

TRIAL TIPS FOR LITIGATING YOUR CASE IN THE D. COLO. BEFORE MAGISTRATE JUDGES

I. Preliminary Thoughts

A. A good trial starts with a good pretrial

1. Make sure all discovery (including expert) and discovery disputes are wrapped up.
2. File dispositive motions in an expeditious fashion (i.e., giving the Court sufficient time to render a decision well in advance of trial preparation beginning).
3. Timely submit all evidentiary motions (in limine, striking an expert, etc.).
4. Designate only those experts who *really* matter (for example, do you really need an expert to testify that an insurance company "unreasonably delayed or denied" coverage? What about that standard does an expert need to explain?).

B. As trial time nears

1. Confirm and arrange appearances of all witnesses and especially avoid any testimony voids during trial.
2. Resolve the mechanics (including any necessary tech folks) of electronic presentation of evidence.
3. Determine the necessity of trial preservation testimony.
4. Know and practice with the technology in the courtroom - setting this up through the judge's courtroom deputy.
5. Thoroughly read the judge's trial practice standards, including, especially, the numbering of exhibits.
6. Prepare your case for the time that you have been given - e.g., four-day trial, plaintiff will get about two days for case in chief.
7. Prepare for the halftime motion.
8. Request status conference with the Court if you are not totally sure about any aspect of how the trial will occur.
9. Alert the Court to even the *possibility* that, in the last week before trial, you are pursuing settlement.

10. Engage in a sincere and deliberate attempt to stipulate to the admissibility of exhibits and facts.

II. Beginning the Trial

A. Before the Jury Comes In

1. Be on time - expect traffic delays, etc.
2. Alert the Court to anything unexpected that has occurred - a trial judge wants no surprises when she/he walks into the courtroom to start a trial.
3. Have your space organized - a messy trial table (or the area around it) is some indication of your preparedness.
4. Be prepared to raise any preliminary issues (which should *never* be a surprise to the other side because of your absolute duty to confer).
5. Regardless of the legal title, *always* address the trial judge as “Judge Smith” or “Your Honor” - drop the “Magistrate Judge”.

B. As Trial Starts

1. Always stand for the jury and when you address the Court.
2. Avoid any semblance of body language or eye contact with the jury that might be construed as persuasion.
3. In open court, never address opposing counsel directly - always address any comments or questions to the Court absent authority from the Court to talk with one another.
4. During jury selection, ask to approach with any request or information that might embarrass a jury or that is sensitive or confidential.
5. The courtroom microphones are always on - so watch it!

III. Trying Your Case

A. Legal Considerations

1. Focus on MAKING THE RECORD; trials - and appeals -- are won or lost on EVIDENCE.
2. Properly present stipulated facts to the jury.
3. At all costs avoid any possible contact with a juror outside the courtroom.

B. Practical Considerations

1. Don't waste even a minute of the jury's time.
 - a. Witnesses should be lined up like planes on the tarmac.
 - b. Every examination must be ready to go (including cross) on a second's notice.
 - c. Know your litany for getting exhibits admitted.
 - d. Have potential impeachment evidence ready in advance.
 - e. Minimize repetition of arguments or evidence. They get it!
2. Follow time-honored methods of examining witnesses
 - a. On direct, establish who the witness is, why they are relevant to the jury, and, generally, what their testimony is chronologically if possible.
 - b. Be as brief as possible on cross, not repeating any testimony just to fill time and let the jury think you are doing something.
3. Objections
 - a. Minimize them and the number of words you use to articulate them; the rule number and a brief explanation is all you need.
 - b. Timely raise them, or they are lost.
 - c. Pop up (never object while sitting) and state "objection" loud enough so everyone (including the witness) sees and hears you, but not so loud as to be obnoxious.
 - d. If the trial judge's practice standards permit, raise them in a trial brief prior to the start of trial, as well as any significant legal issues.
4. Avoid jury distractions
 - a. Excessive consultation among lawyers at your table.
 - b. Lots of paper shuffling.
 - c. During the witness oath, everything in the courtroom should stop.
 - d. Especially during opening and closing, give the jury its space.

5. Bench conferences
 - a. Make them rare.
 - b. Always ask, “Your Honor, may we approach” without making too much of a scene; sometimes the judge will ask why, so be prepared to give the minimum amount of necessary explanation.
6. Exhibits
 - a. If using hard copy, have them organized and easily accessible - nothing is worse than an attorney fumbling around trying to find an exhibit.
 - b. When you use a stipulated exhibit the first time, mention that it is stipulated or already in evidence; you may want to do this the first few times a particular exhibit is used, after that, the jury will know it.

C. End game

1. Hope for time between close of evidence and closing but mentally be prepared to move directly into closing.
2. In closing, argue the case the jury just witnessed.
3. It’s a rare trial attorney who does not use a lot of “filler” time on closing just because they think the more time in front of the jury, the better - less is more.

D. Jury Instructions

1. **START EARLY!** The sooner you start working on jury instructions the better. Clear instructions on claims determine the relevance and importance of certain evidence.
2. **COORDINATE WITH OPPOSING COUNSEL!** The more that can be stipulated and agreed the better. Take seriously the obligation to get together and work through the instructions to minimize areas of conflict, before presenting an initial set of proposed instructions to the court.
3. **STOCK INSTRUCTIONS ARE THE STARTING POINT—NOT THE END.** Every stock instruction needs to be edited for the needs of the case, and for simplicity of concepts and language. Stock instructions come from appellate decisions and are frequently confusing or incomprehensible to lay-people.
4. **THE VERDICT FORM IS CRITICAL!** The verdict form is a great potential source of confusion for jurors. Think carefully about the form,

and whether you want or need special interrogatories. With each additional special interrogatory comes more potential for confusion and error.

5. USE THE INSTRUCTIONS AND VERDICT FORM AS A GUIDE FOR ARGUMENT TO THE JURY. Do not hesitate to use the instructions and verdict form as an important guide or outline for your argument. Consider enlarging the verdict form and explaining what you believe the evidence would justify in terms of an outcome. Ignore the instructions in closing at your peril.
6. DO NOT UNDERESTIMATE THE IMPORTANCE OF INSTRUCTIONS. These are often the primary or even sole basis for an appeal. You must consider each instruction word for word. Obviously, you waive appeal except for plain error if you do not advise the Court of an objection to a jury instruction.
7. LISTEN TO THE READING OF THE INSTRUCTIONS. It is not uncommon that the trial judge might misread an instruction. You must advise the Court of any errors before the case is submitted to the jury, or else any appeal on this issue may be waived.

IV. After Closing

A. Deliberations/Verdict

1. Be available at all times (a few minutes' notice) for potential jury questions.
2. Prepare yourself and your client for a very unexpected verdict - it is becoming the norm.
3. At all costs control the emotions at your table when the verdict is read.

B. Post Verdict

1. If the judge lets you talk to the jury, don't make the judge regret it with your questions.
2. Remember the local rules about contacting the jury outside the courthouse.
3. Sleep on it before you comment to the Court about the verdict or the Court's handling of the trial, unless an immediate record is absolutely necessary.