Novel Yet Unconventional Trial Tactics that Worked

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I. Introduction

While this is a sorry way to start a paper, I'm going to start it this way anyway: The title assigned to this paper makes no sense. If the trial tactic is novel, it is fairly axiomatic to assume that it is unconventional too. But more importantly, there is no way on earth I am going to describe my best, most effective, and most novel trial tactics for all the world, (read defense lawyers) to read about them. With that caveat, I do think that having tried all kinds of cases - against railroads, trucks, doctors, product manufacturers, landlords, and governments that I have picked up a few useful tactics of some interest. So here goes.

Our first point of business is to define "trial tactics". To do this, we first have to understand that trial tactics are not trial themes. The American Heritage Dictionary of the English Language defines theme as "[a] topic of discussion, often expressible as a phrase, proposition, or question." Robert V. Wells writes in his book, Techniques of Expert Practitioners, that "[t]hemes link narrative and argument to show the role of human action in producing the particular plot. These stories don't just happen, but they are caused by the actions of the parties." Id. at §6.08 p.209. Another author puts it this way: "[t]he theme is the 'storyline' of the case. . . . [It is] the soul or moral justification of your case. It is rooted in human behavior and sociocultural attitudes, and is sometimes more intuitive than analytical." Purver, Young, Davis & Kerper, The Trial Lawyer's Book: Preparing and Winning Cases, §6:3 p.86-87. Put still another way, the "theme should be that explanation of the facts which shows the moral force is on your side." Lake Rumsey, Master Advocates' Handbook, p.1. "Strong themes crystallize complex concepts and arguments, fixing in jurors' memories the ideas they represent." Amy Singer, Jury-Validated Trial Themes, Trial, October, 1994.

All of the above sounds impressive, and certainly each of the sources quoted above should be read when the curious trial lawyer finds the time, (perhaps while waiting for the jury to return), but the definition which is most useful to me when attempting to choose a theme is this:

A trial theme is the single phrase which lends credibility, through human experience, to your version of the facts. An effective trial theme will leave a jury with no choice but to apply the facts, presented within the framework of the legal theory of recovery, and award you a verdict.

The trial theme is not the legal theory of recovery. The legal theory of recovery is the why of your case and the theme is the how, in a general sense, of your case. For example, in a typical intersection case the legal theory, that is the reason why you are entitled to recover, is almost always that the defendant failed to yield the right of way. The themes which are applicable to such a case are as broad as the imagination of the trial lawyer, who will tell the story of the crash through in opening statement, closing argument, and through the voices of his or her witnesses illustrated by exhibits. Negligence is not a theme - it is a legal theory. Careless failure to prevent injury is a theme. Note the emotional difference. Talking about negligence does not establish emotional or psychological responses in the jurors. Talking about a defendant's careless failure to prevent injury evokes a variety of emotions and images, which are likely to aid the plaintiff in obtaining a fair recovery.

Trial tactics are related to trial themes but should not be confused with trial themes, as there is a difference in scale. A "tactic" is, in the words of the dictionary, "an expedient for achieving a goal; a maneuver." Note the subtle but important difference. So what is a trial tactic if it is not the theme, or even the legal theory of recovery? The answer is this: A trial tactic is strategic decision used in the implementation of the trial theme. If the war is to win for the client, and the trial theme is the battle plan by which the war is won, a trial tactic is the bullet by which battles within the war are won - in and out of the courtroom battlefield.

II. Trial Tactics

Tactical decisions begin when the client walks in the door to our office – and don't end until we close the case. From file opening to case closing we are constantly making strategic decisions and implementing maneuvers that will ultimately affect the outcome of that client's case. Because I think tactical decisions begin early in the case and continue at every stage, I am dividing this paper into sections consistent with the chronological order of things as they progress from start to finish and will try to describe several tactics applicable to each stage.

A. Venue Choices

Often there are several choices for where a case will be filed and tried. There is the usual choice of state versus federal, and perhaps multiple counties or even states. Choosing where to file suit is a tactical decision. The conventional wisdom is "pick the big city and dodge federal court". Too often we fall into the trap of doing our venue research and discovering that in Eastnowhere County there has never been a verdict over $100,000 and choose to avoid the county because of this historical anomaly. I think this is a major mistake. Most of the time rural counties with small populations have never had a big verdict because they have never had a big case, or been asked to return a big verdict. It is more than my advocacy skill that has netted my clients the highest verdicts ever in several small towns and counties throughout the southeast. I'm simply not that good. These jurors were anxious to be part of a "big case" and when I asked them for a lot of money they were proud to award it. Keep in mind that there is no sign at the county line that says, "we don't value human beings and their suffering here as much as they do in big cities." In fact, if there was a sign, it would say, "welcome to Nowheresville, a place where people are held accountable and we take care of our friends and neighbors." So, assuming the demographics look good, and the client is the kind of person the jury will like, novel trial tactic number one is:

1. **File suit in small counties.**

In addition to avoiding small counties, the conventional approach is also to avoid federal court. This is just as knee jerk and ill thought out a tactical decision as is avoiding small counties. There are some mighty fine federal judges out there. And, in many cases, the dockets move faster assuring our clients of the closure they need in

the most efficient manner. (Now that many states have adopted Daubert and have complex pre-trial procedures too, there is really not often much practical difference in the two systems.) I like to think that federal jurors come to the United States Courthouse with the mindset that they are going to be participating in a big case. Big cases demand big verdicts. The phrase "don't make a federal case of it" does not exist in a vacuum. It reflects people's thoughts that federal cases are big and important. So, assuming the state venues are not superior, and the trial judge is a decent sort, novel trial tactic number two is:

2. File suit in federal court.

B. Choose Defendants Carefully

I don't think it is a wise tactical decision to sue everyone as a matter of course. Instead, we sit down and think through the effect of suing each defendant on the dynamics of settlement, trial preparation, trial, and even the potential appeal. The first question in deciding to add a party is this: Will this defendant help me recover for my client or hurt that goal? The next question is, in relation to venue, does this defendant help me recover against some other defendant by allowing for a better venue? A railroad grade crossing example illustrates this problem. By suing the conductor or engineer, I might be able to avoid federal court and even get a more favorable venue in state court. But, at what cost? I gain nothing economically and potentially convert my defendant railroad from being a heartless bastard to becoming a human being who went home the night of the collision and cried in his wife's arms and has nightmares about the little girl his train killed. If I really want to avoid federal court, and the crew really didn't do anything too wrong, I think suing the Division Engineer or the Maintenance of Way supervisor accomplishes this goal and places blame where it ought to lie anyway – on the men who, for example, decided not to cut down vegetation. That brings us to novel trial tactic number three:

3. Sue supervisors instead of the train crew.

C. Think about discovery

The process of discovery brings numerous opportunities for tactical decisions. Some lawyers go into discovery like a pit bull, sinking their teeth into every interrogatory and demanding that it be fully answered, filing motions to compel, and basically doing everything they can to insure that the other side has a complete understanding of what the plaintiff thinks is important about his case. We simply can't be dogs; after all, dogs lick themselves because they can. Likewise, just because we can file a motion does not mean we should, just because we can take a deposition, does not mean we should. Think about the options. How about good old-fashioned interviews of witnesses where it's just you and the witness with no defense lawyer to screw up the conversation. How about doing nothing and letting the defense lawyer wonder what his witness will say. I think one of the best things defense lawyers do for me is conduct four-hour deposition of my clients. I must admit that I have never spent that much time learning about my client. And talk about a priceless opportunity to see how my client will perform at trial! This brings to mind an FELA case in which the client had worked for the railroad for twenty years, had given the railroad an extensive statement, and had testified at a discipline hearing for hours. The railroad knew just about all there was to know about this man, and his version of the events, and its able lawyer chose not to take the plaintiff's deposition. Accordingly, I had no idea how the man would react to cross-examination. The railroad clearly knew him better than I did and I was lucky to get a fair settlement during a break in the devastating cross-examination. Certainly, the vast majority of cases require discovery, but some simply don't. So, how about this novel trial tactic, to be used in rare cases only, as number four:

4. Do no discovery.

Given that most cases require some level of discovery, the next inquiry is whether there are tactics involved in discovery whereby the defendant hangs himself with inadequate answers that are either the product of an intentional desire to mislead of simple laziness. Let's look at the answer to an interrogatory asking for a description of all federal funds expended in improving a grade crossing. The average defense lawyer will answer it something like this: "this information is beyond the scope of discovery and irrelevant" or they will claim they don't have the information but "will supplement" when it becomes available. An interrogatory on

expert witnesses will likewise be met with some sort of stalling answer. An interrogatory asking the defendant to identify what that plaintiff did wrong will often be met with "discovery has not yet been completed, this response will be supplemented." These are great answers! Why in the world would a rational lawyer move to compel answers to these questions when the answers are essential to the defendant's defense? Instead, lay low, send a generic request to supplement all answers and watch the defendant's laziness hang them. When we make a defense lawyer work, they actually focus on our case. . Let them work on one of the 125 other cases for which they are responsible. Sometimes Garth Brook's song about unanswered prayers is relevant to what we do. While I am interested in who the defendant's expert is, I would rather they not identify one in a timely fashion. Then, when the discovery period has expired and the pre-trial order is due, it is we who have the leverage. They got bupkiss. So, novel trial tactic five is this:

5. Allow the Defendant's laziness to kill it.

The converse is equally true. Answer discovery like your case depends on it. It does! List every pain and suffering witness you can find, describe what the defendant did wrong, give them everything they want and then volunteer some more. There is no way you will find yourself handcuffed at trial when you told them everything. Novel trial tactic number six:

6. Answer the Defendant's discovery requests.

D. Prepare for Trial

I love a good mob out to help a deserving plaintiff. Mob mentalities are dangerous, yet oh so helpful to plaintiff's lawyers. This is why, whenever possible, I prepare all my witnesses for trial at the same time in one place. I want them to feed on each other. I want the sense of community and shared sense of purpose that comes when eight or nine people are on the same team - team plaintiff. That brings me to novel trial tactic number seven:

7. Prepare witnesses in a group setting.

It is imperative that the trial lawyer have been to the scene of the event and inspected the roadway, intersection, grade crossing and

equipment involved. Relying on photographs or video is a mistake. This should not be a novel tactic, but sadly it is often overlooked. So, for novel trial tactic number eight, I say:

8. Do not virtually eliminate reality.

Part of trial preparation involves identifying and limiting issues that need to be tried. In an FELA case involving a safety appliance, does liability really need to go to the jury, or is it a better idea to eliminate the issue by moving for partial summary judgment? Or perhaps in a grade crossing the railroad claims a preemption defense but has failed to show federal funds. How about testing that defense with a motion for partial summary judgment? Drum roll please – novel trial tactic number nine:

9. File motions for partial summary judgment.

In addition to considering the tactic of filing motions for partial summary judgment to test the sufficiency of certain defenses, or establish liability, consider filing motions in limine to test your own evidence. For example, if you identify an expert early in the discovery process, get his Rule 26 report, and have him deposed, but are still concerned about the possibility of a Daubert challenge being filed (often accompanying a motion for summary judgment – a deadly cocktail if ever there was one) consider filing a motion in limine to test the Court's reaction to the sufficiency of the expert's opinions. By filing the motion, in most courts you gain the advantage of having two bites at the apple – the initial brief and a reply to the defendant's response. So, if the defendant says Mr. Expert failed to identify a test upon which he relied, you simply modify his reports with the overlooked materials and fix the problem in the reply. If the expert is struck, there is still time for a new one to be identified and you have the court's ruling as a cheat sheet telling you what you need to fix. This actually is a novel trial tactic and that it why it is number ten.

10. File Daubert motion to test your own expert.

E. Trial Tactics

I guess its time to pull the paper back to the title, so lets spend some time on actual trial tactics that are used in the courtroom.

No, on second thought, let's spend a few more minutes on thinking about tactics that will set up later victories. Some lawyers think that that once we are in the courtroom, that is when the real trial tactical war begins. I don't necessarily agree. The important tactics, such as what issues to focus on and witness order, are already decided before trial. So when we talk about courtroom trial tactics, in some ways what we are really referring to is "parlor tricks" or courtroom demeanor. But, if the really important tactical decisions are to have success, then certainly they have to be properly presented - i.e., effective parlor trickery.

With this in mind, let's look at some trial tactics that seem to work. The first of these has to do with choosing the order of witnesses. This really establishes the focus of the trial. Will it be focused on damages or liability? Because ultimately, the whole exercise is a waste of time unless damages are recovered, I think the first witness has to at least have some damages input. I don't think it should be the plaintiff. Instead, an eyewitness or co-worker or emergency personnel who can describe the scene of the event and the damages suffered. A neutral witness who can't hurt us. Perhaps the supposed mantras of the medical profession is an applicable novel trial tactic as number eleven:

11. The first witness should do no harm.

What about the plaintiff? Should the plaintiff be the first witness? If the plaintiff is the injured party I would rarely make them the first witness. Instead, I would hold them for later and let them warm up to the courtroom and see how others do it. Usually, under the rules of sequestration, the plaintiff is the only witness who will have heard other testify. This allows them to tie things together, clear up confusion, and be comfortable effective witnesses. With this in mind, novel tactic number twelve is this:

12. Let the Plaintiff get comfortable before testifying.

To paraphrase David Ball, a trial is about what we make it about. As noted above, when we represent plaintiffs, ultimately our cases are about damages. The trial tactics used to establish damages are thus critical. I think it is critical to keep some thoughts in mind as we attempt to convince the jury that our client has suffered a severe loss. First, plaintiffs who are whiners are not winners - they are

wieners. Second, repetitive pain and suffering witnesses (sometimes referred to as B&A by some lawyers intending to mean before and after but actually meaning boring and awful) are not effective. Third, the most powerful tool in our arsenal is the imaginations of the jurors - do not be so graphic as to sterilize the injuries - leave enough for their imaginations to run wild. Recall the shaking mud puddle in the movie Jurassic Park - it was way more frightening than if we had been shown the dinosaur's feet pounding the ground.

Here are some examples that worked. Early in my career, I represented a man who was accused of running a red light and broadsiding a car. He was the defendant in a subrogation claim for damage to the car. I third-partied in the driver for my client's broken wrist injuries. Thus, I was actually more of a plaintiff than a defense lawyer - indeed, I knew nothing and still no nothing about defending cases. Oh, I forgot to mention that my client was riding a horse when he crashed into the side of the car at issue. As a tactical decision, we decided not to call any medical providers as witnesses and have the plaintiff describe his injuries (a badly broken wrist). He couldn't talk about how the pins got into his wrist, but his description of how they got out, "the doctor put his knee on the back of my hand, grabbed the wires in some kind of pliers with two hands, and pulled them out one at a time - letting me catch my breath between tugs". The damages verdict vastly exceeded anything I could have hoped for and the driving force was the juror's imagination of what was damage was inside the plaintiff's wrist that would require wires such as these. When I asked if it hurt, the plaintiff just smiled and that was enough! We'll use this example as the segway to two novel trial tactics that worked:

13. Don't let the plaintiff whine.

14. Leave some things to be imagined.

Pain and suffering is a critical to plaintiff's cases. But it can be sterilized by four witnesses who say the same thing: "he used to be happy and now he's not". Again, an example is called for. In an FELA case in which the plaintiff had not required surgery but could not return to his craft as a track inspector, it was critical for the jury to understand how his injuries affected his life. So, the four or so

pain and suffering witnesses, many of whom had overlapping knowledge, were called upon for unique aspects of the plaintiff's life. One described fishing, another yard work, another church activities, and another family life. I introduced each one by telling them with the first question "Joe told us how Tom can't fish like he used to, can you tell us about how it's affected his yard work?" Novel trial tactic number fifteen is this:

15. One topic per pain and suffering witness.

Timing is too often overlooked. The importance of timing of witnesses is not reserved to the question of who will be first and last. It is imperative to think about each day as well as breaks for lunch and recesses and breaks. Here is an example of the tactical timing of the presentation of a witness that was critical. A medical provider had been deposed for use at trial. The doctor was no only boring, after he got out the critical information in direct testimony he gave it all up in cross-examination. Playing his deposition immediately after lunch allowed us to get the direct in before the post lunch slump in attention occurred. But timing is not only the when of testimony it is the length too. When taking a deposition of a surgeon in a typical back surgery I think the jury will give me about twenty minutes of attention - this is actually a couple of ten minute segments. With this in mind, very early in the testimony I get the crucial questions of what was done and why out of the way. Then use some medical artwork in the middle to get a new attention span and wrap the whole thing up in twenty minutes or so. The defense lawyer then wastes an hour and I come back with a five-minute re-direct. My twenty-five minutes are almost always more effective than the endless droning of the defense lawyer. It's a question of time control. Too few lawyers have the courage to conduct short medical depositions for use at trial, and that is why this is novel trial tactic number sixteen:

16. Time medical testimony carefully to maximize its value.

One of the most experienced FELA trial lawyers in America, Frank O. Burge, Jr., of the Alabama Bar, says the plaintiff's case begins in an FELA case when we rest. Given the propensity of exaggeration and blatant lying by many of the railroad officials who constitute the railroad's witnesses, this is a fairly accurate statement. I think it is true in many ways in grade crossing cases too. The corporate

mentality of railroads is such that they think they can "railroad" the jury just as they do their employees, local governments, and their customers. What kinds of tactics work well to maximize this propensity? Here are some from actual trials that seemed to work.

Railroads are very poor record keepers for many things they do. They do keep good car repair records because car repairs can be charged to the owners. But, there are hardly any records on track and right of way maintenance. As a result, this is a fertile field for cross-examination. But the question has to be asked just right to always get a good answer: "Mr. Official, did you bring to the courtroom with you today, documents that evidence that someone actually got off the track and inspected the sight lines from the roadway?" "No? "Didn't you think the jury would want to see these documents?" There is no good answer to this - he either says they don't exist of he didn't want the jury to see them. This makes this line of questioning, novel trial tactic number seventeen:

17. Ask about documents that do not exist.

Some witnesses just will not answer a "yes or no" question. They will do anything to dodge these simple inquiries. Here is a tactic we use that works pretty well. After the second or so failure to give a yes or a no, pause and ask the witness this: "Mr. Witness, can we come to an agreement?" He'll say something like "it depends". The next question is this: "Can we agree that if I ask a 'yes or no' questions that you will answer it 'yes or no' and I'll then let you explain your answer? Does that sound fair to you?" The jury will only accept one answer. If he refuses, then get the Court's assistance. This is novel trial tactic number eighteen.

18. Get the witness to agree to give yes or no answers.

There is really nothing novel about "poisoning the well" or "stealing the defendant's thunder" by delving into topics which help the defendant's case and hurt the plaintiffs. But a novel trial tactic that has worked well for me is what I call a "challenging direct examination". This calls for actually examining plaintiff's witnesses in a way that tests them on tough points. For example, in a grade crossing case, I don't just ask the plaintiff why he did not see the train, I push him and push him with phrases like: "how could you miss it, it's a train" and "surely your heard the horn". I think this is

an essential trial tactic to take with witnesses in hard cases and therefore list it as novel trial tactic number nineteen.

19. Challenge your own witnesses with tough questions.

Often a case proceeds through discovery with several theories of recovery, some of which are even competing. Think about choosing a single theory on the morning trial starts. This has several advantages. One, it focuses the trial down to its most essential elements. Two, it throws the defense off its game. This works particularly well with a defense lawyer who does not react quickly on his feet. I have seen defense lawyers use half of their opening statements on negligence issues when I have dropped those claims and chosen to proceed only on strict liability. For example, in an FELA grab iron case, I might have prepared the case to show that the car was not inspected properly and then announce on the morning of trial that we will proceed on strict liability only and have motions in limine prepared to exclude evidence of good care by the railroad and carelessness by the plaintiff. So, number twenty of the novel trial tactics is:

20. Narrow the issues on the day of trial.

A courtroom is a special place. He who controls it, controls the trial. This is an important tactic and it includes a variety of sub components. Meet and greet the bailiff and court staff. Use your own quality easel and projector and screen. Details matter. Show the jury that you are comfortable in this courtroom because you expect to win here. Welcome them to the process. Novel trial tactic number twenty-one is:

21. Control the courtroom.

Preserve the record for appeal, but not at the expense of winning at trial. Similarly, don't make a close call objection that will not help you win if it will give the defense a basis for appeal. In other words think about what you and doing and don't try to win every objection. If you can't show it is essential to the win and it might give the defense an appellate issue, let sleeping dogs lie. As some lawyers think every objection must be made and won, this novel trial tactic number twenty-two.

22. Do not try to win every objection.

Not only should we not try to win every objection, we should also be careful about jury charges. Getting the worlds most plaintiff friendly instruction is short sighted, as the victory will be pyrrhic. Instead, argue for a fair balanced charge that will hold up on appeal. Additionally, by being fairly conservative, and withdrawing obviously bad charges, we build credibility with the court that we can spend to get rid of the defendant's most offensive requests. This is kind of novel, so I am numbering it number twenty-three.

23. Ask for fair jury instructions.

Here is one that should not be novel, but sadly it is. Be credible and tell the truth, admit when the law is against you, tell the jury about the bad parts of the case, and then explain them away. Truth goes a long way. If we can't win with the truth, maybe that is a case that we just should not pursue. In an FELA case where the track inspector crashed into the back of a train he was following I told the jury that when I first heard the facts I thought the case smelled like a rotten onion. Then I told them how as we peel back the layers of onion we find a peach of a case inside. The truth went a very long way in helping that client recover and that is why telling the truth is novel trial tactic number 24.

24. Tell the jury and the court the truth.

During the opening phase of closing argument, challenge the defendant to answer questions you think are unanswered. For example, if you ask for $1,000,000.00 challenge the defendant to tell the jury why that amount should not be awarded given the pain and suffering the plaintiff has endured. This puts the defendant in a tough spot. Either it answers the question or it does not. If it suggests a smaller amount at least it was talking about money. If it fails to rise to the bait, you blast it for its failure during rebuttal. Either way, we get a tactical advantage; in fact, we get the advantage of novel trial tactic number twenty-five.

24. Challenge the defendant to answer your questions.

F. Post Trial Tactics

Tactical decisions do not end with the verdict. Even when we obtain a verdict we are faced with the challenge of getting through the appellate process. In federal courts where the interest rate is so low that the defendant has no financial incentive to settle, we have to figure out a way to put leverage on them and expedite the ending of the case. A clever, indeed novel, tactic is to take the federal judgment and attempt to domesticate it in a state with a high post judgment rate. After all, as to that state, the federal judgment is a foreign judgment. Another drum roll for novel trial tactic number twenty-five. I have tried this against NS and CSX. CSX seemed to care; NS (perhaps because the underlying judgment was so large) did not.

25. Domesticate federal judgments to increase the post judgment interest rate.

To conclude this paper is impossible. There is an endless supply of trial tactics. The important point to keep in mind is to be creative, think outside the box, but don't take unnecessary risks by trying trail tactics that aren't just novel - they are ridiculous.