

## 5 Surefire Ways To Botch A Trial

By **Brandon Lowrey**

*Law360, Los Angeles (February 22, 2016, 2:16 PM ET)* -- Good trial attorneys prepare vigorously. Great ones boast a laser-sharp focus, a powerful command of the facts and an engaging personal touch that establishes their credibility. Bad ones — well, there's no shortage of ways to botch a trial.

Here, top trial attorneys discuss the five most common ways inexperienced, untalented or unprepared lawyers can go down in flames during trial.

### **Be a Jerk**

This might sound like a no-brainer, but top trial attorneys put on a great, friendly attitude from the moment they arrive at the courthouse.

Everyone has a story about an attorney behaving badly in the courthouse. Maybe a trial attorney rolled his eyes at an associate, a bailiff or a courtroom clerk. Or perhaps she made a snide remark to the snack shop vendor or the marshals manning the metal detectors at the courthouse's entrance.

It's safe to assume that jurors, judges and courtroom staffers are everywhere, always watching. And they're likely to judge your client based on your attitude and actions.

"You're always on display," said Nicholas Gravante of Boies Schiller & Flexner LLP. "Everything you do, the way you dress, you name it, jurors are focused on that."

While some lawyers might think that attitude doesn't matter so long as you've got a strong case, veteran trial attorney Joseph M. Price of Faegre Baker Daniels LLP begs to differ.

"If they think you're a jerk and they hold it against your client for having a jerk of a lawyer, you really do a disservice to the client, not just to yourself," Price said.

Voir dire is where jurors are likely to form their first and most lasting impressions, according to Price.

For many jurors, it's a stressful event. Many of them are unfamiliar with the process and are concerned with matters outside the courtroom. All the same, they're piled into the box with a bunch of strangers and a couple of lawyers begin peppering them with probing questions.

It's crucial to come off as good-natured, friendly and sensitive during the voir dire process. An aggressive

lawyer can easily be cast as the bad guy from the start.

### **Be the Smartest One in the Room**

Attorneys need to be smart to represent clients in cases that are inherently complicated or involve difficult technical or scientific issues. But one of the dumbest things those attorneys can do is try to show jurors just how smart they are.

"A good trial lawyer has to resist the temptation to show the witnesses and jury how smart they are by going toe-to-toe with the witnesses using all the big words and complex theories," Price said. "A good trial lawyer knows how to make the difficult easy, or easier, so that other laypeople — jurors — understand the points she is trying to make.

"It doesn't matter a bit that you understand the tough stuff if the jury comes away clueless."

Similarly, it's not a good idea to tackle every single issue in the case with equal vigor.

Brad Brian, co-managing partner of Munger Tolles & Olsen LLP, said that if there are 10 critical fact issues in dispute, figure out the one or two of them that you absolutely need to win the case.

That doesn't mean that the eight other issues should be ignored. Instead, they should be woven into the overall theme of the case. That way, those less critical issues don't overwhelm the judge or jury.

"Boil it down," he said. Otherwise, "you will be mired in a reactive, detailed presentation that will have no thematic appeal."

### **Become a Prisoner to the Plan**

Trial lawyers who rigidly adhere to their plans can end up missing opportunities, leaving questions unanswered and bungling their case.

"I've seen lawyers who are too tied to their outlines and scripts and have been hurt because they haven't been willing to moderate their approach in light of developments that come up in the trial," Brian said. "You need to be nimble."

A notable exception to this general rule can be during direct examinations, which are generally predictable and scripted. But during cross-examinations, Brian said he has seen some attorneys blow through question after question while missing obvious cues for a follow-up.

"The most important thing in cross examination is to listen," he said. "Listen to the answer and have the confidence to follow up to the answer."

He said that while it's wise to keep a basic theme in mind, too many attorneys get frozen when they need to be fluid.

A truly capable and prepared trial attorney is ready to seize on any inconsistencies or surprises that a witness might offer on the stand. And the best way to do that is to thoroughly and personally prepare, Brian said.

## **Look for Shortcuts**

Delegation is a must for trial attorneys. There's a ton of work. But there's one area where delegation gets a lot of attorneys into trouble: researching a witness that they'll be cross-examining.

"If I'm doing a cross-examination of a witness, I need to — myself, not a partner, not an associate, not a junior associate — I need to read every deposition that witness has given," Gravante said. "I need to read every document that witness's name is on ... you have to be prepared for the curveball, and you have to be prepared for the answer you didn't expect."

The trial attorney doing the cross-examination needs to be able to spot an inconsistency and immediately expose it, pointing, for instance, to the page in the deposition transcript where the witness gave contrary testimony, Gravante said.

He or she needs to be the absolute master of the facts relating to the witness on the stand. Maybe even more so than the actual witness, he said.

And there's no substitute for taking personal ownership of the matter.

"If you haven't done the work yourself and read everything, you really shouldn't be doing a cross-examination," he said. "That's not a task that can be delegated."

## **Waste a Jury's Time**

"Lawyers tend to think that if a point is good to make once, it's even better to make 10 times," Price said. It's not.

Jurors are painfully aware of the time they're spending in the courtroom. If they feel like lawyers are wasting it, they're sure to resent them.

"You're putting terrible strains on these jurors to perform this otherwise valuable service that we as a society need," Price said. "If you're filling up that time with repetition or extraneous facts that don't seem to have any relevance to the issues at hand, jurors just get impatient."

This is another place where preparation pays off.

Jurors can sense when attorneys are unprepared, and unprepared lawyers are also inefficient at presenting their case.

"You stumble around, fumble around, and the jury's saying, 'Why am I wasting my time listening to this clown?'" Price said.

--Editing by Katherine Rautenberg.

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