

DAMAGES AND TRIAL PRACTICE: SYMPOSIUM PRESENTATION OF JUDGE KEVIN BRAZILE

Hon. Kevin C. Brazile*

JUDGE KEVIN BRAZILE:

Good afternoon, everyone. I am so pleased to be here. My good friend [speaking about Ibiere N. Seck], she is hard to follow. I have got to tell you. I have known her for years, and I think it goes without saying, you see why she is a great trial lawyer. You saw that today, and I think that is what most of you who are going to be litigators aspire to be. This is a great example right here—what she showed you this afternoon—of how a trial lawyer really tries a case. I mean, it is textbook what you just saw.

But I am the judge. So, it is a little different. I am going to give you a different perspective of what you have been hearing about. You have been hearing a lot about the theory, about how to try a case, and what I want to tell you about today is in my real experience as a judge.

There is theory, there is advocacy, but as a judge, I kind of have the best seat in the house. I have been a trial lawyer for twenty years and been on the bench for over twenty years. In watching lawyers, it is easy to see what works, and that is why today so important for you all.

You are the future of the law. You are going to be trying these cases. I remember when I was a young lawyer going up against Johnny Cochran.¹ I was on the opposite side—lost a lot of cases to him and won a few. As a trial lawyer, you learn from every single case. You also learn more from the cases you lose than from the cases you win. When you lose a case, you think deeply about what you did right, what you did wrong, and how can you do better. Try enough, you are bound to lose a case at some point in

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1. *See About Johnnie L. Cochran, Jr.*, THE COCHRAN L. FIRM, <https://www.cochranfirm.com/johnnie-cochran/> [https://perma.cc/VTS4-XBNP].

your career. You want to really get that experience of what a case is really about. Most of you, maybe you have done mock trial, moot court, trial advocacy, or something like that, but it may be a while before you actually try a case. But you are going to get that opportunity and you want to develop certain skills. Part of that is that you have to know how does a trial work.

So, for me it all starts with jury selection. I am sure none of you have done that yet—maybe some of the lawyers here have—but when you say how does that impact proving your damages, a lot of good trial lawyers will tell you a case sometimes is won or lost at jury selection.² And I can tell you after having sat in on many civil trials, you can almost tell who is going to win once the jury is picked. I can tell you—and my colleagues can tell you too—once the jury is picked, we have a pretty good feel about how the case is going to come out. So that very important process of jury selection is something that you really must learn and master.

So, I want to give you a few pointers here. I strongly urge lawyers to use jury questionnaires. Some judges will not allow it, but if you read the rules of civil procedure, generally judges must allow a questionnaire. I have always found jury questionnaires to be incredibly helpful. Give it to the jurors, and it will make your voir dire more effective if you have those answers already from that questionnaire.

Then, what is also important in the beginning is your mini opening. A mini opening is a relatively new concept.³ The question is: How long should an opening be? If you are targeting an opening statement beyond an hour, after that, they do not know what you are saying. But in that mini opening you want to touch upon damages.

One thing my good friend here [pointing to Ibiere N. Seck] that she does so well—and this is the hallmark of a good trial lawyer—every case that we look at is a story, in some way, every single one. You must become a good storyteller. In that mini opening, you want to lay out the boundaries. You probably heard that it is a road map. It is a story. People are not talking to you, so you want to talk to the group. It all starts with that mini opening.

2. See *Why Jury Selection is CRUCIAL to Winning a Case?*, JURY ANALYST (June 18, 2014), <https://juryanalyst.com/blog/jury-selection-strategy-crucial-to-case/> [<https://perma.cc/B5WL-Y898>].

3. See Sonia Chopra, *Structuring Your Mini Opening: Know When to Hold 'Em*, PLAINTIFF (Jan. 2020), <https://plaintiffmagazine.com/recent-issues/item/structuring-your-mini-opening-know-when-to-hold-em> [<https://perma.cc/66U9-ZAKU>].

Then there is that voir dire process.⁴ As a trial judge, I do my own process of voir dire and it takes about twenty minutes. I try to anticipate a lot of questions a lawyer is going to ask, but at the same time I do not want to steal all their thunder. They want to make a connection. Sometimes I find myself laying out certain questions so that when the inevitable cause challenge comes up, they say the jurors cannot be fair and impartial, but when I asked them the very same question, they said they could—so maybe these are not true challenges for cause? Maybe they are peremptory challenges?

Do not use up all your peremptory challenges. Be strategic with it. In the voir dire process, you want the jurors to talk. You do not want to be the one talking. You want to know their thought process. Nobody comes into the courthouse with a clean slate. Ask the jurors whether they can be fair and impartial to both sides and whether they can decide the case based on the evidence and the law. You want to tap into the jurors: what are their feelings? Have they ever had emotional distress?

I have a caseload of about 700 cases. We have a backlog, so the average time to trial is about three years. For me, the employment discrimination cases are a big part of my docket. Last year, there was a case for \$24 million. I recently had a \$6 million case for someone who was discharged from their job, got another job within six months, a job that was paying more money. All these cases have no physical injury, no brain damage, no disfigurement. But all of them involve emotional distress. So, whether you are on the defense or the plaintiff's side, these cases are worth a lot of money.

Picking the right jury starts the race. I am kind of split on the value of jury consultants.⁵ I think it is a mixed bag in terms of how good they are, and I know a couple who I think are really very good. But a lot of the times the best jury consultant is a good voir dire process—getting some kind of connection and getting jurors to open up. One little practice tip I can give is if you are on the plaintiff side, have your client there every day—every single day. I have had jurors say during voir dire, why is not the defendant here? If you have a likeable client, having that client in the courtroom every single day is important.

4. See Paula L. Hannaford-Agor & Nicole L. Waters, *Examining Voir Dire in California*, NAT'L CTR. FOR COURTS (Aug. 2004), https://www.courts.ca.gov/documents/voir_dire_report.pdf [<https://perma.cc/4YH9-9FZY>].

5. See generally April J. Ferguson, *The Who, What & Why of Jury Consultants*, OPVEON, <https://www.opveon.com/blog/the-who-what-why-of-jury-consultants> [<https://perma.cc/X68E-BZPS>].

I just want to talk briefly about opening statements. An effective PowerPoint presentation really goes a long way into making your point.⁶ Spend some time on that PowerPoint. Another little practice tip is that there is nothing as embarrassing as when your PowerPoint stops working or gets mixed up or confused. The jurors are just sitting there now. You do not want to lose them. You want to keep their attention.

Having a timeline is so important. So, the first question obviously is the plaintiff's testimony. Do you put the plaintiff on first or last? I believe last. You may ask: Why? Because that is the story again. You want to set it up with the experts. It is very important, too, if the plaintiff has some significant other who can talk about their injuries. Who can speak about one's injuries, their pain and suffering better than the injured person? Yes, the significant other. Because the significant other lives with them and shares the same bedroom and house, they have maybe been together for years, and maybe they have children: They have that bond. So, the plaintiff is going to tell their spouse what they are really feeling. You want to put that person on the stand. That person is going to lay the foundation for what the plaintiff is going to come back and say, and that person is going to be very believable and very credible to the jury. I see it over and over, where literally the damages have been proven by the significant other saying that "this is our life now." If somebody is injured, that makes a difference, and it impacts your life. That is something that jurors reach out to, grab a hold of, and say, "Yes, that is me! We must make this person whole. We must make this person accountable."

You also want to show the medical treatment and medical cost. You want to have a psychologist or psychiatrist. I recently had a case where the plaintiff suffered from stress, anxiety, panic attacks, worry, and humiliation for fourteen years. They had seen a psychologist, and the person's wife had seen a psychologist. You have got to argue to the jury what is fair. How do you make this person whole?

Let us talk a bit about the jury instructions.⁷ The juror is going to hear that you must follow the law even if you disagree with it. It is hard to define, so that is where we talked about their common sense. That is why the voir dire and everyone's experience become crucial.

Lastly, I want to talk about closing statements. Again, I cannot stress enough having very good PowerPoint slides. Good lawyers—great

6. See Brian Poulter, *The Electronic Presentation of Evidence in Opening Statement*, ADVOCATE (June 2022), <https://www.advocatemagazine.com/article/2022-june/the-electronic-presentation-of-evidence-in-opening-statement> [<https://perma.cc/F4PY-Q8TU>].

7. See generally Kevin M. Fong & John M. Grenfell, *Crafting Jury Instructions to Win Trials and Appeals*, 40 THE PRACTICAL LITIGATOR 39 (2022).

lawyers—they will always take out some pages from the jury instruction and put them on the screen, and they will explain to the jury what that instruction means and how that instruction fits with their case. That is where you win, getting the jury to understand what that means and how to apply it. With your PowerPoint slides, go back to that timeline and explain it, referring to the facts of the case. Videotape your depositions because when you read the page and line to the jurors, they fall asleep. When you show a video, that statement is remembered. The key thing to remember is you do not want to just read twenty or thirty pages from the deposition and have the jury put their heads down. To avoid that, use a video recording. Now when you are doing your page and line, they can see, they can hear the credibility, they can feel their responsibility to judge the case and render a verdict. As a trial lawyer, you must think about putting on enough evidence for the court, so that when you get that post-trial motion, you can say that there is enough evidence.

So, these are some of the things I hope you can remember—some of the tips of the trade. For me, it has really been a pleasure being a judge, being able to see good lawyers like we see today in their presentations. I think all of you are on that path. Remember that it is all about preparation, preparation, preparation, and teamwork, teamwork, teamwork. Thank you and have a great weekend.