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TORTS THE BIG CHILL

By
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Unlike the movie, THE BIG CHILL in trial work is when the jury announces you lose. Sometimes even when you win a jury verdict for your plaintiff, the amount of the verdict may seem devastatingly low, and you still feel the effects of THE BIG CHILL.

Why do some plaintiffs lose their cases when apparently they should have won? Or, why do some very seriously injured plaintiffs recover nothing near the real value of their injuries or losses? And why is it that some plaintiffs recover far more than even their own attorney ever dreamed was possible? The answer is usually in the overall impression created in the minds of the jurors during the trial. This article will offer suggestions on how to create the right overall impression and avoid THE BIG CHILL.

This article assumes that the case you are going to take to trial involves good liability or at least close liability. (If your case is not at least close, you should have settled the case already or dropped it. If you do not have a 50-50 chance of winning the case, this article will be of little use in helping you win.)

Before you go to the courthouse, prepare yourself with the proper mental attitude. The right attitude should include reminding yourself many times that your client has been harmed through the negligence of another, and that your client is entitled to just, reasonable and fair **compensation**. You are not going to ask the jury to do something that the law does not justify or warrant.

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If you have asked for an unrealistically high sum of money in the ad damnum clause of the complaint, **before** voir dire begins, ask to amend the complaint to bring **down** the damages to a reasonable sum. If the ad damnum clause is outrageous, defense counsel will bring this to the attention of the jury in voir dire. Defense counsel will utilize your outrageous demand as but one example of the outrageous nature of the plaintiffs whole case. If the ad damnum clause is at least close to reality, you are a step closer toward the right impression.

From the moment you leave your office with your client until the moment you return at the close of business each trial day, you and your client should be very serious. You should assume

that jurors are everywhere, including in every passing vehicle on the way to and from the courthouse. If a juror sees either of you joking, the rest of the jury will hear about it.

Have your client dress appropriately. If the male plaintiff does not wear a coat and tie on any regular basis, do not ask him to wear a coat and tie to trial because his discomfort in such attire will give the wrong impression. Have him dress in a conservative pair of pants and preferably a long-sleeved shirt. A female plaintiff should dress as if she were going to church. Conservative dress is the key. After all, the jury is going to get its first impression of your client based upon the way he or she looks. The jury will also get its first impression of you upon the same basis.

"Discuss money as late as possible in voir dire."

Before voir dire begins in those moments while you and your client are in the courtroom and the potential jurors are in the back of the courtroom waiting for the court process to begin, advise your client to sit still, say nothing and look dignified. You will have plenty to do, and you should be busy at counsel table. Review the questions that you intend to ask in voir dire. Work on something and let the potential jurors see that you are a working lawyer. Do not carry on a conversation with the defense attorney in the presence of the jury. As a matter of fact, it is suggested that the jury never see you talking with the defense counsel in the hall or any other place at any time during trial. It is an adversary system to the jury, and if jurors see you on the one hand strenuously fighting your opponent, and on the other hand joking or conversing with him or her in the hall, they will not understand. Defense counsel may be your best friend, but never let the jury know it.

Plaintiff's counsel has the first opportunity to speak to the jury. This is a tremendous advantage. Early in voir dire, let the jury understand that what you are seeking on behalf of your client is justice and only what is fair and right under the law. Discuss money as late as possible in voir dire. Whatever you do, do not discuss money with the jurors early during jury selection. If you do, they may get the impression that all your client is interested in is money.

Avoid legal jargon during voir dire. Compare the question "If you find the defendant is liable, can you award reasonable damages to the plaintiff?" with the question, "If you find the defend-

ant is responsible for the injuries my client has suffered, can you vote at the end of this case that my client be **compensated** with a reasonable sum of money?" The jury, in all likelihood, would not understand the phrase "damages" as it is contemplated under the law, but everyone knows what "compensation" is. Use words throughout voir dire that do not require a fancy degree to comprehend.

Let the jury know that you are not seeking anything on the basis of sympathy. Beat the defense attorney to the punch and insist that the verdict rest not on sympathy, but on the facts and the law. The jury may begin to wonder just exactly whom you represent when you tell them that their verdict cannot be one based on sympathy, but your credibility will begin to be established.

Through your conduct and words, show that it is a serious case and an important case. Some defense attorneys will try to joke with the jury in an effort to make them feel the situation is not as serious as it really is. The best way to defeat this sort of tactic is to be very serious yourself and to convince the jury of the seriousness of the situation.

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In respect to creating a good overall impression, it is important to have a theme for the case. Pick an overall theme, something that is simple and logical that will have appeal to the jury. Jurors are lay persons; they do not think like lawyers. They are not trained to think like lawyers. They are good, ordinary citizens who come into court looking to do justice. Do not confuse them with complexities and attorney-like "legal" thoughts, but make a genuine effort at keeping the case simple. This is not to say that you should talk down to the jury, because you should never do that. Always "talk with" the jury. Stiff, formal words and legal jargon alienate rather than impress.

By the end of voir dire, the jury hopefully will have the impression **you** are credible. In opening statement, you should show your **case** is credible. It is generally recognized that the first twenty minutes of your opening statement will be the last time you have the attention of each and every juror for that long a period. If you do not create the right impression about the case in the first twenty minutes of your opening statement, you never will.

There are hundreds of articles and dozens of books that contain helpful hints on giving opening statements. Read as many as you can. You will begin to see a common thread among the recom-

mendations of experienced trial lawyers. The common thread is that your opening statement should be as short and simple as the case will allow and yet dynamic enough to conjure up in the minds of the jurors that an injustice has been done and appropriate compensation should be paid. Show that the plaintiff's version of this case as to the facts and injuries is reasonable. Do not exaggerate; it would be better to understate than to overstate the facts.

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Naturally, the impression your witnesses create has a great deal to do with the verdict. Most people believe that a person who does not look them in the eye when talking is not believable. Tell your witnesses to look at the jury, to speak up and to be honest. Interview all witnesses that you plan to call, and **insist** that no exaggerations be given, that they should not try to win the case singlehandedly. The role of each and every witness is to give honest testimony. There are, however, good ways and bad ways of giving honest testimony. Find out what each witness is going to say and how he says it before he says it to a jury, and consistent with honesty, clean him up when necessary.

Watch the jury as witnesses testify. Try to ascertain the impact of the testimony on the jury. Sometimes you can tell nothing by watching the jury. However, there are many instances where facial expressions reveal how the jury is thinking.

If you know there are bad points that your opponent will bring out on a cross-examination, bring them out yourself on direct examination. This further enforces your credibility and your case. The jury understands that you are not trying to hide anything.

On cross-examination, maintain the right impression with the jury by doing your job in an appropriate fashion. If you can bring out facts without being discourteous to the witness, the jury will appreciate it. Rarely does an attorney have to raise his voice or act discourteously toward a witness. It is only when a witness, through his own conduct, acts in such a discourteous or obnoxious manner that the trial lawyer is invited or justified in acting slightly similarly. The jury usually will believe that if you have to get angry or discourteous, the facts are not on your side. You should always bear in mind that there is nothing wrong with forceful cross-examination if that is what it takes to reveal the truth. The trick is knowing how to be forceful and not offensive—how to maintain the right impression.

When all of the proof is concluded you will

have either succeeded or not in creating the impression that you set out to create. Closing argument is not the place to create an impression. By the time you commence your closing argument, the jurors will be impressed or unimpressed with your claim. If your case is sound, if you have done things correctly to maintain the proper impression up to this point, then the closing argument simply is your final vehicle by which you launch the jury into doing what is right. Here is a golden opportunity to show the jury that you kept your promise to them and that indeed your client is entitled to a full measure of adequate compensation. Your closing argument should be consistent with the theme you selected long before you started trial.

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Creating the right impression with the jury involves many factors: having at least a decent case of liability, the plaintiff’s attorney’s acting like a lady or gentleman, keeping the case as simple as possible under the circumstances, talking with the jury and not down to the jury, presenting honest testimony in a logical manner, not asking for unreasonable awards, having an overall theme for the case and sticking to it. If there is a deficiency in any one of these factors, carry along an extra wrap to help fight off THE BIG CHILL.



**ABOUT
THE AUTHOR . . .**

Randall L. Kinnard is with the firm of Randall L. Kinnard & Associates in Nashville, Tennessee. A life member of TTLA and a member of TTLA’s Board of Governors, Randy specializes in representing plaintiffs in medical malpractice cases. He received his B.S. from the United States Military Academy and his J.D. from Memphis State University School of Law, where he served on the law review.

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