



# THE TEN CRITICAL MISTAKES THAT TRIAL LAWYERS MAKE (AND HOW TO AVOID THEM!)

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# Introduction

## Your Worst Mistake? Not Being in the Courtroom!

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Why are trial lawyers featured on TV, in books, and in the movies?

*Because what we do is sexy.* There's no sex appeal in a well written contract. Nobody cheers aloud or weeps openly when a commercial real estate transaction is finalized. No one is aroused by a successful patent application. But when a trial lawyer works magic in the courtroom, it's **sexy**. Hollywood doesn't produce movies about bankruptcy attorneys. They don't create TV shows featuring the taxation sections of law firms. No intellectual property attorney has ever been the protagonist of a best selling book.

### ***Trial lawyers are different.***

Those other lawyers play valuable roles, but only trial lawyers get featured in the spotlight. That's because, in the crucial deciding moments, the trial lawyer acts alone. Like the surgeon, the jet fighter pilot, or the lead singer of a rock band, the trial lawyer stands out in front, alone, bearing the weight of the entire case upon his shoulders. The trial lawyer can't look to a support team in the middle of a critical cross-examination. No associate can help when direct examination takes an unexpected turn.

During opening statements and closing arguments, only a single voice may be heard. That voice is the trial lawyer's.

***I love being a trial lawyer.*** I can't imagine why anyone would suffer through three years of law school, and then never step foot inside a courtroom. This book isn't for "litigators," dabblers, or wannabes. This book is written for my fellow trial lawyers. You don't know what it's like to be a trial lawyer unless you've actually been one.

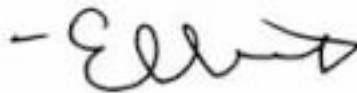
If you've never stepped foot inside a courtroom, you don't know.

If you've never asked "one question too many," you don't know.

If you've never lost a case you think you should have won, you don't know.

As Clarence Darrow said, "The only real lawyers are trial lawyers. And trial lawyers try cases to juries." These are the ten most important lessons every trial lawyer should apply to their trial practice. If you apply just **one** of these tips, you will dramatically improve your courtroom performance. Apply **all** of them, and you'll become one of the best lawyers in your courthouse.

Best wishes for success in your next trial!



Elliott Wilcox  
Editor, *Trial Tips Newsletter*

# Critical Mistake #1

## Letting Your Opponent Out-Prepare You

***In trial, you only get one chance to present your case. One critical factor that determines whether you'll win or lose is how prepared you are. Who will be the best prepared lawyer: You? Or your opponent?***

When I was eleven years old, I discovered one of the most important lessons I've ever learned about winning jury trials. At the time, I didn't even know that I wanted to become a trial lawyer. I had just joined the Boy Scouts, and to earn my "Scout" rank, I needed to learn the Boy Scout Motto. I had no idea that the motto I was about to learn would help me win more jury trials than anything I ever learned in law school. What did I learn?

I learned the Boy Scout motto: "Be Prepared."

Before we begin this ten step journey of trial advocacy improvement, take a moment to focus upon those two words: "Be Prepared." Be prepared for what? For anything and everything. It is not the best looking attorney, the flashiest, or the smoothest talker who wins trials. The victorious lawyer is usually the one who is best prepared. Be prepared for every eventuality.

It has been said that soon after he passed the bar, F. Lee Bailey sought an opportunity to meet the famed trial attorney Edward Bennett Williams. Williams was renowned for his skills in the courtroom and ability to win trials against overwhelming odds. Bailey asked him how he managed to pull a rabbit out of a hat so consistently. Williams told him, "If you want to pull rabbits out of hats, you better have fifty hats and fifty rabbits... and get lucky." The more prepared you are, the better your chances of getting "lucky."

Be prepared. Nothing else matters as much as this. Nothing. Williams once remarked, "There's no substitute for knowing everything." Not just the strengths and weaknesses of your case, but the strengths and weaknesses of your opponent's case, vacation schedules, upcoming deadlines, relationships, financial situations, recent news or media events that

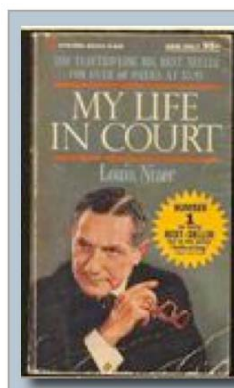
will affect how jurors view the evidence... everything. Do you know your opponent's case well enough to try it yourself? You will have a greater guarantee of success in the courtroom when you know more, do more, and understand more than your opponent does. A trial lawyer with immense skill, fantastic presentation skills, but insufficient preparation will be beaten by the trial lawyer who is completely prepared.

Legend has it that Vince Lombardi's Green Bay Packers were so good, they could tell their opponents which play they were planning to run, and the other team still couldn't stop them. Just imagine, the quarterback telling everyone in the stadium: "We're going to rush the ball up the left side of the field. Try to stop us." He hikes the ball and hands it off to the running back. The play is executed with such precision and perfection that the back rushes up the left side of the field for a first down. Imagine how despondent the defensive players would be when, even knowing what the play was going to be, they still couldn't stop it.

The secret to the Packers's success? Preparation and practice. They ran the same basic plays over and over again until they were unstoppable.

Now imagine walking into the courtroom able to telegraph your plays, knowing that your opponent still can't stop you. You can do it. How?

It's easy: **Be Prepared.** ♦



*Yes, there's such a thing as luck in trial law, but it only comes at three o'clock in the morning... You'll still find me in the library looking for luck at three o'clock in the morning*

- LOUIS NIZER,  
on preparation for trial

# Critical Mistake #2

## Making it Personal

Have you ever seen a movie or TV show with a stereotypical confrontation between a bookie and a “degenerate gambler”? Right before the bookie breaks the gambler’s thumbs or kneecaps, he says the same thing: “I hope you understand, this ain’t personal, it’s just business.”

If bookies and degenerate gamblers can understand not to take it personally, so can we. Here are five reasons why the best trial lawyers never make it personal:

### **REASON #1. When you make it personal, you lose your objectivity**

That means that you’re putting yourself in your client’s shoes. You’ve heard the adage, “A man who represents himself has a fool for a client,” haven’t you? When you get too close to an issue, you can’t evaluate it clearly. Your objectivity was one of the reasons your client hired you. If you can’t provide him with that objective evaluation of the strengths and weaknesses of his case, refund his money and tell him to hire someone else.

### **REASON #2. By making it personal, you lose sight of your objective**

Your objective is to show the jury why your client deserves to win, not to show them why your opponent is a jerk. You haven’t been a successful advocate when the jury tells you, “Your opponent sure was a jerk,” but sends your client home empty-handed.

### **REASON #3. You’ll get distracted**

When you make it personal, you can get caught up dealing with petty annoyances, rather than trying your case. Don’t lose your case because something your opponent said or did distracted you from the real issues in the case.

### **REASON #4. Your health (mental and physical)**

If you make it personal, you won’t sleep well at night. You’ll toss and turn, thinking about how to “stick it to ‘im” during trial. You won’t enjoy going to the courthouse, either. Your stomach will clench in knots as you approach the courthouse steps, knowing that your enemy awaits you inside.

I think it was Dwight D. Eisenhower who said no one could make him angry, because he refused to give them that much power over him. It worked for him, and he fought *Nazis!* Don’t let it get personal - you give your opponent too much power over you.

### **REASON #5. You’ll make an enemy, and your future clients will suffer**

Don’t burn any bridges in the courthouse - you never know when you’ll need to cross them again. This won’t be the only case you have together. Down the road, you’ll try other cases against each other. You may even find yourself aligned in the courtroom! Several years ago, while working in Palm Beach, I tried several cases to verdict against an experienced attorney. We fought in the courtroom, fiercely advocating for our clients, but never taking it personally, and never letting it spill over outside the courtroom. Years later, it’s a different city, different circumstances, and we find ourselves aligned in a case where a young girl had been killed by a drunk driver. We worked together and resolved the case to both of our clients’ satisfaction. But what if either of us had taken things personally? Do you think we would have been able to resolve it? This is a job. It’s not personal. If you make it personal, you will lose your objectivity and your effectiveness. Your job is to prove the case, not to argue with the other attorney. If your opponent says your case stinks and that he’s going to kick you around the courtroom, don’t lower yourself to that level. It’s better to say, “You know, you may be right,” and let your actions, rather than your mouth, do the talking. ♦

# Critical Mistake #3

## Trying the case you wish you had, rather than the case you do have

Did you know that every case you take to verdict will actually be tried three times?

1. The case you plan to try,
2. The case you do try, and
3. The case you *wish* you'd tried.

Despite all of your preparation and pre-trial efforts, the case you do try will rarely look exactly like the case you planned to try. But when lawyers get these cases confused, they put their client's fate in jeopardy. Learn to avoid these common problems lawyers encounter when they confuse the case they have with the case they wish they had:

### **PROBLEM #1. Confusing testimony you heard before trial with testimony you heard during trial**

When you're preparing for trial, you gather lots of information that may not actually make it into your final case presentation. During closings, don't confuse the testimony you heard outside the courtroom with what you heard inside the courtroom. Want a simple way to avoid this mistake? Prepare a checklist of your important elements of proof. As each element is discussed, check it off. At the conclusion of your case, you should have a check mark next to each element you intend to discuss in closing arguments. If you don't have it checked off, you'll know that you can't discuss it.

### **PROBLEM #2. Pretending the witness testified as well on the stand as he did back in your office**

Unlike the first mistake, where you're discussing evidence the jurors didn't hear, this mistake involves overestimating the persuasive quality of the witness's testimony. In your office, the witness was engaging and dynamic. But under the pressures of the courtroom and the stilted language of direct examination, he was a dud. Or maybe he was skewered during cross-examination. Don't pretend he wasn't. They may not

like the witness, but that doesn't mean they have to disbelieve his testimony. Be candid, and discuss the weaknesses of his testimony during closing argument. Then show the jurors how his testimony is corroborated by other evidence.

### **PROBLEM #3. Attacking the witness who was a jerk during depositions, but appears polite and courteous during trial**

The jurors didn't see his pre-trial antics - they're only seeing what happens inside the courtroom. You'll need to adjust your cross-examination before you ask your first question. You can find a way to expose his antagonistic side, but do it politely. If you treat this witness with hostility or contempt, the jurors won't feel angry at him, they'll feel sorry for him.

### **PROBLEM #4. Ignoring case weaknesses**

Remember the Black Knight scene from Monty Python and the Holy Grail? During battle, the Black Knight's arm is cut off. His response? "Merely a flesh wound!" *A flesh wound?* C'mon, he wasn't fooling anyone. Neither will you if you ignore the damage your opponent inflicted on your case. Everyone in the courtroom knows you were injured. If you pretend it didn't happen, they'll think 1.) You're either too dumb to be trying cases, or 2.) You think they're too dumb to know you were injured. Neither situation is acceptable. Not every wound is fatal. Admit it, deal with it, and then move on.

If you avoid the first critical mistake we discussed ("Let no one out prepare you"), then the case you **plan** to try, the case you **do** try, and the case you **meant** to try should appear almost identical. Just keep your eye out for these four common mistakes, and your trial should be a success. ♦

# Critical Mistake #4

## Not Doing What You Said You Would Do, When You Said You'd Do It, and How You Said You'd Do It

**Promises.** You make them everyday. Promises to opposing counsel (“I’ll fax you a copy of the contract by the end of the day.”) Promises to jurors. Promises to friends and colleagues (“I’ll call you and make plans for lunch this week.”)

Do you want to cement your reputation as the attorney who can be trusted? Then make sure that you follow through on your promises. Every time you tell someone that you’ll do something, you’re making them a promise. Regardless of whether your promise is as trivial as “I’ll call you tonight” or as serious as “Our offer of settlement is \$17.3 million in damages, paid out over 5 years, with no admission of wrongdoing on our client’s behalf,” people rely upon what you say. If they can’t rely upon you for the little things, then they can’t rely upon you for the major things, either.

### **PROMISE #1. Do what you said you’d do**

The reason we have jobs as trial lawyers is because many people don’t do what they said they’d do. They breach a contract, and we get hired. They’re deliver a negligent level of care, and we get hired. They violate the law, and we get hired.

You’ll stand out from the crowd if you simply do what you said you would do. This part is easy. If you tell someone you’ll pick them up at the airport, you pick them up. If you tell them you’ll bring their files over to court, you bring the files. If you tell someone you’ll cover the deposition, you cover it. Like the Nike ad used to say - “Just Do It.” When you become known as a man or woman of your word, your reputation as the trustworthy advocate will grow.

### **PROMISE #2. Do it when you said you’d do it**

One of my old Boy Scout leaders had a phrase he loved to repeat about punctuality. The first time I heard it was one morning after I’d slept past reveille

and flag raising. He threw a bucket of water on my head and yelled, “Fifteen minutes early is never late!” (It worked - I didn’t miss another flag raising the rest of the summer!) When you say that the deposition will start at 1:00 PM, what time do you get there? Are you there at 12:45 PM, set up and ready to go? Or are you still at the restaurant, enjoying the last sips of your iced tea? Does the witness, your client, or your opponent have to wait for you to arrive? I’ve seen some of the worst abuses of this rule in criminal court. On any given day, you’ll see clients pacing back and forth in the hallway, wondering where their attorneys are. Their case was set for a hearing at 8:30 AM, and now it’s 9:45 AM, but the attorney is nowhere to be found.

Appearing late for court may waive your client’s speedy trial rights, cause a motion to be dismissed with prejudice, or even trigger a contempt citation. Not to mention the loss of faith the client has in his attorney and the loss of respect the court has for the attorney. In those situations, it’s not enough to simply do what you said you would do. You need to do it when you said you’d do it.

### **PROMISE #3. Do it how you said you’d do it**

If you do what you said you’d do when you said you’d do it, you’re already well on your way to becoming a top tier trial attorney. To complete your journey, you must do it how you said you’d do it.

Have you ever asked a colleague to cover a hearing for you, only to have them do a substandard job? Had an associate research the issues in a case, and miss the most important precedents? Heard an attorney promise he’ll ask “just one more question,” only to ask a dozen more?

Don’t just do it. Do it how you said you’d do it. If you don’t specify how you’ll do it, then it’s inferred your level of preparation and follow-through will

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# Critical Mistake #5

## Not Being Convinced in the Strength of Your Case

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How much do you trust the Chevrolet salesman who drives a Ford? Or the thrice-married marriage counselor? Did you follow the recommendations of your fat Phys.Ed. teacher?

Why don't you trust them? Probably because they don't have enough faith in their own products or services to purchase them, right? You can't sell something that you wouldn't buy. If they don't believe in what they're selling, then neither should you.

Jurors make their decisions using the same common sense rules that you do.

When you don't believe the story you're presenting, you won't deliver an effective opening statement. When you don't have full faith in your story, you won't cross-examine the witnesses with conviction. Regardless of how well you play poker, the jury will sense your lack of belief, and your closing arguments will fall upon deaf ears.

For example, let's say you're defending a client in a criminal case. Based on your initial investigation, you believe your client has an airtight alibi. You prepare your opening statement and case presentation on the theory that he left work at 10:45 PM and was at his girlfriend's apartment when the robbery occurred. But then, as your investigation continues, you start to doubt your client's alibi. The alibi doesn't completely crumble, but you have your doubts about it. What should you do?

When you find yourself doubting your case, it's time to start looking for a different story, one that you *do* believe in, because you will be more convincing when you tell stories that you believe.

Although you're prohibited from stating our personal opinion in a case, that doesn't mean you're prohibited from believing in your cause. When you truly believe in your arguments, you won't need to tell the jury you believe in them - the jurors will

sense your belief. Sir Winston Churchill said it best: "Before you can inspire with emotion, you must be swamped with it yourself. Before you can move their tears, your own must flow. To convince them, you must yourself believe."

You're more than just a hired gun - you're a professional persuader. Every case may have multiple defense theories or different theories of liability. To immediately become more persuasive, start looking for the stories that you do believe in. To be a world class trial lawyer, ***you must be convinced before you can be convincing.*** ♦

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### ***"Critical Mistake #4"*** *continued from page 7*

meet the highest professional expectations.

If you say you'll cover the request for continuance, do more than pick up their file and walk to court. Read through the synopsis, and be prepared to answer the judge's questions about the case. If you attend a deposition for someone, take detailed notes (in legible handwriting!) for them. If you cover a pre-trial conference for an attorney, you should know which days the attorney is available for trial and which days are off limits.

**Your word is your bond.** It won't always be easy to follow through on your word. Sometimes, sticking to your word may even mean you'll miss opportunities or experience short term discomfort. But in the long run, when you become known as someone who does what you said you'd do, when you said you'd do it, and how you said you'd do it, you'll develop a reputation as one of the most reliable attorneys in the courthouse. ♦

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# Critical Mistake #6

## Hoping Your Opponent Overlooks Your Weaknesses

Did you ever watch the TV show *Columbo*? Peter Falk played the role of Lt. Columbo, the homicide detective with a lazy eye and a rumpled raincoat. Whenever Columbo interviewed suspects, he appeared dazed and confused. They gladly talked with him, because they were convinced they could outwit him and get away with murder. But then, just as he was about to turn and leave, he would stop in his tracks and say, “Just one more little question...”

At that moment, the murder suspect suddenly realized that perhaps Columbo wasn’t so stupid after all. How did he do it? Week after week, murder after murder... How did Columbo get the murderers to slip up and admit their guilt? Easy. He presented himself as shambling, disheveled and slow witted. Murderers looked at him and thought, “This guy’s an idiot. I can outsmart him.” They underestimated him.

Are you making the same mistake? Are you underestimating your opponents? If an important part of your trial preparation consists of hoping your opponent misses the weaknesses in your case, you’re making the same mistakes Columbo’s suspects made. You need to prepare for trial as if your opponent won’t overlook **any** weaknesses in your case. Could you imagine preparing for trial and making any of these statements?

- ▶ “I doubt they’ll discover the similar lawsuit our client filed. After all, that was in a different state, and under her maiden name.”
- ▶ “She doesn’t know about the contradictory opinion our expert gave in that case - that case was settled before the verdict, and wasn’t reported anywhere.”
- ▶ “Don’t worry about it. They probably won’t even notice that the document is missing pages 233 and 234.”
- ▶ “They won’t be able to establish a case on liability, so we don’t need to worry about damages.”

If you expect your opponent will let you “slide” on these or other issues, you’re in for a rude

awakening. You should prepare each case for trial as if you’ll be facing one of the best attorneys in the courthouse. With that level of trial preparation, your trial skills will improve dramatically.

From personal experience, I can tell you that preparing your trials as if you’ll be facing the best attorneys in the courthouse is one of the best ways to supercharge your trial skills learning curve.

Almost every young prosecutor starts their career at the bottom of the ladder, prosecuting misdemeanor cases. At age 25, I was no different. Like most young prosecutors, my caseload primarily consisted of Driving Under the Influence (DUI) cases. The great thing about prosecuting DUI’s is that you get to try cases against a wide range of defense attorneys.

Some of my opponents were just like me: fresh out of law school, walking into court for the very first time, and still wet behind the ears. But other opponents were some of the most experienced defense attorneys in town. These were the guys who made their living defending DUI cases. They had breathalyzers in their office and knew them inside and out. They lectured at state and national conferences. They not only knew the law backwards and forwards, they were the ones who had litigated the issues at the appellate level.

I quickly learned a valuable lesson. Have you ever heard the phrase, “Dress for the job you want, not the job you have”? I did something similar. Even if I was trying a case against someone who had as little courtroom experience as I did, I prepared for trial as if I’d be facing one of the superstars.

Can you imagine how much faster your trial skills will develop if you prepare every case like that? Regardless of your opponent’s (perceived) skill level, prepare for every trial as if you’ll face world-class counsel. If you approach each case like that, and never expect your opponent to overlook anything, you’ll quickly become one of the best trial lawyers in your courthouse. ♦

# Critical Mistake #7

## Expecting That the Case Will Settle

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Your first impression of the case was, “This will never go to trial. It’ll plead out quickly.” You did a perfunctory deposition of the star witness, read the reports, and put the file back in your file cabinet, confident it would plea. But now, as the potential jurors start filing into the courtroom, you’re realizing what a big mistake you’ve made. You’ve made one of the biggest blunders a trial lawyer can make: You expected that the case would settle.

What if other hired guns made the same mistake? Think of these legendary cowboys:

- ▶ Chris Adams (Yul Benner) in *The Magnificent Seven*
- ▶ Rooster Cogburn (John Wayne) in *True Grit*
- ▶ Wyatt Earp (Burt Lancaster) in *Gunfight at the O.K. Corral*
- ▶ The Man With No Name (Clint Eastwood) in *The Good, The Bad, and the Ugly*
- ▶ The Waco Kid (Gene Wilder) in *Blazing Saddles*

Could you imagine any of them ever arriving unprepared for a gun fight?

Imagine this scene: It’s high noon. Your fearless Hero rides into town. He dismounts and ties his horse to a nearby hitching post. Confidently walking to one end of the street, you hear the ring of spurs with every step he takes. Finally he stops and turns to face his opponent.

There at the other end of the street, is the biggest, toughest, meanest looking man you’ve ever seen. His hat is black. His vest is black. His gun belt is black. His chaps are black. His boots are black. Even his eyes are black. With a sneer, he looks at your Hero and spits out a single word: “Draw!”

But then, your Hero stammers. “Wait a second... You’re serious?!? You really wanted a shootout? I’m sorry - I left my gun at home. I didn’t really think we’d have a gunfight today. I thought our case was going to settle. There’s no way I could be prepared to go today. Maybe you would you agree to a first time continuance?”

He wouldn’t be much of a Hero, would he?

But if you prepare for trial by expecting that your case will settle, you won’t be much of a Hero, either. Trials are the modern versions of gunfights. Not every dispute needs to end in the “bloodshed” of a trial. When a client pays you to be their Hero, you need to be prepared for the showdown at high noon. You can’t expect that your opponent won’t show up or will back down. If you were going to be in a gunfight, you would clean your weapon, practice your marksmanship, and work to be the quickest on the draw.

Nowadays that means you must read the reports, take the depositions, talk to every witness, go to the scene, do the research, draft the motions, subpoena the witnesses, develop a theme, prepare the cross-examinations, write the summations, and know what a judge and jury might do if the case goes to trial.

It sounds like a lot of work, because it is. But that’s why your client pays you such an exorbitant hourly rate. And here’s a little secret: there’s no such thing as wasted preparation. Even if this particular case doesn’t go to trial, you’ll still reap the benefits of your preparatory work. All of the effort you invest in the case will be rewarded in three ways:

First, you will develop the reputation of being ready for trial. Attorneys (and judges) talk to each other. They know which attorneys go to trial and which ones plead out their cases at the last minute. Your reputation affects settlement offers. If you have a reputation for backing down at the last minute, your opponents know you’ll accept their last minute offers, because you won’t have any choice. That doesn’t happen when they know you’ve prepared every case for trial.

Second, you’ll develop what Judge Pat Siracusa of Clearwater, Florida, calls a “foundation of excellence.” By preparing every case for trial, you develop skills, habits, and knowledge that you can apply to future cases. You won’t need to reinvent the

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# Critical Mistake #8

## Not Having at Least Two Forms of Proof for Every Essential Element

**TAMPA, FLORIDA.** In a startling press conference earlier today, the head coach of the Tampa Bay Buccaneers announced that he was firing all of the team's quarterbacks except for last season's Super Bowl MVP. The coach said that he had no intention of hiring other quarterbacks. "He's the best in the league. He's the reason we won last year's Super Bowl. With him at the helm of the team, we're guaranteed to keep the Lombardi Trophy in Tampa for another year." Sources close to the quarterback report he will sign a 7 year contract extension later this week.

When you read that press release, you probably thought to yourself, "A football team without a backup quarterback? That head coach is crazy. What happens if the quarterback gets injured?!?"

Of course, the story isn't true. Regardless of how talented a quarterback is, no head coach would ever start the season without backups for that position.

After all, what would happen if something went wrong during the season? No one can predict what will happen on "any given Sunday." The quarterback is too valuable. He's the lynchpin of the entire offense. Without a quarterback, the team's season would crash to a halt. Head coaches know this, and that's why they always have at least one backup quarterback.

How about you? Do you have a backup? In trial, just like on the football field, anything can happen. (Well, almost anything - I doubt you'll ever get hit by a 300 pound tackle during your opening statement.) But no matter how well prepared you are or how much faith you have in any individual witness or piece of evidence, you'll want a backup plan - just in case something goes wrong.

Do you know what part of your case needs a backup form of proof? To find out, start by analyzing your case using a proof chart. A proof chart shows what witnesses and evidence will be used to prove the key elements of your case. Look at this example from a DUI case:

Element	Witnesses	Exhibits
1. The Defendant drove or was in actual physical control of a motor vehicle	1. Jonathan Mayson (civilian witness)	
2. While under the influence of alcoholic beverages or a controlled substance	1. Ofc. Pauline Hawkins 2. Technician Bill Mays (breath test operator) 3. Technician Joe Sawyer (breath instrument inspector) 4. Jonathan Mayson (civilian witness)	1. Roadside video 2. Breath test video 3. Intoxilyzer results
3. To the extent his normal faculties were impaired	1. Ofc. Pauline Hawkins 2. Technician Bill Mays (breath test operator) 3. Technician Joe Sawyer (breath instrument inspector)	1. Roadside video 2. Breath test video 3. Intoxilyzer results

At a glance, you immediately see you have just one form of proof for Element #1. This is where your case is weakest. Even if that witness is a superstar, you should be concerned about this element. If anything happens to him, your season comes to a screeching halt.

Things happen. Witnesses forget. They develop “warts” (impeachable convictions, interests in the outcome, bias). They oversleep and miss court. They fall apart during deposition. They get lost on the way to the courthouse. They lose interest in testifying. They crumble under cross-examination. Sometimes, they even die.

Don’t put all of your eggs in a single basket. To best prepare for trial, you need at least two forms of proof for each element: A deposition and a witness. A photograph and eyewitness testimony. Two witnesses to the same fact.

Even that may not be enough. Bob Dekle, a friend of mine and a skilled courtroom advocate, says you should have **three** forms of proof for every essential element.

Have a backup plan. Even if you don’t use it, be prepared for every eventuality. There’s a scene in the movie *The Heist* that illustrates the importance of having a backup plan. Gene Hackman stars as a veteran thief preparing for a master heist. The plan appears so foolproof that one of the new thieves asks him why he’s even bothering to prepare a backup plan:

**Kid:** Why should it go sour? Teach me something. Why should it go sour, is that such a stupid question?

**Gene Hackman:** You ever cheat on a woman? Girl, something, you know, stand her up, step out on her? Ever do that?

**Kid:** Yeah.

**Gene Hackman:** When you called her, did you have an excuse?

**Kid:** Yeah.

**Gene Hackman:** What if she didn’t ask? Was your alibi a waste of time?

If you never use your backup form of proof, is your preparation a waste of time? Hopefully, you’ll

never need to use your second or third form of proof. But if something happens to one of your witnesses, or if one of your exhibits is excluded from trial, you will still have your backup form of proof. It’s better to limp across the finish line on backup proof than it is to go home early and promise, “We’ll be back next season.” In trial, there is no “next season.” You only get one shot to win. Be prepared to make it count. ♦

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**“Critical Mistake #7”** *continued from page 10*

wheel every time a client walks through your door, because you’ll be able to build upon the foundation of work you’ve already done. Many of your cases will be very similar: The hand-to-hand drug transaction on Parramore Avenue looks exactly like the hand-to-hand drug transaction on Tamarind Avenue. The A&P slip-and-fall case is almost identical to the slip-and-fall in the Piggly Wiggly. After a while, every D.U.I. starts to look the same...

Start your career by preparing every case for trial, and that foundation of excellence will minimize how much time you spend preparing future cases for trial. Let’s say it takes you twenty hours to properly prepare your first D.U.I. case for trial. You need to read the reports, watch the video, research the caselaw, review (or write) the motion to suppress, and prepare your theme and case presentation. When that case pleads out before trial, you don’t lose all of the work you did. All of that research can be invested in the next case you prepare. Because of all that effort you invested, you can prepare the next case in a fraction of the time.

The final reason to prepare every case for trial is because Murphy still lurks in the courtroom. Of course, you know that most cases won’t go to trial. You know that over 95% of all cases will be resolved short of trial. But there’s a reason they call it Murphy’s “Law” rather than Murphy’s “Maxim.” That case that you’re “confident” is going to plea? Sure enough, that will be the one that goes to trial. When that happens, other attorneys might fret and worry, but not you. Because you prepared every case for trial, you’ll be ready. Never expect that the case will settle, and you will quickly become one of the best attorneys in the courthouse. ♦

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# Critical Mistake #9

## Carrying Past Losses with You to the Next Trial

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Don Shula. Larry Csonka. Bob Griese. Mercury Morris. Paul Warfield. Nick Buoniconti.

Do you recognize the names? For football fans, their names are legend. They were the 1972 Miami Dolphins, the last NFL team to have a “perfect” season. Since that year, no other NFL team has completed the entire season with an undefeated record.

Luckily, the NFL championship doesn’t require a perfect record. Each year, one team can say without dispute that they are the best team in the National Football League. That team hoists the Lombardi Trophy aloft and is proclaimed the Super Bowl Champions. Nowadays, with salary caps, drafts, and free agency, every team has the potential to have a championship season. On any given Sunday, every team has a chance to win. The reality of the situation is, there probably won’t be another team with a perfect season. But every so often, a team comes close:

- ▶ In 1985, the Chicago Bears came close to a perfect record. “Da Bears” won 12 games in a row, but lost their 13th game to the Dolphins. That was their only loss of the season, and they went on to become Super Bowl champions.
- ▶ In 1998, the Denver Broncos won their first 13 games. They weren’t perfect either. They lost their last two games of the regular season, but won every post-season game to conclude their championship season.
- ▶ Most remarkably, the 2003 New England Patriots started their season by losing their very first game! Were they doomed for the rest of the season? Nope, they went on to win their last 15 games in a row and back-to-back Super Bowl championships.

Trial lawyers should learn an important lesson from these championship teams. No matter how great you are, you probably won’t go undefeated for an entire season. Sometime in your career, a jury is going to tell you, “No.”

Early in my career, an experienced trial attorney told me, “If you’re not losing them, you’re not trying them.” You may know attorneys who brag about their “perfect records,” but I don’t personally know any trial lawyers who’ve tried more than 10 cases and still have a perfect record.

Great trial lawyers don’t just try the cases that are guaranteed winners. Anyone can win cases when all of the facts, law, and jury appeal are on their side. It’s the great trial attorneys who win cases when the facts aren’t on their side or the jury appeal rests squarely in their opponent’s corner. The great trial lawyers take tough cases to verdict. And that means, sometimes, you’re going to lose.

What do you do when the unthinkable happens? Do you retreat to your office, shut the door, take the phone off the hook, and sulk? Do you complain about how blind the jury was, how stupid the judge’s rulings were, and what an idiot your client is for opening his mouth and volunteering otherwise inadmissible evidence during cross-examination?

Or do you learn something from the experience, improve your trial skills, and start preparing for your next trial?

When it happens, don’t carry the loss with you to your next trial. If you do, you’ll be fighting two teams at once, and you won’t win. Great trial lawyers know that a trial loss doesn’t define you. (Neither does a trial win.) You need to acknowledge the loss, learn why it happened, prevent the same mistakes from happening again, and move on. Here are a few tips to help you avoid carrying your loss with you to your next trial:

**Tip #1. Have a strong home life**

Do you know any lawyers whose kids wear name tags, because daddy doesn't see them often enough to remember their names? That may be an exaggeration, but it makes an important point. You need to have something besides trial wins and losses in your life. Everyone is there after the trial victories. Everyone enjoys hearing your stories when you're celebrating your trial win at a post-verdict happy hour. But not all of your raving fans are going to be there after a trial loss. Your friends and family will be, though. Cultivate those relationships and strengthen those bonds.

**Tip #2. Have other goals**

When the Apollo astronauts returned from the moon, many of them became very depressed. Why? Because they didn't have anything else in their lives to look forward to. They'd spent their entire lives preparing for one single moment, and didn't have any other goals to achieve once they returned to earth. (After all, once you've been to the moon, what else is there? The rest of your "TO DO" list probably looks pretty bland by comparison). That's why NASA made sure that the next generation of astronauts had a goals program, so they'd have something else to look forward to once they completed their mission. How about you? What else do you have? What goals do you have besides your next trial victory? What else are you working on? Make sure that your entire life doesn't get tied up in each trial victory or loss.

**Tip #3. Learn a lesson**

The old cliché says that every cloud has a silver lining, and a trial loss is no different. Yes, it stings, and yes, you hate losing, but that doesn't mean you need to grow accustomed to it. Ask yourself, "Why did I lose this case? Did I push an argument too far? Butcher a cross-examination? Neglect to pull the full story out of my witness during direct examination? Fail to rebut my opponent's case theory during closing argument? If I could try this case again,

what would I do differently?" The quicker you capture those lessons, the faster you'll improve your trial skills.

Know that there will be other trials. Not everyone who watched ABC's *Wide World of Sports* remembers what the "Thrill of Victory" looked like, but they all remember "the Agony of Defeat." Even if you only saw it once, the image of Slovenian ski jumper Vinko Bogataj losing his balance at the 1970 World Ski Flying Championships, rocketing off the end of the ramp, flipping out of control, and crashing through the retaining wall burned itself into your mind.

Regardless of how spectacularly you crash and burn, know that there will be other trials. No matter how much this verdict stings, you will wake up tomorrow morning and have another trial to prepare. Yes, Bogataj was injured in the crash (amazingly, despite the ferocity of the crash, he only suffered a mild concussion), but more importantly, he returned to skiing, eventually becoming a ski instructor.

When you crash and burn, you'll need to do the same thing. Shake off your injuries, and get back out there. Even the best attorneys in your courthouse lose cases. The difference between those lawyers and the mediocre ones is that they don't carry their past losses with them to the next trial. They don't dwell on their losses, they learn from them. They don't get depressed, they get motivated to improve their skills. Follow their lead. You might not have a perfect season, but that doesn't mean you can't have a championship season. ♦

*Young trial lawyers think trying cases is all glory. But trial lawyers pay a price unknown to our armchair colleagues who never stray beyond the safety of their desks. Trial lawyers lose cases. Did you ever hear of a lawyer's losing a contract? If you lose a trial, every explanation seems lame. The client who adored yesterday's summation glares at you in disgust after today's defeat. The jury has rejected you. It's a personal defeat. It burns in memory. Defeat is the price lawyers pay for success.*

- JEREMIAH SAGE

# Critical Mistake #10

## Thinking That Any Case is Worth Your Reputation

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As a trial lawyer, what is the most valuable asset you possess? It's not your law library... It's not your office building... And it's not your client list...

It's your reputation.

If your library burned to the ground tomorrow, you could rebuild it. If you lost your building tonight, your practice could continue tomorrow. Even if you lost your entire roster of clients, you could rebuild your practice.

But damage your reputation, and you may never recover.

Every attorney has a reputation, and you didn't develop that reputation overnight. You've been developing your reputation as a trial lawyer from the moment you took the LSAT. Actually, it started developing even before that. Your reputation is the accumulation of every decision you've made, every action you've taken, and every word you've spoken. You've spent your entire life developing your reputation.

Do you know what your reputation is? Do you know what other lawyers say about you behind your back? What do they say after you've left the courtroom?

- ▶ Do they say, "\_\_\_\_\_ is one of the best trial lawyers in the courthouse. Always prepared, always punctual, and a passionate advocate."
- ▶ Do they say, "\_\_\_\_\_ is a 'lawyer's lawyer.' If I was in trouble, that's who I would want to represent me."
- ▶ Or do they say, "My mom told me that if you can't say something nice, don't say anything at all. So I guess I'd better be quiet."

As a lawyer, your reputation is all you've got. It's fragile, and any damage could be irreparable. You must protect it more carefully than any of your other possessions.

Right now, you may be thinking, "Oh, this reputation stuff doesn't apply to me. We've all heard of lawyers who will bend the truth, conceal evidence, or actively mislead the jury to get favorable verdicts, but I'd never do anything like that. My reputation and bar card are too important to me. Besides, I'm honest. I'd never lie to a judge, juror, or fellow attorney."

You're right. Sure, there are some lawyers out there who would sell their souls to the devil to obtain a favorable verdict, but those individuals are the exception. The overwhelming majority of lawyers are honorable, diligent, and decent individuals. You'd never lie to the court or misrepresent something to your opponent. But your reputation is delicate, and if you're not careful, you could inadvertently damage your reputation with a single bad act.

How delicate is it? Let's compare your reputation to a bank account. Every day, you may make a deposit, but your deposits are limited to a small amount each day. Over time, however, those small deposits add up. With the power of compound interest, your account balance can grow to staggering heights. But if you ever make a withdrawal from this account, it's a huge withdrawal. Usually, you have to take it all out, and start the next day with an account balance of zero. In a single instant, your reputation, your most valuable asset, becomes worthless.

Lawyers talk to other lawyers. Judges talk to other judges. And they both talk to each other. Whatever you do, say, or decide will be mentioned to others. That's why no case is worth your

reputation. You have to be able to serve all of your clients, not just this one. No matter how hot under the collar you get, no matter how fired up you are, and no matter how much the case matters to you (personally, financially, or emotionally), you can't do something that will taint your reputation, because you'll cripple your ability to represent all of your other clients.

Young lawyers need to realize that there will be many more cases after this one is concluded. Yes, your case is important. But it's not the end of the world. And it's not worth doing or saying something in this case that will negatively affect your ability to try larger and more important cases down the road.

No case is worth your reputation. Certainly not some misdemeanor or small claims case. But there isn't a death penalty case or billion dollar verdict that's worth your reputation, either.

Ask yourself, "What type of reputation do I want to establish?" "What do I want people to say when I leave the courtroom?" "What type of legacy do I want to leave behind?" Every lawyer has a reputation. Once you develop a negative reputation, it's almost impossible to change, even if you change.

Your reputation walks into the courtroom before you do. Listed below are some of the different reputations that attorneys can develop. Do you recognize any of them from your courthouse?

**Rip Van Winkle.** Make sure you Shepardize every case in Rip's motions. Some of these cases have been bad law for years, but he's never updated his boilerplate motions. When confronted, Rip will tell you, "I've got a case back in my office..." Maybe he does, but it probably doesn't say what he thinks it says.

**Inigo Montoya.** Every client that Inigo accepts becomes a personal crusade. ("My name is Inigo Montoya. You killed my father. Prepare to die.") Inigo takes everything personally. (*"My name is Inigo Montoya. You killed my father. Prepare to die!"*) Once you disagree with Inigo, you've made a

lifelong enemy. (*"My name is Inigo Montoya! You killed my father! Prepare to die!"*)

**Don Quixote.** Don fervently cares for his clients and is emotionally involved in their cases. That's why Don takes exception to every unfavorable ruling, and lets everyone know it. He turns his back on the judge because he's not happy with the court's ruling, throws papers or tosses books onto the table, and whispers under his breath about how misguided the judge is.

**The Professor.** The Professor's smart. Real smart. He graduated at the top of his class and has been looking down ever since. He uses \$10 words to describe 50¢ events. But the Professor can't seem to understand why those stupid jurors keep rejecting his brilliant arguments.

**Paul Masson.** Paul is never quite ready for trial. He will "sell no wine before it's time." Nothing is ever ready for trial when Paul is around. He needs to continue the case because depositions still haven't been taken, motions still haven't been filed, and discovery still hasn't been completed. He's never willingly announced "Ready for trial" in his life. He knows that if he can get just one more continuance, perhaps next time, the case will be ready.

**Billy from the Family Circus.** Billy lives an exciting life. He's popular. You can see the trail he leaves as he runs all over the neighborhood, getting into wonderful adventures. He's scheduled to be in ten different places at once, which means at least nine different judges and nine different clients are always asking, "Where's Billy?"

**The White Rabbit.** The Rabbit can't make it to court on time, either. "I'm late! I'm late! For a very important date, I'm late! No time to say 'Hello,' 'Goodbye,' I'm late! I'm late! I'm late!"

**Han Solo.** "Look, I ain't in this for your revolution, and I'm not in it for you, Princess. I expect to be well paid. I'm in it for the money." Han describes his practice as a "business," gets his money up front, and churns and burns his cases as quickly as possible. Trials are the least profitable portion of his business, so Han avoids them whenever possible.



**Halitosis Harry.** Show some pity for Harry. Earlier this morning, something crawled into his mouth and died. But Harry's such an incredibly dedicated lawyer that, rather than going to the dentist to have the corpse removed, he rushed straight to court, walked over to you, leaned in close, and started negotiating his case.

**Egg Fu Young.** An hour after he's eaten, he's hungry again. After the deal has been finalized and you've signed on the dotted line, he tries to renegotiate a better deal. When dealing with Egg Fu, make sure he signs the contract first.

**Wile E. Coyote.** He's got great plans, but nothing ever seems to go his way and nothing ever works correctly. Try as he might, Wile still struggles with the evidentiary predicates and can't get any of his exhibits admitted into evidence. (Maybe it's because he never reads the instructions.)

**Dean Martin.** Dean can be entertaining ("hic!") and charming. Or mean and obnoxious. Or slow and disoriented. And all before ("hic!") ten o'clock in the morning. Dean couldn't survive morning court appearances without a combination of Altoids, eye drops, and caffeine. Be cautious when you see Dean driving into the parking garage, but even more careful when he's walking into the courtroom.

Which of these lawyers have you seen in your courthouse? Ever tried a case against one of them? Even if you've never met them, you've probably

heard other lawyers talk about them. Their reputation precedes them into the courtroom, doesn't it? But lawyers and judges don't just talk about the negative reputations. They talk about the positive reputations, too. Let's finish by discussing the reputation of one last attorney:

**Atticus.** You've never seen Atticus loosen his tie or remove his coat. Even last July, when the air conditioning broke and the temperature in the courtroom became unbearable, his collar remained buttoned tight. But you've never seen Atticus unprepared, either. You've never seen him raise his voice, never seen him lose his temper, and never seen him caught off guard. Atticus doesn't say much, but he doesn't need to. His reputation speaks for him. If Atticus says it, it must be true.

What type of reputation do you have? What reputation would you like to have? What reputation are you developing? Are you becoming one of the caricatures, or are you developing an Atticus Finch-like reputation?

Remember that every action you take, every word you utter, and every decision you make affects your reputation. If you make frivolous arguments, take indefensible positions, or react unfavorably to rulings or verdicts, people will remember. But act as if everything you do will be printed on the front page of tomorrow's newspaper, and you'll develop a reputation worth more than every other asset you own. ♦

*Your reputation is your most valuable asset.  
Cases and clients will come and go, but your  
character and reputation will endure. Always  
hold yourself to the highest ethical standards.*

- PETER D. POLCHINSKI

# Bonus idea:

## Do More Than They Expect You to Do

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This was supposed to be a ten part series. After all, the original working title was “Top *Ten* Tips for Trial Lawyers.” So why is this extra section here?

Because every lawyer should do more than they’re expected to do. Law is a *profession*, not a business. Whenever attorneys describe their practice as a “business,” it never sounds right. It sends the message, “I’m only in this for the money.” Would you want your doctor to tell you he’s in the healing “business?” How would you feel about a psychiatrist who tells you she’s in the mental health “business?”

Yes, the practice of law is a profession. But that doesn’t mean lawyers can’t learn important lessons from the business world. If you couldn’t operate your practice at a profit, you wouldn’t be able to keep your doors open to serve clients. That’s why you should learn a few basic business principles. And every trial lawyer who wants to improve their closing arguments should learn and apply some basic sales techniques. But the most important lesson every lawyer should take from the business world is understanding the value of delivering amazing customer service and doing more than clients expect.

There are a thousand other attorneys who want your clients’ business and referral business. Just open your phone book and flip to the section marked “Attorneys.” How many different listings do you see? If you want to stand out from the herd, you need to do more than just competent work. You need to exceed client expectations.

Let me give you an example. There’s an oil change business near my office that advertises a 15 minute oil change. That’s what initially drew me to their business. Their 15 minute guarantee got me in

the door, but that’s not why they earned my repeat business.

Let me tell you what they did. To ensure that they complete the oil change in 15 minutes or less, you need to stay in your car. But since they’re changing the oil, you can’t keep your car running. Now, in case you didn’t already know, it’s hot in Florida. And humid. Spending 15 minutes without air conditioning can be a sweaty experience. It’s not unbearable, because you’re halfway indoors and under shade, but still, it’s not the most comfortable experience. So, do you know what they did? They bought a portable air conditioning unit, ran a hose into the car, and let me enjoy air conditioning while waiting for them to complete the oil change.

They certainly didn’t need to. You could survive 15 minutes without air conditioning. But they did more than I expected. I only paid them to change my oil. That’s all I expected they would do, and they certainly delivered on their promise. But they also checked my tire pressure. They checked all of my lights. They topped off all of the car’s fluids. They even washed my windshield. They did more than I expected them to do. That’s why I come back ever 3000 miles.

How about you? What do your clients expect? Do you deliver more than they expect? What do your jurors expect? Do you deliver more than they expect?

Anyone can do the bare minimums. Anyone can accept a settlement offer, present a bare bones opening statement, or ask “What happened next?” “What happened next?” “What happened next?” during direct examination.

But the best attorneys go further. They deliver more than their clients expect. Your clients have high expectations. What are you doing to give them more than they expect?

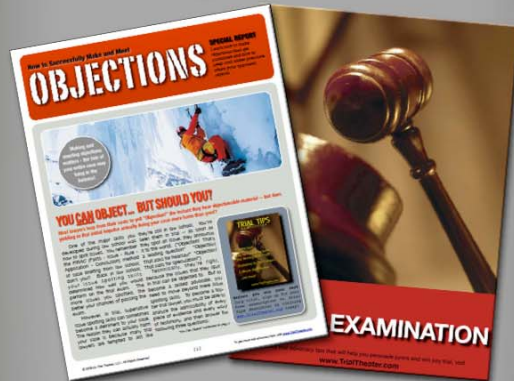
- ▶ “Thank You” cards or gifts after the case concludes?
- ▶ More detailed billing?
- ▶ Send them copies of everything?
- ▶ A monthly summary explaining what services you performed or how the case is progressing?
- ▶ Performing *pro bono* service for the client’s favorite charity?
- ▶ Providing the services of a victim advocate?
- ▶ Access to your cell phone number?
- ▶ Be glad when they call?
- ▶ Guaranteeing that every phone call is returned within 4 hours?
- ▶ Hosting client appreciation events? (ex. hosting a seminar to teach tax saving tips, how to avoid litigation, or other personal/professional development skills)
- ▶ Remembering their birthday or anniversary?
- ▶ Guaranteeing appointment times?

What will you do to exceed expectations? Start by answering these questions:

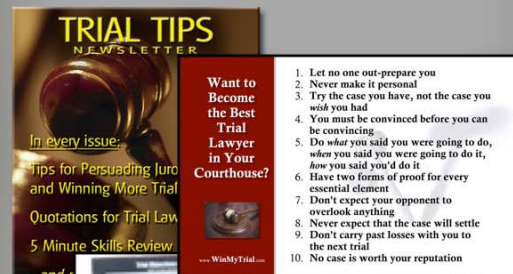
1. What can I do for my client that they wouldn’t expect?
2. What can I do for the jurors to exceed their expectations?
3. What can I do for my firm to exceed their expectations?
4. What can I do for my family that they wouldn’t expect?

Want to stand out from every other attorney in the phone book? Want to guarantee repeat and referral business? The answer is simple: **Do more than they expect you to do.** ♦

## Going to trial?



Before you pick your next jury or try your next case, get your hands on these great trial advocacy training materials that will help you persuade jurors and win more trials. You’ll learn how to successfully make and meet objections, how to get jurors talking, how to control runaway witnesses during cross-examination, and more! Before you go to trial, make sure you go to [www.TrialTheater.com](http://www.TrialTheater.com)



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