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Evidence at trial: Mistakes I made so you don't have to

The mistake at trial is never as bad as you think it is when you're making it

After nearly 10 years of practice, I finally have enough trials under my belt that I am not completely terrified of going to trial. I have ditched my "white-knuckled-at-the-podium" style, and even said goodbye to the Gerry Spence/Matlock trial persona I created for myself based on what I thought jurors wanted to see (I actually kind of liked that guy. In my head he looked like the "most interesting man in the world" from the Dos Equis commercials).

The big picture of a case is now clear. I know what depositions I need to take and what evidence I really need to prove my case. Adjusters no longer roll their eyes when I proclaim that I will take a case to trial. What is even better is that I believe it myself when I say it.

Do not get me wrong, I still get nervous, and I am no Bruce Broillet up there, but I am not terrified. I am hitting my stride and, for the first time in my career, I believe that I could be pretty darn good at this (as opposed to just lucky, or blessed with good facts).

Maybe I am an idiot and it was/will be easier for all of you to get to this

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point. In perusing the CAALA Listservs, it appears as if everyone out there is a "baller" with a zillion trials. The Los Angeles legal community is highly competitive and we are all competing for cases with some of the most talented lawyers in the world. It is easy to get discouraged and give up before you even get started. I am glad I did not, and encourage any younger lawyers out there who do not feel like things are clicking to keep pressing on as well.

I started my own firm a couple years out of law school. I had no formal trial training other than a trial practice course in law school. No matter how many books I read, or how many times I watched good lawyers try cases, the vast majority of my trial experience came from jumping into the deep end and taking my lumps. The remainder of this article will be about those lumps and lessons learned from them. Hopefully my embarrassing moments will provide some practical insight on evidentiary issues you may not find in a textbook, or be thinking about until it's too late. If nothing else, laughing at me should be entertaining.

Know the rules of evidence

Perusing the evidence section of your old BarBri book the night before trial is not sufficient knowledge of the rules of evidence. Most civil attorneys do not know the rules of evidence. In my experience, a civil attorney's knowledge of the rules of evidence basically consists of residual knowledge from the bar exam, and a night before trial once-over of the laminated study aid everyone had in law school that lists the hearsay objections on one page.

The level of unfamiliarity with the rules of evidence is not surprising considering the fact that we never really have to use them until we are in trial. Once trial comes around, the last thing anyone has time to do is study the rules of evidence. With preparing witnesses, creating your witness binders, practicing your opening, etc., etc., the first thing that gets triaged is truly learning the rules of evidence.

In one of my first trials I discovered this reality the hard way. I pulled an all nighter the night before trial opposing frivolous *motions in limine* and working on my opening. I found myself in trial the next day with little more than the Evidence Code and a "dual fingers crossed" approach to properly applying the rules of evidence. Of course, defense counsel was a silver-haired seasoned vet who seemingly had the entire Evidence Code tattooed on his eyelids.

Sensing blood in the water, defense counsel objected to everything I said. "Objection, foundation." "Objection, hearsay." "Objection, (dramatic sigh) foundation again, your Honor." And so on the objections went. My responses were mostly questions followed by a wince (e.g., "past recollection recorded?"), and they did little to quell the barrage.

Thankfully for me, the trial was bifurcated and the first half was a bench trial. Our judge took pity on me and, with his help, I managed to introduce my evidence relatively unscathed. From that moment on, however, I vowed to never find myself in that position again.

I went home and called a friend of mine who practices criminal law. In my experience, criminal lawyers are experts on the rules of evidence. If I ever need a practical answer to an evidentiary issue, I always call my criminal lawyer friend before looking to a book. I explained my experience to my friend and asked him to recommend the best way to learn the rules of evidence. I figured there must be a secret class or book that all of the criminal lawyers had exclusive access to. My friend told me that the best way to learn the rules of evidence was to buy a copy of the Annotated California Evidence Code and read it. Mystery solved.

I took my friend's advice and immediately purchased a copy of the Evidence Code. Instead of quickly scanning it the night before trial, I take time to read from it as much as I can throughout the year. This simple step has given me a tremendous leg up in trials. Remember, most civil lawyers don't know much about the rules of evidence so it does not take much effort to get ahead of the pack. Being familiar with the rules is extremely empowering. If used properly, your knowledge can go far beyond fending off baseless objections from silver-haired bullies. Knowing the rules of evidence will gain you credibility with the judge and jury, allow you to dissect and exclude the opposing party's evidence, and give you the confidence to really take control of your case.

Lesson 1: Buy, read, learn the Evidence Code

Buy an annotated version of the California Evidence Code and read it *before* your next trial. *Laying foundation is not simply asking the same question a different way.*

Foundation – my old nemesis. A different trial, and a different silver-haired attorney, made me realize that I didn't really understand how to lay foundation. I thought I did. I read about it and must have dealt with it in moot court. What else was there to know?

This time it was a jury trial. I was conducting a direct examination and asking seemingly innocuous questions. My outline did not have foundational questions on these particular topics because I did not think any attorney would ever object to such harmless questions. I was wrong. Defense counsel objected to every question based on lack of foundation. The objections were being sustained. Because I did not understand how to lay proper foundation, I merely rephrased the question and asked it again. Naturally, because I was essentially asking the same questions, counsel objected again, and the objection was sustained again. After the objections were sustained for the second time, the judge would tell me to move on. There I was – standing in front of the jury, derailed from my precious outline, with 12 sets of eyes burrowing into my soul. The morning recess mercifully rescued me from my personal hell.

The judge called counsel into chambers during the recess and kindly explained what I was doing wrong. The judge then went on to tell a story about how his wife was in court on his worst day. Apparently the judge was likening his worst day *ever* in court to the performance I just gave. It was a

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really fun day for me. Needless to say, I vowed to learn how to lay a proper foundation the second I got out of that courtroom.

The best resource I found was a book called, Common Sense Rules of Advocacy for Lawyers, by Keith Evans. If you don't have that book, you should buy it. It contains 100 common-sense rules for lawyers to follow. I keep a copy of the book on my desk and consult it often.

Rule 67 is entitled "The Foundation Rule" and, in five short paragraphs, it breaks down laying foundation in such a simple manner that it caused the switch to flip for me. I have boiled it down even further into one simple question that I ask myself of the witness when an attorney tries to jam me on foundation: "How do you know what you know?"

Foundation is that simple. If one of your questions is sustained for lack of foundation it is because you have not properly demonstrated how the witness knows what he or she knows. All you have to do is back up and ask whatever questions you need to in order to get that information. For example:

Q: Mr. Lumbergh, what did you do with the TPS Report after you received it from Mr. Gibbons?

Objection, lacks foundation. Sustained.

(No problem. Simply back up and ask yourself: How does Lumbergh know what he knows?)

Q: Mr. Lumbergh, do you know Mr. Gibbons?

A: Yes.

Q: How do you know him?

A: He works for me.

Q: Do you know what a TPS Report is?

A: Yes.

Q: How do you know?

A: I work with them every day.

Q: What is a TPS Report?

A: A useless document we make employees fill out for data entry purposes.

Q: Has Mr. Gibbons ever given you a TPS Report?

A: Yes

Q: What did you do with it?

You may have to back up even further depending on how much foundation the judge is looking for. With the simple question – how do you know what you know? – it will not be a problem. In my experience, effortlessly handling the foundation objection once will let defense counsel know that you know what you are doing and greatly reduce future foundational objections in all but the most egregious instances.

Lesson 2: Be careful using video testimony at trial

Unfortunately for me, I have two lumps on this issue. One lump came from my use of video testimony at trial. The other came from defendant's use of video testimony.

In the case where I used video testimony at trial, the judge made it clear that he did not want the jury to hear anything but the questions and answers. The judge was adamant that all objections and comments from counsel were to be edited out before the clips were played to the jury. Of course, one of the first clips we played contained a snippet of a comment from defense counsel that our videographer missed when editing the clips. The judge was furious. He immediately called everyone into chambers and invited defense counsel to bring a motion for mistrial. Thankfully, defense counsel did not bring a motion, and it was ultimately a non-issue. The experience was terrifying enough. However, I am a lot more careful about using video testimony at trial. Carefully review all of your clips yourself before they are played in open court.

In the case where defendants introduced video testimony to the jury, they "accidentally" included a comment that I made during a break in a deposition. It was an all-day deposition and towards the end of the day defense counsel and I were joking about how worn out we were. Defense counsel made a comment about how long I was taking and I responded by saying something to the effect of "you think I still want to be here"? Of course, the only part the jury heard was me saying "you think I still want to be here?" The jury laughed at my comment and we won the case, so it was a painless lesson. Suffice it to say, however, I don't say anything at a video deposition that I do not want the jury to hear, even if we're "off the record."

One final note on using video depositions at trial involves a mistake I have seen others make, but have not made myself. It wasn't one of my own screw-ups so it doesn't technically belong in this article, but I'll make an exception. Keep the clips short. I have seen defendants play hours of video deposition testimony and jurors hate it. I have watched jurors fall asleep minutes after the lights go off. I don't care how compelling you think the testimony is, think long and hard about playing lengthy video deposition clips to the jury.

Lesson 3: Don't object just because you can

When I was a new lawyer I was approached by producers at NBC to "vie to become one of the nation's top young trial lawyers" on an Apprentice-style television show called "The Law Firm." The premise was that we would try cases every week and get voted off, based on our performances by famed attorney Roy Black. Trying cases on national TV sounded great to me, so I jumped at the opportunity. Well, I did not win, so I must have done something dumb to get voted off.

The case involved a neighbor dispute where one neighbor's bull-mastiff dogs allegedly attacked the other neighbor's smaller dog through a hole in the fence that divided their properties. I represented the plaintiff and was in charge of cross-examining cold, without any preparation, the defendant neighbor with the bull mastiffs. I had never seen the guy before he took the stand, and I had no deposition transcript to impeach him with. Suffice it to say, the witness was eccentric, and the examination was a challenge.

After what seemed like hours of rambling, nonresponsive answers, I finally got what we needed and sat down. Defense counsel began her redirect examination of their witness, and it was more of the same nonresponsive, value-added comments. I had objected and

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moved to strike so many times throughout the examination that I was on auto pilot. In response to one particular question, the defendant went on a scathing rant that was nonresponsive to the question his lawyer asked, but beneficial to our case. I instinctively objected and moved to strike the response. These objections were the beginning of the end of my television career.

The judge stopped the proceedings and asked my why I would move to strike something that helped our case. I had no good answer, withdrew the objection, and we won the case. Winning the case was too little too late for Roy Black, and he sent me home for that temporary lapse in judgment. (If anyone is wondering, my friends still make fun of me about all of this to this very day).

I realize that this is a bizarre made-for-tv scenario, but I think the lesson translates to cases in the real world. Listen carefully to every question and every response. Do not object, or move to strike, just because you can. Bad objections annoy the judge and jury. Even when your objections are sustained the jury could think you're trying to hide something. Finally, as I learned the hard way, not all non-responsive answers should be stricken.

Conclusion (kind of)

I have made enough mistakes in my career to fill a dozen more issues of the Advocate. The point is, we all make mistakes, particularly when it comes to dealing with evidence at trial. The key is to learn from them. Hopefully the painful process of sharing a few of my mistakes will help at least one person learn something that will help them out in their next trial. If not, I hope at least one young lawyer will read this and realize that it's never as bad as you think it is when the mistake is happening. There are multiple ways to introduce evidence at trial and a boneheaded move rarely spells disaster for your case. Keep your head up and don't feel sorry for yourself. If you ever want to swap stories, or just need a pep talk, call me.

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