Courtroom Challenge: Preparing For A First Trial

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August 11, 2014
Law360

Trials are stressful. Even seasoned trial lawyers get nervous, but there is a certain kind of nervousness that comes from the fear of being embarrassed. This is especially true for an inexperienced lawyer trying their first case or two. How to examine witnesses, how to cross-examine witnesses and how to craft arguments are not mechanical and can only be mastered through experience. Learn everything you can about where to sit and stand in the courtroom, how close you can be to the witness and the jury, and who goes first in jury selection, opening statements, witness examinations and closing arguments. You can learn all of this and much more from colleagues and any number of books. This will reduce nervousness from the fear the judge will yell at you for doing the wrong thing, which will allow you to focus on your client's plight instead.

Learn as Much as You Can About Your Trial Judge

Send an email around to lawyers in your office, bar association networks, etc., asking if anyone has had experience with your particular trial judge, especially if they have tried a case in front of the judge. Then, time permitting, try to sit in and observe your judge presiding over a trial before yours. If nothing else, it will help reduce the nervousness that comes with the unknown. Further, if your case is in federal court, track down one of the recent clerks for your judge and ask him or her as much as you can about the judge's trial preferences and demeanor. They can be a wealth of information.

Watch Other Judges Try Cases

Go to the courthouse on some free morning or afternoon and spend two or three hours there observing portions of one or more trials. Observing the pace, tone and logistics of various other trials will be yet another way to make yourself feel more comfortable in your own trial.

Do Not Worry About Whether Your Time is Billable

Many senior litigation partners at AmLaw 200 firms have never talked to a jury. When you are given an opportunity to do so, you must seize it. Preparation undoubtedly will require substantial time on the side where you must read, study, analyze and think through trial issues which to a large degree may not be billable time at all (and will be on your time). Don't worry about it. If you are given the opportunity to have an on-your-feet role in a trial, now is not the time to worry about whether it

counts toward any applicable hours requirement; you may never get a second chance.

There is No Such Thing as Being Too Prepared

Just because you are an inexperienced lawyer does not prevent you from knowing every document, fact and witness better than anyone else involved in the case. As President Dwight Eisenhower once said, "Plans are useless, but planning is indispensable." Preparation allows you not only to prepare your case in the most advantageous way, but to change course when needed, improvise and adjust, especially during cross-examination.

Google Your Client/Witness

Social media can be your best friend and worst enemy during trial. While we can learn everything there is to know about the other party, opposing counsel and even certain jurors, do not assume that you know everything there is to know about your client/witness. This is not to say that your witnesses have been dishonest with you, but as nonlawyers they might not think that certain information is important to the case.

First, interview your client/witness and ask them what social media and websites they are members of or operate. Second, if certain information or images may be perceived in a negative way — or could actually be used as evidence in your case — ask your client/witness to take their post(s) down during the weeks leading up to, and including, the trial. Finally, play it safe — Google them! Googling your client/witnesses will allow you to find sites you may not personally be familiar with or think to ask them about (e.g., Twitter, blogs, etc.,).

Clear Your Calendar — Your Life is Booked

When a case is getting ready for trial — and definitely when you are in trial — you have no other commitments and no other priorities except the trial. If you are flying solo or working with a more senior lawyer, you must be available any time day or night for anything that is needed. The flip side of that is that the rest of the legal world, if they know anything about trials, knows that the phrase "I'm in trial" means "Please leave me alone and do not bother me until I finish."

Know All the Applicable Court Rules

There are many of them. In addition to the rules of civil procedure, there are the rules of court, county/federal district rules, and many times judges have their own rules as well. Find and read them all.

Master the Evidence Code

Always bring a copy of the Evidence Code to trial with you no matter how experienced you become. And, as a more junior lawyer, skim through it all cover to cover — read closely the civil sections several times before your first trial.

Agree With Opposing Counsel to Make Life Easy on Both of You

Examples of this include agreeing to use mini deposition transcripts in lieu of the voluminous full-sized copies. Agree on the admissibility of all documents and premark them. (Nothing will put a jury to sleep faster than marking and authenticating documents in their presence.) Talk to each other beforehand about what witnesses will be called and roughly how long each will take. Most judges will not allow its lawyers to run out of witnesses before the jury's day is complete, unless they have been given advance warning — in general anything that wastes the jury's time is not going to go over well with the judge or the jury.

Make Sure You Get One Witness

You haven't really tried a case until you have spoken on your feet in front of a jury. No matter how complicated the case, no matter how many lawyers are staffed on it, if you have to get on your hands and knees to beg to personally perform the examination of at least one witness then do so. Standing at the podium with all eyes in the courtroom glued to you changes everything. Direct examination of a friendly witness is the best place to start. (Cross-examination can be very dangerous and best left to more seasoned lawyers, if that is an option.)

Make Sure Technology Works

Make arrangements with the clerk to get to court early and make certain that your videos, PowerPoint presentation, overhead projector, Elmo, DOAR, TrialDirector, etc., all work perfectly before the jury arrives.

Juries See Everything

First, always be courteous, civil and professional, it is the right thing to do. But, if this is not enough of an incentive, juries will resent (rightfully so) any lawyer they perceive as being unprofessional, and will especially resent a lawyer who acts professionally to other lawyers in the courtroom while not acting the same toward court reporters, bailiffs or clerks. Jurors are perceptive and they are watching you. Everything you do in the courtroom, even when you are not questioning a witness or your client is not on the stand, may impact how the jury views your client and his/her case. Social cues and body language are huge. For example, if your client or witness is slouched down in her chair and appears disinterested, why should the jury be interested? The same goes for other areas of the courthouse and neighboring streets. Wait to speak with your client/witness until you are sure you are in a private place and can speak freely. And before trial starts find a bathroom your jurors are unlikely to use.

Stand When You Speak in Court

Do the same when the jury enters or exits the room.

Speak Your Mind

Even if you are a more junior member of the trial team, your role is not simply to carry boxes back and forth to court. Freely share your thoughts about witnesses, themes and strategies, including giving them in real-time as trial is ongoing. The more experienced members of the trial team sometimes may have trouble seeing the forest for the trees because they have become so accustomed to their own personal trial styles. If you are not following the significance of a particular witness, fact, document or theory, it is a good guess the jury is not either.

Trial Examinations Are Not Depositions

A common mistake for lawyers in their first trial is to draft their examinations as though they are drafting a deposition outline. This is a huge mistake, especially on cross-examination. Similarly, the objections that can be made into questioning at trial are completely different than the standard deposition questions. Whereas in a deposition objections like speculation, vague and ambiguous are uttered more than most, these are seldom useful in front of a jury. Conversely, in depositions objections for irrelevance, hearsay and leading are either inapplicable or impermissible — these are the big three when it comes to trial objections. Indeed, relevance per se is not a deposition objection at all, but it is the most important trial objection available. One of the most challenging things for a lawyer in his or her first trial is "defending" the cross-examination of his or her witness by the other side. Knowing when to object takes a split-second response time and is usually better handled by a more seasoned lawyer, if available.

Your Outline is a Guide — Not a Script

Before trial begins you should have an examination outline for every witness you intend to question on the stand, both on direct and cross. However, this outline is exactly that — it is not set in stone and should be edited, reduced or added to based on the testimony given at trial.

One temptation for young lawyers, both in deposition and at trial, is to simply move down their outline and check questions off one by one. This process is safe and ensures the lawyer does not miss anything. However, like depositions, trial testimony does not always go exactly how you expected it would. Your own witness may say something unexpected or miss your not-so-subtle prompt to say the response you discussed during preparation.

Conversely, your adverse witness may decide to play hardball when at his deposition he was relatively amicable. At these times you will need to go off-script and respond to what was just said and either gently prod your witness or actively pursue the answer you want. Moreover, there may be times when

you will want to shorten your questioning, rather than lengthening it. The jury will become resentful if they feel you are belaboring a point. If the testimony sounds repetitive to you, it certainly does to them. Once you feel you've adequately hit all of the elements of your claim or defense and the jury has the information it needs, feel free to move on.

Cross-Examination Is Dangerous

If during your first trial you are cross-examining adverse witnesses, keep in mind the following: First, it is almost impossible to win a trial through the other side's witnesses. Every once in a great while it happens, but more often than not arguing with your opponent's witness simply allows your opponent to score points during your questioning. When you are questioning, only you should be scoring points. Second, which is a corollary of the first, cross-examination is about ratios. Whereas during direct examination the most important person in the room is the witness, during cross-examination the most important person in the room is you. Cross-examination is your opportunity to make a series of one-sentence arguments to which at the end of each the witness must agree. Accordingly, it is better to ask 20 questions and receive 20 perfect responses, preferably in form of a yes or no, than to ask 100 questions and receive 50 positive responses. Whereas in the latter instance you are receiving more positive responses (50 vs. 20), you are only scoring on 50 percent of your points (as opposed to 100 percent in the former). In other words, during your chance to be the star the witness is stealing at least half of your thunder. And, unless you are absolutely sure you know the answer, during cross-examination never ask, "Why?"

Stay Calm

Something is bound to go wrong at trial; your witness will answer a question the exact opposite of how you practiced it, an adverse witness will suddenly remember something they "forgot" during their deposition or your computer will freeze at the exact wrong moment. No matter what happens, stay calm. If your opponent strikes a point, don't let them or the jury know it got to you. Very often, the moments we think are terrible for our case are not as significant to jurors. If you do not have an outward reaction to something, the jury may not realize its importance. The same can be said when questioning a witness. If she says something you do not like, rather than trying to fix it — which sometimes, you absolutely need to do — you may just want to move on if the point is not critical for your case. Asking more questions could just draw greater attention to the issue.

Have Fun!

While trial can be stressful and is a significant amount of work, it should also be fun. For litigators, trial is our Olympics. Some of us may try several a year, but they are still fairly rare. Every trial is a fantastic learning experience and provides you with the opportunity to hone your skills. So, amid the strategizing, practicing and occasional moments of stress, take a moment and enjoy trial, because you

will be back in the office soon enough.