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[LETTER to a young trial lawyer]

PREPARATION, NOT SPONTANEITY, LEADS TO VICTORY

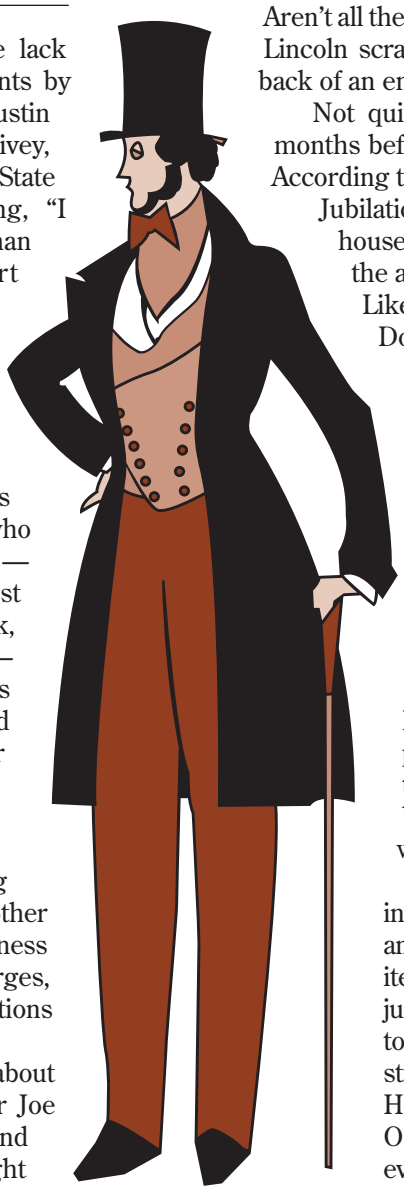
by DAVID K. BISSINGER

Trial lawyers today bemoan the lack of jury trials. We read comments by great trial lawyers — such as Austin plaintiffs attorney Broadus Spivey, quoted in a 2004 article in the State Bar of Texas' *Advocate* saying, "I think I've tried more cases than our entire Texas Supreme Court and United States Supreme Court put together" — and we weep for another time.

But take heart. Most lawyers have the same problem. Remember the value of preparation. Even the legendary late Percy Foreman of Houston — who defended countless criminal defendants, including James Earl Ray, who assassinated the Rev. Dr. Martin Luther King Jr. — said that the better prepared advocate will almost always win, according to Michael Dorman's book, "King of the Courtroom." Go watch a few trials — civil or criminal — and you'll see many instances of poor preparation among even experienced lawyers. Beating a more experienced lawyer ranks among life's finer pleasures.

A new lawyer may ask, "How do I prepare?" Before anything else, prepare the jury argument — the opening statement and closing argument. That will force you to prepare all the other pieces needed to win: jury instructions, witness examinations and exhibits. As this outline emerges, so will the discovery plan and pleadings and motions strategy

But all that preparation seems boring. What about attorneys such as famed Houston trial lawyer Joe Jamail, who drank Scotch with Willie Nelson and Darrell Royal (who both stuck to beer) the night before Jamail's closing argument in *Pennzoil v. Texaco*? Aren't all the great arguments spontaneous, like Abraham Lincoln scratching out the Gettysburg Address on the back of an envelope?



Not quite. Jamail had prepared his argument for months before the November 1985 closing in *Pennzoil*. According to his autobiography "Lawyer: My Trials and Jubilations," Jamail spent two full weeks alone at his house in Galveston in quiet preparation developing the arguments that fueled his legendary closing. Likewise, as documented in David Herbert Donald's biography "Lincoln" and elsewhere, Lincoln prepared the Gettysburg Address for many weeks in advance of giving it, during which time he tied together years of work from previous speeches and writings.

In both instances, and as with any great speech or argument, Lincoln and Jamail had so absorbed their material that they spoke from the heart with words, phrases and ideas carefully crafted over time.

Lincoln kept notes in his stovepipe hat. Now lawyers have computers and handheld personal digital assistants to do the same thing. However it's done, lawyers should build arguments that contain their own words, thoughts and stories.

Build the argument around your jury instructions, deposition and trial testimony, and, most important, the exhibits. At trial, these items serve as signposts for lawyers and the jury. Using that structure will help a lawyer get to a point where his speech gives itself. He may still need notes, but only for basic navigation. He may wander off a bit but come back. That's OK. He will address the resonant themes, not every detail.

Lawyers may object to this approach on the ground that clients won't pay for trial preparation early in the case. Don't be so sure. Sophisticated clients as well as those new to the legal system appreciate the value of good arguments. In fact, that's the part of the case they understand best. Sharing your trial notebook with the client opens a way for the client to help with the case. If the client nevertheless refuses to pay for that preparation, consider what prominent litigator Walter Lancaster, a partner in the Los Angeles office of Kirkland & Ellis, wrote in the American Bar Association's *Litigation* magazine in 1997: "[L]ook at yourself in the mirror and ask whether your desire to win is limited by whether or not the meter is running."

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Make It Your Own

Lawyers need to build their arguments for cases they don't even have yet. This advice goes beyond work in a particular case. In every trial, lawyers need stump speeches for opening and closing, as well as for voir dire and even bench conferences. Use your own trials as well as those of other lawyers in your office. Read about other trials; certain themes will reveal themselves over and over.

For example, you can read Jamail's autobiography, in which he discusses *Pennzoil,* a 1985 merger dispute. Jamail, who would go on to win an $11 billion verdict in that case (the largest in history up to that time) writes that he argued in closing that "[t]here cannot be half justice without there being half injustice. Pennzoil is entitled to full and complete compensation for its damages." Good plaintiffs lawyers make this argument in every case.

As trial lawyers absorb the literature and build on it, they'll have increasing numbers of themes from which to draw. Test ideas and themes with family, friends, colleagues and peers. Again, you may never try 300 cases to juries, but you may prepare 300 jury arguments. You will become a better trial lawyer each time you prepare one.

How does a lawyer know if she's created a good argument? It should generate a flow in her mind and in the minds of jurors. In fact, the preparation of the argument ends only when the audience hears it and makes it its own. As reported in Donald's biography, Lincoln's law partner, William Herndon, wrote about one of Lincoln's abolition speeches, "[It] was full of fire and energy and force. It was logic; it was pathos; it was enthusiasm; it was justice, equity, truth and right set ablaze by the divine fires of a soul maddened by the wrong; it was hard, heavy, knotty, gnarly, backed with wrath."

Few better examples exist of an audience hearing an argument — and, with history as witness — making it their own.

David K. Bissinger is a trial lawyer and partner in Siegmyer, Oshman & Bissinger in Houston.