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6 Trial Tips Your Law School Professors Left Out

By **Andrew Scurria**

Law360, New York (June 04, 2014, 3:32 PM ET) -- Many attorneys are loath to stray from the playbook they learned in law school. But the best trial lawyers know better. Here, they share six unorthodox tips for securing a victorious verdict.

As any seasoned trial litigator knows, having the facts or the law on your side is all well and good, but a jury trial can turn just as easily on the jurors' subjective perceptions of each sides' attorneys and the arguments they advance.

Winning jurors' hearts and minds can require some unconventional moves, experts told Law360. Trial lawyers would do well to mind their six offbeat tips for being a better litigator.

In Big Moments, Go Small

Over the past two decades, Ed Aro of Arnold & Porter LLP says he's noticed that jurors have come to expect lawyers to be manipulative and bombastic, due in part to popular legal dramas on television and their outsize portrayals of trial attorneys.

The popular images of attorneys passionately pleading their cases or shouting at witnesses in the courtroom has made the average real-life juror more likely to simply tune out a counselor who engages in those antics, according to Aro. Jurors tend to be cynical about the legal process to begin with, and especially skeptical of trial lawyers, he says.

"The way that you do carry yourself and the way that you present yourself and your physical bearing ... is increasingly critical because as people watch TV dramas, they form a certain image in their mind," he said.

But Aro contends that attorneys can use the dynamic to their advantage. By modulating their voice and controlling their mannerisms, Aro says, attorneys can grab a jury's attention by contrasting themselves with the caricatures people have come to expect.

When Aro reaches a critical point in a cross-examination, for example, he drops his voice, softens his tone and speaks in slow, measured sentences. "You can literally see the jury coming up out of their seats so they can hear what I'm saying," he said.

"When I am cross-examining somebody and I'm honing in on a point, when 15 years ago I might have been more loud and aggressive and in the person's face, what I do now habitually is crank it downwards," Aro said. "That is a way to draw attention to what you're doing in a way that is unconventional and a way that they're not used to seeing on TV."

When Attacking Witnesses, Look Way Back

Andrew Pollis of Case Western Reserve University outlines a way to impeach an opposing witness that can have the side effect of tarnishing the other side's counsel.

When most attorneys try to impeach, they rely on inconsistencies from the witness's deposition or a prior writing. But it can be more effective, Pollis says, to contrast their testimony with prior pleadings in the case, showing a jury that the witness's account doesn't line up with how the case was framed in the early going.

"Theories of the case that a lawyer can put together, especially early on when all the facts aren't known, are not always consistent with the way evidence comes out at trial," Pollis said. "It happens to all of us."

What makes the technique powerful is that it undermines the opposing counsel's credibility, according to Pollis, who noted that he teaches young attorneys this technique with a "measure of discomfort" because it is, in essence, an ad hominem attack.

"But it can be a very successful way of undermining your adversary's credibility and get the jury to understand that this may be what the lawyer wrote to get the ball rolling, but [something] else is what's actually coming out at trial," he said. "If you can convince the jury that the lawyer on the other side is selling soap, you can go a long way toward boosting your own credibility and your client's credibility even if ultimately it doesn't make a difference as to whether or not there is a claim to be proven."

Even an adversary's opening statement can be fodder if the facts that come out at trial contradict it. Michael Alder of AlderLaw PC recommends obtaining a copy of the opposing party's statement in advance, which most judges allow. Look for any assertions that were not conclusively established at trial, then call attention to the discrepancies during closing arguments, he says.

"It is an effective tool to be able to argue that an attorney said the evidence would show something but, in fact, it did not," Alder said, "or better yet, it showed the opposite."

Don't Be Afraid to Ask the Unknown

A cardinal rule of cross-examination is not to ask a question you don't know the answer to. But according to Tom Rohback of Axinn Veltrop & Harkrider LLP, attorneys are often well-advised to float an unknown question. Under the right circumstances, it can prompt a witness to divulge something damaging, or at least make them appear less sympathetic.

Posing a question without knowing the answer requires making a snap judgment about whether there is a possible downside, Rohback said. If not, attorneys should go for it more often than not, he says.

In one instance, Rohback was trying a class action brought by auto body shop owners that hinged on the owners' labor costs. A class representative got on the stand and described his employees as "like family" but curiously omitted the last name of one of his mechanics. Rohback asked why.

"I didn't know the answer, but the downside is what – he tells me the last name?" Rohback said. "No big deal, because the question didn't load up the jury for a big thing. It was sort of a throwaway question."

In fact, the class representative could not recall his worker's surname and saw his credibility as a good employer diminished in the eyes of the jury, according to Rohback.

More dangerous is "the why question" – as in, "Why did you do that?" Law students are taught never to pose this open-ended question on cross, even if the answer might well help their cause, because more can go wrong than right, Chip Babcock of Jackson Walker LLP says.

But sometimes the question simply begs to be asked, and jurors might unconsciously penalize an attorney who leaves it on the table, according to Babcock.

"I'm not scared of the why question. ... Sometimes you get an answer that's really bad for the other side," Babcock said. "Jurors like and respect the lawyers that ask the questions that they want to ask. So if you have 12 people sitting there asking why, and I'm not asking that question, in their eyes I'm not being as effective as I could be."

Turn to the Stars for a Winning Quote

An attorney's theory of the case can be confusing, with lots of moving parts, and it can be tough to fit the flurry of facts that come out during trial into an overarching narrative. Frank Goldstein of Goldstein Law Group specializes in pursuing insurance fraud cases against organized crime rings, and he makes a point of selecting well-known phrases from media or pop culture sources to encapsulate his cases.

In one such case, Goldstein went after members of the Cuban mob who set up a bogus health clinic that solicited auto accident victims and was designed to bilk insurance companies by billing for excessive patient services.

The clinic's clients would enter for a routine treatment, but the clinic would insist that they also needed an array of other unnecessary services.

Goldstein's presentation at trial revolved around the theme that at the clinic, "You could check out any time you like, but you can never, ever leave," he said – a reference to the famous lyric from The Eagles' hit "Hotel California" that resonated with the jury.

"I will tell you that in every one of my trials and in preparing for trial, the most important thing you can do is develop a theme," Goldstein said.

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Have the Courage to Say 'No Cross'

The conventional wisdom says to always have a cross-examination planned for every opposing witness. The idea is that no witness should go unchallenged, but Rohback shared two cases where passing up the opportunity to cross-examine paid off.

In one, a disability insurance policyholder was accused of feigning psychiatric illness in order to reap benefit payments. The claimant got on the stand and testified to "all the things he couldn't do," like concentrating, running his business or enjoying a social life, according to Rohback, who noted how cogently and clearly the witness was expressing himself.

Rohback, then a young associate, recommended against conducting a cross-examination.

"I said, 'He's going to get up there, and under your cross-examination, he'll rant, he'll rave, he'll cry, he'll act crazy,'" Rohback recalled. "All you have to do is say 'no cross,' and then in closing you'll be able to look to the jury and say, 'You heard him testify cogently and competently; this guy is capable.'" The insurer prevailed at trial and on appeal.

In a case he tried on behalf of Alcoa Inc., Rohback says his adversary called an expert geologist who was so pompous and arrogant that his testimony was clearly not landing with the jury. Again, Rohback declined to cross-examine.

"I'm sitting there and thinking, I know the topic, and I don't know what this guy is saying. So how could the jury know what he was saying?" he said. "The client was there with me at the table and almost fell off his chair, but he was smart enough to say OK."

Show Them the Real You

Establishing a personal connection with jurors is critical because it's not just the plaintiff and the defendant that they evaluate — the attorneys litigating the case are effectively on trial too, and juries are reluctant to return a verdict in favor of a client whose legal team they can't relate to.

Jurors also don't like being pandered to, but the process of personalizing oneself doesn't have to be transparent, according to Marc Lazo, the managing partner of Wilson Harvey Browndorf LLP's Irvine, California, office.

When Lazo questions individuals in the jury pool during voir dire, he poses the usual hypotheticals about how they would react to certain situations, but with a twist — he inserts himself into the questions in order to reveal details about his life.

"Voir dire, for me, is all about personalizing myself to the jury," Lazo said, adding that his goal is to vet the pool but also to "push the limit" by sharing as much about his own personal experiences as he can.

"I say, 'This is me, and this is how I reacted, and would you do the same thing in the same situation?'" he said.

--Editing by Kat Laskowski and Katherine Rautenberg.

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