Trial Advocacy 101: A View From the Bench

By William Carlucci

After 43 years as a trial lawyer, I became a judge in August 2022. Because I was a practicing attorney for so long, little about this job was new to me. One matter that was a complete surprise, however, is the number of attorneys who are completely unprepared at hearings and trial. I applaud Pennsylvania Supreme Court Justice Christine Donohue's Project LITIGATE initiative as an important step in providing attorneys with trial skill. Since I have prepared and tried a great many cases over more than four decades and now watch others do so, I thought that I might reduce my thoughts to writing.

I begin with a disclaimer. I never claimed to be an expert on trial practice. Many lawyers have more trial experience than me. Those who want to "stand on the shoulders" of great lawyers can read *My Life in Court* by Louis Nizer, *How to Argue and Win Every Time* by Gerry Spence, *Trying Cases to Win* by Herbert J. Stern and Stephen A. Saltzburg or The Irving Younger Collection, *Wisdom & Wit From the Master of Trial Advocacy*. Those who want to hone their skills at negotiation can read *Getting to Yes* by Roger Fisher and William Ury or *Getting Past No* by Ury. All I can offer is a few "helpful hints" acquired over many years, often knowing the thrill of victory, and sometimes learning the agony of defeat.

George S. Patton Jr. is quoted as having said, "He who sweats more in training bleeds less in battle." In my experience, the outcome of trials often depends on the quality of the presentations, which, in turn, depend on counsels' preparation. Many years ago, I was plaintiff's counsel for an arbitration hearing against a far superior lawyer in Centre County. I thoroughly prepared my case. He did not. He never knew what hit him.

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Opening Statement

Except in jury trials, lawyers frequently waive the opening statement. Unless the court will not allow them, waiving this opportunity is a mistake. The opening statement allows counsel to offer the finder of fact a brief overview of the case, to introduce the parties and other witnesses, to mention key legal issues and to suggest what lies ahead. Where the facts are undisputed, the opening should focus on the law. Where the claimed facts will differ, the opening may suggest that credibility will be key. An opening that is well crafted, sincere and reasonably brief may "anchor" the finder of fact into seeing the case in the way that counsel wish.

There are a few things that counsel must not do in the opening. Don't make a closing argument. Passion has an important place in litigation. The opening is not that place. Don't belittle the opposing party or opposing counsel. Don't talk longer than necessary (five minutes nonjury, 15 to 30 minutes jury). Never mention a witness who may not testify, an exhibit that might not be used or permitted or any item of evidence that might be excluded by the court. Since some preparation is required for every step of a hearing or trial, make a few notes, outlining areas you wish to cover. Unless the matter is very simple, avoid making an extemporaneous opening statement.

Direct Examination

During my time on the bench, I have witnessed dozens of clumsy direct examinations. Witnesses misunderstand questions. Some make long-winded, argumentative statements that are unrelated to the question asked. When handed an exhibit, some appear confused or simply have no idea what the lawyer is showing to them. Although I might expect some of this behavior on cross-examination, I don't expect it on direct. The only explanation is lack of preparation.

Skilled trial lawyers prepare a "first draft" of their closing statement long before the trial starts. If preparing for a jury trial, they review the Pennsylvania Suggested Standard Jury Instructions. If preparing for a bench trial, they write proposed findings of fact and conclusions of law. Once counsel know the evidence they plan to rely upon in closing, they have a "roadmap" for planning direct examinations.

Every performer understands the importance of considering the audience. A trial lawyer must do so, as well. In a bench trial, the court will be familiar with courtroom procedures, but might know little about the relevant area of law. In a jury trial, counsel should assume nothing.

After counsel have prepared thorough and effective direct examinations, their job is only half done. They must then prepare their witnesses. This cannot be an afterthought and should not be done the day before trial. Witnesses need time to understand the flow of their testimony, to connect the correct answer to the correct question, to recognize and understand exhibits and to feel at ease with their role in the trial. That may require significant time and patience. Counsel should offer helpful hints about proper courtroom attire, advise witnesses about courthouse security and caution witnesses to be on time. In some cases, counsel may need to take a witness to the courthouse before the trial to make the witness comfortable in the courtroom.

We were taught in law school that counsel should not lead the witness on direct examination. I disagree. Although counsel may not ask leading questions on direct, it is the responsibility of a trial lawyer to lead the witnesses through their testimony.

An effective direct examination tells a story that the finder of fact can believe. My preference was to have the witness testify

to events in chronological order, without referring to exhibits or the testimony of other witnesses. I followed up with exhibit identification, which I used to "remind" the finder of fact about matters referred to earlier in the witness's testimony. At the end, I had the witness refer to the testimony of other witnesses, agreeing with some and disagreeing with others. The point was to tell the story first without any distraction from exhibit identification, quibbling with other witnesses or otherwise.

Some lawyers have only one or two of their witnesses ready at the beginning of their case, in an effort to avoid having others waiting to testify. That can be dangerous. While the court should attempt to be courteous to everyone, there is no guarantee that a trial judge will adjourn the trial until counsel can round up missing witnesses. Counsel should have all witnesses ready, either at the courthouse or a few minutes away.

I always know when witnesses in my courtroom have experienced counsel. They are appropriately dressed, at ease in the courtroom and know their role in the case. They are prepared to provide clear answers to questions and to identify and explain

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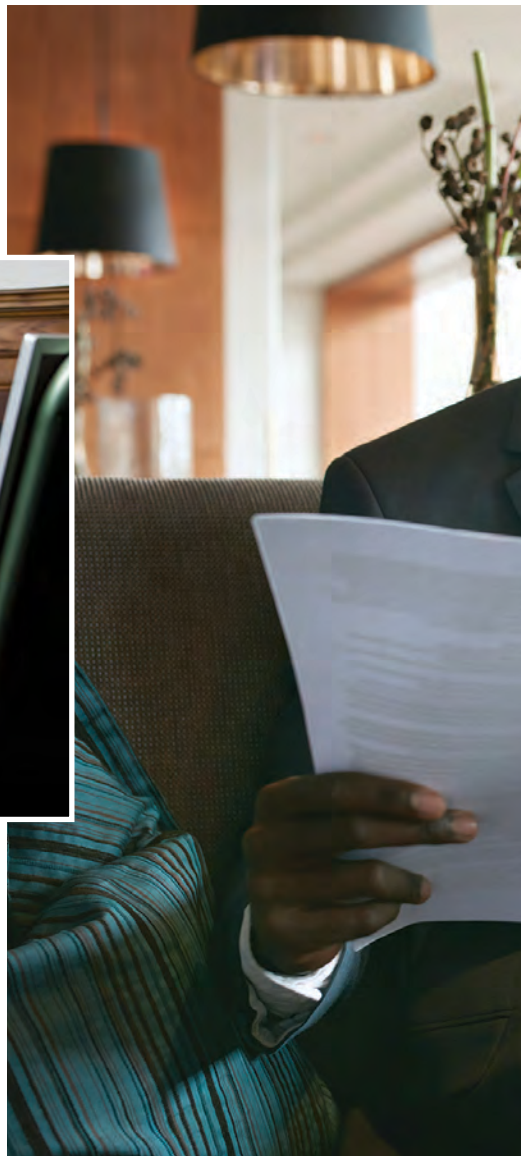

exhibits. This does not happen by accident. It happens because trial counsel invested the time and energy required to ensure that their witnesses make a good impression.

Skillful Use of Exhibits

Attorneys often undervalue the impact of exhibits. Outside of courtrooms, most folks tend to tell the truth. For that reason, judges and juries tend to believe most of what witnesses tell them. Those who regularly appear in court know that witnesses make mistakes and that some witnesses have a motive to lie. When the finder of fact needs to determine the truth from opposing testimony, exhibits are often the key.

During my time on the bench, I have been surprised by the very casual presentation of exhibits. Lawyers attend hearings without pre-marking exhibits, without paginating long exhibits and without making sufficient copies. When lawyers ask their own witnesses to identify exhibits, many stumble, as if seeing the document for the first time.

The rules for the skillful use of exhibits are elementary. Mark exhibits with an appropriate exhibit sticker in advance. Have enough copies for all parties and the court and the witness. Paginate all multipage exhibits. If the exhibits are numerous, put them in three-ring binders and prepare an exhibit list for easy reference. Make sure that the introducing witness is familiar with the exhibit. If an exhibit was assigned a number in a deposition or pretrial proceeding, consider using the same number. Very few judges will object if exhibits are introduced out of order or if a few numbers are missing.

There should rarely be a need for argument about the introduction of an exhibit at trial. Except for the rare case where an exhibit is used in rebuttal at trial, exhibits should be shared with the opposing party in advance, and the party proposing the exhibit should secure pretrial approval from the court.

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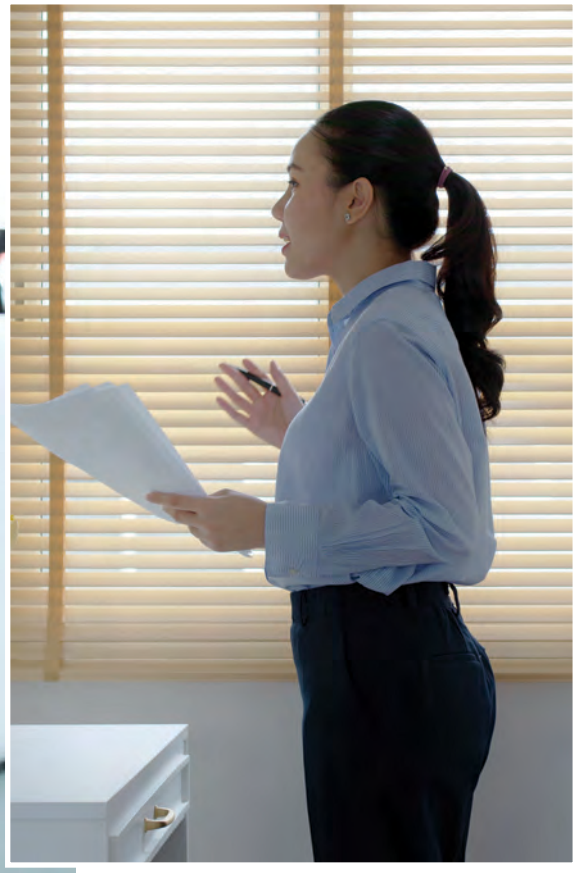

Presenting exhibits to a jury takes careful planning. Consider the use of technology so that all jurors can all view the exhibit at the same time on a screen. When appropriate, have large copies made for use at trial. When trial counsel are well-prepared, it suggests confidence in their case.

Cross-examination

During my time on the bench, I have witnessed many long, painful, pointless cross-examinations. Sometimes, opposing counsel simply walks the witness back through the direct, attempting to challenge earlier testimony. The lawyer nearly always fails, and the witness simply gets another chance to tell his or her story.

Many years ago, Irving Younger prepared a presentation titled the "Ten Commandments of Cross Examination." It is on YouTube. Lawyers should watch it before every trial. I will not repeat what he has already said. I will simply make a few points, based upon my many years of both success and failure.

First, nearly every question on cross-examination should be leading ("You would agree with me that you were given plenty of time to review the contract before signing, were you not?"). Second, counsel must ordinarily know the answer before asking the question. They should conduct the cross-examination armed with either an indexed deposition transcript, indexed written documents or detailed notes from the witness's direct testimony. The witness will often provide the answer that counsel expect. If not, counsel must be prepared to impeach the witness immediately with prior inconsistent statements. Third, cross-examination must be surgical. A few answers that hurt the witness's credibility can be effective. An hour of cross-examination that accomplishes nothing can only hurt the lawyer who conducted it. Fourth, cross-examination should ordinarily be pleasant. Some experienced lawyers conduct adversarial cross-examinations of bogus experts or witnesses who make a very bad impression. In most cases, however, cross-examination should be conducted with dignity and respect. Fifth, not every cross-examination needs to be an attack on credibility. I once cross-examined an

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elderly widow, represented at trial by her son. I asked her leading questions about every fact in the case that was not directly in dispute. She admitted every one, helping to establish my client's credibility. Her lawyer-son could do nothing, and she effectively became my witness. Sixth, listen very carefully to the witness's direct testimony. The way a witness answers on direct often hints at how he or she will answer on cross. Seventh, end big. Too often, lawyers get a dynamite admission on cross-examination, then dilute it with meaningless questions. Finally, there will be times when counsel decide either that an opposing witness did them little damage or that cross-examination is unlikely to be successful. In those cases, the best strategy is "No questions, Your Honor."

Closing Statement

The closing statement should be the easiest part of the trial. Effective direct examinations, supported by the effective presentation of exhibits, allow counsel to argue credibly for a result favorable to their client. Effective cross-examinations provide key pieces of testimony, which can be weaved into the evidence introduced on direct. All that counsel need to do in closing is to explain to the judge or jury how the law applies to that evidence. I will offer only a few hints on the closing.

First, judges and juries only pay attention for so long. In a nonjury trial, a closing longer than 15 minutes is probably not necessary. In jury trials, a closing longer than 30 minutes is rarely needed. Second, trial counsel should prepare the first draft of their closing before trial. Otherwise, they may overlook the need to introduce key pieces of evidence or to support a theory or cause of action that they need to argue in closing. Third, in any jury trial, counsel must have a thorough understanding of the court's proposed charge before closing. They should review the Suggested Standard Jury Instructions, determine which are helpful to the case and request them. Although many trial judges avoid "custom-drafted" instructions, most are willing to give any of the Suggested Standard Instructions if the evidence supports them. Armed with a knowledge of the charge, counsel can read portions of it during closing and highlight how the evidence met or missed what the law requires. When the court's charge matches a lawyer's closing statement, it dramatically increases the impact of the statement. Fourth, if the court intends to have the jury answer special verdict questions, experienced counsel will include those questions in the closing statement. Finally, this is the time for passion. Thorough preparation and professional courtesy will often be enough for opening, direct and cross. The closing statement is the chance for counsel to really argue the case. That doesn't mean insults or histrionics. It means that judges and juries expect lawyers to have the courage of their convictions. The closing statement is the time to put that courage on full display.

There Is No Substitute for Experience

Lawyers who confine their practice to drafting pleadings, tedious document review, exhaustive depositions, ill-fated motions and unsuccessful mediations still claim to be "litigators." In my view, only lawyers who actually try cases are entitled to that claim.

My first job after law school was in a private firm. After two years, I took a job as an assistant district attorney. In a little over three years, I tried 30 jury trials and managed many hundreds of other hearings. I worked long hours for a meager salary, but the job was a gift. After each jury trial, I asked the trial judge for advice on how to improve my presentation. After many trials, our then-president judge said, "I would not change a thing." Only then did I feel like I knew what I was doing.

Lawyers who want to develop litigation skills need to get into the courtroom. Some of us landed jobs that put us there, every day. Others can do pro bono litigation or "second chair" with an experienced litigator. Lawyers can attend major trials and learn from others. My talented law clerk joins me for nearly every evidentiary hearing. Later, we discuss the evidence and review exhibits. His perspective is valuable to me, and the process is making him a better lawyer. He is eager to learn as much as he can and to match my skill. My prediction is that he will become far better than me. ⚖

William Carlucci is a Lycoming County trial judge and a past PBA president. He gratefully acknowledges the assistance of Adrian M. Lee and Benjamin E. Landon. Lee is a graduate of the University of Delaware, has an M.A. from Cornell University and a Juris Doctor from the NYU School of Law. He was formerly a senior editor of the *NYU Review of Law and Social Change* and currently serves as law clerk to Judge Carlucci. Landon is a graduate of Lycoming College and has both an MBA and a Juris Doctor from the College of William and Mary. He serves as law clerk to Judge Eric R. Linhardt.

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