

# **18 TRIAL TIPS FROM A JUDGE'S PERSPECTIVE**

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1. Be honest. This is my number one piece of advice for all lawyers. You cannot become so involved with your client and your case that you shade the truth when talking to the opponent, the court or the jury. You may get away with it a few times, but this will catch up with you. Your reputation for being honest will help you for years to 'win' or get the best results for your client. We all knew the lawyers who could not be trusted. They drive up the cost of litigation in dollars and in frustration. Judges know who they are and will be hard on them in rulings, whether it's a discovery problem or a trial setting.
2. Don't make excuses or blame others for your lack of preparedness. Be grown up and professional, apologize to the court and counsel and proceed as best as you can. If you absolutely need time to prepare a brief or argument, ask for a new setting within a reasonable time. Also, during arguments about an legal issue, do not list all of opposing counsel's bad acts. They may be listed in a discovery dispute or to explain the efforts made to avoid having to come to court. BUT they should not be listed as a defense for one's own failure to provide discovery.
3. Don't claim cases stand for something when it is just dicta. In pretrial motions, motions in limine, in trial briefs, motions for summary judgement, etc. lawyers routinely cited cases for a particular proposition and after I went into the hall outside my chambers, got the SW2d or 3<sup>rd</sup>, read the case, I would most often find that the case did not stand for that proposition. The facts would be different, the main point of the case was different, but the quoted statement was in there as dicta. Do they still teach that in law school? After a few years of frustration, I began asking for a brief memo setting forth the arguments and cases supporting those points, with the cases attached. Now today, with cases readily available on the internet, a judge may not need paper copies of the cases. However, it would be smart to provide paper copies of the cases for the convenience of the court; further they can be marked and highlighted by the judge.
4. More is not better, it's just more. When arguing Motions, be direct and concise ; give the judge the three strongest cases to support your position. Don't repeat yourself over and over, the judge is not deaf and understands the point if your argument is clear. Once each side has made their argument, STOP. Do not keep arguing back and forth.

If you file a motion and don't call it up, the court will assume it is unimportant and may not rule on it at the time of trial. It takes thought to be brief. When arguing motions, don't allow yourself to be interrupted by the other side, but don't squabble. Take the high road.

5. Motions in limine preserve nothing for appeal. They are used frequently and are helpful to give the judge an early indication of sensitive evidence that may be prejudicial if admitted in front of the jury. What other uses do you see for them as trial attorneys?  
Are they used in this area as second bites at summary judgment or Daubert motions? They should only be used in jury trials and only for the purpose of preventing any mention of highly prejudicial evidence in trial, which once heard by the jury, cannot be easily cured by an instruction to disregard.
6. Don't object during voir dire. I say this because those objections don't preserve anything and thus are unimportant and it stops the flow. Only a judge's ruling on excluding a hostile or biased juror is successfully appealed. Everyone is bored during voir dire except the lawyers who are trying to scope out the best jurors for their case. The judge is bored and the jurors don't want to be there. Voir dire is the time for the jurors to talk, and they get impatient with lawyers fighting with each other. Frequent objections this early also sets a hostile tone for the whole trial. Be lawyerly and professional from the start. Get to the point in voir dire. Try to keep your questions short, efficient and important for your case. If it's taking a long time with one juror, who has been in ten accidents, apologize to the rest and explain why this is important. Any other bad habits in voir dire?
7. Be respectful of jurors' time. Jurors get paid \$12 a day for voir dire (and waiting to be called to a courtroom) and \$18 a day when chosen as a juror or alternate. I have been called for jury service 3 times since retiring. Jurors are happy when they are called for a case; it then means they will be doing what they were called for. Citizens generally understand that the job is important in our country, but don't like to sit around doing nothing or standing in the hall waiting, or in their jury room waiting. Be prepared and ready to start the case on time. As a judge, I always made sure the jury knew that we were working on important matters, if I made them wait or started late. If your judge is not worried about the impatience of jurors left waiting, you should be. You might say something like " shouldn't we get started" or "judge, could you ask your bailiff to check on the poor jurors out in the hall for an hour?"
8. Don't bore the jury. Your direct exam should be direct and efficient. Plan and prepare your direct and cross examinations. You notice many of my points are directing your attention to the jury. That is because, as a judge, my focus was keeping them happy and attentive. They decide your case. Lawyers always talk about the judge, who the judge is, etc. but in my experience, judge's rulings during the trial are generally unimportant.  
How many of your cases get won on appeal? Judges rulings on discovery, pretrial motions, motions in limine, and motions for new trial may be more important. Those before trial govern the conduct and evidence during the trial. The most important factor is what the jury is thinking. If your direct or cross is long and pointless, the jury will know that. They are smarter than you think. Not only are

there a lot of legal shows on TV, there is more exposure these days to news about trials and injuries.

9. Don't delay the pace of the trial with a lot of objections. Objections are only necessary to convey a message to your witness; to prevent irrelevant and damaging information from the jury; or to preserve your point on appeal. Any other reasons for objections? Unnecessary objections irritate the judge, and more importantly irritate the jury, delays the trial, and interrupts the flow of the story. Be aware of ineffective objections. For example, 'form of the question', 'foundation', the document speaks for itself' preserve nothing for appeal and do not exist.

Also, don't make 'speaking objections' or arguments from counsel table, just state your legal grounds. If it is a jury trial, the jury isn't supposed to hear legal arguments. If it is a judge trial, the court usually understands the objection without the necessity of an argument.

I have watched juries for 13 years from the bench and they are very attentive and interested in doing their job. Certainly, sometimes during a long afternoon, I have had to cough loudly to wake up a juror. If you see a juror dosing off a lot and the judge does not see it, ask for a side bar to request a break. However, jurors get impatient with sidebars – use with caution. Many courts prohibit sidebars and some let the jurors hear legal arguments. This practice may discourage frivolous objections. Jurors hate this waste of time; they expect lawyers to object and the courts to rule quickly.

10. Keep your Opening remarks simple and direct. I was told years ago to tell a story; that opening is like the table of contents for a book. Think of drawing a simple picture for the jury in outlining the evidence. You don't have to start every sentence with 'The evidence will show'. Just narrate the story; this humanizes your client and makes the case seem simple, like something that could happen every day or any day.
11. Be prepared. Jurors like an orderly and quick trial. They and the judge can see if the lawyer is shuffling through papers, hesitating between questions, and generally appearing disorganized. They (and the judge) will lose respect for you, as an advocate. This can negatively affect your client's case. The judge will be impatient with you and will be less likely to sustain your objections.
12. Pay early attention to Exhibits and videotaped depositions. This is a similar point to being prepared. If your exhibits are premarked by the court reporter, and shown to the other side before trial, it expedites the whole trial. This also helps you organize your presentation of the case, organize your thoughts, and will show you the important points you must make. Be sure to organize your exhibits for each witness so that you can make your points or get the opposing witness to

concede those points. Have the depositions marked and tabbed on important testimony that may lead to impeaching the witness.

13. Highlight the relevant and important points in your exhibits before trial and practice technology before using it in the courtroom. In medical malpractice cases, products liability, and employment cases, the exhibits are long and complex. Highlight your relevant parts for the jury and have copies for them to hold and look at during testimony. If you can't use the technology, it makes you look incompetent.
14. Plan your cross in advance and pick your issues. and hit only the important points. Don't respond to everything a witness says; it gives importance to facts that don't damage your case. Think beforehand about what you want from each witness; make your points and stop questioning on irrelevant matters. The jurors will remember your important point, not twenty small points. Cross examination suggestions from MaryAnne Sedey: Always stand during cross examination – you need to dominate here. Use leading questions to control the witness. Also lead up to your point with a series of questions. (For example, in a slip and fall case, establish the defendant's desire to construct a safe place, and then point out the unsafe condition to him/her.) You need to control the witness. Go for only one fact per question. Pause for emphasis. Listen carefully to the witness' answer. Follow up on the 'gifts' a witness gives you. Stop while you are ahead!
15. Know who you are appearing before. As Judge Wallace says, 'we might all dress alike, but we are different.' If you haven't had experience with a particular judge, ask your friends for information. Each judge has difference styles and expectations. You want to be well informed, polite and respectful. Introduce yourself before your speak until you are sure the judge knows your name.
16. Be exceedingly humble and nice to all Court clerks. They know a lot about procedure for that particular courtroom and they know the judge's preferences on filings, arguments, schedules, and time. They also can make your life difficult if they find you arrogant and condescending.
17. Don't make negative comments or facial expressions. That includes rolling your eyes at a judge's ruling. Also do not speak directly to opposing counsel during proceedings; direct all your comments/arguments to the court.
18. Have your instructions with you on the first day of trial. This will enable you to review what the jury will be looking at as they deliberate. Also, in some courts the plaintiff has to provide the boiler plate instructions. This will also speed up the end of the trial when the jury is sitting in the jury room waiting for instructions and final arguments.

For discussion: the following is quoted from “Judicature” Vol.100, No.1, Spring 2016.

“Give jurors the same tools as judges use in bench trials to decide fact issues. Judges can ask questions of witnesses, keep notes, get real-time transcripts, read entire exhibits, discuss the case with their law clerks, and know what the law is before they hear the evidence. **IT IS RIDICULOUS THAT THE SAME TOOLS ARE ROUTINELY DENIED TO JURORS.** In civil cases, without any rule changes, judges have the ability to allow jurors to ask questions of witnesses, to take notes, to discuss the evidence with other jurors before final deliberations, to be given individual copies of written instructions on the law before the trial begins, and to hear interim arguments of counsel. None of these changes would slow down the trial and all would improve juror comprehension.”