

The Five Essential Ingredients of Success in the Courtroom

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Success in the courtroom is a result of thorough preparation, passion, spontaneity, creativity and just being yourself. Some of those essential ingredients, like preparation, spontaneity and creativity, may be the product of fear. If so, we must harness our fear to produce them. Passion may be the product of our own life experiences. If so, we must explore those experiences and relive them. To be ourselves in the courtroom, we must know who we are and have the courage to be real. The ingredients are there, but we must find them and use them.

I. PREPARATION.

A. Living with the Client's Case.

Preparing to win involves more than going through the formality of client meetings, informal and formal discovery, trial preparation and trial. No two clients and no two cases are alike. Every client's case requires unique and creative preparation and trial strategy. Every case has its own strengths and weaknesses which must be discovered, used and dealt with at every stage of discovery and preparation.

Many years ago I thought I had the secret of success. After several victories in the courtroom, I began using the same, or a slightly modified, voir dire outline, order of witnesses, or approach to summation that I had successfully used previously. I began losing. Why? Because every client is unique and different, every trial is unique and different, and I was not creating a new masterpiece with each trial, I was just copying from an outdated print that was not relevant.

Now I treat all of my past trial experiences as a vast array of information that forms the foundation for the creation of each new trial, much as an artist uses his or her knowledge of colors and their combinations to produce a new piece of artwork.

However, to prepare for the creation of a successful trial, you must be motivated to live with the client's case, sometimes day and night.

B. To Properly Prepare, You Must Motivate Yourself to Win.

1. To lose is unacceptable.
2. Use mental images. From the time that you meet the client until trial starts, paint mental images of the trial process, courtroom scenes, and constantly develop an overall picture and theme. Keep changing the mental images and picture of the trial process in a winning fashion.
3. Know, like and understand your client. Meet the client's family, visit the client in his or her home, and breathe life into the recorded facts.
4. Constantly think about the weaknesses and problems in your case and create ways of solving or minimizing those weaknesses and problems during discovery, in trial preparation, and in the trial process.

C. Role Reversal.

Successful trial lawyers have always gone through the psychological process of "role reversal" in the discovery process, in trial preparation, and in trial. You must reverse roles with your client and also tap into your own life experiences to feel the client's pain, to understand what motivated the client, and to, finally, love the client. You reverse roles with the witnesses you are going to depose in preparation for their depositions.

Trial lawyers have always used role reversal in the courtroom. You must reverse roles and put yourself into the hide of the witness being examined in order to effectively conduct a direct or cross-examination. The lawyer must place himself into the body and hide of each juror during voir dire and throughout the trial. A lawyer must try to anticipate how each juror is reacting to the evidence, what the juror is probably thinking, and what questions the jurors would probably like to ask during every stage of the trial. The lawyer is likewise placing himself in the hide of defense counsel in trying to determine what the defense is likely to ask the plaintiff and plaintiff's witnesses during trial, what the defense strategy will be, when the defense is likely to object to questions, and what the judge's likely rulings will be. Before trial, the plaintiff's lawyer is attempting to think like a defense lawyer in anticipating the defendant's trial strategy. In short, the lawyer is constantly involved in the mental gymnastics of role reversal.

D. Fear.

We should recognize and accept our fear as the driving force behind preparation. The fear of losing, of embarrassment, of rejection by a jury, can immobilize a trial lawyer. But if we accept fear as necessary and a gift, we can harness it to thoroughly prepare for trial. The trick is to accept it and not be overcome by fear.

II. SPONTANEITY.

A. Preparation Creates Spontaneity.

In preparing for the cross-examination of the opponent's expert witnesses, I create a detailed outline of each point that I intend to establish and the questions to be asked to establish each point. I likewise have a detailed outline of each direct examination, of the story I am going to tell in opening statement, and of my summation. Having prepared, reviewed and revised these outlines enables me to then achieve spontaneity in the courtroom by then setting the outlines aside, to be referred to only if I need help. As stated by Dan Williams, a New York trial lawyer: "Spontaneity only comes through preparation. It's when I'm not prepared that I have to go to my notes. Spontaneity comes from that confidence of being totally prepared."¹

B. What Is Spontaneity?

The definition of spontaneous behavior in Webster's Dictionary, which applies here, is "acting in accordance with or resulting from natural feeling, temperament, or disposition, or from a native internal proneness, readiness, or tendency, without compulsion, constraint or premeditation."² For our purposes, it is "living and acting in the moment." It is being caught up in and engaged in the flow of the direct or cross-examination, being in the story and reliving the story in opening statement, and experiencing and living the passion of summation. This can only be achieved with thorough preparation and setting aside those necessary notes and outlines made in preparation.

C. Why Is Spontaneity Important?

1. It gives you the freedom to be who you are, and not an actor or reader wed to a script.
2. Spontaneity breathes life into an otherwise dull and boring courtroom filled with sleeping jurors.
3. Reliving a story in opening statement is more persuasive and credible than reading it to a jury.
4. Passion comes from feeling, from the heart, and is not an intellectual exercise. Without spontaneity, there cannot be passion.
5. Spontaneity creates courtroom drama and real life drama in the courtroom often reveals the truth and persuades a jury.

D. What Destroys Spontaneity?

1. Constant reference to an outline or checklist destroys spontaneity and prevents you from being a good listener and director of the drama. Reading from an outline also gives a jury the impression that the testimony is rehearsed and helps destroy the credibility of both the lawyer and witness.

III. CREATIVITY.

A. How Is It Used?

Creativity involves doing something new or unique to solve a problem or demonstrate a point or argument. Unlike spontaneity, creativity usually involves thoughtful, advanced planning. It might involve a careful plan, following a role reversal, of cross-examining the adverse party which results in that party changing his or her testimony and becoming your witness, to the shock of defense counsel. It might involve your making a portion of your opening statement in the first person as your client or even as an object, such as a machine or medical device. It might involve using courtroom objects to set the scene where the important events occurred and having the client or a witness reenact the event in the courtroom. It involves the use of metaphors and analogies.

B. Courage Enhances Creativity.

Creativity by definition is something new or unique. Trial lawyers are often prevented, by fear, from being creative. It takes courage to assume a risk, but the risk of failure can be overcome by the confidence that what you have created will succeed.

Spontaneity and Creativity sometimes operate together in the courtroom to produce dramatic results because the timing was right and you had the courage to act on your instincts.

For example, I once became "the decedent" in a wrongful death product liability case and cross-examined the human factors expert while seated, on a runaway pipe-layer traveling backwards down a steep mountainside.

I once asked my client on direct examination if she would like another opportunity to speak to her deceased daughter, then "brought" her daughter into the courtroom for a last tearful reunion.

Sometimes spontaneity and creativity go hand-in-hand if the moment is right. The moment is right when you sense that defense counsel cannot object without offending the jury and if there is an objection, it will probably be overruled because the judge is so caught up in the drama that he or she does not want it interrupted.

IV. BE YOURSELF³

A. Who Are You?

To be persuasive in the courtroom, you must know who

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you are and then just be yourself - not the imaginary person that you believe will do a better job of persuading the jury. Bill Trine is not Gerry Spence or Peter Perlman, and is obviously not Roxanne Conlin or Milt Grimes. Any attempt to become an actor or actress and be someone that you are not is dishonest, unreal and will be apparent to the jury.

B. Courtroom Personality.

Unfortunately, many of us develop a courtroom personality, which is a facade and hides the person that we really are. To achieve honesty in persuasion, we have to first shed our courtroom personality and become the real person that we hide from the jury.

Why do we develop a courtroom personality? Is it out of fear that the jury will not respect or like me if I display who I really am? Is it because I want to trick the jury or hide something from them and to do that, I must pretend to be someone that I am not? Or is it simply because I cannot answer the question of "Who am I?" "I have tried so hard to be what I am not that I don't know who I am. I have multiple personalities: one for my wife, another for my partners or employees, another for my grandchildren, and yet another in the courtroom. Who am I?"

C. Discovery Who You Are.

Becoming yourself and a "real person" in the courtroom often requires going through an archaeological dig into yourself to discover how the events in your life have impacted and shaped you. This process helps you to discover how much of life's baggage you have not dealt with, baggage which hides your humanity, your kindness, and your ability to love, so that you appear to be a non-entity to the jury - a robot going through the motions, just doing your job.

D. Courage.

It takes courage to just be yourself, with all your frailties and weaknesses, in front of the jury. "My God, the jury will see that I am not perfect. They will see that I am human and can make mistakes, or get frustrated or angry or cry or have weaknesses and feelings, just like them. They will see that I am passionate about my client and my case and that I am doing the best that I can." Is that bad, or do the jurors then see you as one of them and assist you in the honest search for the truth?

V. PASSION.

A. Where Does It Come From?

A trial lawyer's passion often results from discovering and developing the client's story, which triggers any one of the emotions: grief, love, fear, joy, hate, anger, etc. But where does that emotion come from? What is it about a client's circumstances or story that triggers certain emotions in you, the client's lawyer, and does the client's

story trigger the same emotions in others? I know that my passion comes from my own life experiences. Sometimes the emotion is immediate and the source is apparent. At other times, I may have to do an archaeological dig into myself and my life's events to trigger a feeling or emotional reaction to my client's story.

For example, a client's grief over the loss of a loved one immediately triggers the emotions of my losses, but it is more difficult for me to identify with a man who has lost his job because of his obesity or a woman who cannot find employment because she is disfigured. That is, until I remember how I was treated and ostracized on the school ground in the first grade because I was the only boy wearing farmer's coveralls. Passion comes from within and you sometimes have to search for and discover it.

B. How Do You Discover and Use Passion?

If passion comes from within, isn't it terribly important that we know who we are? That we know what it is about our life's circumstances and events that sometimes causes us to be unexpectedly angry, sad, disappointed, or joyful? We often suppress and even deny traumatic events of our early childhood or later life, when those events, if properly identified, can be tapped into and become the source of passion for our client's case. The passion can come in the form of anger or outrage over the defendant's conduct. It can come from the love of a father for his son, or from the grief over the loss of a loved one.

Once you have developed genuine passion, summation is a time to show passion for your client's cause, to display appropriate anger toward the defendant's wrongful conduct, and to empower the jurors to render a verdict for your client. However, you can also call upon that passion to help get in touch with your own feelings during the direct examination of your client, during a powerful cross-examination of the adverse party or his expert witnesses, and in telling the client's story in opening statement.

CONCLUSION

The five essential ingredients are there and available to each of us. We can harness fear and turn it into success through preparation, spontaneity, and creativity. We can be courageous and assume the risks associated with the use of creativity. We can just be ourselves in the courtroom, just real, genuine people, and we can represent our clients with the passion that they deserve. ☺

ENDNOTES

- 1 *The Warrior*, p. 26, Spring 2003.
- 2 *Webster's New Twentieth Century Dictionary*, 2d. ed., 1956.
- 3 This section was first published in Vol. 51, *Trial Talk* 5, Aug/Sept 2002, a Colorado Trial Lawyer Association publication.