LAW360

Portfolio Media. Inc. | 860 Broadway, 6th Floor | New York, NY 10003 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Rookie Mistakes: Litigators On Their Past Trial Blunders

By **Lisa Ryan**

Law360, New York (October 28, 2014, 7:18 PM ET) -- Today's top litigators can make trial work seem easy, but these legal brains would be the first to admit that trial practice makes perfect. Law360 asked veteran litigators about the steep learning curve in trial work and to tell us about some rookie trial errors that helped shape them into successful trial attorneys.

Steve Adams, Barton Gilman LLP

"Timing is everything. In an environmental contamination case involving a multimillion-dollar home, the plaintiff homeowner was testifying with the help of notes. I turned to my veteran co-counsel and whispered, 'We have to object!' He said gently, 'Not quite yet.' Soon plaintiff's counsel asked how long plaintiff had been married. The witness looked at his notes. My co-counsel objected, which the judge sustained, saying to the plaintiff that he was expected to testify from memory. The jury, already predisposed to dislike the wealthy plaintiff for complaining about his vacation house, had another reason to dislike him: He couldn't even remember how long he had been married! Left to my own devices, my objection would not nearly have been so well timed."

John K. Bennett, Jackson Lewis PC

"As younger lawyers, trained to be 'litigators' and not necessarily trial lawyers, we may have thought that all of the facts and documents we worked hard to develop over years of pretrial discovery have to be presented at trial. They don't. And they shouldn't be. One of the biggest 'rookie mistakes' in a trial is to present every possible fact and issue developed in discovery, because the client liked them, or they seemed important at the time, or for whatever reason. That kind of cover-the-waterfront approach results in a mess of extraneous details, unnecessary witnesses, useless exhibits and lines of questioning that open up areas proving to be not helpful or necessary. They also distract from telling your basic story."

David W. Evans, Haight Brown and Bonesteel LLP

"During direct examination, a witness became confused about the date of a key conversation with the plaintiff. Instead of simply reading from her prior deposition to re-establish the timeline, I asked her, 'Are you sure you didn't tell the plaintiff to sue my client on that date?' 'I'm absolutely certain,' she

answered. During the pregnant pause that followed, I saw my statute of limitations defense going down the drain. But the witness then continued, 'What I said was, "You're an idiot if you don't file a lawsuit right away — the statute of limitations runs out next week!"' I said, 'Thank you,' and sat down as quickly as I could."

Tom Feher, The Simon Law Group

"Trial practice is an ongoing learning process. One of the hardest things to do in trial is to be yourself. I spent so much time watching others and reading books on trying cases that I tried to be someone I was not. Before every trial, I remind myself to just be me. The other most important lesson I learned is that trial never goes as planned and you will never be able to control the entire process, so don't panic. You have to be flexible with the court's rulings and scheduling witnesses. The calmer you can be, the better."

Pamela S. Gilman, Barton Gilman LLP

"Before the start of my first civil jury trial, I confessed my cluelessness to the clerk. Thankfully, he took me under his wing as I awkwardly made my way through the evidence. On the morning of closing arguments, the clerk approached and asked if I was ready. 'Yes,' I said, with more confidence than I was feeling. The jury then filed in and took their seats. The clerk nodded in my direction. 'Counselor, all set?' After several seconds passed, the clerk walked toward me and mouthed, 'The defense goes first.' I won the trial and learned the first of many invaluable lessons: Share what you know, admit what you don't know and never be afraid to ask questions."

Walter C. Greenough, Schiff Hardin LLP

"Young attorneys need to consider that their witnesses are even less experienced than they are and bear in mind a number of concerns. Make sure witnesses dress appropriately — Metallica shirts rarely bolster credibility — and ensure they know when and how to get to the courtroom and where to go if sequestered. Attorneys need to know how to react when thrown a curve by a witness and have a strategy — a safe concluding question. Attorneys should advise witnesses that as they leave the stand, they should not take exhibits. Also, attorneys should warn witnesses not to discuss the case with anyone while in the courthouse."

Robert Hoffman, Gardere Wynne Sewell LLP

"My previous method of preparing for closing argument included haphazardly reviewing hundreds of exhibits into the wee hours of the morning and shoving them into a bloated PowerPoint. Oh, and little sleep. Now I present each jury question via PowerPoint, followed by up to three exhibits that answer the question favorably. I ask jurors to note my exhibit numbers on their charge as they follow along. This more structured system has me asleep by 11 p.m., allows me to get through the PowerPoint and provides a clearer understanding of how key evidence answers the jury charge."

Wendy Lumish, Carlton Fields Jorden Burt

"In the age of social media, virtually everything is caught on camera — except most trials. Lawyers tend to forget that the appellate court cannot 'see' what happened in the trial court and thus, it is critical for trial lawyers to adequately describe events taking place in the courtroom. Here's a simple example: the plaintiff was crying hysterically on the stand. Without counsel putting that fact into the record, it will be tough to argue that the verdict was based on sympathy. Just remember: If it's not in the record, it didn't happen!"

Heidi Machen, Machen Law

"In my first trial I learned the importance of retaining expert witnesses to directly match those hired by defense. In our case, defendant's expert economist downgraded plaintiff's damages by presenting a graph of plaintiff's collateral source income, concluding that it more than made up for lost wages. The economist's claims, which we'd sought to exclude in limine, likely helped reduce the final award with no authority to rebut them. You can't assume the court will grant your motions, even if you believe the law is on your side, so you'd better be ready to present your own experts, just in case."

Thomas S. McConnell, Miller Starr Regalia

"I obtained 'smoking gun' evidence in a business dispute. The parties had agreed to share profits relating to a computer program my client developed, but when profits exceeded expectations, the company terminated my client. A former executive of the defendant shared powerful information off the record about how executives referred to my client, which was vile. When I confronted the company president in deposition, I secured a powerful admission. However, I was unable to use it at trial because defense counsel made a successful motion to exclude it, claiming potential prejudice to the defendant exceeded any probative value. I wish I had delayed disclosing my 'smoking gun' until trial."

William McGuinness, Fried Frank Harris Shriver & Jacobson LLP

"The temperature in the depo room is starting to rise, and the expert witness is squirming. You have her cornered on a critical flaw in her analysis, and she hasn't thought of a way out. The depo ends and the examining lawyer high fives abound. Months later at trial the expert cross begins. Examining lawyer, glancing sidelong at the jury, thunders, 'Isn't it true that you failed to consider the square root of the hypotenuse in reaching your conclusion?' The waterboarding of the examining lawyer now begins with a wan smile from the expert witness. I am so glad you asked me that, Mr. Jones, because I have been giving it a lot of thought since my deposition ... ' Too late. You're dead. Rookie mistake: Don't cue the expert at his or her depo what the cross is likely to be. Just pin them down on what their theories and methodologies are. A killer cross of an expert at a depo is great theater, but poison at trial. Get just the raw materials for cross at the depo — save your cross for trial."

Mark Mermelstein, Orrick Herrington & Sutcliffe LLP

"Early on in my career as a public defender, I was trying a 0.07 percent blood alcohol DUI. I was confident because my client was below the legal limit. During closing, however, the jurors' eyes told me we lost. They were saying: 'Your client drank, he drove and he caused a car accident. What more do we

need?' They didn't care that my client's conduct didn't violate the law. In their view, he acted badly. Lessons learned: Never be overconfident. Decision-makers do not robotically apply the facts to the law. They are feeling people who will consider an emotional plea."

Eric Westenberger, Edwards Wildman Palmer LLP

"Technology is an amazing tool in the court room — when it's used effectively. I once witnessed an attorney make the horrible but not incredibly uncommon mistake of not sufficiently working with court personnel to ensure that the format utilized by the attorney for his digital presentation was compatible with the equipment in the courtroom. When the moment came to present his expensive and what likely would have been an effective presentation, it was giant dud due to technical problems. Lesson learned: You don't get a second chance at a first impression. Assign primary responsibility to someone on your team to work closely with the court to make sure your hard work doesn't go to waste. Follow up yourself to make sure that all the glitches have been worked out. Utilize the assistance of litigation support and IT people at your firm since they likely know best how to ensure a smooth presentation. And it doesn't hurt to do a trial run."

--Editing by Chris Yates.

All Content © 2003-2014, Portfolio Media, Inc.