The Do's and Don'ts of Trial Practice, Trying Your First Case

Young Lawyers' Panel: "The Do's and Don'ts of Trial Practice, Trying Your First Case"

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The genesis of this panel was a dinner among trial lawyers, sharing some harrowing experiences during our early years as trial lawyers; and, yes, even if you are a second year associate diving in for your first jury trial, you are a trial lawyer. A special breed we say, but I am not so sure. If you have it within you to

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be yourself, to be honest with the evidence (written and testimony), and you have the will to prepare, you can be a trial lawyer. Bear Bryant once said, "It's not the will to win that makes you a winner; it's the will to prepare to win."

So, against this background, that dinner evolved into a discussion of the many mistakes we all had made – grateful really for them as they "happened" over the years of experience and practice. And, we all lamented that the era of young lawyers trying many cases had really slipped into that sea change referred to by the ABA Section of Litigation as the era of "the vanishing trial."

How can young lawyers make mistakes and, therefore, learn to become experienced trial lawyers when cases simply are not going to trial? And, so, with only one hour, we have devised a panel of speakers to address mostly the "don'ts" that then reveal the "do's" – a sort of indirect or artificial experience that we hope may be used by young trial lawyers who are getting less actual experience these days.

This writing is a collection of ideas gleaned from calls and meetings among the panelists, with some references to broader writings that have been important to those panelists.[2] We hope our casting of some lesser moments in our experience will reveal better paths as they have done for us.

A. The *Batson* Challenge

First, be aware of the *Batson* challenge. Janelle and Richard have both been caught unaware during their first, first-chair trial, not really paying attention to the fact that all peremptory strikes had been used on prospective jurors of the same gender or the same ethnicity.

[2] The panelists making up the "Young Lawyer Panel: The Do's and Don'ts of Trial Practice, Trying Your First Case" are Janelle Davis, Judge Gary Miller, Adam Spicer, Sammy Ford, and Richard Gaal, as moderator. I will refer to them from time-to-time in this article by first name except in the case of Judge Miller.

Judge Miller reminds us to make sure you know your jurisdiction and generally the types of *Batson* challenges available, including gender, ethnicity, religion, sexual orientation, and others. In short, think before you strike, and make very sure you have neutral reasons for your strikes.

Adam reminded us that even if you survive the *Batson* challenge and get the juror you think you want remaining on the jury – be careful what you ask for because your preconceived ideas of how a juror will decide may be utterly wrong, as we all have learned.

Richard added an unrelated anecdote -- and not to make light of the importance of *Batson* – an anecdote from his partner and member of American College of Trial Lawyers: strike all preachers and teachers. The neutral reason is that they tend to be forepersons and lead the jury in one direction, and you do not want one juror with that much sway.

B. Know Your Jury

Judge Miller first tells us to know well ahead of time the rules for how you will get to know your jury – through traditional *voir dire*?; through written questionnaires?; how far will the particular judge let you go? And, Judge Miller said that many lawyers (young and old) never ask themselves "what am I really looking for in my jury?" Sammy asks: What is your goal in picking the jury? You better have one well ahead of walking into the courtroom. Many also do not know how to conduct *voir dire* – so go and watch others during *voir dire* because they are usually open to the public. And, of course, practice your *voir dire* just like opening statements, closing arguments, and other phases of the trial.

One very intriguing question raised by Adam – and very important in the social media absorbed world we live in today: "Is it appropriate to look at information online or on social media about your prospective jurors?" Rule 4.3 of the Model Rules of Professional Conduct provides: "In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is

disinterested." M.R. 4.3 (emphasis Added.) Can you, your paralegal, or a private investigator (even one who may know the juror) "friend" a juror on Facebook and obtain information that is not on the public portion of their Facebook page? Could this rise to the level of tampering with the jury? Might you be prohibited by your own local rules on the manner and types of contact you may have with jurors and/or prospective jurors? It may sound reasonable to contact them even indirectly electronically, but maybe not.

Richard offered some final advice: really know your jurors; what are their professions? What do they like to do/read/watch for entertainment? What are their proclivities? Then, do not stop there. Weave into all phases of the trial certain phrases and even evidence that play into your theme but that impact one or more jurors. For example: in a case where a party lost certain evidence or claims to not remember something critical, a teacher (accidently) left on the jury might relate to a question on cross about "the dog eating their homework." You may get a knowing smile from the teacher juror who ends up being your foreperson and who revealed the smile to your opponent – as happened to Richard many years ago!

C. Opening Statements

The question of which phase of the trial is most important is often debated and a fun topic for trial lawyers at cocktail parties.[3] Adam revealed his position that it is the opening statement – primarily – that is the most important because such a large percentage of jurors will pick sides during the opening statement and so few will ultimately change their minds.

[3] Only lawyers talk about practicing law at cocktail parties (while their non-lawyer spouses roll their eyes). All other professions generally do not talk about work – doctors only talk about investments and travel for example. Yet another reason to love a trial lawyer.

Mistakes made during openings are legion, but a few highlighted tips are:

(1) Do not talk about documents or evidence that you are not sure will be admitted, as Sammy admonished. Richard revealed how he made this mistake once, not getting in some expected testimony, and, during closing, the other side used this to twist the knife: "Remember Richard's opening – how exciting and promising it was of the great things to come? Like one of those movie previews that looks so good until you go and see the movie and what they promised simply is not there?" Adam recommended avoiding this problem by having your important exhibits admitted and testimony cleared by stipulation or motions in limine.

(2) All of our panelists weighed in on the issue of using technology in the courtroom.

(a) Adam recommended tailoring its use to your jurisdiction – what may work in a federal district court in the Southern District of New York may not work at all in a state court in the Mississippi Delta.

(b) Judge Miller admonished that as with all trial work, when it comes to technology in the court room, be yourself; use technology if it fits you. If not, then not.

(c) Janelle offered that you not use technology as a crutch – some lawyers will blindly struggle through aspects of their presentation – as often with speeches at CLE's – seeming to wait for the next slide to learn where to go next. You will lose your audience every time if you do that, as we all know.

(d) Sammy offered that you use the technology that you are very comfortable with, such as a lawyer he knew who used PowerPoint teaching Sunday school every week – he looked natural using it in the courtroom, like any other Sunday.

(e) Adam reiterated here that your pre-admitted evidence can be compelling in an opening statement – yet crippling if the document shown in twenty feet by

twenty feet 3D never gets admitted and the jurors are instructed by the court as such.

D. Cross-Examination

Richard told the story of a night before trial when he practiced his cross-examination before a seasoned trial partner only to be told to scrap the whole ten page epic and to return with no more than five or six of the most compelling points that reiterated the opening, the theme, and the expected closing – staccato punches of the very best leading questions, beginning and ending with the two best pieces – all of which probably lead to victory.[4]

Cross-examination can play into the fact that most jurors, as Adam reminds us, have short attention spans. Cross can "wake them up" or confirm their desire to keep on snoozing – it's up to you. Do not get bogged down during cross. So Judge Miller suggested also using a handful of your very best points and that you should not be afraid to cut away certain evidence. After all, Judge Miller also stated, if you are using an adverse witness to admit the evidence you need to prove your case or defense, you are in real trouble.

Janelle offered two great points for cross: use leading questions and the rules of cross-examination to control your witness, especially one that you know may try to derail your examination. Janelle's other key point – a mistake often made by young lawyers – is to listen to what the witness is saying on cross rather than staring at your notepad or iPad, as the witness may reveal a zinger or a way to get a zinger.

Richard offered that when considering asking a controversial or debatable question, watch your jury closely to see from their body language if they are giving you permission to ask the questions – it will be a judgment call in real time. An example here could be one of credibility – calling the witness a liar or revealing what some might consider private or sordid evidence, even though clearly admissible and an

[4] The real reason for the defense verdict may have been by revealing that it was my first jury trial, which resulted in the little elderly ladies on the jury giving me a sweet smile – a word of advice I didn't appreciate or understand until that moment.

appropriate question. On this point, Judge Miller reminded all trial lawyers to remember the jury is there – see what they are seeing; hear what they are hearing – if you miss that, it could be (and often is) fatal to a case.

E. Direct Examination

Richard is of the opinion that direct examination of a witness is the scariest part of the trial because it is the time during which you have the least amount of control. Here is where you tell your story in evidence; Adam says that here is where most of the building blocks of evidence to prove your case are set down – and here is where you can lose the witness utterly and completely. Richard often reminds witnesses that here they are tethered to him as he questions them by dental floss, and the farther away they drift, the more likely it will snap. All panelists agreed with Adam's statement that preparation of a witness for direct may be the most important and taxing preparation for trial.

You must be able to communicate your story and theme to the jury through your primary witness on direct, says Sammy, yet Adam also stated that cutting off a witness on direct can be critical but also most difficult, particularly with all of the preparation that goes into it. You must not be afraid to cut certain aspects of direct or even an entire witness.

F. Jury Instructions

Jury instructions as a topic for trial can be seemingly mundane, but beware of waiting until the last minute to determine which ones apply and to know the ones applicable to your case. The facts, the evidence that is, are only important insofar as they apply to the law and the elements that apply to your case in chief and defenses.

Adam suggests determining very early in your case – even before discovery – which ones will apply. You can build your evidence much better knowing what you will have to prove. Attached is an article

written by Richard along with noted trial lawyer James Brosnahan. Mr. Brosnahan suggests that you always keep the basic pleadings such as the complaint and answer close at hand, like the jury instructions; and carry these with you in a notebook from early in the case to keep you grounded in the essential elements of your case.[5] In short, prepare for trial from day one, knowing the law that will apply to your case.

G. Closing Arguments

Summation is more than a summary of all the evidence as applied to the law. It is your time to argue at long last – to explain by your evidence and law the reason for the verdict you seek.

Never forget to ask the jury for exactly what you are looking for, and make sure it is clear to them exactly what you are looking for. Richard tells the story of a trial during which the plaintiff's counsel failed to ask for damages or giving the jury any summary of the monetary damages being sought, assuming there would be time for that (and assuming they were best sought) in rebuttal. The problem is, defense counsel waived closing and there was no rebuttal. The jury returned a defense verdict. As important as primacy, some say that recency is the most important or equally important consideration – closing is your last chance to speak directly to the jury – to make your final appeal to them to see the evidence as applied to the law the way your client sees it. As with many of the items above, consider highlighting your very best points – crystalizing in the minds of jurors the evidentiary building blocks placed piece by piece.

Once the case is given to the jury, your work is done. The wait can be the most thrilling aspect of a jury trial, and unlike a bench trial, you will soon have the verdict. Unlike so much of the practice of law, there is no more waiting than the time it takes for the jury to decide.

[5] Richard M. Gaal, "Developing Good Trial Skills, Tips for Young Trial Lawyers," Products Liability Newsletter, ABA Section of Litigation, Volume 15, Issue 1 (Spring/Summer 2004).