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14 Tips For Presenting A Compelling Commercial Plaintiff's Case

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As the intrepid and trustworthy guide, you lead the way from Point A (start of trial) to Point B (judgment for plaintiff) along your well-planned route, charted with your theme in mind each step of the way. Here's how.

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UNLIKE CASES involving medical malpractice, personal injury, divorce, and alleged criminal acts, commercial cases typically lack drama and can be, well, boring. This article discusses ways to make the plaintiff's presentation in a commercial case not just engaging, but compelling.

GETTING THERE • Picture yourself as the intrepid leader of an expedition. Your goal is to get from Point A (the start of the trial) to Point B (a plaintiff's judgment). You want to arrive there by the most direct route, avoiding swamps, boulder fields, treacherous stream crossings, and the like. Your opponent's goal is to divert you from that path and, worse yet, to lead the judge (this article assumes a bench trial, except in the last section) from Point A to Point C (a defendant's judgment)—somewhere you definitely do not want to go. So, how do you get to Point B most efficiently and effectively? You must begin preparing for this expedition well before trial. Here are some useful tips.

1. Choose A Compelling Theme

From your first client meeting, you should be thinking about the theme that will guide the judge along the path to Point B. As you learn additional facts, and conduct legal research, ask yourself: What theme fits the facts and the law best, and will make the judge want to rule in your favor? Think beyond just establishing the elements of each cause of action you assert. Your theme should be based on common sense—it must ring true—and it should be so succinct that it would fit on a billboard.

For example, consider these themes, all of which put the dispute in human terms:

- People should live up to their promises (breach of contract);
- Cheaters should pay the price for their deception (fraud);
- People should think before they speak, and a victim of someone who doesn't should recover his due (negligent misrepresentation);
- No one should take unfair advantage of another (unjust enrichment);
- Someone who betrays another's trust and confidence should suffer the consequences (breach of fiduciary duty); and
- Everyone must play by the rules, or be punished (violation of an unfair trade practices act).

2. Draft Your Complaint So It Is Consistent With Your Theme

In drafting your complaint, you could just mechanically recite the bare-bones facts of your case, without telling the story that promotes your theme. Even though Fed. R. Civ. P. 8(a)(2) provides that a complaint must be "a short and plain statement of the claim showing that the pleader is entitled to relief," you have some leeway in drafting your complaint. The judge will read it before the trial starts. Within the bounds of proper pleading practice, draft a complaint that tells your client's story in such a way that, by the time the judge finishes reading it, the conclusion is just about inexorable that your client is entitled to all the relief you seek. As you draft, ask yourself: how does each paragraph promote my theme? In early drafts, add all causes of action that you may want to include; then discard the weaker counts, because they detract from the stronger ones. Write short sentences in simple English, in short numbered paragraphs, with subheadings, as appropriate.

3. Conduct Discovery To Get Admissions And Streamline The Trial

Conduct all pre-trial discovery with an eye toward gathering information and documents useful in the courtroom to promote your theme. You can establish facts for elements of your causes of action or corroboration about them by getting admissions of the opposing party. You can also streamline the trial, without the risk of getting answers at trial that divert you from your path, by putting the opposing party's admissions into the record at trial. Here are some techniques:

- Use the deposition of the opposing party not just to gather facts, but to get admissions. Make sure, as you take that deposition, that you have obtained the admissions you need so that you can put them in the record at trial. Putting such admissions into the record at trial goes well beyond their use as impeachment. Pursuant to Fed. R. Evid. 801(d)(2), such statements are not hearsay, and you can introduce such admissions as the admissions of a party. If the opposing party is an entity, take a Fed. R. Civ. P. 30(b)(6) deposition, in which you can obtain an entity's admissions. *See also* Fed. R. Civ. P. 32(a)(2), authorizing use of deposition transcripts of an opposing party—whether an individual or an entity—for any purpose allowed by the Federal Rules of Evidence. A real-time transcript is useful, if the client can pay the expense, so that, during the course of the deposition you can be sure you have

the admissions you need. If you take a video deposition, the judge at trial can observe your opponent making such admissions—more compelling than mere words on a page;

- Take advantage of requests for admissions, as provided in Fed. R. Civ. P. 36. Such admissions are conclusive for purposes of your case, unless the judge permits their withdrawal or amendment. *See* Fed. R. Civ. P. 36(b). In drafting requests for admissions, remember that they are not limited to facts, but can include admissions pertaining to "the application of law to fact, or opinions about either," as well as "the genuineness of any described documents." Fed. R. Civ. P. 36(a)(1). You can include similar but not identical requests for admissions, so that even if the opposing party can figure out a way to deny all or part of one request, you can get an admission on a similar request. You can also use requests for admissions to establish certain documents as business records, so that at trial you do not need to go through the cumbersome and sometimes time-consuming process of establishing that certain documents are within Fed. R. Evid. 803(6), the business record exception to the hearsay rule;
- Obtain documents from third parties and from the public record. Do Web searches, but keep in mind that not everything you find on the Internet is reliable;
- If your case involves public records, obtain certified copies, so that you can put them into evidence without the need to call any public official as a witness, as provided in Fed. R. Evid. 803(8);
- When appropriate, seek judicial notice of adjudicative facts, as provided in Fed. R. Evid. 201. A court must take judicial notice of such facts if requested by a party and supplied with the necessary information. Fed. R. Evid. 201(d). Such a fact must be one that is not subject to reasonable dispute in that it is either generally known within the jurisdiction or capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. Fed. R. Evid. 201(d). Such facts include, for example, prevailing interest rates, contents of court records, SEC filing requirements, federal regulations, scientific, technological, and mechanical principles, facts involving history, geography, locations of buildings, distances between places, and topological characteristics.

4. Stipulate To Admission Of Documents As Full Exhibits

In most commercial cases, a sub-set of documents will be admissible at trial, without any bona fide objection. Seek agreement of opposing counsel for the admission of as many of these documents as you can, to streamline the trial. Of course, you must expect that defense counsel will likewise seek your stipulation to documents he or she wants in the record, but that is a small price to pay for the benefits to your client of such a stipulation. Pre-trial orders often include the requirement that parties so stipulate to the extent they can. Read all pre-trial orders carefully to be sure that you comply with this and all other pre-trial requirements.

5. File Motions In Limine On Key Evidentiary Issues

A motion in limine is a useful device that serves several functions:

- First, it alerts the judge that, during trial, an evidentiary issue will likely arise that will require more careful deliberation (possibly including research by the judge's clerk) than run-of-the-mill evidentiary issues;
- Second, it gives you an opportunity for the judge to see that evidentiary issue your way, with the benefit of your analysis of applicable evidentiary rules and precedents;

- Third, it avoids having the presentation of your case bog down just as you are building up a head of steam, while the judge hears extensive oral argument on a predictable evidentiary issue.

The downside of filing a motion in limine is that it highlights the evidentiary issue for your opponent, and gives your opponent the opportunity to review and analyze your view of that issue and the authorities you rely on, and to file an opposing memo on that issue. But the benefits of filing a motion in limine on key evidentiary issues typically outweigh this downside.

6. Prepare A Trial Notebook

This three-ring notebook will be your bible for the trial. Make separate subsections for:

- Key pleadings;
- Chronology;
- List of plaintiff's exhibits;
- List of defendant's exhibits;
- Each witness (inserting direct and cross examination notes, and deposition summaries);
- Key exhibits (if not voluminous); and
- Trial notes.

7. File A Pre-Trial Memo, Even If Not Required By The Pre-Trial Order

Keep in mind your role as the intrepid leader of this expedition from Point A to Point B. The pre-trial memo is your map for the judge, showing how to get there. Distill your case down to its essence. Write as few pages as possible. Every sentence should promote your theme. By the time the judge finishes reading your pre-trial memo, the judge should want to rule in your favor, needing only the trial record to justify getting to Point B.

8. Select As Few Witnesses As You Need And Present Them In A Logical Order

Put on only as many witnesses as you need to establish all the elements of each cause of action. With few exceptions (such as strategically important corroboration of key testimony), duplicative testimony may not only violate the rules (*see* Fed. R. Evid. 403)—it can result in inconsistent testimony. Confusion only aids the defendant, whether by inconsistent testimony or otherwise. Even if duplicative testimony is not inconsistent, consider whether the additional testimony will bog down the trial.

Under the theory of primacy (what we hear first we tend to remember better), your first witness should be very strong. Generally, you should present your witnesses so they can relate the facts in chronological order, although this is not always possible. Under the theory of recency (what we hear last we tend to remember better), end with a strong witness. Put in the middle witnesses whose testimony is required, but who either are weaker or whose testimony is less important or unavoidably tedious.

9. Prepare Your Witnesses To Avoid Surprises In The Courtroom

If your witnesses have a good idea what to expect in the courtroom, they will be less ill-at-ease when they testify. When preparing your client, ask the same questions you plan to ask in the courtroom, while assuring your client that there is no script, so this is not a memory contest. In this respect, the trial of a case is more like performing jazz than classical music—jazz musicians can improvise; classical musicians are limited to the notes on the sheet music. If you plan to use exhibits or demonstrative exhibits during your client's testimony, make sure your client is thoroughly familiar with them, and comfortable with their use. Anticipate the cross of your client, and put your client through cross-examination before trial. Depending on your client's prior courtroom experience and sophistication, it may be appropriate to take your client to the courtroom where the case will be tried, to get the feel of the place and a sense of the judge.

Discuss with your client the theme of your case and the legal theories supporting it, as well as

defendant's theme and theories to get to Point C, so that when your client answers questions on the stand, he or she understands the context. This is especially useful when your client answers questions on cross-examination. Your client will be less likely to be surprised by cross-examination questions that even you didn't think of if your client has an understanding of the strategy underlying those questions. Your client will then be more likely to answer cross-examination questions consistent with your theme, keeping you on the path from Point A to Point B, avoiding detours and staying off the path to Point C, a place you want to stay far away from.

When preparing witnesses other than your client, you don't have the benefit of the attorney-client privilege. So, assume in any conversation you have with a non-client witness that opposing counsel is sitting next to you.

10. Ask Direct Examination Questions To Get To Point B Efficiently And Effectively

Some pointers:

- Keep your questions short. Shorter questions are easier to understand, for the witness and the judge, than long, convoluted questions. Ask questions using plain English words;
- Ask questions using a pace that moves things along nicely, but not so fast that the judge will be unable to follow the testimony, or take notes. If the judge is taking notes during the testimony, as most judges do, keep an eye on the judge's writing hand. If you are going too fast for the judge to write, slow down;
- Ask only questions that further your theme;
- Vary the types of your questions to avoid a dull back-and-forth with your witness. Include leading questions for preliminary matters (*see* Fed. R. Evid. 611(c));
- Use headnotes, such as, "Let's turn to the day you signed the agreement with Jones." Such headnotes are signposts along the trail, guiding the witness and judge to let them know just where you are, and where you are headed;
- Use loop backs, by which you incorporate into a question the answers from the prior question or two. Loop backs re-enforce the testimony your witness just gave, provide context for the question you are now asking, and strengthen the flow and logic of your presentation;
- Once you have the answers you need, do not try to "gild the lily" by asking "the one question too many that too often results in a bad answer;
- Avoid objectionable questions. Each time you ask an objectionable question, your opponent is presented with an opportunity to place obstacles in your path, transforming a nice, easy trial into one full of rocks, roots, and ruts. If you inadvertently ask an objectionable question, and realize that it is truly objectionable, withdraw it (don't say "stricken," which only a judge can do), and ask a proper question;
- If opposing counsel objects to a question as irrelevant, use the opportunity in response to reinforce your theme, explaining how the answer to your question is relevant to get to Point B;
- Don't allow opposing counsel to take the judge on a detour off your trail in the guise of voir dire on a document, on competency of a lay or expert witness, or otherwise. When a judge does allow voire dire, make sure you object to the first question beyond the scope of proper voire dire;
- Use your voice like an instrument. Avoid the monotone Q-and-A that puts everyone to sleep;
- When eliciting key testimony, build up to it. Through the witness, bring out the significance of the event, creating anticipation, so that the judge is eager to hear that testimony;
- Make a pre-emptive strike by asking your own witnesses questions revealing weaknesses in their testimony. This may seem counter-

intuitive, but far better that you introduce this testimony first, so long as you don't let it overshadow the helpful testimony. You can insert such testimony in the middle of your witness's testimony, presenting it in the most favorable light that is reasonable, even though it is negative. You will not be able to explain it away, but you can put opposing counsel to a disadvantage, because by the time the judge hears the cross on this vulnerability, it is old news, with comparatively little impact;

- Before you end your direct examination of each witness, ask for a moment to review your notes. Once you say "no further questions," it is awkward—and sometimes futile—to ask the court's permission to ask further questions of that witness. Likewise, review your notes before resting your case, to satisfy yourself that you have put into the record at least a prima facie case.

11. Use Documents To Get To Point B Efficiently And Effectively

Put into evidence only documents that further your theme:

- Know the evidentiary basis for the admission of each document. Be prepared with evidence rules, precedent, and other authorities to support the admission of each document;
- Build up key documents to highlight their significance before introducing them, just as you do with key testimony;
- Introduce into the record the admissions in the transcript of the deposition of the opposing party (*see* Fed. R. Civ. P. 32(a)(2)) and the admissions in response to your requests for admissions (*see* Fed. R. Civ. P. 36(b) and Fed. R. Evid. 801(d)(2)). Keep in mind, though, that pursuant to Fed. R. Evid. 106, opposing counsel can put in the record any other portions of the transcript of the deposition of the opposing party, or other responses to requests for admissions, which "ought in fairness to be considered contemporaneously with it";
- Introduce into the record the deposition testimony of anyone (not necessarily a party) within the scope of Fed. R. Civ. P. 32(a)(4), which includes, among others, any witness who is more than 100 miles from the place of trial, any witness unable to attend the trial because of age or infirmity, or anyone whose attendance cannot be procured by subpoena. Be aware that Fed. R. Evid. 105, the rule of completeness, applies to this transcript as well as to party admissions;
- To save time, and increase persuasiveness, introduce summaries of documents into evidence, as appropriate, taking advantage of Fed. R. Evid. 1006. Remember that you cannot introduce summaries unless you make originals, or duplicates, of all the documents you summarize available for examination or copying, or both, at a reasonable time and place. So, consider the utility of summaries well before trial and comply with Fed. R. Evid. 1006;
- Use demonstrative exhibits, as appropriate, to clarify complex testimony or documents. Examples include time lines, organization charts, and flow charts. Limit the amount of information in each demonstrative exhibit, so it is easy to understand. Use such exhibits in a way to avoid being faced with a challenge pursuant to Fed. R. Evid. 403 and 611(a), which give the judge discretion to keep out cumulative evidence and evidence that needlessly consumes time. Well before trial, play devil's advocate by asking yourself how opposing counsel might use your proposed demonstrative exhibits against you, and make any necessary revisions;
- Consider using electronic demonstrative exhibits. If you do so, make sure you have the proper power sources and equipment in the

courtroom, and that you are facile at using such equipment;

- Make an extra set of exhibits for opposing counsel, the judge, and the judge's law clerk, with an individual tab for each;
- At trial, keep a list of all documents that are made full exhibits, so you know what you and opposing counsel put into the record, and all exhibits marked only for identification.

12. Select An Expert Who Has The Required Background And Experience

To get the best from your expert:

- Select an expert who can speak plain English, and knows how to use effective analogies;
- In establishing your expert's credentials, intersperse leading questions (*see* Fed. R. Evid. 611(c)) to move the testimony along;
- Anticipate any *Daubert* issues and make sure they are resolved before trial;
- It is not necessary to ask the judge to find that your expert witness is an expert on the subject for which you offer his opinion testimony. Accordingly, there is no reason to put this obstacle in your path to Point B;
- Do ask your expert his or opinion on the ultimate issue the judge must decide (*see* Fed. R. Evid. 704(a));
- Use the expert's report to guide the judge through the expert's testimony. Even though the expert's report is hearsay, judges typically allow it as a full exhibit. Your expert is the teacher, the judge the student, and you are the moderator.

13. Miscellaneous Tips

Here are some more ways to get from Point A to Point B:

- If you expect the judge to follow your lead, you must be trustworthy. In your pre-trial memo, make sure that each fact will be supported in the record, and that each legal authority you cite supports the proposition for which you cite it. During trial, be yourself, and don't seek to have any witnesses exaggerate anything about themselves, or distort the truth in any way. In your post-trial memo, deal with the entire record, not just a skewed selection from only part of the record while ignoring anything inconsistent or adverse to your position. One misrepresentation taints everything you do. If you lose credibility, you risk losing your case;
- When you get a bad answer from your own witness, don't panic. Ask yourself if you have asked the question in a way that confused the witness. If so, rephrase the question. If the witness is hopelessly confused at that point, go to a different subject. If the witness is your client, discuss the troublesome testimony during the next break, unless the judge precludes such discussions. If your client was confused, but your discussion clarifies what you were seeking, deal with what will be apparently inconsistent testimony head-on. Make clear on the record, after the break, that your client understood by your earlier question "X," whereas, reworded, he or she now understands the import of the question is "Y." This detour off your path is usually avoidable by careful preparation;
- When the judge is activist, asking your witnesses many questions, the witness should not be surprised by this turn of events, and should be advised before trial to look the judge square in the eye and answer the judge's questions directly. You should listen carefully to the judge's questions, and make the most of any follow-up questions you may want to ask on a subject that obviously has the judge's attention;
- Stay organized. Your space at counsel table should be neat and tidy. You should have on it only what you need, and nothing more;
- If you are trying the case with co-counsel, have a stack of note cards with you at counsel

table. They are handy for communication between you and co-counsel without any conversation that could interfere with your undivided attention on the witness, judge, and opposing counsel. Each card should have only one point on it. You can then discard cards (in a recycling bin) as you cover each point;

- Keep in mind your role as leader of this expedition. Even when you are diverted from your planned route to Point B, keep your composure, and remember that there is more than one way of getting from Point A to Point B;
- Don't burn out during trial. Make the time each day to do something relaxing. Even an intrepid expedition leader needs time to unwind during an arduous trek;
- When litigating in state court, apply the state court analogs to the Federal Rules of Evidence and the Federal Rules of Civil Procedure cited in this article.

14. Adjust All This Advice For A Jury Trial

All the advice in this article is as useful in a jury trial as in a bench trial, with some modifications:

- Well before trial, get advice from a non-lawyer. Describe the facts of your case, without disclosing whom you represent. Start with the most basic facts, and ask what additional facts would be required to decide who should win. Provide that additional information. Find out what facts make a difference, and why. Then present your theme to determine if it is effective. Brainstorm other themes. More formally, you can do this with a focus group or mock jury;
- As in a bench trial, be trustworthy. In your opening statement, throughout the trial, and in your closing argument, do not promise what you cannot deliver, and do not misrepresent or distort anything;
- Even though you should reinforce your theme throughout the trial, don't bludgeon the jury with it. Generally, people do not like to be told what to think, and prefer to arrive at their own conclusions. As an analogy, consider Seurat's pointillist masterpiece, *Sunday Afternoon on the Island of La Grande Jatte*, the pixelated paintings of Chuck Close, or the connect-the-dots puzzles you did as a kid. Each is nothing more than dots; but, together, the dots form an image. Each dot is a fact, and it is for the jurors to connect those facts to come up with their own image—which is, of course, what they find at Point B;
- Unlike in a bench trial, you take a risk of confusion or worse using legal terms that a juror will not understand. The judge is a seasoned trekker, who generally knows the territory, although the judge has not been down this particular path. The jurors are novices, just learning the ropes, and need more guidance on the path to Point B;
- Consider using more demonstrative exhibits in a jury trial, to keep the expedition more engaging to lay people;
- Make sure you include the jury as each document is made a full exhibit. Think of effective and creative ways to publish each exhibit to the jury, such as blow-ups, copies for each juror, and displays on computer monitors in electronically-enhanced courtrooms;
- Unlike in a bench trial, in a jury trial you make an opening statement and closing argument (both of which you should practice in front of a mirror), and you have input on the charge to the jury. Each should be no longer than necessary, in simple English, and promote your theme. Your opening statement is your opportunity to show the jurors the map of the trail along which you will lead them. Your closing argument is a recap of the route you took together, weaving in your theme to explain why the destination you brought them to is where they ought to be. The charge to the

jury, ideally, is the judge's explanation of how it is that they can arrive at your destination.

CONCLUSION • By implementing all these tips, you enhance the likelihood that you and the judge or jury will arrive together at Point B, having made the trek at a steady pace, on your well-planned route, charted with your theme in mind each step of the way.

PRACTICE CHECKLIST FOR
14 Tips For Presenting A Compelling Commercial Plaintiff's Case

- Choose a compelling, succinct, common-sense theme.
- Draft your complaint so it is consistent with your theme.
- Conduct discovery to get admissions and streamline the trial:

__ Get deposition admissions and judicial admissions in response to requests for admissions to promote your theme;
__ Obtain certified copies of public records;
__ Get judicial notice of adjudicative facts.

- Stipulate to admission of documents as full exhibits.
- File motions in limine on key evidentiary issues.
- Prepare a trial notebook.
- File a pre-trial memo.
- Select as few witnesses as you need and present them in a logical order.
- Prepare your witnesses to avoid surprises in the courtroom.
- Ask direct examination questions efficiently and effectively:

__ Ask short questions in plain English at a comfortable pace;
__ Ask only questions that promote your theme;
__ Vary the types of your questions;
__ Use headnotes and loop backs;
__ Don't ask "the one question too many";
__ Avoid objectionable questions;
__ Counter defense counsel's objections in a way that reinforces your themes;
__ Cut off voire dire that derails your case;
__ Use your voice like an instrument;
__ Build up significant testimony;
__ Make a pre-emptive strike on weaknesses in your witnesses' testimony;
__ Review your checklist before ending your questions of each witness, and before resting your case.

- Use documents efficiently and effectively:

__ Put into evidence only documents promoting your theme, and know the evidentiary basis for each;
__ Build up significant documents;
__ Put into evidence deposition testimony and responses to requests for admissions;
__ Put into evidence summaries of voluminous documents;
__ Use demonstrative exhibits;

__ Make sufficient copies of documents;
__ Keep track of which documents are in evidence, and which are for identification only.
• Select an expert who will support your theme efficiently and effectively:
__ Select an expert with the requisite background and experience who speaks in plain English and who is not subject to a *Daubert* challenge;
__ Have your expert testify on the ultimate issue;
__ Introduce your expert's report into evidence.
• Miscellaneous tips:
__ Do not misrepresent or distort anything;
__ Be prepared for a bad answer from your own witness;
__ Prepare your witnesses for questioning by the judge;
__ Stay organized during trial;
__ Use note cards to communicate with co-counsel during trial;
__ Be flexible during trial;
__ Avoid burnout during trial.
• Adjust all this advice for a jury trial:
__ Workshop your case with a non-lawyer, focus group, or mock jury;
__ Don't promise more than you can deliver in your opening statement and don't mischaracterize the record in your closing argument;
__ Don't bludgeon the jurors with your theme;
__ Try your case at the level of the jurors;
__ Use more demonstrative exhibits than at a bench trial;
__ Publish each exhibit to the jurors in a meaningful way;
__ Promote your theme in opening statement, in closing argument, and in the charge to the jury.