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Three Lessons from Two Trials for One Great Performance

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My first exposure to the law came in the early 1990s when reading To Kill a Mockingbird in school. I was mesmerized by Atticus Finch and the courtroom drama in the novel. I was hooked on the idea of going to court and representing my clients to the best of my ability by persuading 12 strangers that my client was right and the other guy was wrong.

Perception is not reality. Sadly, Texas has experienced a sharp decline in civil jury trials over the past 20 years. According to an Office of Court Administration report, the percentage of cases resolved by jury verdict was 0.4 percent in district courts and 0.6 percent in county courts in 2010.

One effect of the small number of jury trials is that opportunities are rare for new Texas civil trial lawyers to gain actual courtroom experience. If a case is of little value, both parties likely will realize trial does not make economic sense and settle the case. If a case is significant in value, odds are more experienced lawyers will handle it, and younger lawyers who work on the file will likely have minor roles at trial, if they are lucky enough to attend at all.

I have been fortunate, as a young lawyer, to first- and second-chair civil jury trials in state and federal court in Texas. I learned a vast amount from each trial.

Here are three things I learned from my last two trials. These are simple points yet can be appreciated fully only after trying a case to a jury.

Know the rules. Most young litigators are familiar with the Texas Rules of Civil Procedure through Rule 215, which is the last rule in the section on evidence and discovery. Before I go to trial, I always re-read the state or federal rules of civil procedure, and I read the rules of evidence out loud. I've found pets and small children make excellent audiences for such scintillating reading.

Quick recollection and citation of the rules when objecting or arguing before the bench is something that separates the wheat from the chaff. No lawyer can know how to use the rules to her advantage if she has not read them, and many of those rules mandate the court do something, if only the lawyer asks.

For example, an excellent tactic after the jury panel is assembled but before they are seated for voir dire is to ask for a shuffle under Texas Rule of Civil Procedure 223 and

Three Lessons from Two Trials for One Great Performance, Continued

re-order the panelists before they enter the courtroom. Prior to voir dire lawyers normally will receive a list of the jurors and their responses to questionnaires with basic background information, including their jobs. I suggest focusing on not only what people do for a living and their education level but also where they fall in the jury panels ordering.

Let's say a lawyer has a personal injury case, and the panel of 48 jurors has six nurses, but all of them are in the back 20 jurors. If no one is struck for cause and each side gets six strikes, none of the nurses will get on the panel. Depending on the facts, the lawyer may want those nurses on the jury. A shuffle could move some of those nurses into a lower panel positions where they could get on the panel and help the clients case. The Texas rules only allow one shuffle in any trial. If an attorney asks for it, she automatically gets it.

Know when to ditch the script. In one trial, I cross-examined the plaintiff's economic expert. I had what I thought was a great exam outline. I had a vision of what was going to happen in the exam.

But within five minutes, it was clear my vision did not comport with reality. The witness rejected what I knew to be a valid hypothetical, stating that I did not understand the basis of his calculations. He was just tooling me around and trying to throw me off my plan, which he did.

Instead of trying to re-do the hypothetical on the fly and otherwise stick to my script, I simply obtained concessions from the witness that: 1. He had nothing to say about liability matters, 2. the jury had to find liability before they could consider his numbers and 3. the jury, not him, ultimately decided what the case was worth.

After I made those points, I said something to the effect of, "I guess we'll let the jury decide" and sat down. The jury not only laughed at the comment but looked relieved that they didn't have to hear from the witness anymore. They also ultimately did not agree with the economist.

Know the audience and when to sit down. These are probably the hardest things for young lawyers to do: read their audience and know when to shut up. Some jurors will nod their heads in opening statements or, more likely, in closing arguments. Some jurors will look confused during questioning of a witness.

If an inexperienced attorney isnt paying attention to the jury, she cannot tell if they agree or disagree with what she is doing. Thats why its critical to watch the jury while the other side is examining a witness. How do they react to the witness? At what points did the jury take notes, if at all? If a jury took no notes during an expert witness' testimony, does that indicate jurors believe the witness at all?

Another difficult task for any lawyer is to stop talking. This, in my mind, goes hand in hand with knowing the audience. If the jury gets a lawyers argument, she should move on. If she has nothing else to say and thinks the audience gets it, shes done just like this article.