

TRIAL WORK SHOW NOTES

Tell the Expert Story of First Trial.

Getting Exhibits in Not Really a Topic

Establish Your Theme?

You have to have a *Theme* that carries both you and your jury through to the end. Your Theme will then become part of your Opening Statement which will set up the Closing Statement. It is also a promise to the jury that you will keep throughout the trial. It is an effective way of trying a case but remember, the door swings both ways so take care on the theme you choose: **Pick your theme AFTER you have done the hard work preparing for the trial.** You will know you have not done enough work preparing for your case if something comes up during the trial that surprises you.

Surprises Kill Cases (and Themes):

You can't pick a theme and "hope" it fits in with the evidence at trial. If you miss something and that "surprise" contradicts or changes the theme you choose, that will be bad for your case and the jury's acceptance of your claim. It is not fatal, but why have more problems to overcome. So, know your shit, back and forth. Surprises Kill Cases.

Word on Preparing for Trial to Settle the case:

There is an old expression in trial work: "You prepare for trial to settle the case." 99% of cases settle. Most good cases don't make it to trial. If your preparation is thorough and you put the time in, two things are very true:

1. You learn your case and the many things supporting it very well. Everytime I prepare for a case I find things I wish I knew sooner that either support or hurt the case. But you find out things from the preparation that would have been so valuable to know at the beginning of the case. But, this 99% settlement of cases hangs over

every case when figuring out what requires the review from a trial perspective.

2. Ideally, if you could take a minimal amount of bigger cases and not need to pay bills with small ones, then you could give every case a “trial” like focus. Again, that trial focus is so fruitful. Sometimes you learn a whole new case inside the case you thought you had. So, don’t do the theme until you have done all of the work. **So, what is that work?**

The necessary work to try a case:

Know that shit so well, you see every document you studied in your head. Try the case in your head and argue against yourself while pretending to be the other side. I fantasize situations I go into in my daily life for upcoming stressful events. Positive motivation speakers call this visualization. But go through possible situations that could come up and have all the evidence or case law necessary to win that “fantasy” argument. It will be useful preparation. Go through situations that would come up.

Go through arguments with the judge:

Know the Elements of each claim. Here are the elements of an account stated claim in Michigan:

1. Establishing a debtor-creditor relationship between the parties;
2. An express or implied agreement between the parties as to the amount owed or due;
3. An express or implied promise to pay the amount due by the debtor (your client).

In *Florida*, here are the Elements.

1. Plaintiff and defendant made a previous transaction;
2. The parties’ agreement that the balance is correct and due;
and

3. Defendant made an express or implicit promise to pay balance.

Basically, the same elements among the States. So, it is Plaintiff's job to get a "yes" to every element and it is your job to show and prove a "no" on only one element to win your case.

Case law preparation will be for arguments in getting parts of your case or proof your "no" to kill one of the elements of the case.

The key to winning an account stated claim for your debtor client:

Defenses, you need one.

1. Dispute the owing the debt with a good reason. Identity theft,
2. Did not use the credit card or receive funds from the disputed obligation. Plaintiff has the burden of proof-have they shown proof your client used the card or received funds. You win those against debt buyers as they just don't receive the proper paperwork. *Again, see burden of proof.*
3. There is no agreement between the parties. Where is the contract or agreement? Contract? Usually no. Debt buyers don't get the original contract for pennies on the dollar.
4. There is no promise to pay THIS PLAINTIFF AS STATE IN THE COMPLAINT. See my Answers stating this.

Other defenses:

ID Theft, commonly the debtor was victimized by a relative in most cases.

Statute of Limitations. Was the lawsuit brought within the proper state mandated time limits.

Someone else signed up (died or disappeared) for the card but your client used the card with an authorized use while not being obligated on it-does not stop debt buyers suing you.

A common belief of owing the debt to someone so therefore the debt is owed to a new owner of the debt is completely false.

That's a hump you have to carefully walk the jury or judge over and through. That is actually part of a good theme I use all the time.

“My client owes the debt (shows the client in a good light owning up to their obligations), she does not owe the debt to this third party, fifth owner, unknown (however you want to categorize in your legitimate favor) company.”

And a tough one, I owe the debt but not the amount they say:
I don't like this as liability is admitted.

Burden of Proof:

This is what the whole thing is about.

These cases are all won or settled on the Burden of Proof. I can't say this any better than even if your client owes the debt, the lawsuit actually makes it easier not to have to pay their debt. The Plaintiff bears the extra work of having to meet the Burden of Proof. Just missing one part of any element and the client walks away free of the debt. But....

When the Account Stated Statute (at least in Michigan) is sued upon with an Affidavit attached to the Plaintiff lawsuit, it switches the Burden of Proof from the Plaintiff to the Defendant who now has to prove she does not owe it as opposed to the Plaintiff needing to show that she does and also proving the elements.

That is why I follow the statute that states specifically that if you file your own “counter” Affidavit, the Burden of Proof switches back. Make sure you file an Affidavit with every Answer with an

eye towards it standing up to a deposition and eventually, a trial analysis.

Depositions are mini trials and a chance to ferret out yours (and theirs) good and bad evidence:

Use what you learn in depositions to shape that Theme as the start of truly analyzing your case and creating the:

Theme → **Opening Statement** → **Closing Statement.**

So, the deposition will make you learn more about the case, the people involved and how the other side is bringing in their case. See my deposition tricks and the **Rule of Five** discussion. Protection from the other side knowing your case. Also, if the attorney for the other side is not good at protecting or shaping his client's story, that's good information.

Trying cases are/is tough work:

Every inch counts. Knowing the other attorney sucks shapes your psychology on pushing forward. It is better to never underestimate the attorney on the other side.

SO NEVER UNDERESTIMATE how good the attorney is on the other side unless you have legitimate proof. Which unfortunately, you see bad attorneys all the time. It is deflating. Because, if you go into the fight scared because you fear their other side, you will learn more, work harder, know your case better and do whatever it takes to win. **When I play pickleball, I play tougher people to elevate my game.** I am trying a case to win but also learn how to win for my client. It's a mind set you have to lean into if you fear going against a skilled or more experienced trial attorney.

I won my first trial against a more experienced litigator.

In my estimation, 70% of a Win or Loss at trial is the facts of the case. 20% is likeability of the client you represent and 5% is you and 5% is just pure luck. But remember, **THE HARDER YOU WORK, THE LUCKIER YOU GET**. So, that 5% can be increased by stealing from the other percentages if you put the work in.

Experts should not be feared:

The word “Expert” is a separating term where the person is elevated to a realm we don’t share if we are not experts at the same thing. **So, how do you beat the expert at trial.**

1. Knock his ass down in a deposition and test his conclusions and get admissions, obviously. But there is a better way, especially with these debt collection cases.
2. Know what he is supposedly an expert in better than he does enough where not only do your questions expose the limitations in the experts conclusions as to your case but also, if you do well enough and take on the expert, the Jury will see this and value what you, the attorney say more than the expert. You jump into a higher level off him.

You have to “outexpert” the expert. My first trial I out experted the expert. I knew his job better than he did. I knew his manuals better than he did.

So, you have your Theme.

Now make it part of your opening statement with emphasis on the things you want to show the Jury you will prove. Your check off list. **Hit it and move on.**

Tell jury the exhibits you will show to prove your points-killing the Burden of Proof.

Create a Trial NoteBook.

Don't every read from a book when talking to a Jury:

Why, cause the other side will live in theirs like a child wraps itself in a cozy blanket. You have one friend in trial. The jury. A Trial Note Book is there to remind you or add to arguments over evidence coming in as evidence. Preparing that book is how you prepare the case.

You should live a breathe out of your one page, opening statement list.

Hit is and move on.

Check off when you prove a topic on the list. Then underneath the checked off topic, write down what evidence prove that topic.

Ex. No contract was signed. Absence of contract or no agreement between the parties.

Ex. Id Theft, not your client's debt. Police report, Identity Theft Affidavit, no use of the card by client, wrong address or soc proves this topic you checked off.

All the above check offs, are really your closing statements. Repetition of the proof, the topics proven and your Theme.

Closing Statement should be your Opening Statement and should be your Theme.

Promises made, promises kept:

Take the jury through your opening statement check list. You are reminding them of how how things came in.

Thank the Jury. Sorry if I offend but I am passionate about my client, hold that against me, not the defenses of my client.

Podiums, Empty Seats, and announcing your opponent as coming up next while also taking a shot against them.

Bring a Book. Quick time vs Long Time Deliberations. All BS.

Do I poll the Jury after a Win or Loss.

