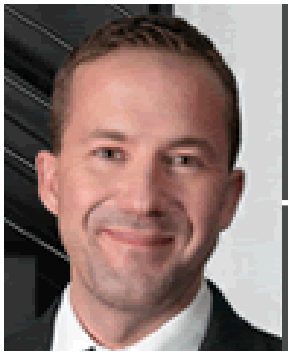

HOW TO LOSE AT TRIAL: A TUTORIAL

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How To Lose a Jury: Mistakes of Trust
Josh Lanning

Among the legions of research papers, blogs, columns, and testimonials about how to win over juries, one of the most critical concepts is also one of the simplest by far; juries listen to people they trust. A trial lawyer can give a Shakespearean opening, have every objection sustained, devastate key witnesses on cross, and deliver an Academy Award-worthy closing argument. But if the jury does not trust her, she will lose; or, if she wins, it will be in spite of her performance not because of it (despite what we often tell ourselves, the lawyers are only one of many influences on a final verdict).

Given the importance of a lawyer's credibility in the courtroom, it is a little shocking how few trial advocacy courses give much attention to the issue. As a baby trial lawyer (many eons ago on the plaintiffs' side), I was not particularly focused on it. I knew not to lie, and just by dint of natural temperament I have never been overly antagonistic. But if I am honest about what was really going on in my head back then: I was excited to use all my new trial tools; I wanted to rack up wins; and I wanted to impress all of my jurors with eloquent rhetoric and an astonishing command of law and facts. What I actually did was lose my first three jury trials. In fairness, given the same facts and witnesses, I do not think I would win any of them today. I do, however, think I might be able to keep the juries deliberating for more than 9 minutes – which is literally the time it took one those three to come back and shatter my dreams.

We win or we learn, however, and my winless record made me question whether I was focused on the right things. I was not. And over the next several trials, I began to realize that the trial was not about me at all. My job was honestly, clearly, and efficiently to deliver my client's story to the jury – and my vain goal of amazing jurors was actually getting in the way. This all really hit home after I trial I thought I would lose, but miraculously did not. It was a wrongful death case. The decedent was a father and his three kids all testified, along with his mother. Plaintiffs' expert was impressive and Plaintiffs' counsel was coming off a $5 million verdict in another county the month prior. A few days after the verdict came back in our favor, I received an e-mail with the subject line: "A message from juror # 4." It read:

> I wanted to write to let you know what a good job I felt you did in court for the past couple of weeks. I especially appreciated that you were respectful to all the witnesses and to opposing counsel. You came over as genuine and nice. I recognize that "niceness" may not be a description that attorneys yearn for, but, believe me, it wears well and is very refreshing. In this trial, [opposing counsel] illustrated the more adversarial style which I found rude, distasteful, and ultimately harmful to their case.
>
> I was impressed that you told the truth in your closing argument and did not attempt to correct testimony or sway our memories about evidence. I also noticed that you didn't have to stoop to these tactics because you prepared your case so well. Finally, I appreciated the fact that you took no cheap shots, and maintained integrity throughout the long and tedious process.

Just to be clear – this is not a humble brag. Apart from saying I was prepared, Juror #4 did not say a thing about

my stellar oratory or dazzling legal argument or really anything that trial lawyers think of as "talent." She said I was "nice" and "genuine" and "respectful" and that Plaintiffs' counsel was not. I re-read this e-mail before every trial because, after weeks of immersing myself in all the exhaustive details and most important arguments, it helps to remind me that all of that work might be for nothing if the jury doesn't believe I am worth trusting.

There are a million ways to lose credibility with the jury, but here are a three of the most effective:

Unearned Incredulity

As a lawyer walks into a courtroom deliver an opening statement, her mindset is about as distant as it will ever get from the folks sitting in the jury box. She has worked on the matter for many months if not years; she has culled all of the key facts to make her case; in some cases she may have a well-earned dislike of opposing counsel for bad behavior in discovery; and she has a client watching her every move expecting a return on value for his investment in her.

Jurors don't know or care about any of that. They are hearing everything for the first time. In fact it is their job at that stage to have no preconceived notions about who is right. Jurors have no way of knowing that the opposing party lied at his deposition, or that opposing counsel was sanctioned for withholding key documents in discovery. They just want to know what the case is about; and a heavy dose of righteous indignation out of the gate does not answer any of their questions. Picking early fights with opposing counsel, or voicing angry objections during openings statements are rarely a good idea. Once I watched a young lawyer quickly lose a jury during openings by, before even laying out the basics of the case, saying "I don't know what kind of fools the defendant thinks we are!!!!" Hit out of the gate with a wound up lawyer, jurors will begin to have serious reservations about your ability and commitment to be objective and honest when delivering facts to them. And if you can't tone it down to explain your case, their concerns are probably justified.

Lack of Humility

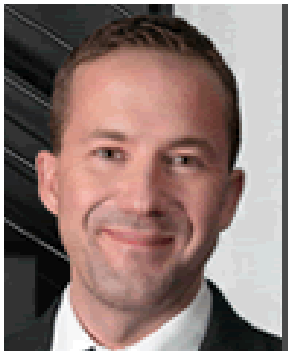
The perception that lawyers are arrogant, know-it-alls is not uncommon – and plenty of lawyers are less than helpful in dispelling the stereotype. Thus, consciously or unconsciously, many jurors will be waiting for signs of arrogance and, when they find them, will be more than happy to place you in a bucket with other egomaniacs. Moreover, they will resent that the law requires them to sit and listen to you. The advice blogs tend to focus on the lawyer's language in making this point (e.g. don't use "legalese", don't "we lawyers know"). But in my experience the best barometer of humility is how you treat the other people in the courtroom. Most lawyers are respectful to the judge because she is the boss – but jurors do not typically identify with the judge, who sits up on her throne with a big robe and calls all the shots. They identify with the court reporter (who has to simply listen to everything and be quiet like they do). They identify with the judge's clerk. They may identify with the junior associate on your trial team. If you're lucky, they'll identify with your client, and watch closely how you treat him during the trial. Jurors are smart enough to know that people who are humble and respectful only part of the time are not really humble or respectful at all.

Hiding the Ball

This one should be obvious. If jurors think you are trying to keep information from them, they will not trust you. The vast majority of jurors I've experienced are conscientious and want to get to the right result. They listen, if permitted take notes, and have vigorous discussions once the deliberation room doors close. They don't particularly care about technical rules of evidence, and their trust is lost if they believe you are working to prevent them from having the facts to do their job. Even the perception that you do not trust them with all of the facts can be game changing. Everyone knows about "picking your objections" so the jury doesn't think you are afraid of the facts. But the issue can arise in surprising ways. In one devastating example (fortunately from a mock jury exercise prior to trial) my trial partner was going through a PowerPoint presentation and began to run out of time. Realizing this, he flashed through a couple of slides that were not critical, and wrapped up his presentation. Frankly, I did not think anything of it. Some of our "jurors" however, were incensed. As we watched them deliberate, we heard comments like: "Did you see him quickly put the slide up and take it down?" "Yep. He definitely did not want us to know what it said!" "He's hiding something for sure." We were a bit stunned, but in retrospect probably should not have been. Our mistake was in failing to include the jury in the process – a simple, self-deprecating comment about time-management would have gone a long way toward preventing the inference of deceit.

There are of course plenty more, and they are all important. The critical thing about mistakes that hurt a lawyer's credibility with the jury is that they are so hard to fix. Once trust is gone, it is virtually impossible to get it back in the short time span of a trial. Further, while other trial mistakes are self-contained (the jury might be annoyed that your deposition clips did not have working

audio but they'll likely realize it was an honest mistake), a mistake of trust keeps giving, and everything you tell the jury afterward will be suspect. The good news is that preventing mistakes of trust is not complicated – simply be nice, be genuine, and be respectful.



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Josh Lanning brings considerable trial and litigation experience to his cases with a wide-ranging background in complex commercial disputes. Lanning has tried numerous cases to court decision or jury verdict and has successfully argued state and federal appeals in areas ranging from constitutional law to securities entitlements. Lanning focuses his practice on antitrust and commercial litigation, including matters involving state and federal antitrust laws; complex contractual disputes; fraud and other business torts; Civil RICO; unfair commercial practices; securities fraud; intellectual property; and fiduciary duties. In addition, Lanning has managed multiple internal investigations for clients including Fortune 500 companies and local government bodies.

Lanning has represented plaintiffs and defendants in state and federal courts throughout North Carolina as well as in a number of other jurisdictions, having litigated significant disputes on behalf of his clients in Connecticut, Massachusetts, New York, New Jersey, Florida, Maine, Georgia, Utah, Nebraska, Texas, and Louisiana. His clients are a diverse set of people and businesses ranging from individuals and families to large national banking institutions.

In addition, Lanning has made pro bono matters an important part of his litigation practice. His experience includes representing prisoners in need of adequate medical care; advocating for special needs children requesting special education services under the federal Individuals with Disabilities Education Act; helping battered spouses obtain protective orders; representing families facing eviction; and assisting in obtaining debt relief for low-income families who were victims of a nationwide fraud ring.

Practice Areas

- Employment & ERISA Litigation
- Financial Regulatory Advice and Response
- Financial Services Litigation
- International Dispute Resolution
- Litigation
- Mediation and Arbitration Services
- Securities Litigation
- White Collar, Regulatory Defense, and Investigations

Representative Matters

- Defending large financial institution in multiple class actions asserting anti-competitive practices arising from alleged manipulation of foreign exchange markets;
- Represented large financial institution in class action arising from an independent investment advisor's Ponzi scheme;
- Defended several prominent construction companies against competitors' Civil RICO claims alleging public bid-rigging scheme;
- Represented a family business in action for securities fraud to recoup multi-million dollar investment funds obtained by material misrepresentation;

Education

- B.A., University of North Carolina, 1995 (Distinction, Highest Honors)
- J.D., University of North Carolina, 2000; Order of the Coif; North Carolina Law Review, Staff