A VIEW FROM THE BENCH

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Webster's Dictionary defines "earn" as follows: "to get as payment, reward, or yield in return for work or services; To deserve or obtain by merit or wrongdoing." In this author's experience, the definition of "earn" describes the reason why juries render the verdicts they do at the conclusion of jury trials. Verdicts in virtually every case, are the direct result of a diligent lawyer's hard work and preparation. Verdicts are not accidental results of chance, whimsy, or happenstance. Jury verdicts are instead a yield in return for hard work and verdicts are deserved or obtained by merit or wrongdoing

The lawyer's work to earn a favorable verdict begins when the lawsuit is filed or perhaps even before filing. Although a complaint, or an answer to a complaint, is only the first official act in a lawsuit, these initial pleadings set the tone for the entire case. When drafting an initial pleading, a lawyer should take a moment to consider the causes of action in the complaint. Are the causes of action meritorious? Is there a sound legal basis for each theory of liability in the complaint? Are there any special pleading requirements for the theories of liability asserted? Is the evidence likely to meet the elements of each cause of action in the pleadings? For answers, the same questions should be asked about affirmative defenses.

Consider whether there are matters in the complaint that are far-fetched factually or legally. Including such matters could erode the Court's trust or confidence in you as a lawyer. Earning the Court's trust and respect in you as a practicing lawyer is one key to obtaining a favorable verdict. If you feel compelled to include a novel or far-fetched theory as a cause of action or affirmative defense, then by all means be forthright and candid with the Court and

opposing counsel that a particular theory may be a long shot. Otherwise, you risk creating an impression that you, as a lawyer, are not trustworthy or that your client's case is weak.

The pattern jury instructions are a wonderful resource for lawyers and this resource should be consulted during the preparation of initial pleadings and during discovery planning. The pattern jury instructions are, in virtually every case, the instructions the Court will give to the jury for the jury's use in rendering a verdict in your client's case. Each element of each cause of action is likely set out in plain English and these elements should guide a lawyer's preparation of his or her client's case. For the plaintiff, consider whether there are particular elements of a cause of action that will be difficult to prove. By focusing on the elements to be proven at trial, the thoughtful lawyer can spot weaknesses in each case and plan to conduct discovery with these weaknesses in mind. For the defendant, consider whether there are affirmative defenses that may be difficult to prove or whether the plaintiff may have difficulty proving elements on which the plaintiff has the burden of proof.

After studying the elements of the cause of action and affirmative defenses, consider whether your client's particular case presents any particular evidentiary challenges. After all, a jury trial is predominately the presentation of evidence. For example, evaluate whether there are scientific, technical or medical issues that will require expert testimony and retain the needed experts as early as reasonably feasible. Think carefully about the evidence you would like to show to the jury and what specific foundation you will need to lay in order to admit each piece of evidence. Taking these steps early in your client's case will pay good dividends down the road when it is time to present your client's case to a jury.

You should then be able to create a discovery plan that is focused on the particular strengths and weaknesses of each case and focuses on meeting any particular evidentiary challenges your client's case presents. As part of your discovery plan, you should think about the trial of your client's case. Visualize how you would like to present the case to a jury. If you begin with the end in mind, you are much more likely to build a coherent message during the discovery process. Develop a theme (or several competing themes) for the trial based on the particular facts as you understand them and based on your client's particular strengths. Your chosen theme will keep you focused on the ultimate goal which is the successful presentation of your client's case to a jury.

Next, you must seek to earn the Court's respect and, if possible, earn opposing counsel's respect as well. This occurs during discovery and pre-trial motion practice. Earning the respect of opposing counsel and the Court is not easy but is simple. If you demonstrate thoughtful preparation in your discovery requests and in your pre-trial motion practice, your opposing counsel will take note; so will the trial judge. The most important ingredient is honesty in your dealings with the Court and counsel. A lawyer's reputation for integrity is his or her greatest asset in the courtroom, so guard your reputation accordingly. If your client's case has weaknesses, you should be willing to acknowledge them and work hard to discover facts that will allow you, as an advocate, to overcome or minimize those weaknesses. Often, a case is only as good as its weakest part. If you try to distract the Court (or even worse, mislead the Court) with respect to a weak aspect of your client's case, you could find yourself on the wrong end of a motion for summary judgment. Instead, work hard to develop facts that will demonstrate a genuine issue of material fact regarding the weakest element of your client's

case. Unless you follow these steps, it is unlikely you will earn a jury verdict favorable to your client because you may not even get your case to trial.

Now, it is time to focus on trial preparation and the trial itself. There are no shortcuts at this stage. This is where a trial lawyer truly earns a favorable verdict through countless hours of hard work. Consult your trial Court's pre-trial orders and follow them to the letter. These orders are in place for a reason and if you use the pre-trial orders as a roadmap rather than an obstacle, your client will greatly benefit. Again, your trial judge and opposing counsel will take note if you are generating carefully prepared witness lists, exhibit lists, and motions in limine. You will send a clear message that you are ready for trial. Take time to prepare witnesses for their trial testimony. Most witnesses are inexperienced at best. While preparing witnesses, keep your trial theme in mind and look for subtle ways to reinforce your chosen theme in both your questions and in the witness's answers; and then prepare, prepare, prepare. When it is time for trial, you should know the facts and evidence well enough that you can devote your energy to winning over the jury by earning their respect and trust.

During trial, the lawyer must earn the jury's respect. For the trial lawyer, respect is in this authors opinion, largely earned by demonstrating respect to others in the courtroom. In order to earn a jury's respect, a lawyer should demonstrate by his or her actions <u>at all times</u> respect for the Court, Court personnel, the court reporter, jurors, witnesses and opposing counsel. A lawyer should also demonstrate respect for the process by being prepared, knowing the rules of evidence, and getting to the point. Believe me, the jurors are watching a lawyer's every move during trial and listening to every word. Jurors will not form respect for a lawyer who is disrespectful. Nothing shows a lack of respect for others more plainly than wasting time.

If you are wasting the jury's time by being repetitive or by being poorly prepared, the jury will feel disrespected and will, either consciously or unconsciously, return the favor by not respecting you.

The successful trial lawyer must also earn the jury's trust. If you make certain promises to the jury during voir dire or during your opening statement, then you better deliver on those promises. If you tell the jury to expect certain evidence or testimony from a witness, the jury will not trust you if you fail to get the promised evidence admitted or if a witness's testimony is materially different from what you told the jury to expect. The jury will also decide whether to trust you based on your behavior and appearance in the courtroom. Jurors are far more likely to trust (i.e., believe) lawyers who use direct, straightforward language compared to lawyers who use long-winded, flowery, or circuitous language. Finally, confidence engenders Oust. If you put in the hard work to prepare your client's case during discovery and then followed that up with diligent trial preparation, then you will appear confident. If not, you will have a hard time faking confidence in the courtroom.

Building the jury's trust and respect begins in voir dire. Jury selection is a unique opportunity to interact with jurors and build rapport, trust and respect. Here are some helpful tips for using the voir dire process to build a relationship with the jury:

1. Do not talk at the prospective jurors, seek to converse <u>with</u> them.

   The simple truth is some lawyers like to hear themselves talk. Don't be one of those lawyers. The authors have watched numerous lawyers squander the

unique opportunity voir dire presents by doing almost 100% of the talking. If you are doing the majority of the talking, you are not doing an effective voir dire

2. Treat them like their opinions matter to you.

   Everyone wants to be heard and feel like their opinions matter. If you ask a question of a prospective juror, treat the juror's answer with respect. Even if you do not "like" the answer, you can acknowledge the response respectfully and use the response to learn whether other prospective jurors have a different opinion.

3. Get them talking and then demonstrate that you are listening to them.

   As open-ended questions designed to touch upon common, everyday scenarios that prospective jurors are likely to have experienced. You are much more likely to get them talking if you are grounding your questions in everyday experiences. Use questions that are open-ended such as "tell me about your views on punitive damages" instead of "yes or no" questions like "Do you agree with the law that provides for punitive damages?" You are highly unlikely to learn any valuable information by hearing a "yes or no" answer or by scanning a room full of people with their hands raised. Let them know you are listening to their answers by using their answers to form a follow up question.

4. Be yourself.

   Please do not try to pretend to be someone you are not. Jurors will see right through it. If your opposing counsel is blessed with the great comedic timing and wit, do not try and keep up with your opposing counsel by using humor unless you are similarly blessed. Be yourself and play to your own unique strengths. If you are being genuine, chances are excellent the jurors will perceive you as a genuine person.

5. Begin introducing the theme of your client's case.

   Voir dire provides an opportunity for you to begin building a theme for your client's case. Use concepts, phrases, ideas, etc. that you intend to repeat during all phases of trial. Use them early and often. Take care to think of subtle ways to weave your intended trial theme into voir dire topics. If, for example, your theme is "the defendant cut corners to save itself money," then ask questions during voir dire that invite discussions about short cuts, profit motives and similar subjects.

6. Be very careful to avoid making promises to the jurors that you may not be able to keep.

   This goes back to building trust. If you make the mistake of making a promise that you fail to keep, it is very hurtful to your client's case. Worst case, the jury will believe that you lied to them or otherwise tried to mislead them about the

evidence. You may not even think of the words you use as a "promise" or "representation" but that may not stop the jury from perceiving your words as a promise. As an example, be careful in using a hypothetical fact scenario during voir dire if that hypothetical is far removed from the actual facts of the case or greatly exaggerates the actual facts. If you do, be very open with the panel that you are using facts that have nothing to do with the facts of the case to be tried.

If you have done the work to prepare your client's case ahead of trial, the presentation of evidence should proceed smoothly. I cannot stress the next two points strongly enough. Be tight with your case presentation. Focus your witness examinations on what is really important to your client's case. Do not waste time examining witnesses on collateral and unimportant matters. Every second of the jury's time is precious and should be treated as such. Juries resent lawyers who are, or who are perceived as, wasting their time.

Finally, do not "over fry" your client's case or exaggerate your client's injuries/damages. The single largest mistake the authors have observed in their courtrooms is exaggerating damages and/or making strained claims (for example, unwarranted requests for punitive damages) that are not consistent with the evidence presented. Juries in the current social and economic climate will punish lawyers and plaintiffs for requesting damages in amounts the jury considers exaggerated.