

TWENTY SUGGESTIONS TO INCREASE COURTROOM EFFECTIVENESS OF THE INEXPERIENCED TRIAL ATTORNEY

As a young trial attorney, I unwittingly made a number of strategic errors during courtroom presentations. Undoubtedly, this resulted from the all but forgotten practice of elevating substance over form. As I gained experience as a lawyer and learned to elevate form over substance (a more popular practice among experienced attorneys), I noticed that many young lawyers made many of the same mistakes I had made.

Having now been placed in the position of a neutral observer, freed from the bonds of being immersed in the facts and certain strategies, I embarked on this project to compile a list of bad practices that, at least in this writer's view, tend to reoccur with the inexperienced attorney. Some of these may seem oversimplified or obvious. If that is the case, then you can rightfully claim that you have successfully made the transition from a champion of substance to a true practitioner of form. Short of that accomplishment, I submit for your consideration (in no particular order), the following twenty suggestions as ways for an inexperienced trial attorney to improve his/her effectiveness in the courtroom.

1. Do not wait until the eve of trial (or, even worse, the middle of trial) to file/urge any motion that depends on an analysis of the law.

While a Motion in Limine filed just prior to voir dire may be sufficient to obtain a correct ruling on "boiler-plate" matters, many lawyers also wait until that time to include complicated motions dealing with complex issues. This affords the judge little or no opportunity to review the case law/statutes and give consideration to any evidence which may bear upon the issue. Many courts (mine included) will hold a pre-trial conference in advance in an effort to avoid this situation. If pre-trial conference cannot be heard in advance, you should consider filing a pre-trial motion and request a hearing in advance of the trial date. Depending on the ruling, it may allow you to focus your trial preparation on fewer issues and, hopefully, allow you to be better prepared.

I have also been faced with the dilemma of conducting hearings and making rulings during trial on matters that the attorneys knew would arise but did not address in advance. This forces the judge to make a relatively uneducated decision or, even worse, to keep a jury waiting while the attorneys and the judge scurry around looking for the law. Studies have shown that one of jurors' primary complaints about "the system" is that they are often kept waiting outside the courtroom while the court "takes up a procedural matter". By taking up procedural/evidentiary matters in advance of trial, this can be avoided.

2. Organize your exhibits before trial and have exhibit stickers on them.

If you cannot bring yourself to pre-mark (i.e. pre-number) your exhibits, at least take the time to have the stickers on them before you mark, identify and offer. Over the course of a trial, you will save everyone a lot of time by avoiding the unnecessary exercise of handing the exhibit to the court reporter to place a sticker on the exhibit and mark it. This makes you look efficient and will build the jury's confidence in you.

3. Develop a system to manage your exhibits.

Have a printed checklist of all your exhibits with columns to mark indicating that an exhibit was (a) offered, (b) admitted or (c) excluded and, if appropriate, (d) offered for a bill. I have seen numerous attorneys mark an exhibit, examine the witness to identify the exhibit and then move on - only to forget to offer the exhibit. You should also compare your list with the official court reporter's list during breaks to make sure you have offered all your exhibits before you rest or evidence closes.

4. Obtain rulings on any objections to video depositions before trial and edit the tape accordingly.

Frankly, I think the verdict is "in" on video depositions and the simple truth is that most jurors do not like them. The soporific quality of the deposition will only be enhanced if the tape is constantly stopped to skip over excluded testimony or, even worse, to argue the objection and then skip over excluded testimony. This, like many of these suggestions, makes pre-trial preparation more difficult but it will pay dividends where it counts most - in the courtroom.

5. Remember, neither the judge nor the jury are familiar with the facts/issues of your case.

Any given fact may be of paramount importance to you but the jury and (in many cases) the judge have no underlying knowledge of the case to place the fact into context. Often, too much reliance is placed on the opportunity to "piece it all together"

during closing argument. Having practiced 14 years, I, hopefully, (emphasis added) can anticipate better than the average juror where an attorney is going with a particular point. Nonetheless, with some frequency, I find myself baffled as to the significance of a fact that an attorney repeatedly hammers home. More often than not, it does come into context later but, by that time, the impact may be lost on the jury.

Given the unique opportunity to view the jury as I do, I often note that the jury "just doesn't get it". Since nobody wants to concede their mother was wrong about them, jurors tend to assume the attorney is bogged in obtuse theory and move on to important thoughts like golf, the next cigarette break or, if they are really bored, whether the attorney owns another pair of shoes.

Take the time to carefully map out (not argue) the evidence and issues in voir dire (be aware of the particular judge's approach to discussing such in voir dire) and opening statements.

6. When discussing your case (voir dire, opening statements, closing argument), avoid terms like "we feel" or "our position is".

I know you will be shocked and dismayed to learn that some jurors can be skeptical of what lawyers have to say. If you use terms like "our position is", the average juror will interpret this as something along the lines of "here's our story and we're stickin' to it". Furthermore, do not be offended, but, in most instances the jury probably does not really care what you "feel".

When discussing your case, speak in terms like the "undisputed" or "credible" evidence establishes a certain point. Do not use any terms that allow the jury to disagree with you or your position, rather, structure your argument so that an adverse answer to a jury question must be contrary to the evidence and the jury's oath to follow it.

7. Have multiple copies of exhibits to provide to opposing counsel and the judge.

Obviously, this is not possible in every instance. For example, this cannot be done with actual objects, enlargements (if offered) or voluminous documents. To every extent possible, when non-voluminous documents are going to be offered, provide copies to the court and opposition. Too often a document is marked and the attorney questions the witness to identify the document. After offering it, the attorney then has to give the exhibit to opposing counsel - who must then review it. Inevitably, opposing counsel has an objection and the document must be tendered to the judge for review. If a copy is provided to each at the outset, much, if not all, of this wasted time can be avoided. As stated above, jurors are impressed with efficiency and preparedness and that tends to boost your credibility. In a close case, it may all come down to credibility.

Similarly, when reading portions of a deposition into the record, provide the court with a copy so that the judge can read along.

8. When questioning a witness from an enlargement, flip chart or diagram, try to position the easel where the judge can also see the chart.

Nobody likes to be left out, even (if not especially) the judge. While it is certainly more important for the witness and the jury to view the chart, etc., if it can be positioned so the judge can see it, do so. The matters demonstrated may be of factual significance to a later evidentiary ruling or, equally important, a matter of submission. If the judge has not seen it, you will lose the benefit of that evidence. At a minimum, the judge does not feel left out. After all, studies have shown that a fairly significant percentage of judges are human.

9. Perfect the art of objecting.

Studies have shown that an even higher percentage of inexperienced lawyers (than judges) are human. Naturally, you do not like rejection. Do not throw in the towel, however, if your first objection is overruled. If you are confident that an item/question is objectionable, keep objecting. The only bad thing that can happen is that you are overruled again. If the judge's patience seems to be dwindling, simply inform him/her that you do not want to waive any objection and perhaps you will get a running objection. In the alternative, opposing counsel may simply move on. Even better, the judge may gain some new insight and sustain the objection.

Likewise, if your first objection is sustained, do not grab your trophy and head to the house. I have seen a number of attorneys object to a question by opposing counsel with good reason. After the court sustains the objection, opposing counsel asks the same question with only a slight variance in an equally objectionable manner but there is no objection. Probably the most common scenario involves a sustained objection to a leading question. Typically, the interrogating attorney continues right on leading the witness without objection. The point to be made is this - if the objection is worth making once and is sustained (if it is overruled, see the paragraph above), it is

meaningless if you allow your opposition to barge ahead with the same objectionable question/evidence.

10. If objectionable evidence/testimony
being produced or an objectionable question being
asked does not hurt you, consider whether
you really want to object.

Despite instructions from the court to the contrary, some jurors interpret objections as a technical/procedural effort to prevent them from hearing the truth. I believe most jurors pick up rather quickly, however, that trials are governed by evidentiary rules. In fact, many of them even come to understand them. I have, on at least one occasion, looked up to see that several of the jurors had affirmed en banc my ruling as to an objection by nodding their heads "yes".

On balance, however, needless objections (especially if repetitive), even if technically correct, should be avoided. Therefore, if you are confident that the objectionable question/ evidence does not hurt you, consideration should be given as to whether you really want to object in the first place.

11. Do not ask for numerous bench conferences.

Simply put, jurors do not like bench conferences. They feel left out and often feel they are witnessing some sort of collusive effort. Moreover, excessive bench conferences are a waste of time.

Obviously, some matters have to be taken up at the bench outside the presence of the jury. Far too often, however, inexperienced attorneys ask to approach the bench only to lodge an objection to hearsay or some other basic matter just because they are reluctant to object in the jury's presence. After several of these, the jury tends to view the attorney as "running to mommy" with every problem rather than "slugging it out"; which is, of course, what they "paid" to see.

There is even a more basic danger inherent in using bench conferences to make objections. Unless the particular court reporter is equipped or positioned to take bench conferences, the objection/ruling will not be in the record. For this reason, try to limit bench conferences to the few legitimate instances where they are warranted and make sure the reporter takes the conference.

12. Once you have established a point that helps your case or hurts your opponent's (such that you can legitimately argue it), do not dwell on it.

Far too often inexperienced attorneys insist upon dwelling on a subject that has been favorably established. Given enough opportunity, any witness is likely to give testimony that "clarifies" a certain point and reduces its effect. While opposing counsel may ask questions that attempt to diminish the effect, a jury may perceive this to be self-serving and less damaging to the initial point than a spontaneous response to your repeated questioning. In light of that fact, once you have established your point, move on quickly and do not dwell on it such that the witness can recant, contradict or clarify it.

13. Avoid side-bar.

While a cynical statement may appear to be effective (not to mention really feeling good), juries can view side-bar as a "cheap shot". If the court sustains an objection and/or, even worse, admonishes you for such, the jury will tend to disregard legitimate criticism of the opposition's case. As a corollary, do not include nasty little diatribes in the text of a question either. Questions, whose premise ridicules your opponent and/or their position, can be viewed as equally offensive.

14. Do not confer with your co-counsel or client while the opposition questions a witness.

I have seen a lot of objectionable testimony come in unchallenged because counsel was busy conferring with co-counsel or the client. Tell them to write any suggestions/comments down so that you can concentrate on the testimony as it comes in. Few attorneys are talented enough to simultaneously listen to the testimony and confer with someone at their table. Moreover, if someone is constantly whispering in your ear, the jury may misconstrue this as being unprepared or uninitiated.

15. Do not publish a document to the jury and then continue to question a witness.

Just as most attorneys cannot listen to co-counsel and a witness simultaneously, few jurors can read a document and listen to a witness at the same time. Structure your examination so that you publish documents after you have finished. If you are lucky, your opponent will make the mistake of questioning the witness while jurors are busy reading the document you have just published.

16. Do not allow your opponent to mark on your exhibit.

If a diagram/chart is your product, you have the right to have the jury view it in the form you have developed it especially if it has been admitted as an exhibit. Often, inexperienced attorneys are reluctant to stand up for that right. The obvious concern is that they feel a jury will construe their refusal (to allow opposing counsel to alter it) as obstructing the truth. This is a valid concern but an objection can be couched in terms to diminish such a perception. For example: "Your Honor, if opposing counsel wants to prepare his/her own diagram, I have no objection but I believe this diagram/chart fairly depicts the accident scene/ chronology/witness' testimony, etc. and I object to counsel altering my exhibit."

17. When questioning a witness at the witness stand from a document/chart, etc., do not position yourself so that you block the view of any juror.

This may be difficult given the layout of the particular courtroom. Nonetheless, to every extent possible, position yourself so you do not block the jury's view. Jurors often interpret a lot from the demeanor of the witness. While they may not entirely grasp the significance of a

particular fact or admission, they can all recognize that a witness is really uneasy. Stated differently, let the jury see the witness sweat.

18. Never let them see you sweat.

Never, ever react strongly to miscues or testimony. Jurors routinely look for attorneys' reaction to assess the damage. Facial expressions can be very telling. A truly experienced trial attorney will perfect the art of an appropriately stifled yawn or looking terminally bored while even the most damaging evidence/testimony comes in. If you have to, take notes (or, at least, pretend to) so that you are looking down and the jury can not see the look of terror or devastation on your face.

19. Gain credibility with the jury by conceding the obvious.

Do not quibble over meaningless matters if they are self-evident. The paranoia that, inevitably, besets trial attorneys tends to make them want to contest everything. If you deny the obvious, a jury may question the basis for every denial you make. This can hurt you if you have a legitimate basis to deny a certain point. Nothing tends to build more credibility with the jury than appearing to honestly concede issues/evidence that should be conceded so that the jury can concentrate on the bonafide issues.

20. Unless you have found yourself lamenting that your life lacks excitement, do not ask a question that you do not know the answer to.

For some reason, inexperienced attorneys, in the never ending quest for truth, repeatedly venture into the realm of the unknown. Those who have done so, will usually have the scars to prove it. Remember, the truth within the context of a trial is essentially any unimpeached or

unrebutted statement by a witness. Presumably, if you have done a good job in discovery, you should be able to establish the points you wish to make by asking questions to which you already know the answer.