HOW TO LOSE A CASE

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In a new publication, Edmund King QC sets out a list of ways that a case can be conducted badly and highlights some of the most common pitfalls so that you avoid them.

I can't, without looking as absurd as a celibate priest giving a 45 minute wedding homily on the secrets of a successful marriage, say how to win a case.

But a bit like the brilliant Sedley's laws of documents (google it if you've not seen it), it can be helpful to set out ways to do things badly. Both so you don't do them yourself, and so you can give your ~~opponents~~ learned friends the chance to screw it up royally. It's surprising how often people do.

1. **Have a really big team**
   Small teams beat big teams. The best team I worked on was 1/6 the size of the other side. It was more nimble, got letters out faster, was on the front foot, wrote shorter documents.

2. **Have a team that doesn't trust each other**
   Then you can spend all your time on internal fretting, managing the client, trying to keep the client's confidence, none of which will get you further forward.

3. **Have a team that doesn't know its skill set**
   A team of C grade lawyers that knows its strengths and weaknesses will generally beat a team of A grade lawyers that thinks they are the true heir to Cicero and Marshall Hall. They make fewer mistakes.

4. **Have a paper allergy**
   How many lawyers don't read the papers? Staggering.

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5. **Use other people's chronologies**
   If you prepare your own, you know what happened. If you don't, you don't.

6. **Be too grand to worry about bundles**
   Bundles are not glamorous. They are prepared by junior people who have a very difficult job: to work out what documents will turn out to be relevant at trial. Typically the person doing it has never even seen a trial before. Typically the silks and judge can see only after weeks of evidence what the few critical documents are. So if you don't keep an eye on it, it's pretty much luck what goes in and how it's ordered.

   Get involved in the bundle preparation process. You need them early.

   Format matters. If it's not electronic, you can often merge/doubleside and shrink your papers. You will be quicker at finding stuff as a result.

   The index will contain all sorts of long irrelevant words. Cut it down. Remove the heading so more of the info is on the first page. If you need to be looking something up on the index in court, it will be quicker. If up to 30 tabs, you can sellotape the index to the inside cover of the bundle so that when you're talking to the judge and the file is open, you can see what tab you are going to. Redo all the spines of your bundles so you can see them all quickly. I have spent literally days redoing and remastering bundles before trials. It is never wasted time.

   For electronic trials, it's the same principles: make sure you have the right number of screens, the right processes for finding documents, the right people able to comment on your e-post-its. Have someone automatically bring up on a separate screen the document being shown to the witness so you can leaf through the full doc while following the questions on the particular page. Invest time in thinking ahead as to how you can be nimble in the court room.

7. **Get someone to write your cross for you**
   It always shows if someone else wrote it.

8. **Prepare your cross on your own**
   Eh? How does that fit with the previous point. Like this:

   Read the statements, briefly.

   Read the contemporaneous papers. Get your junior/pupil/solicitor/expert to read the contemporaneous papers too at the same time.

   Then you sit in a room with them and read them in what I am told is yeshiva-style: you read every page – often *out loud, i.e. slowly* – and discuss the contents. This will always, always, yield points that you would never have thought of

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alone; or collectively without having read the papers first. It is long, it is slow – several days for a medium case – but there is no substitute.

Then look at the statements again. The truth is never in the statements, and judges will never hardly ever go for statements over documents. (If the judge did, it's probably because they really want to tie you up like a kipper; you lost on the narrative overall and they are making themselves CA proof.)

Then think what the best place to start XX is. It may not be chronological. It is often best to go straight into the heart of a key topic. The judge is normally listening intently at the start; most starts are boring so yours will have novelty value; and the witness has not had a long time to settle in. Judges like it that you look as though you are not wasting time on peripherals.

9. **Ignore the facts**
   Every single case is only ever won on the facts, even the ones that supposedly aren't. If the facts were worse, the judges would bend the law to do justice and sleep at night.

10. **Think that law is like maths**
    Judgments are written as though they are solutions to a set of facts, almost like working through a simultaneous equation. I have this fact, this fact, I work it through, this is the answer. That's not how it works.

    It's more like moral philosophy. The judge knows where s/he wants to go in the conclusion: they know who won. When you do a simultaneous equation, you don't get to choose your two given equations. The judge gets to choose the facts to which to apply the law, and the facts will be shaped by the conclusion s/he wants to draw (even if s/he doesn't really know that it is).

    It's also like moral philosophy in that if the conclusion is gross ('so it's okay to eat my children') you go back and look at where you must have slipped up in your reasoning. Judges do the same.

    That's why, ultimately all trials are won on the facts. Each side has to be able to give the judge a credible legal argument – but they nearly always can. Then the judge has to want to see the case through a factual lens that fits that legal argument.

11. **Set out it out in a full opening**
    Your trial opening should look as though it's for a PTR. The judge is just getting into the case, even if s/he's done the interlocutories. Reading accounts from each party that read as though they are for different cases is just a confusing mess. You want your skeleton to be the guide through the mess for the judge when s/he comes to write judgment.

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So be the judge's friend, helping him/her into the case. Identify the issues. Set out the common ground. Set out what s/he can rely on – and give him/her a roadmap of the issues that s/he'll need to decide at the end of the case. Sometimes you can do this helpfully by having a factual section that says in italics at the end of each paragraph: this paragraph is common ground. It's almost like you are helping them write a commentary on your own document.

The judge can then trust your document as a roadmap. One over-the-top comment will undermine the judge's confidence in being able to trust your submissions. No adverbs. No rhetoric.

If the evidence goes well, it is so much more effective from the witnesses than from you. As novelists say: show, don't tell. In court that means – let it come out orally from the witness or in closing.

Plus, you really don't know for sure how the live evidence will turn out. So keep all the fireworks for closing.

12. **Like complicated analysis**

There are two forms of intelligence. One explains why apparently simple things are complex. There is a place for epistemology, which as far as I could make out is an entire branch of philosophy devoted to defining the verb "to know"; but it's not normally the way to win cases. Judges can see more than enough complexity in front of them at the start of a case. You want to show the other kind of intelligence, that takes something complex and imposes a simple analysis on it.

Sometimes an analogy works very well for this. Robert Miles won Harbourmaster (where the question was: was there a right to redeem where there had been an event of default but it had been cured by the time of the attempted redemption) by the analogy of cleaning windows. If you don't know it, read the CA judgment which shows how that turned the entire case. Something changed in the judges' eyes in a Supreme Court case (all about the meaning of "so far as possible") where Sue Prevezer was leading me and used an example of it being possible to go to the gym for 20 seconds but that wasn't what you meant when you said you went to the gym every day "so far as possible". If good, analogies allow you to be succinct. Lord Hoffmann's analogies are legendarily brilliant.

Some lawyers loathe analogies, so it doesn't work for all cases. I loved them and always stretched them too far. But even if you don't like them, you'd be staggered how many financial list judges are sitting there thinking in terms of mortgages and credit cards when considering really complex transactions. So even if they don't do it for you, it's not a bad idea to be thinking in those terms too, at least some of the time.

13. **Leave it all to the judge to sort out**

The judge wants help. S/he's busy. They have less good clerking support typically. Number their files, provide flow charts and helpful documents, update

their folders for them, make sure the metal hoops close properly, that the file won't rip their dodgy back if they pick it up because it's had too many updates. Offer them double sided etc. Think about how to make their life easier.

When you are trying to persuade them on case management, look forwards to practicality and deferring arguments wherever you might lose. When you get to have the argument, you will hopefully have won on the facts (if not you are stuffed anyway), and then the judge wants to write a judgment in your favour.

14. **Assume the judge knows as much as you about the case**
When you get to court, you have been living the case for a long long time. Take him/her through it slowly. There are usually two different narratives and you need to show the judge how it happened.

If your opponent is a liar, or more politely their version of the neutral facts is a million miles from yours, it's even more important that you have oodles of time to do this, and you need to have thought ahead for the time estimate on this. You need a lot of time to undo an untruth– the t/e with one opponent might be ten times what it should be for another, because they will say six half-truths and mis-representations in five minutes, each of which takes 10 minutes to unwind. Judges don't appreciate this either. Dealing with this in the current time, time, time climate is one of the hardest parts of the job, because in reality you won't get extra time. Plus when judges start worrying about the time, they stop listening, and you actually need more time. So just try to make sure that you have a generous t/e to start with – you get in a lot less of trouble, both as a client and a lawyer, if you run short rather than long.

Use prejudice carefully when going through the material. Prejudice works. But you shouldn't be seen to use it overtly or you will prompt a blowback: Is this a whinge? What am I supposed to do with this? What issue does this go to? An old hand dealt with this cleverly: he would read the paragraph above the damaging one aloud. He'd then pause, carrying on reading in his head, knowing full well the judge was doing the same, and after a couple of minutes, say, "no I don't think I need to read that". Perfect.

15. **Be recognised as an impressive cross-examiner**
Controversial this one. But the best XX I have ever seen was sooo good that no one, not even the judge or the clients, recognised it. The witness didn't blub, wasn't beaten into a pulp. It just looked as though he hadn't really been properly proofed; his story supported our case. I didn't realise it either. Only when this happened in the next case too did I realise that I was in the presence of the most talented cross-examiner I would ever see. Open questions at killer points – wtf?

The first level of XX skill is a close controlled XX where the witness is boxed in and has to lose credibility or agree with you. This is often very hard. Some advocates never get there. But judges discount this evidence somewhat; they can see the skill of the advocate. They are trying to do justice, remember, so it's only

natural to assess the witness in the light of how good the examination seems. The style that clients love but actually makes a judge think that the witness would have confessed to anything to make the XX stop, while effective, is less effective in winning the case than it looks. How daft is that judgment – we lost even though we destroyed them in XX! – is not an unusual complaint. I think the obvious skill of the examiner explains why you hear that complaint often.

The second level of XX is a close controlled XX where the witness is hemmed in by wires that not even the judge can see. That's a whole different level of control of a witness. It is usually done by charm and by thinking in preparation as to what must have happened as a matter of natural human behaviour, picked up from clues as to what was going on from the documents. It's very hard – it does require charm – and it's impossible without the preparation. When the witness destroys him/herself – or apparently does it himself, all the help to do so being hidden – it's generally fatal to the case.

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