# TIPS FOR THE LAST-MINUTE TRIAL LAWYER

*by CHRIS ARLEDGE*

It is a strange feature of the American legal system that a single lawyer is often expected to take a case from its infancy to its end, from the first meeting with a client all the way to a verdict. This is a strange feature both because it need not be this way—the British system's separation of barristers and solicitors shows an alternative—and because the different skill sets required to be a pre-trial practitioner and a trial lawyer make such a system far from ideal. The practice of calling upon an experienced trial lawyer late in a case, when trial seems highly likely, is probably less common than it should be. But it does happen.

Having served as a last-minute trial lawyer in various cases, I believe there are particular pitfalls and opportunities that come with such engagements. My purpose here is to give practical instruction to lawyers who take on an engagement late in the litigation process with the intent of serving as first-chair trial lawyer in the matter. (For purposes of clarity, I will distinguish between the roles of pre-trial lawyer and trial lawyer by using the terms "litigator" and "trial lawyer," respectively.)

### First Step: Assess Your Freedom to Change Course

Depending upon when the trial lawyer first enters the case, he or she may or may not have an opportunity to affect the record on which the trial will be based. The trial lawyer must immediately determine how much of the case is already set: What are the claims and defenses alleged in the pleadings, and is there time to amend? Have experts been designated, and is there still time to do so? Is discovery complete, and are any critical depositions left to be taken?

These are rather obvious questions that any competent trial lawyer would ask. But in asking them, the trial lawyer should be looking through a different prism than most litigators do. For most litigators do not develop a case with trial in mind; trials are sufficiently infrequent in their practice that they can get away with this, and many litigators would not know how to prepare a case for trial, having little or no experience before a jury. So what must a last-minute trial lawyer do?

First, take great care in developing your story. Litigators may think of cases in terms of causes of action and elements. It is the absence of a required element that leads to the downfall of a case on a motion to dismiss or at summary judgment. Thus, competent litigators pay careful attention to the elements of claims. But trial lawyers pay careful attention to stories. The more time you have, and the more discovery you have unfinished, the more you can do, of course. But it is never too late to shore up an effective trial story. Ask the client and predecessor counsel to summarize their story succinctly. Ask them to do the same for the other side. If they cannot offer a twenty-second story that leads to a win for your side, your side does not yet have a story to tell at trial. This is a common failing that the last-minute trial lawyer must rectify.

Second, determine who can best tell your story, and make sure that witness is capable of playing the role assigned to him or her. Is it too late to add witnesses? Frequently, the litigator handling the case has not paid attention to your most effective witnesses. On other occasions, the story a witness was expected to tell is not within that witness's capability. Is it too late to modify the story? If so, is it too late to rely on another witness? These are questions you must ask immediately.

### Step Two: Improve Your Story By Thinking Like a Trial Lawyer

If your client has no trial story, you obviously must develop one. And if your client has a story, test it aggressively. The last-minute trial lawyer has an advantage over most other litigators: he or she has been retained either because the client believes the previous lawyer has messed up, or because the client (and maybe the current lawyer) is concerned that, without a skilled and experienced trial lawyer, a big opportunity may be lost, or a disaster may befall them. This means that your client is already nervous; they have not hired you to give them a false sense of security. Do your job. Challenge your client's claims; challenge your client's anticipated trial story; make sure your case foundation is solid.

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In one trade-secret case I took on more than a month before trial, the client had lied repeatedly in her deposition on the single most important question in the case. The lies were going to be easily proven. She didn't tell me this when she first consulted me, of course; she didn't even want to admit it when I asked her about those deposition answers after I discovered them. But this weakness made it impossible to tell the story the client wanted to tell—a story about an innocent woman wronged, of a business that just wanted to stamp out a possible competitor. She had put herself in a position where a clear victory was virtually impossible. We were in damage-control mode, and our goal was to keep the other side from destroying her and her new business with their multi-million dollar damages theory. Thus, we had to tell a far different story than the one the client wanted to tell: a story about two people who were close, who became enemies, and who were engaged in a long-running feud. In a situation like that—where the parties have been out to destroy the other—the jury needed to be extra careful to look at the other side's damages theory, since the theory was not about finding justice, but about causing hurt. This approach worked, and the jury rejected the other side's damages theory. Our client lived to continue her business, but had we told the story she wanted to tell—the one she had prepared to tell—she would have had to deal with a different result.

Testing your client's story is especially critical because one common weak spot for all lawyers is the inevitable tendency to let your side's arguments grow on you, often to the point where you believe your own arguments far more strongly than you did early in the case, and often far more strongly than you should. Clients almost always fall prey to this problem, as they are so emotionally invested in believing that they are right and on the side of justice and the other side is guilty of all manner of malfeasance. But lawyers also must fight against this tendency. And lawyers who have little skill or experience at trial are most susceptible to believing too strongly in their own arguments, as they often have a limited understanding of how the evidence will come out at trial and what a jury is likely to do with it.

As a last-minute trial lawyer, time is not your friend. You must make decisions quickly. How do you test your client's story quickly? Often the most-effective way to test your client's trial story is to read the opposition's depositions of your key witnesses, their dispositive motions, and their mediation briefs. From those documents, you are highly likely to identify what the other side believes to be your weaknesses. Get those weaknesses in the open, and discuss them

vigorously. You cannot do your job effectively unless you challenge your client's story and understand its weaknesses.

### Step Three: Build Your Cast and Develop Your Characters

Just about every litigator understands that it is important to tell a good story at trial. Unfortunately, some litigators do not understand what this really means, and therefore they do little during discovery to prepare effectively. Film directors understand that the story they are trying to tell can succeed or fail based on character development and casting. A quality trial lawyer understands this as well.

A trial lawyer tells his story through witnesses. But litigators often fail even to identify the most-effective witnesses in the case. There is nothing more effective than a third-party witness who will testify consistently with your story on the big issues. Jurors will almost always believe a witness who does not seem to have a dog in the fight. Yet so often litigators fail to prepare to use those third-parties at trial, leaving the trial presentation as a he-said-she-said between warring parties. This is almost always a mistake.

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In addition, casting is critical. Just because the paper trail is susceptible to a story does not mean that your witnesses can carry that story. We know this from the movies. Arnold Schwarzenegger as a terminator? Sure. Arnold as one of the nerds being abused by the jocks in *Revenge of the Nerds*? Probably not. And it would not matter if he wore the pocket protector and the taped glasses. It would not matter if he delivered the same lines that Anthony Edwards delivered. He simply would not be believable in the role.

But I've seen lawyers make the same mistake. Some years ago, opposing counsel tried to argue that his client was a superstar salesman, the guy you bring in when you need to close game-changing deals. But, in person, he was meek and unimpressive, as far from an Alpha Male as you could get. He could not play the role assigned to him. It did not matter that some of the emails allowed him to tell that story. He was not the person they claimed he was. The jury could see that.

A trial lawyer must quickly determine if she has a casting problem—or if the other side does. Part of this analysis is trying to learn about the other side's key players so you understand who they are. If you're story is that the other side is greedy and took advantage of your client, your first knowledge that the principal on the other side gave all her earthly possessions to charity and lives on a nickel a week better not come when she says it from the witness stand. Yet most litigators make no effort to actually know the key players on the other side. They ask only questions about elements of the claims. This is almost always a mistake.

As a last-minute trial lawyer, if you still have time to do discovery, use it to understand who your opponent really is. And if you have no more discovery, do whatever informal research you can. Know your opponent; know your client; know what roles each side is capable of playing effectively at trial.

### Step Four: Cut, Then Cut Some More

The tendency for any lawyer is to use every available argument, to point to every available piece of evidence that could support her case. This tendency is especially pronounced when the lawyer is uncertain. When the record is not as complete as you'd like, it's easy to err on the side of throwing out everything you have. That is a mistake.

Being a last-minute trial lawyer does not change your primary responsibility as a trial lawyer: to make the most-compelling trial presentation possible. This means you must be an effective storyteller. And an effective storyteller is judicious in his use of facts, in who he asks to tell the story, and in the breadth and depth of the story he will tell. A great film-maker does not include every scene he shoots. A great novelist does not include every line of dialogue she has invented. And a trial lawyer does not include every fact, witness, and argument found in his file.

There will always be useful facts that do not make the final edit. Your job is not to put in front of the jury every piece of evidence and testimony that might tend to prove your case. Your job is to tell the most compelling story possible to achieve your trial goal, and telling a compelling story means you must pick and choose your facts carefully. Often you leave some pieces of evidence on the cutting-room floor because there is no way to work them into your narrative without embarking on tangents or because, for example, they simply cannot fit into the cross examination without having the cross be broken into a multitude of unconnected parts. The critical evidence will always be part of your narrative. Non-critical evidence? Some will have to go.

As a last-minute trial lawyer, the record is not always the one you would have developed. That does not relieve you of the responsibility to edit and streamline. More of the same information is not always better. Jurors can get bored, of course, and once you've lost them, you may never get them back.

They can also become accustomed. That is, even the most-impactful piece of evidence becomes uninteresting if seen too many times. Only a fool would show the best document or best deposition sound bite once. But there comes a point of diminishing returns. Once, opposing counsel had a tremendous sound bite from our 30(b)(6) witness, and he knew the value of what he had. When he played it in opening, I felt like I had been kicked in the gut. But he kept playing it. Over and over. By the time I gave my closing, I joked that opposing counsel would no doubt want to play his same favorite clip again five or six times. The jurors laughed. When opposing counsel inevitably played it again, they turned to me and laughed again. That evidence had lost its power to persuade.

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