A Trusted and Effective Trial Lawyer

How to be exactly what in-house counsel needs when they are dealing with a conflict in a difficult jurisdiction

Introduction

As a trial attorney, when you practice in difficult jurisdictions that do not realistically offer summary resolution of cases, one of three good things should happen: (1) you become skilled at negotiating settlements; (2) you learn how to win tough cases; and (3) sometimes you do both. Unless you want to spend your career compromising claims and negotiating settlements, you must develop not only the competence to try difficult cases but also the skills needed to give your clients confidence in your ability to accurately assess a case and obtain the best possible result at trial where dismissal or settlement is not possible or reasonable. The goal is to become your client's trusted ally and effective trial counsel not just a litigator. This paper will offer insights into how and why outside counsel is selected, strategies for developing a trusting relationship with clients and juries, and tools that can be used to thoroughly evaluate and try cases in difficult jurisdictions.

Structure

This paper explores this key question under the following headings:

1. How and why do outside counsel get selected?
2. How can trial lawyers rise to this challenge?
3. How can a trial lawyer's methods and mindset help you become your clients trusted ally?
4. What strategies and techniques lead to trusting relationships with both clients and juries?

1. How and why do outside counsel get selected?

How? Carefully. Why? To win.

The selection of outside counsel is an important decision which is not taken lightly. The how usually involves consideration of several factors including:

- Team composition – is the proposed team right-sized in relation to the matter
- Subject matter expertise – does the matter/area of law require specialized expertise
- Experience – is there unique experience with the issue, court, business etc. that would be beneficial
- Strategy for success – is there alignment in approach to the problem
- Cost – is the value provided right-sized in relation to the cost

In assessing the why, many clients will consider a variety of factors they are managing such as the business, investor community, regulators etc. As such, many clients will consider:

- Business objective – does the firm understand the business problem and offer solutions
- Stakeholder perspectives – does the firm understand various stakeholder (e.g. C-suite, Board, Investor Relations, Communications, Business, Regulatory) perspectives
- Predictability – does the firm provide consistent, accurate and timely budget forecasts
- Practical solutions – does the firm provide helpful and practical solutions
- Other factors – is the firm responsive, efficient, leverages technology, listens and follows company processes (e.g. vendor guidelines), etc.

2. How can trial lawyers rise to this challenge?

What does in-house counsel want?

In-house counsel appreciates an early substantive case assessment, which includes:

- Whether any dispositive motions are applicable, whether the court is likely to grant such a motion and after how long
- A legal budget that considers the possible outcomes, dismissal, settlement, trial, appeal
- An estimate of the chance of successful defense, settlement value, range of possible jury verdicts
- Legal analysis of the available strategies, your recommendation as to strategy and why

Outside counsel's assessment must be updated as you learn new information and discovery develops. It is critical to talk to in-house counsel about this assessment, make sure it includes what they need and that it aligns with the client's business considerations, expectations of the board of directors and shareholders, and eliminates surprises as much as possible.

Trial outcomes are uncertain, so it is critical to control what you can, such as:

- Timely response to calls and emails
- Legal bills that are accurate, timely, with entries that document what work was done, by whom, and why it was necessary and helpful to advance the matter
- No surprises

How and why outside counsel is selected, and how to become your client's trusted ally

Outside counsel must learn about their client and recognize the differences in perspective of in-house counsel.

Outside counsel must have the ability to effectively try the case but must also be able to

evaluate a case in relation to the numerous other considerations that impact the client. Of course, a lawsuit can have a direct financial impact, but it can also damage a client's reputation, hinder the growth of a new class of products, prompt regulatory action, or result in more lawsuits being filed.

In-house counsel often hires an attorney rather than a law firm. An attorney who obtained a good result does not guarantee another attorney in the same firm or another office of the firm will have similar skills or obtain similar results.

Outside counsel must think about the client's best interest, make an honest assessment of whether they have the skills and resources to handle the matter. Do not hesitate to collaborate with others as appropriate.

3. How can a trial lawyer's methods and mindset help you become your client's trusted ally?

A clear picture is emerging, in which we can see that the daily methods and habits of the trial lawyer play a big part in them becoming the trusted go-to attorney for tough cases. What's more, many of the attributes which lead to winning the trust of a jury, can also win the trust of a client.

Remember, this is a people business**.** A person with a problem needs someone to solve it. Recent research at Harvard Business School found that 85% of referrals come from people who feel good about their relationship with their outside counsel. But it's not just about liking you, it's much more about ***liking your work***. The difference between getting rehired and one-and-done is how you deliver the current assignment.

If you get the job done, and if your clients like how you work, they will pay your bills and send you the next assignment. This is why it's so important to identify the key assets skills, assets and rudiments needed for relationship building. Here is our list of what the assets you need to show up with:

- **Personality**: Likeability, for sure, but also your attitude and mindset. Clients are looking for enthusiasm, empathy and responsiveness.
- **Knowledge & Experience**: These are important assets which you'll need, but they're a given, not a differentiator. So don't try to build by selling how much law you know. On the other hand, if you can extend your knowledge beyond the law and into the sector, the client, their people, processes and problems, then your knowledge becomes directly relevant and valuable.
- **Methods**: Your knowledge and experience are only valuable if you can apply it effectively in service of your client's problems. This is why your methods matter. They build your credibility and reputation.
- **Toolset**: Playbooks like Lean Law equip your team to provide you with the toolset to understand your client's needs and deliver a service aligned to their with goals.
- **Skillset**: The work of a trial lawyer is highly skilled. As Professor David Maister,

author of *The Trusted Adviser* explains, imagine going into a hospital, that is how your clients feel when they come to see you. They are putting important problems in your hands, and they trust in your skills to fix them. This helps us pinpoint the right kind of skills. The fundamental skills are not about how you ***pitch***, they are about how you ***perform***.

Let's focus on the delivery skills which will get you hired, paid and rehired. A helpful acronym for what clients want is TREE:

- Transparency;
- Reliability;
- Effectiveness; &
- Efficiency.

What skills would a trial lawyer need in order to be transparent, reliable, effective and efficient?

🔍 **Transparency:** For this, the skills to develop and bring into everything you do are these:

- **Communication Skills**: Clients want clear concise communications that are forward ready. And when things go wrong, which they always will, remember, no fluff and no obfuscation.
- **Listening Skills**: As lawyers, we all love to talk, but active listening is a vital skill.

⏱️ **Reliability:** Reliability beats razzmatazz and builds trust. So the skills to focus on include:

- **Project Management**: Manage expectations, plan realistically, monitor progress, fix issues, hit deadlines and keep promises.
- **Consistent Excellence**: Bring the same quality standards to every task, every day, every assignment.

🎯 **Effectiveness:** Every action should be in service of solving the client's problem. The road will be littered with interesting diversions and provocative sidebars. Keep the focus and deliver the outcome. The skills needed include:

- **Problem-Solving**: Frame your work around solutions to the problem.
- **Making Recommendations**: Lawyers are wary of this. Don't be. Explain the risks for sure, but get off the fence and recommend a course of action.

⚙️ **Efficiency:** Show clients that you value their money by valuing your time. Create a good process, set the tasks in the right order, execute them efficiently. Find waste and eliminate it. If that sounds like it comes from the Toyota Lean playbook, it does. The skills to hone include:

- **Process Skills**: Get good at creating streamlined workflows and embrace the right tech.
- **The "Lean" Mindset**: Make a habit of asking yourself "Why are we doing it this way?" and "Why are we doing it at all?"

The actions which drive these noticeable traits are not soft skills, they are service delivery skills, along with others such as Consulting, Collaborating, Networking and Presenting.

4. What strategies and techniques lead to trusting relationships with both clients and juries?

Current events shape the opinions of judges and jurors

Like all of us, jurors and judiciary are influenced by headlines, the economy, and evolving cultural norms. While our individual circumstances are often diverse, there are several general themes that litigants must account for:

- Polarization – People have become more polarized than ever before, about issues as fundamental as whether to trust health care professionals. We evaluate legal arguments, witnesses, and evidence through the lenses of our personal experience.
- Suspicion of elites – Wealthy or famous individuals, corporations, or governmental and regulatory bodies are likely to be viewed with more hostility and less likely to receive the benefit of the doubt.
- Emotional response – Economic instability, sensational news, crime, war and other crises cause stress such that jurors may be less able to overcome bias, are more reactionary, less patient and objective.
- Distrust in institutions – As skepticism of political leaders and corporations has increased, jurors are increasingly likely to question a litigant's motives or a witness's credibility.
- Juror confirmation bias – Some jurors have a flawed sense of "what they know or believe," and they reach some decisions quickly and long before they have heard the complete set of facts, testimony and evidence that is presented during trial. As a result, these jurors have a tendency to process information in a way that supports or "confirms" their existing beliefs.

Acknowledging and accounting for these issues in your litigation strategy can help ameliorate their impact.

Tools to assess case value and develop your strategy

Assess the community of potential jurors, focusing on how they are likely to react to issues in your case

Research the jurisdiction where your case is pending, including traditional data such as age, economics, education, political tendencies, but also what community members think

about individual responsibility, corporate indifference, legal authority, etc.

Focus groups and mock trials

In a focus group, a facilitator generally presents the fact pattern of the case, arguments, the law then asks a series of questions. The focus group provides feedback, identifies issues, assesses the relative importance of issues in the case, and can be helpful at the beginning of litigation to learn what issues to explore in discovery.

A mock trial is intended to simulate an actual trial and be a test run of various aspects of the case, including opening and closing statements and presentation of deposition testimony or other evidence. A mock trial allows you to watch how jurors respond to specific arguments or evidence and how it impacts their opinions about liability and damages. Focus groups and mock trials are usually recorded so others on your team can watch them later.

Conducting a focus group or mock trial (or a combination of both) with panels composed of people from the venue where your case is pending can be invaluable because it provides insight into how the people that will decide the fact issues in your case may process the arguments and evidence. Beyond just the facts of your case, watching and listening to the groups speak, you learn a lot about a community, its values and what is important to the people who live there.

Research the judge and opposing counsel

Westlaw has many tools that are helpful with this type of research. You can enter your issue or question, select all states you are interested in and whether to include federal law, and Westlaw will provide an AI Jurisdictional Survey report summarizing the issue in all jurisdictions you selected.

You can also run Litigation Analytics Reports for judges, attorneys, law firms, case types. For example, a report for a judge includes their frequency of granting motions to dismiss, motions for summary judgment and others, and how long the motions were pending before a ruling. This can be helpful information to help plan how to spend time and economic resources in a case. If dispositive motions are almost never granted in a court, maybe it would be better to spend the money that would have been spent on briefing on a mock trial instead.

Find prior cases similar to yours that have been filed in the judge's court. Talk to attorneys who have tried cases before the judge, ask about tendencies regarding evidentiary rulings – does the judge tend to let the parties try their case, admit almost all evidence, and leave it to the jury to assess or is the judge a strict gate keeper who may be willing to exclude an expert or at least certain opinions that have no appropriate foundation.

Work to learn how opposing counsel thinks. Look for CLE articles or other writings

which will give you insight into their perspective on whatever topic is covered. Find other cases they have worked on using Pacer or searching the district clerk's records where the attorney mostly practices. In Houston, Texas, we can search the district clerk's records by an attorney's bar number. Review the parties' pleadings in the case, the attorney's designation of experts (they often use the same experts), substantive motions the attorney filed so you will be prepared for similar arguments. You may want to contact the attorneys who were averse to your opponent to learn about their style and get any advice or helpful materials they may have. Get copies of trial transcripts or depositions your opponent has taken (videos if you can find them). Use these materials to prepare your witnesses for deposition and trial.

Get real about economic losses

In Texas, a plaintiff can only recover the medical charges that were actually paid or incurred, and not any amount that is written off or reduced based on contract rates. To get around this, it is relatively common that plaintiff's counsel coordinates his client's (often unnecessary) medical care under a letter of protection, where the medical provider has a vested interest in the outcome of the case. Medical providers do not submit their significantly inflated bills to plaintiff's health insurance company but only send them to plaintiff counsel. Because the entire balance is still outstanding, plaintiff can ask the jury to award the much higher medical expenses.

To defend such practices, the defense must present expert testimony that the medical bills presented by plaintiff counsel are not reasonable for the services at issue. This is more difficult than you would expect given that courts require such an expert to have the appropriate background to discuss the medical services at issue and the market prices for such services. Most physicians are not involved with their own billing and are often unfamiliar with charges related to their services. There are experts who study medical billing practices, the billing codes related to various procedures, etc.

The Texas Supreme Court determined that parties could discover the negotiated rates medical providers charge to private insurers and public payors in personal injury cases.[1] This type of information is helpful to establish reasonable charges for the medical care in your case.

What about when plaintiff counsel does not seek economic damages?

Traditionally, attorneys and jurors considered noneconomic damages in relation to the economic damages at issue. More recently, plaintiff attorneys may not seek damages related to medical expenses and do not offer medical bills into evidence so that the juror's award for noneconomic damages is not tethered to any amount of actual damages. Instead, plaintiff attorneys suggest an "anchor" to the jury which is an arbitrary dollar amount often much higher than they expect to recover. After hearing the anchor throughout the trial, the jury may believe they entered a reasonable dollar amount that is

[1] *In Re K & L Auto Crushers, LLC*, 627 S.W.3d 239 (Tex. 2021).

lower than the anchor, despite still being much higher than the case is worth.
This strategy makes it even more important to discover information to help defend noneconomic damages. Noneconomic damages such as physical pain, mental anguish, and disability are not tangible and not objectively measurable. Noneconomic damages are specific to the individual so work to discover information about the plaintiff, and how they actually lived before and after their alleged injury.

Of course, explore the plaintiff's social media, but also seek information concerning the household services that the plaintiff was really providing. Talk to the plaintiff's friends, family members, co-workers, etc. about the plaintiff's interests, activity level, and daily routine. A plaintiff often claims they can no longer participate in a sport or hobby, when in reality was only a dream or aspiration. Surveillance can be useful. Send specific discovery addressing their physical activities, requested information to be downloaded from smart watches and bands related to movement and activities.

Going to trial in a difficult jurisdiction

Get the most out of your pretrial motions by having a thorough strategy

Strongly consider hiring a "local, local" attorney – somebody who is respected by your trial judge, respected in the community (especially if the venue is rural/small), and somebody who can provide practical assistance throughout trial.

Follow the jurisdiction's local rules regarding when to submit various pretrial materials and request a pretrial hearing before the day of trial to allow adequate time to present your motions, objections, etc. and for the judge to consider the issues thoroughly before ruling. This also allows time for follow-up research or briefing as necessary.
File a motion to exclude evidence and a related motion in limine to exclude plaintiff's evidence, such as speculative testimony from a life care planner, documentary evidence that is not proven up or lacks foundation.

In the appropriate case, consider filing a motion to bifurcate the trial as to liability and damages, or as to punitive damages.

File a motion to prevent plaintiff counsel from making reptile theory arguments. Reptile questions and arguments appeal to the jurors' perceptions of their own safety and the safety of the community rather than deciding issues between the parties in the actual lawsuit.

File a motion to prevent plaintiff counsel from asking voir dire panel members about whether they can or would award certain dollar amounts. Such questions are inappropriate and are often used to get reasonable people to agree that they cannot award ridiculously high dollar amounts and then ask the court to strike them for cause.

Voir dire strategy, identifying the worst panel members

Frame questions to assist in revealing extreme opinions, such as an expectation that a product be absolutely safe, a belief that corporations cannot be trusted, skeptical of science, or that seek "confirmation" of an existing belief rather than evaluating evidence and then forming a conclusion.

Even after the jury is selected, consider hiring consultants who can perform research on the jurors – consider reviewing their social media presence, review various posts and statements that have been made as you search for ways to better "connect" with each of the jurors selected to hear the case.

Case themes and stories are important

Story telling is a fundamental human activity and is critical to making your case themes memorable and relatable. Focusing on the weaknesses in the plaintiff's case is more important than trying to convince the jury that the defendant is a "good corporate citizen" (although it rarely hurts to attempt to establish the "good corporate citizen" path). Starting with the opening statement, describe specific facts that lead the jury to the conclusion that it would be an injustice to award the plaintiff a significant sum of money.

Appropriate arguments may include:

- Plaintiff's comparative fault
- Plaintiff's overreaching on damages (has been released by their physician, no future care scheduled, returned to work, etc.)
- Attorney directed medical care
- Specific weaknesses about plaintiff's experts

The defendant should present evidence to help avoid a reptile response from jurors:

- Show how defendants who are individuals or people who work for defendant corporations have trained and developed skills in what they do because they are personally invested in it and care very much about what they do.
- Use people's names during the trial and not just their corporate titles.
- Show the defendant's efforts to avoid accidents and negative outcomes, even if not directly related to the plaintiff's incident.
- Show there is no immediate threat to the community.
- If appropriate, describe actions taken to avoid a future event similar to what the plaintiff experienced.
- If plaintiff counsel argues their case is about improving safety or sending a message so something similar does not happen in the future, point out what plaintiff and plaintiff counsel have not done, such as have not suggested alternative designs, written letters to industry groups or legislative bodies.

Arguing and defending damages

Plaintiff attorneys have become more and more aggressive with their use of anchoring and in some instances take it too far. In *Gregory v. Chohan*, plaintiff counsel obtained a judgment exceeding $16 million in a wrongful death action related to an eighteen-wheeler accident. In closing argument, plaintiff counsel used analogies including a $71 million F-18 fighter jet and a $186 million painting. The Supreme Court of Texas reversed and remanded the case for a new trial, noting that the problem with such analogies is that things like an F-18 fighter jet are not related to the plaintiff or the evidence in the case. The court held that, "to survive a legal-sufficiency challenge to an award of non-economic damages, a wrongful death plaintiff should bear the burden of demonstrating both (1) the existence of compensable mental anguish or loss of companionship and (2) a rational connection, grounded in the evidence, between the injuries suffered and the amount awarded."[2]

The court rejected any requirement that the ratio of economic versus noneconomic damages must be considered but did not give a clear road map about how to do it correctly. The court held that if an attorney believes the amount sought is reasonable, then there should be an articulable reason why that is so. An attorney asking a jury to award that amount in damages should be expected to articulate the reason why the amount sought is reasonable and just, so the jury can rationally decide whether it agrees."[3]

Anchoring can be important to the defense, even where you have a strong liability defense. Defense counsel should also be able to articulate their methodology for their arguments about noneconomic damages rather than risking that the jury could assume you are offering a very low number with no relation to the case.

Learn about what is allowed in the subject jurisdiction. For example, some states allow a party to argue both lump sums and supporting per diem calculations. Some states allow a party to argue either lump sums or per diem calculations but not both, and other states do not allow either one.

Plaintiff counsel will work to present evidence about how the alleged injuries have impacted plaintiff's daily life. Hearing a person talk about their physical pain and how it impacts simple tasks every day makes it more personal for jurors, who can relate to some of the tasks they describe. Use the specific factual evidence you discovered as discussed above to show all the abilities the plaintiff has, what they are capable of, and at the very least how their activity level may not be much different than before.

[2] 670 S.W.3d 546, 562 (Tex. 2023).
[3] *Id.* at 561-562.