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A Plaintiff's General Trial Strategy

by

Richard T. Seymour*

* Law Office of Richard T. Seymour, P.L.L.C., 1150 Connecticut Avenue N.W., Suite 900, Washington, D.C. 20036-4129. Telephone: 202-862-4320. Cell: 202-549-1454. Facsimile: 800-805-1065. E-mail: rick@rickseymourlaw.net. This paper and other papers can be downloaded from www.rickseymourlaw.com. Many of my other CLE papers are also downloadable from this site.

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Mediation and Arbitration. Listed on American Arbitration Association Commercial Arbitrator Roster and Employment Panel Roster.

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A. Formation of the Critical Traits: Honesty, Flexibility, Humility, Self-Mastery, Diligence, Discipline, and the Willingness to Envision Defeat

A successful trial strategy starts with the formation of one’s own character and traits.

Traits are easy to form and maintain; they simply require constant and uniform application until they become second nature. Those mentioned above are among the most important character traits of successful attorneys on both sides. Their presence does not guarantee victory and their absence does not guarantee defeat, but their presence or lack can dramatically change the odds of success, the likelihood of making serious mistakes, and the ability to obtain advantage from the other side’s mistakes..

Judges and jurors alike tend to form impressions of the merit of a cause in part from their impressions of the qualities of counsel. My impression from almost four decades of practice is that a client much more often gets the benefit of the doubt, and the willingness to draw a favorable inference, if the judge or juror thinks that client's counsel has the above traits.

This is not to say that terrible human beings cannot be good trial lawyers. Facts undoubtedly play a role, and sheer entertainment value can excuse a lot of sins. In general, though, clients seem to me better served across the spectrum of cases when counsel have formed these traits.

Honesty is important both internally as well as externally. It can be very dangerous to deceive oneself about the risks in one's own case, or the possibility that a key witness might not be believed, because then counsel will not do the extra work to shore up the weak areas and demonstrate the truthfulness of the witness..

Flexibility is critical because the "murder board" discussed below, with its assessment of facts, opportunities, and dangers, can change uncounted times when a new controlling or precedential or persuasive decision comes out, when the court indicates that it is less than enamored of one side's position, when opposing counsel takes an extreme approach and the delightful possibility of laying snares arises, when a focus group turns thumbs down on a theory, or when sudden new thoughts arise in the course of everyday life. Sometimes the answer is a better or different foundation for the existing approach, sometimes the answer is a completely different approach, and sometimes the answer is to change the goal to one more winnable. Flexibility and rigidity are like steel and iron: it is better to bend than to shatter.

Humility is critical because the instant one allows oneself to feel markedly superior to opposing counsel is the instant that one begins to slacken and create opportunities for the

opponent by assuming that opposing counsel will never be able to turn the tables and seize the opportunity. This is also the instant in which opposing counsel can start to prepare traps, snares, and stratagems. A good trial lawyer is a belt-and-suspenders person who is always concerned that opposing counsel may have surprises up her or his sleeve.

Self-mastery is critical because attorneys who are not masters of themselves have created tools by which opposing counsel can manipulate them in many and diverse ways. A tendency to get timid or pugnacious, angry or frightened, degrades decisionmaking under pressure, and is a gift to the opponent. Further, an attorney who allows him- or herself to feel disdain for the opponent or the court will often communicate that to the judge and jury, and his or her client may pay a heavy price for it.

Diligence is obviously critical, but attorneys often think only of initial diligence on a topic, and one seldom hears about “follow on” diligence. Initial diligence will produce documents or testimony that can help the case a lot. “Follow-on” diligence is the diligence to keep looking for more evidence to bolster the first and to rebut any attack the other side will mount against this evidence.

Discipline is critical because it is what we need to call on in order to re-think the case continually, and to avoid the “Aha!” moment when an apparently very useful piece of evidence might otherwise cause us to shut down our mental processes.

The willingness to envision defeat is critical because it helps us be alert to warning signs that may trickle in over time, and it leads us to fortify our cases against the most likely dangers. Trials are no place for blind hope.

B. Case Selection

In hindsight after every defense or low-damages verdict, the losing plaintiff's counsel often reflects on the warning signs that were present when deciding to take the case or not to settle the case. In hindsight after every plaintiff's or high-damages verdict, it would not surprise me that losing defense counsel thinks of the turning points at which the defendant elected to "roll the dice" at trial rather than settle the case.

Often, one side or the other gets a result much better or much worse than could have been predicted at the beginning, because of the emergence of new facts or legal standards, differences in skill between counsel, and the like.

Nevertheless, the key to a successful plaintiff's practice is usually not to take every problematic case and hope for an outrageously good result, but to take problems into account in the very beginning.

Sometimes, one gets very good results because one has turned down a problematic case for a current employee, advised the client to let this dispute go in light of the problems, counseled the client on what to do to avoid problems in the future and, if the employer does discriminate in the future, litigate on the terrain one has selected in consultation with the client, and not on the terrain the employer initially handed to the employee.

Choosing one's battleground is a key element of trial strategy.

C. Working with the Client

Clients often are unaware of the distinction between an issue that bothered them greatly but is either forbiddingly hard to win or unlikely to produce meaningful relief, and an issue that is winnable and can produce major relief but did not bother them much at the time. Clients often put great emotional value on factors they assume should have a strong relationship to workplace

outcomes, such as seniority, where the employer was under no obligation to give weight to that factor. If the plaintiff wants to win, the plaintiff must conform his or her understanding to the real world of legal obligations.

Claims must be pruned ruthlessly unless they are potentially winnable and will either produce relief worth the effort or help win another claim that may produce significant relief.

A very small number of clients arrive at one's door ready to go on the stand that afternoon, but few of them understand that and few understand the realities of what an adverse presentation of the facts of their dispute might look like.

We must remember that, while many clients become personal friends, we disserve our clients if that is our goal. They have come to us for our professional skill in resolving a particular dispute, not to be swaddled in warm and fuzzy feelings. We must ask them the hard questions, and must challenge every fact they assert and assumption they make, to ensure that we wind up with a true understanding of the facts and their implications for the case.

I routinely tell my clients that I will slip without warning into cross-examination mode, and will defend counsel against them. I use adverse documents, tone of voice, speed, inflection, and choice of words to lead them to perdition by the best means available. And I do it again and again. If they tell me after their depositions or trial testimony that it was easier dealing with defense counsel than with me, I've done my job.

If a plaintiff's attorney can refine his or her understanding of the case because of something the client first revealed under a practice cross-examination, or if the resulting facts lead to a direct examination on which effective cross is now much more difficult, or to a more effective cross of defense witnesses, or to an opening or closing argument that defense will find harder to counter, the outcome of the trial may be affected/

Practice cross-examinations are also a good tool to spot, and work on eliminating, problematic mannerisms of the client that may adversely affect the result, or give an opening to defense counsel.

Working with the client also means demystifying the process of litigation and the way that legal standards affect the trial and possible outcomes. This can help avoid the risk of the client blurting out something unasked, that the client mistakenly assumes is true or thinks will help. A well-informed and well-oriented client is much harder for defense counsel to shake on cross-examination.

D. Planning the Theory of the Case

A lot of cases are won or lost because counsel did not develop the most effective theory of the case, or did not change it to conform to newly-emerging facts..

Every case needs a theory. Like a scientific hypothesis, a theory of the case has to be tested by the facts, and discarded or modified if the facts either disprove it or require too great a leap of faith. The task of a plaintiff's lawyer is to work endlessly in developing, modifying, and refining the theory of the case until she or he has a theory that fills all these needs:

- It does not depend on assumptions that cannot be proven at trial (the alternative is Beginner's Mistake # 1);
- It fits the facts better than any other theory;
- It fits the fact better than counsel's best estimate of the other side's theory of the case;
- It is supported by multiple strands of evidence, such that it will survive and seem like the "best fit" for the facts even if one or more strands of evidence are weakened.
- It makes a compelling story;
- It will correspond with the judge's and jury's sense of the way the world works; and

- It is simple enough that a thirteen-year-old child can understand that something wrong occurred. I have heard that this test comes from Melvin Belli, but in any event it is quite useful.

E. Dealing with the Sympathy-for-Defendant Factor

A famous plaintiff's lawyer has been on public television, cowboy hat and fringed leather jacket, maintaining that jurors feel instinctive sympathy for individuals and instinctive antipathy to corporations, which by contrast are not live things. If this were ever true—and I have my doubts—it is certainly not the current state of affairs, and plaintiff's counsel must deal with the realities of the day.

The reality is that jurors are members of the public, often work for corporations, deal with corporations in their financial planning and often in medical services, and have often developed loyalties to their favorite airlines, banks, accounting firms, medical providers, and the like. They rightly do not see that corporations are intrinsically alien and to be disfavored.

Part of reality is that judges and jurors alike tend to start out indulging a presumption of regularity to the employer's actions. Employers have records and manuals and personnel offices and training programs, and thus have a lot of help in getting things right. Jurors know from their own experience that some employees do not do good jobs, and that some are whiners.

Another important aspect of reality is that jurors have as members of the public been bombarded for more than a decade with very expensive advertising campaigns demonizing plaintiffs' trial lawyers. In some cities, including the Washington, D.C., and Arlington, Virginia, areas, business advertising campaigns have targeted potential jurors by running ads at subway stops near local courthouses depicting plaintiffs' trial lawyers as voracious alligators who should not be fed. While these ads are probably intended to influence jurors in personal-injury cases, it would be very foolish for a plaintiff's employment lawyer to overlook their impact on jurors in

employment cases. The ads, after all, do not ask jurors to distinguish between meritorious cases and baseless cases, let alone make fine distinctions by type of case.

It is thus a huge mistake not to recognize juror bias for the defendant as a major problem, and to address and erode that bias in everything done in the presentation of the case.

A plaintiff's lawyer must therefore show that, whatever indulgences may be given to corporations and employers in general, this particular employer has fallen far short of the mark, and thus that they can rule for plaintiff without surrendering the biases with which they walked into the courtroom. The plaintiff's grievances must also be pruned ruthlessly, to ensure that the focus of the case is on the major problems and things that help prove the major problems.

F. Planning the Theme of the Case

A case theme should grow out of the theory of the case, be supported by key pieces of evidence, and make the hearer want to find for the plaintiff. It should make the hearer feel that the theme makes sense of the facts at trial.

The following are examples of themes:

- Some men's resistance to women being promoted on their merits is so strong that, when these men are in positions of power they will literally do anything to derail women's careers.
- Some managers are so wedded to the notion that youth is the same as vigor and success that they will purge their staffs of older workers who are in the prime of their careers and outperforming the younger workers who were not discarded.

Counter-themes are also important. If plaintiff's counsel knows that a defendant is planning to use a particular theme, or that its trial presentation will focus on a particular set of concepts, plaintiff's counsel may want to throw caltrops in defendant's path by using a theme or counter-theme that would make it harder for a jury to accept defendant's point of view. If a

defendant has a facially plausible nondiscriminatory explanation currently, but has changed its explanation during the course of the proceedings, for example, plaintiff's counsel could highlight the changes and undermine the current explanation by calling the point at issue "A Firing in Search of a Reason," or by asking the decisionmaker or a reviewing official on cross-examination if it is fair to say that, in terms of explanations, the company was pursuing a policy under which "Innovation is Our Most Important Product," or by using an opening or closing argument repeatedly putting in defendant's figurative mouth the phrase "Well then, would you believe?"

G. The Murder Board

One of the concepts developed by intelligence agencies most useful to the life of a trial lawyer is that of the "murder board." The idea is that, in planning an operation, one breaks every element into all of its underlying pieces: known facts, probable facts, plausible possible facts, unlikely but possible facts, and assumptions. Then one has to figure out:

- the links between them, and which particular facts or assumptions make others more or less likely;
- the facts that will help turn an assumption into a reasonable inference;
- the perceptiveness of defense counsel, his or her possible counter-moves, and the changes that might need to be made if particular things happen;
- the goal that constitutes success when reached;
- the alternative routes to the goal if one or more are blocked;
- the relation of each possible fact and assumption to every route to the goal.

In the context of litigation, following this approach enables a plaintiff's attorney to see at a glance the most important opportunities to exploit and the most important dangers to preclude.

A good defense attorney will try to do this in reverse, and construct his or her own murder board.

This device forces the attorney using it to ask the hard questions of his or her client, and to press them. It also forces counsel to recognize and confront logical or inferential inconsistencies in the planned presentation. In reading published decisions, it is astonishing how often one side or the other will introduce evidence or suggest an inference for one purpose, without realizing that the evidence or inference can be exploited by opposing counsel to destroy a claim or defense.

For each side, one of the early signs of potential success, like a crocus in the snow, is an opposing counsel who has not used this type of approach, and has either introduced self-destructive evidence, or taken self-damaging positions, or is wedded to his or her client's view of the case without ever having asked hard questions of the client.

H. Planning for the Jury Instructions

A plaintiff's counsel should have a clear idea of the possible jury instructions at the outset of the case, and pursue discovery and develop the case with those in mind. Trying to figure out the elements of a claim or defense a few days before the pretrial filings are due is not a good strategy for success.

In arguing the jury instructions, counsel should point to exhibits or deposition testimony that made a desired instruction appropriate, or an opponent's undesired instruction inappropriate.

I. Planning for Surprises and Confusion at Trial

Organization of trial documents is critical, and counsel need to bring to trial an index of all available materials, including indices of depositions, that will make it possible to find instantly a document or deposition statement that can be used in cross-examination or in arguing an evidentiary dispute.

If opposing counsel has previously represented that he or she would not object to particular exhibits, or that its objection would only be on specified grounds, copies of the letters and e-mails and other documents containing the representations should be in a separate folder in the courtroom, just in case opposing counsel take a different view at trial.

Key documents and passages of testimony can also be bar-coded with a bar-code reader connected to a laptop so that one can instantly put a desired image in a courtroom display device.

J. Decisions on Displays

One must visit the courtroom in advance of the trial and test the display equipment to see if it will be clear to the court and the jury.

One should decide which parts of documents or of deposition testimony to blow up and present on posterboards or on display equipment, and be prepared. For purposes of cross-examination or redirect examination, it is useful simply to have a loose copy of each indexed deposition, so that it can be blown up with an Elmo and shown as to the witness and jury at the same time.

K. Decisions on Graphic Representations

A common mistake in graphic displays at trial is to try to show too much information in a single graphic. A useful rule-of-thumb is that each graphic should show one new thing. After a series of useful single-subject graphics, it can then be useful to show a summary linking a number of things together.

Counsel should always be alert to the possibility that opposing counsel will be able to use the graphic display for his or her own purposes. Graphic displays have a much greater impact when they are hijacked by the other side.

L. Arrangements for Equipment

Some courthouses have equipment available without charge, but it has to be reserved in advance. The order for the equipment needs to be updated if the trial date is changed.

M. Planning for the Pre-Trial Pretrial Conference

All else being equal, it is more impressive to make a point from an opponent's exhibit than from one's own. If plaintiff's counsel plans to introduce particular exhibits for particular purposes and defendant plans to introduce those or similar exhibits satisfying plaintiff's purposes just as well, plaintiff has an interest in ensuring that those defense exhibits are actually received in evidence.

In deciding whether to object to an opponent's exhibit where admissibility is questionable, it is important first to think about three possibilities. First, is the exhibit a "door opener" for the defendant to put in damaging testimony or other exhibits that might not otherwise be admissible or persuasive? Second, can the exhibit be used to advance plaintiff's case substantively? Third, does the exhibit itself demonstrate that defendant improperly withheld documents during discovery, enabling plaintiff to use it to impugn defendant's and its witnesses' credibility? The important point is that the mere existence of a question about admissibility does not determine whether one should object

Any information that can be gleaned at the pretrial conference about the instructions the court will issue can enable the parties to fine-tune their opening arguments and trial presentations to build their cases in harmony with the instructions.

N. Planning for the Day-of-Trial Pretrial

Many judges like to have a short conference with counsel just before the start of a jury trial. If circumstances have changed, this is the time to bring to the court's attention any

additional matters that could be subject to an *in limine* ruling, or that should lead to reconsideration of an earlier *in limine* ruling.

O. Opening Statement

This is the first opportunity the jury will have to hear plaintiff's side of the case. It needs to orient the jury to the types of evidence to be introduced, highlighting particularly important evidence, and showing where they fit within the story.

Any weaknesses in the case that plaintiff's counsel knows will come out in the trial, should be discussed here, so that the jury hears it first from plaintiff. The caution is that "drawing the venom" by being the first to introduce evidence or air a prejudicial fact can waive a valid objection that was denied in an *in limine* ruling but might have been sustained on appeal from an adverse result. *Ohler v. United States*, 529 U.S. 753, 755 (2000) ("Generally, a party introducing evidence cannot complain on appeal that the evidence was erroneously admitted."); *Canny v. Dr. Pepper/Seven-Up Bottling Group, Inc.*, 439 F.3d 894, 904, 17 AD Cases 1153 (8th Cir. 2006) ("Dr Pepper cannot avoid the consequence of its own trial tactic by arguing it was forced to introduce the evidence during the direct examination of Dixson to diminish the prejudice.")

It is critical to lay out the facts as a compelling story, but it is also critical not to make representations to the jury that cannot be fulfilled, thereby providing the defendant with ammunition for its closing argument. In the eyes of the jury, unfulfilled promises may be taken as the equivalent of a required element of the claim that was not shown.

It is also critical to remember that statements made in opening arguments may become the focus of questions asked of witnesses by one's opponent. An opening argument that is "over

the top” may lead to the erring counsel’s own witnesses cheerfully admitting that his or her statements did not accurately describe what occurred.

P. Pre-Clearance of Materials to Be Used in the Opening Statement

In the event that counsel intend to use audio-visual materials, deposition excerpts, or a graphic display in an opening argument, they should be pre-cleared with the court if they have not already been pre-admitted in evidence.

Objections can be made to opening statements. *Cf. Tritchler v. County of Lake*, 358 F.3d 1150, 1155, 93 FEP Cases 378 (9th Cir. 2004) (holding no abuse of discretion in barring plaintiffs’ counsel from reading excerpts of admitted documents to the jury, where the lower court determined that the out-of-context excerpts would have been too inflammatory and placing them in context would have taken too much time, where her counsel was permitted to read the same excerpts to the jury in closing argument, and where accordingly no prejudice could be shown).

It is not good to have a prepared opening frustrated, in the presence of the jury, by a well-taken objection to the materials being used.

Q. Whether to Call Hostile Witnesses in Plaintiff’s Own Case

There is a clear advantage to calling hostile witnesses in plaintiff’s case-in-chief, if they are relevant to the case-in-chief and if useful points can be made. The jury’s interest will be high, the jury will have just heard from plaintiff’s friendly witnesses, and the jury can be focused on the weak points in the defense.

Calling hostile witnesses during plaintiff’s case-in-chief also reduces the risk of the well-orchestrated presentation that might ensue if they are first called by defendant, and enables the jury to hear from them first answering plaintiff’s questions and discussing the weak points in the defense.

The manner of the hostile witnesses may become an important factor in their credibility. If they are tight-lipped and buttoned-up when answering plaintiff's questions but relaxed and open when answering their counsel's questions, it provides the opportunity for plaintiff to argue to the jury that they are not credible.

However, there are also risks. A plaintiff's attorney may lose enormous credibility by failing to make headway, appearing disorganized when the jury's interest is at its peak, by an appearance of undue hostility, by an appearance of docilely accepting what the hostile witness says, and by failures to follow through.

There are also trial situations when it is better to let the hostile witness testify first in defendant's case and lock in their testimony. This is a particularly useful tactic when plaintiff's counsel is confident of the hostile witness's testimony on direct, is confident that he or she has enough material to destroy the credibility of the witness, and where plaintiff's counsel believes that defense counsel has not asked hard questions to the defendant's officials. The advantage of letting the hostile witness testify first in the defendant's case in this situation is that it enables plaintiff's counsel to destroy the credibility of the defendant and its counsel, not just of the witness.

R. Complications When Plaintiff is Still Employed

It is always important to treat witnesses fairly. When the plaintiff is still employed, however, the plaintiff may directly suffer the consequences of perceived unfairness by counsel. Real retaliation is not always easy to prove, and part of the job of plaintiff's counsel is to avoid doing avoidable harm to plaintiff's future prospects with the defendant.

My experience with private companies is that a supervisor or manager is unlikely to take new retaliatory action against a plaintiff if the supervisor or witness feels that he or she was

treated fairly by counsel, even though counsel pressed them hard and made them look as if they had acted for improper motives or did not know what they were doing. Giving them a chance to understand a document they are shown before they answer, giving them a chance to explain their answers, giving them time to consider their answers before requiring them to respond, taking into account reasonable explanations for apparent divergences from deposition testimony, getting their admission that they were treated courteously during their depositions and they had no reason to think they would have been denied the courtesy of taking time to think before answering if they had indicated they needed more time, not taking their words out of context, and maintaining a courteous tone, are extremely important even when chasing the witness across the county in his or her testimony, varying the speed of questions, confronting them with inconsistencies, and the like.

S. The Uses of Documents

Documents that are not discussed by a witness will generally not be given much weight in the jury room even if mentioned during argument. Questioning hostile witnesses about documents can provide a strong indication of their importance. Showing that a hostile witness is lying, or so mistaken as to be unbelievable on any point, is one of the most effective uses of documents. Rehabilitating an apparently-damaged friendly witness on redirect, by using documents to refute the implications suggested by defense counsel in his or her cross-examination, is also a highly effective use of documents.

One of the reasons for a judge's or juror's initial bias in favor of the employer is that the employer has the documents and is presumed to have regular procedures and oversight. Using documents to show that this employer did not understand or properly use its own records, or that

procedures existed only on paper and oversight was nonexistent, can swing the judge or juror just as strongly in plaintiff's favor.

T. Establishing Standards for the Employer's Conduct

Defendant's paper policies and the judgments of its officials are often useful in explaining to the judge and jury how things were supposed to be handled, that there are solid businesslike reasons for handling them that way, and that failing to handle them that way opens the door to the kind of violation the plaintiff has alleged. In that context, showing that the employer did not meet these standards can affect the outcome of the case.

There is an excellent book laying out in detail this "rules of the road" strategy. It is RICK FRIEDMAN AND PATRICK MALONE, RULES OF THE ROAD: A PLAINTIFF LAWYER'S GUIDE TO PROVING LIABILITY (Trail Guides, Portland, Oregon), described at <http://www.trialguides.com/roadrules.htm> (viewed on October 7, 2007).