Nine Tips for Civil Trials

from a Prosecutor Turned Judge

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As a former prosecutor who became a federal trial judge with a civil-heavy docket, I saw stark differences between civil and criminal trials. Criminal trials are more frequent, more efficient, and less contentious than civil trials. And jurors are often unimpressed by costly, time-consuming tactics common in civil but not in criminal trials. People have asked me what civil litigators can learn from their typically lower-paid but trial-hardened colleagues in the criminal bar. I figured I should share what I discovered before I forget what a trial looks like, given that I am now an appellate judge. There are, of course, also lessons to be learned in the opposite direction, like thoroughness and preparation, but those are for another day.

Civil trial lawyers should jettison the usual playbook in which trials are largely the performance of a fully rehearsed play. They should trust their own abilities—to cross-examine and persuade, among other things—and they should trust juries. At the same time, they should step back from wanting to be the center of attention and instead let the witnesses and documents tell the story.

Tougher conversations with clients may be necessary. Criminal lawyers, especially prosecutors, enjoy great independence in shaping trial strategy. No in-house counsel tells them what to do. Civil lawyers, by contrast, often serve clients who are actively involved and press them to use every available tool, all in an effort to minimize risk. That belt-and-suspenders approach contributes to expense and delay in trial preparation and ineffectiveness at trial.

Real effectiveness embraces bolder trial tactics:

1. Harness the power of surprise. Depositions are rare in criminal cases, reserved largely for witnesses located in foreign countries. Prosecutors and defense attorneys don't have the right to question witnesses before trial; the defendant, of course, has a constitutional right against testifying even at trial; and in many federal courts, counsel do not receive a list of potential trial witnesses until close to trial. Prosecutors may not receive notice of defense witnesses until they have rested and the defense has elected to put on a case. As a result, prosecutors often question witnesses within minutes of learning they will testify.

Although that's a challenge to the questioner, it also presents opportunities for surprise, as the witness will hear the questions for the first time at trial. For many civil lawyers, the prospect of asking a witness a question for the first time during trial is discomforting because the notion of confronting the witness for the first time at trial is downright unthinkable. The result? Civil trials typically lack bombshell moments, or any displays of spontaneity, that jurors expect based on what they see on TV.

Published in *Litigation*, Volume 44, Number 1, Fall 2017.

Of course, the focus on summary judgment means that depositions are often needed to support or defend against pretrial dismissal. But summary judgment practice is not the only reason civil lawyers want to ask questions before trial. In cases that survived summary judgment, I had lawyers ask to re-depose witnesses just because a new document had emerged since the deposition. When I responded that they could just ask about the document at trial, without also incurring the time and expense of reconvening a deposition, the lawyers seemed shocked. How could I suggest something so daring?!

For civil cases that are reasonably likely to go to trial, civil lawyers should consider holding off on deposing all key trial witnesses or on asking all the important questions when they do. This can produce big dividends, as one case I presided over demonstrated. It was a claim for overtime pay under the Fair Labor Standards Act. The main issue was whether the plaintiffs were exempt from the statute as "outside salespeople," which depended on whether most of the time they worked in the company's sales office or were out and about meeting with customers.

At the pretrial conference, the company sought to add as a witness one current employee. After balancing the equities of the late disclosure and the strong interest in presenting all relevant evidence, I allowed the witness to testify. The plaintiffs' counsel was upset and stressed the challenge they faced of questioning a witness at trial who had not been deposed. But, as lawyers must, they dealt with the ruling. After the witness testified that she had met with three customers (whom she identified by name) outside the sales office on Sunday, the plaintiffs' counsel started asking her about the car she drove to work and the clothes she was wearing. "The questioning," I started to think, "is getting off track."

The relevance soon became apparent. Counsel had hired an investigator to surveil the witness the last day she worked before her testimony. The video showed that she never stepped outside the sales office. The case soon settled and later the witness was charged with perjury.

It was the most Perry Mason–like moment I've seen in any trial, civil or criminal. It also would not have happened if the plaintiff's counsel had not been forced to question the witness without the usual vetting of a pretrial deposition.

2. Use more common sense, not more experts. Despite focusing on often complex white-collar cases, as a prosecutor I rarely used experts. Because of the higher burden of proof in criminal cases, I didn't want the case to come down to a battle of experts. Even with complicated matters, I preferred appealing to the jury's logic and common sense over hoping that the jury would find my professor more reliable than the defense's.

Experts, of course, are common in civil cases and often are treated as the key witnesses. Expert testimony is inevitable when the subject matter truly requires technical expertise. But I saw so-called experts seeking to testify on topics about which children could form an opinion: in a discrimination case, whether the remarks were racially charged; in a products liability case, whether warnings on a box were understandable. This expertization of civil law is a major reason for the complexity, expense, and delay that limit access to the justice system and make trials so rare.

Many civil lawyers seem to think—sometimes abetted by court decisions that seem to require expert testimony on certain issues—that witness testimony or lawyer argument unsupported by someone with a PhD is not compelling. The juries I talked to usually took the opposite view: "We didn't trust any of the experts, so we based our verdict on the other witnesses and the documents," was a refrain I often heard.

Using an expert can complicate, rather than simplify, what otherwise could be an obvious and easy point. Take a case in which the plaintiffs retained an expert who was going to fly to Texas from more than a thousand miles away to testify that a specific email demonstrated racial bias. In an interlocutory ruling, the court of appeals had already said the email "was clearly derogatory." Having an expert address the question might prompt jurors to wonder: Was I missing something when I thought this was obvious? And if it is so clear, why couldn't they find someone local to testify about it? The act of self-doubt by the plaintiffs' lawyer likely would have undermined rather than enhanced the strength of the evidence.

Overreliance on experts signals a larger problem: Lawyers don't trust their own advocacy skills. Experts aren't needed to tie together every piece of a case. It's the lawyer's role to lead the jury to draw those inferences. And it's not always best to take them all the way there. Jurors are most likely to embrace a position and advocate for it if they perceive a role in reaching that conclusion. That should be what the lawyer is doing in the questioning and closing arguments.

3. Let the witnesses be the stars. Despite the common perception that prosecutors are tough cross-examiners, the vast majority of witnesses who testify in a criminal trial are called by the prosecution. The defense may not put on a case at all, and the person the prosecutor most wants to question has a constitutional right to stay silent. So prosecutors are far more used to presenting witnesses on direct examination than on cross-examination. The good ones thus adeptly let the witnesses tell the story of the case.

For civil lawyers, the opposite is true. Because the vast majority of their experience questioning witnesses comes from depositions of adverse witnesses, many civil lawyers have more trouble effectively posing open-ended questions on direct examination than leading questions on cross. But witnesses are

less credible whenever it looks like the lawyer is feeding them their testimony. Although a great cross-examination requires more experience and ability than a great direct examination, great direct examinations are rarer than great crosses.

So spend the time to craft a direct examination using open-ended questions that allow the witness to tell a compelling narrative in the witness's own voice. Give each witness room to talk to the jury through the direct examination. And, to be persuasive on direct, resist the lawyerly temptation to be the center of attention. There are other times for that.

4. Act like the truth is on your side. As a prosecutor, I rarely objected. With a defendant's liberty at stake, I didn't want it to look like I was keeping evidence from the jury. The bar for an objection was high: The evidence had to be highly prejudicial and a clear violation of the evidentiary rules. Cases could be tried without that threshold for objecting ever being met.

A trial with few objections is unheard of in the civil arena. But most of the objections I saw in civil trials had me thinking about the question a judge I used to try cases in front of liked to ask: *Does it hurt you?* The answer is often no. Don't ignore the substantial benefit from not being obstructionist. The juries I talked to almost always selected the more confident and less obstructionist side as the lawyers they most trusted.

Limiting your use of objections won't just help you look like the confident party that wants the jury to hear everything; it also can create an opportunity for devastating cross-examination. It has long been said that cross-examination is the most effective tool for discerning the truth that humankind has ever invented. But many of today's civil trial lawyers have seemingly abandoned that view. Civil lawyers often have the default mind-set that if the other side wants something to come in, you should want to keep it out. Clients often encourage that behavior, confusing needless conflict as vigorous advocacy.

That's different than a trial strategy mind-set. When reading *Daubert* motions challenging the reliability of expert testimony, I often had the following reaction: If this expert is as full of it as the motion says, the opponent should want the expert to testify. Trials come down to credibility, and the chance to show that the other side has presented bogus testimony can win you the case.

When objections are limited and focused on issues that really matter, trials are shorter, saving the parties money and involving fewer needless confrontations.

5. Avoid the inside baseball. When a criminal lawyer does object, the objection is usually simple and straightforward. A jury can easily understand objections about relevance or hearsay: "the evidence has no bearing on the case"; or "the evidence is unreliable." Then, even if the evidence is admitted, the jury may give it less weight, having heard the lawyer's argument against it.

When civil lawyers object, however, the basis for doing so often invokes legal jargon unfamiliar to the jury. Two of the most common objections in civil trials are "beyond the scope of the expert report" and "beyond the scope of the Rule 30(b)(6) designation." The jury has no idea what the lawyers are talking about. It feeds the perception that the objections are invoking technicalities that prevent the jury from hearing relevant evidence. Keep it simple and easy to follow.

Another example of how a lawyer's mind-set is at odds with a juror's mind-set is the frequent attempt to impeach a witness based on perceived inconsistencies in prior deposition testimony. There is always the big buildup: *Do you remember when I asked you questions six months ago? You were under oath that day too, right? And a court reporter recorded your words just as is being done today?*

What follows is usually a big letdown. The lawyer points out some subtle or nuanced "difference"—often one apparent to only the lawyer who has lived with the case for months—in what the witness is saying in court versus what the witness said in deposition earlier. The cost of that letdown is significant. It feeds the perception that the lawyer is playing games and obfuscating. I am not alone in this observation. Judge Robert Lasnik recently made a similar observation in these pages. *See How Effective Trial Attorneys Present*, 43 Litigation 6 (Fall 2016).

Identifying clear inconsistencies in prior testimony on important issues is one great tool of cross-examination. But use it sparingly, and make sure you are doing it, not to show what a brilliant lawyer you are, but instead to let the jury see that the witness is not credible.

6. Let the exhibits tell the story. One of the biggest strategy decisions is the order in which trial witnesses should be presented. Lawyers recognize that the witness lineup matters for telling a coherent story. In criminal cases, though, we thought about not just the order of witnesses but also the order of exhibits.

In criminal cases, the juries must decide guilt for each count in the indictment, so we would number the exhibits to correspond to those counts. Documents being used to prove Count 3 would be numbered Exhibits 3A through 3K. That way, when the jury was deliberating, the exhibits would align with the jury questions. The order of exhibits thus serves as a closing argument of sorts that continues to present itself throughout the jury's deliberations.

But in civil cases, the exhibits often appear to be listed in a haphazard fashion. The order may correspond to the use of the exhibits at depositions months earlier. There often are large gaps in the numbering system. That may result in the order of exhibits sowing confusion and lead to questions from the jury about how to find certain exhibits.

Instead, use the opportunity of exhibit numbering to organize and present the case. The best method of ordering the exhibits will depend on the specifics of the case, but too few civil lawyers even give thought to using that as a tool for improving juror comprehension.

7. Think about the appeal. Prosecutors win the vast majority of the cases they try. They should—because they get to choose the cases they bring. One of the biggest lessons I learned as I tried more cases was minimizing issues for the inevitable appeal by not pushing the envelope with close evidentiary issues or jury instructions.

Because so many civil lawyers rarely go to trial, those who do often have a myopic focus on winning the trial and give little or no thought to how the verdict will hold up on appeal. Thinking about the appeal during trial is hard. The adrenaline of trial leads to a short-term mentality. Keeping the powder dry on some points to avoid an appellate issue also requires a great deal of confidence in your ability and your case. When considering evidence you are trying to have admitted, the flip side to the "Does it hurt you?" question for filtering objections is "Do you really need it?"

Providing a sound answer to that question takes experience and good judgment. So does assessing the other part of the cost-benefit calculus that should be made when thinking about the appellate implications of a trial decision: What is the chance this issue could lead to an appellate reversal?

The biggest problem I saw with civil trial lawyers is not that they lacked the ability to make those assessments; rather, it was that they didn't even have the appeal on their radar screen. Leaving arguments on the table takes nerve, but doing so can save a client the delay and expense of an avoidable appeal and, in some cases, reversal and a new trial.

8. Make sure your clients behave. Most people would think that criminal trials present the greater risk of disorder. The defendants are often charged with serious, sometimes violent, crimes. As a result, more courtroom security is present at criminal trials. But I rarely saw a need for it. No doubt this is because the lawyers often admonished the parties, victims, and witnesses about the seriousness of the proceeding and the need for decorum.

Many civil lawyers must not be having the same discussion before trial. Perhaps they think that clients who operate in the business world don't need those instructions. But I saw more disruptive behavior in civil trials than in criminal trials. In two different trials, a party started yelling at the lawyer cross-examining him. Then there was the less vocal but likely even more damaging behavior epitomized by the plaintiff in a patent case who vigorously shook his head in disagreement whenever opposing counsel or witnesses said something with which he disagreed. Muttering comments under one's breath was also not uncommon. Juries take seriously the premise of our adversarial system that each side should get a fair opportunity to be heard. They don't look fondly on parties who fail to show that process the same respect.

9. Be more civil. It's not just the parties who are better behaved in criminal trials. When I made the switch from civil litigation to the U.S. Attorney's Office, one of the most pleasant differences was that the criminal bar is more civil than the civil bar. Just about any federal district judge will confirm this.

There are a number of possible explanations. Given the relatively small size of the federal criminal bar, there are more repeat players in criminal law, so your reputation matters. Criminal lawyers are interacting in person much more often than civil lawyers, and it's harder to be a jerk in person. And, because the stakes of a defendant's liberty are so high, there is little room for obsessing over petty stuff.

That civility carries over to criminal trials, where the lawyers are aggressive advocates but typically show respect for both opposing counsel and the court.

Civil lawyers, who more often lob personal attacks at opposing counsel and question the court's rulings during trial, could learn something from the civility of the criminal bar. Treating opposing counsel and the court professionally and with respect isn't just consistent with one's lawyerly obligations; it also helps win trials. Passion is effective advocacy; anger rarely is.

These suggestions offer a bolder, innovative approach to trying civil cases. Many reflect what jurors told me they found effective. Some may also help eliminate another difference between civil and criminal trials: Although jury trials are vanishing on both sides of the docket, they are nearing extinction in the civil arena.

Reducing the expense, delay, and complexity of civil trials will lead to more of them. That in turn will build lawyers' trust in their abilities and the wisdom of juries, so that they become more comfortable implementing these suggestions, thus further reducing the expense, delay, and complexity of trials. Even if these tactics don't transform civil litigation, however, they are guaranteed to at least surprise the other side accustomed to the rehearsed, untrusting, and cautious style that is all too common in civil trials. ■