

Chapter 6

Winning Trial Methods & Strategies

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Know the People

The most important thing you can do to prepare for trial is to know your case inside and out. Not just the facts, but the statutes and case law involved, and the remedies available. Be prepared to have to argue anything and everything--the better you know it, the more persuasive your argument and presentation will be to the Judge and the Jury.

The next best thing you can do is to know the people involved. Know the experience, attitudes, opinions, and style of the Judge, the defense attorney, the witnesses, your client, and finally the Jury (from voir dire). Don't forget the bailiff, either. No one has the Judge's ear like the bailiff and no one has the leisurely ability to watch the Jury during a trial like the bailiff. They have probably seen dozens (if not hundreds) of juries, and are often remarkably adept at "reading" the jury's reaction to testimony and evidence far better than some paid jury consultants.

The more you know about the participants, the better you can plan for trial and make adjustments when the unexpected happens.

One of the best ways to know your case thoroughly is by preparing an Exhibit Book, a Law Book, and a Trial Book for use at trial in virtually every case.

Use an Exhibit Book

Preparing an Exhibit Book well in advance of needing it serves two functions. It forces you to organize your case by thinking through the claims in the case and what documentary evidence is needed on each claim.

At trial you could use every document your client gave you if you wanted to, but the question is do you really want to? If a document does not help you, then you do not need it in the trial. Mounds of exhibits may serve to distract the Jury from the central issues at hand. On the other hand, if you want to confuse the issues, then include every document that is even remotely related to the case during the trial and you will very likely distract and even bore the Jury (and

maybe the Judge).

Number your exhibits in advance, make copies of them and bind them into an Exhibit Book with an Index.

Provide an advance copy of your Exhibit Book to the Judge and opposing counsel a few days or more before trial. That way no one can claim surprise during your case when a document starts being used.

Give a copy of your exhibit Index to the bailiff or clerk, so they can keep track easily as you use the exhibits. They appreciate the convenience, and few people are as experienced at judging jurors' attitudes better (or are more willing to share their thoughts – but do not bet the farm on anyone's hunch but your own).

Keep your original exhibits in a colored file folder plainly in view on your table. The colored file folder adds significance to the contents (*i.e.*, your Evidence) and can make the Jury wonder what all you have in there every time you reach for the folder and pull out another document that you offer into evidence. It actually can accentuate your evidence.

Those documents that you should consider for inclusion in your Exhibit Book, at a minimum and depending on your state's Rules of Evidence, include:

Exhibit Book Outline

1. Client's Diary;
2. Your Expert Report & Photo's;
3. Your Repair History Summary;
4. Client's Sales Documents to be used at arb-trial (in the order they would have occurred in the sales process):
 1. New or used car window sticker;
 2. Deposit receipt (if applicable);
 3. Sales contract;
 4. Finance contract;
 5. Lemon law notice (if applicable);
 6. Warranty booklet.
 7. Client's repair documents.
 8. Repair orders and rental car receipts, etc.
 9. Dealership Sales File (Use only those documents applicable to case)
 10. Dealership Repair File (Typically, use it all)
 - A. Make sure you have technician-mechanic notes for each repair.
 11. Factory Warranty History Printout.

12. Factory Service Bulletins (and Index, if applicable).
13. NHTSA Defects Investigation, Service Bulletin Reports List.
14. NHTSA Domestic Defect Recall Campaign List.
15. NHTSA Defects Investigation, Owner Reports List.

Use a Law Book

Judges tend to be extremely busy and have little time to research the law in an unfamiliar area. In fact, many Judges have never had to look at the more than a few consumer protection laws. As consumer litigation increases, the bench is becoming more aware of their complexity and novelty.

Judges typically appreciate the attorney who gives them copies of exactly what statutory and case law is applicable to the case at hand. It saves them research time and trouble. It does not hurt the attorney's "judicial respect factor" either.

Consider making a copy of each statute (and any important case you want the Judge to know about), and having it bound into a Law Book or use a three ring binder. Provide an advance copy to the Judge and opposing counsel.

It will make it easier for you to keep track of things, too.

An added bonus is the fact that your client will see all this work you are doing and gain a better appreciation for your monthly bill or, in a fee shifting case, the Judge will see your concern for accuracy, courtesy and detail and bear that in mind at the fee hearing. Of course, the flip side of the coin is that your client may actually read those laws and begin to second guess you or debate the law with you. Then again, that may not be so bad an idea.

Use a Trial Book

Anyone who has tried case using the "legal pad" approach and then done it using the Trial Book approach will attest to the value of the latter.

Some attorneys swear by the "Columbo" (*i.e.*, Peter Falk's tv character) trial method where the attorney is just a good fellow trying to do his best to handle his client's case without offending anyone, and hoping to win by the empathy or sympathy created by a seeming clumsiness of character. Some swear at it. Talk to a juror sometime and find out what they think.

Jurors, and Judges alike, expect an attorney to look professional, act professional, and be professional. After all, this is not Hollywood — this is real.

It is important to give a constant appearance that you have your case fully prepared and are ready to meet any contingency.

That impression is not fostered by stacks of file folders and note pads on the table and fumbling through brief cases looking for that document you just know you put in there somewhere. Leave your yellow "Post-It" stickers at the office and keep your trial table in the courtroom neat and clean.

Trial Book Contents

Use a 3 ring binder with tabbed dividers which clearly mark each section.

Typical contents should include sections dealing with Pending Motions (put the pretrial statements here), Core Pleadings (complaint and answers), Voir Dire, Opening Statement, a Witness List (including phone numbers), Defense Witnesses (Including job positions), Neutral Witnesses, Plaintiff Witnesses, Rebuttal, Closing Argument, a Liability Outline, a Damage Outline, and Jury Instructions.

Ideally, you made a Trial Book file folder at the beginning of the case and have been putting notes in it whenever something occurred to you ever since you took on the case. Review it before trial as you prepare the Trial Book for final form.

Some particular notes for each section:

Stipulations: list admissions and those things that have been or will be stipulated to.

Pending Motions: also put the pretrial statements here for quick and easy reference during trial.

Core Pleadings: just the complaint and answers.

Voir Dire: ask if they know anyone employed by a car dealership or in sales, if they every had a car dealer lie to them, if they ever bought a lemon car. Work your theme into voir dire. And always ask two critical questions: (1) how many people here think there are too many lawsuits nowadays? (Be sure to raise your hand as you ask it) (2) how many people here think that car dealers get sued too much? (Be sure to lower your hand as you ask it). Note: don't ask them "why" or let them explain anything; what you are doing is just making your point, not getting opinions.

Opening Statement: Tell them something about the case, just the bare facts and where each side differs. If there's something bad about your side of the case, get it out and deal with it now. Then tell them, "point blank," what they will find (*i.e.*, "You will find that the defendant breached its warranty, that it violated the Consumer Act...", *etc.*). Weave your case theme into your presentation.

Witness List: just names, something about them (to remind you of why they are a witness) and phone numbers. In a car case, the people the consumer's attorney may want to call would normally include: service manager, salesman, sales manager, the defendant's representative, dealer business manager (referred to as "F & I" in the business), the Consumer, and your expert witness.

Defense Witnesses: including job positions and what they know and what you want them to say. Be sure to establish agency status of the dealership for doing factory warranty repairs (if applicable), meet the merchant and supplier definitions (Commercial Code and Consumer Act), and ask "What procedures adopted and maintained to avoid any error in compliance w/law?" (for bona fide error purposes). Ask the service manager if all these kinds of cars have this kind of repair history. When reviewing the repairs, one at a time, with the factory zone representative, ask him if it is normal to have to do that kind of repair on this kind of vehicle at that amount of mileage.

Neutral Witnesses: Have the consumer bring in friends and neighbors who can attest to the problems they saw with the car, or what they saw happen in the repair shop, etc.

Expert Witness: Qualify your expert, ask about his inspection of this vehicle, let him explain what he found and what he thinks. Finally, ask about his opinions (*i. e.*, "Do you have an opinion, based upon a reasonable engineering certainty as to whether or not there was a _____ related defect in the manufacture or repair of this vehicle? What is that opinion? What is the basis for opinion? What is the way to fix it?").

Plaintiff: Identify the exhibits and let them tell their story. Ask about misrepresentations, if they thought the dealer was stalling in doing repairs, if they refused to bring it in for repairs, and if they did maintenance. Then ask about damages (*i.e.*, in a rescission case you only need to establish their out-of-pocket losses, but in a "damages only" case the UCC measure is the difference in value of the goods at the time and place of delivery; so ask, do you have an opinion on what was the value of this vehicle on the date of delivery if it had been in the condition that it was represented to be – typical answer is yes, the price paid – and follow it with, do you have an opinion on what was the value of this vehicle on the date of delivery in the condition that it was actually in – typical answer is yes,

a lower number). Also, ask if they have made all their loan payments to date and why.

Rebuttal: a blank sheet when you start trial, put any last minute notes here during the trial itself.

Closing Argument: Thank the Jury first. Repeat your theme. In fraud cases, tell them that there is a long, technical definition for fraud and the Judge will explain it to them, but that fraud is basically just a lie that costs your client money and then tell the Jury where the lie is in your case.

Liability Outline: simply state the statutory or case law basis for liability for each claim, in outline form only.

Damage Outline: state exactly how much damages you will ask for on each claim.

Jury Instructions: make sure that your instructions are complete, from beginning to end, using mostly the accepted form or quotations from reported cases. And know the preference of your trial Judge: most appreciate your help but some do not want your proposed instructions.

Take Control of the Courtroom

Juries expect the Judge to be in charge of the courtroom, but they expect you to be in control of your own case. What you need to do is also create the subtle appearance of being in control of the courtroom itself.

Be on time, have your witnesses ready, use simple courtesy freely, and be polite and respectful of all participants (particularly the bailiff).

Nevertheless, there is a time and a place for levity, anger, mild sarcasm or thinly veiled innuendo. If that time arises during your case, do not pull back from it--just do not rush headlong into it without considering the outcome. A small amount here or there, in the course of a trial, may not hurt you and it may even amuse the Jury, but be very careful: it can backfire viciously.

Plan the order and timing of your witnesses carefully and build in a contingency plan if something goes wrong, because you can be sure that, sooner or later, it will.

Outline the testimony of your witnesses and note what exhibits (by number) will be used with each witness.

Object when you must, but never too much. It is easy for a Jury to think you are trying to hide something that you do not want them to learn about. And never look shocked when the witness drops a bomb in your lap (the explosion will only sound louder if you make a big deal of it).