

## Scripting the trial

By: F. Dennis Saylor IV and Daniel I. Small ◉ March 25, 2016



Our March 7 column noted that there are four basic options for organizing your trial presentation: no notes, a barebones outline, a detailed outline or a script.

Judge Saylor's view is that a script is almost always preferable, provided that you observe some important limitations. Dan Small prefers a detailed outline and will explain why in the next Tried & True installment.

This week's column goes to Judge Saylor ...

In my experience, scripts almost always work best. Just to be clear: by "script," I mean writing out every single word of your opening, your questions, the anticipated answers and your closing. In advance.

The arguments for a script go something like this:

1. Trials are complex affairs. It is not possible to produce a tightly organized, carefully constructed, thoughtfully worded courtroom presentation without substantial advance planning and one or more organizing documents. You need either a detailed outline or a script; the only question is which.
2. The words that you use are almost as important as the substance of what you have to say. A script gives you an opportunity to think carefully about, and polish, the specific wording of your questions and arguments.
3. It's hard to think on your feet under the best of circumstances. The more you have thought out (and written out) in advance, the better off you will be.
4. It's easier to think about issues such as pacing and delivery once the specific words and the order of presentation have been thought through.
5. Jurors and judges complain constantly about lawyers who are inefficient and disorganized. Anything that is made up on the spot is likely to contribute to that problem.

Lawyers who advise against using scripts usually say one or more of the following:

- Scripts are flat and boring.
- Reading from a script is tedious.
- Scripts are inflexible.
- Witnesses lose credibility when their answers are scripted.
- You'll be tempted to read from it, even when you know better.

Let's examine those arguments in detail.

### **"Scripts are flat and boring."**

This is simply not true. The easiest way to illustrate the point is to consider examples from outside the courtroom.

"Romeo and Juliet" is just a script. It was written in about 1595, in Elizabethan English — and it can move modern teenagers to tears. Great movies, too, are based on scripts. Every year, Academy Awards are presented to the writers of the best screenplays.

Abraham Lincoln delivered the Gettysburg Address from a script. He did not write it down, as legend has it, on the back of an envelope; he polished it for weeks beforehand.

The great wartime speeches of Winston Churchill were delivered from scripts. The first part of the "I Have a Dream" speech by Martin Luther King Jr. was delivered from a script (the second part was based on speeches and sermons that King had delivered for many years and had committed to heart).

Scripts, then, have a pretty decent pedigree. A script is boring only if (1) it's written that way, and (2) it's delivered that way. Of course, trials are not plays, or movies, or political speeches. But the basic point remains the same.

### **"Reading from a script is tedious."**

Of course it is. So don't do it.

A script can't just be written; it has to be delivered. That does not mean performing like an actor (although there are parallels). But it does mean using your voice, your facial expressions, and your physical movements to make it sound interesting and persuasive.

Indeed, you can script your delivery, at least to some extent. But make sure the delivery sounds natural and that it suits your personality and voice.

Don't, however, memorize your script. You're not a professional actor, and it won't sound right.

Put the script in a three-ring binder, and leave the binder open on the podium or table where you can see it. Use a font that's large enough so you don't have to bend over or squint. All you have to do is glance at it from time to time. You know what's in there; you wrote it. Don't worry about following it verbatim. Minor variations rarely matter.

### **"Scripts are inflexible."**

It is certainly true that a trial is dynamic and somewhat unpredictable. Witnesses say unexpected things; opposing lawyers make unexpected arguments; judges admit or exclude evidence, or sustain or overrule objections, in unexpected ways. No script can take all of those twists and turns into account.

That simply means that a good lawyer will always have to think on his or her feet, no matter how well-prepared. A script will minimize the amount of extemporaneous speech, but can never eliminate it. But if the script somehow interferes with the ability of the lawyer to be flexible, the problem is not the script but rather the lawyer.

In any event, the "inflexibility" problem tends to be overstated. In an era of extensive discovery and pretrial disclosure, true surprises are not all that frequent. And some trial events are pretty easy to predict.

For example, opening statements almost always go exactly as anticipated. And if you organize it properly, your script can be relatively easy to adjust on the fly.

### **"Witnesses lose credibility when their answers are scripted."**

This is true. The solution is easy: Don't give your witnesses a script.

Certainly you will need to write down (for your own benefit) what you expect the witness will say. If the witness forgets something, you will want to refresh her memory, and if she gets a detail wrong, you will want to take care of it.

And you need to prepare your witnesses. But your witnesses should not be working from a script. Don't give one to them, even if they ask.

### **"You'll be tempted to read from it, even when you know better."**

This, too, is true. Some lawyers just can't resist the temptation to read from the script. Others remember to use the right voice and inflections, but look down at their notebook far too often.

If you don't maintain discipline, your presentation will suffer. That's true for scripts. But it's also true for detailed outlines. And when lawyers using a detailed outline break discipline, they don't just put their heads down in their notebooks. They also ask poorly worded questions, and they especially tend to ask leading questions on direct.

Scripting your presentation won't solve all your problems, but it will give you a big leg up. You're much more likely to give a clear and concise presentation, in the right order, and with the right word choices, if you've laid it out as much as you can in advance.

But don't just read the script. Deliver it in a way that is interesting and persuasive. Be disciplined. And be flexible, because no matter how much you prepare and plan, things are bound to change.

*Previous installments of Tried & True can be found at [masslawyersweekly.com](http://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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