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To Win Cases, Remember K.I.S.S. (Keep It Simple, Stupid)

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Do you want to win cases? Then consider Occam's razor, a principle of parsimony used in logic and problem-solving. It was William of Ockham's belief that among competing theories, the one with the fewest assumptions should be selected. That is, the simplest explanation is usually the correct one. Einstein is credited with putting it this way: "Everything should be made as simple as possible, but not simpler."

The appellate lawyer's job is to come in after the trial and kill all the survivors. After nearly a quarter century of killing survivors, I'm convinced that the first cousin to Occam's razor — the K.I.S.S. principle — applies to litigation. Building a case from the ground up on the simplest possible legal framework always produces better results.

Let me give an example. I recently worked on a property-damage case where the plaintiff insisted on asserting both tort and contract claims even though the law in the jurisdiction made it clear that the claim sounded only in contract. The trial court accepted the plaintiff's argument that the case could be brought under both tort and contract theories and submitted a negligence question, a damage question for the negligence theory with a comparative fault subpart, and a breach of contract question. The plaintiff did not request, and the court did not submit, a separate damage question for breach of contract.

When it came time to form the judgment, the trial court awarded the plaintiff the sum of damages found by the jury, minus 40 percent based on the jury's assignment of comparative fault to the plaintiff. The court rejected the plaintiff's argument that it could elect to recover in contract, thus avoiding a comparative-fault reduction, and recover the entire sum of damages found by the jury.

This two-theory trial strategy cost the plaintiff nearly $1 million. Had the plaintiff proceeded solely under a contract theory, the trial court almost certainly would not have submitted a comparative-fault question. (I say "almost certainly" because enterprising defense counsel might have persuaded the court to submit a comparative fault question based on the Restatement
(Third) of Torts: Apportionment of Liability § 1 & cmt. e (2000).)

This is the simplest example of violating Occam's razor that I've seen in a long time, in the sense that it didn't create a particularly unwieldy or complex jury charge. More often, the problem I encounter involves parties asserting a laundry list of theories of recovery and defenses. The typical commercial case these days invariably seems to involve, at the very least, claims for breach of contract, common-law fraud, statutory fraud, breach of fiduciary duties, tortious interference, conspiracy, aiding and abetting, and negligent misrepresentation. And all too often the defendant has pleaded at least a dozen different inferential-rebuttal and affirmative defenses.

Now, admittedly, I'm grousing about this because preparing a jury charge in a case with so many claims and defenses is a pain in the tuchus. But I'm not asking for sympathy. Consider instead the reaction of a jury confronted by a 65-page jury charge with 35 questions submitting myriad claims and defenses, along with the assorted legal instructions necessary to elucidate the questions, and not to mention the multitude of complex conditioning instructions. Plowing through this morass, is the jury going to remember your closing argument? Will the jurors throw up their hands in frustration, read the conditioning instructions, and answer the fewest number of questions possible?

This kitchen-sink strategy invariably produces difficulties throughout the life of the case. Most familiar to me are the problems associated with preparing a coherent jury charge. Bill Dorsaneo likes to tell his law students to (imagine the voice of Graham Chapman playing King Arthur in Monty Python and the Holy Grail) "run away" when, after entering practice, someone asks them to draft a jury charge. According to Dorsaneo, the best possible grade you can make when handling the jury charge is about a C. In a kitchen-sink case, I might be more inclined to say a D.

Even a grade C charge spawns trouble during deliberations. If you've tried one of these cases, I'm sure that, like me, you been summoned to the courtroom during deliberations to hear the judge read a note from the jury, a note revealing the jury's utter confusion about how to reach a verdict. And when the jury does reach a verdict, haven't you felt that twinge of panic as you try to decipher the import of the multiple findings, wondering whether there is a conflict in the numerous findings requiring that you ask the jury to return to its deliberations?

The United States Navy developed the "keep it simple, stupid" or K.I.S.S. principle — systems work best if they are kept simple rather than made complex; therefore, simplicity should be a key goal in design and unnecessary complexity should be avoided. Leonardo da Vinci said it more elegantly: Simplicity is the ultimate sophistication. Be a sophisticated lawyer and throw out the kitchen-sink approach to litigation. Your clients will be better off for it.

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