

For the Young
Defense Lawyer

By Lana K. Alcorn

No matter the amount of preparation—expect the unexpected.

Ten Things I Wish I'd Known before My First Trial

All young lawyers dream about their first jury trial. No older lawyer can ever forget his or hers.

For a young lawyer, your first jury trial is one of the most frightening and exciting things you'll ever do.

After months—and often years—of spending endless hours doing case investigation, reviewing documents, taking and defending depositions, writing motions and briefs, trial time arrives at last. Your hard work *finally* pays off. All you need is to follow your trial plan (which is very prepared, highly organized, color-coded and exceedingly brilliant... if you do say so yourself). With all your skill and just a little luck, you're destined not only to win, but to *dazzle*. You're certain to be the next Clarence Darrow!

For the older lawyer, the fear and excitement of that first trial—regardless of the outcome—never fades away. Neither does the stinging “list” of the things that you know *now*, but wish you'd known *then*. I certainly have my own list, which I am sharing in the hopes that your own list will be much shorter. So here it goes... the top 10 things I wish I'd known before my first trial:

Number 10: I wish I'd known how differently each judge handles jury selection

and how fast jury selection happens. To be effective, you need to understand fully how your particular judge will handle this process so that you're not caught off guard and unable to screen the potential jurors in your case properly. How big is the venire? Does the judge have “standard” questions that he or she asks the venire first? Is there a time limit on *voir dire*? Are there any subjects that are off-limits (*i.e.*, religious affiliation)? Are there subjects that can only be inquired into via a written juror questionnaire? How does he or she handle challenges? How long does he or she give you between strikes to make your next decision? The best way to prepare is to get a full description of the judge's jury selection procedures and to go watch your judge do jury selection before you have to do it in your case.

Number 9: I wish I'd known to be prepared to argue a Batson Challenge. Although we all hear about such challenges in constitutional law class during law school, dealing with them in the real world requires



■ Lana K. Alcorn is a partner with Lightfoot, Franklin & White, LLC in Birmingham, Alabama, practicing civil litigation with a concentration in toxic torts/environmental law and employment law. Ms. Alcorn is an active member of DRI's Toxic Tort and Environmental Law Committee.

preparation and practice. You should know what the legal standards are (and are not) so you can argue them effectively if one comes up in your case. While it may never come up, it's better to be prepared than to look foolish in front of the judge and your opposing counsel.

Number 8: I wish I'd known when, why and how you need to make an offer of proof and fully understood how important it is for an appeal. If the court excludes evidence that you wanted to admit, you must make a proffer on the record (but outside the presence of the jury) stating what the evidence was that you would have introduced and the reason that you wanted to offer it. Also, with all exhibits, you should check with the court reporter each day after trial to make sure your "admitted/excluded/proffered" list matches the court reporter's list. You should also make sure that you've entered and offered proof on all of the exhibits you need to before you rest your case.

Number 7: I wish I'd known to ask beforehand if there would be a court reporter at the trial. Believe it or not, it's not automatic in every court. Some state courts require you to ask for one.

Number 6: I wish I'd known to file a written motion for a judgment as a matter of law at the time you make the argument. I was under the (mis)impression that these motions are made orally at the close of the plaintiff's case and at the close of all of the evidence. After all, how else would you know what the plaintiff did or did not prove? Well, you don't know all the details before trial. Nevertheless, you can still prepare a written motion as if the plaintiff failed to prove all of the elements of her case (list each one separately and provide an explanation). That way, just in case you accidentally forget to argue something, it's in the record in writing. (The written motion for judgment as a matter of law made at the close of all the evidence also gives you a head-start on post-trial motions seeking to have the jury's verdict set aside after the fact.)

Number 5: I wish I'd known how important jury instructions are and how to preserve your objections to the judge's failure to give them. Simply copying and filing pattern jury instructions is not always sufficient. You should think critically about the issues in your case and review the pro-

posed instructions carefully to ensure that they correctly state the law and are understandable for the jury (at least as much as jury instructions can be). Also, make sure you object on the record to improper instructions proposed by the other side and to the court's failure to give your proposed instructions. If you don't make a record of it, you risk waiver.

Number 4: I wish I'd known how much jurors watch you and how they make judgments about you (and your client) based on those observations. During trial, you'll feel like someone's eyes are on you every second. That's because they are. So, when sitting at counsel table, coming into the courtroom, talking to a paralegal or getting a drink of water in the hallway, make sure you appear calm and respectful. In the same way, you should tell your client and witnesses how to act (and not act) during the trial.

Number 3: I wish I'd known to be better prepared for the objections that I knew were coming and wish I'd better studied (and memorized) the rules of evidence to prepare for the surprise ones. Evidentiary foundations are particularly important. If you want to admit a particular document, you should know which witness you are going to use to get it admitted, what the necessary predicate is to authenticate the document and what the necessary predicate is to overcome a hearsay objection (*i.e.*, if it is a business record, know the foundation, etc.). The best piece of evidence in the world is meaningless if you can't get it into evidence. So, remember that great "smoking gun" medical record that you have? Keep in mind that the doctor may not testify at the trial. Many states have statutes that allow medical records to be self-authenticating if you have a certified copy. So, make sure you have a certified copy before the first day of trial. The bottom line is that you need to have a plan for getting every piece of evidence into the record. During trial, all the rules, even the most basic ones, become a blur when the other side shouts out an objection that you hadn't anticipated and all eyes are on you. You might even want to create a "cheat sheet" to keep with you that lists the appropriate exceptions/responses to all of the standard objections. Also, make sure that you actually get a ruling from the

judge on each objection in order to preserve it for the record. "Let's move on" does *not* constitute a ruling on an evidentiary objection.

Number 2: I wish I'd known whether or not I was allowed to talk to jurors after the trial. If you are in a jurisdiction that allows you to talk to them immediately after trial, you need to know that so that if you want to talk to them, you can hurry to talk to them as soon as the case ends. Many jurors will try to race out of the courthouse as soon as the judge releases them from jury service, so you might consider asking the judge to inform the jurors before he or she dismisses them that the lawyers would like to speak with them. I also wish I'd known that sometimes the jurors will tell you what they think you want to hear, not what they actually think. For example, I asked a juror once whether he would have voted for my client or the plaintiff in a case that settled immediately before closing statements. The juror told me that he was "totally in our camp." I was thrilled, since several of the other jurors told me the same thing! Five minutes later, I was standing around the corner and overheard the same juror telling the plaintiff's lawyer he would have voted for him!

Number 1: I wish I'd known and followed the "Mother" rule: eat healthy, try to get enough sleep and exercise before and during trial. You really need to be at the top of your game, and you can't do that if you're not taking care of yourself. I did not eat or sleep enough during my first trial; thank goodness it only lasted a week. The very supportive partner I was working with (who'd been telling me for days to get rest and eat well) said that if I fainted, he would scoot me out of the way and would take over my argument.

There are few things as exciting and rewarding as your first trial. Despite all of your preparation, hard work and adherence to "lists," however, there will always be something that happens that you didn't expect. Unfortunately, that never changes. There is always some new approach you've never seen before, some ruling you didn't expect, and there's *always* something new to learn. But the good news is that's what keeps trial work so exciting. Good luck. Maybe you will be the next Clarence Darrow after all!

