White Collar & Criminal Litigation
American Bar Association Litigation Section

Putting Advocacy First

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Litigation is by nature adversarial. Courtrooms are even structured to divide litigants: plaintiff and defendant, the prosecution and the accused, appellant and appellee. There are "camps," i.e., sides for lawyers, and there are deeply entrenched members of each camp—defense die-hards, plaintiffs-side-only—who elect never to practice on the other side of the fence. There is of course value in this dogged commitment.

Like many other former prosecutors, I have practiced on both sides of the proverbial line, as an investigator for the Public Defender Services, then at the Manhattan District Attorney's Office; representing wrongly convicted defendants in connection with the Innocence Project, followed by nearly a decade prosecuting some of New York City's most violent crime. "How? How can you so readily 'switch sides?'" I am most often asked, by non-lawyers and the aforementioned deeply encamped.

After years of working with clients under investigation or charged by criminal indictment and also with cooperating defendants, victims, and witnesses to charged crimes, I have come to believe that the underpinnings of our justice system rely upon the most zealous advocacy on both sides. In practice, advocating from both sides may garner a more fulsome understanding of the interests, incentives, and challenges confronting all parties to a litigation. And with that practice, advocacy itself becomes an expertise.

Whether in one camp or another, on one side of the "v." or the other, advocacy is something that courtroom litigators must keep at the forefront. Indeed, subject matter expertise can be lost in the mouth of a garbled advocate. Masterful trial theories can be misunderstood by jurors whom you fail to captivate with your delivery, with your advocacy. No matter what your specialty or in which camp(s) you sit, the fundamentals of courtroom advocacy remain the same, and bear refreshing upon.

First: Preparation, Preparation, Preparation

Prepare your case by reading, understanding, and internalizing the issues, facts, and law. Deeply. Only if you are conversant in each of these can you clearly and effectively state a position, paint a picture for a jury, argue to a judge, or impeach a witness.

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Prepare by considering the incentives and interests of all stakeholders. These may include the prosecutor or defense attorney, others in your common interest group, judges, jurors, and sometimes all at once.

Prepare by identifying the interests that will sway each of those stakeholders—the law and the facts, economics or policy, interests of justice and humanity, etc. Be mindful that you must speak clearly to all without polarizing any.

Prepare for not only the expected, but also the contingencies and "what-if's." Think through potential rough patches, areas for objection, and controversial topics that are ripe for a sidebar. Prepare what tools you can: a backup line of questions, pocket briefs for legal sidebars, case citations and charts for quick reference, the applicable Federal Rules of Evidence or hearsay exception in the margins of your witness exam. Prepare whatever will enable you to present smoothly and avoid under-the-table panic-Googling.

Second: Stretch Yourself, and Know Your Limits

Think outside of the box. You can and should take studied risk. You can and should apply the law creatively, in favor of your client. Lodge arguments that are appropriately aggressive in their application of the law to the facts. But do not stretch the law so far as to lose your credibility. Straining credibility undermines both your argument and your reputation.

When there are issues for expert testimony, a strong advocate should become an expert in those areas, too. Learn the underlying science, technology, or other complications in the case. Hire outside experts as needed to help you with that growth and to ensure you are best positioned to advocate. No matter what expertise you bring to the table, every case presents a unique challenge, question, or wrinkle, and you must always be prepared to stretch yourself to meet it.

Teach your audience with clarity, and help your experts do the same. An excellent advocate does not stop at intelligent mastery of the subject matter. A true advocate must take that expertise and explain it clearly to their audience(s). Work with your witnesses to ensure they do the same, or use looping and other presentation strategies to ensure your audience is following your expert's testimony.

If you are in over your, albeit expertly prepared, head, take a timeout—in the form of continuance, sidebar, a brief moment, or a supplemental filing—before stretching your credibility. Sometimes only by pausing can we get it right.

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Third: Style & Delivery

Deliver your position—unequivocally, with clarity, power, and commitment. Keep your head out of your notes. Deliver your words. Persuasively. To your audience. Use all non-verbal cues including eye contact, body language, movement, and hand gestures, and the right verbal cues, such as pregnant pauses, changes in volume, speed, and intensity.

Be authentic, with a style that is your own. Do not attempt to posture. For a former actress, an opening statement may be delivered as a monologue to which the audience must be gripped, where there is little need for notes and every line is punctuated with intention. This style may not work for a litigant with a cut-and-dry approach that itself provokes trust. Likewise, the master of dry wit may be able to employ humor on cross-examination in a way that other attorneys may not. Find what defines your style, and embrace it.

Any side, any camp, being an advocate is a privilege, and advocacy is an expertise in which we must all strive for excellence.

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