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[LETTER to a young trial lawyer]

FIRST, DO NO HARM

Trial Myths That Threaten Good Advocacy

by PAUL YETTER and DAVID BISSINGER

Spend time with a litigator and you will hear all sorts of adages about how to try a case. As with old sayings in general, these aphorisms typically contain at least a grain of truth. But in the age of the vanishing jury trial, lawyers sometimes act on certain adages far beyond their original meaning. As long as the number of trials remains low or decreases even more, these myths threaten to do even more harm to good advocacy. This article seeks to distinguish some of those myths from reality.

Myth 1: Know every fact. In today's typical complex business case, following this advice to its literal extreme would debilitate just about anyone. Even small cases now involve hundreds of e-mails of marginal or no value to the issues in dispute. In depositions, hearings and trials, lawyers will use these e-mails and other tangential facts on issues that will play no role in the outcome in the case.

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Instead, the advocate must constantly winnow irrelevant facts and instead hunt for headlines. The lawyer refining her case should bear in mind the observation of the legendary James Brosnahan from the March *ABA Journal* that "[t]here are not 25 or 30 important witnesses in every case. Instead, there are only two or three who truly matter." Brosnahan, a senior partner in San Francisco's Morrison & Foerster, has tried some of the most complex cases in history, ranging from patent infringement claims to the prosecution of Caspar Weinberger in the Iran-Contra matter. If only two or three witnesses have mattered in Brosnahan's cases, chances are the same will apply to the rest of us.

Myth 2: Be spontaneous. This is horribly misleading advice. Winning cases is all about preparation. Great spontaneous arguments come from laborious preparation. As prominent Chicago attorney Fred Bartlit observed in Emily Couric's "The Trial Lawyers," "These big cases are like D day, Normandy beach. They really have to be planned. There are too many ways to make mistakes if you're not absolutely organized."

For example, lawyers occasionally give unscripted opening statements and closing arguments. That always is a mistake because the first 90 seconds in any case are unique moments after which the jurors will stop listening unless they hear something compelling. As Dominic Gianna stated in his treatise "Opening Statements," "[N]ever, ever begin with anything but a power beginning that, in those first 90 seconds, stirs the minds and the hearts of the jurors."

Compelling argument requires careful planning. Take George Strait's advice from "Write This Down": "[T]ake [your] words and read them every day, keep them close by, don't you let them fade away." That written outline, however, does not mean that the lawyer should read the opening, or even memorize it. Instead, a carefully prepared outline should form the basis of an extemporaneous talk that lets the lawyer make eye contact and establish an emotional connection with the jurors.

Myth 3: Don't worry, our expert has it covered. Every case of significant size involves multiple players, including experts, associates and often local counsel. Each of these players can be vital to the trial team, but overdelegating can create problems at trial.

Even good experts are not qualified to put the case together for trial. A good expert will help the trial lawyer (and the jurors) understand technical matters, but the lawyer bears responsibility for the judgments about how to argue. The same applies to associate counsel, co-counsel or local counsel. The lead lawyer needs to know all the important things about the case (unless the other lawyer takes the lead).

Myth 4: Let's divide the trial to keep it interesting. A corollary of Myth 3 is that dividing trial responsibilities will make the case more interesting. Be careful. By and large, jurors like continuity, especially in cases that take only a few days or even a week to try. Every stage of the case requires the careful argument of core themes. Introducing new lawyers into the process inevitably disrupts the flow of those ideas. In very large cases, to be sure, jurors will understand that different lawyers may handle different matters, but this is the exception, not the rule.

Myth 5: Let's not be patronizing to the jurors. Again, this adage sends the wrong message. Just as the Duchess of Windsor said "you can never be too rich or too thin," advocates can never be too simple or too clear. Of course, the lawyer should not treat the jury as unworldly. Most juries will have several savvy, if not highly educated, members. But jurors do not know your case the way you do. Think back to when you first took the case and all the simplistic questions you asked. The jurors have the same questions.

Myth 6: Don't try an arbitration like a jury trial. A corollary of Myth 5 is the notion that a lawyer in an arbitration need not simplify or emotionalize his advocacy. Again, that advice exaggerates the differences between arbitrators and jurors. Francis Wellman's 1903 book "The Art of Cross-Examination" has an observation about jurors that applies equally to arbitrators: "Present day juries, especially in large cities, are composed of practical business men accustomed to think for themselves, experienced in the ways of life, capable of forming estimates and making nice distinctions, unmoved by the passions and prejudices to which court oratory is nearly always directed." Good trial advocacy works in arbitration, and vice versa. Don't use arbitration as an excuse for less-than-stellar advocacy.

In sum, beware of these and other myths, which all too often can become subtle rationalizations for putting off the work required to win. TTL

Paul Yetter (left) is a trial lawyer and partner in Yetter, Warden & Coleman in Houston. David Bissinger (right) is a trial lawyer and partner in Siegmyer, Oshman & Bissinger in Houston.