The Elements of Trial

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To my parents, who always said I could be anything I wanted, and never once suggested what that should be.

—Rick Friedman

To Mom and Dad, who believed I should be a lawyer, and made it (and everything else) possible.

—Bill Cummings

Contents

Publisher's Note

This book is intended for law students and practicing attorneys. This book does not offer legal advice and does not take the place of consultation with an attorney or other professional with appropriate expertise and experience.

Attorneys are strongly cautioned to evaluate the information, ideas, and opinions set forth in this book in light of their own research, experience, and judgment; to consult applicable rules, regulations, procedures, cases, and statutes (including those issued after the publication date of this book); and to make independent decisions about whether and how to apply such information, ideas, and opinions to a particular case.

Quotations from cases, pleadings, discovery, and other sources are for illustrative purposes only and may not be suitable for use in litigation in any particular case.

The cases described in this book are composites, and the names and other identifying details of participants, litigants, witnesses, and counsel (other than the authors of this book) have been fictionalized except where otherwise expressly stated.

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Introduction

The trial process is infinitely complex, bafflingly subtle, and frustratingly unpredictable. Years of experience, study, and discipline can improve your performance, but *no one* ever *masters* the complexity, subtlety, and randomness of trial.

Like many great truths, the truth about trial practice is a paradox. While it is true that the process of trying cases is complex, subtle, and unpredictable, it is also simple and straightforward. The purpose of this book is to provide the simple and straightforward principles and concepts involved in trying a case. This is more than most of today's trial lawyers had when they tried their first case. Understanding these simple principles and concepts is necessary before you can productively struggle with the complexities of trial practice.

For the practicing lawyer, this book is designed to be analogous to a pilot's or surgeon's checklist. You will be reminded of issues to consider, and provided legal research leads to address those issues for each trial stage. Each major stage of the trial process is addressed in a chapter. Many chapters are divided into six subsections: "Purpose," "Advocacy Goals," "Applicable Law," "Implementation," "Questions to Ask," and "Suggested Reading." Here is an overview of what each subsection will address.

Purpose

Trials are a process by which we resolve disputes. Every aspect of the process serves one or more legal or procedural purposes. Motions *in limine,* for example, give the judge and the parties an opportunity to resolve evidentiary issues before the trial actually starts. The judge and each side can make decisions without the time pressure that often exists once the trial begins. The purpose of jury instructions is to inform the jury of the applicable law and encourage decision making in accordance with that law. This subsection describes the purpose behind each stage of trial.

Advocacy Goals

At every stage of trial, you must think about the opportunities you have for advancing your case—increasing your chances of winning the trial. This subsection describes common opportunities available at each stage.

Applicable Law

You must be familiar with the basic controlling legal principles applicable at each stage of trial. This subsection gives you these principles.

The law of trial practice and procedure varies between jurisdictions. While there are important similarities, there are also important differences. This book presents leading cases on each topic from six jurisdictions—Florida, New York, Illinois, California, Arizona, and Washington—and also touches regularly on federal law. It is hoped this will give you efficient research leads no matter where you practice.

Implementation

This subsection discusses some ideas for implementing your advocacy goals and trial strategy.

Questions to Ask

Trial practice and procedure varies from federal to state court, from state to state, from county to county, and even from courtroom to courtroom in the same courthouse. Many beginning trial lawyers are unaware of this fact, assuming they are the only ones who do not know the proper practice.

The easy response to this reality is to *ask questions* of the court personnel and judges, as well as other lawyers who have practiced before them. This is what experienced lawyers do. Inexperienced lawyers sit quietly, hoping no one will notice how little they know. This subsection suggests the right questions to ask.

Suggested Reading

Much has been written about many of the individual topics covered briefly in this book. A good way to improve your skills as a trial lawyer is to read what other trial lawyers have written. Some of the chapters will have a subsection giving you suggestions for further reading on the chapter's topic.

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This book is designed to be your "basic training" manual. It will not transform you into a brilliant advocate, but it should help you do a credible job for your clients. "Credible job" is a good place to start on your journey to trial excellence.

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An Overview

In a trial, you are trying to tell a story. You are trying to convince the jury or judge that your story is true. You are trying to convince them that your story entitles you to a favorable verdict.

Unlike the storytelling we all engage in every day, storytelling at trial is sharply constrained by legal rules. We can't necessarily tell the story we would like to tell in the way we would like to tell it. Perhaps more importantly, there is a competing story; our adversary is fighting to convince the judge or the jury that our story is false and his is true.

Throughout the litigation and throughout trial, keep the following questions in mind:

1. What is the story I want to tell?
2. How believable is this story?
3. What parts of the story are vulnerable to legal attack (exclusion) or factual attack (discredit)?
4. Does the story entitle my client to the legal result he seeks?
5. How does the story's credibility (as I will be permitted to tell it in court) compare with the credibility of the other side's story?

6. Out of all possible stories I could tell, is there another one that could increase the chance of success?

With these questions in mind, your discovery and motion practice will be more efficient focused on the end game of your trial presentation. Constantly revisit these questions as new facts come to your attention and the court makes new legal rulings.

What Is the Story I Want to Tell?

You *should* want to tell the story that will cause you to win the case. Instead, lawyers often want to tell a story to satisfy their own ego or ideological needs. If you represent a man charged with murder, you may want to tell a story involving his mistreatment at the hands of the police. This part of the story may be accurate. It may be compelling to you. It may feel very satisfying to attack the police officers in open court and take them to task for their misconduct. And it might well leave the jury unimpressed.

A good advocate keeps her eye on the ball: what it will take to win the case. What is important or significant to her may be very different than what is important and significant to the jurors. She understands that trial is a time for self-discipline, not self-indulgence. The best story is the one that guides the jury to a verdict in her client's favor. She can vent her anger or promote her causes on her own time.

Ideally, your story will cause the jurors to want your client to win the case. If you represent a man accused of murder, hearing the decedent was a drug dealer and rapist may well convince the jurors that your client did the world a favor. They may *want* your client to win.

How Believable Is Your Story?

With credible witnesses to testify, or documentary evidence establishing the deceased was a drug dealer and rapist, your story may be believable. If such evidence is lacking, and the deceased was a forty-year-old suburban father of three, your story loses

credibility. Evaluate each available fact. Does it make your story more or less believable? Almost every trial will have a mix of available facts, some that add to and some that detract from your story's credibility. If all the facts were in your favor, there would be no need for a trial.

What Parts of the Story Are Vulnerable to Legal Attack (Exclusion) or Factual Attack (Discredit)?

There are innumerable reasons why your evidence of the decedent's bad conduct may not be admitted. To take just one example, suppose he was killed after a minor traffic accident, during which he and your client got into a shouting match that escalated into violence. The court might rule that the decedent's drug dealing and rape convictions are irrelevant or too prejudicial for the jury to consider and exclude them from evidence.

If all of your witnesses are biased against the decedent and the prosecution has character witnesses showing he was a saint, your story is vulnerable to factual discredit. Or, if the jury hears your client is also a drug dealer, and the death occurred as part of a business dispute, you may get in all the evidence about the decedent's bad character, but the power of your story is greatly diminished. Your client's presumed moral superiority over the decedent has evaporated.

Does the Story Entitle Your Client to the Legal Result He Seeks?

If your client's story is that he approached the decedent and shot him without provocation because your client hates drug dealers, the story does not legally entitle your client to acquittal. Your story needs more facts. It must either credibly rebut one of the elements the prosecution must prove to secure conviction (perhaps the intent to kill) or establish a recognized legal defense (perhaps self-defense).

This is why the best place to start case analysis—in *any* case—is with the legal instructions the jury will likely be given at the end of the trial. Only then will you know if the facts of your story can support your desired verdict.

How Does Your Story Compare to the Other Side's Story?

In life, and in trials, there are always two or more possible stories or explanations for an event or series of events. You are going to trial because the other side has an alternative story. Subject your opponent's story to the same analysis you applied to your own:

1. What story does he want to tell?
2. How believable is his story?
3. What parts of the story are vulnerable to legal or factual attack?
4. Does his story entitle his client to the legal result he seeks?
5. How does the credibility of his story compare to the credibility of your story?

And then ask one more question about your own case:

6. Is there a different story (or part of a story) I could tell that would increase my chance of success?

Good trial lawyers are constantly thinking and rethinking these questions at every stage of the litigation process—from their first contact with the client or case, until the verdict is announced. This book's goal is to help you do this with your own cases, while introducing you to the legal structure within which you must consider these questions.

Suggested Reading

Bettinger, Carl. *Twelve Heroes, One Voice: Guiding Jurors to Courageous Verdicts.* Portland, OR: Trial Guides, 2011.

McComas, James. *Case Analysis: Winning Hard Cases Against the Odds.* Portland, OR: Trial Guides, 2011.

Perdue, Jim. *Winning with Stories: Using the Narrative to Persuade in Trials, Speeches and Lectures.* Austin, TX: Texas Bar Books, 2006.

Spence, Gerry. *Win Your Case: How to Present, Persuade, and Prevail—Every Place, Every Time.* New York: St. Martin's Griffin, 2006.