

Persuasion Starts with Strategy

By Chris Dominic and Bruce Boyd

The trial lasted three weeks. Every member of the team executed his or her part well. The jury was out for two and a half days. The attorneys knew that the case could go either way, but they didn't anticipate the significant adverse verdict the panel ultimately handed down. Water cooler conversation concluded that the evidence came in as expected, the witnesses testified well, and the closing argument was strong. Talk of a stealth juror or imponderable biases among the attorneys came and went. In the following weeks, interviews with the actual jurors made clear what the problem was: The trial team had done a good job of executing the wrong strategy.

One of the benefits of being an experienced trial attorney is that many of the skills and tactics employed throughout litigation become second nature. However, it is precisely this level of comfort that can, at times, direct your attention to the long and complex list of items that must be addressed in any litigation process without first establishing a unified strategic vision for the case. Oddly, it is experience—not inexperience—that appears to drive this behavior. It is the sense that one can handle each issue as it comes that leads to an early focus on details and tactics. And it is precisely this focus that can ultimately contribute to an adverse outcome in a trial. There are many questions to ask in the beginning phases of litigation preparation, but the following three will help you develop a strategy that works.

What outcome are you trying to obtain? The answer to this question may seem obvious at first, but consider a plaintiff in a patent case where damages were higher than expected but no injunction was awarded when the injunction was the goal. Another example is when the jury comes to a compromise verdict in a product liability case you are defending. They find that the product is “unreasonably dangerous,” but they report low damages when the goal going into trial was to get a defense verdict to halt the future cases against this product.

If we do a close examination of the preparation in the patent case cited above, we may find a well-executed infringement case to the jury but not enough energy put into the case according to the judge who ultimately had to make the decision about the injunction. In the example of the product liability case, the defense attorneys spent so much time arguing damages that an unintended message was sent to the jury that there must be some merit to the claim. By having the end goal firmly in mind in this scenario, the decision to increase the risk of a higher damage award and a defense verdict by deemphasizing damages is an easier decision to make for the attorney and client.

Who is your audience? The answer to this question is essential to your strategy (i.e., the evidence you choose to emphasize and deemphasize as well as how you try the case), which should change depending on the attitudes and life experiences of your fact finder(s). These attitudes and life experiences filter the way the jury sees the case. This article presumes a jury is the audience, although addressing this question for an arbitrator, a mediator, or a judge is also a good idea. One mistake that many attorneys make is assuming that “testing” the case on their family, friends,

partners, and paralegals will produce a reasonably accurate reflection of how the jury will view the case. A person's peer group is rarely as diverse in attitudes and opinions as a venire. Even experience in legal business makes a person different from the typical juror. For example, imagine you are defending a product liability case on the theory that the product was misused. You try the case out on friends who see your side quite easily. You feel good about your case. If you asked them to raise their hand if they believed the idea that sometimes accidents just happen, you would probably see many raised hands. You should only find true comfort in this approach when your social group is as diverse in opinions as the venire that will be in the courthouse on the day of your trial. If the venire that day showed many raised hands to the question, “If someone is killed by a product, it is probably unreasonably dangerous,” you should obviously evaluate your case differently.

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Where do you want the audience to focus? Once you have a desired result in mind and have considered your likely audience, you should consider what you want your jury to talk about first in deliberations. The direction of deliberations is usually a product of who and what the jury focuses on in the first few minutes of the deliberation. This is the result of an effective case story that fits into their worldview and rings true with how they believe the events in the case unfolded. This makes choosing the appropriate central character and the beginning and end points of a story a crucial part of the process of developing a strategy.

The central character is the person, place, or thing that you build your story and strategy around. Let's say you are representing the plaintiff in the product liability case cited above. Your key character is most likely going to be the unreasonably dangerous product, the plaintiff (and the injuries to the plaintiff), or the defendant (and the conduct of the defendant). Because people tend to compare behavior to what they think should have happened in hindsight, the conduct of the defendant is often the best choice when there is significant evidence to support your arguments. Consider the jury starting their deliberations by talking about the conduct of the defendant in deliberations as opposed to them beginning their discussion with the plaintiff. The risk of talking about the plaintiff is that the jury begins to apply hindsight to some of the arguably questionable choices that the plaintiff made, which contributed to their injuries.

After assessing the central character of your narrative, determine what time period you will cover. All stories need a beginning and an end. Should you talk about the origins of the defendant corporation, the development of the product in question, or the plaintiff's career that was ended so quickly? One way to answer this question is to draft a time line and see how it looks. Is the story more persuasive when told using a short time frame or a long one? You may realize your strategy is covering too much ground or not enough and you should adjust accordingly.

By asking these questions early in the preparation phase of litigation, you ensure that a plan is in place and decrease the chance of doing a good job of executing the wrong strategy. ■