



Three Traps to Avoid at Trial

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his is an article about what works at trial. Generally the lawyers I see defending civil cases in my court do a very good job. But we all make

mistakes, and in a jury trial we all know that a multitude of things can either go right or go wrong. To win at trial, an attorney must clearly communicate and persuade—developing a positive emo-



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tional rapport with the jury is a way to open up communication so the jury can truly connect with the content of your message. In addition, from a defense perspec-

tive there are certain pitfalls which one needs to work hard to avoid that present the risk of a very costly result. I am now in my seventeenth year as a trial judge. I am always watching for what works and what does not work for each side. In this article I want to share my reflections on three of the most common traps that can diminish the effectiveness of defense counsel.

1. Falling Into the “Big Bad Corporation” Trap

Humility sells. Arrogance and bullying do not. One of the consistent problems I have seen for an institutional defendant over the years is allowing itself

to be portrayed as a bully. Jurors do not like bullies, and when they see this type of behavior, it tends to cause the normal reaction of cheering for the underdog.

Of course, at trial, the judge will instruct the jury that the case must be decided on the evidence and on the law, and that neither sympathy nor prejudice against any party is to play any role in the jury’s decision. But the jury is made up of 12 warm-blooded human beings. We know that emotion plays a role in all decision-making. Therefore, if the facts come out at trial in a way that depicts defendant as overbearing, greedy, or recklessly disregarding the legitimate concerns of the plaintiff, then there may be big trouble ahead for the defendant.

In my opinion there are appropriate ways to counteract and minimize the damage that may be caused by a corporate defendant’s appearance of excess size, wealth, or power. Very simply, the defendant must be humanized. The reality is, just like the jury deciding the case, corporations and businesses are made up of individuals. When defense counsel undertakes the defense of an institutional defendant, efforts should be made to introduce the “people side” of the business. I have seen this done in many different ways. It can be highly effective in removing the negative inference that bigness is badness.

In the courts our goal is to provide a level playing field to both sides and not to let emotion get in the way of deciding the case on its merits. Most cases end up with the right result for the right reason. But it is important that defense counsel not unnecessarily let the client get cloaked with a bad image in front of the jury. It is hard enough to win without having a big emotional hurdle to overcome.

2. Not Admitting the Obvious

Pick your battles. Only fight about what really matters to your case. Abraham Lincoln was a gifted trial lawyer for 25 years. He represented railroads and individuals before he became one of our greatest presidents. His former law partner William Herndon described Lincoln’s way of winning cases with words to this effect: “He would concede, concede and concede until he got down to the nub of the issue he would win upon.” Lincoln would admit his opponents’ minor points in order to give force to his own major points. It takes confidence to do this. But there is power in brevity.

A good example of how this can work well for the defense can be found in rear-end automobile accident cases alleging soft tissue injuries. In my courtroom I have seen many defense verdicts in such cases even though liability was admitted.

Continued on next page



THREE TRAPS TO AVOID AT TRIAL continued from page 12

The defense does not seem to be disadvantaged when the case is submitted to the jury to determine only the nature and extent of the injury and what damages, if any, should be awarded. Defense counsel do not weaken their efforts by straying from their central contention that the damages sought have not been proven. There are important lessons in these cases, which apply to many other types of defense cases as well. It is always hard to wade through a multiplicity of issues to decide what should be emphasized and what should be downplayed or ignored. By simplifying your case and focusing on major points, you will improve your advocacy.

3. Disagreeing Without Being Disagreeable

Litigation is a polite form of waging warfare as a way of resolving disputes. The court rules must be followed, and also the rules of professionalism. From what I have seen over the years, being highly professional also helps to win at trial. Jurors and all of the rest of us in the courtroom operate out of both the head and the heart. A lawyer may have a case that is objectively strong on the facts, but the waters can be muddied if the focus gets shifted to bad behavior that makes counsel look like an unpleasant person. Trying your case in a way that is respectful and courteous to the other side embraces professionalism.

Based upon watching hundreds of trials, I have come to believe that most attorneys try hard to follow the principles of professionalism. *The Oregon State Bar Statement of Professionalism* provides in pertinent part:

- As officers of the court, we aspire to a professional standard of conduct that goes beyond merely complying

with the ethical rules. Professionalism is the courage to care about and act for the benefit of our clients, our peers, our careers, and the public good.

- I will not employ tactics that are intended to delay, harass, or drain the financial resources of any party.
- I will be courteous and respectful to my clients, to adverse litigants and adverse counsel, and to the court.
- I will only pursue positions and litigation that have merit.

The above aspects of professionalism are not just important for the sake of your obligations as a lawyer, but in my view they raise your chances of prevailing. My recommendation to attorneys who want to improve their game is to work on improving their professionalism. It is a real “win-win.” This advice also applies to ADR. When I act as a settlement judge I also see the merit in

this approach by counsel. There is an old saying: “Be hard on the problem and soft on the people.” This works wonders. The disputes that one handles are battles. But disagreeing without being disagreeable is the best way to operate in the courtroom.

Conclusion

Trying cases is an art, but it is also a science. Things can always go wrong. But avoiding the mistakes described above is an easy way to bring focus to the strengths of your case. It turns out that the simple virtues—which we may have learned in kindergarten—serve us not only in life but in the courtroom as well.

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