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## **COPING WITH STRESS AT TRIAL**

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When my secretary heard that I had been asked to speak on this subject of dealing with stress at trial, she laughed and said "Ha! what do you know about that, you never get stressed". I was actually surprised to hear her say that because I do find the preparation for trial and the decision as to whether to proceed or settle to be stressful. However, once the trial starts, I find that stress seems to disappear.

Generally, when you are in trial, you are only focussing on one thing. To me, that is much more enjoyable than dealing with the day to day demands of a busy office.

I believe that stress at trial comes from two sources:

1. Concern about the financial impact
2. Concern about "not screwing up".

### **1. THE FINANCIAL IMPACT**

Conducting a trial is an expensive proposition both in terms of your time cost and the disbursements. I am lucky in that I am in a large firm and the financial impact of a loss to me personally is not quite so significant.

The natural tendency for most plaintiff counsel is to take the point of view that "a bird in the hand is worth two in the bush". In other words, if you get a reasonable settlement offer, you are normally inclined to take it rather than incur the risks and expense associated with trial.

You have to ask yourself - have I made the right pragmatic decision as to whether to accept an offer or to proceed to trial? If your answer is overly clouded by your own financial concerns (i.e. can't afford the disbursements associated with trial, can't wait for a possible reserved judgment, can't run the risks of an appeal etc.) you are not really able to serve your client properly.

One of the first steps to eliminate the stress associated with going to trial is, therefore, to have your practice on a sufficiently secure financial footing that you can make the decision about whether or not to proceed to trial based on the client's interest alone, not on your need for "cash flow".



## 2. THE FEAR OF “SCREWING UP”

Even after 27 years of practice I still have this fear. I think it is a healthy fear that encourages us all to do our best. This fear is also what creates the thrill of going to trial. I still get a “buzz” from a good trial, win or lose. Trials are really the fun part of the practice of law.

To keep trials fun, I suggest the following:

1. Don't be afraid to lose. I get the sense from many civil litigators that they will only take cases in which they are virtually assured of victory and in which the damages issues are very strong. I find that in my own practice, I tend to settle just about all of the really strong cases and I wind up trying only the weaker ones. I think it is important to give some weaker cases your best shot rather than just simply shutting the case down. I am not suggesting that you take foolish risks, but I am suggesting that you always let the other side know that you are willing to go all the way, even on a risky case. If the other side is confident that you won't go to trial, you won't see much of an offer. All of us can take a tip from criminal defence lawyers, the best of whom will lose more trials than they will win. Nevertheless they “fight the good fight” and do everything possible for their clients.
2. Be prepared. This is really the key to the stress free trial. As Plaintiff counsel, you can take great comfort from a thoroughly prepared Opening, an opportunity to read in portions of the transcripts and thoroughly prepared direct examinations of your witnesses. If you are well prepared, putting in the Plaintiff's case becomes routine. If you (and your client) are not prepared, it can be a nightmare. In almost every case you are bound to ask at least one question on direct examination that is going to produce a completely unexpected and occasionally very harmful answer. It seems that no matter how well you prepare your witnesses, there are always going to be a few surprises awaiting. Nevertheless, with thorough preparation, you can keep these surprises to a minimum and keep your stress level to a minimum. It is also important to be thoroughly prepared for cross-examination of defence witnesses. Also, I find that it helps me to make comments about each witnesses testimony generally as soon as they have finished in the stand so that I can later incorporate those thoughts into the closing. Each night during the trial, I will work a bit on the closing. I think it would be very stressful to try to have to put together a complete closing in one night.

Last week, after I had finished a trial, people in the office asked me “how did it go?”. My answer was, “it went pretty much according to the script”. What I meant by that was that the Plaintiff and the lay witnesses who I called gave the evidence I expected they would give and were not shaken on cross-examination. My experts conceded the points I expected them to concede, but they were not seriously undermined.



When the defence called its case, I made some progress with their experts, but I certainly did not “blow them out of the water”. The defence counsel made the arguments that I anticipated he would make and I made mine. At the end of the day, the Judge reserved.

Because both counsel and all the witnesses were thoroughly prepared, there were really no stressful surprises during the course of the trial. The trial was just a natural extension of all the work that had been done leading up to it. In my view, a stress free trial scenario.

When you are unprepared and you go into trial, you will be in for a roller coaster ride of unexpected answers from witnesses, unexpected objections from defence counsel, unexpected questions from the Judge and all of those other things that will undoubtedly increase your stress level.

If things do go wrong at trial, it is probably not because of something you actually did wrong at trial. More probably, it is something that you did or forgot to do many months ago that has come back to haunt you. There is no point worrying about those things during the trial. You have no control over them anyway. Just concentrate on the task at hand and do your best.

I would like to add a few brief tips which you may find helpful:

1. Don't double book yourself in the expectation that your trials will settle. I have been caught in this trap. You can always bet that whenever you double book , those will be the matters that won't settle.
2. Don't book your trials too close together. This is another lesson I have learned from bitter experience. When one trial is completed, you will always need a few days to re-charge your batteries before you can get your mind into the next case. Going straight from one trial to another is very difficult. Try to avoid it.
3. During longer trials, take breaks. On the very few occasions when I have worked a whole weekend, I have invariably found that I have run out of energy by roughly the middle of the following week. You know the feeling. You are daydreaming rather than really listening to the witness or your cross-examination gets weak. Taking adequate breaks will enable you to avoid this and keep you operating at full capacity throughout the trial.
4. While I don't normally work with a junior, I find it is helpful to have someone to at least talk to about the case and bounce ideas off. Even in casual conversation, you can sometimes pick up new ideas which you may find to be very helpful. Also, just talking about your case to another lawyer helps you identify what is important and develop themes for your closing.
5. Don't get into a personal clash with opposing counsel. Nothing adds to the stress of a trial more than hostility between counsel. If you keep your relations with opposing counsel cordial, you will find that



the whole trial experience will be much more pleasant.

6. Keep it simple. I believe that most judges and all juries believe that most often they have heard way too much unnecessary evidence. I think you will do better by keeping the direct examination of your client and the lay witnesses relatively brief. Let the defence counsel bore the judge or jury to tears with endless tedious cross-examination.
7. Make sure your client understands the trial process and exactly what you are trying to accomplish. Take time during the breaks and before and after court to explain to your client what has happened and what you expect to happen next. Make sure your client has a clear picture of how things are going. Be candid about good points the other side may be making. You always want to have a good rapport with your client. It is very stressful if your client does not agree with your strategy and is always second guessing you.
8. Always treat the judge with courtesy and respect. A hostile judge will create a very stressful situation. Even though the judge **MAY** still be able to decide the issues objectively, if your client senses that you have alienated the judge, he or she will be very upset.

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