Leveraging The Strengths Of Your Case To Win At Trial

By William H. McKenzie, IV

Projecting confidence at trial has a direct correlation on your performance and desired outcome. So how can we know that we are indeed taking the best approach?

There is an old trial lawyer adage: *If you don't have the facts, you pound the law. If you don't have the law, you pound the facts. If you don't have either, you pound the table!* There is certainly some truth to this colloquialism, but there is a more dialed-in approach that applies to today's juries.

We've all been there: You just finished picking a jury and the first witness is walking to the stand. And you wonder to yourself: *Am I taking the right approach in this case?* Self-doubt is a normal part of the human experience, but projecting confidence at trial has a direct correlation on your performance and desired outcome. So how can we know that we are indeed taking the best approach?

This article aims at eliminating the blurry, counterproductive instincts that take over during the fog of trial. As we unpack **4 Common Mistakes** made in presenting a jury case on behalf of the defense, and **4 Keys to Success** in doing the same, you will leave with a distilled game plan of what works at trial, what doesn't, and why.

4 Common Mistakes at Trial

A trial is not a battle of the wits – it is a battle of perception. In other words, each side is trying to frame a narrative for the jury to believe. The most effective litigators are the ones who are the most persuasive. However, even the most seasoned trial lawyer can easily fall prey to the four following mistakes if he or she is not careful.

4 Common Mistakes at Trial:

1. Responding to Plaintiff's Narrative (instead of telling your defense story)
2. Refusing to Admit the Obvious (don't lose credibility)
3. Refusing to Show Empathy (to disarm the jury's anger)
4. Giving a Binary Verdict Option (with no landing place in the middle)

Common Mistake #1: Responding to Plaintiff's Narrative *(instead of telling your defense story)*

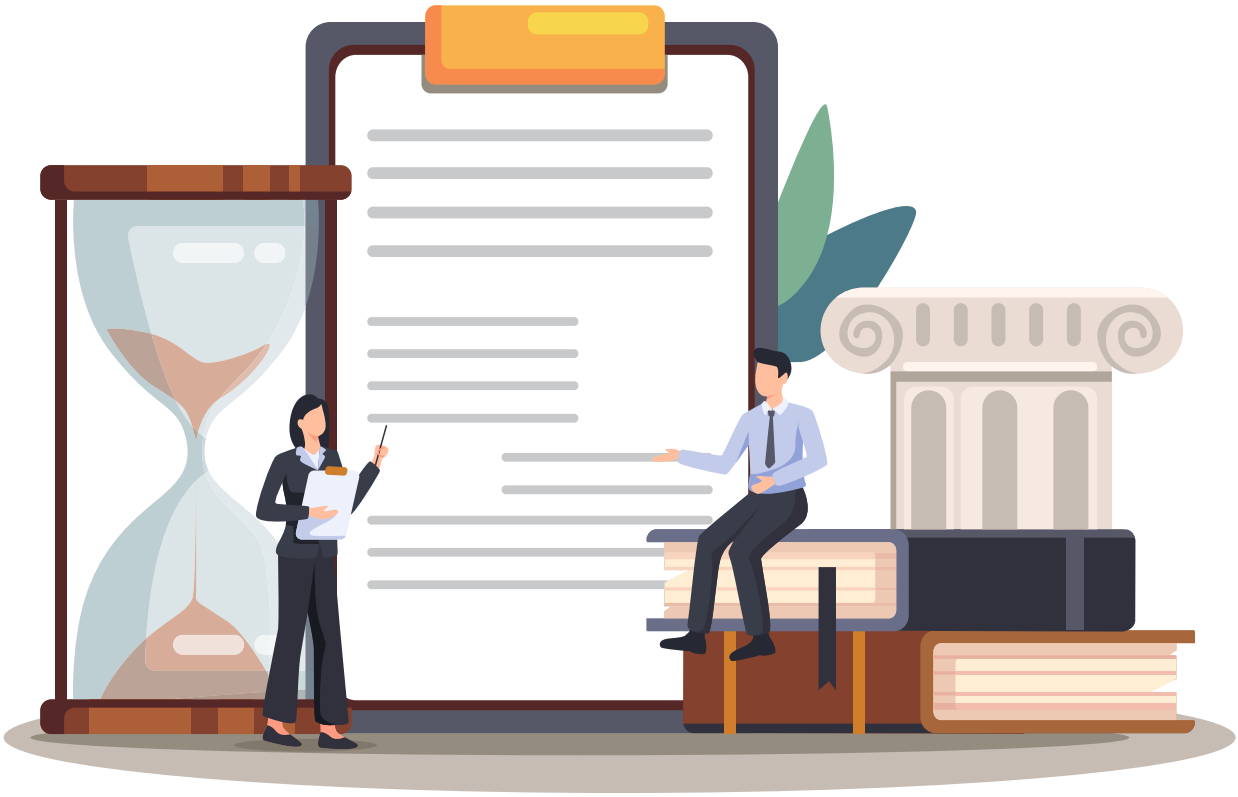
In the United States, the plaintiff always gets to go first at trial. As a Defendant, it is a maddening and helpless feeling to watch the plaintiff's lawyer stroll in front of the jury while giving an opening statement. It is so disturbing, in fact, that I have seen experienced attorneys scrap their planned defense opening statement to, instead, stand up and react to what Plaintiff just said. It is a natural instinct to reactive defensively when threatened. But this is an enormous mistake!

Consider these 2 Opening Statement examples to decide which one is more effective:

1. "It is impossible for what plaintiff's counsel just said to be true because there is no evidence that our truck driver was negligent or that our trucking company knew of any dangerous propensities of our truck driver"; or
2. "You will see indisputable evidence that ABC Trucking Company went over and beyond industry standards in hiring, training, and supervising this truck driver and you will leave fully convinced that this trucking company and our driver serve as an exemplary models for public safety."

So, which one do you think was more effective? Number 1, the reaction to the allegations? Or, Number 2, the telling of our defense story? The second example is

William H. McKenzie, IV (of Norman Wood Kendrick & Turner) is a nationally sought-after trial attorney and an industry thought leader for results-based communication. He has litigated matters in 29 different states (over 50 cases in Federal Court alone), 100s of cases in state courts, multiple arbitrations, and won in the Alabama Supreme Court. He is valued as a confident problem-solver and personable tactician. He serves as lead trial counsel for several Fortune 500 companies and insurers.



clearly the more effective strategy. Why? Because it frames perception in our favor instead of simply reworking an image inside of the framework already established by Plaintiff's counsel.

In sum, the key to avoiding Common Mistake #1 is to develop, express, and repeat strong defense themes. This will ensure that you impart a compelling story to the jury that will frame a favorable perception of the case.

Common Mistake #2: Refusing to Admit the Obvious *(don't lose credibility)*

As a claims handler or trial attorney, you argue for a living. Your instincts make you hesitate to show *any* weakness in fear that it will be exploited as a concession to liability. But this instinct can morph into a common mistake at trial. When you refuse to admit the obvious, you lose credibility in the eyes of the jury to tell the rest of your story.

I had a client one time that, on the morning of trial, wanted to contest liability for causing a trucking accident when we had already admitted in interrogatory responses that we caused the accident. I had to talk this client down even though I understood my client's instincts in wanting to argue contributory negligence to serve as an anchor to a potential Plaintiff's verdict. But I knew that there was no way we could prove that we did not cause the accident – because we did! Instead, we agreed to adopt the approach at trial of owning causation of the minor accident and emphasizing through medical records and Plaintiff's testimony that this minor collision could not have caused the extent of damages claimed by the plaintiff. In other words, we kept our credibility and used it to undermine Plaintiff's damages claim.

I barely avoided Common Mistake 2 due to pressure from my client. Thankfully, I resisted and followed the correct approach which resulted in a highly favorable settlement before the jury reached a decision in the case.

I tell that story to illustrate a common psychological mistake that develops while preparing a case for trial: **confirmation bias.** Confirmation Bias is "the tendency of people to favor information that confirms their existing beliefs or hypotheses" (Simplypsychology.org). Defense teams sit around in rooms getting ready for trial and essentially become an echo chamber of each other's ideas. At worst, the defense team confirms each other's cognitive biases and develops an *unrealistically strong* view of their own case. This happens more often than we like to admit. So, a nice safety measure is to bring in an outside person to test your defense theories. Hopefully, this can provide a check-and-balance system that keeps you from becoming overconfident (and deceived) about the true dangers of your case.

Here's the takeaway: admit the obvious and save your fight (and credibility) for the contested issues. There is an innate human fear of accepting *any* liability.

So, you should expect resistance from yourself, your boss, and even your client (or attorney) when it is time to fall on the sword for a certain aspect of the case. But play the long game of credibility. Losing the battle can help you win the war.

Common Mistake #3: Refusing to Show Empathy *(to disarm the jury's anger)*

Sometimes it is hard to know what to do with an injured Plaintiff. You don't want to add fuel to the fire by coddling them on the witness stand or weeping when you hear their story in front of the jury. But, as we study nuclear verdicts over the past couple of years, jurors' anger at the defendant (for being so callous) has led to large jury verdicts. It is imperative that trucking companies and other accused Defendants show true empathy for the injured parties to disarm the jury of destructive, punitive anger.

Even if you don't have natural empathy for the plaintiff, you can develop what Chris Voss calls "tactical empathy" in his must-read book **Never Split Difference: *Negotiating As If Your Life Depended On It.*** Voss makes the point that even when interacting with a terrorist you must make yourself see things from their perspective in order to successfully navigate communications. The main idea is that even if you have no natural empathy for Plaintiff, you can manufacture empathy through intentionally retracing the Plaintiff's life and ideals to develop an understanding for the Plaintiff's worldview. This will yield "tactical empathy" (which will be evident to the jury).

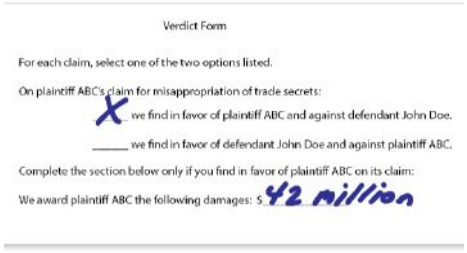
If you think about it, it is difficult to be angry with someone who is taking appropriate responsibility. The problem at a jury trial is that if you take responsibility, it can be tantamount to an admission of liability. Our instincts make us think "if you are in for a penny, you are in for a pound." So, we avoid any hint of human emotion towards Plaintiff. The tightrope we have to walk is being empathetic on a *human level* to the pain and experience that Plaintiff has suffered, while still disagreeing that we should take any of the blame for it.

I like to create scenarios where we can blame a third party for causing the accident. Or we create a straw man to blame (such as a dangerous road condition) to offer some other solution for the accident besides the fault of my client. But even in the cases where you must argue comparative or contributory negligence, having a tone of empathy is not lost on the jury. Consider the tone of this closing statement to illustrate this:

> *Our heart breaks for the pain this Plaintiff has suffered. This was such an unfortunate accident. But even though Plaintiff has told you about the hard things she has gone through, the question of liability at this trial has already been answered. Overwhelming evidence in this case has shown us that ABC Trucking Company did nothing to cause or contribute to this accident. In fact, the accident and damages to Plaintiff could have been a lot worse had my client not acted so carefully in this case. That is why we ask you to apply the law that the judge will give you to the clear evidence that has been presented this week.*

Common Mistake #4: Giving a Binary Verdict Option *(with no landing place in the middle)*

Almost every verdict form you will come across looks like the one below:



Verdict Form

For each claim, select one of the two options listed.

On plaintiff ABC's claim for misappropriation of trade secrets:

X we find in favor of plaintiff ABC and against defendant John Doe.

____ we find in favor of defendant John Doe and against plaintiff ABC.

Complete the section below only if you find in favor of plaintiff ABC on its claim:

We award plaintiff ABC the following damages: $ 42 million

https://cogentlegal.com/2013/11/verdict-form/

The problem with this form is that it gives a binary option: find for Plaintiff or find for Defendant. Oh, and, if you find for Plaintiff, go ahead and just award whatever amount you feel is right. This is a reckless approach in the age of nuclear verdicts!

Instead, we need to follow the sage retail advice: *Price what you want to sell in the middle.* Successful retailers know that if you list three products at different prices, human nature drives the consumer to purchase the one priced in the middle. This is because it is not the cheapest and it is not the most expensive making it seem like a "safe" or "reasonable" purchase. This is a basic human psychology tactic known as "anchoring bias."

Now, don't get me wrong, in certain cases you should swing for the fence and go for the complete defense verdict. But in *dangerous* cases – ones that can result in a nuclear verdict – offer a landing spot for the jury to act as your safety net. Therefore, instead of following the standard binary verdict form, give the jury a number to land on if it decides award damages.

This can be done in closing argument. For example, you can say to the jury:

> *Throughout this week's trial, these lawyers for Plaintiff have not offered you one piece of evidence that truly shows that ABC Trucking Company is at fault for this accident. So, when you go back to the deliberation room in a few moments, we ask you to remember the key piece of evidence in this case – that plaintiff admitted to being on her phone at the time of the accident – and to mark the "X" on the verdict form in favor of defendant ABC Trucking Company.*
>
> ***But even if you disagree with me, and somehow find that ABC Trucking Company is responsible for this accident while plaintiff was on her phone, the most money Plaintiff would ever be entitled to from a fairness standpoint would be her medical records in the amount of $50,000. Now, the plaintiff's lawyer is about to stand back up here in front of you and talk about pain and suffering and how the medical damages are not enough money to compensate her. But even if you believe him, and multiplied the $50,000 in medical damages times three to account for pain and suffering, that would mean the damages in this case equate to, at the most, $150,000.***
>
> *Ladies and gentlemen of the jury, this is the decision you have to make. And when making this decision based on the evidence, your decision should be made in favor of* ABC Trucking Company. This is why I ask you to mark the "X" by ABC Trucking Company on the jury verdict form.

From my sample closing statement above notice how I: 1) asked the jury specifically to mark the jury form in my favor; 2) reframed the universe of maximum damages and limited it to three times medicals; and 3) stole opposing counsel's thunder by directly addressing pain-and-suffering damages before his Rebuttal. This approach can help avoid a runaway jury verdict by placing a perceived lid on the universe of reasonable damages.

There are, of course, many ways to successfully try a case. You will do well by simply avoiding the 4 common mistakes outlined above. However, if you want to do even better, keep on reading!

4 Keys to Success at Trial

The best trial lawyers are excellent in every form of communication. Verbal, body language, written . . . you name it, a salty litigator can be punchy using every communication medium. So, what is the main thrust of the 4 keys to successfully trying a case to a jury? You guessed it: improving communication to make a pointed impact.

It is not good enough to stand behind a podium and be likeable. You must ask for the vote of your constituent.

4 Keys to Success:

1. **Simplify the Case.** *(the most persuasive attorneys present in a way that a 10-year-old can understand)*
2. **Be Dynamic.** (jurors expect a show) (don't be insecure about setting the standard)
3. **Establish a Consistent Theme** (in *voir dire*, opening, cases in chief, and closing)
4. **Tell the Jury Specifically What to Do in the Jury Room** (ask for their vote, but change their choice circumstances)

Key to Success #1: Simplify the Case

Insecure or unprepared lawyers try to sound smart. They speak a lot of "Legalese." However, the most persuasive attorneys can present information in a simple way that a 10-year- old can understand. Effective trial lawyers work hard to simplify the language, themes, and issues of a case so that the jury can easily digest the information.

Humans are far more receptive to things that they understand. So, the first key to success at trial is ferreting out all irrelevant and superficial data that does not move your case forward. You and the jury will be left with only the vital issues of the case. Next, strip down those issues to the most bare-bone elements. Finally, carefully choose the best and fewest words to convey these elements.

Even better, develop a simple analogy that can be easily adopted and repeated. One of the best examples in recent public memory was attorney Johnny Cochran, in OJ Simpson's criminal trial, where he focused on a leather glove found at the scene of the crime. His argument was very simple: the glove was too small for OJ Simpson's hand. Therefore, he came up with a simple mantra: *"If it don't fit, you must acquit."*

This simple trial tagline echoed to the jury and the public because it was so "sticky". In the book ***Made to Stick: Why Some Ideas Survive and Others Die*** (by Chip and Dan Heath), the authors say, "what we mean by 'simple' is finding the core of the idea." So, the key to presenting a "sticky" narrative to the jury is simplifying your case to express your core idea. You make this core idea "sticky" by adding a memorable tagline, emotional anecdote, or a correlating visual cue to help the jury quickly absorb it.

Finally, simplifying your case also means simplifying the language you use. Jury trials can be confusing enough for a juror with all the legal speak. So, speaking to your audience at their level, using their dialect, and matching their level of education will undoubtedly get them to buy in to more of your narrative. One of the best pieces of favorable feedback I have ever received from a juror (that liked me and adopted my arguments) was that "you didn't sound like a lawyer." I gladly accepted her compliment!

Key to Success #2: Be Dynamic

In the age of televised jury trials and Netflix legal thrillers, jurors expect to see a show. A key to success that I see older lawyers struggling with is the failure to be dynamic with technology. Sure, technology requires a lot more preparation work and planning, but there is no substitute. Accident reconstructionist experts need to have vivid drone footage, and panoramic aerial photographs of the scene of the accident (that can be digitally zoomed in on at trial) to show the jury exactly what happened from your client's perspective. Further, trucking attorneys must immediately subpoena body-cam footage from first responders to obtain this dynamic evidence. Playing video clips like this are engaging to the jury. Jurors are more easily persuaded when they are engaged.

In an extensive study, researchers found that jurors, despite their efforts, do not recall all the evidence presented at trial. This is not surprising. However, the researchers noted that "all studies found that **the type of evidence jurors recalled predicted their verdicts"** (*"The impact of individual differences on jurors' note taking during trials and recall of trial evidence, and the association between the type of evidence recalled and verdicts."* (Published: February 19, 2019). (Joanna Lorek, Luna C. M. Centifanti, Minna Lyons, Craig Thorley) ***https://doi.org/10.1371/journal.pone.0212491***). This is significant. If we can beat the other side in presenting the most memorable evidence, we can expect a positive correlation to a favorable verdict!

Let's be honest: defense firms can be very conservative (read: *BORING!*) in their dress, presentations, and mannerisms. But most jurors (who are stuck sitting there all week without access to their iPhones) just want the lawyers to be more *interesting.* This doesn't mean you have to slick back your hair or wear stiletto heels, but it does mean that you need to put on your performance persona, enunciate your words, and add a little dramatic flair to your presentation. Use visual aids. This is not a

personality thing, it's a persuasion thing. The more dynamic you can be, the more engaged the jury will be. And the more engaged the jury is, the more you can influence the jury with your narrative.

Key to Success #3: Establish a Consistent Theme

Each jury trial takes on its own personality and flow. It is easy to get lost in the rhythm that is set for you. However, a key to success is establishing a consistent defense theme and emphasizing it from the very beginning.

It all starts in *voir dire*. *Voir dire* is often a wasted opportunity by defense lawyers. They feel like they must get in front of the venire and identify every single bias of every single juror. They want to justify each juror strike with tangible information. While this is important to do, you do not want to miss the opportunity to prime the jury with your defense narrative. You can prime the jury by asking questions under the guise of probing impartiality.

For example, you can ask: *Does anyone here think a trucking company should be liable for an accident just because it had one of its trucks on the road at the time of the accident? Or consider this one: Does anyone think that just because a tractor trailer had a collision with a smaller car that it must be the tractor trailer's fault?* These questions prime the jury with the doubtful narrative that the plaintiffs are blaming the trucking company just because it is a trucking company. To carry this theme forward consistently, you would need to repeat this theme in your Opening Statement, crossing Plaintiffs on the stand, and crossing Plaintiff's experts. You would continue to emphasize this same theme during your case-in-chief (through your own witnesses), and finally by emphasizing it heavily during Closing Argument. A theme that is repeated is remembered.

Key to Success #4: Tell the Jury Specifically What You Want Them to do in the Jury Room

Every experienced politician knows that to be successful you have to ***ask*** for what you want. In other words, it is not good enough to stand behind a podium and be likeable. You must ask for the vote of your constituent. Similarly, the trial lawyer must specifically ask the jury to do what she wants them to do. (i.e., *I want you to mark the "X" on the verdict form by my client's name because . . .*).

To stack the odds in our favor, we can first limit the choice circumstances of the jury before asking them to decide. Author Richard H. Thaler wrote the book ***Nudge*** which talks about how we can steer decision making. You are probably familiar with some ways to encourage decision making such as:

- *Activating or inciting:* Stimulating emotions to motivate individuals
- *Encouraging or discouraging:* Using incentives or disincentives
- *Informing:* Providing relevant information
- *Training or educating:* Influencing their deliberative capacities
- *Deceiving:* Providing false information
- *Brainwashing:* Influencing through subliminal images, drugs or hypnotism
- ***Nudging:*** **Changing choice circumstances to steer decision making.**

"Nudging" a jury takes place by changing the jury's choice circumstances. For example, a client of mine had a case in Texas where a merging collision between its tractor trailer and plaintiff's vehicle occurred while the vehicles were attempting to avoid a mattress located in the highway. Instead of letting the jury simply decide between Plaintiff and Defendant, the trucking company took advantage of Texas' comparative negligence law and asked the jury to assign a portion of fault to Plaintiff and a portion of fault to the mattress! And that is what the jury did!

You see, instead of just letting the chips fall where they may, you can steer decision making by changing choice circumstances in presenting a strawman, a third-party object, or a codefendant or nonparty's "empty chair" that the jury can assign some fault to. But no matter what you decide to do, make sure you are clear in informing the jury exactly what it is that you want from them. Like a politician asking for a vote, we must ask the jury to mark the verdict form in our favor. We increase the odds of this happening by first changing the jury's choice circumstances.

Conclusion

This article has armed you with **4 common pitfalls to avoid** and **4 tried-and-true keys to success** at trial. Jurors can sense authenticity in any trial lawyer. So, the wisest strategy is always to be yourself and try the case with your own personality. But that will not be enough.

The most persuasive attorneys can present information in a simple way.

You must avoid responding to the plaintiff's narrative in lieu of telling your own defense story. And don't risk credibility by refusing to admit the obvious. Make sure to show tactical empathy. Never settle for a binary jury verdict option. Instead, price what you want to sell in the middle when dealing with dangerous facts.

Finally, *instead of presenting your case to the jury, present the jury your case.* In other words, tailor approach to your audience by simplifying the case, being dynamic, establishing a consistent "sticky" defense theme, and telling the jury exactly what you want them to do in the deliberation room.

Now you have a game plan so that you don't have to settle for merely pounding the facts, pounding the law, or pounding the table!