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Trial Practice – The ABCs and Beyond

Veteran Civil Litigator's Tips for Success

For the courtroom novice, here's a list of basic rules of conduct based on missteps I've seen in the courtroom in recent years, some by not-inexperienced litigators. This list is far from comprehensive. Thus, nothing is said about openings or closings, and very little about cross-examination. (Perhaps in another article.)

1. Standing.
   a. If you want to question the witness while seated (as you may if you are juggling exhibits), don't just start that way. Ask the judge if he has a preference as to whether counsel sit or stand. Most judges don't care.
   b. If you are seated and the judge addresses you, stand up.
   c. If you are seated and are about to address the judge, stand up.
2. Interrupting.
   a. Don't.
   b. Do not interrupt the judge.
   c. If the judge interrupts you, keep quiet until he/she finishes.
   d. Think of the judge's interruption as an opportunity to learn, even if – especially if – what he or she says is unfriendly to your position.
   e. Do not interrupt opposing counsel.
   f. If opposing counsel interrupts you, say, "Your Honor, I did not interrupt Mr. X." Usually the judge will tell opposing counsel to keep quiet.
   g. But, if the judge does not stop the interruptions, feel free to respond in kind until the judge takes control.
   h. In one of those rare situations where you must interrupt, do so as courteously as possible. (And, before interrupting, ask yourself again if you really must.) One way is to stand and wait for opposing counsel to finish the thought and then say that there's a point that should be flagged right away. The judge may let you speak or may not. If he tells you to sit down, do so without further comment.
3. Arguing.
   a. Argue to the judge.
   b. Do not argue with the judge.
   c. If you argue with the judge, you will lose – every time.
4. Your target/your audience.
   a. Usually, the witness will be your target. If it is your witness, you will be asking questions to elicit his or her facts. If it is the other side's witness, you will be looking for some helpful sound bites.
   b. But, the judge and the jury are your audience. So, be sure they can follow what you're trying to bring out. Thus, if you are questioning about an exhibit, have a copy for the judge and a blow-up for jurors, perhaps with the key language highlighted. Consider using an overhead projector – but don't do that just because you can.
5. Exhibits.
   a. My preference in a non-jury trial is to have a separate exhibit book for each witness to be given to the judge, the witness and opposing counsel when the witness takes the stand. That way you can move quickly and smoothly from one exhibit to the next.
   b. An overhead projector works well in a non-jury trial too.
   c. If you want to approach the witness, ask the judge's permission. It's the judicial equivalent of Giant Step: if you ask permission, it will virtually always be granted; if you do not, the judge may reprimand you for not doing so.
   d. Aim to get agreement with your opponent as to how exhibits will be marked. The ideal arrangement is to use the same numbers as at depositions. That way, if you want to ask the witness about what he said about Ex. 17 during his or her deposition, you don't have to keep explaining that such document is now Ex. 222. Mark the first document at the first deposition Ex. 1, and run the numbers from there. That way, if 25 depositions are taken, there will only be one Ex. 1, not 25 of them. If your opponent wants to batch his separately, he can start at 501 or some other number. If there are deposition exhibits that will not be used at trial, just drop those numbers.
   e. Aim to get some agreement as to admissibility of exhibits. Sometimes the parties will agree that all exhibits are admissible, sometimes only that they are authentic. Whatever deal you get will help to speed things along at trial. Caveat: agreement that a document is authentic is not agreement that it is admissible.
   f. In the absence of agreement, remember to move into evidence at

the end of each witness's testimony whatever exhibits you used with him unless you don't want some of them in the record.

g. If there's an exhibit that is going to be used often during the trial (e.g., the contract at issue), have extra copies handy. Some witness will ask to see a copy and having extras at hand will avoid delay.

h. If that happens during your opponent's questioning and he does not have an extra handy, offer one of yours. It does not cost you anything and, in a small way, shows confidence on your part; moreover, the judge and jury may see you as a "mensch," never a bad thing. Besides, it avoids the embarrassment of the judge saying to you, "Do you have an extra copy there? For goodness sakes, give it to him." The net result of which is that, instead of being seen as a well-organized good guy, you look like a petty schnook.

6. Tech guy.

If you are going to use one, practice with them so that things run smoothly in the courtroom. Notwithstanding Allen Iverson's dim view of "practice, man" – this is a situation in which there is no substitute.

7. Direct Examination.

a. Don't overlook its importance.

b. In her mind's eye, every trial lawyer has this vision of a truly excellent Walter Mitty moment. It is always, always on cross-examination. And it always envisions the lying conniving key witness on the other side being exposed as such by your withering cross-examination, which reaches a crescendo with a single killer question. We seem to be more interested in punching holes in the other side's case than in presenting our own in a compelling way.

c. Years ago, before I had a case with the legendary Jim Beasley, I asked a more senior lawyer what was so great about Beasley. The answer surprised me: "Direct examination." He explained that Jim elicited the key facts with the fewest possible questions. The cross-examiner then confronted a choice: ask no questions, in which event the testimony stood unchallenged; or ask questions, which always seemed to elicit additional harmful facts, which carried more force just because they came out on cross. Crafting that kind of direct is not just organizing the witness's facts.

d. If there is something harmful to your side that your opponent is sure to push, bring it out yourself but without saying that it is the other side's contention, which will elicit an objection that you're not stating its position accurately, that you're trying to cross-examine your own witness, etc. Just get to the essence of the potentially harmful information, as in:

- At that time, did you know fact X?
- Did it occur to you that, in light of fact X, you should take action?
- Tell us why, even though you knew X, you did not take any action.

There are a couple of advantages to this approach. First, when the cross-examiner gets into that subject, the jurors will not think, "The other lawyer did not bring out that important fact." Instead, they are more likely to think, "The witness just explained that." Second, by reason of having just given the jurors her explanation in response to your non-threatening questions, the witness should feel more comfortable in dealing with the same questions on cross.

8. Cross-Examination.

a. There is a style of cross-examination on "60 Minutes" that goes:

- "Did you ever tell the Atomic Energy Commission of this dangerous condition at the XYZ nuclear power plant?" Answer: "No."
- "You never told the AEC about this dangerous condition at the XYZ plant?" Answer: "Right."
- "You're saying that you never advised the AEC of this dangerous condition?" Answer: "Right."

b. Though it passes for probing cross-examination in the popular media, I find it maddening. If the fact-finders are engaged in your cross, they will react the same way. Some trial lawyers might argue in favor of repetition of a good answer. Just not my style. You need to find yours.

9. Use a checklist.

Keep a master checklist, preferably no more than a page, of what you expect to happen at trial. Such as:

- Argue motions in limine

1. Motion to exclude evidence of XYZ
2. Motion to limit testimony regarding XYZ

- Jones [your first witness]
- Move Exs. 2, 4 and 6 into evidence
- Smith
- Move Exs. 7, 11 and 15
- Move for JMOL.

You will be tired and under pressure during the trial, the judge will be nudging you to move along, and your opponent will not be looking to be helpful. It's easy to make a mistake in those circumstances. A good checklist will help to avoid the risk of overlooking something.

10. When to raise issues.

It can matter. An example makes the

point. In a recent non-jury trial, the judge who managed the case pretrial had ordered that certain disputed funds should be paid into escrow, but that order was to remain in place only until trial. The case was assigned to a different judge for trial. When and how should one first raise with the new judge the request that he extend the escrow arrangement? Not an easy question. Your decision is much more likely to be sound if you have thought it through.

11. Your turn to talk.

Jim Leyden, an old guy when I started practicing (somewhere in his 50s), had tried hundreds of cases. He often told these Aesopian trial tales, followed by the moral. For one the moral was: "Don't talk just because it's your turn." As with most of Jim's insights, it is sound advice outside the courtroom too. (Ever hear anybody say, "His problem is he doesn't talk enough"?) You are constantly making that decision on the trial level: should I open; should I object; should I cross-examine; should I put that question to this witness; etc. Here's an excerpt of opposing counsel's cross-examination in a recent trial. It was "my turn to talk" via an objection at two places, each time immediately after opposing counsel spoke. But, because the witness was handling himself well, I kept quiet. It went this way:

> Opp. Counsel: In light of your testimony that [mischaracterizes testimony], isn't it then true that XYZ?
>
> Witness: You've mischaracterized my testimony.
>
> Opp. Counsel: I don't think I have.
>
> Judge: I think you did.

Usually you'll want to make the objection to the mischaracterization. But, "Don't talk just because it is your turn."

12. Going beyond the ABCs – your credibility.

Keep in mind at all times that your primary objective is to establish your credibility – with the judge, with the jurors. If the judge is not sure that she can rely on you to accurately state the case law, you have become a much less effective advocate. If the jurors are not sure that you will fairly recapitulate the facts, you have diminished your ability to persuade them. Keeping that in mind will make it easier to deal with the unexpected issues that arise in any trial. Your simple guide will be, "Do the right thing."

13. Let your personality show – make it interesting.

There are times when you have to make a plea that you know the judge will be inclined to reject. To state the obvious, try to figure out a way to get him to think again. Here's an example. In a recent trial, the judge remarked more than once that he was going to recess at 4 o'clock, no matter what. At 3:40, I put on a witness who very much wanted to complete his testimony that day so he could return to New Orleans for an important meeting the next day. So, when the witness took the stand, I started with, "Your Honor, one of my mentors once remarked that there are times in a courtroom when you have no choice but to beg." The judge started to smile, listened, and then remarked, "We'll complete this witness today." And we did. I'm not suggesting that you act the wise guy. But there is usually a way to improve your chances. All part of the advocacy game.

You don't want to be saying it too often but nothing establishes credibility faster than the simple statement, "I made a mistake."

14. Admit mistakes.

If you made a mistake, own up to it – without attempting to suggest that it was really somebody else's fault. In fact, if somebody else on your team makes a mistake, take the blame yourself. You don't want to be saying it too often but nothing establishes credibility faster than the simple statement, "I made a mistake." If appropriate, sometimes you can stop short of that by saying, "If I were going to rewrite that page of our brief, I would say it differently. I would say XYZ." Or something like that.

15. Try to engage the judge.

a. Picking up on paragraph 2d, above, look to engage the judge after she has asked some question unfriendly to your side of the case. The best way to do so is to give a direct answer to the question. Sometimes you may decide to make some preliminary comment. Do not say, "That's a great question, Your Honor." It comes across as painfully patronizing. It's better to say something like, "I've been thinking about that question since I first got into this case." Suggests, without being obsequious, that it's a question very worthy of consideration, and yet one you're confident you can deal with. After that exchange, how can the judge not be interested to hear the answer to come?

b. A harder challenge is when you've poured your heart and soul into an argument and the judge is not buying it. For what they are worth, here are a few rejoinders I've used, sometimes to good effect:

- "Your Honor, I'm just not saying it right. Because I know the case law supports what I'm trying to say. Let me try again." Suggests that the deficiency is with your powers of articulation, which is always better received than suggesting that the deficiency is with the judge's powers of comprehension.
- Or, if there is nothing else to say, "Your Honor, I once read that sometimes the first reaction to effective advocacy is disagreement. I'm going to hope this is one of those times. Let me take another stab at this."
- Appeal.

16. Two final thoughts.

a. There is a reason they call it a trial.

b. It is not just the case that is being tried. ■

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