The Toy Box
by
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Like you, I practice in a document-intensive area of law (lender liability and insurance bad faith) where defense tactics routinely include burying plaintiff's counsel in paper.

In one case, for example, we fought over a year for a court order threatening the defendant with sanctions of a thousand dollars per day, per document, for every document the defendant continued to withhold in violation of previous production orders. That order triggered a barrage of boxes delivered to my doorstep every day for a month. I came to know the lightening-bolt insignia of the messenger service very well; and at the end of a month we had over one hundred thousand pages of documents in our office.

At trial, we had less than one hundred pages of exhibits.

The key to effective use of documents at trial is to have as close to none as you possibly can. Leave it to the other side to wheel in stacks of boxes. You breeze in with a single briefcase, and your audience - be it jury, judge, or hearing officer - will breathe a sigh of relief when defense counsel sits down and you stand up. But how to carry out the winnowing process required to go from one hundred thousand pages to one hundred pages?

I use a toy box.

Every case is a story to be told. Unlike most stories, however, it is not told by a single narrator.

As attorneys, we must tell the story through the words and voices of a number of different people. Some speak from the witness box; others speak through documents; many do both. Most resent us no end for making them testify in the first place. The trick is to orchestrate these many voices so that they tell a single story fluently and simply, without duplication or disharmony.

In fact, the better analogy might be that each case is not the telling of a story, but the singing of a ballad, with trial counsel as the conductor. Before you begin to put together your trial or hearing presentation, think through your entire case, going back to the basics.

- What have you alleged in your complaint and, within each count or theory of liability alleged, what precise facts must you prove to establish every element of that count?

- What person or document is the source of proof for each one of those facts?

- What order do you want to present those facts in to sing the most beguiling song? Chronological? Topical?

- Which singer (witness or document) do you want to use to express each of those facts?

- Finally, how do you most effectively use your documents, in concert with your witnesses, to orchestrate the ballad that must emerge?

It is this last point that I want to talk to you about, and that is where the toy box comes in.

From the outset of a case, you should keep firmly in mind each individual fact you need to establish to prove each element of your case, and then like a bloodhound sniff out those facts in the discovery process.

Step one should be getting your hands on every piece of paper that relates in any way, shape or form to your claim or to the anticipated defenses. As you go through these documents, ask yourself two questions:

> 1) does this piece of paper I am now looking at prove one of those facts; and
>
> 2) even if this piece of paper doesn't prove a fact I need proven, will it help me corner a witness into testifying to one of those facts I need proven?

If the answer to both those questions is no, file that document and don't look it at again. If the answer to either of those questions is yes, put it in the toy box, or toy file, to play with in the future.

Next, identify each witness - your singers - who knows some piece of the story you need to tell, and correlate your toys to particular witnesses.

For example, suppose you want to demonstrate that the school acted in negligence or bad faith. You have a good (or perhaps, very bad) outside psychological evaluation in the file that should have been taken into account by the school psychologist but wasn't. Target the school psychologist for a deposition using the outside evaluation as a toy to get her to admit both that it should have been taken into account but wasn't (negligence); and that she knew it was in the school file but chose to disregard it (bad faith).

I will give you an example from actual testimony in one of my cases involving a bank, in which the bank brought a fraudulent conveyance suit against my client, the wife of a bank officer, in an effort to attach the stock that she had purchased from her husband.

One element the bank had to prove in a fraudulent conveyance action was that my client, Mrs. Lussier, had not paid a fair price for the stock. One toy in the toy box was the bank president's written, sworn affirmation that he sued Mrs. Lussier for fraud after "conducting an investigation into the stock-transfer records of the bank" -- an impressive-sounding recital. Another toy in the toy box was an exemplar bank stock-transfer record. Happily for us, this contained no information whatsoever on price paid in a given transfer but merely recorded the seller, buyer, number of shares and date of transfer.

Thus when cross-examined on his own written affirmation as to exactly what his investigation into the stock-transfer records of the bank actually involved, the bank president testified:

> Q. Now, you had also indicated that prior to swearing under oath in the federal court case that Mrs. Lussier had acted fraudulently, you searched the bank records; is that right?
>
> A. I checked the bank's stock records, yes.
>
> Q. What exactly do you mean by stock records, what exactly did you look at before making that affirmation under oath?
>
> A. I looked at stock transfer records, and I was primarily looking at dates of transfer.
>
> Q. What information is contained in these stock records as to how much money is paid for stocks in a given transfer?
>
> A. Usually none.

Thus, the toy was used to pin the president down to the scope of his "investigation into the records of the bank" as looking only where one would not expect to find any information about the price paid for the stock - i.e., negligence. On further cross-examination on the same toy - his written affirmation - we were also able to get at the bank's subjective state of mind in suing Mrs. Lussier, wife of the former bank officer, for fraud:

> Q. Now, you had testified earlier that one component of your thinking as to why the stock transfers were fraudulent is because you thought you had evidence that Mr. Lussier had engaged in conduct that was illegal and improper; is that right?
>
> A. Yes.
>
> Q. Did you think you had any evidence indicting that Mrs. Lussier had engaged in conduct that was illegal or improper?
>
> A. No.

And that's how we go beyond negligence and get to bad faith.

Once you have developed your toy box with written discovery, you should continually remove toys from it as you go through the litigation. That is, you should take out any documents that you may have put in the box originally that, on further contemplation and in the light of later discovery, are not really on target after all.

There is nothing wrong with erring on the side of over-inclusiveness when you put toys in the toy box; but you must later remove those that are only marginally fun to play with.

Each time you depose another witness, play with the toys - whichever toys compromise that particular witness. In this way, you build stronger testimony as you go, and you can also easily discard those documents that have unexpectedly proven to be no fun once you hear a witness defuse what you thought was a dynamite written statement. By the time you get to trial, your toy file - which originally was selected from a large universe of documents - should be downright skinny, and contain nothing but lethal documents.

Now for the really special toys.

You know the ones I mean: those precious few that are so great they just scream negligence or bad faith all on their own.

Don't just play with those toys at trial. Enlarge them! Blow them up! Put them on an overhead projector! Force a witness from the other side to read them aloud into the record! Sing, sing, sing!

Sometimes I opt for enlargements of good toys on poster boards placed on an easel in front of the jury or judge, because then you can splash lots of color around. Often I prefer to use the overhead projector because you can (oops) leave it glaring on the screen even after you have moved on to another topic or the witness has stepped down.

For you tekkies, there is always projection from a laptop computer if the courtroom is equipped with individual screens for the jurors. Whatever has visual punch - use it to play with your toys.

That way you'll have much more fun at trial than your opponent.

About Lisa Chalidze

Lisa Chalidze is a trial attorney whose offices are located in Castleton, Vermont. She concentrates her practice on civil litigation in lender liability and insurance bad faith claims action. Before limiting her practice to lender liability and insurance bad faith claims actions, her civil practice in litigation involved professional malpractice actions, products and premises liability, and auto accidents.

Some of Lisa's published work includes her *Policy Interpretation: Recent Developments In Vermont*, Vermont Bar Journal, 1993; *Disability Discrimination Based on Dyslexia in Employment Actions Under the Americans with Disabilities Act,* 74 AmJur Trials, 255 (2000; *Defending the Legal Malpractice Claim Arising from Representation of Small Business*, 62 AmJur Trials, 395 (19970; *Parent Corporation's Liability for Lease of Subsidiary*, 79 AmJur Trials, 1 (2001); and *Proving Insurance Coverage for Legal Malpractice Under Errors and Ommissions Liability Policy*, 47 POF 3d 317 (1998) (co-authored with Brice Palmer).

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