

Trying the PL Case: Lessons Learned in the Courtroom

PLUS Blog

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Dana A. Gittleman

It is not a secret to those in the insurance defense profession that the opportunities to actually take a professional liability case to trial are increasingly less common. Clients are, understandably, risk averse, and civil trials can be costly, time-consuming and emotionally draining. While I have successfully handled many professional liability matters on behalf of clients, the opportunities to try a case through verdict in a courtroom have been more limited – with the exception of this summer, when I had two cases go to trial. My experiences illuminated some key lessons which have enriched my career and which I will carry into my next trial endeavor.

1. Prepare Early and Thoroughly. There is truly no substitute for adequate preparation. Your client, co-counsel, opposing counsel, the judge, jury and tipstaff will all be able to glean whether you are prepared. This involves developing a cohesive case narrative to be carried through from opening to closing. Think about how each witness and each piece of evidence ties into that theme and draft direct and cross examination questions accordingly. Be intimately familiar with the record, including depositions, pleadings, discovery responses, and expert reports. Doing so requires ample time. Assume any task will take twice as long as projected, and anticipate that witnesses may require more than one preparation

session or meeting. Do not wait until the eve of trial to begin preparing!

2. Consider Your Client. Think about your client and what questions, thoughts and feelings they may have. This may be their first trial experience, and their preparation is a key factor in the success of the case as well. Re-view sample direct and cross exam questions, and remind them that opposing counsel's questions may be unclear or alter the facts, thus listening is critical. However, even the most confident witness can crumble when the attention of every person in the room is on them. Remind your client to focus and digest each question posed and respond accurately, truthfully and – generally – succinctly. Prior to trial commencing, encourage your client to review the file and familiarize themselves with their prior testimony and key documents. Your client's preparedness – just as yours – will be apparent and can demonstrate to the jury that they appreciate the gravity of the litigation and importance of the outcome to all parties involved.

3. Be Flexible. Something inevitably will go awry. Technology is an effective tool, but not without limitations. Have a backup plan if the audiovisual technology fails, the courtroom configuration is unexpected, or the judge will not allow for certain technology uses (e.g. no exhibits shown during openings). Think about the anticipated witness

testimony, but also ways you can pivot if responses are unexpected or the cross exam of your client yields unanticipated testimony. Technology is unpredictable, witnesses are unpredictable, and trial is unpredictable. Do not let a lack of agility hamper your case.

4. Think About Logistics and Supplies.

The PowerPoint you want to show? No use without a screen. The video you want to play? No use without sound. The chart you want to draw for the jury? No use without a white-board and markers. These small details may be easily forgotten in the midst of witness preparation and trial outlining. Plan out logistical items before you are in the throes of trial preparation; or, better yet, delegate logistics and supply acquisition to a trusted paralegal or assistant. This will allow you to focus on other trial preparations while providing an opportunity for your paralegal or assistant to be a committed and valued member of the trial team.

5. Ask for Help. Your colleagues want to help you and can offer an abundance of knowledge and advice. Whether it is asking for insight about a judge, practicing an opening argument to a friend, roundtabling a complex issue or seeking counsel on appellate considerations, do not be afraid to ask for help. Doing so is not a sign of weakness or laziness, but rather a step toward best serving your client.

6. Be Authentic. There are many types of trial lawyers with different styles of presentation. While it is beneficial to observe

other attorneys' arguments to determine what is effective, it is critical to remain true to your own authentic style. Deviating too far from your own innate personality will not resonate with a jury, and the jury will be able to quickly identify inauthenticity. As you develop as a trial lawyer, your style will evolve. Litigation is a dynamic profession, and with each trial experience, you will learn what works for you. While juries are the finders of fact, they are humans first, and it is impossible to entirely divorce trial results from likeability and credibility.

7. Humanize Your Client. While many professional liability cases involve corporate entities, there is always a face behind the company. Before the Court, individuals and corporations must be judged equally and fairly. Where your client is a corporation or business, is it important to humanize the entity and the hardworking professionals that comprise its workforce. Jurors are keen observers and notice inopportune smiles, laughs and gestures. Your client should demonstrate professionalism and decorum in the courtroom while maintaining relatability.



Dana A. Gittleman, Esq. is a shareholder in the Professional Liability Department at Marshall Dennehey. Resident in the firm's Philadelphia office, she focuses her practice on the defense of claims and lawsuits brought against insurance agents and brokers, real estate professionals, attorneys, directors and officers, and large product manufacturers. Dana may be reached at dagittleman@mdwgc.com.