

The 5 Most Common Trial Mistakes I See Lawyers Make

*"Information is the currency of democracy."
- Thomas Jefferson, Third US President, Architect and Author*



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"I know the price of success: dedication, hard work, and an unremitting devotion to the things you want to see happen."

— Frank Lloyd Wright

Have you ever lost a trial that you thought you should have won? Are your jury verdicts lower than what they should be?

If so, do you blame the “tort reform” movement as the cause of your failure? Or was it the trial judge who made bad rulings on evidentiary issues?

This article will reveal the most common trial mistakes that I’ve observed over the past 25+ years of trying a large number of Superior Court cases and watching other lawyers during their trials. The interesting thing is that none of these five most common mistakes have anything to do with tort reform or bad judicial decisions.

In my opinion, too many trial lawyers are in denial about why they’re losing cases. These same lawyers spend too much time blaming the dissemination of tort reform propaganda by big corporations as an explanation for their poor trial results. They put too much emphasis at pointing a finger at others while completely disregarding the 4 fingers curled in their hand pointing back at themselves.

These poor verdicts generally have more to do with how those lawyers try their cases and less to do with the “tort reform” marketing messages their jurors are exposed to outside the courtroom.

Sure, I understand and appreciate (in fact I’m appalled) by the influence that corporate America and its misguided tort reform message has on our juries across the country. At the same time, I’m convinced that a good trial lawyer can get a jury to correctly find in his client’s favor on any given day assuming that he goes about trying the case correctly.

What follows are the five biggest mistakes I’ve observed by opposing counsel and other lawyers trying cases. I’m guilty of making many of these myself over the past quarter century of trying cases. Here are the mistakes and here are the solutions.

Mistake #1: Not Being Prepared

It's amazing to me how many lawyers show up for trial unprepared. When things don't go their way, they actually seem puzzled about the outcome. Almost without exception, they blame someone else or something else for their failure.



Remember the “6 Ps”? Prior Preparation Prevents Piss Poor Performance!

When you are assigned a trial date, immediately make a list of all witnesses and evidence you will need at time of trial. I actually prefer to do this right away and no later than during the first month a new case comes in to our office.

Once the trial date is set and, depending on your local rules, immediately subpoena or make arrangements to subpoena your witnesses. This eliminates being exposed to the “missing witness” syndrome too many lawyers experience on a routine basis during trial. Are lawyers who wait until the last minute to locate and subpoena witnesses really surprised when they can't locate a key witness to appear at trial?

When it comes to physical evidence, immediately review the evidence code and make the necessary arrangements to do what needs to be done (witnesses, checklist, stipulations) to easily get your evidence admitted at time of trial. Again, too many lawyers stumble through very easy foundational issues and questions while standing in front of a jury. Sure, they may eventually get the evidence admitted but they lose the jury's confidence and respect while doing so.

Most experienced lawyers will stipulate to foundation requirements if you seek the stipulation 60-90 days before trial. If you wait until the last minute to seek a stipulation, they'll interpret this as a sign of not being prepared and will probably, while blaming it on their client, refuse to stipulate.

In summary, do things early. Don't wait until the last minute.

Mistake #2: Not Being Nice or Professional

I'm embarrassed when I see opposing counsel talk down to the judge, clerk and jury. I cringe when opposing counsel talks in a condescending fashion to the court and during voir dire, opening statement and closing argument. Although embarrassed and cringing, at the same time I'm smiling on the inside because I know opposing counsel is quickly alienating everyone in the courtroom from his client and case.

Human nature is pretty simple. People like to do things for people they either like or find fascinating. When you're in court, be that type of person.



Treat everyone with respect and learn how to smile even when you don't feel like it. A smile can say a lot and go a long way to helping you bond with others. Of course there's a time to be serious but you can do so in a professional manner.

During voir dire and trial, stand when the jury enters and exits the courtroom. I also like to stand and move around the courtroom while asking questions if allowed by the court. Don't take yourself too seriously and even laugh when you make a mistake. Be human and be real. Jurors like and appreciate the effort.

In summary, by being kind and professional, you'll become the most likeable person in the courtroom. Also remember that a smile, and I'm talking about a real smile, can go a long way.

Mistake #3: Not Being Real, Honest or Speaking from the Heart

Too many lawyers spend too much time trying to be someone else during trial. They do everything they can to look and sound like the senior partner in their firm or some famous lawyer on TV rather than just being their unique, wonderful, and honest self.



Others are less than accurate or truthful with the facts. By watching and listening to you, most jurors can figure out pretty quickly which lawyers are being real and honest with them.

During voir dire, opening, direct, cross, and closing, they rarely make eye contact with the jury and read from their script or outline. By doing so, they spend all their time during trial shooting themselves in the foot and no time whatsoever bonding with the jury.

When I'm in trial, I rarely use notes. I spend all my time looking jurors or witnesses in the eye and engaging them. I don't have a memory anywhere close to being "photographic" but I do trust my knowledge of the case and its facts. I trust the rhythm, dance and art of trial and by not limiting myself to an artificial script, I can easily get in tune with the moment and magical things happen.

My secret is to prepare a draft of my voir dire, opening and closing early in the case. As the case progresses, I tweak it with new information. These are not simply paper documents. They are living and moving trial tools that, whether you realize it or not, you internalize. The information becomes part of you well before you walk through the courtroom doors and begin jury selection.

Sometimes I'll add a short 2-3 word bullet point outline to make sure I don't miss something but for the most part, I'm standing before the jury or witness and speaking from the heart. There's a connection that happens and it's real.

I rarely use legal words or terms unless they are specifically spelled out in my jury instructions. I use everyday words that my jurors will understand. I talk in a way that helps us communicate with each other and develop rapport.

The scary part for many lawyers is trusting this process. I gained the courage about 20 years after watching one of Gerry Spence's tapes of advocacy. Up until that point, I literally read everything from a list while trying to quickly look up and make eye contact with my jury or witness. Even on my best day, this approach was ineffective.

After watching Gerry's video, I made a conscious decision to use his techniques in my next trial. I started off doing voir dire without any notes. At first, I stumbled and the questions and dialog were strained. As things progressed and I became more comfortable with this new process. I trusted it and I trusted myself. I was able to easily carry it over to the rest of my trial and on to my trial lawyer career.

After our verdict, the positive jury feedback made me a believer for life. I bought in to this approach to trial and for the next two decades, it hasn't failed me once. I strongly urge you to leave your notes on the counsel table and do this too.

Summary- Be yourself. Be real and speak from the heart. Don't use fancy legal terms to explain you case. Leave your notes on the counsel table.

Mistake #4: Using Technology the Wrong Way

Successfully trying a case before a jury is all about developing trust and rapport with your jury. You want to empower them to do the right thing and to help your client when nobody else will.



Leave your laptop on the counsel table. When interacting with the jury or witnesses, you want the focus to be on you and them. Not on a precariously perched laptop on top of the lectern. Similar to your jury being distracted by you reading from your notes, the same factors come in to play when reading notes or an outline off the screen of a laptop during trial.

I understand and completely appreciate the psychology behind how powerful a “Dateline” or “20-20” type of presentation can be during trial. So if you’re going to use this type of technology, make sure everything works correctly the first time and without any pause in your presentation. The jury’s confidence and respect for you will proportionally diminish for every second the jury is looking at your backside while your bending over trying to find a power source for your equipment that unexpectedly stopped working.

Smart trial lawyers always have an effective backup plan should technology fail. Without exception, so should you.

If you’re going to use technology such as PowerPoint or videos, do so as an explanatory tool to assist your “human” trial. And by all means, make sure, months before trial, that your technology fully complies with all evidentiary foundational requirements and court rules. Refer back to “Mistake #1” if you still have questions about when you should be completing this task.

Mistake #5: Leaving Questions Unanswered and Not Asking Your Jury For Specific Help

You’re in trial because your client needs help. Briefly touch upon this with your jury during voir dire and your opening. After you’ve developed trust and rapport during the trial process, be clear and emphasize what help you need during your closing. All of the above should be carefully incorporated in to your trial theme.

I’ve seen one trial lawyer after another come across during trial as though he or she were bored or wished he or she were someplace else. Speaking in a monotone voice and mixing up the names of the witnesses and parties is inexcusable.



Never finish a trial without answering all the important questions for the jury. Be specific and be clear. During the course of the trial, tell the jury what you're going to show them, show them, and then tell them what they just saw.

Some lawyers explain the law and facts to the jury during closing and try to tie it all together with a couple of jury instructions. This style of trying a case never makes it clear to the jury what you want them to do next. Worse, they also fail to empower the jury to be proud about the process and make a statement to the community with their verdict.

You can correct this by being clear and letting the jury know exactly what you need and why you “need their help” (use these exact words) during voir dire and opening. Again, until you’ve developed trust and rapport with your jury, it would be wrong and ineffective to ask them to believe you over your opponent at this point in the trial. Right now, you’re planting seeds for the crop you’ll cultivate and grow during the trial process.

As you try your case and intertwine your theme with your voir dire, opening, direct, cross and closing, you’ll be gaining trust with your jury and they’ll begin to understand why you’re there and what it is you need them to do for you.

Handle your trial like I mentioned above and then harvest your crop during closing argument.

By this time you’ve gained their trust and respect. Tell them, “my client needs your help” and in story format, talk about the intangibles and harm experienced by your client. Don’t waste their time reiterating all the facts that they heard during trial. Do talk about how the harm has affected your client’s family, business or life.

Be specific about the amount of money it will take to correct this harm and make things right. Give your jury guidance as to what the verdict should be and then trust them with their decision.

Starting with voir dire and ending with your closing, remind your jury that this is the only opportunity your client will have to seek justice. She can’t come back in to court later. This is it. She needs your help and that’s why you're here.

Conclusion

In my opinion, trying a case is all about being real and transparent. It’s about developing rapport with your jury and for that matter, everyone else in the courtroom.

I share the above most common mistakes with you because (1) I’ve made them all myself and (2) if you can overcome these 5 mistakes, you can be an effective and successful trial lawyer. Everything else you do to improve as a trial lawyer is simply icing on the cake!

More About Mitch...



Jon Mitchell "Mitch" Jackson is the founding partner and Senior Litigation Partner of [Jackson and Wilson, Inc.](#), a top AV rated firm by Martindale-Hubbell. The firm focuses its practice on helping victims of personal injury and wrongful death.

In 2009 Mitch was named an Orange County "Trial Lawyer of the Year" by the Orange County Trial Lawyers Association. In 2011, Mitch was honored to be nominated a second time for the award.

Mitch's firm is listed in the Bar Register of Preeminent Lawyers, an exclusive listing reserved for less than 5% of all distinguished law practices in the United States. Several earlier recognitions include Mitch being repeatedly named as a "California Super Lawyer" and an ability rating of 10.0 or Superb by the AVVO lawyer rating system.

With a desire of sharing more than 25 years of litigation and trial experience, Mitch has established a free and confidential service to help other lawyers with their negotiation, litigation and trial related questions and issues. You can learn more about this service via Facebook at www.Facebook.com/AskMitchJackson

At the site www.AskMitchJackson.com, Mitch accepts questions and also provides visitors with access to his free email newsletter where he shares litigation and trial tips with his readers. Don't miss the next tip. Get on this popular email list today!



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