



Being yourself at trial

“The bigger, overarching question is, do you play it safe – e.g., keep it simple, not go for home runs – or go big?”

BY SETH ROSENBERG

My mentor Berne Reuben never lost a trial. Over his long and remarkable career he tried and won countless of the toughest cases imaginable, such as harassment and discrimination cases. One such difficult trial was a case where a student at a professional wrestling school died from, that’s right, training to be a professional wrestler. I was fortunate enough to be his second chair for that trial. Defendants offered essentially nothing before trial and everyone wrote the case off as a lost cause. Berne won that trial going away. Berne did not revel in his remarkable success and, instead, was livid afterwards that the jury found the decedent one-third comparatively negligent. I couldn’t believe we weren’t defensed.

So the question follows: how did Berne try cases so successfully for so many years? He was not silver tongued or physically imposing. He did not follow David Ball religiously and this was well before “Reptile” or “Trojan Horse” was on the scene. Berne actually examined each and every witness from the Plaintiff’s table...sitting! I was taught that trial lawyers stand at podiums because, well, that’s what trial lawyers do, right? His explanation for this method: it makes it easier to go through his papers during an examination...and he doesn’t like standing. So I asked Berne for the secret to his trial success. In Berne’s inimitable way he gave me the only advice I would ever really need to be a successful trial lawyer: “Seth,” he said, “you gotta be yourself.”

It took me seconds to appreciate the correctness of this statement, but years to find “myself.” Over the years, I have done what all of us have done – read the books, gone to the seminars, tried cases, and watched others try theirs. And this



approach has been successful for me, but I have to admit that for all of these efforts, never did I truly feel “myself” in trial. There was always a time when I felt I was doing what was “expected” of a trial lawyer or used an approach because others swore by it.

Then there was the *Fraissl* case. *Fraissl* involved electronic dance music DJ Skrillex stage-diving at one of his shows, and allegedly causing my client to be struck during his stage dive and suffer a stroke two weeks later. From Day One, this was a case some people expected to end in a defense verdict. It was an extremely difficult case for numerous reasons. But as the parties engaged in a four-year march toward an inevitable trial, I had an epiphany. This trial needs to be done my way. I need to be myself. I did not want to try this case and, if I lost, blame it on a tactic people had said would work, or acting in a manner I believed a trial lawyer should act. Win or lose, I was going to be me.

One could look from the outside, see a \$4.5 million verdict, and say my approach worked. But I knew being myself

was successful because for the first time I tried a case and every part of it felt completely genuine. Besides my wedding and the birth of my kids, finding myself in the crucible of a courtroom was the best feeling in my life.

So, I will share a little bit about the trial lawyer “me,” who I recently discovered. I hope this will help those who are similar to me (Lord, help us all) or just help people on their own journey of self-discovery. Or, as I imagine Berne would tell me: “Seth, just shut up and say what you want to say.”

I want to go for the jugular

There is no doubt that trials are part science, part art, and in large part intuition. You need to make dozens of calls each trial day, small and big, based on a combination of these factors. But the bigger, overarching question is: do you play it safe – e.g., keep it simple, not go for home runs – or go big? I have tried cases in the former manner with success, but the real me, I want to go for the jugular.

Before the *Fraissl* trial started, I knew I was going to try to get Skrillex to admit he was responsible for any injuries my client suffered when he stage-dove. Did I need this admission? No. But I wanted it, and if I want something, the real me is going to go out and fight like hell to get it. (Side note: I told my wife *before* we started dating that we were going to get married). Seeking this admission from Skrillex was not the safe move, but I figured I could get him there with time and pressure. I believed in myself. So I devised an entire examination with one of the main goals, if not *the* goal, being to get him to accept responsibility if he caused my client harm. After a couple hours of cross examination and set up, this is what I received:



Q: It was your decision to stage dive; right?

A: Correct.

Q: Nobody else had any say in that; correct?

A: Correct.

Q: Okay. And did you believe that, if you stage dove, and your stage dive led to somebody being injured, that you would be responsible for that?

A: Yeah. If I stage dove and it led to someone being injured?

Q: Yes.

A: Absolutely.

Q: You believe that today?

A: I believe that.

Q: So, in this case, you believe that if your stage dive led to Ms. Fraissl's injuries, you would be responsible; correct?

A: Absolutely.

I am not your friend

This was probably the most surprising revelation. I love people. I love talking to people and being friendly, and if I'm being completely honest, I want people to like me. And there is certainly plenty of time during a trial to kibbitz with opposing counsel and in past trials I happily obliged. And boy, did my opposing counsel in *Fraissl* like to kibbitz and be friendly. But for whatever reason, this time it really dawned on me: I'm at war. I'm not here to make friends or be friendly. I want to destroy defendants' case, dismantle their witnesses, and then salt the ground they walk on. I was still pleasant, but I engaged in absolutely no small talk. My co-counsel, Mark Fong, knowing that small talk with opposing counsel can be beneficial during a long trial, artfully engaged the other side. But everyone knew from the start not to talk to me. I was not having it. And it helped me focus on what mattered.

I would often not even look at defendants' witnesses while defense counsel examined them. It must have looked very strange, as for long stretches during examinations I would just sit at the Plaintiff's table, with my head looking down, not moving. But it helped me focus on

what the witnesses said without distraction. It was the closest to meditation I've ever come. This helped immensely with cross examinations.

I need to be vulnerable

I'm an emotional guy. Sometimes that really sucks, but it is what it is. It's me. Most people have a view of trial lawyers as these individuals with booming, authoritative voices who show no weakness. And that's great if it's you. It's just not me. And I knew that I needed, when appropriate, to be that emotional, vulnerable guy during trial.

Knowing this, I had an idea for closing and it was authentic and real, but it was emotional and would make me look vulnerable. I was worried I would cry during it and I almost did. And here it is:

And for future pain and suffering, you're supposed to determine what is reasonably certain to happen in the future. All right. Well, how do you do that? How do you determine what pain and suffering someone is going to suffer in the future? And for me – you know, I'm an analytical guy, good or bad. I like to look at the evidence, the facts, documents, put it together as a whole, and see what it shows me. And it's tougher with pain and suffering, but you can do it, and I'm going to show you how. It's hard. It's not fun. It's not fun. I see Jennifer getting married like most of us...

Defense counsel: Counsel is personalizing again.

The Court: Overruled.

I see her getting married someday. I believe this is reasonably certain to happen, okay, because most of us get married. And I see her on her wedding day, and I see her dad Heinz Fraissl probably in a Warrior sweater probably smiling, and I see her in her white dress and she's happy, you know. It's a beautiful day. Dad's beaming, parents are beaming, but she's walking with a limp, and she has her hand curled, and she's anxious because everyone's look-

ing at her. She's the bride, right, so she's walking and she's just feeling terrible anxiety, and she feels this because this is – this is her life, and she will walk down this aisle, and her day will be partially ruined because she will be anxious and feeling grief-stricken over her existence of walking with a limp. And this is reasonably certain to happen, and this is a wrong that needs to be righted. Okay? I believe that Jennifer will have kids one day. Most of us do. She's going to have kids, and she's going to be walking outside with her kids or one of them, and kids are going to do what kids do, and one of the kids is going to run ahead and is going to do something stupid, maybe run into the street, and Jennifer won't be able to run after him. She'll be fear-stricken as her child is running into the street, and all she can do is yell, "Stop." And then I realized that this moment will be every moment with her kids because she will always worry about protecting her children because she will be limited in doing so, and this is all reasonably certain to happen. This is reasonably certain pain and suffering. And I think of all the other moments that are going to happen, that are going to happen to her. She will be embarrassed if she's riding her scooter with her family because she can't walk the long distances. She will feel anger that her left foot looks disfigured because it's been stubbed so many times from dragging it. She will worry at parties with her friends that she's going to say something or someone is going to blurt out, and she's going to be embarrassed. She will feel sad that she misses another quarter of school because she's too depressed or anxious to sign up for school. I see her walking down the street, and people would be looking at her with a pitying look on their faces, and she'll see this, and she'll be embarrassed. And I know this in my mind that all these things are reasonably certain to happen. I see her in her



40s when she feels humiliated and remorseful that all of the people she knows are more successful than her because she feels she was limited and is limited and couldn't achieve what she wanted to achieve. She'll love her sister, but she'll feel regretful her sister was able to become a vet and she was not. I see her wanting to walk on the beach with her husband, and she won't be able to because her foot drags in the sand, and it makes it tough, and she can't do it. I see her having a fall where she's alone afterwards and worried about getting up. I imagine all these moments. I picture them in my head. I try to live them in my mind because they are reasonably certain to happen, and that is how we have to value pain and suffering. I think to myself that this is tough for me to do and that she will have to live this. This will be her moments for her alone. And don't get me wrong. I am sure Jennifer will have a great life, and wonderful things will happen for her, and she will do wonderful things. But all of these moments are certain to happen, these terrible, horrible, painful moments that she never should have had to suffer, that she never should have had this damaged life. But it was the life that was given to her based on decisions by other people.

This argument worked because I was being me. I honestly did have these thoughts and feel these pains for my client. If someone tried this and it was not them, a jury would see through it in a second. But I can say this: It was a moment I will remember till the day I die. During this part of my closing, there was not a sound in the courtroom. The courtroom literally did not have one empty seat in the gallery (Skirillex has a lot of fans), but there was not one sound of a keyboard or a paper being shuffled. You could feel the moment. There was a feeling of oppressive sadness in the room as everyone knew that what I was saying was absolutely coming from the heart and

absolutely true. I did not learn this from a seminar or seeing others. I simply searched my heart and this is what flowed out. I was being me.

It is theater and I will play my part

I have long used the terms "lawyer arguments" and "jury arguments." Lawyer arguments being the points to win battles between attorneys. Jury arguments being the arguments that actually resonate with a jury. It felt like the defense thought this was a pinball game and as long as they scored the most points, they would win. I believed the jury wanted less information and some theater. As people may say about me – I hope with good intentions – I'm good for both.

For my cross of each defense witness, I would limit myself to between six and eight points that were jury arguments. Each point being a high level point – i.e., important contradictions, prior inconsistent testimony, damaging testimony generally, etc. Even if I could make more arguments than that, I limited myself. I believed the jury would tune me out if I went more than that. But I always tried to come up on the fly with one argument that would come out of nowhere and simply embarrass the defense. It is "me" to make important points *and* keep the jury entertained.

For instance, when defense counsel cross-examined my expert, Dr. Rajeev Kelkar, counsel pointed out that he had not generated much work product, as follows:

Q: All right. And I'm going to bring up two of the images in just a second, but you're aware, are you not, that the amount of data that was produced by Ms. Smedley and Mr. Skiera in this case, it was all given to you, the raw data; correct?

A: Yes.

Q: It was 44 gigabytes of data; correct?

A: Sure.

Q: That's a huge amount of data; agreed?

A: Yeah.

Q: Okay. And – whereas you, in terms of the analysis that you did, produced not even close to a gigabyte of data in your analysis; agreed?

A: I very well could not have.

So on redirect, I started with this:

Q: You've been doing this legal work for some period of time. Is that fair to say?

A: Approximately 22 years.

Q: In that time, has any lawyer ever said to you, "You know what really shows the strength of an opinion? The number of gigabytes used"?

A: They might have said that to me. It doesn't mean I believe it. They might have said to me.

Q: Have I ever said, "Dr. Kelkar, I need an opinion that's got 44 gigabytes, not 1 but 44"?

A: No.

For some, this redirect would come off as arrogant or too cute. But it was me and it was theater. It worked. And I did something like this with almost every witness defendants called. I actually felt the jury would be disappointed with me if I didn't do something like this after a while.

I want and need my friends around me

Being a first chair can be a lonely place. All major decisions go through you and the buck stops with you. Berne tried almost all of his cases alone. But I don't want to be doing this by myself. It's just not me. I want to do this with my friends. I work better that way. For *Fraissl*, I tried this with my old partner Mark Fong and my old paralegal Brian Edgar. Besides being colleagues, they have been my friends for ages. There was no finger-pointing or back-biting during the trial. As friends, we were in this together. And honestly it was beautiful. I couldn't imagine having gone through this trial alone or with people who I did not know or trust. Because of our friendship, Mark could tell when we needed to let off a



little steam and hit up Korean BBQ, and Brian could tell me when some of my ideas were crap. I want and need to do these trials with friends.

In conclusion, I have an overly-simplistic syllogism: I was myself as a trial lawyer and my client won. I'm sure that many, including defense counsel, will have numerous other explanations for the verdict in *Fraissl*. But I believe Berne

was right all along. Once I found myself as a trial lawyer, victory would follow. And now just like Berne, I'm livid that the jury found my client 15 percent at fault.

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