

At trial, less is more

By: F. Dennis Saylor IV and Daniel I. Small ○ July 14, 2016

Good trial lawyers necessarily immerse themselves in the details of their cases. But as trial approaches, the process must be reversed. Just because you spent a lot of time and effort learning something or developing it in discovery does not mean that it's important.

In the words of the minimalist architect Ludwig Mies (borrowed, apparently, from the poet Robert Browning): "Less is more." To Mies, the phrase meant producing "the greatest effect with the least means." (Time, 1954). To the trial lawyer, it means more or less the same thing: To maximize the impact of your most important evidence and arguments, minimize everything else.

The need to eliminate unnecessary detail and "noise" is not limited to the length of your questions and arguments. It applies across the board to everything that happens at a trial.

Work constantly to use fewer words, ask fewer questions, call fewer witnesses, and offer fewer exhibits. That does not mean lightly skipping over important points or eliminating all detail. If it matters, leave it in. Otherwise, get rid of it.

It isn't enough to get rid of the things that are completely unnecessary. You also have to eliminate things that are marginally relevant or that you don't really need to win.

That's harder to do than eliminating mere "noise." And it runs counter to the instincts of many lawyers, who tend to be cautious, thorough and meticulous by nature. While those are good qualities in many contexts, in the courtroom they can result in a presentation that is deadly dull.

Consider, for example, why so many trials are so much longer than they need to be. Why do lawyers introduce so many unnecessary exhibits and ask so many unnecessary questions? Why do they obscure their best arguments with marginal, or even trivial, ones? If you ask, you often get some version of the following:

I wanted to make sure the record was complete.

I wanted to make sure that I had covered everything.

You never know what the jury might latch on to.

You never know what the court of appeals might think was important.



Work constantly to use fewer words, ask fewer questions, call fewer witnesses, and offer fewer exhibits. That does not mean lightly skipping over important points or eliminating all detail. If it matters, leave it in. Otherwise, get rid of it.

If your object is to persuade people, adding things simply "for the record" is normally a bad idea. In a trial of any complexity at all, you have to make choices about what to put in and what to leave out. You can't put in everything, or you will obscure your message, frustrate and bore the jury, and exasperate the judge. Often, that involves very difficult choices. But you aren't there to cover your own rear end; you're there to win.

Sometimes, of course, you do have to make sure the record is complete. As a prosecutor, Dan Small once forgot to ask his witness about a relatively minor but essential element of the crime: the interstate commerce nexus. On a motion for directed verdict, only a fleeting reference discovered by chance in an exhibit entered for another purpose saved his case.

Sometimes, too, the details are critical, and they take time to develop. For example, if the case turns on scientific and forensic evidence found at a crime scene, you may want to be very thorough indeed. And if the point is truly important, you want to make sure that it has sunk in.

Too often, though, the lawyer is simply piling on evidence for no real purpose. If all you are trying to do is establish that a meeting took place, you probably don't need to offer every conceivably related document — such as the email suggesting the meeting, the email agreeing to the meeting, the email setting the time of the meeting, and the email ordering donuts for the meeting.

Just ask the witness, "Was there a meeting?" If the witness says "yes," that's probably all you need.

When you're constructing your case, think of yourself as an aircraft engineer, eliminating all the excess weight, ounce by ounce, to make the plane fly faster and more efficiently. Every ounce that isn't necessary is simply weighing you down.

Previous installments of Tried & True can be found [here](#). 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.

Copyright © 2017 Massachusetts Lawyers Weekly

10 Milk Street, Suite 1000,

Boston, MA 02108

(800) 451-9998