BY JEFFREY VALLE

Wanted: A Few Good Arguments

ONE OF THE MOST COMMON MISTAKES of litigators, even very experienced litigators, is making too many arguments. Ask a lawyer why he thinks he should win his case and he will rattle off a host of reasons. When a lawyer prepares an answer, he takes pride in how many affirmative defenses he can assert. When was the last time you saw an answer that did not include "estoppel," "laches," and "failure to mitigate" as affirmative defenses, even in cases in which these doctrines do not even remotely have any application? When a lawyer opposes a motion, he will list 10 reasons why he should win, reasons that are often contradictory or inconsistent with each other.

Lawyers love arguments; the more the merrier. It may seem logical that the more arguments you can make in support of your case, the greater are your chances of winning. Who knows which of your arguments an ever-fickle judge or jury will latch onto? Better safe than sorry. But this is not true. Lawyers often lose cases precisely because they make too many arguments.

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For some reason, lawyers seem to forget that judges and juries are not trying to decide which party has the cleverer lawyer but which has justice and the law on its side. Justice is not determined by counting up arguments but by determining which side's arguments make sense, that call for a result that is consistent with legal and equitable principles. The challenge for a lawyer is to present a case that resonates on those two levels.

The way to accomplish this is to identify a few arguments—among the many possible ones—that you believe you can win and will really matter to the outcome of the case. To do this, you need to fully and thoroughly analyze your case. Look at it dispassionately. Don't ask yourself what the strengths of your case are; instead, ask what its fundamental weakness is. And then devote your lawyerly skill to addressing that weakness by identifying a correct legal argument that solves the fundamental problem and also makes equitable sense.

Of course, in many cases there is no perfect argument, but by seeking the arguments that address the fundamental weakness of your case, you will be getting to the heart of the issue that the judge or jury most needs to hear you talk about. And then—and this is the hard part—leave out the long list of other possible arguments. Once you have identified the arguments that answer the fundamental weakness in your case, everything else is a distraction, or worse. If you have analyzed your case well, you will see that your case will stand or fall based upon the success of these arguments. That is not a situation to be feared; it is precisely what you want. When you have a good, persuasive argument that makes equitable sense and is consistent with the law upon which your case will turn, you are in good shape.

Contrary to conventional wisdom, in almost every case, the fewer arguments the better. One is best. If you make only one argument, you can be sure that the jury will be discussing that argument in the deliberation room. Who knows which argument the jury will be discussing if you give them a dozen to choose from. Notwithstanding the logic of this approach, lawyers are afraid to follow it. Part of the problem is that lawyers are often unwilling to leave anything out that has any potential.

A deeper problem is that lawyers often do not fully analyze their cases, so they do not realize what arguments really matter. If you are unable to make a confident determination about which arguments are better than others, the safer course is to include them all. But it is not the better course of action. As with most things in life, it takes time and hard work to do it right. In order to adopt this approach, it is absolutely essential that you roll up your sleeves, hit the law library (or the Westlaw or Lexis terminal), look at every document, talk to every witness, and think your case through. Only then will you be able to select the best arguments. When you have developed the habit of thinking about your cases in this way, I am confident that you will find that in pleadings, motions, and trials—in virtually all cases—one good argument is better than ten.

For example, suppose you are representing a defendant charged with breaching a contract. Suppose, when you analyze the case, you realize that he pretty clearly did breach the contract, but that the plaintiff did not suffer any damages as a result of the breach. Most lawyers would argue, "My client did not breach the contract, but even if he did, the plaintiff was not damaged so he should not collect any money in this case." But, if your first argument is weak, you are much better off leaving it out. Compare this approach: "My client did breach the contract. We admit that. But the plaintiff did not suffer any damage, so any recovery you award him would be a pure and unjustified windfall." With this approach you gain enormous credibility, and you can use that credibility to focus the jury exclusively on the issue that really matters.

This approach requires courage, confidence, maturity and, perhaps most important of all, judgment—precisely the qualities a client wants in his or her lawyer. Carefully selecting a few good arguments, and rejecting the rest, will not guarantee victory. However, by adopting this approach, you will focus the judge or jury on the issues you want them to be focused on, you will have consistency and credibility throughout your case, you will maximize your chances of prevailing, and you will be a better lawyer. ■

Jeffrey Valle is the founder of Valle & Associates, a boutique litigation firm in Santa Monica.