Three Neglected Trial Techniques

By Steven Susser

Trial is a game of inches, with the little things often making the biggest difference. The three trial techniques described in this article that I have used are trial memos, calling an adverse witness, and challenges to expert voir dire.[1] They are effective and often underused by trial lawyers. Because they're effective, they could give you that needed edge; since they're often underused, they may surprise your adversary.

AT A GLANCE

A trial memo elevates your position above one made only orally, increasing your chance for success.

Calling an adverse witness gives you the opportunity to create damaging testimony before your opponent can rehabilitate.

Expert voir dire can plant doubt even before your opponent's expert starts testifying.

Trial memos

A trial (or bench) memo is a short memorandum of one to three pages that supports a request or objection you make about an important piece of evidence. Typically, you would make your objection and then ask to hand a copy of the memo to the judge and opposing counsel. The memo provides legal support for your position, with a short introductory section devoted to your case's background and issue(s) and another section primarily devoted to your argument.

For example, say that you have a particularly important point you want to make, but it is susceptible to a hearsay challenge. You can argue that it is not offered for the truth of the matter asserted, but you bolster your position if you can reference other similar situations in which a court has allowed that type of statement.

A trial memo is different in nature and timing from a motion in limine. First, a motion in limine is used to keep evidence out, not ensure its admission. Yet even when you use a trial memo to keep information from the jury, the memo either complements or replaces a motion in limine. One situation would be when the point is not sufficiently important to highlight in a motion in limine. Another is when you are not sure at the beginning of trial whether the point will arise.

You might ask why a memo is needed when the point will be made orally. One reason is that a memorandum allows you to present your argument in a more comprehensive way, giving the court a full picture of your supporting citations. Another is visual. Your point will appear (and be) more authoritative if you present it in writing. Finally, the memo highlights to the court the importance of the point you are making by setting it apart from the more frequent oral motion/objection.

Be careful about two things, however. Do not annoy the judge with frequent trial memos. Save them for points that are between an oral motion/objection and a motion in limine. Second, beware the impression that you knew an issue would arise but you "played possum" and waited until you had the memo that your adversary lacked. Both errors might erode your credibility.[2]

Calling an adverse witness

I do not understand why attorneys for the plaintiff do not routinely call the other side's witness as an adverse party—that is, calling your opponent's witness as part of your case-in-chief. This procedure is allowed at the federal level by FRE 611(c)(2) and in Michigan by MRE 611(d)(3). When I use this technique, I almost always call a key representative of my opponent, say a CEO or chief engineer.

Calling an adverse witness has a few advantages, but the main one is that it allows you to put your adversary on the defensive early in the case and draw the sting of testimony that may hurt your case. Another advantage is that it can allow you to present necessary or desired evidence during your case-in-chief—evidence that, if lacking, may subject you to a directed verdict at the close of your proofs. Yet another is the ability to surprise your opponent, as there is no requirement that you alert your adversary in advance (unless, of course, you want to call a witness who is not in court).

As with almost any trial tactic, calling an adverse witness has its dangers. The most significant is that it allows your opponent to taint your case-in-chief with damaging testimony. Another is that your adversary might use the opportunity to present its entire defense "on your dime," so to speak.

Ultimately, the decision to call an adverse witness will be the result of balancing pros and cons for your situation. But too many lawyers let their fear of this procedure stop them from using it. It can be jarring to you, as a lawyer, when you have to lead with cross and when you really need full control of the witness. Yet too many eschew the technique because they worry that the adverse witness will get the better of them.

There are things you can do to make calling an adverse witness more effective. First, call the witness toward the end of your case-in-chief. Rarely will you want to lead with an adverse witness because of the possibility of significant damage to your case at an early stage when the jury is most attentive and open-minded. If you call an adverse witness as your penultimate fact witness, your case has all but been presented. When possible, I like to have at least one friendly witness after an adverse witness to make it more likely that I will end my case-in-chief on a high note.

When calling an adverse witness, make it short and controlled. Optimally, you would ask a handful of questions supported by deposition testimony that will make a splash with the jury or are harmful to the witness's credibility or your opponent's defense.

Expert voir dire

FRE 702 and MRE 702 require that an expert be qualified to testify on the subject matter of his or her testimony by education or experience. Typically, before you present an expert at trial, you must qualify that expert as being competent to testify and then move to admit the witness as an expert in the pertinent subject matter.

This sets up a scenario in which your opponent asks rehearsed questions of the expert to establish the depth and breadth of his or her expertise. After this series of questions, your opponent will move for admission of the expert testimony and you will have a chance to object. Most of the time, you will not object because you will probably lose and look bad in front of the jury. After all, if the expert was unqualified, you would likely have already tested your challenge through a *Daubert* motion.

So you simply say no objection, right? Not so fast.

A challenge to an expert during voir dire can be effective in questioning the expert's authority. Virtually every expert has some experiential or education-based weakness. Maybe he has a doctorate in the area but has never gotten his hands dirty. Maybe she has lots of experience but little education or training. Alternatively, his or her weakness may not be in the abstract but in comparison to your expert—perhaps your expert has a doctorate and the other side's expert has career experience.

If handled correctly, you can plant some doubt in the jurors' minds even before your opponent's expert begins testifying. But this must be done with a light touch. Why? You will likely lose if you object to your opponent's expert, and you do not want to start the examination with a loss. Save your objection for an egregious case. Also, there is a risk that if you are heavy-handed, the expert may use that against you to put you in your place before beginning his or her testimony.

If you approach the voir dire challenge in a relaxed way, however, you may be able to inject a bit of juror skepticism before the adverse expert does his or her song and dance. Choose one or two points that you believe to be weaknesses of the opposing expert. For example, he does not have a college degree in the subject matter of his testimony and has never written on the subject. Under these circumstances, you can simply ask, "Plaintiff's expert has a PhD in Topic X. Do you have any educational background on Topic X?" or "Plaintiff's expert has written extensively on Topic X. Have you ever written on Topic X?" Once you get your answer, pause for effect and then say something like "I am fine with this witness, no objection" to convey to the jury that you are allowing that witness to testify because you do not fear him or her.

Conclusion

It would be comforting to think that trial lawyers win or lose on the facts alone. That thought relieves from my shoulders the burden of changing fate through my presentation to the jury. Yet, in the real world, good facts sometimes surrender to a more compelling showing.

Trial memos, adverse witnesses, and expert voir dire are designed to improve the presentation of your case to the jury. They should not be used unreflexively, however, for their effectiveness comes in large part from using them in the appropriate circumstances. After all, sometimes less is more in trial work. ■

Steven Susser is a commercial trial lawyer with the Carlson, Gaskey & Olds intellectual property law firm. He has handled many complex commercial trials over the past 25 years. He currently focuses on patent and trademark litigation. The tips in this article are the results of his efforts to find the most effective way to present a compelling story to a jury.

ENDNOTES

1. I am not aware of these techniques being prohibited by any rule or practice guideline. After all, they are part of our adversarial process. But to be sure, check your local rules and the court's guidelines.
2. If you would like to see a sample trial memo, please contact me at ssusser@cgolaw.com or (248) 988-8360.