INTERNATIONAL ASSOCIATION OF DEFENSE COUNSEL
2021 ANNUAL MEETING
CHICAGO

LESSONS ON EFFECTIVE TRIAL STRATEGY FROM *MY COUSIN VINNY*

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INTRODUCTION

Nearly 30 years after *My Cousin Vinny* debuted in movie theaters we are still watching and still laughing. We laugh when the stuttering defense lawyer points at the judge on the way back to his seat after his halting opening statement. We laugh when Vinny enters the courtroom late, carrying a box and wearing a vintage magician's outfit. And we laugh at (and dream about emulating) Vinny's one-sentence, curse-laden opening statement… oh how We Do Dream That.

Even while we laugh, *My Cousin Vinny* can remind us of some lessons that we can use our real life courtrooms.

"OH YEAH, YOU BLEND"

> *Whether you live in town or somewhere a few times zones to the east, the courthouse is its own locale. Rules matter. Not all of them are written. Following rules, respecting the ways and rhythms of the courtroom where you are, and being curious about and respectful of people's experiences different from your own affect your credibility and efficacy.*

► You Do Not Blend. You are counsel in a case being tried. Even in large courthouses, that is a finite group of people. Your usual ways of doing things are not necessarily the preferred ways of the people in the courtroom: both the formal rules and the unspoken customs and cultures. Pay attention to those things because they can be the difference between a smooth ride and a rocky road for the people who work in court and, consequently, for you and your client.

► Remember That Everyone Can See You, Everywhere. If someone knows about your case, chances are very good that they are going to recognize you if they see you—whether it is in the courthouse elevator or the grocery store—and they will watch you to see what they can glean about who you are.

► Deliberately look for the Written and Unwritten Local Rules; and Follow Them.

◊ Judges have preferences, whether or not they put them in writing. If judges have taken the time to write their preferences, you better find them and follow them. In the federal system, district court judges may post their written preferences on the uscourts.gov site for their federal district. In addition, a general Internet search can reveal informal or anecdotal discussion of the preferences of a particular judge or court, including summaries of or manuscripts from CLEs.

◊ Court staff—including clerks and court reporters—are in court to do a job, just like you are. Ask them what things lawyers do that make their job easier and their job harder. Do not call them by their first names if you have not worked with them before. Prepare a list of uncommon names, words, or acronyms that might be used in your hearing, and offer it to the court reporter for handy reference of proper spellings. If paper exhibits are used, consider having enough copies on hand to provide to court staff who are working in your hearing.

◊ Ask other lawyers about their experiences with the court. This is a conversation, not an email. Do not expect to get good information in writing. Also, a conversation avoids the technological mishap of having your written inquiry misdirected with an errant email address or inadvertent forwarding.

◊ Remember that the courthouse is a town of its own, no matter what the size of the municipality. Behave like you fully understand that you do not own the place. Be assured that the judges value the courtroom personnel; and they hear them talk to each other. And they do talk to each other *about you:* about how you treat them; whether you follow the rules of their court; and if you are late or sloppy or arrogant. They don't do that because they are bored; they talk about you because how you behave and how you do your job affects their daily life.

So, take some time to see the work of the people who run the place, not just the judges who grant and deny requests. Remember in your interactions, particularly when you are frustrated, that courthouse personnel work every day in a place that very few people visit for joyful reasons. Most people come to the courthouse only because of the worst moments of their lives. Courthouse personnel show up and do the work every day that is required to give people a place to have their irreconcilable disputes decided and their unspeakable tragedies spoken.

► Even if You Live In Town, remember that everyone in town is not just like you. Look deliberately for all the diverse perspectives in your jury and the judge.

◊ Diversity of experience is a strength and often leads to better decisions. Before trial starts you spend time deciding the themes and metaphors that will best convey your client's position to the jury. You do your best to try it with a variety of people to evaluate its efficacy, maybe even with mock jurors. Once your trial starts, you must look anew at the people who are *actually* on your jury. Appreciate the differences in experience. Speak to and include everyone. Remember the glaring example of the *My Cousin Vinny* prosecutor who referred to "England and all our little old ancestors" when talking to a not wholly English jury.

► When You Are From Out of Town, do not pretend that you live in town. Do get to know the place and find its great things: it will help you understand your decisionmaker better, which will aid your communication and will convey a respect for your audience that infuses your presentation.

◊ Be yourself but still notice when you behave (and dress) in a way that is different than where you are trying your case. Make sure that you truly believe that your different way is not "better" than the ways of where you are. It is not helpful to anyone.

◊ Do what you can to get to know the place and its culture enough that you can be aware of communication styles. Some things might be offensive there that are not offensive where you live. There are colloquial expressions that can be very useful if understood, and problematic if unknown. For instance, when Americans from the southeast talk about spending their beach trip "shagging," they mean dancing, which would be fine to say in open court under the right circumstances: but in Britain, the meaning of the same word would be decidedly different.

◊ Remember at all times that you do not live here and that is okay. There is no need to say "our" when referring to the local jurisdiction's rules or restaurants, and in fact you should not.

"I'M FINISHED WITH THIS GUY"

Witness examination styles should be deliberately chosen and modified to fit the moment. To frame questions and find the right tone, consider the characteristics of the witness, the progression of the narrative before the jury, and what the witness cannot credibly avoid admitting, whether or not she was deposed.

► Tailor Your Examination to the Time, Place, and Witness. Read the Room as it is, not as you think it should be.

◊ Remember that the jury has never heard the story of your client's case before. This can be challenging when you have seen every scrap of evidence, you have lived with the testimony, you have been dealing with all the lawyers for years, and you know the papers, words, and players so well that they all have lost their mystery and shimmer. But this story is being told to the jury for the first and only time. Be cognizant of what has been revealed—and what has not—as you consider whether to take a harsh tone with a witness who you know might deserve it. Has the jury heard what it needs to hear to view the witness

as a villain, or will you be the one who curries their disfavor? Have you earned the jury's trust enough to smile a little at an answer that defies credibility? Has the jury heard enough context to see the flaws in the testimony? These contextual elements affect the tone you decide to use with the witness.

► Prior deposition of a witness is helpful but not necessary for effective cross-examination. Cross-examination of a witness without prior deposition may happen more often in the future than civil litigators prefer or have experienced so far. In arbitration, depositions may be limited, if not outright prohibited. Some jurisdictions similarly are actively limiting the breadth of discovery. For instance, the United States District Court for the Middle District of North Carolina has adopted three presumptive case management tracks, and the "Standard" track requires discovery to be completed within 4 months and presumptively allows 4 depositions (including experts)[1]. In other cases, the cost-benefit analysis may weigh in favor of limiting depositions of fact witnesses. In short, there are many reasons why an adverse witness testifying in trial may not have been deposed, or even interviewed, before trial.

◊ Carefully decide what goals you hope to accomplish by asking the witness questions. It is not necessary to ask every witness a question. If the witness didn't connect any punches, consider whether to leave it there.

◊ The "Ten Commandments of Cross Examination" by Professor Irving Younger[2] are excellent guideposts for framing cross-examination of witnesses, particularly when there has been no opportunity to depose the witness. They are not inflexible and do not apply to every situation. But they are a great place to start. The "Ten Commandments" (which have been re-phrased or varied in their repetition by others and by us) are essentially:

[1] LR 26.1(a)(1) https://www.ncmd.uscourts.gov/sites/ncmd/files/2021_June_21_CIVRulesEffective.pdf

[2] Many videos of Professor Younger delivering a lecture on the "Ten Commandments" are available online, including at https://www.youtube.com/watch?v=dBP2if0l-a8 (last accessed on 7 July 2021).

1. Be brief.

2. Ask short questions and use plain words.

3. Always ask leading questions.

4. Don't ask a question to which you do not know the answer.

5. Listen to the witness's answers.

6. Don't quarrel with the witness.

7. Don't allow the witness to repeat his direct testimony.

8. Don't permit the witness to explain his answers.

9. Don't ask the "one question too many."

10. Save the ultimate point of your cross for summation.

◊ Find, and have at the ready, sources of impeachment or correction (or recollection refreshing) that are not witness testimony. When identifying documents that might be used with the witness at trial, remember to search for documents that you would ordinarily have marked for use in a deposition.

- Lengthy cross-examination is not necessary and often is counterproductive. One question or one subject cross-examination is effective: "You weren't in the car, were you?"

- When more than one subject will be covered during cross, the first questions should be ones for which the witness will have predictable answers and can lull the witness down the road to the conclusion that you desire.

◊ Do your homework on the person. The investigation should include public sources and questioning your clients. This investigation is different than the evaluation you make when you decide which witnesses merit depositions based

on their potentially relevant knowledge compared to those who may not. This investigation will involve far more considerations, including:

- social media profiles and posts, including other people's mentions of the witness;
- criminal records and disciplinary records available;
- educational background;
- age and any known family history;
- known personality traits;
- written communications or publications of any kind, including searching documents produced in discovery for the witness's name; and
- news articles that mention the witness.
- Do not limit your investigation to searching the Internet, discovery documents, and public records. Ask your clients what they know about the witness. Ask not only what facts the witness may know, learn what you can about demeanor and temperament.

"HOW MANY FINGERS AM I HOLDING UP NOW?"

Any theatrics should be carefully calculated and scrupulously choreographed. The lure of a grand reveal can be strong, and the effect of a successful one can be powerful. If all the elements are within your control and do not depend on witness performance, the risks of failure diminish. Even then, consider whether the performative value of even a successful dramatic moment may appear to be contrivance. (They are, after all.) If there is any doubt, don't do it.

► Do Not Depend on a witness to answer a question a certain way for a big theatrical moment. Put another way: don't ask the adverse witness to try on the glove.

◊ As audience members, we love when Hollywood delivers a courtroom twist involving a witness admission or recantation. We know the Jack Nicholson "YOU CAN'T HANDLE THE TRUTH!" speech, even if we haven't seen the

whole movie. And we know that the jury wants *something* not-mundane to happen. But leading into a question with a dramatic tone when you cannot control the answer can not only fall flat, it can deflate any progress that you have made with convincing the jury that your client's position is the more reasoned, and more likely true than the other side's. We will never know how the OJ Simpson trial would have ended if the prosecution had not asked the defendant to Try on The Glove. We do know the defense refrain that preceded the acquittal: If it Doesn't Fit, you Must Acquit.

◊ This is not the only horror story of theatrics gone bad. Remember that a central underpinning of persuasion is credibility. Showmanship attempts in and of themselves can undermine your credibility, particularly when they exhibit a lack of respect for the forum and when they eclipse the facts of the matter.

◊ Make sure that the dramatic moment you envision does not feature you in a starring role: the case is not about you. It is about your client's side of a dispute. The spotlight should be on the important fact that you are using the technique to highlight.

► Dramatic moments (the planned ones) are best left to the end of the case, perhaps in closing or a demonstrative. The risks are more contained. All the evidence is in. The chance for any witness to thwart the foundation underlying the point has passed. The risks of opposing counsel disrupting the moment also are smaller. In many places, it is very bad form to interrupt a closing argument with an objection, and the objection itself may call attention to the importance of the issue.

"*ONCE AGAIN, IT APPEARS THE COMMUNICATION PROCESS HAS BROKEN DOWN.*"

Judges are human and some days they are more human than others. Although it is not frequent, we all have seen it happen: the judge does not like your side or likes the other side a whole lot and it shows. Sometimes the disconnect is a result of a misstep and the situation can be righted with proper recognition and action. Other times, perhaps inadvertently, the judge plays an active and visible role beyond the mere calling of balls and strikes. No lawyer wants to aggravate a presiding judge or an already-problematic situation. But when it happens, there are ways to try to the reduce the conduct, mitigate the damage, and preserve the record for an opportunity for future relief.

► When You Know the Reason that the judge appears skeptical of your arguments or requests is because of a prior event in the courtroom or the case, there is an opportunity to repair the disconnect.

◊ Minor transgressions of rules or norms by lawyers or clients on some days evoke strong reactions from a judge—sometimes disproportionate to the conduct. These instances are likely to blow over if not escalated through defensive reactions and if further transgressions are avoided. In the movie, Vinny does not follow the rules and does not dress appropriately in the beginning of the trial—and the judge dislikes Vinny's disrespect for the court. As the trial progresses, we see Vinny reform his conduct to be closer to the judge's expectation of how a lawyer should behave in court. The judge's view of Vinny changes, too. This story arc is dramatically portrayed for the movie, but it is not inconsistent with human (and judicial) nature.

◊ On the other hand, if your client is sanctioned for conduct that is contemptuous (violating an order) or offensive to principles of justice (concealing or failing to disclose material information that was requested), an attempt at more drastic rehabilitation may be warranted.

► In the unusual event when a judge is playing an active role in the trial that conveys to the jury favoritism for the opposing side, it may be difficult to discern what to do. Many lawyers reasonably fear incurring additional disfavor by acting on the issues. While at all times counsel must defer respectfully to the authority of the court, counsel also must zealously represent their clients. Sometimes this means taking action to ensure that the written record will later show the judge's actions that are problematic for your client.

◊ In any request or objection, be sure to articulate the conduct that is prejudicial. Describe physical actions that will not otherwise appear in a transcription.

◊ Instead of an objection, you may start with a deferential request to the judge to be aware of a certain issue and to avoid further repetitions. This request should be outside the presence of the jury but on the record. You may start with a request at the bench, but you may want to put the request on the record at a break.

- For example: "Your Honor, you may not realize that you nodded throughout the testimony of the first two witnesses for the plaintiff and, when they finished testifying, you gave a thumbs up to the plaintiff's attorney while the jury was present. May we inquire whether all witnesses will receive the same reactions or whether the court believes any corrective instruction might be warranted?"

◊ If the conduct is persistent, be sure to continue to object sufficiently to record each instance.

◊ If you are able to report juror reactions or other information tending to show prejudice that would not occur in the form of words that will be typed, state that information. Similarly, if the judge is yelling, pointing, or red-faced,

remember that you must describe that with your words for it to be on the record.

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Cue the credits and call for the mint green convertible to pick us up. It's time for us to take our popcorn and trial tips and head back to the real courtroom.

May all your trials have happy endings.