

## **Diary of a Trial Lawyer**

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*This is a true story. When it started I imagined a wonderfully happy ending. But in real life things don't always work the way we plan. I share this story with the hope that one might learn something from it. I know that I will be seeking understanding for a long time to come. . .*

### Wednesday. The day before Thanksgiving.

We've been in trial for 7 days, and I've lost 7 pounds. I drink coffee in the morning, but can't stomach any breakfast. At the lunch breaks, I force myself to choke down half a sandwich.

I barely have an appetite for dinner, have completely lost touch with the daily activities of my wife and four children, and continue working as soon as I get up from the dinner table.

It has been a long time since I have been in trial -- exactly four years -- and I felt a little rusty when we started. My last trial was a huge victory, a genuinely life-saving result for a victim of medical malpractice, in the face of no offer. I was honored as Trial Lawyer of the Year. I was at the top of my game. I now realize the real trophy was four years of good settlements without the stress and risk of trial. All good things come to an end.

Josh Karton, that amazing little Jewish Leprechaun (if there could be such a thing), talked about teaching the butterflies in your stomach to fly in formation. Mine have been bouncing off the walls like a mosh pit at a punk rock concert. I'm working too hard and sleeping too little, but it seems like things are going well. If I can just hold it together for a few more days after the

long weekend, I think I'll be able to bring this thing in big.

The judge gave us today off for holiday travel. The defense has been going for two days, and it seems they have another day or two. It is fully two months before I become the next President of CASD, but my first President's Column (this column) is already two days late. I'll ask our Editor, Kerry Hoxie, for an extension. There really is no way I will get this done until the trial is over.

Thinking about the column makes me realize what a huge supporting role CASD is playing in this trial. Just days before I picked the jury, I was blessed with a "focus group" of 50 trial lawyers at the CASD / Josh Karton seminar. I took Josh's advice and started my opening statement in the middle of the scene, jumping immediately to the action. I had props and action and drama. It was fun and exciting, and I think it went well. It was about as far from the defense lawyer's behind-the-podium formality as I could hope for.

Last week the defense said they were bringing Dr. Raymond Vance as one of their first witnesses. I was concerned they were going to use Vance in ways I had not fully anticipated. Before trial, I thought his testimony would be non-threatening. Now, I thought I might have to take him out. I knew that John Rice and Ross Jurewitz had been working for months to gather "the book" on Vance and others to offer on the Expert Bank at CASD's website. ("The Book" on several "lawsuit doctors" and defense regulars will also be offered in high impact closed door seminars this year, complete with "how-to" instructions from the lawyers who have pieced it together.) A quick call to John last Thursday night bore immediate fruit, a box full of Vance materials. Huge thanks go to Rob Wallenstein and Fred Schenk for donating transcripts of recent depositions they took. It was everything I needed.

By the way, "lawsuit doctor" is a term I like. I suggest we use it. It is an accurate, non-

argumentative description of the work Vance and others do. I used it throughout Dr. Vance's cross-examination: "Q. You spend at least 40-50% of your professional time working like this as a 'lawsuit doctor,' don't you?" "Q. And at least 85% of the time you are working as a 'lawsuit doctor' for defense lawyers like these, testifying against injured plaintiffs." "Q. In fact, you make between \$500,000-\$600,000 per year working for defense lawyers as a 'lawsuit doctor' in cases like this." And finally, my personal favorite: "Q. Is there any orthopedic 'lawsuit doctor' in San Diego who does more of this lawsuit work than you?" (He gave no names.)

I don't think anyone would want to go to a "lawsuit doctor" for treatment, so there is no reason he should be given any credit when he says the plaintiff won't need further treatment. I thought the defense lawyer had the same concern when, on re-direct, he felt the need to ask Dr. Vance, "Even though you do all this work for defense lawyers, are you telling the truth?" Hmm. If you have to ask . . .

Yesterday, we ended the day with Edward Workman, Ed.D., a vocational rehabilitation expert. He was shot in a hunting accident as a teenager and is paralyzed from the mid-thoracic down. From his wheelchair, Dr. Workman is the embodiment of a successful disabled person. It is a powerful image, and he routinely testifies that the plaintiff's injury will have little or no effect on her future earnings. Before the trial started, Tracee Lorens sent me a couple depositions of Dr. Workman, including one blistering examination by Wayne Hughes. I had also heard that Denny Schoville had conducted the definitive Workman cross-examination in trial. A call to him today was in order, and Denny was gracious and generous. He invited me over to discuss his strategy with Dr. Workman and give me copies of two trial transcripts, his and Browne Greene's. Hard to go wrong following the lead of these giants.

Friday. 8:30 a.m. The day after Thanksgiving.

I definitely ate yesterday, and drank a couple beers. I crashed early and slept well. Today I'm pretty sure I'm the only person working in the building. But I'm on a mission.

The Workman transcripts all refer to other cases. I'd like to have the other transcripts too. So I search on Trial Smith, the online plaintiff's-only database accessible through CASD membership. There is Workman testimony going back over 20 years. I want it all. I download every transcript, and the printer is humming for the next 8 hours straight. I spend the next 2 days reading 57 transcripts of Ed Workman testimony.

Saturday.

I've read 20 years of the man's work. I know his jokes, when he tells them, and why he tells them. I've seen his testimony evolve regarding money, caseload, and per cent of defense work. I'm into the man's head, and I have an amazing collection of cases with absolutely indefensible opinions. ("The Book" on Ed Workman will definitely be included in a seminar this year, so the details will have to wait.) I can hardly wait for the chance to cross-examine Workman with my 57 transcripts, tabbed, highlighted, summarized, and on display for him and the jury to see.

Monday. 5:30 a.m.

Like every other morning during the trial, I am in the shower, brushing my teeth, and throwing up. Dry heaves is more accurate, since there is nothing in my stomach. I tell myself it is just toothpaste foam gagging the back of my throat, but this only happens to me in trial. Most of the defense case will come on today, and I couldn't be any more prepared. Yet, my butterflies are in full flight -- free style. I am scared.

Monday. 10:30am.

I'm well into the Workman cross-examination, and it's rocking. I'm having a great time and Dr. Workman is getting irritated. The defense had no idea what was coming and their objections are getting overruled, only adding to the overwhelming sense of this man's bias. I work my way through 13 different transcripts before the judge decides it's been enough. A few more specific questions about my client and I'm done. It was one of my best cross-examinations ever.

I am strong. I am invincible. Bring on your next witness for the reckoning. I love this job.

Tuesday. 3:45 a.m.

The defense is expected to rest this morning; then we will do closing arguments. I have been reading David Ball on Damages from another CASD seminar, have taken some arguments directly from the book, made some visuals from ideas in the book, and feel good about the structure of the argument I am preparing. Last night, though I wasn't really finished, I decided to go to bed at 11:30 and get up at 3:30 this morning to fine tune the presentation. I am shivering uncontrollably. I'm wearing sweat pants, a long sleeve t-shirt, sweatshirt, and wool slippers. Is it really that cold this morning? I pour another cup of hot coffee and wrap myself in a blanket. It must be really cold, right? I'll be retching in the shower again this morning.

Tuesday. 11:00 a.m.

I'm fifteen minutes into my close and it is going exactly as planned. I feel confident. I'm making genuine eye contact with each juror. I'm speaking clearly, firmly, in control. The thoughts and words are in sync. I move with purpose. I pause for effect. I'm blending photo blowups, documents on the Elmo, and video clips from the computer. This is my moment. This

is what I do well, and I *am* doing it very well.

And it is obvious that I am bombing, badly. Until this very moment, I have completely misread this jury. Each day until now I felt every juror, except one, was with us. Let them have the one, I thought. I'll take the other 11. Now it looks like maybe I have one. What happened to the others? This jury that I thought loved me yesterday, has shut down today. I press on. What choice do I have?

I'm talking about money now, big money. The economic damages alone total \$1 million. My client is 34 years old and she has a severe case of reflex sympathetic dystrophy from the incident. She has had 10 procedures already, and it is undisputed she will have at least another 11 surgeries over her lifetime to maintain her current pain level. She is in pain all day, every day, for the rest of her life. I explain three different methods that add up to \$3 to \$4 million for the human losses, the non-economic damages. Nobody is taking notes. Not even my one juror.

The defense close is mediocre, at best. It is disjointed and confusing. At one point he forgets his client's name and, for a time, refers to her by the plaintiff's name. After rambling for a while, he asks for a defense verdict and sits down. My rebuttal is quick, fun, and clever. I make good points, strong points, and finish with a twist on one of the defense lawyer's comments that brings me to an appropriately sentimental finish. "She has put her faith in you. Please take good care of her."

My client and her parents are very happy. They feel great about the closing argument. They are very happy with me and appreciative of my hard work. They are confident that victory is ours, and grateful that I made it happen. I accept their thanks and allow their good cheer to fill me. Their optimism feels better than my reality. As I pack up to leave the courtroom, the court reporter stops me to say she thought my argument was the best she has ever heard. I thank her

for the huge boost for me, because I couldn't tell whether it was great or horrible. I'm exhausted. I've done everything I can do and have done it as well as I could do it at the time. I only hope it was enough.

Wednesday. 10:10 a.m.

We survived the first hour and a half of deliberation yesterday. I'm feeling better this morning about the whole thing. I awoke with confidence that the jury was just fine. A verdict between \$2 to \$3 million is reasonable and likely to happen, I decide. I'm settling in for the wait, explaining to my client that my last jury was out for 4 days. I lay out the conventional wisdom that a quick verdict is bad; a long deliberation, better.

My cell phone rings. It's the clerk. (Must be a juror question, right?) "Mr. Hulburt?" "Yes." "We have a verdict." It has only been two and a half hours.

Wednesday. 3:00 p.m.

My client has gone home with her mother. We talked to some jurors, and have talked to ourselves to no end. She has been crying off and on since the verdict. She cried throughout the reading, the 10-2 juror polling, the jurors walking out solemnly with their heads down and eyes averted. I wanted to cry, too, or scream, or choke somebody, or all the above, but I've been trying to play counselor, to explain the unexplainable. Why do I love this job?

You cannot blame the jury for a bad result, or the judge, or the defense lawyer. If they don't understand that justice demands a verdict for the plaintiff, it is because I failed to present the evidence in a way that compels the right decision. This is the enormous responsibility we carry as plaintiff's lawyers. This is the burden the lawyer bashing public can never understand. I have revisited most of the thousands of decisions I made before and during the trial. It was a righteous case, and I am still not sure why I lost. If the exact same case comes into my office

tomorrow, I will take it again. I will try to do better. That is all I can do.