

ABA Section of Litigation  
Tips from the Trenches  
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### **Reheating Old Soup: Taking a Case to Verdict... A Second Time**

On two (2) separate occasions during a short time span, I took medical malpractice cases to verdict with each case resulting in a deadlock jury (truth be told, both were 11-1 against me). Needless to say, I was not overjoyed with the thought of reenacting the trials. Getting prepared to retry a case is not fun... especially when I could not convince more than one juror in each trial. As I told an office mate, preparing and motivating oneself for a trial is akin to running back into a burning building. In other words, if you do not have to do it, avoid it at all costs! Unfortunately, with no settlement offers, I had no choice.

At the retrial of both cases, the outcome was reversed and victories were obtained. Both juries found the doctor negligent and awarded substantial damages. I thought I would share some of my thoughts on the retrials.

After the initial trials, I spoke with the jurors. Sure, it would be easy to say that I had a "bad" jury and that is why we were not victorious. (By the way, I have used that excuse in prior jury trials). After speaking with the jurors, I realized that I needed to call an "audible" and change my game plan. In the laboratory of their minds, the jurors thought the defendant doctors were gentlemen. Both doctors even "looked" like doctors. More importantly, the jurors found both doctors to be very believable. Somehow I had to denigrate the credibility of the doctors.

Both cases were in small, conservative jurisdictions. I came away with valuable information after the conversations with the jurors. The more educated jurors were the ones that seemed most plaintiff "friendly" in these complex cases. As I indicated, both trials were 11-1 against me. When the jurors returned to the jury room to deliberate, however, the numbers were not that skewed. It was 7-5 against me in one case and 6-6 in the other case. It turned out that each and every farmer was against me (and all malpractice cases). I now needed to change my approach in jury selection. The "Dorothy you are not in Kansas anymore" concept was especially true to me... Jeff was *not* in Chicago anymore. I needed to eliminate farmers... not the easiest thing to do in a farming community. In the retrials, I attempted to select young, educated jurors. I did my best to eliminate members of the farming community. It was a completely different approached form the first case. I guess one could argue that the initial trials turned out to be very expensive focus groups. Education – yes... cost effective – no.

The best career advise I ever received was from someone that once told me, "find something you don't do well and don't do it." After speaking with the jurors from the initial case, I knew I did not effectively cross-examine the doctors. It was time to begin thinking outside of the box. I now realized that I had to put a dent in the armor of the

defendant doctors. I needed to switch things up. I had to be a little more creative. I cannot emphasize enough how nice and “grandfatherly” the doctors were in the first trials. A gentle, ineffective cross examination would be harmful to my case. I decided to go on the attack and impeach the doctors as much as possible. This turned out to be the easiest part. The doctors had medical records, a deposition and former trial testimony. Surely, there had to be some inconsistencies. As it turned out, there were several. The focus of my cross examination of the defendant doctors was to impeach them... early and often. Even if it was not germane to the issues of the case, my sole goal was to contradict them at trial.

I impeached the doctors by omission (records), with prior inconsistent statements (depositions and trial testimony) and with the medical literature. It took days to organize the new cross examination of these doctors, but it was worth it. In the one re-trial, I impeached the defendant twenty seven (27) times within the first two hours of the trial. Momentum had changed.

I also changed my theory of liability. I assumed the defense would not change anything. In each trial they had already convinced eleven jurors. I expected that the defendants and experts would review their trial testimony and the pertinent medical records and that would be the extent of their preparation. I was correct in the initial trials, the cross examination of the experts consisted of approximately eight (80) pages of trial testimony. In the retrials, I only used about ten percent of the initial cross examination and came at them from different angles. The defense experts looked unprepared and confused. In my opinion, they were not believable.

The hardest thing to remember about a retrial is that *this* jury has not heard the evidence. While the facts may seem boring to you, the witnesses, opposing counsel and the judge, you *must* remain motivated. Remain upbeat. Remain confident. Sometimes that is easier said than done.

How do you remain motivated in a retrial? I switched the order of proof. In the second trial, I put my expert witnesses on at the beginning of my case, not at the end of my case like the first trial. In the first trial, the plaintiff testified at the outset. In the second trial, Plaintiffs testified last. I changed the order of all proof. The changing of the order of proof was for two reasons. First, and the reason that I will address in the next paragraph, is that I was a tad bit superstitious. Secondly, I wanted the trial to go in with a “fresh” look. If the order of proof in the trial was changed, maybe the result would change. Not exactly knowledge based upon scientific studies but it worked for me.

That dovetails into the notion of being superstitious. I must admit, I can be a bit superstitious at times. When a borderline superstitious individual can only convince one juror in a trial, everything changes in the second trial... trust me, I do mean everything! In the first trial, I had soup for lunch. The second trial, I switched to salad. During the first trial, I walked on the east side of the street and crossed over at the far end to get to court. At the second trial, I crossed over at the corner and walked on the west side. I stayed in a different hotel during the second trial. Typically, I will wear white shirts on

Monday, Wednesday and Friday during a trial and blue shirts on Tuesday and Thursday. I did that during the first trial. In the second trial, I wore blue shirts Monday, Wednesday and Friday and white shirts on Tuesday and Thursday (sad, isn't it?). I do not know if it made a difference, or for that matter, if I truly am superstitious. All I know is that on the way to court, I avoided walking under all ladders, avoided all black cats and my lucky penny never left my pocket.