

Taking the Lead 2019: Winning Strategies and Techniques for Commercial Cases

By Moshe Boroosan

On March 12, 2019, the Commercial and Federal Litigation Section held its annual “Taking the Lead” CLE. The program, which was co-sponsored by the Young Lawyers Section and the Committee on Continuing Legal Education, opened with a mock trial that pitted a team of talented young female commercial litigators against a group of more experienced female practitioners. The event showcased opening and closing statements, and the direct and cross examination of witnesses, convincingly played by former ComFed Chairs Jim Wicks (an agitated septuagenarian in a wig) and Jonathan Lupkin (a brash and unapologetic police officer). The performances were closely observed by prominent members of the judiciary, including District Judge P. Kevin Castel (S.D.N.Y.), District Judge Mae A. D’Agostino (N.D.N.Y.) and Commercial Division Justices Saliann Scarpulla (New York County) and Timothy S. Driscoll (Nassau County). The Honorable Shira A. Scheindlin served as the presiding judge.

After the trial, the judges critiqued the performances in the trial, and discussed tips, strategies, and techniques for successfully trying complex commercial cases. Below are some of the observations, advice, and insights discussed by the panel, in no particular order:

Judge Castel

Incorporate technology into your presentation. Put your notes on a PowerPoint so you will be free to engage with the jury.

Work as a team. If you notice that another member of your team failed to elicit key testimony, make sure to address it so there will not be any holes when it comes time for summation.

As defense counsel, focus on the fact that the plaintiff just wants money.

Pro Tip: The Prompt Denial. As defense counsel, your opening statement in every case that you try should start with the following words: “You just heard my client accused of _____, _____, and _____. Those are not the facts. That is not what happened. Good afternoon. My name is _____ and I represent the Defendant.”

Judge D’Agostino

Write your summation before anything else. It will help guide you through the trial.

Avoid starting every sentence with “and,” even on cross examination.

Use proper diction, not legalese. You will present as a more polished attorney.

Speak loudly and clearly so the judge and jury can hear you.

Control your witness. Make sure to get a clear “yes” for the record, and not a “yep.”

Keep a poker face, even if you get a bad ruling.

Pro Tip: Object! Don’t be afraid to object. Protect the record. Even if you can’t articulate why a question is improper, if it feels wrong, object. The court might agree.

Justice Driscoll

Lead with the facts. The most effective trial attorneys tell the facts first and then explain how they fit into the law, not the other way around.

Don’t be married to your outline. Listen closely to the witnesses and adjust your questions to their testimony in real time.

Learn how to project your voice. Practice by listening to your voice in a recording. Speak loud enough so the jury can hear, but don’t yell at the jury.

Pro Tip: The Rule of Three: Hear, Understand, and Perceive. Use the Rule of Three in your opening and closing statements. This will give the jury a second chance to hear the evidence.

Justice Scarpulla

Less is more, especially in closing arguments.

Use numbered lists to make your important points. Numbering helps the jury focus.

Quote key witness testimony verbatim in closing statements.

Pro Tip: *Learn everything you can about the presiding judge before trying your case.* Every judge has her own idiosyncrasies. Justice Scarpulla, for example, is extremely unforgiving when attorneys attempt to improperly introduce hearsay. She does not permit leading questions on direct, or summary questions by lawyers that are just trying to repeat witness testimony. And she does not permit lawyers to instruct the jury on the law.

“Taking the Lead” 2019 was undoubtedly a success and was both entertaining and instructive to commercial litigators at all levels of practice. Congratulations to Sarah Hanson of Kramer Levin Naftalis & Frankel LLP; Ndidi Igboeli of Smith Villazor LLP; Riane F. Lafferty of Bond Schoeneck & King PLLC; and Kat E. Mateo of Morrison & Foerster LLP for their impressive performances.

But more important, as Judge Scheindlin noted, the evening highlighted the crucially important work of the ComFed’s Task Force on Women’s Initiatives and called further attention to the Task Force’s Report, *If Not Now, When? Achieving Equality for Women Attorneys in the Courtroom and in ADR*. The report was co-authored by Judge Scheindlin, Program Chair Lauren J. Wachtler, and program faculty members Carrie H. Cohen and Tracee E. Davis.



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