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Ten Not-So-Obvious Trial Tips That Even Experienced Attorneys Can Use

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Both the allure and challenge of a career in litigation is the unpredictable nature of trials. Whether you are preparing for your first trial or you've done hundreds, there is always room for improvement.

We have conducted and observed numerous jury trials and mock jury studies—as attorneys, as a law clerk, and as a juror. Here are some not-so-obvious tips based on what we've observed.

1. Don't forget jurors aren't as excited to start as you are. While judges and arbitrators are often eager to hear opening statements and the first witness examination, jurors may have other things on their minds. If the trial is beginning the same day as voir dire, jurors are likely thinking about informing an employer, arranging child care, or other ways their lives suddenly have been interrupted to serve on a jury. If you're beginning a longer trial and you have the opportunity to wait until the next day for opening statements, consider taking it. If you must push forward, lower your expectations for what jurors will retain during the first day and adjust your trial plan accordingly.

2. Don't forget you're being watched. When the jury is in the court room, it is show time and you are "on stage" whether you are speaking or not. Jurors are especially curious during sidebars: They can't hear what is happening, so no matter how the judge rules, make sure to thank the judge and act like you "won."

3. Don't dim the lights more than necessary. Jurors often struggle to pay attention. Don't make it harder for them by using demonstratives that require dim lighting for extended periods of time.

4. Don't use different versions of the same exhibit unless you must. Showing juries slightly different versions of the same document creates an unnecessary distraction. Instead of listening to what you are saying about a document, they may be examining the document and wondering how and why it is different from the version another attorney presented.

5. Don't let demonstratives keep you from connecting with the jury. Every time you put up a demonstrative, you're taking the focus off yourself. If the demonstrative has text, you're inviting the jury to read instead of listen to you. So be selective in the demonstratives you use. When you do use a demonstrative with a witness, give jurors a chance to digest it before asking questions. Make sure you and your witnesses continue to find opportunities to make eye contact with jurors.

6. Don't impeach just because you can. It can be infuriating when the witness you deposed arrives in court unable to recall anything useful to you or with new facts that he or she claims you simply did not ask about during the deposition. Push your frustration to the side, and be selective with your impeachment. If you try to impeach the witness on everything, the jury will

at best get bored and won't follow your questioning closely enough to hear the lies unfold. At worst, the jurors think *you* are unreasonable and tiresome.

7. Try to use the weekend to your advantage. If your trial extends over a weekend, the testimony the jury is most likely to think about over the weekend is the testimony from the last witness who testified on Friday. Therefore, if you have the opportunity to call witnesses on a Friday, be thoughtful about whom you call, and line up your witnesses accordingly. On the flip side, try to avoid having the other side's star witness testify on Friday if you can. If you are the plaintiff, consider calling a case-in-chief witness you are on the fence about calling, which may push the start of the defendant's case-in-chief to the following Monday.

8. Don't discount the impact of reading deposition testimony. If you're able to present testimony by having a deposition transcript read aloud, choose your reader carefully and practice with him or her. For example, a likable reader can revive the testimony of an unlikable witness.

9. Don't forget to watch videotaped testimony before you play it. If you're able to present testimony by playing a videotaped deposition, remember that how the witness's testimony reads on paper may be very different than how that same testimony appears on video. The witness's testimony may not be as crisp as it appears on paper (thanks to a generous court reporter), or the witness's demeanor, tone, or body language may be distracting. As a corollary, if it's possible that any of your potential trial witnesses might testify by videotaped deposition rather than in person (for example, because they are outside the court's subpoena power), treat their depositions as if you are examining the witnesses before a jury.

10. Don't forget to give jurors enough context to care. If you find yourself asking a jury to decide a narrow issue, you run the risk that the jury might not care enough to take the decision seriously. Figure out a way within the rules to convey consequences—legal or personal—to make the jurors invested in your case before they begin deliberations.

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