



Civil Lessons From Criminal Trials

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Criminal trials are trials by ambush, mostly, with little to none of the traditional discovery we expect in civil trials. Ambush --- preferably as the ambusher, rather than the ambushee --- makes criminal trials more exciting, but also a little scary. Fortunately, we can apply principles from criminal trials to your civil cases, points that will make arguments robust, score points with the jury and develop a good record for appeal.

Lesson 1- Early Investigation: Knowledge is Power

The Government is always ahead of you in a criminal case. Urgency is the hallmark of a good criminal defense lawyer. Don't let the luxurious time-lags in civil lawsuits to lull you into complacency. As soon as you read a complaint, identify all fact witnesses and develop a strategy for interviewing them.

There's little discovery in criminal cases. There's no need to wait on discovery in civil cases. Determine the various liability and damages issues you face and identify the witnesses whose testimony will have the most bearing on those issues. Will liability or damages hinge on the cause of death? Will it be important in the liability phase to know if a plaintiff was on her cell phone when an accident happened?

Send an investigator out immediately to interview those witnesses, obtain reports and photographs and check the files of public agencies.

Based on the rules about discoverability of statements, consider whether to have your investigator take statements.

After your investigator has talked with all of the

witnesses, decide which ones you should personally visit. If someone has the potential to be an important witness in the case, you will want to assess their credibility personally. If their testimony is important to your client, they are more likely to give testimony in a deposition that is consistent with their previous statements if you personally interview them.

Take control of the deposition schedule and set the tone for the case by taking the depositions of the witnesses that are good for your client first. All depositions are trial-depositions --- even if they serve some additional purpose.

If you know that certain facts may come out later that may dilute a witness's testimony, get them deposed before the other lawyers wise up to those facts.

Lesson 2 - Identify sensitive evidence early on

In a criminal case, the grand jury is a powerful, one-sided discovery tool for the Government. They have the bad stuff before you do.

In a civil case, are there emails you are worried about? Is there a witness who may hurt your client? Are there damning documents? Figure out your approach now, as though you adversary already has them.

Doing a thorough investigation, interview of your client, and review of internal documents can help identify these potential problems early on.

Early action is particularly important if you are considering a "document dump" production. If there are emails you are worried about, you want to take a hard line on all of those communications so that you don't waive the right to object to producing them later.

Lesson 3 - Burden of Proof

Criminal defense lawyers use burden-of-proof and the Constitution all the time. Civil lawyers often forget them.

Depending on your position in the case and the causes of action/affirmative defenses alleged, never miss an opportunity to let the jury know that the other side is solely responsible for proving their case.

Use graphics to remind the jury of the burden --- football field, bridge, puzzle, etc.

Tell the jury why you expect the evidence will show the other side can't meet their burden of proof. Also, remind jurors that you don't have to offer witnesses or evidence if your opponent doesn't his or her burden.

Cross-examine adverse witnesses to demonstrate the elements of their case they cannot prove.

Frame the burden of proof in a manner that leaves the jury with no doubt that because the other side chose to file a lawsuit or assert a defense does not make the allegations true, and they have to prove them- you don't have to disprove them.

Let the burden of proof help you organize your case for trial. Don't spend a lot of time and money developing witnesses who clutter up the evidence at trial and don't fit into your burden of proof theme.

Lesson 4 - Make your case about the other side

Criminal-defense lawyers often put on no affirmative case at all. Put yourself in the same mindset.

Like everyone, jurors are impatient and have short attention spans. If you wait to make the points you want to make in your case until the moment the case is turned over to you, it's too late.

Weave your case themes into your cross-examination of the other side's witnesses

Shift away from a destructive cross to a cross designed to get their witnesses to agree with you.

An "agree, agree, agree" may not be possible for every witness, and some you will just have to discredit. But others may be credible, or a jury may like them, and you want to get them to agree with some of your points.

If you can establish points of common ground with the other side's witnesses, do so. You will narrow down the issues and facts the jury has to consider --- and the jurors will like you more.

If there are certain reports, audits, checks, emails, letters or photographs that you want to make sure go back with the jury, getting them in with the other side's witnesses is a great way to give yourself some flexibility in presenting your own case.

For example, if you really want to get an email in that is between a witness for the other side and one of your corporate witnesses, but you don't really want to put your witness on the stand because they are not likeable or are subject to a brutal cross, get the email in through the other side's witness.

This practice also allows you to discuss, in closing, how the documents that are important to your case were introduced through their witnesses.

Criminal cases can be knife-fights. Don't go to extremes in your civil case, but get more personal in your opening and closing arguments.

Lesson 5- Your Witnesses and a Cost/Benefit Analysis

Nobody is righteous in a criminal case. Every witness comes with a cost to his or her proponent, no matter how sympathetic the witness is as a person. A cost/benefit analysis is particularly important in deciding what witnesses to present in your case.

If you have gotten as much evidence in as possible through the other side's witnesses, you should identify the remaining documents that need to be admitted and determine what witnesses are needed to admit them through.

Determine what themes you did not get to explore or fully develop on cross, and present witnesses who can talk about those themes. Or, did you get everything in on cross?

For each witness you consider calling in your case, weigh the possible benefit they provide against the harm they could do to your case through cross examination.

Witnesses who are tied to sensitive correspondence and documents should be carefully and critically

considered, as the other side will get a chance to revisit those harmful documents and undo the good points you made about the document when it was presented through their witness.

Lesson 6- Embrace Bad Facts

In a criminal trial, ties go easily to the defendant. In civil cases, if there are bad facts or documents that you have to produce, and cannot keep from the jury during trial, embrace them. Fight to a standstill, and you may win the point.

This may mean introducing such documents or facts in the other side's case in chief, or bringing them up in your opening statement.

Find ways to take the sting out of these documents.

Lesson 7- Pay Close and Deep Attention to What is in Evidence

The Government in a criminal case often gets a free ride on evidence. In your civil case, make a chart of the testimony and documents the other side has to present in order to carry their burden of proof on their complaint or affirmative defenses.

During the trial, keep up with every document they put into evidence, as well as the points their witnesses make in direct testimony and cross, and list those under each element they have to prove.

If the other side did not get in a critical document they need in order to prove an element of their case, then you should be careful not to admit it in order to have a good record on appeal.

Keeping up with the evidence will also allow you to clearly see what the jury has seen, and what holes may need to be filled in by your witnesses.

Lesson 8 - Develop a strategy for dealing with multiple defendants

In criminal cases, prosecutors can sometimes convict multiple defendants in multi-defendant cases just through guilt by association. This tactic is less common in civil cases, but still happens.

Learn as much about your codefendants as you can early on - their relationship with your client, their strengths and weaknesses, etc. and determine what

kind of relationship you want to have with them.

If it is not necessary to turn on your co-defendant, don't do it. You will be fighting two opponents instead of one.

Developing your co-defendants' trust and finding ways to align their interests with your clients' will make it easier to coordinate cross examination of witnesses and the presentation of all of the defendants' cases.

For example, your codefendant's lawyer may be just the person to handle a particular plaintiff's witness on cross, and you want to be in a position to help him score points for your client in addition to his own.

Lesson 9 - Humanize the Business.

Criminal lawyers present the human side of their client as much as possible to the jury. While a large corporation trying to avoid a seven-figure verdict doesn't seem to have much in common with a family man fighting for his freedom, there are ways to make your client seem more relatable to the jury.

Do not wait until your case in chief to start telling this story.

Take every opportunity during opening statements and cross examination to let the jury know why your client's business does what it does, how it started, who started it, how it serves its customers, and who the human beings are who run it.

If the case is about a particular product your client makes, consider whether it's possible to present a witness at trial who was an integral part of inventing that product. If the case is about a denied insurance claim, try to find a good witness who was involved in that decision and can be presented as someone who cares about the companies customers and works hard to make sure the company serves its customers well.

If it's possible to have a good corporate witness at the table with you every day, do it (unless you do not want them to be called in the plaintiff's case).

Lesson 10 -- Never, never, never give up.