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Collective Wisdom: One Bit of Advice

Gary Gildin

Penn State Dickinson Law, gsg2@psu.edu

Jules Epstein

Robert Little

Kenneth S. Klein

Jim Roberts

See next page for additional authors

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Authors

Gary Gildin, Jules Epstein, Robert Little, Kenneth S. Klein, Jim Roberts, Rachel Brockl, H. Scott Fingerhut, Ramona Albin, Charles H. Rose III, Kaelyn J. Romey, Catherine E. Stahl, John Singer, Marian Braccia, Elizabeth Lippy, and Laura Rosed



COLLECTIVE WISDOM

ONE BIT OF ADVICE

JULES EPSTEIN

“If I had only told them”

Lawyers make mistakes. Read a transcript (your own or that of someone else) or a news media account, go to court and watch, or just learn about it when a colleague describes a trial—with insight and an acknowledgment of missteps or hubris and a peacock display of self-adjudged skill. They are mistakes of omission or commission, but they occur every day.

The checklist movement—adapting the checklist model used by surgeons and airplane pilots—is a critical tool for error reduction and elimination and has its place in law.* But beyond granular details that must be checked and double-checked for a particular category of case during preparation and trial, there are overarching lessons and advisories that can guide lawyers and improve trial practice and outcome. Below is a collection of such insights and tools.

* For a great illustration of their use, consider the success of the [San Francisco Public Defender](#).



Robert Little

Director of Advocacy Programs

Baylor Law School

COLLABORATE

Far too often, trial lawyers like to think of themselves as lone rangers. There is a somewhat romantic aspect to the idea of the trial lawyer walking into court by themselves ready to take on the opposing party, the judge, and the jury all alone. The lone gunslinger.

Additionally, trial lawyers are nothing if not egotistical. This isn't necessarily a bad thing. You want to walk into trial with swagger and confidence, knowing that you've prepared the case well and that you trust your skills and experience will allow you to try a good case, and you want to project that confidence to the jury and the judge to build credibility. But, while projecting confidence inside of the courtroom is an essential skill for a trial lawyer, allowing your ego to get in the way of reaching out to others to test out ideas or work through the thoughts in your head before you get in the courtroom is a mistake.

Finally, there is always the issue of who is going to pay for this? When you're working on a case, you must be conscious of the fact that somebody is paying the bills and they may not be interested in paying for you to run through theme and theory ideas with other people. They may not be interested in paying other lawyers in your firm to sit



with you and talk through cross-examination points. They hired you, and they may not see the benefit of getting input from others.

Despite all that, I think one of the most essential things a trial lawyer can do before getting to court is collaborate with others. When you're getting ready to try a case you will spend countless hours thinking about a theme for opening statement, crafting the story you want to tell during that opening, determining which documents you think merit inclusion on the exhibit list and how you're

going to use those documents at trial, outlining your direct and cross-examinations and thinking about the critical points you want to make with various witnesses, and outlining the key points you want to make in closing argument. But trial lawyers shouldn't engage in that process alone, without input from others around them.

When you think of a theme, take one of your partners to lunch and talk through it with them. Or when you have your direct and cross-examination outlines ready, walk down the hall to a partner that you trust and see if they have ten minutes to talk about them and see what they think.

And it doesn't have to be another lawyer. A friend, a spouse, or a family member might be the perfect person to tell your story to and see what they think. Ask them what they are getting out of it and see where the holes might be and whether you are effectively communicating the main points that you want to make. Tell them your theme and see if they understand what you're driving at and what you're trying to convey.

These conversations with others might spark ideas that you might not have ever come up with on your own, and that can only make your case stronger as you head to trial. Alternatively, these conversations might reaffirm the path you were already taking, which can only boost your confidence about your trial strategy as you head into court. Either way, collaborating with the people around you—both in your firm and in the real world—is a critical step in preparing your case for trial and making sure that you're in the best position to persuade the jury when you step into that courtroom.



Kenneth S. Klein

**Louis and Hermione Brown Professor of Law
Associate Dean for Assessment and Teaching**

California Western School of Law

INTEGRITY

A wise mentor of mine told me that a litigator ultimately has only one tool in their toolbox: their integrity. If I were to give one and only one piece of advice that I would want any lawyer preparing for trial to follow, it would be that.

This advice has multiple implications.

An advocate should not try to play the style of a good advocate (as they perceive it). Be true to your own personality. There is no single correct style or set of styles. Shy, muttering, stumbling attorneys sometimes win. But many people are very good at intuitively recognizing out a person who is fake, who is playing a role. And except when watching movies or television, most folks don't trust actors.

Don't hide from or ignore your opponent's position. Recognize it, embrace it, and deal with it. There are no lay down hands in litigation. If an advocate presents their case as a clean winner, then when the weaknesses emerge, the advocate will lose.

Facts are messy. Reality is messy. Human memory is messy. Don't advocate for everything being a perfect fit. It won't actually fit, and it makes you out as a liar.

Ask out loud the questions you think the jury is asking in their mind. Especially the ones they are

asking of you. Anything else makes you seem like you are hiding.

Show, don't tell. Expose lies rather than call someone a liar. If you tell rather than show, it makes you seem like a salesperson and undermines your integrity.

You must believe your position; never argue a position you do not actually believe.

I will close with a story about this. My father was a factory rep for furniture companies—he would travel the state of Texas selling furniture, on commission, to furniture stores. As a kid, I would travel with him. Sometimes he would go in a store and the buyer would tell my father that the buyer had no time to meet, but my father could just fill in the order form and the buyer would sign it. I asked him once, “Why would they do that??” He explained that for years when the buyer was actually over-buying, he would tell them not to do so. This taught them that my father had such integrity that my father would derogate his own self-interest to his customers. As long as he honored that trust, they would buy anything he offered to sell them.

Take a lesson from my father. You be you. You be true. Your only actual tool also is the best tool—your integrity.



Prof. Gary S. Gildin

G. Thomas and Anne G. Miller Chair in Advocacy

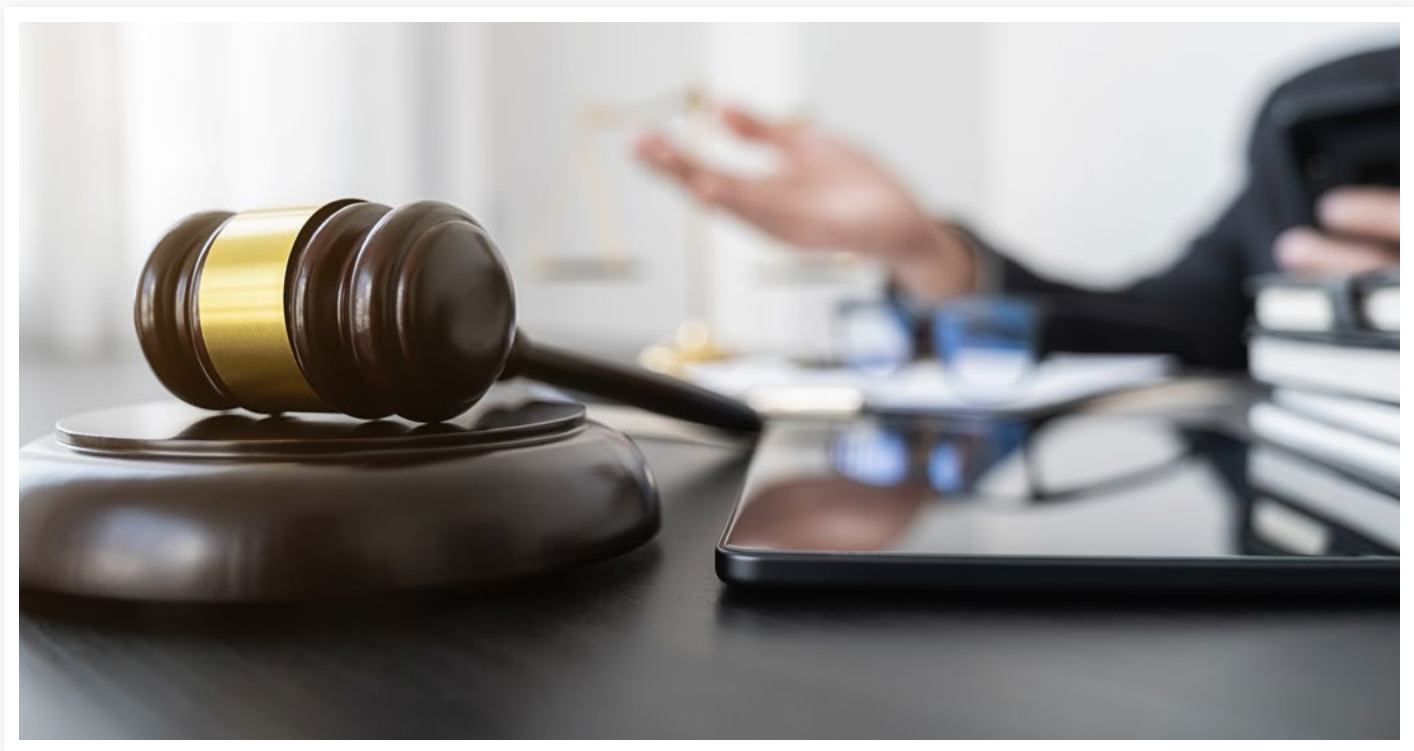
Penn State Dickinson Law

IT'S THE STORY, STUPID

Lawyers in general, and trial lawyers in particular, are savants at finding and lodging alternate arguments in support of a position. While offering multiple pathways to victory might be effective when arguing the law to the judge, suggesting different versions of the disputed past event that gave rise to the trial will undermine our effort to persuade the jury. Before uttering a single word in the courtroom, the trial lawyer must have settled on their factual story of the case—the

single version of what happened that justifies and demands a verdict in favor of their client. Every speech given, every question asked, every exhibit offered, and every objection raised must support the chosen story. Conversely, evidence that would be useful for an alternative story, but which does not advance the predetermined narrative of what occurred, must be consigned to the cutting room floor.

Abandoning a winning factual argument seems counterintuitive, and most certainly will feel painful



if not sacrilegious to the trial lawyer. Yet social science, neuroscience, and the commonsense reason for trials explain why forwarding a single rendition of the facts is the better course. Studies of mock deliberations consistently found that jurors do not decide cases by stacking facts on a scale calibrated to the burden of proof, but rather side with the litigant who offers the most coherent story of what occurred. Recent developments in neuroscience have revealed that the brain is constantly, automatically, and subconsciously making predictions by comparing what we are currently sensing against the data base of what we have experienced. The brain then causes us to act in accordance with what neuroscientist Lisa Feldman Barrett terms the single “winning instance” of resemblance to a pattern of past life experience. And trials would be unnecessary if technologies akin to those that have allowed us to watch the brain in operation could transport the jurors back in time to observe with their own eyes the alleged wrong giving rise to the trial. Instead, we summon to the courtroom witnesses to the past event who, subject to infirmities of credibility, perception, and recollection, share what they saw. The expectation of the jurors will be the same as

if they had been transported back in time—confidence that they now have “seen” precisely what happened. The jury’s search for coherence, the pattern matching conducted by the search engine of their brains, and the jurors’ expectancy that the trial will allow them to know what happened demand that we offer them a single account of the facts.

James Carville famously coined the phrase “It’s the economy, stupid,” to keep his own wonkish and loquacious lawyer–client, presidential candidate Bill Clinton, on message in the 1992 campaign against incumbent President George H.W. Bush. As trial lawyers, we need to adapt Carville’s snowclone in a tangible form to keep us from succumbing to the temptation of advocating alternate factual theories of the case. Whether pasted to the front of our trial notebook, taped to our computer screen, or otherwise seared into our consciousness, the single factual story of the case must constantly be in our field of vision, the polestar reminding us to purge from our trial presentations otherwise favorable facts and arguments that do not fit, support, or advance our chosen story of what happened.



Judge Jim Roberts

Circuit Court Judge, Tuscaloosa, Alabama
Head of National Trial Teams

Samford University, Cumberland School of Law

KNOW YOUR ENEMY AND FEAR NOT

Sun Tzu, the famous Chinese general, military strategist, and philosopher well known for the military treatise *The Art of War*, wrote, “[i]f you know the enemy and know yourself, you need not fear the results of a hundred battles,” and “[t]o know your enemy, you must become your enemy.”

Combining these principles tells us that by becoming our enemy, we have no fear in battle because we know how to defeat our enemy. We understand their thoughts, their approach, their reactions, and most importantly, their weaknesses. And we learn how to attack those weaknesses.

But the most successful generals reverse these principles onto themselves. They view their own forces and strategies through the lens of their enemy so that they will see what their enemy sees—their own weaknesses and how to exploit those weaknesses. That’s why the United States military has conducted simulations or wargames for decades: to not only know the enemy, but to know its own weakness as well.

In trial, the courtroom is our battlefield and the opposing side our enemy. Please forgive a brief Shakespearean aside and allow me to say that no matter how contentious a case may be, we

should always maintain proper respect for the opposing side and professionalism. Nonetheless, we can learn a great deal from these military principles. In preparing a case for trial, we must know our opponent’s case and honestly assess the weaknesses of our own case.

Whatever success I managed in seventeen years of practicing law and trying cases was built largely on taking advantage of my opponent’s failure to adequately assess their own case and its weaknesses. As a trial judge for the past ten years, I have witnessed countless attorneys with outstanding reputations make this same mistake and lose the battle as a result.

As part of my trial preparation, I also prepared my opponent’s case against me. How would I try their case if I were on the other side? Where would I attack my own case? Many times, I would infuriate my own client by cross-examining them or their witnesses. But through this “wargame” I would strengthen my own case and better prepare my client and my witnesses for battle.

My advice to any lawyer preparing a case for trial is to prepare your opponent’s case against you. Know your enemy ... become your enemy ... and fear not the results of a hundred trials.



Rachel Brockl

Director of the Litigation Center and a Visiting Professor of Law

Golden Gate University, School of Law

KNOW EVERY DOCUMENT AND PIECE OF EVIDENCE IN YOUR FILE

Knowing every document and piece of evidence in your case file is imperative to competent preparation of your case. While this may sound obvious, many attorneys fail to follow this advisement to their own peril. The reasons for knowing your case file in and out are threefold: (1) you want to be the case master, (2) you do not want to be caught off-guard, and (3) your reputation is on the line.

First, let's start with why it is important to take on the role of case master. A case master is an attorney who has reviewed everything in their file and has thorough knowledge of the details. Typically, this attorney will come to be relied upon by the court, the jurors, and the court clerks, because they are confident in their knowledge of the case and are able to swiftly provide precise information when requested by any party. A case master can easily be spotted when opposing counsel does not have a firm grasp on the facts or their file. For example, when opposing counsel is struggling to pinpoint an exact date or time during a hearing, the court master can rapidly provide those answers to the judge, who, in turn, comes to rely on that attorney for information inquiries



going forward. The person who can consistently provide accurate answers, when asked, is the person who becomes the case master.

Next, you never want to be caught off-guard when it comes to your own case. If your case has a weakness, you better know about it. If your case has investigation that could strengthen it, you better know how and when you need that completed by. This type of case involvement will positively assist you in negotiations, pre-trial motions, trial practice, sentencing, and beyond. While it may be painstaking, turning every page in your file is critical. As an example, I observed a criminal case where the defense attorney indicated that the investigating officer did not articulate reasonable suspicion for stopping his client's vehicle. The defense attorney went on for about five minutes before the judge turned to the prosecutor and asked whether there was any articulated reason for the stop. The prosecution calmly told the judge that the officer had written notes on the back of the traffic ticket and that defense counsel was in possession of this evidence. On the other side of counsel table, the defense attorney flipped the ticket over in his hand and said, "Huh," as if he had just discovered this information. As you can imagine, there was no further argument from that side of the table on this topic. These are scenarios that you can avoid by reviewing your case in depth and preparing for any next steps.

Lastly, your reputation can be tarnished forever if you are not on top of your case file. If you have ever gone to court and watched someone fumble through papers when the judge asks them to recite a date or they respond to the judge's question about their case with "I'm not sure," then you have already seen glimpses into that attorney's reputation for unpreparedness. The same goes for an attorney who claims that they did not receive a piece of evidence, but then opposing counsel provides the judge with a signed copy of the discovery form for the exact piece of evidence that the attorney just claimed that they never received. Instances like this do not only waste the court's time, but they leave a lasting impression that this attorney cannot be trusted in the future. How can a court ensure that what this attorney claims in the future is valid if their confident statement was so easily contradicted? As the saying goes, it takes a long time to build trust, but only a moment to lose it. Keep your reputation solid and in good standing with the court by immersing yourself in your case file before you step into any courtroom.

If you take your cases and your reputation seriously, put eyes on every document and every piece of evidence related to your case, so that you will become the case master in court and can avoid being taken by surprise.

Professor H. Scott Fingerhut

Assistant Director, Trial Advocacy Program

Florida International University College of Law



LISTEN

Of all the most important advice to any lawyer preparing a case, the most important is this:

Listen.

To understand, not reply.

Listen.

To your client. First.

Then, listen,

To everyone.

And everything.

The formal and the scripted, and casual and offhand.

By the judge and the juror, and counsel and witness.

The bailiff. The bailor. Your office clerk.

To all of them, and all of it.

Listen.

To the verbal and non.

To *what's* being said.

And not.

And how.

And why.

And the rhythm.

And the sequence.

And *all* the space between.

Listen.

That's the key.

It's *why* you know what you know.

The weakness in a case.

The argument's folly.

Actively. All in.

All you have to do is

Listen.

Without interruption, analysis, or dismissal, if you can help—at least at first: the impact of the observer.

Just try it. Just once.

Listen.

To maintain interest.

Capture detail.

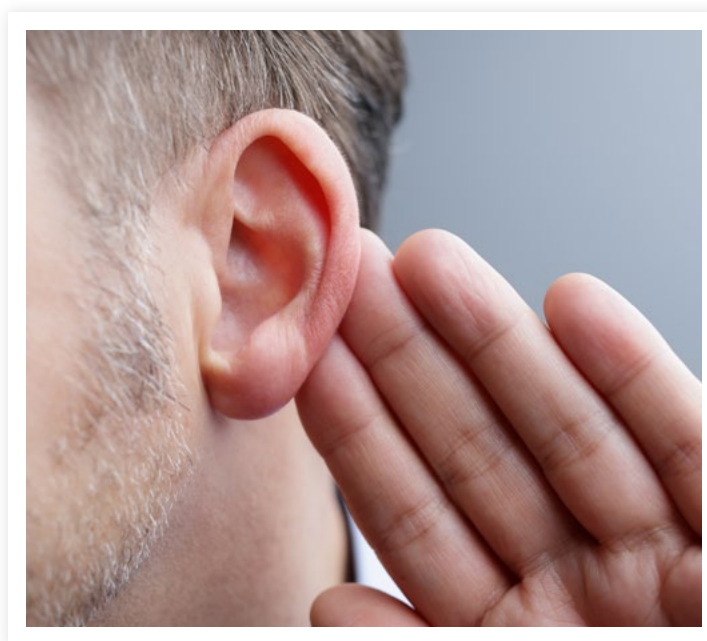
Craft.

The bespoke response the judge requests.

Your jurors need.

Your client deserves.

There's magic rising when you
 Listen.
 You'll know when it's time
 To tilt, or withdraw.
 Notes unbound.
 In the loop.
 You *are* presence itself.
 Because you listen.
 So, listen.
 To set a goal.
 To manage expectation.
 Establish trust.
 And build rapport.
 To know their *think*, before attack.
 To get it done, just
 Listen.
 [Three-second pause]
 That silence?
 Embrace it.
 Listen.
 It's a gift,
 To pause and reflect.
 That keeps on giving.
 In our mutual yearning—to be validated: do you
 see me, do you hear me, does what I say to you
 matter (whether we agree)?
 If only we would *be*, and



Listen.
 To what's *actually* being said.
 Not expect or hope or want.
 But things as they *truly* are.
 That make our stories real.
 Bring our verdicts home.
 Deliver us unbroken.
 So why not listen?
 As if *everyone* has something valuable to say.
 As if all lives maybe *do* have equal value.
 Do this.
 Lean in. Eyes on.
 Breathe deep.
 And listen.
 To the conversation, at that moment, that's your
 only one going.

With the person, in that moment, who's most important in the world.

Don't just *hear*.

Listen.

It's the child's lesson. You remember . . .

Stop. Look. Listen.

Think.

And *Trust yourself* to respond.

That's the formula.

Though everybody lies.

Still,

Be still,

And listen.

To yourself, too, by the way.

Not ego. Or impulse.

But the grit in your step.

The iron in your word.

A seasoned reflection of how you see the world,

And it sees you.

The lens you count on

To get your client home.

Listen.

To understand, not reply.

Listen.

For knowledge.

Power.



Judgment.

To *win*.

Listen.

Learn

To listen.

Practice listening.

It's why you went to law school.

By day's end, to do more good than harm.

Tear down walls.

Blow doors open.

Vaults of opportunity.

Freedoms' release.

To build a bridge,

Just

Listen.



Ramona Albin

Associate Professor of Law and Director of Advocacy Programs

Cumberland School of Law, Samford University

MOTIONS *IN LIMINE*

In preparation for trial, counsel must know every piece of evidence she plans to admit, prepare predicates for each piece of evidence, evaluate potential objections to admissibility, and be prepared to meet those objections under the rules of evidence and applicable case law.

Similarly, trial counsel should prepare appropriate objections to the evidence that she anticipates the other party will offer at trial. Although filing a pre-trial motion *in limine* is not necessary (in most jurisdictions) to preserve an objection to evidence later presented at trial, counsel should consider filing such a motion as part of preparation for trial. Thorough preparation of evidence and well-drafted motions *in limine* are essential for success in trial.

Filing a motion *in limine* may help the case in several ways. First, a concise, well-drafted motion allows counsel to fully present relevant evidentiary rules, case law, and applicable facts to the court without the time pressure that exists when evidentiary issues arise during trial. The court probably will appreciate the time to think about evidentiary issues before the trial begins—especially issues that are likely to be important to the outcome of the trial (and thus are likely to be the subjects of any appeal). At the same time, presenting a well-reasoned, well-supported argument for admission or exclusion of evidence

before trial gives the court the best opportunity to understand and appreciate counsel's position. Second, a well-drafted motion *in limine* is an opportunity for counsel to give the court a preview of her theme and theory of the case, and to cast doubt on the best facts of the other side's case. Judges have large dockets and may not be familiar with the important facts of your case. In the background section of a motion *in limine*, counsel may give the judge important context for the claims in the case and specific evidence that may be offered at trial. Third, filing a motion *in limine* gives counsel an opportunity to establish and enhance her credibility with the court. A well-written, well-researched motion can help counsel show herself to be a reliable source of information who can help the court do its job. Every trial lawyer should want the judge to think of her that way, and filing a good motion—that looks professional, sounds reasonable, advances a logical argument, and candidly addresses “hard” facts or arguments—can help. Finally, a conclusive ruling on the record preserves the issue for appeal under Fed. R. Evid. 103(b), which means that counsel need not repeatedly object at trial and (potentially) distract or annoy the jury.

Given all of those potential benefits, trial counsel should consider filing motions *in limine* as a routine part of trial preparation.

Charles H. Rose III

Dean and Professor of Law

Ohio Northern University Pettit College of Law



NEVER FORGET WHO YOU ARE PERSUADING

Attorneys have a tendency to be impressed with ourselves. We've been through a lot of school, achieved advanced degrees, hold important jobs, and love to hear ourselves talk. We like five-dollar words when a fifty-cent one will do just fine, and we are always conscious of what others think—our peers, the judge, our bosses, and sometimes our clients. Many of these attributes are endemic in the profession where they have their purpose. They have no place in the courtroom.

In the courtroom, everything we do is done with one thing in mind, the impact on the jury. The clothes we wear, where we stand, the words we choose, the way we say them, the witnesses we call, the theory we choose—all of it is oriented toward convincing the people in the jury that our case is just and we should prevail. Too many attorneys lose sight of this most basic principle. They become lost in fear, concerned about their own reputation, consumed with the battle, focusing on surface issues that impact their own sense of self. We must always remember to set those concerns aside, and focus everything we do on the finder of the fact.

This approach is freeing, if adopted and remembered. Suddenly the fact that we brought out in voir dire when we questioned a particular potential juror becomes a communication channel to that juror. When witnesses testify about that fact, we watch that juror to see how they respond. When we turn toward the jury on a particular cross-examination point, we look that juror in the eye as we ask the question that has no answer.

If we have done our work properly, through thorough case analysis and jury selection, we know which facts to “give” to each juror, through questions, eye contact, and body language. Never forget that you are simultaneously having multiple private communications with the members of the jury as each question of fact rolls through the trial. We convince them one micro-fact at a time. If we are truly focused on the ones that matter, when we stand up to sum up our case, we look them in the eye, remind them of the facts we've proven, the ones the other side failed to prove, and what it means. We bring them back to the promises they made during jury selection and then merely ask them to do what their heart already knows should be done.

It is always about the jury. The rest is just details.



Kaelyn J. Romey

Visiting Tax Professor

University of San Francisco School of Law

NEVER MAKE IT PERSONAL AND DON'T TAKE IT PERSONALLY

Professionalism includes the ability to recognize and distinguish different perspectives and the capacity to separate out your own experiences and feelings. Remember that you are here for your client, your role is to be an advocate while always providing civil and polite responses.

Never make it personal.

Your goal is to be a zealous advocate, but to do so without expressing your personal opinions or taking offense by disagreements with your adversary.

Contentious cases can bring rise to emotions and highlight personal issues for both sides. To successfully represent your side, never take it personally. Learn to identify your emotions and keep them at bay while in court. One way to evaluate your case independently of your personal feelings is to take a clear look at the facts from both sides. This allows for objectivity and helps you understand weaknesses in your own case.

Don't take it personally.



There are times when your adversary may take personal swipes at you to get the upper hand. By taking things personally, we fail to realize that what was said really reflects more about your adversary than about you. Remember that you are here to represent your client. When you let other people upset you, you allow them to dictate how you feel, giving them power over you. Take your power back and fight for your client.

When you find yourself in a position where you can feel the heat rising, don't take the bait. Be polite, keep your cool, maintain your professional demeanor, and remember you are here for your client. It is not about you.

Professor Catherine E. Stahl

Director of Trial Advocacy and Moot Court Competitions

University of Illinois College of Law



PREPARATION—BEGIN WITH THE CLOSING

Preparation is one of the most important aspects of trial. When you prepare, how you prepare, and the level of detail required is something that new lawyers do not always fully understand or appreciate until they are in the position of actually having to do it. To quote the filmmaker George Lucas: “Don’t avoid the clichés—they are clichés because they work!” Many trial lawyers are familiar with the oft-repeated method of beginning case preparation by drafting the closing argument. Doing exactly that can shape and define the entire course of trial, starting with the discovery process and generating synergies and positive impacts along the way. While it can be easy to postpone in the face of competing priorities and deadlines, begin work on the closing argument as early as possible. Even day one is not too early.

Tackling closing argument at the outset of case preparation is an ideal way to jump-start trial theme development and focus attention on the facts, witnesses, documents, and evidence needed to ultimately prevail at trial. The closing will then become a living document that changes, evolves and develops as the team continues to learn more about the case. The early closing argument goes hand in hand with a detailed trial work plan that tracks the seemingly myriad things that need to be accomplished pretrial, including formulating a strategy to obtain the information highlighted by the early closing argument. The trial work plan then tracks projects, responsible attorneys, due dates, and statuses to keep everyone accountable and moving toward a common goal as trial draws closer.





John Singer

Adjunct Professor

University of Baltimore School of Law

PREPARING A PROOF-OF-FACTS CHART

In the roughly thirty-five years that I practiced, in every case I invariably prepared a proof-of-facts chart, listing the elements of each claim and the evidence I had to establish each element of each claim, including the evidence (typically documents, witness interviews, declarations, and depositions), the source of the evidence, and the basis for its admission. While the level of detail would vary considerably based upon the complexity of the case and the amount at stake, I found the chart to be an invaluable asset in everything from the simplest case to the most complex case. (The most complex trial in which I was first chair ran for about six months and had about eighty witnesses.)

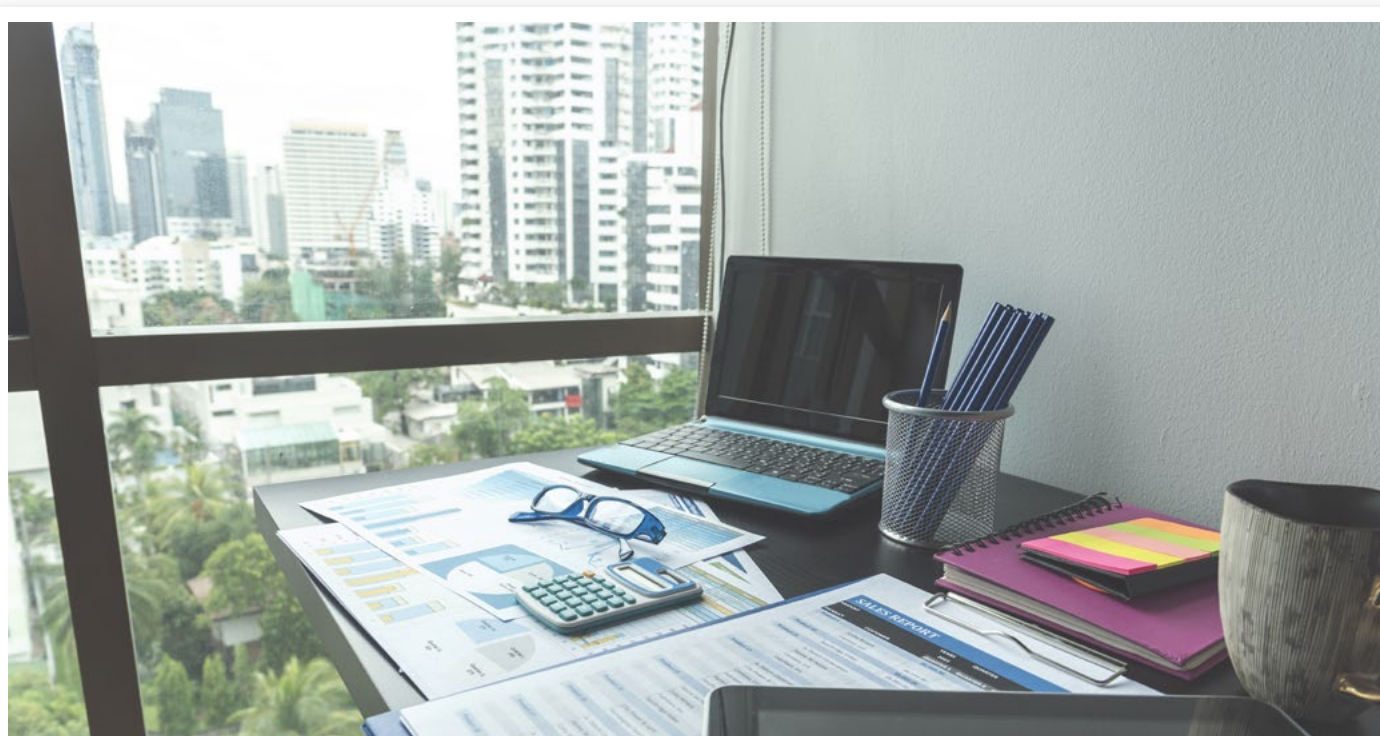
My practice was to start preparing my proof chart at the outset of the case, usually before filing the complaint. This helped me to chart out what information I had (so I knew I had a good faith basis for each count in my complaint) and then helped me to chart out what discovery I would need to do (for example, the evidentiary holes in the case to fill in). As I progressed through discovery, I would update the chart to see what additional information I would need to attempt

to find. The chart would serve as my road map for preparing (and opposing) dispositive motions. Finally, the chart was invaluable in preparing for trial since I knew precisely where I could find all of the evidence that I wanted to get into the record at trial to support my case.

I usually prepared a similar, though less detailed chart for the opposing side's case. That way, I could attempt to determine what evidence they had, what holes they had in their case, and what evidentiary objections I may make.

I generally prepared my proof charts in the form of an outline (count, element of each count, then evidence supporting each element) because that format is most compatible with how my mind works. Depending upon how your mind works and what technology you have available, it could also be done in the format of a spreadsheet or database. Whatever format you choose from the proof chart, consulting with pattern jury instructions for the relevant jurisdiction is often a good way to begin the determination of what claims are available and the elements of each count you are considering pleading.

You also at times may need or want to take some of the evidence in this overall proof chart



and reformat it for a specific need—for example, the evidence that you hope (or opposing counsel hopes) to introduce at trial through a particular witness, both through testimony and the introduction of exhibits. This can serve as the beginning of your direct or cross-examination outline.

For the final twenty-five years of my career, I was a prosecutor with the Federal Trade Commission. About thirteen of these years were in the Office of the General Counsel's Office's Litigation Section, where I primarily worked on appeals, preparing appellate briefs, and arguing in the federal circuit courts (at the FTC, a small, central group of lawyers handles all of the agency's appellate matters). Whenever assigned an appeal, my first

step usually was to request that trial counsel provide me with three things: (1) the order on appeal (usually a final judgment or permanent injunction), (2) all summary judgment briefing (if any and even if the trial court denied summary judgment), (3) and trial counsel's proof chart. In the (fortunately) very few instances where trial counsel's response was "What's a proof chart?", I was not surprised that almost invariably the FTC was the appellant, not the appellee.

Regardless of the merits of your case, only if you are well-organized can you guarantee that you will present your case to the trier of fact (whether jury or judge) in a coherent, comprehensive, and convincing manner.



Professor Marian Braccia

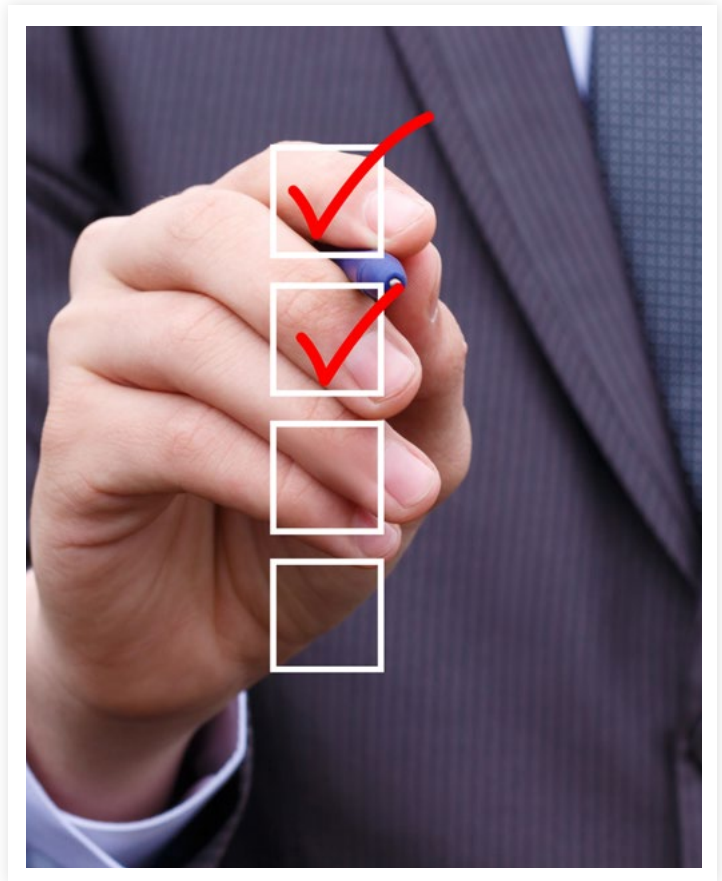
Director, LL.M. in Trial Advocacy

Temple University Beasley School of Law

READ THE F*#%*!G RULES

Just about forty years ago, a friend and mentor of mine received the call offering him a job as an ADA at a big-city prosecutor’s office. He got the call from the elected DA himself on a Friday afternoon. My friend was told to come by the office to pick up his files, as he was expected in court on Monday. My friend would be starting as a “lateral,” which meant that he wouldn’t be part of a “class” that enjoyed the benefit and comfort of large-group training and a shared learning curve. Having never worked as a prosecutor before, my friend asked how he should prepare for Monday’s cases. The elected DA, never known for his gentility, barked, “READ THE F*%K#@G CRIMES CODE!” before slamming down the phone. (It was so much more dramatic when you actually had a receiver to slam down, rather than our delicate “end call” tap nowadays.)

Nearly twenty-five years later, that same friend and mentor was responsible for training and supervising all newly hired first-year prosecutors in that same office. That’s how I met and learned from him and where I first heard the now infamous “read the F*%K#@G crimes code” story. I think he told us that story to remind us how good we had it with a ready-made binder of relevant



case law to reference in preliminary hearings, suppression motions, expert voir dire, and any other proceeding we’d handle in that first year in the courtroom. The “read the crimes code” story was my friend’s way of telling us how many miles he’d walked barefoot in the snow to school each day (uphill both ways, of course); it was his “In my day . . .” speech.

That ready-made reference binder certainly made my life much easier that first year, and undoubtedly saved me hundreds of hours of legal research. Whenever a new case came down, I'd three-hole-punch it and add it to the "bible." A defense expert's CV? An office memo on diversion eligibility? The updated DUI sentencing matrix? Into the binder they went. The binder, however, was my study guide, my quick reference, the Cliff's Notes to my real and substantive study of the law. I learned the law (the specific Pennsylvania criminal law that I practiced) by the RTFR ("Read the F*%K#@G rules" method). (In fact, as a graduation gift, my parents had sprung for the "fancy" handbook that included the crimes code, the Pennsylvania Rules of Evidence and Criminal Procedure, the Health Code, and the Vehicle Code. If there's such a thing as reference book envy, I'm pretty sure my classmates all had it!)

Blackstone's *Commentaries* define the "law" in its most general and comprehensive sense: "that rule of action which is prescribed by some superior and which the inferior is bound to obey." Ours is a rule-based society. The very first rule of our profession requires competence, which as its most basic requires legal knowledge. To acquire that knowledge, the law—for the most part—is readily available to us, indeed to us all as citizens, but for my meaning here, it's available to us practitioners in order to meet the minimum threshold of competence.

Since Hammurabi inscribed his code on that upright stone pillar, our body of rules has existed in written, referenceable form to resolve disputes, establish standards, and of course to protect

liberties and rights. Legislative statutes, executive decrees and regulations, and judicial precedent all mediate our relations between each other and our government. The text of the rule, then, provides the starting point for any legal inquiry.

Can I still file suit, or has the statute of limitations run? RTFR.

How many interrogatories can I serve? And how long to they have to respond? RTFR.

What are the formatting requirements for my appellate brief? RTFR.

Drafting your closing and need to address the prosecutor's burden of proof? RTFR.

Can my client actually be prosecuted for catching a fish with his mouth? RTFR. (Spoiler alert: in Pennsylvania, the answer is yes.)

Some may say that my insistence on reference to the rote rules diminishes the creativity of advocacy and the art of storytelling. I am reminded of an anecdote from actor Matthew McConaughey's recent memoir, in which he recalled filming his 1995 film *Scorpion Spring* (you're not missing anything). McConaughey had spent considerable time getting to know his "man" (his character), how he walked, talked, dressed, how a ruthless drug lord like El Rojo would inspire fear and obedience. What McConaughey hadn't done was read the F*%K#@G script. He planned to improvise a pivotal scene . . . that is, until he arrived on set to learn that his big scene was a four-page monologue. In Spanish. (McConaughey doesn't speak Spanish.) What



the actor learned and what I offer here as advice is that you can allow yourself freedom and creativity only after you've put the work in. For McConaughey, that should have meant memorizing the script for that particular scene. For our purposes, it could mean fully digesting the jury instructions before delivering a riveting closing argument, or navigating the complexities

of municipal liability before passionately railing against civil rights violations.

The rules provide the framework for all that we do, write, and say in the practice of law. An amateur advocate's impulsive mistake would be to shortcut the work needed to learn that framework. So, please, do yourself a favor: RTFR.



Professor Elizabeth Lippy

Director of Trial Advocacy

Temple University Beasley School of Law

RECORD KEEPING. MEMOS TO THE FILE.

Some may call it a CYA trail, but I call it good lawyering. What do I mean by that? Every time an attorney works on a file or case, one needs to keep written documentation detailing the actions taken. This is helpful not just for purposes of preparing a case for trial, dispute resolution, or even an amicable settlement. Most attorneys handle many cases simultaneously. Without

properly documenting each step taken on the case, it is difficult to remember conversations with the client, opposing counsel, strategic decisions made, requisite next steps, and important issues.

Memos to the file: Every time you talk to a witness, client, party, judge, or opposing counsel, make a written memo to the file outlining the discussion. Doing so helps protect you as an attorney if the case does not resolve in your client's favor. Additionally, having easy access



to written memos helps refresh your own memory as to the procedural posture of the case. Additionally, if handling criminal matters and the client is convicted of a crime that carries a lengthy sentence, written memos to the file help ensure that if the client pursues an ineffective assistance of counsel claim against you, you can justify the decisions you made in the case.

Record keeping helps for purposes of appeal: In the event a case goes to trial and then a direct appeal is needed, having written memos and documents help streamline the reasons for appeal. During trial, one of the folders you should have in your trial binder should include a folder about appellate issues. Any time the trial court rules against your client on a legal issue during the trial, write it down at that moment and put that document into the appeal folder. This helps you decide what issues of trial court error arose without having to re-review the entire transcript of the case. Additionally, by including the date of the issue that arose, it will help you as an attorney to quickly identify the location within the transcript of the issue you wish to appeal.

Follow up emails or letters to the client and/or opposing counsel: Any time you have a conversation with either the client or opposing counsel, document it in writing. This does not have to be in a negative way. Rather, confirming your understanding of the conversation in writing to opposing counsel provides them an opportunity to clarify if their understanding is different than yours. As far as a follow-up email

or letter to the client, it ensures communication with the client. Clients often have high stakes in the outcome of any matter. Feeling as though they are a part of the process throughout the preparation, trial, and even appeal provides the client confidence in your abilities. Not to mention it helps in the off-chance you find yourself in the situation referenced above when the client is filing an ineffective assistance of counsel claim against you or even a potential malpractice claim.

Create a tickler/reminder system: Sometimes cases sit stagnant for months on end. In those months, there may be no deadlines or work that needs to be done. However, sometimes there are deadlines. They can easily go missed if you do not have some sort of reminder or tickler system set up in your office. There is nothing worse than missing a statute of limitations or filing deadline. Even if there are no deadlines, have a reminder system set up so that once a month you touch base with the client. They deserve that much from their attorney and it will help foster a better professional relationship and more confidence in you due to the attention paid to them.

For any written documentation of your work on a case, include the date, time, list of people present or involved, and a write-up on the actions taken. Providing this type of paper trail will help ensure you effectively represent your client, help you with your trial preparations, and ensure that you fulfill your ethical duties and obligations as an attorney.



Professor Laura Rose

**Assistant Professor of Law
Head Coach, National Trial Team**

University of South Dakota Law School

THE “TOUCHSTONE” PERSON

It is no great secret that trial work requires intense preparation. Advocates spend countless hours learning each of the details of the file, the nuances of the surrounding law, and often must make themselves experts on subject matters that were once totally foreign to them. As late nights of preparation become early mornings, advocates envision their theory of the case with all of the logical inferences necessary to prove it. This intensity requires lawyers combine their practical and doctrinal knowledge to be sure that they have a theory of the case that is not only persuasive, but survives the scrutiny of the jury.

It is all too easy as lawyers to get caught up in the preparatory work. After all, we went to school for seven years to be able to stand in a courtroom and make these arguments, and in firms across the country we work day to day with people who also have that level of education and exposure to the law. Our colleagues help us refine the case and the nuances of the legal argument, but that echo chamber carries a danger. It reinforces the idea that we are clearly explaining our case to others, but the truth of the matter is that our juries are *highly* unlikely to have the same experiences and education levels. The 2018 Census revealed

that 3.2 million people in the country have a professional degree, and as of 2019 the U.S. population was at 328 million—which means it is far more likely that the members of our juries will have vastly different life experiences and education levels than we do. This is a fact that an advocate must embrace from the first moment they begin working on the case.

Enter the concept of the “touchstone” person. Take a moment. Think of someone in your life whom you hold in high regard who, for whatever reason, does not hold an advanced degree and is in no way connected to the practice of law. It is crucial that you select a person whose judgment you trust, because they are going to serve as a check on each stage of your preparations. For each thing you write, plan, and ultimately wish to argue in a case, ask yourself if your person would understand where you are going. If you can get in contact with your touchstone person, do so and run a few of your more detailed arguments by them in a hypothetical form. Call them and ask them questions about what kind of information they would want to hear to believe a particular fact or argument. In short: advocate to this person and see what they have to say.



If, either through mental analysis or in conversation with the touchstone person, the advocate determines they are not making their theory clear, it is time to re-evaluate whatever is causing the problem. This helps the advocate focused on the fact that, even as they live with their case day in and day out, they still have to

explain it to someone without their educational advantages and have it make sense the first time that person hears it. By incorporating your touchstone person into each phase of your preparations, you greatly enhance your ability to advocate to your fact finder.



Jules Epstein

Director of Advocacy Programs

Temple University Beasley School of Law

VISIT THE SCENE

It might seem elemental and obvious, but too few lawyers visit the location where the event(s) on trial occurred. This piece of advice is critical for all types of cases, from the obvious—the criminal case or automobile accident where lighting, angle of viewing, and a myriad of other perspective issues are in play—to the case where seemingly nothing can be learned, such as the office where a contract was negotiated.

What can one learn in a case where visual (or aural) perception is at play? The below photograph tells it all: in this homicide trial, the eyewitnesses were at the barber shop at the bottom of the photograph and the shooting took place at the next corner, yet trial counsel never learned that at the distance between the two there is no way to see the details of the face of a perpetrator, even in broad daylight.



What can be found at a scene? Lighting, distance, obstacles, conditions that contradict or undercut witness statements, new witnesses, security cameras—these are the bread and butter of criminal case and civil tort investigation.

But there is something more. Visiting the scene, preferably in conditions as close to those at the time of the event, also gives power—the power to portray or redefine the story, and the power when questioning witnesses to show that the examiner has knowledge and thus the witness knows not to run wild or invent facts.

And the same is true in a case where lighting, distance, and other observation factors have

no play, such as the office where the patient was treated, the employee discharged or the agreement negotiated. Was the setting one where power was equal or uneven; where care could be taken or distractions abound; or is there a book, diploma, photograph or knickknack that gives insight into one of the players—and, again, that shows the witness(es) how thorough the case has been prepared and that no detail has gone unnoticed.

Knowledge is power—and knowledge of the scene is essential.