Top 39 Tips for New Litigation Associates and Trial Lawyers: How to Be a Good Litigation Attorney

Summary: You know how to dazzle the jury box with your closing argument. You know enough now to wing it, right, Icarus? Only if you want to crash and burn.

You've watched dozens of courtroom trials on the tube and on the big screen. You've watched The Practice, and committed most of it to memory, including the special features. You've been the star of moot court every year. You know to never ask a question in court to which you don't know the answer. You know how to execute a crushing cross of your opponent's star witness. You know how to dazzle the jury box with your closing argument. You know enough now to wing it, right, Icarus?

Only if you want to crash and burn.

What do you do when the person sitting at the other lawyer's table has 20 years trial experience to your 20 minutes? Well, short of slumping in your chair and going into the legal dumper, you can get up to trial speed quickly by adopting some of the same tactics those judicial graybeards are using to kick your butt. We've consulted with eight trial lawyers, some of whom were winning cases before your parents went on their first date. Listen up and find out their secrets. And after you've racked up a few big verdicts, the only thing you'll have to figure out is how gracious you're going to be in victory.

START NOW

1| Become a Courthouse Groupie

Call the clerks of the court, ask when the top attorneys will be in trial, and go study them. Former Judge Steven Johnson says, "I would go watch the greats in trial, civil and criminal, and study how they did it. Then when those cases went up on appeal, I'd read the original trial transcripts and sit in the mezzanine of the court and listen to the oral arguments. I learned a lot from them." Indeed, Johnson learned so well he became legendary as a successful St. Louis civil rights attorney and prosecutor before he went on the bench.

2| Get Perspective

If you plan to be a career prosecutor, first work as an intern for the public defender. "If you aim to be the next Clarence Darrow, start off as an FBI agent or assistant D.A.," suggests Don Roberts, a criminal defense attorney. "When you work both sides of the table, you learn the other side's strengths and weaknesses," says Roberts, who began his 43-year career as a prosecutor in the U.S. Army in Europe and
became a state prosecutor after returning home.

3| Pound Your Community Chest

Be a mensch who gives back more than a long billable hours worksheet. "Being part of your community also gives you a good reputation before the judges and jurors," says Roberts, who has served as the national vice president of Big Brothers Big Sisters, and was legal counsel to the St. Louis Urban League for 20 years and the ACLU of Eastern Missouri for 25 years.

BEFORE THE TRIAL

4| Become a Boy (or Girl) Scout Again

Remember the Boy Scout motto? Heed it. "I may not be smarter than the other attorney or as quick on my feet, but I can out-prepare him and win," says Joe Mosk, partner in Woodstock, Illinois, near Chicago. The more you know, the more confident you'll appear.

5| Read, Read, Read

"Reread your petition and research the law, so you know what you have to prove," says Ted Horowitz, a member of the College of American Trial Lawyers and a plaintiff's attorney with 50 years' experience in negligence actions.

6| Line Up Your Ducks

"Review and summarize all the depositions so you know exactly what everyone has to say," says Horowitz. Dictate a summary of each page with the page number so you can refer to it during the trial.

7| Be a Know-It-All

"In an appellate case, know the record cold or it's malpractice," says Floyd Abrams, a senior partner at Cahill Gordon & Reindel in New York and author of Speaking Freely: Trials of the First Amendment. "An appellate lawyer should never put himself in a position where he must tell the court, 'I wasn't the trial lawyer and I don't know the answer.'" You should be prepared to answer every question the judges ask you.

8| Go Back to School

"Don't be too proud to get more court cred. I've hired doctors to teach me," Horowitz says of his medical malpractice cases. The same amount of prep work goes into his product liability trials: "I read every article I can find on the product."

9| Know Thy Enemy

"Step back and look at the case the way your opponent does. Then repeat the process before you walk into court," advises a family law specialist in Rockville, Maryland, and Washington, D.C. If you know how the other side thinks, you can have an answer when the trial shifts.

10| Stay Informed

"When I have a trial out of town, I subscribe to the local dailies and listen to the radio stations," says a litigation partner at Latham & Watkins, in Washington, D.C., and a former counsel to the U.S. Attorney's Office. You have to understand where the jury is coming from and how you and your evidence will appear to them.

PREPPING CLIENT AND JURORS

11| Just the Facts, Man

"Get your witnesses in the habit of answering the question and only that question," Horowitz says. A voluntary statement from the witness will create new territory for your opponent to exploit.

12| Start Strong, Finish Stronger
"Open with the strong witness," adds Horowitz. Sandwich the slow stuff in the middle, and always end each day with the most impressive witness of all. You want to send the jurors home with a bang.

13| Teach Your Client Well

"Educate your client about what winning is," says an attorney who spent the first 20 years of her career specializing in school desegregation and labor and employment litigation. Too often they think only a big jury verdict is winning. Sometimes, the client wins if you settle.

14| Lose the Bling

It isn’t hip for clients to flash bling in front of a judge or a working-class jury. "Cover tattoos with long sleeves," Horowitz says, "and have your client lose his mustache, little goatee, or ponytail."

15| Wear-withal

"Borrowed clothes don’t fit well," Horowitz says. "Leave the diamond stickpins, alligator cowboy boots, and other signature raiment to the marquee names known for it." Adds Pulliam: "You are who you are. You are not who your clients are. Some lawyers think they’re special because their clients are important people. All clients are important if you chose to enter into a relationship that is honored and protected by the law."

16| Community Cred

"When I try cases in any location other than my own [especially in small towns], I always go into the courtroom with the best or most credible lawyer in that community," Roberts says. "The local counsel enhances my credibility in the beginning, from the voir dire." This tactic helped Roberts, a big-city lawyer, win big in Lafayette, Louisiana, when the federal judge appointed him lead counsel for 30 defendants in a big drug case and he walked his client along with 27 other men.

DURING THE TRIAL

17| Swear Tactics

"If my client is African American and the jury pool comes from a racially polarized community," says Roberts, "I ask during voir dire if they can take the oath to treat the defendant fairly, even if they admit to being a little prejudiced. I remind them of that commitment when they go to the jury room to deliberate."

18| Gut Feelings

"During voir dire if some guy makes you so uncomfortable that you wouldn’t want to go have a beer with him, keep him off your jury panel," Horowitz says. "You want only sympathetic jurors. Trust your instincts."

19| Do You Hear What I Hear?

"Ask the jurors, Can everybody hear me?" Horowitz says. "Lots of times the jurors don’t even realize they’re uncomfortable because they can’t hear you or your client. As a result, they become irritated and unreceptive to your case."

20| Make It a Chat Room

"Keep it conversational," Horowitz says. "Know your case well enough so you don’t have to read your opening statement or closing argument." The worst thing is to read questions to a witness. "But do keep a checklist of questions for each witness," adds Horowitz, "and make certain you’ve asked them all before you dismiss him."

21| Look for an Opening

"Never waive an opening statement. You need to win on that, especially in domestic violence cases or family law," Mustille says. "If you are representing the defendant, you cannot afford to give up that first impression after the plaintiff’s attorney or prosecutor has made your client look bad. The judge is predisposed on first impression. You need to set a framework, to give the judge a filter by which to hear the case on your side."

22| Prove It All Day
"Don't make claims you can't prove. You'll lose credibility with the jurors and the judge," Smith says. "You have to be honest."

23| Lie Detecting

"The facts are gossamer by their nature," Abrams says. "It's absolutely essential to know all the facts and the non-facts, too, the false statements. You need to be able to predict as best you can everything someone might say. People frequently say one thing to the police and another in a deposition or in your office, or in trial even if it's not deliberate. People remember one way at one time and another way at another time. "If your witness contradicts himself, don't look surprised," Abrams says. "But when the other side's witness does it, look stunned."

24| Human Capital

"Jurors are won over by humans, not abstract legal concepts like the First Amendment. Your job is to make the jurors want your guy to win," Abrams says. "If your guy is a publishing giant, focus on his days as a reporter in the field."

25| Swing Back

"If your opponent is mocking or intimidating you, stand up and strut your stuff," Abrams says. "New practitioners are often timid," Mustille adds. "When pressed, they shut down. You have to ask the court for everything. Whether you get it or not, what's important is the confidence you show. It's your credibility as a lawyer. Why should the judge or jury take your case seriously if you don't? Act bold not brash even if you don't feel it."

26| Mum's the Word

"If you remain silent, the opposing counsel and his witness will fill up the space, often to his or her detriment. When you're winning, be quiet," Mustille says. Do not object; do not argue. "When the judge is on your side, zip it and let him or her talk," adds Mosk. "It's a very difficult lesson to learn, but keep quiet after you've won. Same thing in marriage," he says after 51 years of living happily with wife number one.

27| Control Your Temper

"Never ever blow up in court," Mustille says. "Whenever my opponent is rude and raises his voice, I refuse to take the bait and look bad. I lower my voice and speak more slowly. The louder he gets, the softer I become. When he loses sight of the other side, I win."

28| Don't Control Your Temper

"Displaying anger only works when it's calculated and when you feel you can righteously exhibit ire that jurors must feel as well, like when you catch a witness in a lie," Smith says.

29| Don't Become a Lawyer Joke

"Never sound like a lawyer," says Smith. "Drop the legalese. Also, always talk to the jurors in a respectful, polite manner."

30| Respect the Judge

Never argue with the judge on rulings. Horowitz remembers the contentious defense attorney in a personal injury case, who so irked a timid jurist that he shouted out, "Sit down and shut up." Result: She got wiped in the verdict. Jurors pay attention to how the judge reacts to lawyers.

31| Hang the Judge

Every lawyer has heard stories about bullies in black robes humiliating attorneys in front of their clients. "It's an occupational hazard," Abrams says. "It's happened to me, and it's happened to a lot of lawyers. You can't take the judge personally. You haven't failed because he's yelling. Act as though you're not afraid of him. Walk the difficult line between zealously defending your client and not angering the judge more than is necessary," he says. "Try to align yourself with the jury against the judge," Abrams advises. Nasty judges can antagonize jurors, too."
32| Get Over Yourself

"Your main client is your client, not your career," says Pulliam. Adds Abrams: "Keep reminding yourself this isn't a clash of egos, but a carefully structured battle. You have to do everything you can for your client, even if you look bad in doing it."

33| Learn a Little Judo

"Use the other side's momentum against them like judo," says Mustille, who has a black belt in the martial art. "When your opponent is rushing toward you in judo, you roll down and use their energy to toss them over your shoulder. The same principle applies in court. If the other lawyer is using a lot of momentum, let him go overboard. He'll overstate his case and lose credibility with the judge."

34| Win an Oscar

"If the opposing counsel's witness perjures himself, look to the judge and jury to enforce the rules," Smith says. "Argue the law to the judge and argue the facts to the jury. For example, if the defense lawyer violates the rape shield laws, remind jurors how unfair that is."

35| Stiff Upper Lip

"A trial is never the time to forge a relationship with one's opponent unless it's useful to win your case," Abrams says. "If the jurors see or hear you and the opposing counsel chatting and laughing in the hall during recess, they'll think you're insincere," Horowitz says.

36| Stiff Lower Lip, Too

"Don't do a Letterman or Leno imitation for the witnesses. It deflates your case and infuriates the jurors," Horowitz says. "Once a defense lawyer joked with the victim in a case about how good his sex life was after receiving a penile implant. You could see the jurors get mad. The defense lost millions."

37| The Soft Sell

"Get what you need from the witness and get out," Horowitz says. "The second and third time a lawyer goes over the information, the jurors get bored." Adds Smith: "And the jury will question your integrity if you oversell your case."

AFTER THE TRIAL

38| Make Tracks

Once you've won, pack up and leave the courtroom as quickly as possible. "One lawyer won his motion," explains Mustille, "but instead of heading for the double doors, he schmoozed with other lawyers in the back of the courtroom. In the middle of Mustille's presentation, the judge spotted the winning lawyer and called him back. The judge peppered him with questions, then changed his mind. He wound up reversing his ruling."

39| Learn to Dance

"Even good lawyers can be stumped. Avoid looking flummoxed by developing a theme for your case and at least three soft shoes to support it. Whenever you're stumped, those three ideas [stall tactics] can buy you time until you can come up with something," Mustille says. "I was a newbie working for a partner in Los Angeles and had to take his case to L.A. Superior Court, known as 'Divorce Central,'" she says. "When I walked into a motions hearing, the opposing counsel walked over to my side of the table and slapped down some papers. 'You ought to read this,' he said and walked back. I took one look at the papers and panicked. Fortunately, the judge wasn't on the bench, so I bolted into the hall and called my office."

The partner asked me, "What shoes are you wearing?"

"Black heels, why?" I said.

"Do a little soft shoe."
"That's it?" I asked.

"Yup," he said.

"It was very scary," she says. "But when I walked back in, I had an idea. The judge was on the bench and the opposing counsel was explaining that he had an out-of-state order that would end this case. I approached the bench and said, 'Your honor, how do we know this is a real order? It's not certified.'"

Mustille says she didn't have a clue whether that order needed to be certified or not and neither did the judge. "But it was good enough to get me a continuance, and that gave me enough time to turn around the case. That taught me always to walk into court armed with three soft shoes."

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