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Working without notes can be recipe for disaster

By: F. Dennis Saylor IV and Daniel I. Small March 3, 2016

It should be obvious that, to try a case properly, you have to do a lot of planning and can't just make it up as you go along. It also should be obvious that you can't possibly carry around in your head everything you need to know.

How, then, should you approach the task of organizing your presentation? And what materials should you have with you, at counsel table and at the podium, to help you?

There are four basic choices:

1. No notes

2. A barebones outline

3. A detailed outline

4. A script

Each option has passionate adherents, and whichever you employ, someone is bound to criticize your choice. Dan Small prefers to use a detailed outline; Judge Saylor thinks a script is the better choice. (Both will be explored in upcoming columns.)

We agree, however, that it's a bad idea to work without notes of any kind.

The argument in favor of a no-notes approach goes something like this:

Your presentation should feel fresh and spontaneous. You want to make a human connection with the jury, and your notebooks and papers and laptops just get in the way of that. Jurors don't care if your presentation is technically perfect; they do care if it is lifeless. Plus, the jury will be very impressed if you do it without any notes.

At first blush, that may sound attractive, even seductive. But beware. Hardly anything does more damage, in more cases, to the cause of effective persuasion than this stubborn insistence on extemporaneous speech.

In a trial with any degree of complexity, the no-notes approach is almost always ineffective, and sometimes disastrous. There is simply too much to remember. It is particularly ineffective in closing arguments, at which the lawyer has the most to say with the least amount of time in which to say it, and therefore tight organization and careful word choice are critical.

Cross-examinations made up on the spot may look good on TV, but in real life they are likely to be ineffective and disorganized.

As for freshness and spontaneity, your choices are not limited to (1) fresh but disorganized, or (2) organized but dull. You can be organized and still make it sound fresh.

And as for impressing the jury, you aren't there to show off your prodigious memory or your skill at extemporaneous speaking. You're there to win.

Some lawyers use a barebones outline, or rough notes, so that they aren't doing everything completely from memory. Certainly a barebones outline is better than none at all. You use a list when you go to the grocery store; surely trying a case deserves as much. But a trial normally involves a myriad of details, and it's almost as important to keep the details straight as the broader points.

Simply put, the wording and order of questions and arguments are too important to leave to chance and memory. If you are making up every question as you go along, the quality of the questioning is bound to suffer.

The same goes for openings and closings; it's not exactly an ideal time and place to be searching for the right words and phrases.

Finally, some lawyers say that it's wrong to take a "one-size-fits-all" approach, and that each lawyer should do what suits his or her skills best. That's true, to a degree.

The point is to produce the best, most effective presentation you can under the circumstances. How you do that is ultimately up to you. If there's another approach that works better for you, use it. But it is a fact that too many trial presentations are terribly disorganized and repetitive, and that many lawyers fumble when they make up their questions on the spot.

Vincent Bugliosi, who prosecuted Charles Manson and later wrote several bestselling books, described his practice this way:

"Although the clear trend in the legal profession is toward fewer and fewer notes, … I do the opposite, almost to an obsessive, perhaps even unnecessary extreme. … The standard explanation of lawyers who religiously avoid the pain and agony of the yellow pad is that if a lawyer does all that preparation and has everything written down, he can't be flexible, and can't think on his feet when something not covered by his notes occurs. If that's not a classic non sequitur, I don't know what is. Is instant improvisation and flexibility the domain only of those who are unprepared?"

Let's be clear: It's a lot more work to try to lay everything out in advance. Lawyers are often very busy, and there simply may not be enough time in the day (or enough client funds to pay for that time). Such is life; you have to do the best you can under the circumstances.

But time also can be a convenient excuse. Ask yourself if you are using no notes because you truly believe that your presentation will be better without them, or because you just don't want to spend the time needed to create effective notes. If you have the time, or can make the time, there's no reason not to try to get it right.

In short, working without notes almost always leads to a disorganized presentation. It's a bad idea; don't let anyone talk you into it.

Previous installments of Tried & True can be found at masslawyersweekly.com. Judge F. Dennis Saylor IV sits on the U.S. District Court in Boston. Prior to his appointment to the bench, he was a federal prosecutor and an attorney in private practice. Daniel I. Small is a partner in the Boston and Miami offices of Holland & Knight. He is a former federal prosecutor and teaches CLE programs across the country.

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