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SECTION 18

TRIALS & TRIBULATIONS: WHAT IT TAKES TO BE SUCCESSFUL AT TRIAL

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TRIAL TIPS THAT WORK FOR ME

By Charla Aldous

REBUTTAL ARGUMENT BY MR. GALIPO

By Dale Galipo

TRIAL PREPARATION: IT'S A MARATHON, NOT A SPRINT

By Betsy Greene

LAYERING THE TRIAL: BUILDING THE EMOTIONAL CONNECTION OF THE CASE WITH MYSTERY, INTRIGUE AND REVELATION.

By Karen Koehler

IT'S OKAY TO BE A LITTLE DIFFERENT

By Daniel Rodriguez

TRIAL TIPS THAT WORK FOR ME

By Charla Aldous

We are fortunate to be practicing at a time that is something of a golden age of excellent books and seminars setting out researched, thoughtful and compelling trial techniques. I certainly commend the excellent work of many of these great trial lawyers.[1] But it raises a question: with so many great theories, each different, which is the correct one? I do not think that is the right question. I certainly do not believe that there is a single winning model that can be duplicated by any lawyer with predictable winning results. The concept that is first introduced in law school that there is a rigid method of the "right way to try a case" is not true. As there are as many different types of personalities practicing law as theories on how to do it, it should to be obvious that a "one size fits all" approach will not work. On the contrary, it is my belief that a primary goal of any lawyer should be to be yourself and to break free of stilted and rigid thinking that there is a right way to try your case. So which model of how to try a case is right? It is whatever method naturally fits your personality because, at the end of the day, you have to be your authentic self.

While I do not think a uniform "winning technique" exists, in my experience there are some useful tools that I utilize to address and overcome many of the challenges that lawyers face when presenting a case to a jury. That is why the title of this paper is "Trial Tips that Work for Me." Candidly, what works for me may work for you or may not. But I am hopeful that this will help you think about some of the challenges that you may face with a jury.

Tip One: It is All About the Jury

Probably the best thing that has come from the explosion of literature on how to try cases is that they all teach lawyers to think and work your case up with an eye towards how it will be presented to a jury. I cannot tell you the right way to prepare and try a case, but I can tell you the wrong way: if you get a case in and just work the case up in a rote manner to prepare it for settlement, then you are doing it wrong. From the outset of any case, every thing you do should be done with the thought of how it will help you with the jury. Always remember that a case is all about how you are going to help a jury see it. If you start your case with that mindset, you are going to be ready for trial.

Tip Two: Humanize Yourself

We think a lot about how we are going to humanize our clients to help get the jury to understand what our clients are going through. But equally important is that we need to humanize ourselves. One unfortunate fact is that often jurors do not like lawyers. Whether it is a result of how lawyers are depicted in the media, in Hollywood, or simply the abundance of lawyer jokes, lawyers are looked upon negatively by most lay people. Although we believe we are champions of justice, our reputation with the public at large remains a negative one. Jurors will be skeptical of an attorney presenting a case because they have this natural bias.

So one task that is of fundamental importance is to try to get a jury to like you, and to do that, you have to humanize yourself. Let the jury know a little about you as a person. I typically try to do that in voir dire. In most jurisdictions, jurors are required to fill out forms or questionnaires about themselves in advance of voir dire. This is invasive. Why should jurors have to give these lawyers they don't know private information about themselves? You can understand why this may be off-putting. So one thing that you can do is to tell the jury about yourself and provide them with the same information they had to provide you. This humanizes you and lets the jury know more about you than some preconceived idea of a lawyer. Also, be a little self-deprecating. Make a mistake and laugh it off. Let the jury get to see you as a person and not some lawyer from central casting.

Tip Three: Climb in the Box

Importantly, bring down the wall between you and the jury by the way you refer to them. Do not ask the witness to "tell the jury..." Ask the witness to "Explain for us..." This further humanizes you and puts you on the same team as the jury as if you climbed in the jury box with them. If you can get the jury to see you as a normal person like them, working just like them to get answers, they will be more inclined to trust you and follow you where you want to go.

Tip Four: Ditching the Script but not the Preparation

Law schools teach a script about how to try a case. While what they teach may be useful to young law students to help them get a beginner's knowledge of how to behave at trial, you will not achieve great results by playing by that script. You have to think outside the box and keep the jury (and the judge and opposing counsel) guessing. Jurors like to be entertained, and opposing counsel get rattled when the unexpected happens. Thus, if you can catch everyone off guard, you will have accomplished those two worthy goals in your presentation. In one trial, when asked to call my first witness, I responded by calling to the stand any of the "suits on the other side who would care to try to explain why my client had to die." In another, I objected to my own client on direct examination for talking too much: "Your Honor, can I object to my own client and tell him to hush?" These are but just two examples, but they both caused the same effect: opposing counsel and the judge were caught off guard and the jury sensed something electric was happening. As it is essential to keep a jury entertained, you have to be willing to depart from the script or else you risk the jury nodding off.

I am a firm believer that being scripted is a bad thing. I have seen too many lawyers so married to a script that answers are ignored and not followed-up on, as the lawyer just goes to the next part of the script. Trial lawyers must learn through experience how to be fluid and be willing to go with the flow.

When I say things should not be scripted out, this is not to say that trial lawyers should just wing it. On the contrary, preparation is the most important thing that a lawyer can do. A lawyer must know the record and the witnesses completely to have any success. Moreover, a lawyer must command the courtroom during the presentation which requires that the lawyer prepare for that presentation. Commanding the courtroom requires thought being put into where (and when) to stand, what exhibits to use, tone of voice, and even what clothes to wear. The courtroom is your canvas and you must have the right tools and know what your brush strokes are going to be before you even begin. To properly command the courtroom involves preparation and thoughts about what image you want to send to the jury in everything you do.

The trick is to be masterfully prepared, but not to seem scripted. And if you are using an outline, that is not possible.

Tip Five: Try Cards

I personally never script things out. I do not even use outlines. Instead, I use a method that my friend Lisa Blue taught me involving colorful index cards and Sharpies. I write down on each card just a short topic to cover. The cards are never in any particular order, and they may involve topics that can be used with different witnesses. The cards allow me enough information to ensure that I cover the topics I need to cover, but they still enable me to be fluid because the only things on the cards are broad topics. The cards also have the benefit of the jury knowing that there is a subtle transition when I lay a card down and move on to a new topic, as well as being able to see how much longer the examination will likely last. I think they like being able to follow along in that regard. In my experience, I think they listen extra closely when they see I am on that last card/topic without me even prompting them to do so.

Tip Six: Use Jury Consultants

Most experienced trial lawyers like to believe that they know how to read a jury. And to some extent they do, but even the best trial lawyers can benefit from jury consultants. In any case of substance that would

permit you the expense of hiring a jury consultant, it is my belief you should use one. Jury consultants can help with witness preparation before a deposition to work out the kinks in how your client answers questions. Jury consultants can be of assistance in developing themes for your presentation. They can help decide what exhibits should be used and how they should be presented. Jury consultants can also run focus groups and mock trials which are worth their expense, especially because they are perhaps the best way for an attorney to get the true value of a case. Most importantly, jury consultants can be extremely valuable in voir dire and developing jury questionnaires that will help you efficiently and accurately avoid a jury that is biased against your case. They are adept at doing this because they have experience, but also because they look at the matter as a neutral instead of an advocate.

We are often too close to our own cases to make neutral assessments which leads us to over-valuing our case or over-looking short-comings. This is dangerous. So I believe that you should find a jury consultant that can be trusted and then trust that consultant.

Tip Seven: Be Bold

A timid lawyer will not have success. To be successful, a good trial lawyer must be confident enough to be bold in presentation. This is most important when dealing with damages. Damages must be addressed early and often. Start in voir dire and set the jurors' minds thinking about damages. Be bold in asking witnesses about damages. And in closing, you need to be completely bold in asking the jury to award damages. In my opinion, one should not put a number on soft or unliquidated damages but be bold in describing the ways in which your client has been affected. You cannot be timid about damages or act ashamed for seeking them.

Being bold also comes into play when dealing with the bad stuff that every case has, such as a particularly annoying trait or bad personality of a client or a witness. Trial lawyers often try to diminish or hide bad stuff. But if it is going to come out in front of the jury, a trial lawyer should be bold and embrace the bad stuff and disarm the negative consequences by addressing it first. To do so is bold, but it will also humanize you to the jury and entertain them in addition to disarming the bad stuff.

Tip Eight: Never Let Them See You Sweat

There is a risk for lawyers who are caught up in the battle of a trial to get lost in the moment and if some ruling does not go the lawyers' way, the lawyer gets upset or concerned. Remember that the jury is always watching you. If you act like a ruling on an objection or instruction from the court was expected, the jury will assume it is no big deal and forget about it. If you look shaken or upset, the risk is the jury will over-read into that and assume something important happened and a weakness in your case has been exposed.

There may be times at trial to be indignant or show your displeasure, but those should be purposeful moments to send a message to the jury like after some particularly egregious conduct by opposing counsel or a witness. It should not be because you are truly upset or surprised by some development. Every reaction you show should be done with an understanding of how a jury will perceive it, and you should always be perceived as in control–never rattled or surprised. Never let them see you sweat.

Tip Nine: Handing it off to the Jury

If you are successful in humanizing yourself, in getting the jurors' trust, and in persuading them by not being scripted with an informed and bold presentation, then all that is left is to hand the case off to the jury. In closing argument, you must put the jury in your shoes with a purposeful connection. The jury must feel like they are taking the case from you; that they are finishing the job you have started. I inform them that I am giving the case to them and then it is out of my hands. This triggers a responsibility in the mind of a jury that will drive their deliberations. With luck, you will have created an emotional connection to the jury that will ensure that they will finish the job for you and in your client's favor.

Tip Ten: Try Your Cases

The best tip I can give you on how to be successful at trial is to get experience. No trial lawyer is better in their first trial then they are in their fiftieth. The only way to get better at trying cases is to just do it.

Much has been written about the death of the jury trial, and I agree that far too many cases are settled instead of tried. I think a lot of that is fear. Fear of losing, fear or getting stuck on appeal, fear of the emotional and time investment needed for trial. Juries can read that fear on you, and it will hurt your case. The only way to overcome this fear is to just try cases until that fear is gone. As a plaque in my office says, "shut up and pick a jury." Unless you are getting great value, take your case to trial. You will get experience and be better the next time. You will show to defense counsel that you are not afraid of trial, which actually will help you in the next settlement discussion. You will learn, and if you worked up the case correctly, you have a good chance of winning.

Try your cases. You will learn through trial and error how to be the best version of you. And your clients will benefit from that.

Endnote

1. There are so many wonderful books that have been published in the last decade that I have found compelling and useful and recommend to others. Chief among them are Rick Friedman and Pat Malone's essential *Rules of the Road*, Don Kennan's breakthrough *Reptile* book and his follow-up *Keenan Edge* books, Randi McGinn's motivating *Changing Laws, Saving Lives*, and the brilliant Mark Mandell's powerful and recently-updated *Case Framing*. Even though I have tried hundreds of cases, I continue to find useful ideas and concepts from these thoughtful and sharing masters of our craft.

REBUTTAL ARGUMENT BY MR. GALIPO

MR. GALIPO: Okay. So now we only get ten or fifteen minutes so it's not too very much longer. Thank you all again.

Counsel said the most objective evidence in this case is Deputy Woods. I would submit that's the most un-objective evidence in this case.

What's objective is Kelsey, Kennedy, the medical examiner, the pictures of Nate's face. That's subjective. Okay? So here's what they want you to believe.

Nate was winning this fight. There you have it. Who does it look like was winning this fight? I think it's pretty obvious.

And when he mentioned the people that were there that night, he forgot to mention Nate. Nate was there. He can't be here to tell you his side of the story so I'm going to try to tell you his side of the story the best I can.

And his side of the story is he didn't do anything wrong. He wasn't trespassing. He was not under the influence of drugs. I can assure you, ladies and gentlemen, if he was under the influence of drugs, that evidence would be presented to you.

He lived there. He gave his name and date of birth. He wasn't doing anything and he was being harassed, he was being hassled, he was afraid of this officer.

This officer tried to unexpectedly grab him. He tried to step or run away. You see how fast he's coming down those steps? It almost looks like he was pushed with that much momentum.

He should have been asked: Are you okay? Are you all right? Maybe call for medical. He's pointing a Taser at him threatening to tase him.

What I did do? What did I do?

Kennedy sees him backing up and putting his hands up. He's given up. And 20 or 30 seconds later, Deputy Woods kills him.

He kept saying listen to the audio, watch the video. I encourage you to do that. Because the video doesn't show one punch from Nate to him. Not one punch. The picture doesn't show one punch.

His glasses didn't even break. Didn't even break. His subjective statements, totally irrelevant. Yes, there's no blood on his uniform which suggests it wasn't the position he said.

Kennedy never saw him on top. They were side by side. In fact, when you look at the X-ray, one shot -- well, let's play this real quick. This is the audio where he says, "Grab your gun?

"I don't know."

(The audiotape was played.)

MR. GALIPO: You can listen to it over and over if you want. You got to pay attention. You got to pay attention.

He said, "Did he grab your gun?

"I don't know."

He never grabbed the gun. You may have noticed when counsel put Deputy Woods back on the stand in their case and he went through the whole scenario of what happened and he got on the ground and did this demonstration, he never once said, "He grabbed my gun."

Not once. When they got back on the stand when he was going through it, not once. You know why? It never happened.

And could we go to the Elmo, please, real quick.

(The exhibit was displayed on the screen.)

MR. GALIPO: And the other thing is when you look at the trajectory of the shot to the side, look where this shot enters. Enters on the side and where does it end up? It ends up right there (indicating).

That shot was shot to his side.

Let me make sure I got the right side. His left side going across his body this way (indicating). That shot was not shot this way (indicating). That shot was shot to the side and the bullet went across the body. He was not on top of him. Kennedy didn't see him on top of him. He

wasn't on top of him.

Okay. Let me cover a few points.

Mr. James Kennedy, if they thought he was going to help their case, they would have called him and had him there. He doesn't help their case. That's why they didn't call him.

Why he's not here, you can't speculate. But we got some of his testimony in through their expert Mr. Chapman.

The parents. The issues you have to decide right now, the only reason I put Ms. Archibald on is to establish he lived there because they made a big thing of it with Mr. DeFoe.

The audio. Listen to the audio. Not one question about drugs, medication. Zero.

And pupils not dilated? That's the telltale sign of someone under the influence. Five or seven minutes, you don't see his pupil dilated?

Nate has various acts of compliance, cooperation. He didn't have to cooperate at all. They always try to blame it on the decedent. They also try to say it's his fault. Never want to accept responsibility.

That's not right. What did Nate do to deserve to be killed? We know he didn't punch him in the face. We know he didn't grab his gun. You can't shoot someone for

fighting.

What did he do to deserve the death penalty? I want you to think about that. What did he do to deserve the death penalty?

MR. EWING: Objection. 401.

THE COURT: Overruled.

MR. GALIPO: Nothing. Nothing.

POST teaches it has to be life-threatening. It was not life-threatening. And if Deputy Woods, four to six months on patrol, freaked out, overreacted, got over his head, made poor decisions and killed someone, that's what happened.

And then 28 days later they're trying to come up with a story they're still trying to sell to you that is not the truth.

He only ran after he was tried to be grabbed. You can't shoot for running. You can't shoot for fighting. You can't even shoot for someone being assaultive. And guess what? He wasn't even assaultive.

I go back to ask you, ladies and gentlemen, to think about this question. If Nate really punched Deputy Woods in the face repeatedly, which is Deputy Woods' claim, how come you don't see it on the video not even one time? Not even in one frame.

How come you see a face that has no visible

injuries? How come their own expert said it's nowhere there? How come Kennedy said he didn't punch him at all? How come Kelsey said he never landed a punch?

There's only one logical conclusion. It's because it never happened. Even if hypothetically he threw a punch or two, which he didn't because you would see it on the video, he had a right to defend himself when some officer is hitting him on the face and head ten times. You could see it on the video.

Who was winning the fight? Who was the aggressor? Deputy Woods was the total aggressor. Totally escalated this situation and totally was winning the fight and then he killed him to boot.

But fear has to be reasonable and his testimony is not the best evidence. The best evidence is the video, the audio, the medical examiner, Kennedy, Kelsey, and everything else that contradicts his testimony.

Even Dickey comes in here and says he never pointed a gun at me. Virtually every single thing Deputy Woods says is contradicted by other evidence.

You don't hear him mumbling incoherently. Every -- I never -- he never asked me. Counsel stood -- he never asked if he grabbed my gun. Every single thing he says.

The burden of proof in this case, I'm telling you, it's 90 or 95 percent in favor of the plaintiff. This is

one of the worst shootings, most excessive egregious shootings, I would submit, you'll ever see.

And there's so many reasons the detention wasn't reasonable. I went through all of them.

The first three are: He wasn't under the influence of drugs, he his name and date of birth when he didn't have to, and he wasn't trespassing.

The reason the force was excessive, there's about 30 of them. Not last resort, not direst of circumstances, no reverence for human life, other reasonable options.

Overreaction at a minimum. Can't shoot for fighting. Can't shoot for assaultive. It goes on and on.

Totally excessive and unnecessary. The credibility problems, I talked about. So let me just wrap up in saying this.

Whatever happened to kindness? Compassion for a fellow human being? Why is there so much violence? We have to kill people? That's what we want our officers to do?

I'm not anti-police. I have a good friend who's a police officer. But we don't want police officers killing people under these circumstances.

There has to be some boundaries. There has to be some limits. Someone has to police the police and sometimes it's ladies and gentlemen like you who need to have courage and stand up for what's right, stand up for our

Constitution, stand up for a fellow human being.

We don't want people being killed like this. He's just trying to go home.

If this was a case where the officers were responding to an armed robbery with shots fired and people had guns shooting at them, it would be a difference case.

This guy is unarmed. He just wants to go home. He wants to go home and he ends up killed. The parents have one chance, one chance for justice for their son. This is it. You are it. We're putting all our faith in you.

We believe then and believe now you can be fair and will make the right decision based on the law, based on the evidence, based on the value for human life.

We don't want people being killed like this. So I ask you when you deliberate and look at the verdict form, I get it the defense wants you to answer "no"; but if you're answering based on the evidence and the law, the answer to those questions is going to be "yes."

Thank you for all for your time and attention.

THE COURT: All right. Thank you, Mr. Galipo.

I believe we have a bailiff here that needs to be sworn that will take you into the jury room to begin your deliberations.

BAILIFF SWORN

THE CLERK: Please state your name for the record.

TRIAL PREPARATION:
IT'S A MARATHON, NOT A SPRINT

By Betsy Greene

It is a humbling honor to be invited to speak with these great trial lawyers as a Master. I have given a lot of thought as to how to share the insights of a career in 30 minutes. My goal is to provide some insight form the perspective of 37 years of practice some useful tips that can be put to use immediately. Trial preparation is a marathon, not a sprint.

My Marathon Story

Let me take you to November, 2004. I am miserable. I have been a trial horse at a personal injury firm for 16 years. I am overworked, underappreciated and not fairly compensated. I have had a fair amount of success in my career so far. In my heart, though, I know I am not giving my clients my best. With my caseload, it is just not possible. I am struggling.

My boss at the time was a huge Gerry Spence fan. He paid for me to attend a regional seminar put on by the Trial Lawyers College. I met Gerry and was introduced to the Trial College method. That weekend seminar changed my life. I returned home and quit my job of 16 years that Monday morning. I walked away from a large practice and opened my own office. I have never looked back. Not once.

However, during that time, I had a difficult time managing my stress levels. A friend had run her way through a terrible divorce. Martha insisted that I sign up for a half-marathon training class at the YMCA. I had never run in my life. I didn't even know what a half marathon was. Despite my misgivings, my future law partner and I signed up for the class. When I saw the training schedule, I literally laughed. I didn't think I could possibly run all of those miles.

Despite my misgivings, I showed up for almost every training session. I did my solo runs as scheduled. I stuck with it and trained for 3 months. I was slow, but the long runs suited me. When I crossed that finish line in Louisville, Kentucky in May of 2005, it was one of the greatest moments of my life.

I know about marathons. I went on to run 28 half marathons and four full marathons. I have come to see training for a marathon as a metaphor for being a trial lawyer. Being a trial lawyer is a marathon, not a sprint. The message of my story is that people can accomplish almost anything they put their mind to accomplish. Being a successful trial lawyer takes grit, mindfulness and spontaneity. Preparing for trial takes hard work.

I believe we trial lawyers all have grit. Grit means that a person has courage and shows the strength of their character. Grit has five characteristics: courage, conscientiousness, perseverance, resilience and passion. Some say that whether a person has grit is a major factor in whether that person is successful in life. While some people naturally have more grit than others, grit is, according to psychologists, a skill that can be developed. Developing grit starts with commitment.

The other important qualities to being a trial lawyer are the ability to be mindful and to be spontaneous. Your trial story must address the jury's needs, not yours. Mindfulness is a mental state achieved by focusing one's awareness on the present moment. In trial, things happen. A trial is shared experience by a group of people that includes the jury. Successful trial lawyers are present in each moment of the trial and can react to what is happening in the courtroom.

When I went to the Trial Lawyers College three-week program in 2005, I was so not present that I didn't even know what the faculty was talking about. I hadn't heard of the term mindfulness. I had lived my life

planning what I was going to do next. Always thinking of what would come next. The next question. The next witness. The next case. Fortunately, mindfulness can be developed. For me, endurance training was my meditation and yoga taught me to focus on the present.

Spontaneity is also important. For me, it takes a lot of work to be spontaneous. In the trial context, spontaneity allows the trial lawyer to react in real-time to the needs of the jury. This is also a skill that can be developed. Many lawyers take improvisation classes to work on spontaneity. For me, spontaneity requires assiduous preparation. It requires having done the work to discover the story, to design and practice my arguments, and to have anticipated any evidentiary or legal motions. Once I have done the work, I can be present in the courtroom and be spontaneous, if called for.

Trial Preparation

Role reversal is an invaluable tool in all phases of trial preparation. At the Trial Lawyers College, we use psychodramatic techniques to discover the story of a case. The psychdramatic techniques are also used to discover the client's truth through reenactments. Role reversal requires nothing more than a conscious effort to step into the shoes of another person. As Atticus Finch famously told Scout in *To Kill A Mockingbird*, "you never really understand a person until you consider things from his point of view... Until you climb in his skin and walk around in it."

As with any skill, a practitioner of role reversal improves with experience. One simple exercise is to empower oneself as a prospective juror. Reverse roles with the prospective jurors while preparing voir dire. Really try to adopt the point of view of the prospective juror. (If you do not yet have any information about the jury panel, take on the role of someone you know well.) Then, have a colleague ask you some of your potential voir dire questions. Consider how those questions feel. It is amazing how condescending some of the "standard" jury questions feel and how many other ways there are to open a dialogue with a panel of prospective jurors.

Reverse roles with all of the potential witnesses in order to assist in preparing direct and cross examination. Reverse roles with the judge in the case. Reverse roles with your opposing counsel. A consideration from the perspective of all of the trial participants will help the trial lawyer truthfully communicate with everyone in the courtroom in an interesting and engaging way.

Preparing for trial doesn't have to be expensive. You don't necessarily need consultants and experts. Some cases just don't justify the investment of large sums of money. Any case that will go to trial, though, deserves the investment of time and preparation. Preparation in action will reap tremendous benefits using psychodramatic techniques.

Preparation does not begin the week before the trial. You cannot train for a marathon in 30 days. These methods are simple, effective, and inexpensive. What is required is time. You must commit to time, well in advance, to do this work. It will be a challenge. For cases in litigation, I calendar much of my preparation time as soon as I learn my trial date.

Initial Client Meeting

Trial preparation begins at the initial client meeting. It is an ongoing process. Think about finding the story, not necessarily identifying the facts. Try listening for what is not being said. Consider how it might feel to be in that situation. Begin building a trust relationship. Yes, you need facts, but start thinking in terms of story.

Discover what is important to your client. What are their values? What is their message to their children? What message did they get from their parents? Take the time and make the effort to discover the human

story of your client. Spend time with your client. Be curious. Ask questions. Go to their home and share a meal. What is their life really like? This doesn't have to be a catastrophic case. Every person has a story.

Discover the Story

Psychodrama uses guided dramatic action to examine specific problems and issues. The originator of the method, J.L. Moreno, defined it as a dramatic search for the truth. Others such as John Nolte and Kaitlin Larimer, who have for years taught lawyers to use Psychodrama, describe it as discovering the truth through action. While psychodrama has traditionally been associated with therapy, it does, however, have much broader applications and is better understood as a way to enhance communication. Trial lawyers nationwide, graduates of Gerry Spence's Trial Lawyers College and others, have applied psychodramatic techniques to their work with great success. For the trial lawyer who is willing to invest the time and effort to learn how to use psychodramatic techniques, the uses are many and the benefits immeasurable. Among the benefits are improving the preparation of a witness's testimony.

Human beings communicate by telling stories. By using psychodramatic techniques, a trial lawyer and the jury can experience the clients' or witness' stories. This method can require several people and an hour or two. Or, it can require only a lawyer, a client and perhaps one other person, a paralegal or a secretary. It depends on the goal of the specific exercise. The emphasis is on action and the discovery of the feelings that the client or witness has about the action. The process is led by a director, in the case preparation context, generally one of the lawyers. The focus is on the person whose story we are telling, called a protagonist. Others participate by playing roles and are called auxiliaries. However, the information for all auxiliaries comes from the client, who in reality plays several roles.

The goal of the drama is to reenact events crucial to showing what happened in the case. Any number of scenes may be enacted, perhaps before and after the events that gave rise to the lawsuit or the crime. This is done using a variety of techniques, including role reversals, doubling mirroring, soliloquy, and sociometry.

The purpose of the reenactments may vary. The lawyer could choose to do some group work without the client in order to discover the compelling stories within a case or to test the client's version of the case. Again, there is a director and the key is to put events into action. The group then discusses themes that would help the jury understand the case. By considering varied perspectives and listening to the group brainstorm ideas, a trial lawyer can decide how best to tell the story of the case in the opening, in the presentation of evidence, and in closing argument. At the Trial Lawyer's College, this is described as discovering the story.

A lawyer may wish to reenact events with the client or a witness in order to discover what happened. A lawyer working with the client or a witness can reveal details about the case that inform the trial presentation in order to make the evidence more compelling for the jury. The psychodramatic method of reenacting events helps the participants get in touch with and express the truthful and powerful emotions associated with a client's life-changing traumatic injury or criminal accusation. The method can be utilized during the presentation of evidence to actually show the jury events important to the decision in the case.

There are many, many ways to do this. Depending upon your practice, you may not do some of this work until you are sure that a case is going to trial. I would argue, though, that doing some of this work before you do depositions will allow you to explore the possible story of the defendants and the defense witnesses. Once the possible stories are explored, they can then be explored through the questions asked in interrogatories and in depositions;

The goal is to find the compelling and truthful story that will move a jury to take action to right the wrong that was done to your client. How do you personally feel about the client? How do you feel about the issues in the case? Never fall into the trap of buying the defense's story. Banish the words "gap in treatment" from your vocabulary. Psychodramatic techniques are invaluable in discovering and telling your client's story

In addition to role reversal, other psychodramatic techniques have broad application in preparation for the trial and the trial presentation. In addition to role reversal, scene setting, soliloquy and doubling are invaluable tools to discover the story of a case. Successful trial preparation requires many, many hours of work. Psychodrama is an incredibly powerful arrow to add to the trial lawyer quiver. A trial is, by its very nature, dramatic. The psychodramatic method provides a framework for exploring how to best present the drama of the case. Although psychodrama is not difficult to learn, it does require some training and time to practice.

The use of psychodrama in a trial practice takes effort. It requires commitment in time and a willingness to try something different. It requires a different approach focusing exclusively on specific events or emotions in order to understand the client or witnesses' reality. However, by taking the time to truly explore and try to understand the client's or witness' experience, the trial lawyer can greatly enhance his or her presentation.

Focus Groups

Focus groups come in many shapes and sizes. The bottom line is that it is crucial to talk to non-lawyers about your case. There are many resources and books available about focus groups. Two examples are David Ball's book/DVD "Focus Groups: How to do your own Jury Research, (Trial Guides), and the recent Phillip Miller & Paul Scopter's "Focus Groups: Hitting the Bull's-Eye", (American Association for Justice). Ken Levinson, Levinson and Stephani, Chicago, spoke on this topic yesterday.

There is a lot to consider. How much can you spend? Should you hire a consultant? Can you do this yourself? Your focus group will be more successful if you know what you want to accomplish. Do you want to gauge reaction to a particular witness? Are you exploring themes? Are you getting a sense for the ask? These are all remarkably different propositions that require different preparation.

Focus groups can be designed to have varying degrees of complexity and cost. A simple focus group could be talking with a group of your friends. Consider going to a nursing home or a local church for volunteer focus group jurors. If you want a cross-section of the community, you can use Craigslist. (You will have to screen your focus jurors.) You don't need fancy. Check with the local library.

Again, focus groups require time to plan. One of the many advantages of a focus group is that it forces you to focus your presentation. Do your focus group in time to make a difference in your presentation. It's always better to do a focus group than not but it is better to do them well in advance of the trial than the week before.

Trial Skills

I could write for days about trial skills. There are many great educational programs about improving your trial skills, including state trial lawyers associations, the American Association for Justice, and the Trial Lawyers College. (I have been on the faculty of the Trial Lawyers College since 2010.) The challenge to the trial lawyer is to find their own voice. As we say at TLC, it all begins with you. If you are authentic, the jury will trust you.

Again, every phase of the trial must be prepared. I am a big advocate of preparing in action. Get a group together, friends, office workers, fellow lawyers and do your voir dire within a few days of the trial. You can test out your themes and get the group's reactions. You will be so much more confident and relaxed when you get us to address the venire.

Think in terms of story. Work to develop a compelling story which includes a hero and a villain. Design your opening to tell the story in the present tense in a compelling way. Think in terms of movie scenes. If you were making a movie of the case what scenes which you shop a movie almost never starts with the main event. With every witness, including the defense witnesses, tell the story of the witness as it fits in the story of the case. In your closing tell the story of the trial.

Practice, practice, practice. Practice your opening argument to make sure that you points are clear and that you are using everyday language With each witness tell the story of the witness as it fits in the story of the case Be sure to tell your story on cross-examination as well. Use psychodramatic techniques to discover the story both of your clients and of the defense. Incorporate those techniques into your trial presentation.

Practice. Practice. Practice.

IT'S OKAY TO BE A LITTLE DIFFERENT

By Daniel Rodriguez

One of the things that scares most of is being a little different. That may be because we're different, we don't quite fit in. That feeling of insecurity is true for us (the lawyer), and our clients as well. Our fear is that because we're different we won't be accepted by our jurors.

To some extent our differences, whatever they may be, do indeed separate us from the people who sit on our juries. We cannot be part of the group if we're different, or at least that's what we tell ourselves.

After all, we gravitate to people who think like we do, look like we do, shop at the same places we do, worship at the same places we do, and the list goes on and on. After all, birds of a feather flock together, right?

But, does feeling different really mean that we're actually different from others? When we dig deep into our soul, we might find that at our core, the root of it all is fear. And don't we all experience fear in one way or another? And because we all experience fear, our sense of being different just might be something that brings us together instead of separating us from one another.

How might we feel different from others; how might our clients feel different from others? Do we feel different because we happen to be gay, because our skin is a shade of pigmentation that isn't white, because we speak with an accent, because we're overweight, or because we live on the wrong side of the tracks? Once we recognize that our perceived differences might be the very things that connect us with jurors; we might decide to embrace it instead of running away from it.

What Made Me Different

Please allow me to tell you a little bit about myself. I was raised in a migrant farmworker family, which meant that my family was always on the move, following the crops from place to place. I picked cotton in Texas, Arkansas, and Louisiana and maybe Mississippi; although I'm not sure of that state. I never picked cotton in California, but I picked almost every other crop. And that meant I had to attend between three and five different schools every year growing up.

We would cram the entire family (six kids) into a one- or two-room house. We sometimes lived in labor camps. We spent several seasons living in the labor camp that John Steinbeck made famous in his book, *The Grapes of Wrath*. We lived in this camp after the "Okies" had moved out and gone on to become landowners themselves. We Mexicans filled in the void left by them.

Growing up this way meant that I didn't live in a house with indoor plumbing until I was in the 6th grade (about 12 years old). The first time I spoke on a telephone I was a sophomore in high school. The first time I saw dental floss I was about 21 years old. And the first time I was ever seen by a dentist I was 25 years old.

I still remember getting in trouble my first week in school which I started at 8 years old. I didn't speak a word of English and not knowing how to ask where the bathroom was, I decided to relieve myself in the bushes. Unfortunately, the schoolyard teacher saw me and sent me to the office. I remember not wanting to change out of street clothes and into my P.E. clothes in the locker room because I was afraid that people would see the holes in my socks as well as in my underwear.

It didn't help that I decided to major in engineering instead of the traditional pre-law majors of Political Science, English, or History. I was the only student in my class at UCLA Law School with an

undergraduate degree in engineering. And did I forget to mention that I was the only Latino in my electronic engineering class at Cal Poly, San Luis Obispo? All of these things only made me feel even more different.

And when I became a lawyer and went to work at a personal injury law firm in Bakersfield, it turned out that I was a "different" kind of lawyer. And that's because for all practical purposes, I was the first Latino lawyer in the county. There was already a Latino lawyer in the area, but he did insurance defense work and represented businesses and the well-to-do. He did not identify himself as a Latino, but rather gave the impression that he was Basque. I still remember being in court on a criminal matter during my first year of practice and the judge calling out my client's name. As I stepped through the swinging gate, the judge said to me, "I only want the lawyers up here, not the defendants. You'll have to wait until your lawyer shows up." The judge was then taken aback when I told him that I was the lawyer. And the other thing that was "different" about me was that I did both criminal and civil (personal injury) jury trials.

Being Different Paid Off

There is no doubt that being different was sometimes painful for me during my childhood. Every kid yearned to belong to the "cool" kid's club. But, no way could I have ever been a part of this clique given that I was never in the same school long enough to fit in. Although, attending so many different schools taught me a skill that would come in handy later in life as a lawyer. On the first day at a new school, I never knew whether the student walking across the school year wanted to confront me or welcome me. Was he friend or foe? The only way I survived as the perpetual new student was to develop the ability to read people quickly and to learn to build rapport in the first few minutes of meeting a stranger. These skills later came in handy during jury selection because, isn't jury selection all about reading people and building rapport with twelve new strangers?

As for being a Latino lawyer, or as we said back then, Chicano lawyer, within the first month of being sworn I started a weekly Spanish language radio show about law-related topics. Never mind that I had never done any radio work before that time. The show was a hit. Within the first two months or so, I had about fifty new clients and by the end of my first year I had about one-hundred fifty clients. None of these clients came in because of the law firm I worked for, but rather because they had heard a lawyer for the first time in their lives discussing in Spanish what their legal rights were.

And it wasn't just that I spoke Spanish, but rather that I was familiar with the life, the work, and the culture of most of my clients. For instance, one of my first wrongful death cases involved a worker who was electrocuted while picking oranges when his aluminum ladder made contact with an overhead powerline. Turns out that I had picked oranges in the very same orange grove that the worker was killed in. I was also familiar with the defendant landowner because I too had worked for him as a farmworker. And, it gets even better, I knew a little bit about overhead powerlines because I had worked two summers for PG&E. I also knew a little bit about electricity because of my electronic engineering degree, not electrical engineering, but close enough.

My different undergraduate degree, not Political Science, nor History, nor English, but Engineering, also came in handy. As a law clerk I would accompany the lawyers in our law firm on expert depositions, where I would feed them questions to ask of the experts. I also remember the very first products liability case I worked on involved a cotton gin stand that had amputated a worker's arm. The machine did not have a lockout-tagout feature as part of its design. As it turns out, I had worked night shifts while attending the local community college at the very same cotton gin where this accident occurred. I was also very familiar with the operation of the machine in question as well as the layout of the cotton gin.

One of the other ways I was a "different" kind of lawyer is that I tried both criminal and civil trials. That was unusual 40 years ago and is probably even more unusual today. Most lawyers avoided doing both

criminal and civil trials because it involved more work to stay up with recent developments in each particular area of law. I saw it as an opportunity to get into the courtroom and in front of juries.

As it turns out, doing criminal defense work and personal injury work complemented each other. The criminal defense trial work taught me how to think on my feet because we didn't have the luxury of deposing the experts before they were brought in by the prosecution to testify. For instance, we had to be prepared to cross-examine a pathologist, a toxicologist, a fingerprint expert, an accident reconstruction expert, and so on. We also had to be prepared to cross-examine police officers who made wily witnesses after years of testifying before juries. This experience would later become invaluable in civil trials where, for one reason or another, the defense lawyers forgot to send out a demand for exchange of experts. The civil defense lawyers couldn't figure out why I wouldn't agree to a late exchange of experts. Or why I felt perfectly comfortable cross-examining police officers in excessive force cases (42 U.S. Code section 1983.).

Doing personal injury work complemented my criminal defense practice for several reasons. First, I was up against lawyers who spent a lot more time preparing for depositions or trial. The opposing lawyers had a reason to prepare. Namely, billable hours. That made me work even harder in preparing my cases. Second, insurance defense lawyers also had an incentive to get into the minutia of the Code of Civil Procedure. If I didn't cross my T's and dot my I's, I risked having my cases thrown out on a demurrer or on a motion for summary judgment.

Third, unlike prosecutors, insurance defense lawyers filed a ton of paperwork in every trial. In a typical misdemeanor trial, the prosecutor would file no more than three stock motions in limine. An insurance defense lawyer, on the other hand, would file dozens of motions in limines even in the smallest of personal injury trials. Again, because insurance defense lawyers have the powerful incentive of billable hours to try to paper us to death.

Fourth, trying both criminal and civil trials gave me the opportunity to be in front of the jury much more than lawyers who exclusively handled criminal or civil matters. I handled my first criminal preliminary hearing within two weeks of being sworn in as a lawyer and my first criminal jury trial within a month of being sworn in. The ability to try both criminal and civil trials afforded me invaluable trial experience that made me a better trial lawyer in either the criminal or civil setting.

What About the Different Client?

Just like lawyers, our clients can also be a little different from the mainstream person in our society. And they, like us, can feel inadequate or insecure about themselves. All which may impact their ability to communicate in either the deposition setting or at trial. In diverse Southern California, one thing that keeps coming up in our practice is representing clients who do not speak English.

How do we get our clients to better connect despite the fact that they do not speak English? One way is to explain to them that it's okay to share their sense of inadequacy or insecurity with the jurors. Because after all, the jurors have also felt inadequate or insecure about one thing or another at some point in their lives. In other words, it's perfectly ok to be human and have human feelings of inadequacy or insecurity because we all do.

The other thing we can do to reassure our clients is to remind them that some feelings are universal. For instance, in a case involving the wrongful death of a child, the verbal language may be different, but the language of love is universal. Burying your child is not the natural order of things, no matter what language you speak. In a wrongful death of a spouse, re-enacting the moment the couple fell in love needs no translation.

Another way that our clients may feel different from mainstream people is because of their sexual orientation. This is especially true in cases involving minors who have been bullied in school. So much so, that they later suffer from PTSD, depression and/or suicidal ideation. Even though our clients may feel that they alone have been tormented by a bully, the reality is that a good number of people have been bullied during their childhood. Maybe not because they were gay, but because of any multitude of reasons. Because they were overweight, because they spoke with an accent, because they dressed differently, or whatever other reason. The sad reality is that a lot of people will identify with the ordeal of having to live with the constant fear of being bullied, including our jurors. And again, human emotions such as fear, humiliation and embarrassment are emotions that all of our jurors have experienced in some way or another throughout their lives. Which means that stories of fear, humiliation and embarrassment will resonate with them.

Conclusion

In conclusion, we know that all of us as lawyers have felt some sense of exclusion or loneliness because we feel that somehow, we are a little different from other lawyers. And it is true that we are different from any other lawyer because as human beings, we are all unique. We can either wallow in despair at our perceived differences or celebrate that which makes us different from other lawyers.

The same can be said about our clients. They also can experience some sense of exclusion or loneliness because they feel they are a little bit different from other people. It is up to us as their lawyers, the people they sought out for help, to show them how it is their "difference" that will actually help them connect with our jurors. Because whether lawyer or client, it's when we let our guard down and allow ourselves to be vulnerable in the eyes of the jury, that we truly connect with them.

Layering the Trial: building the emotional connection of the case with mystery, intrigue and revelation.

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In the early 2000s I represented a pilot who suffered a head injury when he struck his head on the entryway to an airporter passenger bus. His wage loss was high since he was grounded for over a year. We went to trial with no offer. The lawyers in my office were taking fake bets on how soon the defense verdict would come in.

The Court read a neutral statement to the jury. In a few sentences it explained: the pilot struck his head when entering a Holiday Inn bus and suffered injuries; plaintiff claimed negligence; the defendant denied liability and claimed the Plaintiff was solely at fault.

At which time Juror 10 stood up and loudly proclaimed that this was a frivolous lawsuit. A second juror called out her agreement. The trial judge admonished them for rushing to judgment before hearing any evidence and sent them packing.

Although we won the trial, that experience haunted me for years.

I became interested in psychological and neuropsychological studies involving the primacy and sequencing of information. I would spend a lot of time wordsmithing neutral statements - convinced that the revelation of each word was tied directly to ultimate outcome. I was also preoccupied with the notion of getting the "correct" version of everything out as quickly as possible. Assuming that if I said it first the jury would be more likely to accept my version over the defense version.

Basically I was overthinking the matter. I had forgotten that communication in trial is not an equation.

During the Ride the Ducks trial we hired a producer to put together a podcast. Sara had no training or experience in the law. She attended a few days of the trial, was present for the

verdict, but otherwise got her material from the internet, the media, court exhibits and Court View Network broadcasts. We gave her no direction other than fact checking.

When listening to the completed podcast, I was struck by how her use of storytelling techniques meshed with what we actually did in trial. www.stritmatter.com/podcast. We did not tell a linear story. We did not disclose all of the facts at the very beginning. We used provocative questions. We wanted the jury to travel with us. To wonder. To be dismayed. And shocked. We wanted them to be enthralled with the case we were presenting. To be moved by the humanity of it all.

Regardless if trial takes one day or four months, the layering of testimony, evidence, and commentary will impact how the jury perceives the case. But while strategic decisions do play a role in the timing of everything, the more important governing principle involves building, maintaining, and strengthening your connection with the jurors.

A. Opening Statement.

Have a plan. Execute it. Without apology. With 100% of your mind body and soul.

Trial Diary Day 11
Tuesday October 16, 2018
(excerpted)

Judge Shaffer says: now please turn your attention to the plaintiff for opening statement.

Am not the kind of person who can write out a speech then memorize it and spew out perfectly. That just doesn't work for me. Instead, it is intensely internal. Usually refined during runs through the neighborhood with Nala.

Earlier when brainstorming with Artemis Malekour, told her thought of being the axle housing that eventually would break. Have been inanimate objects before in trial. If Disney can do it, well that's good enough for me. There is a story to be told and it needs a good narrator. But somehow being an axle housing just doesn't feel right.

Over the weekend during a gorgeous run as passed view of Mount Rainier framed by the Space Needle, realize the narrator for the first part of opening should be the person who was the narrator in real life – the duck captain whose job required him to be both the entertainer and the driver.

Stand up. Introduce clients. And let it flow.

> *Good morning, ladies and gentlemen of the jury. My name is Captain Roger Wilco. This is September 24, 2015, and I'd like you to join us on a Duck ride. There's a few things I'm going to tell you about safety and what to expect on this*

ride. And a few things that I'm not going to tell you about. Because honestly – I don't know those things.

Okay. Am not going to win awards for being the slickest most suave attorney in the room. That award goes to John Snyder the Philadelphia lawyer who has come in and taken over lead from Scott Wakefield (that must totally bite to litigate a case for 3 years and not be able to open). Not even the second most polished which goes to Pat Buchanan who in her elegant suit and well modulated voice, actually says with a straight face that accidents happen even if you do everything right.

But bet you that four and a half months later, the jurors will remember that in opening statement, the plaintiff lawyer wore a captains hat and quacked.

This case was unusual as there were 43 plaintiffs. Originally I wanted to talk about them all. To tell their stories so that they would be seen and appreciated as individuals. But if I had done that, opening would have taken at least one full day. Instead I listed their names to show respect and context. Then told just one story. Of a mother and her shy 15 year old son who had come from Austria just the week before to attend school. She had made him his favorite breakfast. And when he said he didn't want to go to class she gently encouraged him. He put his backpack on, said good bye and was walking down the hallway of their apartment. He turned around and she was standing in the doorway smiling at him. That was the last time he would ever see her.

B. What should come next.

We learned from jury bias studies that plaintiff should almost never go first due to attribution bias. In some circumstances you may want to start with a damages witness but for the most part – even in admitted liability cases – I want the defense on. And in the case of a corporate defendant with lots of players, I want the worst performing witness on. In Ducks this came in the form of the Safety Officer. He was an awful witness in deposition and even worse in trial.

He argued with me. Could not give a direct answer even when the court told him to. And helped set the tone of overall incompetence that we were going for.

To plan everything out I start with a trial flow chart.

Day/Time	Witness Name	Role	Props/Evidence

Many judges require a list of all witnesses and projection of the time each will take. They will use the net number of hours in a trial day after deducting breaks. And hold you to your projections, sometimes limiting you further. In Ducks we went through the exercise and realized that trial would take a full year. The judge gave us five months and we did it in four.

Even though we have a paperless practice, we had Kinkos print out laminated month at a glance calendar pages – one for each month. Using post its, we plotted out the trial. Revised. Plotted. Revised. Etc.

Some of our decisions were limited by the availability of the witness. For example, the Austrian family who lost their mom wanted to watch opening statements. We couldn't have them fly all the way back to testify later. Another example was that the doctors were all called live. We didn't want to perpetuate any of their testimony.

Other decisions were complicated by the volume of testimony. Our forensic psychologist was slated to go for over a week. But after day one we realized that we needed to completely revise the process or we would lose the jury. We pulled the witness out of rotation, filled up the gap with others and spent days with him coming up with charts and an abbreviated testimony strategy.

The key was not to get frustrated when carefully laid plans had to be swapped out at the last minute. The brunt of inconvenience went to staff. And of course there was the collateral issue of prepping for a witness and then having to shelve that and prepare for a completely different witness. But trial is never predictable and having a fit never helps anyone.

We began the trial by setting the scene. Fire fighters, fire chiefs, paramedics, ambulance drivers, one after the other punctuated by a plaintiff each day.

Next the local Ride the Ducks Seattle enterprise where we pitted management against the mechanics.

Enter Ride the Ducks International – which went on and on about how safe they were. We let them preen and boast for weeks. It wasn't til almost the end of the liability case that the jury learned that the company was found by NHTSA to have violated 11 federal statutes. And that was that. I could have laid this all out in opening but what would that have gained. It was a horrible piece of evidence for them and its introduction was inevitable. If I mentioned it in opening – it would have been the ultimate spoiler. Instead they set themselves up for a superb fall.

Early on we did a jury view of the duck and charter bus. This took half of a court day. The judge tried to talk us out of it. Other lawyers kept asking what we would get out of it. Again this was a major moment in the trial – the size and scope of the disaster was palpable. It was like being in a graveyard. This is where five people died and 60 or 70 more were injured. The jurors were allowed to use their cell flashlights. They were down on their hands and knees.

When we returned to court from the view, the next witness was the plaintiff who had been most attacked by the defense in discovery. They even used surveillance. What do you think the jurors were thinking as the defendants lit into her.

Some of the liability witnesses were presented by video. If they were key witnesses we would want them on early in the day. If they were lesser, we would use them to fill in gaps.

The judge was concerned about the length of the trial. She would not allow even five minutes between witnesses. Every decision about what or who comes next involved advance team meetings, calendar coordination, and hours of effort on the part of our paralegals. And then testimony would finish early or go long. Or a translator would be late or witness fall ill. And we would have to deal with it.

C. Building anticipation.

The Lion King movie is out as I write this paper. I saw the cartoon and already generally know the story. Young lion is betrayed by bad uncle. Is told he is at fault, believes so, and leaves home. Takes up a carefree life until he grows up. Is asked by childhood friend to return to help. Doesn't want to. Changes his mind. Goes back. Gets into fight with bad uncle. Wins.

Even though we know the ending, we want to see the story and be taken on the journey. Some of us will see the movie more than once. For our purposes, it doesn't matter why we are so fascinated by storytelling. But there is most definitely an entertainment aspect to it.

Jurors don't get to choose the story they are going to hear. Some of them may be interested in the subject matter some may not. Even though they understand how important their role is in the civil justice system, it isn't always delightful to sit through a trial. It's our job to keep them riveted so that they can judge to the best of their abilities. One of the techniques we can use to engage our audience involves building anticipation.

In the Ducks opening, with the exception of the one plaintiff story, we did not tell the stories of the 42 others. But we introduced each plaintiff by name to the jury. They knew that there would be many stories. They didn't know what they would be about. But they knew they would be told. Foreshadowing is a nice way to introduce that something is going to be coming down the road.

We called the attending orthopedic trauma surgeon from Harborview as one of the first medical witnesses. He was able to talk about seven of the plaintiffs. As he discussed the various injuries, the jury began to get a better understanding of what some of those plaintiffs had experienced. And yet some of those plaintiffs didn't testify until over a month later.

The most highly awaited plaintiff also experienced the most unanticipated delays in the telling of her story. The jury knew from the beginning that one living plaintiff had suffered the worst injuries of the group. On our chart we planned out one full day devoted to her story. This was towards but not at the end of plaintiffs' case in chief. We started with the medic who ordered her transport. It was an awful story. The first young person brought to him was alive but he had to triage who had the best chance of survival. He directed the EMTs to move her aside and sent our plaintiff in her stead. She became the first person taken from the scene. That testimony went without a hitch. Then the first host mother from South Carolina before the incident had flown in. She testified beautifully. Things were right on plan. All the local media was present. The jury knew this was a big day. We broke for lunch. Returned and were advised one of the jurors had to go home due to illness. We were given the choice to resume the next day or bump the juror and decided to resume the next day. But we had that day already booked with other witnesses. Then there was a long holiday. Ultimately it was quite a while before we were able to resume our plan of calling the plaintiff followed up by her current host mom. In fact there was such a long delay that we changed our plans and decided to have them be the very last witnesses in the plaintiffs' case in chief.

The jury had been anticipating that testimony for weeks. And when it finally came in, it was as if there had never been a break at all. It was as perfect as it was meant to be.

D. Sometimes the best time is before the allotted time.

We did not take expert depositions in the Ducks case. Instead we used depositions on written questions. The defense identified 54 experts and called most of them. We explored the backgrounds of those we weren't familiar with. And on at least one occasion were able to do

major damage before defense direct had even begun. Using voir dire on a witness woke the jury up. They knew this wasn't the usual order of things. We only used the device when we knew we could score a hit.

Trial day 48
Thursday January 3, 2019

8:30 walk into courtroom. Buddy Frasier says hi. He will be the only defense lawyer to do so today.
8:50 realize the defense is calling an economist and interrupting my cross of Skilling.
8:51 grumble to Scott Wakefield who walks off.
8:57 Judge enters. Tattle on the defense. She reviews yesterday's record. Tells them not to do so again.
9:00 Jury enters. The economist takes the stand.
9:03 Scott qualifies him. BA in economics and other stuff. Begins to ask him about his work.
9:05 K3: permission to voir dire the witness granted.
You have a BA in Economics
No Masters
No CPA license
Not a member of the American Institute for CPAs
Not accredited by American Society of Appraisers Business Valuation (just has done course work)
No finance degree
Not a chartered financial analyst
Your one of 100s of managing directors at Alvarez and Marsal.

K3: Your honor I do not believe the witness is qualified to render an expert opinion in this case.
Judge Shaffer: the jury can make that decision.

Sit down having gutted the witness in 2 minutes before Scott can do anything about it. But it gets worse.
Scott: you aren't a medical doctor.
Witness: no
Scott: how do you decide what to include or not when evaluating the life care plans to perform an economic analysis.
Witness: in this case I relied on Dr. Penilton to provide me with information.
Scott: moves to next question not realizing they are going to get creamed.
15 minutes later
K3: You referenced -- so as -- are you an economist or an
appraiser? What's the right – [big eyes and a shrug]
A. We can say an economist.
Q. Okay. So what's the difference between a BA economist and a Ph.D. economist? Are you both -- do we call you both economists? [continue with big eyes and more shrugs]

A. If you want to.
Q. All right. Well, in your analysis as an economist, you stated with respect to Ms. C that you relied upon Dr. Pendletonb to review information so you could decide which of the life care plan items should or should not be allowed. Do you remember that testimony?
A. Yes.
Q. But that's not a doctor, is it? Dr. Pendleton is no such person; am I right?
A. I don't recall. I did not speak to them specifically. It was related to me.
Q. Ms. Pendleton is actually a nurse, right?
A. Again, I don't know. I did not speak to them personally.
Q. Don't you think that's important when you're coming in to court to testify in front of a jury about what they should award for the rest of a life of somebody that's been pretty catastrophically injured in a crash to find out who you're getting your information from?
MR. GUTHRIE: Object to the form.
THE COURT: No. I'll allow it.
A. It was my understanding that that individual was qualified to make that opinion as to what was necessary or not, the life care plan.
BY MS. KOEHLER:
Q. In your experience as an economist, should you know who you're relying upon and their credentials?
A. Yes. I mean, it's going to factor into how I would approach the information received.

E. Layering Summation.

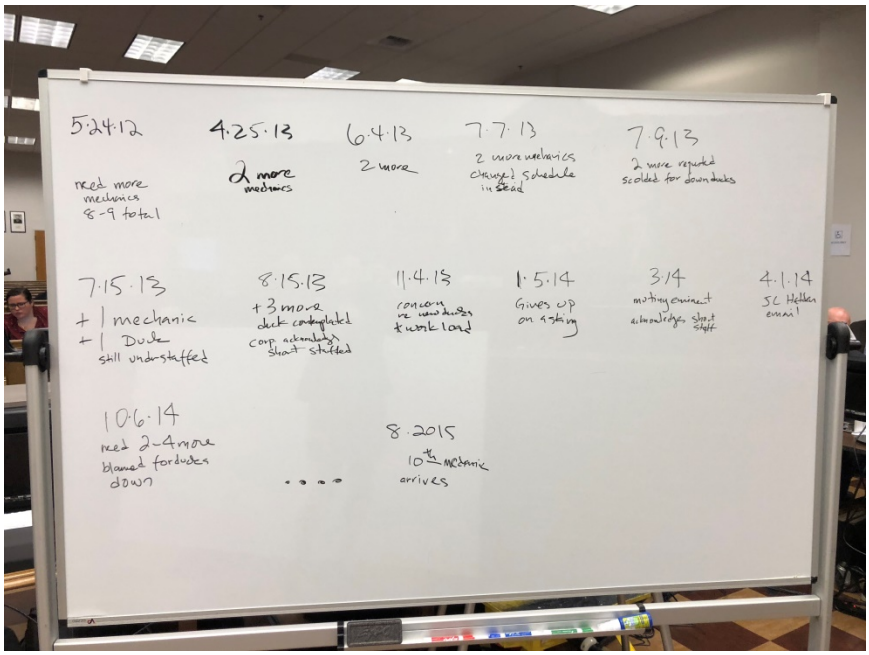
The jury has now been told the story – in a disjointed fashion – but still they know the data by time of closing. They don't want us to rehash the same thing from start to end. And yet this is our grand opportunity to argue our case and empower the jury to fight for our clients. We need to show them how the instructions work and help them understand how to render a just verdict. Plus the jury has been anticipating this final step.

In Ducks the media acted as a shadow jury of sorts. A few of the reporters were there for almost the entire trial. Four months after we started they wanted to know if I was going to be the Captain again and blow the quacker. Instead I adopted a theme that ran through the trial – one that we used and one that even the defendants used against each other. If only they had taken a close look at the axle. If only they had followed the manufacturer's instructions. If only the manufacturer had been registered with NHTSA. I changed the lyrics to Cher's song and told the story backwards using visuals on one screen while at the same time my paralegal ran a

coordinating screen that displayed a timeline going forwards. If only. If only. If only. https://www.stritmatter.com/closing-argument.

No time in trial is there more fodder available for layering than closing. Promises were made in opening (and perhaps broken by the defense). Evidence has been admitted. Testimony has played out. One of my favorite tactics is to use charts or other evidence that was created by witnesses during the trial.

In Ducks we introduced hundreds of exhibits, showed dozens of PPTs, videos, audios, and displayed charts. But the most heavily used of all of our tools – was a 6 foot wide rolling two sided whiteboard. After each witness used the board, we simply took a photo, emailed it to the clerk and it was admitted as an illustrative exhibit. The board below was created during testimony by the head of the mechanics department. It chronicles each time he asked management in vain for more mechanics.



F. Adding in the jury.

If your jurisdiction permits jury questions, those who asked will feel connected if you later touch upon their concerns during trial including closing. The same is true of information you learn during voir dire. Of course there is a subtle line that shouldn't be crossed. Jurors don't want to be singled out. But they will feel heard if you are able to subtly address the issues they raise.

G. Conclusion

Although this paper focuses on a complex and large trial, these thoughts and techniques are of universal application. In the 1990s, my then partner (Pat LePley) conceived of a seminar that we called How to Hammer Allstate. He asked me to give a talk on how to hammer them in trial. I

had never had a MIST (minimal impact soft tissue) case before then. So I went out and looked for one. My client's husband who was a Boeing engineer served as our physics expert against Allan Tencer a biomechanic. We received a small but still – a plaintiff's verdict. Plus I received sanctions against Allstate that were used to buy a lovely piece of art that still hangs over my desk.

After that I wanted to belong to ABOTA which at the time required 20 trials as lead. This involved 5-6 one to two week trials a year which pushed me well beyond that number in a few years. Since then I've taken MVC cases to trial - sometimes with only a few days notice to help a lawyer friend. These cases remain some of the toughest to try because of jury bias. Trying them on a shoestring means that we need to bring every lawyerly technique to bear. It is the best trial CLE possible.

All this is simply to say – whether our client's case takes a few days to try or months, layering the trial is a challenging creative process that provides a grand opportunity for us to connect with the jury.

karen