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‘How Many Cases Have You Tried to a Verdict?’

By Gabriel Berg and Lauren Coppola | March 14, 2024

Trying cases is exhilarating. For as long as the trial lasts, the mind is singularly focused, awake and asleep (mostly awake), on one thing: Winning the case. Trial counsel must carry the action—and never endure a dull moment in the courtroom. Win, lose or draw, the second the trial ends, there is a group of zealots who crave only one thing—the start of the next trial. These deranged people are not litigators. They are trial lawyers.

The difference between trial lawyers and litigators is well-known, but rarely practically applied in selecting counsel. When general counsel interviews firms, the ultimate question to a prospective lead counsel should not be: “How many cases have you litigated?” Most experienced lawyers will say hundreds, if not a thousand or more.

Rather, the most apt question is: “How many cases have you tried to a verdict?” A satisfactory answer to the question will increase the value of any plaintiff’s case and decrease the exposure in any defense matter. Most civil cases settle. This rightly is the norm. But the circumstances surrounding that settlement are bolstered, exponentially, by having a lawyer on the team who has expertise in trying cases, even if general counsel insists on a litigator acting as lead lawyer.

This is not to minimize those without trial experience. Trial work is difficult to come by these days, especially for young lawyers. As an aside, for those craving trial experience, there is no substitute for identifying a widely respected trial lawyer and going to the courthouse just to watch that lawyer in action. Taking on pro bono matters and participating in firm trial workshops or other trainings are excellent tools to gain trial experience as well.

Rather, the point is to highlight the tangible benefits a trial lawyer brings to any case. There are numerous identifiable advantages that reveal themselves during pretrial discovery when opposite a lawyer without trial experience. Unless general counsel is a former experienced trial lawyer, he or she may not know about these advantages.

If, for example, a lawyer lodges an objection to a cross-examination question as “leading,” the trial lawyer will tuck that little gem away. Cross-examination is where cases are most often won at trial–and the point is to lead the witness.

During discovery, knowing how evidence will be used at trial to impeach a witness who changes their testimony is another enormous strategic advantage. It leads to more precise questions and less wiggle room in an answer in a deposition.

Also, in depositions a lawyer who reads two sentences of a document and ignores the third sentence that undermines the first two sentences–and his point–has done himself no favors. In front of a jury, this tactic loses the lawyer all credibility and possibly the case.

If a lawyer decides that his witness is not doing well on cross-examination in a deposition and launches into a lengthy speech to assist that fledgling witness, be reminded that this tactic is included in almost every legal drama on television and in movies but is a death-knell during cross-examination at trial. If a witness gives a horrible answer during discovery or at trial—and it has happened to all of us—play poker and simply make a note to fix it on redirect. The lawyers should not get excited, or worse, respond by attacking opposing counsel.

Unless the cross-examiner is being outrageous (it happens), an attack on opposing counsel while defending a deposition is the sure sign that the cross-examination is going beautifully, and the objecting lawyer does not have trial experience. Unfortunately, as a rule, most juries dislike lawyers. There is no reason to give the jury another reason to dislike a lawyer by going after opposing counsel. Most of all, attacking a lawyer who is clinically dissecting a witness on cross will make matters significantly worse.

At the same time, if a lawyer elicits a game-changing admission during a deposition or at trial, do not stop the examination to gloat. Generally, everyone in the room knows what just happened. General counsels, please always insist that your lead lawyer wait until after the case is won to even entertain celebrating. Anything can happen at trial.

A digression to allow for how hard it is not to react when an admission is elicited that actually wins the case. In an arbitration, I gave a client of mine who is a character (read, loud and obnoxious) a stern lecture about not reacting to testimony during the arbitration. "Watch the witness and when you want to react, grab your pen and take notes instead," I demanded. During the hearing, on direct examination of a witness by our adversaries, a very honest witness told the absolute truth and admitted key facts that made it virtually impossible for us to lose. I grabbed my client's forearm and squeezed it as the witness testified and just could not bring myself to let go, until it was time for my two-minute cross-examination to lock-in what we had just heard. The lawyers on the other side of the table turned sheet white. I honestly believe that I would have also had the exact same reaction and had sympathy for those lawyers. Briefly, of course.

A further digression to repeat: Please do not celebrate early. I am begging you. In a one-sided jury trial in 2014, where we represented the plaintiffs, the judge went so far as to tell the other side in chambers that they were getting beat—so badly that they should settle now. Defendants absolutely refused. The judge warned them again by stomping out of chambers and back to the bench. A very seasoned lawyer for defendants in that case read his two-hour closing argument to the jury from a script in a five-inch-thick binder. The judge fell asleep. The jurors quietly nudged one another and giggled. The jury then took an hour to return a complete defense verdict. While we got the verdict vacated and a new trial ordered on appeal and later settled the case, to this day I sometimes shoot out of bed in a cold sweat at 2 a.m. and wonder: 'What happened?' When I wake up, I target 2040 to get over this verdict once and for all. But that seems too soon.

Back to the ultimate point. To general counsels, in addition to asking the question about the number of cases tried to a verdict, a trial lawyer who is quick to tell interesting trial war stories is the first sign that you likely have hired the right trial lawyer to join the team.

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