparing a chronology immediately and keep it updated as you learn more about the evidence and parties. In addition, create a chart by claim setting forth the elements and standards for every claim; prepare the claim chart by looking at the model jury instructions and state case law. You should understand what you are trying to prove before you go into discovery and motion practice. Create another chart by witness, summarizing the issues and exhibits each of your witnesses will testify to. To learn about trial practice and how judges run their courtrooms, attend other trials handled by your compatriots and those over which your judge presides. For example, you do not want to show up at trial expecting to do voir dire only to find out the judge always does it herself.

NP: The most important thing a new trial attorney can do to avoid mistakes is to read, understand, and follow the rules. For example, in federal court, an attorney should read the federal rules, the district court's local rules, and the assigned judge's standing orders and rules. The second most important thing a new trial attorney can do to avoid mistakes is to keep a clear and accurate calendar of upcoming dates so that deadlines are met.

Finally, new attorneys should find mentors who are experienced litigators and ask for advice on a regular basis. This would include getting information about particular judges, opposing counsel, types of cases, and strategy.

MS: A litigator must understand that "mistakes" or "missteps" will happen, especially early on in a trial attorney's career. It is what we do with those mistakes that separate a good litigator from a bad litigator. A good litigator learns from their mistakes and uses the experience in a positive way. A bad litigator is one who denies that a mistake has taken place or becomes so paralyzed about making another mistake that they do not function to their full potential. With all of that said, there are a few ways to minimize some mistakes:

Be prepared. Give yourself plenty of time to review the motion, matter, or event that is scheduled to take place that day. Often times, lawyers will work up until the last minute on a witness outline or a demonstrative exhibit and will not give themselves time to put the pen down to rehearse and review. Don't wait until the last minute to make sure that you have everything you need: copies of motions or documents, rules of civil procedure, authorities, etc.

Simplify. Litigators in the early years of their career seem to get overwhelmed with the number of questions they can ask a witness, the number of arguments they can fashion in support of their position, or the number of documents that establish a simple fact. If there is a way to streamline and simplify, then you should. It will be more effective and will eliminate mistakes. There is no reason to make a 100-page witness outline if there are only a few points that are significant. There is no reason to make ten arguments in support of your motion if the first two are your strongest.

Spend time in court watching trials and law and motion practice. This is not the same as watching *Law & Order;* this is the real world with evidence, objections, process, and procedure. It is invaluable to sit and observe courtroom techniques and the judicial process.

When a mistake has been made, embrace it. Tell the judge or the partner or opposing counsel that you made a mistake and that you will fix it. Mistakes and problems do not go away if they are swept under the rug. You will gain credibility if you own the mistake and learn from it.

RT: Find a mentor that has tried as many cases as possible. Most smart, young lawyers can learn discovery practices and basic motion practice. High level persuasion is not common sense and runs counter to what law schools teach. If you chase politics and money to the exclusion of finding the right mentor and killer experience, your career will suffer. You will wind up one of thousands of lawyers with a commoditized skill set.

NG: What are some effective ways of managing work flow?

AA: One way to manage work flow is to stay on top of your calendar on a daily basis. Plan ahead and give yourself plenty of time to have work product ready for client/partner review well ahead of deadlines. A solid understanding of civil procedure is essential for a litigator. It is also a good idea to maintain a cordial relationship with opposing counsel to obtain an extension when the need arises.

NJG: As a first chair in a trial, I assign two team captains: one is responsible for the legal assignments, pleadings, papers, and managing key discovery throughout the case, and the second is responsible for work assignments, witnesses, and scheduling (internal and external). We hold regularly scheduled team meetings that focus on logistics and problem solving. As the trial draws closer, these meeting happen more frequently. Most firms now have FTP sites to which clients are invited. We use these sites as a depository for case documents, calendars, key evidence, demonstratives, and ultimately a virtual trial book. Additionally, managing work flow is a significant time investment. I like to carve out blocks of time for *big* thinking and "SWOT" team round tables that get the trial team out of the weeds and looking at the big picture.

JM: Over the years, I've used a number of different work management systems—from Franklin Covey to apps like To-do list. It doesn't matter which system you use as long as it is accurate, provides a ranking system by date, works for you, and you use it daily. We also create charts that are loaded onto our firm's system once we have the court's final schedule for deadlines, materials, etc. leading up to trial. We incorporate witness preparation, trial exhibit deadlines, time needed for motions in limine, jury instructions, etc. so that we work backward and include cushion for the inevitable last minute surprises that may occur, like a sick staff member or witness or other case emergency. Everyone in the office is assigned their tasks with deadlines (soft and hard) and works to meet them. If someone is getting backed up, they must communicate that so that others can pitch in to help.

NP: Work flow can be best managed by planning and organization. Check the calendar daily, but also look ahead to the next week, next month, and next year so that the attorney can schedule their work to meet the deadlines. This requires understanding the tasks necessary to completing the work on time and predicting how much time to allocate. For example, if an opposition to a motion to compel discovery is due in two weeks, the schedule should allow time for legal research, document review, locating appropriate exhibits, and drafting the brief, along with time for review by a more senior lawyer and/or client.

MS: Managing work flow is one of the toughest aspects of a litigator's practice. To do it effectively and efficiently you must be well-organized and disciplined. One helpful practice point is when calendaring an event or a deadline, don't stop at simply inputting the deadline. Think about how long it will take you to complete the item or project and block out those days and time to work on that item and be disciplined to follow your plan. You should leave some extra time just in case things take longer than expected. But if you adhere to your plan and adjust accordingly, you will have conquered half the battle. When something new comes along or a partner asks you to write another brief, look at your calendar and see if you can truly fit it into your schedule. If you cannot, you need to be honest and up-front with whomever you are working with so that they know your schedule does not have enough time in it for the project at hand.

RT: The most tempting bad habit is prioritizing by the fire in front of you. Young lawyers have to recognize what's important and produce superior, insightful work product. This will make you stand out from the crowd and will lead to more and more exciting, challenging projects. Massive document reviews are important to litigation and easy billable hours, but they are not the key to career advancement.

NG: What separates a great litigator from an average litigator?

AA: A great litigator, whether plaintiff or defendant, dictates the course of the litigation and exerts their agenda in the case by setting the pace of discovery and motion practice. An average litigator merely responds to the opposition without trying to dictate the terms of engagement.

NJG: Listening. Great trial attorneys actively listen to the speaker, whether it's the client, an associate, a witness, or the trial judge. I like to hear our client's witnesses tell the story in a narrative as part of trial preparation. At trial, I listen with my eyes as well as my ears. Juries and trial judges are expressive and provide reliable non-verbal cues. Also, rehearsal, rehearsal, rehearsal. Additionally, attorneys who try a case to verdict every two-to-three years are a rare resource in an AmLaw 200 firm. These experienced trial attorneys know how to employ trial consultants, including jury, graphics, and technicians in the courtroom to increase comprehension of the fact finder. Experienced trial consultants go to trial as many as four-to-five times a year in different courtrooms with different attorneys on varying types of cases. Experienced trial attorneys want that wealth of trial experience as part of the strategic team.

JM: Beyond intelligence, hard work, and the ability to present your client's "story" persuasively (textually and verbally), turning an average litigator into a great one includes a lot of hard work, extraordinary preparation, belief in your abilities, communication with your client, continual planning to achieve the client's ultimate goals, and the ability to negotiate effectively. Negotiation is important throughout the litigation, including an extension to answer/respond, discovery, and all the way through appeal and settlement. These skills can be improved upon and sharpened with each year of practice. Finally, great litigators know their facts cold and understand the applicable law. They don't just shoot from the hip.

NP: Great litigators think strategically, are meticulous, and plan ahead. The litigator approaches the litigation process with purpose and intention. Instead of being reactive, the attorney is proactive, developing the facts and theories of the case early in the litigation. Each step in the discovery and litigation process is with an eye towards motion practice and trial. It is impossible to predict which case will go to trial so a great litigator approaches every case expecting that it will be tried.

MS: The ability to communicate effectively and the agility to change positions and arguments with changed circumstances. A great litigator can present their arguments and positions in a clear and concise manner tailored to their audience. In complicated patent cases, the ability to communicate effectively about the scientific and legal principles is critical whether you are speaking with the judge or arguing before a jury. And while you may be prepared to argue a particular position or legal point, a great litigator must also be nimble enough to change

positions based on rulings of the court or if unanticipated evidence is introduced at trial. Additionally, a great litigator must be able to see the forest from the trees and stay focused on the key issue or point. Often times litigators get side-tracked with arguments, evidence, or issues that are irrelevant to the underlying cause of action or the primary focus of the case. A great litigator knows when to chase a foul ball and when to let it go; an average litigator chases everything, not focusing on the ball that really matters.

RT: The ability to take the complex and make it simple, understandable, and compelling. This is far easier said than done. Part of this is knowing what points to argue and not argue. Letting go of arguments is not easy for lawyers—they view life as a pinball machine; the more targets you knock down, the better your score. Real litigation, however, does not work that way.

NG: What are the best strategies for dealing with setbacks during trial?

AA: Setbacks are to be expected. Going into trial you need to have a handle on the case strengths and weaknesses and have some alternative strategies available. Even if things don't seem to be going your way at trial, don't rule out the fact that the opposition may still be willing to settle to avoid the uncertainty of a verdict.

NJG: Every team experiences setbacks during trial. Some are expected and some setbacks come as a complete surprise. First, learn not to react immediately to the information or event. Always appear positive and courteous in the courtroom. I practice reacting the same way to good and bad rulings so that my physical presence appears the same. Second, stay focused and be present in the moment because the trial continues to move forward. At the very next break, check with the trial team and the client to make sure all heard and experienced the same event. As a team, brainstorm and adjust the goals for the next session. At the conclusion of the day, set aside time to evaluate the scope and consequences of the setback event. Finally, take time to get some fresh air outside (even in the winter), away from the team to do some free thinking. Every setback creates an opportunity: see it and seize it.

JM: Appreciate that your case is not just one piece of evidence, but a body of evidence and work that you must consider, develop, and plan about how best to get your client's story in front of the jury/judge. Don't visibly react to any setbacks in a deposition, in the courtroom, or otherwise. Continue to fight hard, exhibit passion for your case, and continue to maintain credibility. Be prepared in advance of trial with procedural steps you can take if the setback includes an important, and unfavorable, decision by the judge.
NP: When setbacks occur during trial, it is important not to panic. Make a record for potential appeal in the courtroom and use the evening to rethink the approach. It may be that the attorney needs to shift their perspective and strategy and/or consider locating additional witnesses or evidence.

MS: Putting the setbacks behind you as quickly as possible and not letting them show. In every case, there will be setbacks, but you cannot allow them to infect the rest of your case, the trial, or the presentation of evidence. If it is a significant setback, you may have to focus on making an appellate record, but don't let the setback distract you from what you need to accomplish objectively. If it is an insignificant setback, then let it slide off your back and move on. Dwelling on the setback will not help your case, your client, or your credibility with either the judge or jury. And don't let the fact finder think or believe that the setback is so devastating to your case that they focus on that issue or problem and hold it against you. Think of the old comedy routine where the comedian falls down as he is coming onstage and gets right back up and says "I meant to do that." The ability to turn a negative into a non-event or even a positive is important to your case and your credibility.

RT: Don't panic. When it happens, you are likely more tuned-in and sensitive to it than anyone else. If you show panic, the jury knows points are scored. Remain composed. Look for your next chance to swing the pendulum back your way. The opportunity almost always arises and the jury quickly forgets the points scored against you.

NG: What are some effective courtroom tactics that give litigators a competitive edge?

AA: An effective tactic to give you a competitive edge is to make sure that you know your evidence inside and out. Litigators who are able to deliver clear and cohesive opening statements followed by precise cross examination can score points in rapid succession. That way you can keep the jury engaged in the subject matter of the trial.

NJG: I find a single theme that fits our client story that I repeat at every opportunity. I say it the same way every time and emphasize the point with exhibits and demonstratives. I start this strategy at the pretrial conference, continue during voir dire, and am relentless in my repetition throughout trial. I also use exhibits, demonstratives, and timelines throughout the trial. Good demonstratives simplify the case and support the main themes. I have been successful in getting timelines and other demonstratives admitted as evidence so that the jury can use the demonstratives during deliberations. We also teach our trial attorneys to listen to the witnesses, especially on direct, as if the witness is telling the story for the first time. The physical presence of a good listener helps the jury focus on the witness, and thus increases jury understanding of the testimony. Good trial attorneys mirror the witness, which helps convey the competence and credibility of the testimony.

JM: Connecting with the jury either during voir dire, your opening statement, or the examination of the initial witnesses. Be genuine and know how others perceive you, then use your strengths to your advantage. Ask those you trust for honest feedback to figure out what works for you and what does not. Great trial lawyers always establish the themes they use effectively in presenting their client's case—and will convey memorable words and phrases during the trial (and dispositive motion hearing) to support those themes. They will create mental pictures to describe the facts and they will use analogies and rhetorical questions. Let's face it, trials can be slow and boring compared to cell phones, iPads, and televisions. Jurors (and sometimes even judges) will lose focus if they are subjected to a monotonous, rambling approach. Try to minimize boredom, avoid unnecessary repetition, and change things up so that you keep the jury's attention.

NP: Be honest and credible. Do not promise what you cannot deliver. Make your case about what really happened and the true story. Juries and judges will see through efforts to argue the case without the evidence to back it up. Also, practice, practice, practice. Practice delivery of opening and closing to make it clear, understandable, and natural. Project poise and confidence, even when things are not going the way you expect them to be. Work on posture, facial expression, and tone. Use video of your practice to see how you come across. Ask colleagues and friends for honest direct feedback.

MS: Here are a few courtroom strategies that I find very helpful and effective:
Sharp and focused cross-examination. Identify the three or four most important points or admissions that you need to establish and leave the rest behind. Make the questions short, simple, and clear and the jury will remember your cross-examination. If you try to attack every detail in a long drawn out cross-examination, the jury is unlikely to understand the significance of your cross-examination or remember it when it comes time for deliberations.
Use simple and clear demonstratives. Demonstrative exhibits are so effective with both the judge and the jury, but they have to be crisp and clear. Do not try and pack your entire case into a single slide and do not overwhelm the fact finder with hundreds of slides. Make the demonstratives count.
Use the jury instructions and verdict form in your closing. Show the jury exactly what you want them to do when they deliberate. After closing arguments, the judge will instruct the jury on the law with a long litany of instructions, which the jurors will quickly forget when they start deliberating. Identify the key instructions and focus the jury in closing on the most important instruction, how to apply the instruction to the evidence that you adduced at trial, and then how to fill in the verdict form based on your theory of the case.
Treat everyone in the courtroom with respect, especially court staff and opposing counsel. The court staff (reporter, clerk, deputies, etc.) can provide help and support in handling witnesses, documents and other logistics, and making your trial life easier and smoother goes a long way with the jury, the judge, and your own endurance. But even more important, being courteous and kind to court personnel and even opposing counsel will enhance your credibility with the judge and jury, who are carefully watching everything you do.

RT: There is one key skill that will give you a huge edge. Gain the confidence that you know your case—both facts and law. Learn to use notes sparingly, whether for openings, examinations, or closings. You will be amazed at just how well you do without the extensive notes that seriously inhibit your ability to persuade. Talk to the jury or judge from the heart and from what you know. It is far more effective.