

## Some parting thoughts as we wrap things up

By: F. Dennis Saylor IV and Daniel I. Small    September 27, 2018

After more than 70 columns, we're running out of things to say — or maybe anything new, or interesting, to say. Plus, we're always saying that lawyers should keep things short and simple, and we've violated that advice enough already. So it's time to wrap things up.

What do we have to say as a farewell message? Basically, what we've already said in dozens of different ways. Be prepared. Be organized. Streamline your case. Know the rules and follow them. You're not there to show off; you're there to persuade.

Persuasion is the key concept; that's your entire job. To persuade people, you need to explain things. Often, you need to do some teaching along the way, so that the jurors understand the meaning of what they're hearing. You can't win if the jury doesn't understand your case. And you need to make sure the jurors are listening — that they're engaged and not bored, drifting off or irritated.

Much of our advice may seem simplistic, even absurdly so. Of course you want to persuade the jurors. Of course you don't want to confuse them, or annoy or offend them. But the fact is, lawyers often don't follow even the most basic, common-sense principles.

Let's take our advice that you should try to tell the story whenever possible in chronological order. That seems obvious enough. But Judge Saylor recently presided over a trial in which one of the lawyers failed to do exactly that. The facts of the case were somewhat complicated, and each witness could present only a small portion of the story. To make matters worse, the lawyer frequently elicited testimony that seemed to come out of the blue, without any effort to tie it to the larger picture.

OK, sometimes that happens. Trial testimony may be a little disjointed no matter how hard you try. That's why we have closing arguments.

But instead of pulling everything together — instead of telling the basic story of what happened — the lawyer's closing was all over the map. He spent a lot of time exhorting the jury in general terms: do the right thing, use common sense, don't be fooled by the other side, and so on. He argued about this and that: why this witness wasn't credible, why that exhibit didn't really matter. He wasted time on trivial issues. He flashed a lot of anger when talking about the other side. But he never got around to telling a clear, chronological story — a basic description of the facts.



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After the verdict, Judge Saylor went back and spoke with the jurors. One quickly raised his hand: "Can I ask a question? [Lawyer X] didn't go through the facts in chronological order. Was there some reason for that?"

Well, that's a pretty good question. Now, to be fair, that lawyer's client won the case. It deserved to win, based on the facts. And that's all the more reason that a chronological description of those facts should have been the centerpiece of the entire presentation. Maybe the lawyer won because of the way he framed his presentation; it is impossible to say for sure. But at least one juror voted his way in spite of it.

In another case in front of Judge Saylor, the closing arguments in a complicated matter were surprisingly short and perfunctory. Afterward, the jury was out for several days, somewhat to everyone's surprise. When the judge went back to the jury room after the verdict, he noticed large sheets of paper, covered with black marker, taped up on

the walls. On the paper were chronologies, lists, outlines and the like. One of the jurors remarked: "The lawyers didn't really go through the evidence in their closings, so we felt we needed to do it ourselves."

Good for them. They took their responsibilities seriously. But they never should have been put in that position. It's the job of the lawyers to "go through the evidence"—to explain what happened and why it mattered. Failing to do that may not be legal malpractice, but it's close enough.

So that's why our advice is sometimes very basic. To quote the lawyer in the first case, use your common sense. It will take you a long way.

Before we close, we want to make two quick final points:

First, trial work is by nature a competitive and combative enterprise. Certainly nobody wants to lose. Some lawyers, such as prosecutors and other government lawyers, have a special obligation to do justice, not simply to win cases. But all lawyers have a duty to uphold the law. No matter what, never let your competitive instincts override your legal duties or your ethical obligations — or, for that matter, basic human decency. There are plenty of things more important than winning.

Second, it takes discipline and a lot of hard work to be an effective trial lawyer. That's the bad news. The good news is that discipline and hard work will take you a long way. It's pretty easy to learn the basic skills, and even the advanced skills aren't all that difficult to master. Though it takes natural talent to be a truly great trial lawyer, learning to try cases isn't nearly as hard for most people as, say, learning to speak fluent French or to play the violin.

Anyway, as Mae West supposedly said: "I never said it would be easy. I only said it would be worth it." **MLW**

*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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