9-6-2011

The Eight Intangibles of Trial Advocacy

Wes R. Porter
Golden Gate University School of Law, wporter@ggu.edu

TUESDAY, SEPTEMBER 6, 2011

The Eight Intangibles of Trial Advocacy

Wes Porter at Golden Gate University School of Law, wporter@ggu.edu, and www.GGUligitation.com offers the following post in memory of a great teacher of advocacy and pioneer in experiential learning - Bernie Segal. Enjoy!

Eight Intangibles of Trial Advocacy

Golden Gate University School of Law Professor Bernard "Bernie" Segal passed away August 12th, the Friday before classes began in his 40th year of teaching. Many of us spend significant time teaching the fundamentals of trial advocacy to new law students. We strive to have as many students as possible absorb these fundamentals as part of their skills training during law school. My friend and mentor Professor Segal had a knack for identifying and demonstrating for students the intangibles of trial work. He had a way of allowing students to envision their path - from where they were to where they could be as an advocate.

There are aspects of trial advocacy, like anything, that separate the exceptional from the competent. While difficult to isolate, understanding the intangibles allows a trial advocate to better understand his or her own development – and *their* own path to excellence. We plan to name our Litigation Center after Bernie and his legacy. But, also in his honor, we will continue to introduce advocacy students to the intangibles, as well as the fundamentals, of trial advocacy. My eight intangibles of trial advocacy are as follows:

1. **Connecting with (not talking at) jurors.**

Great trial attorneys don't deliver speeches. We aim to persuade juries to act in our favor. To persuade jurors to act during deliberations, we must connect with them on some level during trial. We must have a passion for our side and the central issues of our case. Only then can the jury connect with our theory and presentation – and with us. They will go with you and your side if they connect with the passion you present for your side. That doesn't happen with contrived speeches – it only happens with appealing to the jury's genuine emotions.

2. **Crafting an argument . . . from an inference . . . from a favorable fact.**

Effective trial attorneys identify and emphasize favorable facts. From these facts, we create all plausible and workable inferences. And, from these facts and inferences, we craft arguments – the kind of persuasive and impassioned arguments that make the difference in jury trials. Take that important fact at trial and develop the reasonable inferences from that fact – and then craft the best argument possible (as if you have no other facts in your favor). Everyone can read the facts and recite them back to a jury like a speech – the effective trial advocate does something with each fact that changes the complexion of the case.

3. **Maintaining focus on the case theory and presentation (No rabbit holes).**

From the "easier-said-than-done" file, dynamic trial attorneys keep their eye on the prize (their desired outcome realized from their case theory). They do NOT take long, confusing deviations from *their* case during trial. Each question and argument should connect and contribute your case theory and presentation. Avoid chasing unimportant topics down those rabbit holes during trial.

4. **Reacting to the opponent's theory of the case throughout trial.**

Successful trial attorneys react to trial. The questions we ask and the arguments we make should directly reflect, not only our case theory, but the theory we confront from our opponent. Listen to your opponent's questions and understand their theory of the case (and all of the intricacies within it). How your opponent deals with an unfavorable fact may present an argument in closing about their approach to the whole case. We must listen, understand, and REACT to our opponent throughout trial.

5. **Presenting a closing argument as a reflection of the trial.**

Persuasive trial attorneys present and explain in closing the evidence adduced at *this* trial. The jury can appreciate the difference between a pre-written speech about the case and a presentation related to the subtleties of the trial they just sat through. Discuss the specific testimony, explain the evidence presented, offer your assessments of witness credibility, and reference that which you could not have planned for at trial.

6. **Listening to witnesses.**

This one is simple. Ordinary attorneys on trial ask *their* next question. Exceptional trial attorneys listen to the witness and then ask *a* next question. On direct, our next question must flow from the witness' previous answer. On cross, we plan for a yes (or no) answer, but then listen and react when we get any other answer. Why read a prescribed, verbal questionnaire to the witness? Instead, listen to the witness and confidently host a conversation.

7. **Objecting and responding to objections professionally and confidently**

Seasoned trial attorneys give NO indication that the court's evidentiary decisions affect them on trial. Do NOT be the trial attorney that makes a big deal about an objection, response, or judicial ruling; the jury will assess the situation based upon our reaction and demeanor at trial. Deftly rephrase questions, return to central messages after an objection and ruling, and maintain our poker face. We want the jury to see a confident, poised, and professional advocate move on undeterred in his or her case presentation.

8. **Explaining how the jury successfully will carry out their duty**

Jurors serve once or twice in a lifetime; trial attorneys (even new ones) do this for a living. Jurors, like any person engaged in an activity unfamiliar to them, want someone to explain to them how to fulfill their duty. If we are professional, ethical, and candid with the jury on all issues, then they will go with us on closer calls during their deliberations. The jury wants to do the right thing and they are looking for help – so be the one in the courtroom they trust to help them.