# BARRISTERS TIPS

*by Claire-Lise Kutlay*

Although the number of cases that go to trial is increasingly rare, approaching every case with the expectation that it will be tried is invaluable in providing the best possible outcome for the client in a cost-effective manner, even if the case does not reach trial. Focusing on trial during every stage of the case allows counsel to concentrate discovery and motion practice on things that matter and will advance litigation. Many younger attorneys have not been to trial; however, they can still have a trial-focused mindset to deliver value to their clients and team.

Trials require attorneys to focus on the critical issues and evidence to develop strong trial themes. Trial themes will be the mantra during all stages of trial, from pretrial motions through closing arguments. Trial themes help attorneys present a compelling narrative that keeps the trier of fact engaged and, ultimately, to find in the client's favor. Trial themes should be developed early in litigation and updated or modified based on how the evidence develops.

### Thoughtful Analysis

At the outset of any litigation, it is important to engage in a thoughtful analysis of the claims and anticipated evidence, including what will be presented and how it will be presented to the trier of fact, to frame the case to generate maximum leverage. The trier of fact will ultimately rely on jury instructions to decide a case, and they should be considered from day one to help frame the issues in the case. For example, there is no need to allege and litigate five causes of action of varying strength when the same relief can be obtained by one strong cause of action.

Being selective will streamline litigation and avoid needless motion practice, allowing counsel to dedicate his or her time to gathering necessary evidence to win at trial. The same is true for defense attorneys, who can formulate an effective defense from the very first day by determining specific issues or causes of action that will ultimately be presented at trial and which issues will be disposed of early, including through motion practice. For example, in a breach of contract case, there is no need to waste time on whether a contract was formed if the issue in the particular case is whether one party performed under the contract.

### Cost and Time Efficiencies

Once litigation has commenced, a trial-focused attorney will deliver cost and time efficiencies by executing effective discovery plans. Too often, attorneys take a scattershot approach, propounding hundreds of written discovery requests or taking countless depositions that ultimately do not advance litigation. Certain discovery is necessary to obtain background information; however, limiting discovery and depositions to the essential avoids unnecessary and time-consuming document review and discovery disputes. A trial-focused discovery plan should include evaluating: 1) the appropriate scope of discovery, 2) the appropriate forms of informal and formal discovery, 3) what experts will be needed and the factual discovery they will rely upon, and 4) necessary discovery for motion practice, including dispositive motions, potential motions in limine, and, where appropriate, a motion to engage in early punitive damages discovery.

It is also important to think about the format of evidence and how it will be received by the trier of fact. Visual evidence is often powerful, and it is worth the time and expense to obtain color copies of key visual trial exhibits such as photographs. During one of my own trials on a reformation of contract claim, we presented color copies of redlined contracts evidencing that a certain contractual term had not changed over multiple versions of a contract. Color copies were effective; black and white copies would not have been impactful.

The same is true of deposition testimony and the decision to record depositions on video for trial use. Cases are won and lost based on witness credibility. A stoic, unemotional witness during deposition will not be credible if he or she is suddenly weeping on the witness stand at trial. Attorneys should prepare witnesses to testify truthfully and authentically to avoid traps at trial, including the opposing side's playing deposition clips that impeach or undermine witness credibility. For example, during one of my trials regarding an estate plan, we used a deposition clip in which the sole living parent who had set up the estate plan explained they did not want "rich brats," summarily disposing of the rosy-eyed notion that the parents intended their entire wealth to pass along to their children.

### Civil Discovery Act

The Civil Discovery Act is set up to avoid surprises at trial. Nonetheless, every trial has some element of surprise that requires lawyers to think quickly and adapt their strategy. Heading into trial, counsel should have a well-constructed plan, including contingency plans, developed over months or years working on the case. Attorneys also need to be deeply familiar with the evidence so they can adapt as trial unfolds. For example, during one of my trials, we successfully represented one of numerous defendants in the case in which plaintiffs sought over $500 million in alleged damages. On the morning of opening statements, plaintiffs settled with all other defendants, and our client was the sole remaining defendant. Luckily, we got a short, one-week continuance, and I received a crash course in adaptability and flexibility.

As there is no substitute for trial experience, inexperienced attorneys should volunteer for matters that provide trial experience, including pro bono work or participating in the Los Angeles County Bar Association Trial Advocacy Project or mock trials. ■

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