

Every Lawyer Needs To Understand *Trial*

BY JAY MILANO

Lawyers are — *In Trial ... On Trial ... Trying a Case ... Going to Trial, Preparing for Trial, In the Middle of a Trial, Just Coming Off a Trial* — or working very hard to assure that their clients never undergo such a painful experience.

Trial is, in the mind of the populace, what lawyers do. But most lawyers will never enter a courtroom.

What all lawyers must do, regardless of their specialty, is protect their clients from the danger of trial, while laying the groundwork for success should that endgame become necessary. Our common principles; integrity, the professional effort, applying law to fact, mean just as much to the transactional lawyer as they do to the litigator.

Cases are disputes that end up in a lawyer's office. Usually they arise from conduct never touched by lawyers. Sometimes they arise despite the best efforts of a lawyer to avoid the conflict. No lawyer wants his/her client to end up with a case.

Trial is the end game of all cases. It is the application of evidence to law. It is the crucial where evidence and law and skill and personality are mixed and burnt down to yield a verdict — a judgment.

This article is not intended to be treatise on how to conduct a trial. It is written, rather, with the hope it will provide a framework on how to approach the task.

You are not a shark, or a tiger, or a wolverine. You are a teacher — at every turn.

It is your job to make people understand. You need to insure that your client understands why his case is different than his story, his chances of success and what the world of trials will be like for him.

It is your job to teach the judge, at your first opportunity and at every opportunity that you

are right about your case. He or she will make decisions based upon conclusions drawn, whether realized or not. Right from the first contact with the Judge or the staff attorney, you need to load in the quality of your case and your competence as Counsel.

It is your job to teach your opponent. Don't be overly concerned about a strategy of secrecy. Convince your opponent that they will lose and you will win the case — more likely on the safer ground of mediation or a settlement conference.

And then you need to teach the jury.

It is a case, not a story

There are books written about the use of story telling in trial. It is, after all, the way we communicate and pass on history. It is an important tool, but it is death if you overly rely on it as a trial tactic. 'My story against yours,' allows for too many extraneous factors; like emotion and prejudice and inherent power, to taint the result. Contrary to popular myth, all but lawyers with the most powerful clients want intelligent juries. They want juries willing to do hard examination of fact and law, self examining of their prejudices, and then make the difficult decisions necessary to render just verdicts.

Clients come in and tell their story. They ask you, "Do I have a case?" The lawyer's question should be, "Can we win at trial?" expanded to, "What will the admissible evidence be?" and to "What is the law that applies?"

That method of analysis is issue based, rather than story based. It needs to be done as a threshold in every case.

In every case, do an issue-based analysis.

Do a complete exploration of your client's version, exhausting every possible fact or explanation or witness. Your questions are, What else? Who else?, until there are no more answers left. Ask each client, and each potential witness: "What will the other players in the case say good about you — say bad about you — tell me about the situation?"

You also need to prepare a timeline — immediately. People are not that smart and it is difficult to follow a complex presentation. However, they do respond to a framework. The chronological framework gives them a tool to organize their thinking.

(Remember, sadly, that the most common motivation left in America is self-interest. As a result we have trained ourselves to believe that it is OK to lie to forward our interests. And beware of a new and viral strain of this virus, the person who will make up any lie to fit a nugget of fact. They have no compunction to lie on such an outrageous level that they achieve Orwellian credibility because no one believes that they could make that stuff up.)

The next thing you need to do is understand the law of the case. That is easier than you would think. Trial is the end game. The jury finds the facts based upon the presentation of evidence and applies them to the law. They are the ones you have to convince. Where do they get their law? They get in through the jury instructions. A plain English recitation of all of the elements of the trial, from what the cause of action is to what rules the jury uses to reach a verdict.

Read the general jury instruction on such issues as credibility and burden of proof until you can recite them by rote. Read the case-specific jury instructions at the onset of each case and read them again until you thoroughly understand what you have to prove.

Determine what may or may not be admissible, and then apply that evidence to the law.

Make a determination about whether you can win at trial. Repeat the process on a regular bases as the case progresses over time. Cases are fluid and often do not end up where they began.

Integrity Wins Cases

Cases are settled favorably (or won at trial) because you have shown the Judge and the opposition (and the Jury) that your case is real. You should win. They will only believe you, however, if you present yourself and your case with integrity.

Integrity, in this context, means that you will stake out the furthest reasonable position for your client. You will make the professional effort to be fully prepared on each issue. If you say it, regarding law or fact, you say it because you believe it to be true.

People watch and listen. A lawyer might get away with a stretch here or an outright falsehood there (lawyers do lie). But over time, people will watch what you do. You will either build a reputation for integrity or not. In my opinion, you will win more cases based upon a well-earned reputation for credibility and reasonableness than you will on good facts.

How do I prepare?

One way to look at a human being's level of intelligence is to consider on how many levels of abstraction they can think ahead. Chess players think 64 moves or levels ahead. Composer writes symphonies blending levels of instruments and rhythms and tones. Most of us cannot think past lunch.

Young lawyers watch old lawyers operate smoothly in any situation and wonder how. Experience is an equal to intelligence as it allows you a higher point to jump off. You have seen the first 15 steps before, so it is easier to see the next.

So how does a lawyer overcome a lack of intelligence or experience? Through layered preparation. Do the analysis, set it aside and do it again. Do it with others. Each time you do it you will see more, understand more and your arguments and presentations will be more complete.

Has this ever worked in the real world?

I tried a murder case, by myself in Akron.

The allegation was that a young man murdered his girlfriend's two-year-old child by punching him in the stomach. The case was based upon expert testimony regarding the timing of the blow. If it was delivered the night before the baby died, the client was guilty.

I contacted James Patrick MD, the elected coroner from Toledo. He is a large, charismatic fellow. From Harvard Undergrad and Yale Med School (or Vice Versa).

We met 7 or 8 times as he taught me the science of immune cells and how they could be used to time insults to the body. He was convinced that the baby was injured days before. The client was not guilty.

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My theory on direct examination, especially with experts is that it is a dance. The lawyer only leads imperceptibly, while the expert teaches the jury.

So we went to trial and it was a big deal. Packed courtroom. The elected County Coroner of Summit County testified for the state. Our current Chief Justice, then the elected prosecutor, presented for the state.

Dr. Patrick took the stand and I attempted to teach through him by gently leading through his presentation. Except to each of my questions he answered only yes or no. I tried to dance. He stood firm and I began to sweat. In desperation I said, "Dr., what do you want to tell the jury." He got up, set up his presentation equipment and taught the jury, uninterrupted by anyone for more than an hour, exactly how and why the baby died. The client was acquitted on the first ballot and I had nothing to do with it.

But I did learn that while people might root for a fighter, they will listen to and believe a teacher.



Jay Milano has tried cases for over 30 years — civil and criminal. He has won acquittals in every type of criminal case, including death penalty and white-collar crime and won Jury Verdicts in excess of \$1,000,000.00. He has taught Trial Tactics at Case Western Reserve School of Law for 20 years. He is a former President of the Cuyahoga County Bar Association, Founding President of the Ohio Association of Criminal Defense Lawyers and is currently a Member of the Rocky River Board of Education. He can be reached at (440) 356-3136 or jm@milanolaw.com