

The Young Lawyer's Dilemma, Part 2: Gaining Perspective

LAST YEAR IN this space I wrote about the vanishing civil trial and what it might mean for today's young litigators (few of whom have enough experience to be called trial lawyers). One side effect of the lack of trial experience to which I alluded but did not explore is that, without trial experience, lawyers (particularly young lawyers)

risk losing perspective. In other words, if you've never tried a case, you don't know what truly matters and what is simply a distraction. This creeps into every phase of litigation, from filing pre-trial motions, to taking depositions, to haggling over discovery issues.

If more experienced lawyers are to be believed (and I'm not conceding that they are), young lawyers who lack perspective are contributing to a general lack of civility and decorum in litigation. In fact, I recently heard of a federal magistrate judge in the Eastern District of Virginia (where I primarily practice) who now requires that a seasoned partner appear to argue discovery motions; apparently, younger lawyers have been deemed to be the source of needless disputes over documents and interrogatory requests.

So how does a young lawyer gain perspective if he or she is frozen out of experience by the extinction of civil trials? As far as I can tell, perspective is not something typically offered in a CLE seminar. Either you are fortunate enough to practice in a law firm that has real trial lawyers who can teach young lawyers the ropes, or you simply stumble along until you figure it out if you can. What might help, however, is a seminar—and not just one featuring the typical nuts and bolts required for a presentation but also one that includes a solid discussion of what's important and why.

Frankly, I am not qualified to teach a seminar on how to gain perspective—I've been out of law school less than a decade and still have a few years to go before I reach the age of 40—but I have managed to try approximately 20 cases (some solo or first chair, some second chair). And thankfully, of the dozen or so litigators in my firm with whom I routinely work, three are members of the American College of Trial Lawyers, and I have tried, sometimes successfully, to listen when they offer advice.

Also, because I still consider myself a young lawyer, I have some ideas about what I would like to see if I were to attend such a seminar. These ideas certainly aren't new to me, but they're ideas I've seen or heard in a number of different places, and I think

each could be included in one seminar on perspective. So in this brief space I'm going to give this seminar a shot in writing, with apologies to those who are actually qualified to teach such a course.

To begin with, it seems to me that you gain perspective by starting every new case at the end instead of the beginning. Start with your eye on the goal of a trial verdict in your client's favor. I realize this notion should go without saying, but it is a simple idea that really is the bedrock of any good perspective on a case. If something—whether it be a discovery issue, a deposition question, or a pre-trial motion—isn't furthering your goal of a verdict in your client's favor, let it go. In other words, chill out.

Of course, you can't chill out unless you know your case well enough to know whether something is furthering your goal of winning a favorable verdict. So the next thing to do is to back up from the verdict to the next important event that takes place immediately before verdict—jury instructions.

In a bench trial, jury instructions are called "proposed conclusions of law," but you should eliminate that terminology from your mind. A proposed conclusion of law sounds like a summary judgment argument. In my admittedly biased view, if you spend most of your time thinking about summary judgment instead of the trial, you risk losing perspective (and you might never become a trial lawyer). Summary judgment is nice, and there's a certain degree of satisfaction that comes with a Rule 12(b)(6) dismissal, but if you want to gain perspective, motions practice should not dominate your mind-set.

Moreover, a good set of jury instructions is a great tool that focuses the case on important facts and key witnesses. Jury instructions, which should be simple and easy for normal people (that is, jurors) to understand, should remind you that, at the end of the day, almost every civil case is about two things: proving liability and proving damages. Indeed, throughout the case, asking yourself how an issue, witness, argument, or other matter at hand would play to a jury will help you maintain perspective.

After you figure out your jury instructions, back up from there to the presentation of your case. Think about the witnesses and documents you will need to support the closing argument you want to make to the factfinder that will apply the jury instructions to the evidence. Figure out right away whether the rules of evidence will permit you to present the testimony and documents you want to introduce. If a document or witness doesn't match up with your jury instructions (including instruc-

tions on arguably subjective items like the credibility of a witness and the compensable pain and suffering a plaintiff may have suffered), let it go. Get some perspective.

That is not to say you should jettison evidence that could have emotional resonance with a jury or help establish the context and background of the people and things in dispute. But you can't have a proper perspective on this kind of evidence if you do not have a proper perspective on basic items like your proposed instructions and likely witnesses.

Once you have your case in mind, back up from there to your opponent's presentation of the case. Try to answer the following questions:

- What documents and witnesses will opposing counsel use?
- Will your opponent's facts be admissible under the rules of evidence?
- What would you expect your opponent's jury instructions to look like?
- What kind of closing arguments might opposing counsel make to apply their facts to the instructions?

At least by this time (and, I hope, sooner), a theme for your case should have emerged. This should be a one- or two-sentence nutshell of what your case is about. (In Hollywood, I think they call this the pitch.) The instructors at the weeklong National Trial College held at the University of Virginia every January will tell you that you should figure out your theme very early in the case and that this theme should then be the organizing force that guides you. In other words, your theme should give you some perspective and help you focus on what is important and jettison what is trifling.

With this perspective (and a good theme), discovery should fall into place (with the caveat, of course, that for some reason discovery never falls into place). For example, you now should have a good idea of further evidence you need by way of an interrogatory or document request. And you should have at least the beginnings of a list of witnesses whom you need to depose or interview.

This perspective should guide your depositions as well. You should know before each deposition what you need to "get" (to steal a concept from Mark Lanier) from the witness. And what you need to get should be guided by how this information helps you win a favorable verdict. To illustrate, consider these hypotheticals:

- Do you want the witness to admit that walking decks shouldn't be covered with oil because people might slip and fall?
- Do you want the witness to tell you all the names of the eyewitnesses who allegedly were standing around when your client allegedly made a defamatory statement?
- Do you want to lock in witnesses' version of the facts so that during trial you are ready if they try to change their accounts?

- Do you want company executives to admit that their mother never taught them to treat people fairly?
- Do you want witnesses to detail their professional backgrounds so you can contend at trial they were sophisticated users or negotiators?

The "get" should guide your questions and your preparation of an outline for the deposition—assuming you actually need an outline. Sometimes two or three questions might be all it takes.

In addition, if a dispute comes up in or about a deposition, the "get" should give you perspective. If the dispute doesn't interfere with why you need the witness, let the matter go. If it does interfere, take a stand and clearly explain to the court why you need the testimony. If you have the right perspective, more often than not, the court should have it too.

Remember that—notwithstanding summary judgment, which is a topic on which there are too many seminars—the point of a deposition is not to ask a bunch of questions but to prepare for trial. If you are deposing a witness for the other side, one would hope that the deposition will be a fruitful source of impeachment or, in some instances, an admission to be read to the jury. Viewed in this light, answers like "I don't remember" aren't so bad; if the witness' memory is miraculously restored at trial, the deposition will reveal that person's duplicity.

Perhaps the most important point is the following: If you have the right perspective you will see depositions, written discovery, and pre-trial motions for what they are—tools to help you build a case that will win at trial. If a trial is a house, the witnesses and documents are the wood and shingles, and depositions and discovery are the hammer and saw. These tools help build the house, but the point of your case is to build a *great* house, not to have the best looking tools on the block.

In the end, none of this guidance is rocket science, and none of it will replace actually trying cases and developing the sixth sense that great trial lawyers seem to have about those themes and concepts that resonate best with a jury. And, admittedly, I have brushed by important pieces of the puzzle, like whether your opponent has pled a legitimate claim or defense in the first place. But, in my few short years of practicing law and trying cases, I am convinced that these concepts go a long way toward establishing the kind of perspective that can make being a trial lawyer an interesting and fulfilling profession. Besides, if nothing else, my hope is that these thoughts will help that federal magistrate judge start letting associates argue motions again. **TFL**

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