

TRIALS

Tips, Tactics and Tales

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Curriculum

- **Trials: Tips, Tactics & Tales** (6 hours)
- **Expert Witness Practice for Advocates**
(with Tom Mauet) (6 hours)
- **The Amazing Case: Illustrations and Demonstrations of the Trial of a Commercial Case** (with Tom Mauet) (6 hours)

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Years ago, I was fortunate enough to meet two of the most outstanding teachers of advocacy in the country.

The first is Dominic Gianna. Dominic, in addition to being a top rate trial lawyer, is an amazing teacher and writer. I cannot put into words all that I have learned from Dominic. I only hope that I will be able to pass along some of the wisdom he has shared.

The second teacher was Professor Thomas Mauet. Tom is a prolific author and an incredibly gifted teacher. Like millions of others I have learned from Tom's many books, but unlike most, I have had the rare opportunity to learn from Tom, personally.

When I put this course together, I was asked to write course materials. What soon became quite apparent is that whatever I was writing was but a poor paraphrase of what Tom and Dom had already written. Then the idea came to me to simply plagiarize their work, claim it as my own and dazzle you with my apparent brilliance. Unfortunately, both state and federal civil and criminal law put a damper on my otherwise ingenious plan. So instead, I asked these two wonderful teachers and authors if I could share their material with you. Being as gracious as they are talented, they generously agreed. As such, the only credit that I can take for the outstanding written material accompanying this course, is that I was smart enough to choose very good friends.

Michael P. Cash
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TRIALS: TIPS, TACTICS & TALES

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STRUCTURING FACT INVESTIGATIONS¹

Introduction

Preparation and planning for litigation are the critical initial components of the litigation process. Too many lawyers, however, rush to court and file a complaint to get the process started without thoroughly investigating the facts and the law and without devising a coordinated litigation strategy. Small wonder, then, that the results are frequently disappointing.

Most cases are decided by facts, not law. Litigation outcomes are usually decided according to which party's version of disputed events the factfinder accepts as true. Hence, litigators spend much of their time identifying and acquiring admissible evidence that supports their contentions and evidence that refutes the other side's contentions. That evidence at trial will be witness testimony and exhibits. Hence, the fact investigation principally involves finding and acquiring "people and paper," which means following the people trail and the paper trail. The party that is more successful in doing this will have a better chance of convincing the factfinder that its version of the facts is what "really happened."

Structuring fact investigations

There are two ways of "getting the facts." You can get the facts informally before filing suit, and you can get them through formal discovery after suit is filed. A common mistake inexperienced litigators make is using the informal investigation, such as an initial client interview and the reviewing of an accident report, only to decide whether to take the case, and using formal discovery methods as the principal fact-gathering method. This is a serious mistake. First, information is power, and the party that has a better grasp of the favorable and unfavorable facts is in a stronger position to accurately evaluate the case. Second, information obtained early on, particularly from witnesses, is more likely to be accurate and complete. Third, information sought before the action is formalized is more likely to be obtained, since a lawsuit often makes people cautious or uncooperative. Fourth, information obtained before suit has been filed is less expensive to acquire. Formal discovery is the most expensive way to get information. It is usually more effective and less expensive to use informal discovery before filing suit, and to use formal discovery methods to obtain missing information, pin down witnesses, obtain specific information and

¹ T. Mauet, *Pretrial* ' 2.2 (6th Ed., Aspen 2005)

records from the opposing party, and for other such focused purposes. Fifth, Rule 11 of the Federal Rules of Civil Procedure requires that a lawyer conduct a reasonable inquiry into the facts to ensure a pleading that is well grounded. Finally, you can get information informally without the opposing parties participating, or even being aware that you are conducting an investigation. For all these reasons, then, you should use informal discovery as much as possible.

1. When do I start?

The best time to start is immediately, particularly in cases that are based primarily on eyewitness testimony. For example, a personal injury case should be investigated as soon after the accident as possible. Witnesses forget, or have second thoughts about being interviewed; witnesses move away and disappear; physical evidence can be lost, altered, or destroyed. In this type of case, where liability will be determined largely by eyewitness testimony, it is best to start quickly.

On the other hand, an immediate investigation is not always required. For example, in contract and commercial cases, where the evidence will primarily consist of documents, correspondence, and other business records, and there is no danger that records will be lost or will disappear mysteriously, a prompt fact investigation may not be essential. Contract and commercial cases may have complex legal questions that must be researched and resolved before you can start an intelligently structured fact investigation. In addition, delay some-times helps. For a defendant who expects to be sued, starting an investigation may only serve to stimulate the other side into investigating the case. Unless the defendant needs to investigate an affirmative defense or counterclaim, a sound approach may be simply to wait for the other side to do something.

2. What facts do I need to get?

Your job as a litigator is to obtain enough admissible evidence to prove your claims and disprove the other side's claims. Therefore, you need to identify what you must prove or disprove. This is determined by the substantive law underlying the claims, remedies, defenses, and counterclaims in the case. However, how do you research that law if you do not yet know what the pleadings will allege? What do you research first, the facts or the law?

There is no easy answer here. In litigation, the facts and law are intertwined. The investigation of one affects the investigation of the other. You will usually go back and forth periodically as you develop your theory of the case.

Example:

You have what appears to be a routine personal injury case. From your initial interview of the client it appears to be a simple negligence case against the other driver. You do preliminary research on the negligence claim to see if the damages are sufficient to warrant litigation. You then continue your fact investigation and discover that the defendant is uninsured. Because of this, you start wondering if there may be a claim against the municipality for not maintaining intersection markings and safe road conditions. Of course you need to research the law here. If there is a legal theory supporting such a claim, you then need to go back and see if there are facts that support that theory. Back and forth you go between getting the facts and researching the law until you have identified those legal theories that have factual support. This process, going back and forth between investigating the facts and researching the law, is ongoing, and is how you will develop your "theory of the case," what really happened from your side's point of view.

3. How do I structure my fact investigation?

The easiest way to give structure to your investigation is to use a system of organizing the law and facts based on what you will need to prove if your case goes to trial. In short, this is a good time to start a "litigation chart."² A litigation chart is simply a diagram that sets out what you need to prove or disprove in a case and how you will do it. The chart is a graphic way of identifying four major components of the litigation plan:

1. Elements of claims, remedies, defenses, and counterclaims
2. Sources of proof
3. Informal fact investigation
4. Formal discovery

Start with the "elements" of each potential claim, remedy, and defense in the case. Most jurisdictions have pattern jury instructions for commonly tried claims, such as negligence, products liability, and contract claims. The elements instructions will itemize what must be proved for each claim, remedy, or defense. If pattern jury instructions don't exist, more basic research will be

² The litigation chart will become a "trial chart" if the case is ultimately tried. See T. Mauet, *Trial Techniques* §10.3 (6th ed. 2002); F. Lane, *Goldstein Trial Technique* chs. 2-4 (3ded. 1995).

necessary. If the claim is based on a statute, read the statute and look at the case annotations that deal with elements and jury instructions. If the claim is based on common law, consult treatises covering the claim and research the recent case law in the applicable jurisdiction. Regardless of where the applicable law is, you must find it and determine what the specific elements are. When you have done this you will have completed the first step on your litigation chart.

Example:

You represent the plaintiff in a potential contract case. Your client says she obtained goods from a seller and paid for them, but the goods were defective. From your initial client interview, and from reviewing the documents and records she provided, you decided to bring a contract claim against the defendant. Your jurisdiction's pattern jury instructions for contract claims list the elements you must prove to establish liability and damages.

LITIGATION CHART

Elements of Claims	Sources of Proof	Informal Fact Investigation	Formal Discovery
1. Contract			
(a) contract executed			
(b) pl.'s performance			
(c) def.'s breach			
(d) pl.'s damages			

This approach should be used for every other possible claim. For example, since the contract is for the sale of goods, a claim based on UCC warranties may be appropriate. If so, you should put the elements of this claim on your litigation chart. Many lawyers also use the chart for potential defenses and counterclaims.

The litigation chart has two principal benefits. First, it helps you identify what you have to prove or disprove so that you can focus your fact investigation on getting admissible evidence for each required element. Second, a litigation

chart helps you pinpoint the strengths and weaknesses of your case as well as your opponent's case. In most trials the side that wins is the one that convinces the factfinder to resolve disputed issues in its favor. The litigation chart will help you identify the disputed matters on which you will need to develop additional admissible evidence to strengthen your version and rebut the other party's version.

Notice that the grid structure of your chart is just a simple spreadsheet. There are commercially available case management software programs that allow you to create and use customized fields. In addition to the four fields in the litigation chart, you can add fields for: questions, favorable/unfavorable facts, lawyer assigned, and so on. You can create hyperlinks to exhibits and witness testimony. You can export facts to create chronologies. Extending the fields using a case management program allows you to use the database for evidence analysis, discovery planning, and trial preparation. Some of these programs are powerful and flexible, and are extremely useful, particularly in large or complex litigation.

4. What are the likely sources of proof?

Facts come from five basic sources: the client, exhibits, witnesses, experts, and the opposing party. Of these categories, most can often be reached by informal investigations. The client, of course, must be interviewed. Whenever possible obtain exhibits in your client's possession, and other evidence such as physical objects, photographs, documents, and records in the possession of third parties. Witnesses can frequently be interviewed. You can hire consulting experts to help analyze and prepare your case.

On the other hand, formal discovery may sometimes be the only way to get essential information. For example, important witnesses may be uncooperative and need to be deposed. Exhibits in the possession of uncooperative third parties may need to be subpoenaed. Information from the opposing party can usually be obtained only through initial disclosures, interrogatories, depositions, and other discovery methods. However, it is always worthwhile to try the informal approach first, since it is quicker, less expensive, and may be more accurate and complete.

You can interview any person willing to be interviewed, unless you know that person is represented by counsel. In that situation, ethics rules prevent you from interviewing any person known to be represented by counsel in the matter, unless the counsel gives you consent. The rule applies to employees of

corporations and other organizations known to be represented by counsel. It also applies to certain former employees of corporations and other organizations.³

While informal fact investigations should always be conducted, their usefulness depends significantly on the particular case at hand. Some cases can be almost completely investigated through informal means, while others must rely principally on formal discovery. For example, in a routine personal injury case based on an automobile accident, you should be able to get all the basic information informally, since the principal sources will be your client, police officers, police reports, medical reports, and disinterested nonparty witnesses. By contrast, in a products liability case brought against the manufacturer of a consumer product, most of the information about the product's design, manufacture, distribution, and safety history will be in the possession of the defendant manufacturer and can be obtained only through formal discovery methods.

Regardless of the type of case, you must first identify the likely sources of proof, then decide how that proof can be obtained. The second step on your developing litigation chart is to list the likely sources of proof and correlate them to the required elements of the claims.

Example:

In a contract case, determine the witnesses and exhibits that will provide the facts about the case. Your client, the plaintiff, is an obvious witness, and the contract is a central exhibit. Other than these obvious sources, where else can you go for proof? For example, what proof is there that the plaintiff performed his obligations under the contract? The plaintiff is again a source of proof. In addition, the plaintiff may have business records showing his performance. The defendant may have written letters acknowledging the plaintiff's performance. The defendant may have business records proving performance. There may also be nonparty witnesses who have knowledge of the plaintiff's performance.

Continue this type of analysis of each element of every claim you are considering, and put those sources on your developing litigation chart.

³ See Model Rules of Professional Conduct, Rule 4.2 and Comment to the rule; see also §2.5.

Example:

LITIGATION CHART

Elements of Claims	Sources of Proof	Informal Fact Investigation	Formal Discovery
1. Contract			
(a) contract executed	plaintiff defendant contract pl.'s secretary		
(b) pi. Performed	plaintiff pl.'s records def.'s records		
(c) def. breached	plaintiff pl.'s correspondence def.'s correspondence pl.'s records def.'s records experts		
(d) pl.'s damages	plaintiff pl.'s records replacement vendor replacement vendor's records experts		

The third step is to determine whether these sources of proof can be reached by informal fact investigation and, if so, what method is best suited to getting the necessary information. Witnesses can be interviewed; exhibits in your client's possession should be obtained and reviewed; exhibits possessed by nonparties can frequently be obtained from friendly or neutral nonparties simply by requesting them; experts can be interviewed, and you can some-times obtain their reports. Once again, think expansively here, since obtaining information informally is quicker, less expensive, frequently more candid and accurate, and can be obtained without the opposing party participating or perhaps even being aware that you are investigating the case. Put the methods by which you plan to obtain the information on the litigation chart.

Example:

LITIGATION CHART

Elements of Claims	Sources of Proof	Informal Fact Investigation	Formal Discovery
1. Contract			
(a) contract executed	plaintiff defendant contract pl.'s secretary	Interview obtained from pl. interview	
(b) pl. performed	plaintiff pl.'s records def.'s records	interview obtained from pl.	
(c) def. breached	plaintiff pl.'s correspondence def.'s correspondence pl.'s records def.'s records experts	interview obtained from pl. obtained from pl. interview	
(d) pl.'s damages	plaintiff pl.'s records replacement vendor replacement vendor's records experts	interview obtained from pl. interview request letter interview	

The last step is to decide what to use formal discovery methods for, and how and when to use them. These considerations are discussed in Chapters 4 and 6.

5. What is my litigation budget?

You can't buy a Cadillac on a Ford budget, and the same holds true for litigation. The client's financial resources are an important consideration. The "value" of the case, the amount you can reasonably expect in a jury verdict, is another. The amount of work the case requires for adequate preparation is a third consideration. Consequently, you need to estimate how much work the case will require, and see if it is feasible that you can accomplish the work given the resources involved. You need to prepare a litigation budget.

How do you do it? First, you need to estimate how much time you can devote to the case and whether the case can be adequately handled within that time. If a client has a limit on what she can spend, that is the outside limit. Simply divide your hourly rate—if you are billing by the hour—into the fee limit, and you will know the total number of hours you can devote to this case. If your fee is a contingency fee, you should still do the same type of calculation. Start with the dollar amount of a reasonably expected verdict after a successful trial. Reduce that amount by the likelihood that liability will not be proved. For instance, if you have a 50 percent likelihood of proving liability, reduce the expected verdict by that percentage, then divide that dollar amount by your usual hourly rate, and you will again determine the total hours you can devote to the case and still reasonably compensate yourself. Once you determine the total hours, estimate the time you will need to spend on each part of the litigation process: preliminary investigation, pleadings, discovery, motions, and trial.

Think you can't do it? You'd better start. Insurance companies and businesses, knowing that litigation makes sense only if it is cost-effective, regularly require lawyers to prepare detailed litigation budgets. Keep in mind that your time estimates are only that, and it is sometimes appropriate to have a range for your estimates.

Example:

You represent the plaintiff in an automobile accident case. Your fee is one-third of any recovery. Assume that if you win at trial, your client can realistically expect a verdict of about \$90,000. However, you estimate your chances of proving liability at 50 percent. This reduces the "value" of the case to about \$45,000, of which you will earn \$15,000. Your time is presently billed at \$100 per hour. This means you can devote up to 150 hours on the case and still be paid a fee equal to your hourly rate.

The case will take approximately two days to try and require about four days of trial preparations, for an estimated total of 48 hours. How do you allocate the remaining 102 hours? Your profiling investigation—client interviews, witness interviews, exhibits acquisition, legal research, and just plain thinking about the case—may require about 25 hours. Preparing and responding to pleadings may take about 10 hours. Preparing and responding to discovery will require the largest amount of time, approximately 50 hours.⁴ Making and responding to motions may take another 15 hours. Preparing pretrial memoranda and attending pretrial conferences may require 15 hours. How does your budget add up?

Investigation	25 hrs.
Pleadings	10 hrs.
Discovery	50 hrs.
Motions	15 hrs.
Pretrials	<u>15 hrs.</u>
	115 hrs.

You didn't come within the allocated 102 hours, but your initial time estimates are reasonably within range. With experience, you will become more accurate in estimating time requirements of particular cases and in estimating the likelihood and amounts of a recovery. This will help you determine if you should take a case to begin with, and, if you do, how much time you can realistically expect to devote to the various stages of its preparation and trial.

However, always keep in mind that your ethical obligations to the client must ultimately control your handling of the client's case. You have an obligation to handle the case competently; your performance is determined by the requirements of the case, not the anticipated fee.⁵

⁴ Determining how to allocate these 50 hours among the various discovery methods is discussed in detail in §6.3.

⁵ See Model Rules of Professional Conduct, Rule 1.1.

6. What sources should I investigate?

The basic sources for informal investigations are fourfold: the client, exhibits, witnesses, and experts. Your litigation chart will provide the directions for your informal fact investigation. That investigation should focus on obtaining basic facts—favorable and unfavorable—about the case, and identifying credible, admissible evidence for each claim you are considering.

How extensive should your fact investigation be? It needs to be thorough enough to fill out your litigation chart, to the extent that you can do so through informal fact investigation, while meeting the cost constraints you have established. Practically, this means several things. First, the client must be interviewed as often as necessary to learn everything she knows about the case. You will also need to interview her periodically as you gather additional information from other sources.

Second, you should try to obtain all key documents, records, and other exhibits. In a personal injury case, this includes the police accident reports, hospital and doctor's records, insurance claims records, and employment history. These can often be obtained informally, and many jurisdictions have statutes that require they be released to the client on request. In a contract case, this includes the contract, correspondence, invoices, shipping records, and related business records. Where physical evidence is important, it should be safeguarded or photographed before such evidence is altered or possibly lost.

Third, witnesses usually need to be identified, located, and interviewed, although what you do will depend on the particular case. In most cases, what witnesses say is critical. For example, in a personal injury case, where the plaintiff and defendant are likely to have contradictory versions of how the accident happened, the testimony of neutral witnesses will frequently control the liability issue. You need to identify, locate, and interview them whenever possible. On the other hand, witness testimony is not invariably critical at trial. For example, in a contract or commercial case, the issues are frequently decided by the documents, records, or substantive law. In such a case there may be no advantage in interviewing witnesses quickly.

Finally, in some cases you will need to consult appropriate experts early in your investigation. For example, in medical malpractice and products liability cases, plaintiffs lawyers usually have the case reviewed by a physician and a technical expert before filing suit. You might as well see what a qualified expert thinks of the strengths and weaknesses of your case now.

1. HOW TO MAKE AND ARGUE EVIDENTIARY OBJECTIONS⁶

How do you make effective evidentiary objections and respond to them? Remember that early is good, and both early and in writing is better. How objections are raised depends largely on when they are made.

a. Before Trial

Before trial, evidentiary issues are raised in two basic ways. First, parties frequently file written pretrial motions to preclude evidence under FRE 104(a) (also called motions *in limine*) and file written responses to the motions. This is commonly done in both civil and criminal cases.

Drafting the motion carefully is important. It tells the judge and the opposing side that this motion is important, you have researched it thoroughly, and you expect to win it.

As the proponent of evidence, start with a positive statement of why you are offering the evidence and why it is properly admissible for that purpose. After that, state that the evidence is not being offered for an improper purpose. This approach is more effective with judges, who respond better to positive statements of proper purpose. For example, if you are offering evidence as other acts evidence under FRE 404(b), explain that the evidence is properly admissible to prove a proper purpose such as identity, plan, or motive, and that it is not being offered for an improper purpose such as propensity or bad character.

Second, evidentiary issues arise before trial when the judge schedules a hearing on the parties' pretrial statement. In civil cases, in both federal and state courts, most judges require, under Fed. R. Civ. P. 16(d), that the parties prepare a joint final pretrial statement which, among other things, identifies what objections each side has to the witnesses and exhibits that the other side intends to present at trial. Many judges also require that each party submit a trial brief setting out their positions on these disputed issues. Before trial, the judge may hold a hearing on the pretrial statement and the trial briefs to hear arguments and rule on the issues.

Regardless of how the evidentiary disputes arise before trial, the judge may rule without a hearing. Because of this, it is important that your motions, pretrial statement, and trial brief clearly state your positions on these issues and fully set forth the applicable facts and evidentiary law. In most cases, the judge

⁶ T. Mauet, *Trials: Strategy, Skills, and the New Powers of Persuasion* § 10.5.1(a), (Aspen 2005)

will want to hear arguments on some or all of the issues and will set a time for that hearing. Some judges like to hold the hearing in advance of the trial, because the rulings may streamline the trial and may promote settlement. Other judges prefer to hold the hearing immediately before the trial begins.

1. FRE 104 ⁷

FRE 104 draws the line between the functions of the judge and the jury. The judge admits or not; the jury weighs. At times, the line is blurry. FRE 104 is a means of ensuring that the jury receives relevant and reliable evidence that does not run counter to some established public or legal policy. It is a screening process. It aims to avoid the indelicate situation where a judge is required to instruct jurors to disregard words they heard or things they saw.

To minimize these indelicate situations, therefore, FRE 104 assumes lawyers will raise evidentiary issues at the appropriate time, which should be as early in the proceedings as possible. Some do it in the form of a motion *in limine*, although that term is not found in the Federal Rules of Evidence. A motion *in limine* can be made at any time before or during trial and in writing or orally, although a written motion is the better practice. The motion can be aimed at keeping something out or letting something in. In civil cases, preliminary questions can be raised pursuant to Rule 16 of the Federal Rules of Civil Procedure.

FRE 104 has two principal sections. Section (a) governs the procedure used to determine the competency of offered evidence; section (b) governs the procedure used to determine the conditional relevance of offered evidence. The dichotomy is important because the two sections differ in their procedures, standards for admissibility, application of evidentiary rules to the determinations involved, and instructions to the jury that may follow the judge's rulings.

FRE 104(a) applies when the admissibility of evidence depends on a preliminary factual finding by the trial judge. This determination is made by the judge before or during the trial. The judge alone determines whether the preliminary facts are sufficient concerning the "qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence."

The issues that are handled under FRE 104(a) involve matters of witness competency, factual foundations for testimony, and authenticity of exhibits. For example, the judge decides whether a witness's testimony is barred by the Dead Man's Act, whether a dying declarant had the belief of impending death required by FRE 804(b)(2), and whether there has been a showing of the non-production of an original document required by FRE 1004.

⁷ T. Mauet & W. Wolfson, *Trial Evidence* '2.3.1 (3rd Ed., Aspen 2005)

Under FRE 104(a), the judge must consider evidence on both sides of the question of whether the preliminary facts have been established by a preponderance of the evidence. This means that the opponent has the right to voir dire the foundation witness. In fact, the opponent has the right to offer contrary evidence to demonstrate the inadmissibility of the offered evidence. The judge then makes the final determination as the preliminary fact finder.

How the judge hears the evidence to resolve these issues can cause problems. FRE 104(c) provides: "Hearings on the admissibility of confessions shall in all cases be conducted out of the hearing of the jury. Hearings on other preliminary matters shall be so conducted when the interests of justice require, or when an accused is a witness and so requests." This process protects the jury from hearing the foundational evidence, which becomes a problem if the judge later rules that the evidence is inadmissible. The judge would then be in the awkward position of trying to "unring the bell."

When deciding the issues, the judge is not bound by the rules of evidence, except those with respect to privileges. For example, a judge might be asked to make a preliminary ruling that a statement of an alleged co-conspirator is admissible against a defendant because it was made during the course of and in furtherance of a conspiracy. The judge, according to *Bourjaily v. United States*, 483 U.S. 171 (1987), considers all the circum-stances, including the co-conspirator's words, to determine whether the statement is admissible under FRE 801(d)(2)(E). The judge may "consider any evidence whatsoever, bound only by the rules of privilege." *Id.* at 178.

A judge might be asked to determine whether proposed expert testimony satisfies FRE 401, 402, 403, and 702. Presumably, when searching for scientific reliability, the judge considers affidavits, learned writings, published and unpublished studies, and any other testimony or documents that will be helpful to the determination of admissibility. This "gatekeeper" function of a federal judge received new emphasis with the Supreme Court decision in *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993).

The rule does not say how much the judge can rely on inadmissible evidence, but a standard of reasonable reliability along with a need to resort to inadmissible evidence seems to be generally accepted. A judge's use of affidavits to determine factual matters is not a new concept. Rule 43 (e) of the Federal Rules of Civil Procedure authorizes judges to use affidavits when deciding motions based on facts not appearing of record.

Very often, especially in matters of authenticity and foundation, the jury will have to hear the admissible evidence that supports the ruling. If that evidence is not offered, the opposing party will have the opportunity to object to the admissibility of the disputed evidence. Unsuccessful preliminary objections always should be renewed when the disputed evidence is offered at trial.

When the judge has made the preliminary determination under FRE 104(a), no specific instruction to the jury is necessary. In this case, the judge, not the jury, makes the finding as to the preliminary fact.

FRE 104(b) applies only to conditional relevancy issues. If relevancy of evidence depends on a condition of fact, the trial judge "shall" admit the evidence, but the evidence remains in the case only if there is enough other evidence to support a finding that the condition has been fulfilled. For example, the judge "screens" the evidence to determine if there has been a sufficient showing that the speaker in a telephone call was the defendant. If so, the content of the call is admissible.

Under FRE 104(b), the judge considers and determines only if there is offered evidence sufficient to support a finding that the conditional fact exists. If so, the jury later determines if the conditional fact exists and what weight, if any, to give that fact. Only the proponent has the right to present evidence of the existence of the conditional fact (although the opponent may later present contrary evidence). The judge merely screens, rather than weighs, the evidence of the conditional fact; the jury remains the ultimate fact finder.

Under FRE 104(b), the evidence offered to prove the conditional fact must meet all the evidentiary rules. The jury is then usually instructed that the existence of a conditional fact is for the jury to decide and that it should use or ignore the evidence as it sees fit.

The rule's use of mandatory "shall admit it" language impels some judges to informally pretry the existence of the "condition of fact," even though FRE 104(b) does not authorize it. That is, the judge, at times, might not be satisfied with a lawyer's unsupported promise to "connect it up" or "tie it up." He wants some idea of how that will be done. If the promise turns out to be empty, the judge will be in the position of trying to unring bells, since the disputed evidence will be subject to a motion to strike by the party resisting the evidence. For example, the judge may not admit the contents of a letter constituting notice unless the proponent first presents sufficient evidence that the recipient actually

received the letter. The efficacy of instructions to disregard can be dubious at times, although appellate decisions show extreme patience with the practice.

An example of how FRE 104(b) operates at trial is found in *Huddleston v. United States*, 485 U.S. 681 (1988). There, the defendant was on trial for possessing and selling stolen videotapes. The issue was whether he knew the tapes were stolen. To prove knowledge, the prosecution offered evidence that the defendant had sold stolen television sets. The Court held the issue was to be decided under FRE 104(b). No hearing outside the jury's presence was required. That is, the trial judge considers the relevancy of the television evidence by examining all the evidence in the case and deciding whether the jury could reasonably find that the televisions were stolen—the conditional fact—by a preponderance of the evidence. The judge does not weigh credibility or find that the prosecution actually proved the conditional fact. That is the jury's function.

FRE 104(b) does not require any particular order of proof. The judge may allow the disputed evidence — such as Huddleston's sale of television sets—to be heard by the jury before a judicial finding that the condition has been fulfilled—by proof that the sets were stolen. However, if it turns out that the condition has not been satisfied, the opposing party should move to strike the already admitted evidence. In that case, the trial judge must instruct the jury to disregard the evidence.

The fact that judges are not bound by any particular order of proof should not dissuade the opponent of the evidence from urging that the condition of fact evidence be offered before the damaging evidence is heard or seen by the jury. This is the safer procedure to be followed and avoids the "unringing the bell" problem all judges prefer to avoid.

If the judge combines FRE 104(a) with FRE 104(b), he must consider only admissible "condition of fact" matters when deciding whether the jury will hear the disputed evidence. That is because the same evidence must be offered again at trial to support admissibility. The question becomes: Is the promised condition of fact evidence sufficient to support a finding that the condition has been fulfilled? Eventually, if the disputed evidence survives objection, it will be for the jury to determine what weight, if any, to give it.

Under both FRE 104(a) and FRE 104(b), the party offering the disputed evidence has both the burden of going forward and the burden of proof when preliminary questions of admissibility are being decided. The analysis is the same in civil and criminal cases.

The standard of proof for admissibility in civil and criminal cases in any FRE 104 analysis is a preponderance of the evidence—that is, whether the proposition is more probably true than not true. That standard also applies to constitutional issues in criminal cases, such as the admissibility of confessions and evidence alleged to have been seized in violation of the Fourth Amendment.

The party opposing the disputed evidence is not required to surrender to it if it is admitted. FRE 104(e) gives the opposing party the right to offer contrary evidence and, presumably, later challenge the weight and credibility of the evidence during closing argument.

There are times when it is hard to see a clear line between FRE 104(a) and 104(b). For example, when the qualifications of an expert witness are challenged, the judge conducts an FRE 104(a) proceeding. He can consider matters not necessarily admissible in evidence, such as a curriculum vitae, the witness's publications, and affidavits of other witnesses. Still, when the expert is allowed to testify, the proponent of his testimony, to overcome objection, must establish the witness's qualifications in the presence of the jury with admissible evidence.

The same is true for matters concerning the authenticity of documents and tape recordings, the foundations for hearsay exceptions such as the existence of an exciting event, the personal knowledge of a lay witness who offers opinions to the jury, or the agency relationship between a declarant and his purported principal.

FRE 104 expresses a strong preference that preliminary questions of evidence be determined out of the jury's presence. For instance, FRE 104(c) requires that preliminary hearings on the admissibility of confessions be conducted out of the presence of the jury. As to other matters, the test is "when the interests of justice require, or when an accused is a witness and so requests." When an accused testifies on preliminary matters, he does not, according to FRE 104(d), "become subject to cross-examination as to other issues in the case." (However, in *Simmons v. United States*, 390 U.S. 377 (1968), the Supreme Court held a defendant's testimony in a hearing on a motion to suppress evidence could be used to impeach him when he testified at trial on matters directly related to guilt or innocence.)

Most times, however, the jury will be hearing the same foundation evidence the judge is being asked to hear to decide a preliminary question. Since under FRE 611 (a) the judge, at trial, can require the foundation evidence to be presented first, there seems little purpose in hearing it twice, particularly when it

appears obvious that the proponent will be able to establish the necessary foundation. On these occasions, judges do not bind themselves to fine distinctions between FRE 104(a) and 104(b). They adopt a procedure that best uses courtroom time. The result is that the judge hears the foundation testimony at the same time the jury hears it. It is only when the judge has a serious concern about the proponent's ability to establish a necessary foundation that he will hear the supporting facts out of the jury's presence. In those instances, the lawyer's promise that "I will tie it up" is not convincing.

PERSUASIVE QUESTIONS⁸

After you have elicited information from the jurors that you need, you may consider sensitizing jurors to some important concept. The form of a question influences whether you are asking for information or conveying information. You can use questions as a subtle form of persuasion. Questions that persuade, rather than ask, come in many forms. The formula is to make a statement while asking the question. Jurors will make the inference that the statement is true and focus on what is being asked. For example, ask "Do you think that some accidents happen without the fault or negligence of others?" On the face of it, you are asking about their attitudes toward accidents and whether accidents can happen without anyone being liable. However, in truth, you are stating that this case is about an accident but no one is at fault. Interestingly, jury research shows that jurors use these statements of facts as evidence in support of their position.

The how questions get the attitudes. The powerful and passionate advocate only asks the how questions when it is appropriate to do so, when the jurors have been sensitized to the inquiry and know that the lawyer is truly listening. The how questions can be asked indirectly. For example, in a case about a sports car causing an intersectional collision accident, a jury can be asked whether he or she ever owned a sports car, would like to own a sports car, or has had experience at intersections with sports cars attempting to beat changing traffic lights.

In summary, the voir dire can be an effective tool to gather information, share information, and determine who are those best jurors. The right sided voir dire guarantees success.

⁸ D. Gianna, *Reel Justice! Power Passion & Persuasion in the Modern Courtroom*, p. 87, (THE PROFESSIONAL EDUCATION GROUP, INC., 2006)

3. JUROR QUESTIONING METHODS⁹

Learn how jurors will be questioned. Three basic methods are used to question the prospective jurors during the jury selection process: written questionnaires, individual private questioning, and questioning in open court. As with much of the jury selection process, the method used is largely left up to the judge, and the judge may use more than one method in a particular trial.

Written questionnaires range from one or two pages to fifty pages or more. Jurors are given the questionnaires to complete either before or when they arrive in the courtroom. When the jurors have completed them, copies of the completed questionnaires are given to the judge and lawyers.

Some lawyers like written questionnaires, especially in big cases with sensitive issues, because the amount of juror self-disclosure improves significantly when written questionnaires are used instead of questioning in open court. This is because many jurors will not disclose their attitudes or personal experiences in front of other jurors, but will disclose them in the relative privacy of a questionnaire. However, such questionnaires, often prepared with jury consultants, are expensive and time-consuming, and lawyers frequently fight over what questions should be permitted and how those questions should be worded. As a result, most judges allow written questionnaires only in trials involving substantial pretrial publicity and complex and sensitive issues, and usually limit the number of questions asked and subjects covered.

Individual private questioning is another option. With this approach, the jurors are questioned individually — sometimes in the judge's chambers, sometimes in the courtroom out of the hearing of the other jurors. The advantage is more self-disclosure by jurors; the disadvantage is that it is time-consuming.

The most common method is questioning in open court. With this approach, the jurors are questioned in the courtroom, and every juror can hear the questions asked of, and answers given by, the other jurors. Here, the advantage is efficiency, as most juries can be selected in one to three hours. The disadvantage is reduced self-disclosure, because many jurors are reluctant to disclose their attitudes and experiences in front of other jurors.

Because the jury questioning method is discretionary with the judge, lawyers must decide before trial which method is likely to serve them better and request the judge to use that method. However, the judge will permit such

⁹ T. Mauet, *Trials* ' 3.3– ' 3.5

methods only if he is convinced that a written questionnaire or individual private questioning is necessary under the particular circumstances of the case. In routine civil and criminal cases, questioning the jurors in open court is the predominant method.

4. JUDGE, LAWYER, AND HYBRID QUESTIONING METHODS

Learn who will do the questioning. Jurors may be questioned by the judge, or lawyers, or both. Judge questioning is common in federal courts and some state courts. In some courts, the judge may do all the questioning. The lawyers' participation is limited to requesting that the judge ask the jurors particular questions or that she delve into particular subjects.

Lawyer questioning is the traditional method and is still common in a few state courts. With this approach, the judge greets the jurors, introduces the lawyers and parties, and makes some introductory comments. The questioning of the jurors is then turned over to the lawyers. The usual procedure is that the plaintiff asks questions first, then the defense. The judge may put a time limit on each side.

The most common method today is a hybrid of the judge and lawyer methods. With this approach, the judge asks the preliminary questions, either of the jurors as a group or individually. The judge's questions are usually directed to matters that may trigger challenges for cause. Hence, the judge may ask questions to make sure that each juror meets the statutory requirements for jury service; has no personal problems or commitments that would interfere with jury service; has no close relationship to any of the parties, witnesses, or lawyers; and has no fixed opinion about this kind of case or what its outcome should be. The judge may also ask about the basic backgrounds of each juror, such as family, education, job, residence, and whether the juror has ever been involved in an event similar to that underlying the case being tried. After the judge rules on any cause challenges, the lawyers then have an opportunity to question the jurors. The judge may impose time limits, such as 30 minutes per side.

The hybrid method is popular because it allocates the questioning sensibly. The judge does the preliminary questioning because the judge is primarily interested in determining if the jurors are qualified to serve and have anything in their backgrounds that would trigger a challenge for cause. The lawyers do the follow-up questioning, as they are interested in asking more focused questions so they can intelligently use their peremptory challenges.

5. SCOPE OF QUESTIONING

Learn what latitude the lawyers will have in questioning jurors. Most judges take the view that questioning by lawyers should be limited to learning about the jurors, their backgrounds, and their life experiences.

In a few states, however, jury questioning is more broadly permitted. There, lawyers may also ask questions that principally convey information to the jurors. When this is permitted, lawyers frequently "test" their evidence to gauge the jurors' reactions. For example, in a personal injury case involving eyewitnesses, a lawyer may ask: "Do you believe that a person can witness a terrifying crash and later accurately testify about what happened?"

Many lawyers also like to test their themes during jury selection. Most judges today permit lawyers to ask these kinds of questions. For example, in a personal injury case involving punitive damages, a lawyer may ask: "Do you think that some corporations put company profits ahead of product safety?" In an industrial accident case, a lawyer may ask: "Should workplace safety be the employer's responsibility or also the worker's responsibility?"

The line between obtaining information from and conveying information to a juror is a blurred one, however. For example, asking a juror: "Have you ever seen a person take a fast left-hand turn at an intersection trying to beat an oncoming car?" seeks information about the juror's life experiences, but it also conveys the suggestion that this is what happened in this case. Many judges do not permit questions the principal purpose of which is to test the jurors' reactions to anticipated trial evidence.

Some lawyers try to obtain the jurors' commitment to follow the law on core legal concepts such as the burden of proof, presumption of innocence, liability and damages being separate issues, and assessing the credibility of particular kinds of witnesses. Most judges allow such questions, as answers may give rise to a challenge for cause, although not all lawyers agree that such commitment questions are effective.

3.9 QUESTIONING TECHNIQUES¹⁰

We now have seen that jury voir dire should be directed toward accomplishing several goals:

- Creating a comfortable environment for self-disclosure
- Identifying juror attitudes on matters important in the case
- Determining if jurors hold attitudes on these matters
- Determining if jurors hold strong attitudes on these matters
- Determining if jurors are persuaders, participants, or nonparticipants
- Determining if jurors are punitives, authoritarians, or holdouts

How do you ask questions that accomplish these goals?

1. Create a Comfortable Environment for Self-disclosure

In the first minute or two, you should introduce yourself; create a casual, friendly atmosphere; and get the jurors talking. Many lawyers today go directly to the jurors' life experiences, particularly if the judge has limited the amount of time each side has for questioning.

Example:

The judge has introduced the parties and lawyers, read the witness lists, and mentioned the date and location of the collision on which the case is based. None of the jurors knows the parties, lawyers, or witnesses, and none of the jurors has heard about the collision. The judge then turns the questioning over to the lawyers. The questioning is in open court, and both group and individual questions are permitted.

JUDGE: Plaintiff's counsel, you may begin.

LAWYER: Thank you, your honor. [Stand up, leave counsel table, and stand a few feet in front of the jurors, unless local rules require that you stay at counsel table or a lectern.] Good morning, folks. How many of you have ever been involved in a collision involving two cars?

[Several jurors raise their hands.] How many of you have ever been involved in a collision in which you or someone was hurt, hurt seriously enough to be taken to a hospital? [Two jurors raise their hands.] The first juror on the end, your name is Ruth Adams, right?

¹⁰ T. Mauet, *Trials* ' 3.9

JUROR: That's right.

LAWYER: Ms. Adams, tell us about that collision.

JUROR: I was driving to work and stopped for a red light. The driver behind me wasn't paying attention and plowed right into the rear of my car.

LAWYER: So it was the other driver's fault?

JUROR: It sure was. Wasn't any doubt about that.

LAWYER: What happened to you?

JUROR: The crash threw my head and body back, and I hurt my neck.

LAWYER: How badly?

JUROR: They took me to the emergency room, checked me out and x-rayed my neck, and kept me overnight. Nothing was broken, but all the muscles in my neck and back hurt like crazy.

LAWYER: How long did it take you to recover?

JUROR: Well, I missed a week of work, and it took about a month before all the pain went away.

LAWYER: How were you compensated for your expenses, lost income, and the pain?

JUROR: The insurance took care of all that. I assume the other man's insurance paid, but it was all handled by my insurance company.

LAWYER: How has that experience affected you?

JUROR: I guess it's made me a more careful driver. It certainly makes me appreciate good health more.

LAWYER: Thank you, Ms. Adams. The other juror who raised his hand, that was Mr. Baker?

And so on. However, some lawyers prefer to ask easy background questions as a way to get jurors talking about themselves. This is a common approach, particularly if the judge has not imposed time limitations on the voir dire.

Example:

LAWYER: Ms. Andrews, good morning. You're the first juror on our jury list, so I'll talk with you first. How long have you lived here?

JUROR: Five years.

LAWYER: What brought you to our town?

JUROR: I lived all my life in Nevada and went to college there. I got married after college, and my husband's job transferred him here.

LAWYER: What kind of work do you do?

JUROR: I work for a real estate firm. I do the accounting and some administrative work.

LAWYER: And your husband?

JUROR: He's an accountant for one of the big accounting firms.

LAWYER: Let me guess — you met your husband in college?

JUROR: Right. We were both accounting majors, but he was a year ahead of me.

LAWYER: Tell us about your family.

JUROR: Right now it's just me, my husband, and our two-year-old.

LAWYER: Are you working full time at the firm?

JUROR: Yes.

LAWYER: I take it that with the job and the family, you're more than busy?

JUROR: Absolutely.

And so on. Getting jurors talking immediately, using group and individual questions, is important. Being friendly, showing interest in the jurors' lives, asking easy introductory questions, and asking logical follow-up questions all help create a positive atmosphere in which jurors are not afraid to speak up and talk openly about themselves.

2. Identify Juror Attitudes on Matters Important in Case

The next objective is to identify juror attitudes important to the case. This requires two steps. First, look at the parties, claims, defenses, and facts to determine what the important issues and disputes in the case will be from the jurors' point of view. Second, identify the kinds of questions that are likely to elicit disclosure of the jurors' backgrounds, interests, and life experiences that will reveal the jurors' attitudes on those important issues and disputes.

Keep in mind the hierarchy of background information, the third being the most important:

1. Socioeconomic history

- family
- residence
- education
- job

2. Personal interests is hobbies

- organizations active in
- reading interests
- magazines and newspaper read
- television viewing and radio listening
- other information sources
- bumper stickers and window decals

3. Life experiences

- personal, family, and close friends' experiences similar to event on which case is based

General socioeconomic history has little predictive value in most cases. (However, jurors who have achieved satisfaction in life, often by reaching a comfortable socioeconomic level, usually believe in personal accountability and responsibility, an attitude that is important in both criminal and personal injury cases.) Personal interests, and particularly personal experiences similar to the case being tried, are usually much stronger indicators of relevant juror attitudes. This does not mean that you should never ask jurors about their history, because you can sometimes learn a great deal from it, and expressing interest in the jurors and their lives is always important. Rather, it means that when you are looking for background information that suggests juror attitudes on key issues, it is much more useful to focus on personal interests and, most importantly, life experiences.

Example:

This is an automobile collision case. The plaintiff's lawyer will want to know if any jurors have attitudes generally adverse to plaintiffs and the tort compensation system. The plaintiff's lawyer will also want to find out if any jurors have been on the defense side of a similar lawsuit and, therefore, might look skeptically at plaintiffs and the tort system.

LAWYER: How many of you have ever had a lawsuit brought against you?

[Several jurors raise their hands.] The first juror on the end of the front row, tell us your name.

JUROR: I'm John Smith.

LAWYER: Mr. Smith, tell us about that lawsuit.

JUROR: I own a small business, a hardware store, and we've been sued a few times.

LAWYER: What kind of suits?

JUROR: I've been sued twice over deliveries of goods that were defective so we didn't pay for them. We've been sued once for a slip-and-fall incident.

LAWYER: The lawsuits with the suppliers — how did they end up?

JUROR: They settled pretty quickly once it became clear to them that they didn't deliver the kind of quality merchandise we had ordered.

LAWYER: The slip-and-fall — how did that end up?

JUROR: In that case a customer, an elderly lady, claimed she slipped on the floor in one of the aisles. No one else saw it, and there was nothing obviously defective about the floor. But we settled it after the lawsuit was filed.

LAWYER: Were you satisfied with how that case ended up?

JUROR: Not really. We never thought there was a valid basis for the claim, but our insurance company said it would be cheaper to settle for a few thousand than go to trial over it.

LAWYER: How do these lawsuits make you feel about lawsuits in general?

JUROR: Well, I now understand how easy it is to bring a lawsuit, even if you don't have a valid basis for it.

LAWYER: Thank you, Mr. Smith.

Example:

This is a wrongful termination case brought by an employee against his corporate employer. The defendant's lawyer will want to know if any of the jurors has ever been laid off, fired, or had any disputes with their employers, indicating that they might side with the employee in a wrongful termination case.

LAWYER: Have any of you ever been laid off from your job? [Two jurors raise their hands.] Ms. Agnew, could you tell us about that?

JUROR: Sure. It was about five years ago, and I was working at

Montgomery Ward. They closed the store I was working at, and we all got laid off.

LAWYER: Did you ever get rehired?

JUROR: They offered to hire us at another store when there were vacancies, but I got another job before that ever happened.

LAWYER: How did you feel about the layoffs?

JUROR: I understood why they had to do it, but I wish they had given us more notice.

LAWYER: How much notice did they give you?

JUROR: I was a sales clerk, and they gave us one week.

LAWYER: Did you feel they could have handled it differently?

JUROR: Sure. They told us one week before Christmas that we would be laid off. It pretty much ruined everyone's Christmas.

LAWYER: How did they handle the layoffs for other departments?

JUROR: The salespeople and other floor employees were all treated the same. But we heard that the managers had been told sooner than we were, and they all got severance packages.

LAWYER: Did you get any severance package?

JUROR: Not really. They kept our health insurance coverage for 30 days, but that wasn't really enough time to find other coverage.

Example:

This is a murder case and the defense is insanity. The prosecutor will want to know if any of the jurors, or their immediate families or close friends, have ever had any involvement with psychiatry and whether any of the jurors has any education or employment in the mental health field. This would indicate that they might be more receptive to the defense's psychiatric evidence.

LAWYER: Did any of you study psychology, sociology, or similar fields in college? [Two jurors raise their hands.] Mr. Adams, what did you study?

JUROR: I was a sociology major in college.

LAWYER: Did you ever take courses in psychology?

JUROR: Nothing beyond Psych 101.

LAWYER: Ms. Williams, how about you? You also raised your hand.

JUROR: Yes, I was a psychology major at the university.

LAWYER: Did you ever study psychology after your undergraduate years?

JUROR: No.

LAWYER: What part of psychology were you interested in?

JUROR: Child development.

LAWYER: What attracted you to that area?

JUROR: I just find it fascinating how the brain develops from infancy through the first few years. The changes, the growth in mental abilities, are so fast and remarkable.

LAWYER: Thank you, Ms. Williams. Have any of you ever worked in the mental health field? [One juror raises her hand.] It's Ms. Henderson, right?

JUROR: That's right.

LAWYER: Ms. Henderson, can you tell us about that experience?

JUROR: Sure. I worked for the Department of Mental Health for a year after college. I helped test children and adults who had various levels of retardation to determine what kind of training program would be best for them.

LAWYER: Did you find that work rewarding?

JUROR: Rewarding and tiring. It's very satisfying to see someone with limitations learn to be self-sufficient and able to go about daily life with minimal help.

LAWYER: Did you ever deal with children or adults who had behavioral problems?

JUROR: No, that was another department.

These kind of questions, pleasant and nonjudgmental, elicit the kind of information that helps determine if jurors have receptive or resistant attitudes to your side of the key issues in the case.

If the court will allow it, ask questions to test the jurors' reactions to the key concepts and themes you plan to use during the trial. For example, in a personal injury case, you might ask: "Have any of you ever seen a driver who just couldn't wait to make a left-hand turn?" In a criminal case you might ask: "Have any of you ever been frozen by fear?" Some judges bar such questions on the ground that they are designed more to convey concepts than to elicit information. Other judges permit such ways, and they can be good ways to

determine if jurors will be receptive to — or at least open-minded about — your themes.

3. Learn the Strength of Juror Attitudes

Merely learning the likely juror attitudes about key issues in the case is not enough. You also need to determine the strength with which the jurors hold those beliefs. This is where the "what-why-how" questions become important. The what questions get the facts; the why questions get the explanations; and the how questions get the feelings.

Example:

This is a personal injury case in which the plaintiff's negligence claim is based on the defendant's drinking. The defense is that although the defendant had been drinking socially at a business reception, his drinking did not impair his driving. The defense lawyer will want to learn the jurors' attitudes about alcohol and how strongly they hold those attitudes.

LAWYER: How many of you sometimes drink alcohol at social gatherings or business functions? [A number of jurors raise their hands.] Are there any of you who never drink alcohol at any time? [Two jurors raise their hands.] Ms. Iverson, you raised your hand. Could you share with us why you never drink alcohol?

JUROR: Sure. I don't approve of it, so I don't do it.

LAWYER: Why don't you approve of it?

JUROR: I've seen too many lives ruined by alcohol.

LAWYER: Does that include anyone in your immediate family or close friends?

JUROR: Yes. My father was an alcoholic.

LAWYER: How did that make you feel?

JUROR: I alternated between feeling sorry for him and hating him. Our entire family suffered because of his drinking while I was growing up.

Here, simple, gentle, follow-up questions developed not just the juror's attitudes toward alcohol, but also the level other feelings and the reasons for them.

This also is a good way to test the jurors' reactions to your themes (which some judges permit) and gauge the strength of juror attitudes.

Example:

This is a civil fraud case. The plaintiff corporation claims that when it bought a subsidiary of the defendant corporation, the defendant misrepresented the financial condition of the subsidiary by submitting false financial statements. One of plaintiff's themes is that defendant "cooked the books."

LAWYER (plaintiff): Mr. Gilbert, do you own stock?

JUROR: Well, I guess I do through my company's retirement plan.

LAWYER: Who decides what stocks are in your plan?

JUROR: The managers of the plan do that.

LAWYER: Do the managers rely on financial statements to decide what stocks to buy for the plan?

JUROR: I suppose so.

LAWYER: Those financial statements from companies are supposed to show an accurate financial picture of the company, right?

JUROR: Right.

LAWYER: Have you ever heard the term "cook the books"?

JUROR: Yes.

LAWYER: What does that mean to you?

JUROR: It means the financial records have been altered.

LAWYER: By accident, or on purpose?

JUROR: On purpose.

LAWYER: Is this a common problem today?

JUROR: You certainly hear enough about it.

LAWYER: Why do some companies cook their books?

JUROR: To look better than they really are.

LAWYER: How do you feel about that?

JUROR: It's dishonest. The people that do it should go to jail.

There is a cardinal rule you must always obey when delving into juror backgrounds and experiences: do not embarrass a juror. Jurors will let you know

if you are getting into sensitive or private territory, either by telling you directly or by their inflection and body language. When jurors hesitate to answer, look to the judge before answering, refuse to make eye contact, or turn sideways and cross their arms, these are usually defensive and negative reactions to your questions. When that happens, don't pry, because that juror, and all the other jurors watching, will immediately resent you. If the information is important, try to get the judge to help.

Example:

This is a criminal case in which the defendant is charged with sexual assault. The defense will want to know if any of the jurors has been a victim of a serious crime.

LAWYER: Have any of you or your immediate family ever been the victim of a crime? [Several hands go up.] How many of them were burglaries of a home or business? [Two hands go up.] How many of them were break-ins or thefts of cars? [Two hands go up.] Anyone else been a victim of a crime not involving burglaries or cars? [One hand goes up.]

Mr. Avery, right?

JUROR: Yes.

LAWYER: Could you tell us what happened?

JUROR: Well, it involved my sister.

LAWYER: What happened?

JUROR: It's rather personal.

LAWYER: Mr. Avery, would you prefer talking with us out of the presence of the other jurors?

JUROR: Definitely.

LAWYER: Your honor, could Mr. Avery discuss this with us at the bench?

JUDGE: Very well. Mr. Avery, please come up to the bench. [Juror and lawyers walk to the judge's bench and speak in lowered voices.]

LAWYER: Mr. Avery, now that we're up here, can you tell us what happened to your sister?

JUROR: My sister was sexually assaulted in her dorm room when she was a student. There were never criminal charges brought, but the guy was expelled from the university. She's wanted to keep that private, since she still lives here.

LAWYER: Of course, Mr. Avery. We understand. Thank you for sharing this with us.

JUDGE: Mr. Avery, do you think that what happened to your sister might affect how you view this case, since it also involves a sexual assault charge?

JUROR: I don't think so. This case depends on its own evidence.

JUDGE: Very well. Let's have everyone return to their seats.

4. Learn if Jurors are Persuaders, Participants, or Nonparticipants

Identifying the persuaders in the jury pool is particularly important, because they tend to dominate the discussions and have a disproportionate influence over the other jurors. Persuaders are talkative, willing to speak in front of strangers, and freely express their thoughts and opinions. Ask group questions to see who volunteers to speak. Find out who has supervisory experience over others.

Example:

LAWYER (plaintiff): How many of you think there are problems with the tort system, the system that allows persons to file lawsuits and have their cases heard before a jury? [A few jurors raise their hands.]

Ms. Johnson, you raised your hand. Do you feel there are problems?

JUROR: I do.

LAWYER: What are the problems?

JUROR: I think it's too easy to file lawsuits.

LAWYER: Why do you feel that way?

JUROR: My company is constantly being sued, and most of the lawsuits are complete nonsense.

LAWYER: What company do you work for?

JUROR: I work for Robinson's, the department store chain.

LAWYER: What's your job with Robinson's?

JUROR: I'm in the accounting department.

LAWYER: Specifically, what do you do?

JUROR: I'm in charge of the receivables section. We make sure that all income is accounted for and that people and businesses who owe us money actually pay us.

LAWYER: How many people work for you in your section?

JUROR: It varies. Right now I've got 18 employees.

LAWYER: Thank you. Mr. Williams, you also raised your hand. Do you feel there are problems with our tort system?

JUROR: Yes.

LAWYER: In what way?

JUROR: It's so slow and expensive. It seems to take forever to get a case to trial, and it seems you have to be rich before you can afford a lawyer to take a case in the first place.

LAWYER: Have you had personal experience that gets you thinking that way?

JUROR: I was in the rental real estate business for a while, and we were constantly filing lawsuits against persons and businesses who had breached their agreements, usually by failing to pay the rent. There was always a question of whether it made sense to file a lawsuit or whether it was cheaper just to take the loss.

LAWYER: Who had to make those decisions?

JUROR: I did.

5. Learn if Jurors are Punitive, Authoritarian, or Holdouts

Finally, you need to identify if any jurors are punitives, authoritarians, or holdouts, because these are important characteristics in certain kinds of cases.

Punitive jurors are dangerous in civil cases to defendants who are corporations, governmental entities, or wealthy individuals. Punitive jurors have a need to strike out against a system that they see as fundamentally unfair, especially to the "little guy," and they do it by returning large damages awards against such target defendants. Punitive jurors are often at the bottom of the socioeconomic scale, are frequently loners who feel alienated from the mainstream, and some-times have had traumatic experiences in their personal or work lives.

Example:

This is a lawsuit against a large automobile dealer. The plaintiff claims that the dealer fraudulently sold him a used car knowing that it had been involved in a major collision and had not been properly repaired, but nevertheless representing that the car was in perfect condition. The plaintiff is seeking both compensatory and punitive damages. The defendant's lawyer will want to know if any jurors will be receptive to returning a large damages award against the dealership.

LAWYER (defendant): Mr. Belkin, when you were in high school, what did you want to be?

JUROR: A pilot.

LAWYER: Did you become a pilot?

JUROR: No.

LAWYER: Did you change your plans?

JUROR: No. You've got to have money to get the training. I wasn't born rich, so it never happened.

LAWYER: What kind of work are you doing now?

JUROR: This and that. I've been a waiter and done maintenance and yard work.

LAWYER: Where do you see yourself in five years?

JUROR: Probably about where I am now.

Authoritarians are dangerous to defendants in criminal cases. They are deferential to the government and authority figures, and believe that "rules are rules" and are there to be followed.

Example:

This is an armed robbery prosecution. The defense is mistaken identification.

LAWYER (defendant): Mr. Mason, what did you do after high school?

JUROR: I enlisted in the Army.

LAWYER: How did you like your Army years?

JUROR: They were good. The Army made me grow up and become responsible.

LAWYER: What was the best thing about the Army?

LAWYER: Well, it trained me in electronics. But I guess the best thing is that in the Army you learn what the rules are and what you're supposed to do, and if you do that everything will work out

LAWYER: What did you do after the Army?

JUROR: I left after my three years were up, but I'm still in the Reserves I went to work for Raytheon, the military supplier.

LAWYER: And you've been there ever since?

JUROR: Right. It'll be 15 years next month.

LAWYER: Mr. Mason, if you were to pick one person, other than your parents, whom you admire, who would that be?

JUROR: I guess I'd pick General Eisenhower.

LAWYER: Why Eisenhower?

JUROR: He put everything together to make the invasion of Normandy during World War II possible. That wasn't easy. And I thought he was a pretty good president.

Holdouts are dangerous to prosecutors in criminal cases, because the prosecution in almost every jurisdiction needs a unanimous verdict to win. They are dangerous to plaintiffs in civil cases in jurisdictions that require unanimous verdicts. Holdouts are the free spirits and nonconformists. They often have individual, rather than group, interests and admire independent persons.

Example:

This is a burglary case. The defendant was arrested one day later with goods taken from the scene of the burglary, but claimed he'd obtained the goods from someone else without knowing they were stolen.

LAWYER (prosecutor): Ms. Adams, what kind of work do you do?

JUROR: I'm a freelance photographer.

LAWYER: You like doing that kind of work?

JUROR: Yes.

LAWYER: What do you like best about it?

JUROR: The independence. I can set my own hours, take the jobs I like, and I don't have to answer to anyone except myself.

LAWYER: I gather that's important to you?

JUROR: You bet. Being your own boss is the best. You may not earn the big bucks, but you get to control your own life.

LAWYER: Ms. Adams, I've asked this of other jurors, so I'll ask you as well: if you had to pick one person, other than your parents, whom you admire, whom would you pick?

JUROR: I'd probably pick a painter like Picasso.

LAWYER: Why?

JUROR: Because he decided what he wanted to do with his life and how to live it. No one dictated to him, no one told him what to do.

Identifying any punitive, authoritarian, and holdout jurors in the jury pool is the last step in evaluating the potential jurors. You have now focused on four key juror attributes:

- Juror attitudes
- Strength of juror attitudes
- Persuaders, participants, and nonparticipants
- Punitives, authoritarians, and holdouts

You are now ready to use your limited number of peremptory challenges to deselect those jurors who are persuaders holding strong attitudes unfavorable to your side, and any other jurors who are particularly dangerous to your side.

§ 4:5 Persuading jurors—Compel'em with a theme ¹¹

Catch'em with your story, compel'em with your theme.

The single most important task in Grafting the winning beginning is to create a powerful, winning theme. Charles Becton, outstanding trial lawyer, former judge and extraordinarily talented teacher of advocacy says that "a trial lawyer without a theme is like a soldier without a gun." That statement has always been true. "Catch'em with a theme." Why is that? The reason is that your story tells what happens. But that is just not enough. You must make sure the jury knows what the case is about—but, more important, why your client should, and must win. In short, you must develop both a winning legal theory of the case, a people story and a compelling theme. Jurors are entitled to a theme—if you fail to provide one, they will provide their own. And almost certainly, that theme won't be one you like. Each juror will fill in his or her own version of a theme for your client's case. The challenge for you in planning the presentation of your case and in particular your opening, is how to get the jurors version of the facts to align most closely with your position. The key is to find the moral underpinning, the moral guiding principle that lies beneath your case—and plan to retell that principle through the theme. The powerful theme serves as the foundation upon which the case is built. So, how do we prepare those themes, what are they, and how do we deliver those themes?

§ 4:6 "Things go better with coke"—Persuading through themes

Advertising and marketing consultants spend huge sums of money convincing manufacturers to sell their products through powerful themes. In fact, every profession involved in selling, including political strategists, public relations experts and marketing consultants considers a compelling theme to be the very cornerstone of a successful campaign. So should you. Powerful trial themes are the heart of the visceral trial story and the persuasive opening statement. Powerful trial themes should accomplish two goals: first, hold the facts, the evidence together; and second, provide the moral underpinning behind the case. It bears repeating, every case must be grounded, anchored, in a moral principle.

Themes have been a part of all of our lives. Every juror who sits in the courtroom of the 21st century has spent between 15 and 21,000 hours before the television screen or computer monitor. We are inundated with themes. We are most familiar with commercial themes—they persuade us to do something, to

¹¹ D. Gianna & A. Julien, *Opening Statements: Winning in the Beginning by Winning the Beginning*, ' 4.5-4.13, (2nd Ed., Thomson West, 2005)

buy a product. But trial themes must do more than sell—a trial theme must persuade and move our jurors to action, to do something uncomfortable to most people—to speak up and make judgments. A trial theme must motivate. Themes are psychic aids. They help our psyches force us to pay attention, to listen, to stay tuned, to keep reading, to speak up for someone forcefully. Commercial themes are like fishing lures—they hook consumers. Trial themes hook jurors, reel them in and motivate them to act!

A powerful theme is the primary motivational tool available to you in the courtroom. A trial theme provides the motivation so essential to jury persuasion. A trial theme provides the moral foundation for your jurors to convert their preferences to opinions and then to express their opinion forcefully to the other jurors who may not be quite so disposed in your favor. Themes convey the answer to the message "why should I win?" and, most important for the trial lawyer, they stimulate action.

An effective trial theme fulfills another juror trial need—it ties the evidence together, ties the facts together, ties the science together, ties the expert testimony together, ties a nice, simple bow around the whole case. A trial theme conveys the case message efficiently and strikingly. It aids in the assimilation process.

"Things go better with Coke" is something we have heard almost from birth! How much more powerful is that jingle compared to "Drink Coca-Cola!" The message behind the Coke theme is obvious—drink Coca-Cola and your life will be better! That theme tells us all we need to know about Coca-Cola. But, a powerful trial theme has that other purpose, that all-important secondary purpose so necessary in the deliberation room. The trial theme simplifies and conveys our trial message succinctly and helps our jurors convey that message to others and help convince jurors who may not be so favorable to our position. Thus, an effective trial theme must be brief to be effective—but it must be a complete communication. "Where's the beef?" conveyed the message 100% that Wendy's hamburgers were a lot meatier than the others. Most everything we hear in today's media is a theme that captures the entire message, the essence, in 10 words or less. A theme is a 10 word or less motivational infomercial. A telegram. Something like an e-mail letter— short, precise and to the point. No wasted words are permitted. If advertising and marketing specialists know how to motivate us to buy a product we really don't want or care about, why shouldn't you, the trial lawyer, use themes to motivate your jurors to argue your case for you?

What is it about those themes? We know that themes hook us emotionally, viscerally. They are the emotional hooks of the trial. Our basic principle is that

people will do almost anything to become emotionally involved in the life of another person. We know they will suspend reality to do so. That means they will become involved in the life of another person, as long as that person has the characteristics of the hero and the moral purpose behind the hero is clearly right and just. And that purpose is communicated through our theme.

Any character can be made to be a hero. Any case can be grounded in a simple compelling theme. The best examples are examples from films. Do you remember Steven Spielberg's story about the "extra terrestrial," ET? Were you like everyone else in the audience, when you thought that ET was going to die? Were you hiding behind your popcorn, sniffing, crying and even sobbing? Now, you knew ET was not going to die—but you cared about him! You cared about a short, purple faced, wrinkled alien being! Why, because you liked "him." You felt for "him." And, when ET and the children mounted their bicycles and flew toward the sky, you were happy, you probably yelled at the screen, "go ET, go ET!" And when ET went home, we all left the theater happy. The lesson—every case must be bound together by a simple theme, a simple hook.

As we have said, our trial story drops the jury directly into the story of the life of the main character, your client. Your opening statement story puts the jurors directly into the picture in the beginning and involves them in the life of your client, now, right away. But, having done that, the real challenge is to motivate the jurors to root for you early, if possible in the opening, the beginning and to see everything from your point of view, to choose you and advocate for you.

The key and the secret to the winning trial theme? The great trial theme grabs and sustains attention, brings out the injustice in the case in graphic detail and emphasizes the rightness of the cause. It gives those jurors a solid, moral and satisfying reason to vote for you. It answers the question, why should you win?

Themes therefore demonstrate why you should win by a.) simplifying the facts and the evidence and holding the evidence together; b.) resolving differences in the evidence; and c.) motivating the listener to action by providing the moral underpinning for the action. But, if we think about this theme business, there are really two kinds of themes, two separate but commingled themes; the affective theme (the moral of the story which motivates the listener to action) and the cognitive theme (the theme that holds everything together). Real and focus group jurors make it perfectly clear that they want and need to know the moral underpinning of the case right away to help them make decisions right away, to reduce their anxiety right away by picking the party to root for—right away. Combine your affective and your cognitive themes into one.

Powerful, compelling themes can and do all of that.

Where do you find great themes? You find them from the case facts, even the law. For example, in a simple automobile accident case involving a speeding defendant, the theme "People in a hurry hurt!" ties in the facts, the law, speeding and cries out for liability in one simple, short sentence. We all know "hurrying" gets us in trouble. Compacting a mundane automobile accident case into that theme and reducing the theme to a simple phrase grabs and sustains attention. The phrase also allows you to repeat that theme throughout the case, simply and, without objection from your opponent.

From the plaintiffs side, themes such as "The buck stops here," "This is a case of broken promises and broken dreams," "Let's put honor back in the handshake," "Speed kills," "Dr., do no harm," "An ounce of prevention is worth a pound of cure," "The product created an illusion of safety," all tell the plaintiff's story quickly and easily. From the defense side, "America was founded on individual responsibility," "It's easy to blame others," "This company's policy is safety first," all say something wonderful about the corporate defendant, and lay responsibility elsewhere. So, themes are present everywhere.

All it takes is a little imagination and some thought!

§ 4:7 Creating the theme

Themes come from everywhere. They even come from trial events. Johnny Cochran's "if the glove doesn't fit, you must acquit," came from watching a trial demonstration gone sour. But themes are found everywhere. Adages, axioms, the Bible, Aesop's fables, fairy tales, greeting cards, literary works, maxims, movie titles, proverbs, slogans, advertising campaigns, parables—even songs and song titles are a source of great themes that evoke emotions.

So, themes are present everywhere. All it takes is a little bit of imagination and some thought! Gerry Spence summarized the Karen Silkwood case (involving exposure to radioactive plutonium) and the legal principle of strict liability in his trial theme, "*If the lion gets away, Kerr McGee must pay.*"

Themes even come from adulterated common sayings. "Safety first" can be turned to "safety third" for the defendant company.

How do we plant those themes, and where? Themes are planted in the voir dire, fertilized and watered in the opening statement, cultivated throughout the examination of the witnesses and the presentation of the exhibits and harvested in the closing story argument. Repetition of those themes provide the

constant reminder to the jury that you should win. Repetition of those theme words in the form of "anchor" words, your trial vocabulary, your trial phrases and labels, provide the framework for the "directed" examination, that is, the examination that is directed toward your theme and your trial vocabulary and the "buzz-word" cross examination that re-emphasizes your reality. Themes simplify and make the facts memorable and easy to assimilate and they provide the jury with a link to the facts of the case.

And the theme and your trial vocabulary must all emerge triumphantly, loudly, in your opening statement—your beginning.

In summary, the characteristics of a good trial theme are its simplicity, its catchiness and its ability to reach the emotions. The theme must be easy to remember and must be something that the jurors can and want to repeat in the jury room. The good theme must be supported by the evidence and must supply a good causal connection. The theme words supply the hook words or phrases that capture the essence of the case, stimulate jurors to listen to the evidence and assist them in assimilating the evidence into your point of view they have adopted.

Good themes are also rhythmical. Repetition or parallelism counts a great deal. Theme words in threes makes a difference and are easy to remember. "This is a case about success, failure to yield and 15," is easy to remember, lyrical and even poetic in a personal injury case. "If he had drained the puss, there would be no fuss. But because the doctor waited until day, he must pay," is a ditty a jury can remember—and one they can repeat in the deliberation room.

Themes can even be poetic. They can be general. And they are metaphoric rather than narrative. In a case involving a contractor who bid to do work in a petrochemical manufacturing plant where the contractor actually did 100 more work than the bid required but that resulted in the plant owner's refusal to pay the contractor for the work actually done, the contractor's trial theme "The job ABC did was not the job it bid. The job it did was the job DEF hid," conveyed the proposition that the contractor was misled into bidding the job, the principal failed to disclose the nature and amount of the work but now wants to take advantage by not paying for work that was actually done.

§ 4:8 Themes and theories

Themes are not theories. A theory is the legal underpinning of the case. A theory is why your case is strong legally. A theme is *not* a short description of a legal theory. A theme is not a recitation of the facts. A theme is that communiqué

that telegraphs the what's and the why's of your case, the communiqué that orients the jurors to see and hear your story, your way.

General themes can also be particularized and adopted into a legal theory. For example, every personal injury case can be introduced with the simple theme that "this case is about a needless and useless tragedy." Almost any case can be introduced with the theme "This case is about fairness, doing what's right." Every commercial contract case can be summarized with the theme "These two companies made a promise to each other—and the defendant company wants to break that promise." A medical malpractice plaintiff case can always be introduced with "this is a case about a doctor who was too busy to care about the patient," while the defense case can always be introduced as "A case about a patient who wants the doctor to be perfect."

§ 4:9 Watch-outs—From the plaintiff's side/attribution theory

How you theme the case depends, or should depend, in great part upon which side of the court you sit. If you are a plaintiff, you must engage the mind, move the heart—but you must also foreshadow and counter jury thinking that will hurt your client. Whether you are representing a plaintiff in a personal injury case, an employment case, a commercial case or a contractual dispute, the defendant, the party who wears the "black hat," will look for a rational reason to blame, at least in part, the plaintiff. For example, defense theories of the case and defense themes very often attempt to direct jurors toward the theme of "personal responsibility." Most lawyers, in fact, intuitively, use this theme in defense. However, jury scientists have studied this concept, the theme of personal responsibility and have analyzed why that theme remains effective in the 21st century courtroom. It is therefore important to understand the jury thinking underlying the concept of "personal responsibility," the most common defense theme.

§ 4:10 Attribution theory—The choice theme

Whenever a person engages in certain behavior, one of the critical ways of looking at that behavior is whether the individual, in this case a plaintiff, had a choice. Did the plaintiff have a free choice or was that choice influenced or even directed by the defendant? And then, did the plaintiff make the right choice?

The important first question, did the plaintiff have a choice is the question that jurors ask at least intuitively. Why is it important for the defense to emphasize that the plaintiff had a choice? Well, the answer lies in simple jury thinking. If the plaintiff had a real choice, a viable choice, and then consciously made the wrong choice, jurors tend to feel that the plaintiff is personally

responsible, at least in some part, for the consequences of that choice. Jury scientists call this "attribution theory."¹² Attribution theory tells us that when a person chooses to do something, that person is then seen as responsible for the consequences of that choice, the results of that choice, whatever the results may be. Jury science shows that attribution theory is particularly important in selling the concept that a plaintiff should be held responsible in a court case. Plain and simply, if someone makes an informed, reasoned choice, he or she is more likely to be seen as personally responsible for what happens at a result of that choice.

But, how to present this defense to a jury? Presenting attribution by saying that it is a matter of "personal responsibility" takes away from the jurors the ability to conclude, on their own, that the plaintiff made an individual, independent choice. Phrasing that powerful defense in terms of "personal responsibility" is viewed by jurors as an attempt by the defense lawyer to force the issue. Instead, subsume the theory into a "choice" theme. Use the theme this way: "Ladies and gentlemen of the jury, the plaintiff in this case chose, of her own free will, to make the left turn in front of the approaching Chevrolet ...". Jurors are more likely to conclude on their own that the plaintiff is, and should be, responsible for his or her own actions rather than being told that he or she is, or should be, responsible by the defense lawyer. Every human being wants to "get it" themselves. None of us want to be told what to do or how to think. The choice theme, really attribution theory in disguise, permits the jurors to come to and draw their own conclusions, a powerful persuasion technique.

Why are jurors more accepting of the choice approach rather than the personal responsibility approach? The reason is that jurors are given the freedom to come to their own conclusion that the plaintiff must assume responsibility for a free and independent choice. The persuasive value of the jurors reaching their own conclusions about personal responsibility rather than a lawyer telling them what they should think is obvious. The choice theme, attribution theory in disguise, is much easier to swallow than a full-face charge of failure to take individual responsibility. The choice theme is also easier to sell and much less harsh. In effect, it is easier emotionally for most people to blame someone if that person is responsible for their actions, i.e., had a choice—but chose the wrong course of conduct. The defense must argue and prove that the choice was the plaintiff's, and the plaintiffs alone and the defendant did nothing to influence the

¹² Carlson, Donald W. and Graeven, David B., *The Development of Trial Themes and Catastrophe Losses*, The Brief (Summer, 2002).

path chosen by the plaintiff. Everyone knows that certain consequences follow from certain choices.

In summary, attribution theory, the choice theme in disguise, unleashes jurors' own sense of individual responsibility at the plaintiff.

§ 4:11 Defense watch-outs—Counterfactual thinking

Another way of approaching a theme and developing a particularly good defense theme is to use what is called "counterfactual thinking."¹³ Counterfactual thinking occurs when a person evaluates an event or a course of conduct by how easily it could have been undone to create a different outcome, usually a better outcome. Jury science tells us that the ease with which a juror can undo a negative event with a counterfactual affects the amount of blame the juror attributes to a party. The more jurors create counterfactual thinking, the stronger their opinions of blame on the party they feel could have changed the outcome of the event. Counterfactual thinking is most often effective against a defendant.

The question asked (and answered) by counterfactual thinking usually takes the form of "If only..." or "What might of happened if..." or "What would have happened if only...?" For example, the plaintiff, in the intersectional failure to yield left turn automobile case, might say "If only the defendant had been looking where she was going, she would have seen the car, directly in her line of sight, making the left turn..."; "If only that manufacturer had spent \$2.00 more, the plaintiff would never have put his foot into that machine..."; "What would have happened if the defendant enforced its anti-discrimination policy...?"

§ 4:12 Rebuttals

You should presume that your opponent will use a form of either the choice or the counterfactual theme approaches. Knowing that, you can prepare a rebuttal.

The defense, for example, can develop its own "if only..." arguments. "If only the plaintiff had not been in a hurry..."; "If only the child's father would have been watching his daughter before she put her foot into that machine..."

The defense can always use the "even if..." theme to counter the counterfactual argument made by the plaintiff. "Even if the defendant was not looking, the accident would never have happened if the driver of the left turning

¹³ Carlson, Donald W. and Graeven, David B., *The Development of Trial Themes and Catastrophe Losses*, The Brief (Summer, 2002).

car would have slowed down as she must as the light turned yellow..." But that argument is much less powerful when it comes after and from the plaintiff.

The plaintiff can argue that the defendant stole any chance for the plaintiff to make an informed, a voluntary choice.

Counterfactual thinking and choice arguments can always be made a part of the story. Choice theory and counterfactual thinking provide powerful and persuasive jury argument themes—especially if they are made in the opening statement. These themes invite the person to think about the answers to the questions.¹⁴

§ 4:13 Conclusion—The theme's the thing

Delivering a powerful and persuasive theme applies and utilizes the classical, rhetorical principles of ethos, pathos and logos, is consistent with the court's legal instructions, ties the facts together, brings out the injustice of the case and allows the jurors to view a victory for your client as advancing the interests of justice in the community. Great trial themes have universal application and appeal. They send compelling messages by permitting jurors to use their own personal frames of reference, their own sense of morality and justice.

Stories catch the interest of a jury—but themes compel jurors to view the case from your point of view, motivate them to convert their choices to opinions and then proudly voice those opinions in the deliberation room.

As Charles Becton says, "The themes the thing. It holds the case together. It's your weapon, warrior."¹⁵

¹⁴ Carlson, Donald W. and Graeven, David B., *The Development of Trial Themes and Catastrophe Losses*, The Brief (Summer, 2002).

¹⁵ *Ibid.*



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DIRECT EXAMINATION -- THE DECEPTIVE SKILL¹⁶

Reliving Reality

Direct examination involves the most deceptively difficult skill in trial advocacy. Experienced litigators know that although cross-examination looks harder than direct, it is actually the other way around. There is good reason for this. The direct examination must paint the background, create the focused picture and most important, have the jury relive reality from the client's viewpoint - all in the face of objections from the opposition, obstructions to smooth story flow from numerous sources - all the while conscious of the rules of evidence and aware of the need to entertain, educate and involve the jury. No wonder direct examination is the true test of the master advocate. Yet, if the lawyer conducts direct examination poorly, it is the witness who looks bad and the case that suffers. On the other hand, if the lawyer conducts cross-examination poorly, then it is the lawyer who looks bad. The result is that lawyers fear cross-examination even though direct examination is the more difficult and more important art.

Direct examination is important for a number of reasons:

- 1) it is the vehicle for telling the story;
- 2) it requires the skill to make basic facts understandable to people who are unfamiliar with them;
- 3) it requires the lawyer to help the witness appear credible without injecting the lawyer's personality unnecessarily;
- 4) it should make the fact-finder want to hold in your favor;
- 5) it requires that continuity be maintained despite objections and interruptions;
- 6) it requires that all of this be done consistent with the rules of evidence and procedure - in front of a judge who may not understand them.

¹⁶ T. Mauet & D. Gianna, *A Day On Trial! Winning Trial Skills in the 21st Century*, ch 5 (THE PROFESSIONAL EDUCATION GROUP, INC., 2006)

The Law

The law of direct examination is relatively simple: leading questions - questions that suggest the answers - are generally not permitted on direct; but while the rule is easy to state, it is harder to follow. Leading questions are permitted on preliminary matters, matters that are not reasonably in dispute, when questioning very young or very old witnesses (in the discretion of the trial court) when examining an adverse party or witness ruled by the court to be hostile or when refreshing memory. "Narrative questions" - actually questions that call for narrative answers - are discretionary with the court.

The Basic Principles

There are four basic principles of direct examination.

I. Plan the Direct Examination

- a) never do anything inconsistent with your theory of your case and your theme;
- b) keep it simple;
- c) organize the direct examination - remember the principles of primacy and recency, the logical interrelationship between facts, witnesses and chronology, if necessary;
- d) do not read;
- e) listen to the witness;
- f) start where it counts;
- g) Show do not Tell;
- h) be interested and interesting.

II. Be Credible

Remember, all witness interrogation is a three way conversation - you, the witness and the jury. The jury is always watching you. Therefore, avoid objectionable questions and avoid any activity that lowers your credibility. Keep the jury involved in the conversation. Even cross-examine your own witness.

III. Use Effective Communication Techniques

- a) use plain language;
- b) use headlines - "I direct your attention to...;"
- c) emphasize your important points;
- d) involve the jury;
- e) use exhibits - big ones (or one for everyone), keep them simple, interesting and not too many;
- f) make it come alive;
- g) use rhythm and pace to make the direct interesting, exciting and conversational.

IV. The 90% Rule

In direct examination, the witness should do 90% of the talking - the lawyer 10%. The jury's attention must be focused on the witness.

The Style

Imagine the opening of the first act of a play or the beginning of a film. First the scene is set. Then objects come into focus or the place is brought into clear relief. Then characters appear followed by the person in the lead role and the major characters. We get to know who these characters are and why these characters are here. Then, finally we perceive the point of view of the main character, see everything from the author's point of view and become involved with the character and the story.

The direct examination should accomplish what the playwright or filmmaker does. That is, introduce the witness, involve the jury in the witness' story and see the important events from the witness' viewpoint. Therefore the best style or form of the good direct examination can be summarized as follows:

- a) Answer the jury's questions: who is this person, why is this person here, and why should I listen;
- b) Use the "Who, What, When, Where, Why and How" form of question;

- c) Start with a strong point, a point favorable to the case and memorable;
- d) Keep the jury interested with short questions, one fact per question;
- e) Keep the jury with the examination by making clear where the examiner is going and why;
- f) Use headlines;
- g) Keep it short and focused;
- h) Find some logical and easy order or pattern, not necessarily chronological;
- i) Vary the direct examination from witness to witness, e.g. use an impact direct for some key witnesses;
- j) End with a flair, focused on the theme of the case.

Remember, the direct examination is not just "getting the testimony into the record" by any means. It is the chance to tell the persuasive story, get the jury involved in the characters and their lives and the best opportunity to answer the questions the jurors would ask if given the opportunity.

A Basic Structure

A basic direct examination sets the BACKGROUND and the SCENE, starts the ACTION, uses transition questions to get to the EXHIBITS and to the DAMAGE evidence. The witness does 90% of the talking, the lawyer plans and choreographs the action and substance and the jury relives *reality* from the witness' viewpoint.

HARNESSING THE POWER¹⁷

The Visual and Sensory Direct Examination

The powerful and passionate advocate understands that the key to direct examination is to focus upon the person -- the person on the witness stand, his or her life, his or her troubles, his or her own emotional crises. The passionate advocate motivates the jurors to become involved in the lives of the people involved in the story, in the trial. The people most involved in the trial are clients and witnesses. The powerful advocate knows that people will hopelessly and helplessly suspend reality to become emotionally involved in the lives of the people. That precept is the secret to successful film-making and creative writing. The way that filmmakers, playwrights and authors involve their audience in the lives of the characters is to engage the minds and move the hearts of their audience. The powerful, passionate and persuasive people story is the key to involving the audience, the jury, in the lives of the characters. The vehicle is the direct examination.

The ability to conduct a powerful direct examination is the most difficult courtroom art to perfect. The law of direct examination, however, is simple. Basically, non-leading questions must be used, foundations must be laid for all questions, and testimony presented must tend to prove or disprove a fact in issue. The direct examination, however, requires that the story of the person be told, simply and quickly. That story must motivate the audience (the jury), to care about the person, must involve the person in the story of that person, must make the audience (the jury) like that person, and must create the desire among the jurors to become emotionally involved with that person. The powerful advocate knows that the jurors must perceive the event that lead to the courtroom battle through the eyes of the party or the witness who testifies. In effect, the jury must perceive reality from the witness's (and therefore from the advocate's) viewpoint. The reality of the witness can only be accomplished through the literary and the sensory direct examination -- that is, through modern introductions and endings, literary and sensory language, the use of prologue and transition questions, the use of powerful language, rhythms, and, of course, the pre-trial powerful preparation of each witness. And throughout, the material facts must be presented logically, quickly and smoothly.

¹⁷ D. Gianna, *Reel Justice!*, pp. 94-100

Direct Examination

Beginning the People Story

When a person takes the witness stand, the jury asks "who is that person?", "why is she here?" and "can we trust that person?" Therefore, the direct examiner must, quickly, tell the jury who that person is, why that person is testifying, and must lay an instant credibility foundation. These are called prologue questions. If the witness is to be believed, the witness must be liked. The jury must, therefore, come to appreciate the witness as a likable person and therefore perceive the witness as a credible witness. All of us like ourselves. Therefore, the witness that is perceived to be "just like us" is the witness who will be believed. Therefore, introduce the witness to the jury, make certain the jury knows why that person is there, and personalize that witness. That is, make the witness a real live human being, a person with a past, a present and a future, a person who is "just like us." For example, introduce the witness to the jury:

- Q. Are you the person who was standing at the southeast corner of Main and Elm at 3:30 on June 6, 1994 and saw the collision between the Chevy and the Jaguar?
- Q. Tell us about yourself. Were you born here?
- Q. Do you have a family?
- Q. Do you have any children?
- Q. Where did you go to school?
- Q. Have you lived here all your life?
- Q. Tell us why you were standing at the corner of Main and Elm on June 6, 1994.

After the personalization, the story the witness has to tell must be told simply, cleanly, clearly and quickly through the words of the witness. A good rule to follow is the so-called 90% rule. That is, in direct examination, the witness does 90% of the talking and the lawyer 10% of the talking. The jury must believe that the witness is telling the story --not the lawyer. Therefore, non-leading questions should be used, not only because the law requires it, but because jurors want to hear the testimony from the witness -- not from the lawyer.

The Cinematic Direct Examination

Screenwriters, playwrights and authors have given trial lawyers a wealth of information how to involve an audience in the life of another person and how to do it with substance and with style. In any film, play, television production, and certainly in cinematic trials, the direct examinations are carefully structured and tailored to meet the audience's needs. In the cinematic direct examination, the scene is set. The characters are introduced and the audience is involved in those characters within the first minute or two. Ninety second people stories are told, stories that involve the witness. Those stories engage and enmesh the audience into the lives of the witness-characters. In the cinematic direct examination, the story always goes forward. One scene leads to the next. And, of course, the action never stops. Dull movies and boring plays never see the screen. The trial lawyer can learn solid lessons from professional screenwriters. The trial lawyer must direct the movie, set the scene with powerful language, put the characters into the scene, place the props (the evidence) into the scene, introduce the characters and bring the main character into the scene quickly and cleanly. The trial director then directs the witness into the story, simply and quickly. Be a trial director not a trial talker.

Authors and screenwriters know that people do not like to be told. Audiences do not like information pushed into them. The best direct examiners show, not tell. Audiences enjoy "getting it" themselves. And no one wants to be pushed or bullied into a position. The best direct examiners engage the jurors the same way filmmakers engage the audience into the person's story. How is that done? Filmmakers, screenwriters and playwrights engage all of the senses and understand human nature. They use the persuasive (and therefore powerful) style of storytelling.

Persuasive Storytelling

Talented writers know that human beings like to eavesdrop. Eavesdropping on a conversation always works. The lesson for the direct examiner is to engage the witness in a three way conversation. The jury, as the third party in the conversation, is permitted to eavesdrop on the structured conversation between lawyer and witness.

A second effective style of direct examination is for the lawyer to assume the role of the friendly teacher -- not the boring or self-important professor. In the case of an expert witness, the witness can assume the role of teacher. In any case, the role of the friendly teacher works. Therefore, the most powerful storytelling method and therefore the most persuasive style of direct examination is that style that brings the audience into the conversation between lawyer and witness and educates the audience along the way.

Powerful Introductions and Endings

The persuasive advocate knows that the listener must be involved in the witness' life quickly. All of us know that the basic introductions heard in courtrooms everyday do nothing to involve the jury in a person's life. Remember, the jurors want to know why they should listen and why they should care. Jurors want to be oriented very quickly. They want to avoid wondering about anything! They want the direct examination to be interesting, easy to follow and structured. So, it is essential for the powerful advocate to order and structure a direct examination. But just because every direct examination must be ordered, does not mean every direct examination must be chronologically ordered. For example, the direct examination can start with "Introduce yourself to the jury." "Are you the person whose elbow was seriously hurt in the accident of May 1994?" The jury will appreciate that the lawyer has put the witness directly at the scene of the accident.

Set the scene with word pictures. Think of the most vivid film you have seen. What happens? After the scene is set, the action begins. The main character is introduced. In every stage production or film, the audience's attention is focused first upon a broad scene, then on a narrower scene. Characters come into view and then the main character begins the action. In summary, the direct examination should reveal to the jury the life of that person, the story that person is in the courtroom to tell, from the witness's perspective -- and, of course, from the perspective of the client.

Make the direct examination come alive. Use prologue questions, that is, questions that keep the jury focused on where the witness and where the direct examination is every step of the way. Use headlines. For example, "lets go now to the intersection of Main and Elm at 3:30 on June 16. Where are you standing?"

Use present tense to keep the action exciting. Establish a rhythm and a pace to make the direct examination interesting, conversational, exciting and alive. Remember always, that the direct examination is, truly, a three way conversation. The lawyer, the witness and the jury must participate actively.

The direct examination must be short and focused on the theme of the case. If a question doesn't fit in with the theme -- don't ask it. If the question does not move the action forward -- eliminate it.

End with a dramatic flare. Focus on the theme of your case -- especially at the end. Every author and filmmaker ends each chapter with a dramatic end -- or at least a dramatic pause. Every scene of a film leads to the next. Therefore, the direct examination should lead the jury forward along the path and along the journey to justice, toward the final resolution, removing obstacles every step of the way. Direct examination is not just getting testimony into the record. It is the opportunity to tell the persuasive story, to put passion into the courtroom, and the opportunity to get the jury involved in the witnesses, the clients, and the lives and fortunes that are at stake in the trial. The direct examination also provides the best opportunity for the trial lawyer to answer the questions the jurors have. Remember, the trial lawyer must, to be the powerful, passionate and persuasive advocate, hold that audience every step of the way. The easy way to hold the audience is through the structured, ordered, dramatic, literary, cinematic direct examination that reveals the people story and keeps the audience focused upon seeing the world through the eyes of the witness -- and your client.

CROSS EXAMINATION -- THE ART AND TECHNIQUE¹⁸

Destroying Reality

What is proper cross examination? It has been called an art, an ability or talent acquired at birth. Others say effective cross examination is a matter of preparation; most, **if not all**, great cross examinations are carefully planned and executed.

Aside from art and preparation, Francis Wellman lists some of the other elements which contribute to a successful cross examination:

It requires the greatest ingenuity; a habit of logical thought; clearness of perception; infinite patience and self control; power to read men's mind intuitively, to judge of their characters by their faces, to appreciate their motive; the ability to act with force and precision; a masterful knowledge of the subject matter itself; an extreme caution, and, above all, the instinct to discover the weak point in the witness under examination. It involves all shades and complexions of human morals, human passions and human intelligence. It is a mental dual between counsel and witness. F. Wellman, *The Art of Cross Examination*, (4th ed. 1948).

The jurors expect exciting cross examinations and look forward to them. The lawyer must be ready to meet these expectations. There lies the art.

Summarily, the cross examination should be thoroughly prepared, the cross should have a game plan which fits into the overall theme and theory of the case and, the examination should be concise, to the point, easy to follow, and as the Texas oil well driller said:

"Once you have hit pay dirt, quit drilling."

Techniques

The techniques of cross can be conveniently and simply outlined.

I. Preparation

- A) Review everything available
- B) Arrange the cross by topics

¹⁸ T. Mauet & D. Gianna, *A Day On Trial*, ch. 7

II. Whether to Cross Examine

- A) Don't automatically cross examine every witness.
If there is nothing to gain, do not cross examine.
- B) Cross examine only with specific objectives in mind.

III. The Objectives of Cross Examination

- A) Obtain helpful information
- B) Discredit witness and/or their testimony
- C) Bolster the credibility of a third person who will discredit the witness being cross examined.

IV. The Art of Watching and Listening

- A) Listen to the witness during direct examination. Watch the witness, read the body language. Don't be distracted by copious notes. Many times, the witness (by a look, a sigh or a direct answer) will indicate something of great significance.
- B) Listen to the witnesses' answers during your cross. Very often, the witness (by an answer to a question) will give a telltale clue to some position on a very important matter. Most inexperienced lawyers are worried about the next question - and therefore miss the boat.
- C) Watch a witnesses' eyes.

"Except in different matters, never take your eye from that of the witness. This is a channel of communication, from mind to mind, the loss of which nothing can compensate. Truth, falsehood, hatred, anger, scorn, despair and all the passions -- all the soul, is there." R. Harris, *Before and at Trial*, (1980).

The Attorney's Demeanor Should be Completely Courteous and Appropriate to the Witness.

Jurors sympathize and identify with most witnesses - not with the lawyer. Therefore, unless you are fairly sure that the jury dislikes the witness, the lawyer should always be courteous and should not exhibit any temper, browbeat or try to intimidate the witness.

The Ten Commandments of Cross Examination

Professor Irving Younger, in a letter to Cicero, sets out the Ten Commandments of Cross Examination. The basic principle behind the Ten Commandments is to provide the lawyer with the basic tenets to prepare the advocate to cross examine a witness competently. However, before any cross examination begins, the advocate must know what he or she will say to the jury at the conclusion of the trial about the credibility and/or the testimony of the witness to be cross examined. Therein lies the **secret** of cross examination -- *the advocate will cross examine only to the extent necessary to obtain the information he or she needs to support the argument planned in advance to be made in the closing argument*. Once that information has been obtained, the advocate will STOP.

With that preface, here are the Ten Commandments of cross examination.

- I. Be Brief
- II. Short Questions, Plain Words
- III. Ask only Leading Questions
- IV. Never Ask a Question to Which You Do Not Already Know the Answer
- V. Listen to the Answer
- VI. Do Not Quarrel With the Witness
- VII. Do Not Permit the Witness to Explain
- VIII. Do Not Ask the Witness to Repeat Testimony He Gave on Direct Examination
- IX. Avoid One Question Too Many
- X. Save the Explanation for Summation

Always End on a High Point

IMPEACHMENT

Destroying the Opponent's Reality

Effective impeachment can destroy an opponent's reality. Ineffective impeachment destroys a lawyer's credibility. The rules of impeachment are traditionally found in evidence codes (Federal Rules of Evidence 607-610, 613), in case law and custom. The techniques of effective impeachment are found in the basic tenets of advocacy and persuasion.

The Seven Basic Methods of Permissible Impeachment

1. Bias / Interest
2. Prior inconsistent statement
3. Prior convictions
4. Prior bad acts
5. Bad reputation for truthfulness
6. Contradictory facts
7. Treatises

The Uncooperative Witness

There are a number of techniques that can be used effectively to cross-examine the uncooperative witness. In fact, the uncooperative witness can turn out to be the easiest to cross-examine and can seriously damage the opponent's case. Some of the techniques that can be used when a witness tries to be uncooperative are as follows:

- repeat the question
- "I'm sorry, maybe you didn't hear me but the question was ..."
- "Perhaps I didn't ask that question very well, what I meant to say was ..."
- "The answer is, yes?"
- "The light was green?...green?...green?"

- "I wish I could answer you. If I could I would tell you what safety really is. But fortunately, that is for the jury to decide.
- "I know you wanted to say that sir, but my question is..."
- "I thank you for that, but my question was..."
- "You had to say that didn't you? Somewhere along the line you determined in your own mind that you would say that didn't you?"
- "Did that lawyer over there want you to say that?"

Bias / Interest

Bias (prejudice) exists where a witness, because of some relationship to the parties or attitude about the matter in dispute, has a frame of mind that may color or slant the testimony.

Interest exists when a witness' relationship to a party or action is such that the witness stands to gain or lose (usually financially) in the outcome of the suit.

Prior Inconsistent Statements

If a witness has previously said something inconsistent with the trial testimony, that inconsistency will necessarily detract from the credibility of the trial testimony.

Most advocates prefer to lay a foundation on cross examination irrespective of whether it is required. The reasons are that the witness may **admit** the statement (making extrinsic evidence unnecessary) or if the witness denies or fails to remember the prior statement, the confrontation is a dramatic one. If the witness admits the prior statement, do not give the witness opportunity to explain. If the witness denies or cannot remember making the earlier statement, prove it by extrinsic evidence.

The Three C's

A simple but effective method to impeach with a prior inconsistent statement is to use the method of 3 C's:

Commit - to the trial testimony

Credit - the impeaching statement and circumstances surrounding it

Confront - the witness, crisply and cleanly with the prior statement, making it clear where you are reading the statement from to counsel and always reading the statement to the witness yourself

- Ex: Q. Did you just testify that the Cadillac had the green light?
- A. Yes.
- Q. Do you remember coming to my office March 15 of last year?
- A. Yes.
- Q. And there was a court reporter there just like this person here to whom you swore or affirmed to tell the truth.
- A. Yes.
- Q. You knew it was important because all the lawyers were there?
- A. Yes.
- Q. And I told you to ask me to repeat a question if you did not understand any of my questions, didn't I?
- A. Yes, you did.
- Q. Weren't you asked on Page 11, Line 19, "Question. What car had the green light, and didn't you answer "the Chevy had the green light"?
- A. Yes.
- Q. Did I read that right?
- A. Yes.
- Q. Thank you -- I tender this witness.

Note, a prior inconsistent statement, if offered for the limited purpose of contradicting the witness's trial testimony (i.e., not for its truth) is not hearsay. If offered, however, as substantive evidence (i.e., for its truth, in the example above, that the light was green for the Chevy) under the FRE the prior statement must have been given under oath.

Prior Convictions

FRE 609 permits impeachment by felonies and misdemeanors involving dishonesty or false statements. 609 apparently requires raising the fact of the conviction during the cross and permits use of the record of the conviction. Prior convictions are always non-collateral requiring proof by extrinsic evidence in the event of a denial.

Prior Bad Acts

Prior bad acts are admissible to attack the credibility of a witness if the acts are probative of truthfulness. As always there must be a good faith basis for the question.

Bad Reputation for Truth and Veracity

A witness may testify to a witness's reputation for truthfulness. The testimony is limited to truthfulness in the form of reputation or opinion testimony.

Contradictory Facts

Under certain circumstances a cross-examination may show that the true facts are different than what the witness claims. Generally, the denial of non-important facts (collateral) may not be proven extrinsic evidence.

Treatises

Expert witnesses can be cross-examined and impeached by using learned treatises, periodicals and pamphlets. The writing must be established as a "reliable authority" through the testimony of any expert witness (including the one cross-examined) or by judicial notice. The writing is read directly into evidence, but is not received as an exhibit.

CROSS-EXAMINATION OF EXPERT WITNESSES

Revealing Reality

An analysis of the direct testimony of most experts reveals that experts attempt to do some or all of the following in the guise of their conclusions and opinions to create and explain the reality of their side of the case:

- a) Characterize
- b) Generalize
- c) Assess
- d) Interpret

The task of the cross-examiner, therefore, is to destroy the reality (and therefore, the validity) of the characterizations, generalizations, assessments, interpretations and explanations of the expert. This can always be and is best done by the process of revelation.

The simplest method for destroying the expert's reality is to reveal to the jury what the expert has done and how the expert became empowered to create that reality. The cross-examiner should, therefore, focus first, on revealing exactly what the expert has done (whether it be a characterization, generalization, assessment, interpretation and/or explanation), and, second, the cross-examiner should reveal that the conclusions or opinions of the expert are simply the product of that expert's characterizations, generalization, etc. Third, the cross-examiner should reveal how the expert came to those conclusions and opinions and, finally, the cross-examination should reveal who or what empowered that expert.

Every expert claims power. The expert gets power from the person who calls the expert to the witness stand, from the expert's education, experience and training, and, most of all, from the facts, witnesses and documents that, supposedly, support the expert's conclusions or opinions. The expert offers the jury an easy way out -- by combining everything in the trial and wrapping all the facts up neatly with an opinion or a conclusion.

However, an old adage tells us that in a herd of cattle, one steer has power. When that steer breaks out of the herd, it is alone and can be managed. Therefore, the process of removing the expert from the herd and therefore minimizing or eliminating the expert's power can be set out as follows:

- a) Unmasking the pretensions of omniscience;
- b) Revealing the bases for the expert's opinions or conclusions whether those bases be documents, facts supplied by attorneys, expert journals or textbook articles, etc.;
- c) Empowering the jury to reject the expert's analysis, conclusions or opinions;
- d) Making clear to the jury why the expert made errors -- especially if it can be shown that the errors were the fault of opposing counsel.

The trial lawyer must always keep in mind that the one and only purpose of cross-examination is to secure the facts needed to argue to the jury about who or what the witness is, what the witness has said and whether the witness should be believed. The cross-examination of any expert must therefore take place on the trial lawyer's own turf using the trial lawyer's rules. An effective cross-examination can always be structured around the simple analysis of what the expert actually did in the case, what the expert actually said during the direct examination testimony and the revelation of how that expert became empowered to give the opinions on direct examination. No trial lawyer has ever conquered an expert in cross-examination by fighting the expert on his or her own battleground -- that is, in the expert's field of expertise. Therefore, there is never any cogent and compelling reason to fight a battle that, more likely than not, cannot be won by the trial lawyer. An effective cross-examination of any expert can always be construed by revealing the true reality of those expert opinions so boldly and believably given on direct and by revealing the real source of that expert's power.

The cross-examination of an expert constructed using these guidelines will always lay a solid foundation for closing argument and assist the trial lawyer in persuading the jury to accept her or his own explanation of reality.

6.14 Common Problems¹⁹

What are the recurring problems that inexperienced lawyers encounter during cross-examinations?

1. Weak Beginning

You have one or two minutes to let the jurors know that your cross-examination will be fresh and interesting, and will bring out additional information to make them see this witness, and the case, differently. Start immediately with something important, something that has an impact, that makes the jurors think: This lawyer is worth listening to; I'll stay tuned. Slow starts, particularly on cross-examination, definitely do not work with today's jurors.

2. Weak Selection of Points

Cross-examination is in large part the art of identifying and focusing on a few key points that will make a difference in the jurors' perception of the witness and the case. Trying to cover everything, and spending time on marginal matters, only dilutes the key points. A good way to test yourself is to ask: Is this point important enough that I'm going to cover it in my closing argument? If not, it's usually not important to cover during cross-examination.

3. Losing Control

Cross-examination is frustrating, because the actual cross-examination rarely goes the way you had it planned. A common reaction, when things don't go as planned, is to begin arguing with the witness and forgetting your game plan. When this happens, the cross-examination degenerates, and jurors usually side with the witness. Losing control is usually caused by having unrealistic expectations of what you can accomplish during the cross-examination of a particular witness.

4. Ineffective Impeachment Technique

Effective impeachment requires an effective technique. Many lawyers impeach witnesses, but the impeachment has no impact on the jurors because there is no clean technique and accompanying attitude that grab the jurors' attention and drive home the point.

¹⁹ T. Mauet, *Trials*, '6.14

5. No Attitude Projection

Cross-examination consists in large part of creating impressions. Whenever you cross-examine, you need to decide what kind of attitude you want the jurors to adopt about this witness. Is the witness confused, mistaken, or forgetful? Unconsciously distorting because of bias, interest, or motive? Intentionally distorting or even fabricating facts? Unless you project the same attitude you want the jurors to have, it is unlikely they will adopt it.

6. Weak Ending

Cross-examinations frequently end when the cross-examiner runs out of questions to ask. This is a mistake, because jurors remember best what they hear first and last. Always ask: What's the most (or second most) important point I can make about this witness, that I am reasonably sure I can successfully make? Cross-examinations should always end on a high note.

BASIC RULES FOR MAKING CHARTS AND DIAGRAMS²⁰

1. Board

Use standard 30" x 40" or 40" x 60" foam core poster board.

Use posterboard with 10-15% color, preferably light gray, blue, tan or beige color. Avoid a plain white board, since this creates too stark a contrast, particularly with black lettering. Use a dull matte finish to minimize glare.

Another possibility is to reverse the colors: use light letters, such as gold, on a dark board, such as navy blue or burgundy.

2. Lettering

Use lettering that has at least 1" high letters, so that the diagram can be read easily by all the jurors. Most graphics experts suggest using sans serif lettering, such as 120 point Helvetica or similar type.

Weight refers to the thickness of the lettering. Use medium weight lettering for the heading. Use light weight type for the body. This will give the appearance of the heading being in bold type.

3. Color

Color is important, for both catching the eye and for the associations it makes. Use black for the basic parts of the chart or diagram, and use color for the key parts. Avoid using pale colors, especially pale green and red, since these are difficult to see for people with perception weaknesses. Use vibrant colors, particularly red and yellow, to attract attention. Use actual colors to represent actual objects of possible. Use the same colors from diagram to diagram if possible.

4. Movement

Make the diagram appear to have movement, since this draws attention. Use arrows and dotted lines to represent movement, jagged lines to represent changes. Mark vehicles with a 1, 2 and 3 to show their movement and location at key times.

²⁰ T. Mauet & D. Gianna, *A Day On Trial!*, ch. 9

5. Symbols

Select effective symbols to represent vehicles, pedestrians, and other important objects that will be placed on the diagram. Use the same symbols from diagram to diagram is possible

6. Composition

There are no strict “rules” for creating charts and diagrams. The only rule is that the diagram or chart must draw and hold attention, and communicate its intended message quickly and clearly. However, the following usually helps, particularly in making informational charts and diagrams such as a summary chart or damages calculation chart:

Don't use all capital letters, since they're harder to read for people with poor reading skills. Use a capital letter to start a line.

Headings should use medium weight type and be centered on the board. The body should use light weight type. Both heading and body should use the same style and size of type.

Margins should be justified on the left, ragged on the right side.

Use numbers or bullets on the left margin to signal new points.

Use about 2” of white space as a border on the top, bottom, and sides of the diagram. Avoid using a framed border, since it draws attention to the border.

Spacing between letters, and between the lines should be sufficient to avoid a cramped appearance. Spacing between the heading and body of a diagram should be about twice the spacing between the lines of the diagram.

Following these basic rules will produce an informational diagram with a heading and up to eight lines of text in the body, with up to approximately 35 characters per line, on a 30” x 40” board.

Remember the “billboard test” if the message you intend to send is not sent in a few seconds, the diagram is too busy. If it doesn't fit on one diagram following these guidelines, use more diagrams.

2. Using Exhibits and Visual Aids during Trial²¹

In opening statements, lawyers ordinarily may use exhibits that they, in good faith, believe will be admissible during the trial. They may use visual aids to present facts that they, in good faith, believe will be proved during the trial. In closing arguments, lawyers may use exhibits that have been admitted in evidence during the trial, and may use visual aids to highlight points that they are entitled to argue. For example, lawyers frequently use organization charts, timelines, and photographs in opening statements, and frequently use documents, diagrams, and charts with bullet points of key facts during closing arguments. Such aids can be used at any time during the opening and closing. Lawyers usually put them on an easel, screen, or monitor when they want to use them and take them down when done. It is a mistake to let jurors see exhibits and visual aids before you want to use them, or to leave them up after you have finished using them, because jurors will look at the exhibits and visual aids rather than focusing on what you are saying.

Exhibits and visual aids are commonly used during the direct examinations of lay and expert witnesses, and here you have choices and decisions to make. Once an exhibit is admitted in evidence, you can show or read it to the jurors; jurors are always eager to hear and see exhibits at the first opportunity. When is it best to do that?

Remember that exhibits attract attention—but they also take attention away from the witness. The minute a large courtroom exhibit is put on an easel or projected on a screen or monitor, jurors stop looking at the witness and focus on the exhibit. The exhibit will win the war for the jurors' attention every time. Always ask: Where do I want the jury's attention to be focused, on the witness or on the exhibit?

Key occurrence witnesses, such as the plaintiff and defendant in a civil case, the victim and defendant in a criminal case, and critical eyewitnesses, ordinarily should be the center of attention. It is usually better to have the witness first tell the story of what happened without having exhibits interrupt the storytelling, particularly if the story is dramatic or traumatic. After the witness has told the story, exhibits such as objects, photographs, and diagrams can be introduced and used to highlight and repeat key facts. This basic approach—tell the story first, then use exhibits at the end of the direct examination to highlight and repeat—keeps things simple for the witness. It also

²¹ T. Mauet, *Trials*, '7.7.2 – '7.9

works well for the jurors, who focus first on the witness and can connect with the witness on an emotional level. Then they can focus on the exhibits, which reinforce the testimony.

With experienced witnesses, such as police officers and experts, you can usually have the witness testify and use exhibits at the same time. For example, police officers who arrived at the scene after a collision or crime frequently testify while standing next to a large photograph or diagram, and point out things on the exhibit as they testify. Expert witnesses frequently testify and use exhibits and visual aids as they explain the bases for their opinions. Experienced witnesses are much more capable of doing this comfortably and effectively.

Direct examinations of records witnesses in commercial cases are often organized differently. In these cases, the story is in the documents and records, and the witness explains the story contained therein by providing any necessary foundation for the exhibits and, after they are admitted, explaining what the documents and records show. Therefore, the spotlight should be on the documents and records, not the witness. For example, consider a breach of contract case in which the plaintiff sues the defendant for nonpayment on a delivery of goods. The plaintiff's documentation—order form, shipping record, billing invoice, and the like—tells the story of what happened. Those records can be enlarged on poster boards or projected on a screen, and the witness can walk the jurors through the events, pointing to the records that show the events and explaining anything on the records that may require explanation.

The choreography of witness testimony and exhibits during the direct examinations is important. It should be planned in advance and executed smoothly. Too many lawyers reflexively introduce exhibits at the first opportunity during the direct examination, when that is frequently not the best way to organize the examination. Always remember that exhibits attract attention to themselves and detract attention from the witness. Always ask: Where do I want the spotlight to be now, on the witness or on the exhibit?

3. Marking Exhibits and Visual Aids during Trial

Finally, how do you mark exhibits and visual aids during trial? Once the exhibit is admitted in evidence, almost all courts permit the marking of photographs, diagrams, maps, documents, and records. The most common way is to put the exhibit on an easel, directly in front of the jurors but a few feet away. Give the jurors but a few seconds to take in the exhibit before talking or having

the witness talk. Jurors will not listen if they are actively processing a new exhibit.

There are many ways you can and should mark exhibits to enhance their persuasiveness. For example, key language in documents and records can be highlighted by using yellow color behind that language, or by having a witness circle or underline that language. Diagrams, photographs, and maps can be marked to show where witnesses were standing; where vehicles were positioned; the path vehicles and people took; and distances, speeds, and times. As long as the markings fairly and accurately show the facts and are not misleading or inflammatory, they are proper.

There are two approaches: have the exhibits marked before trial, and have witnesses mark the exhibits during trial. There are advantages and disadvantages to each approach.

The advantage of completing and marking exhibits and visual aids before trial is that they can be professionally done. For example, an intersection diagram can show the location of the two cars at the moment of impact. An eyewitness can then testify that the diagram, including the location of the cars, is accurate. The diagram will look neat and professional. The downside is that the jurors all know that the lawyer had the diagram prepared the way he wanted it to look. In short, the credibility of the diagram is suspect.

The advantage of marking exhibits and visual aids during trial is that the jurors know the markings come directly from the eyewitness. For example, when an eyewitness marks a diagram to show where the two cars were at the moment of impact, jurors will, if they believe the witness, also believe the diagram. In short, the diagram may not look as professional, but it will be credible.

Trial lawyers differ on this issue. Some lawyers always like to complete exhibits before trial, because they are nervous about whether witnesses can mark them clearly and accurately. Other lawyers always want witnesses to mark exhibits during trial while the jurors are watching. The best approach is probably a compromise: If the exhibit shows facts that are not seriously in dispute, it is safer to have the exhibit completed beforehand. If the exhibit will show disputed facts, it is probably more persuasive to have witnesses mark exhibits in front of the jurors. Most witnesses, with a little practice, can effectively mark diagrams and other exhibits in court.

Whether you mark exhibits before trial or have witnesses mark them during trial, you need to decide what should be marked. Consider what to mark, what colors and symbols to use, and who will do the marking.

First, what can you mark? In commercial cases, documents and records are frequently highlighted and labeled to draw attention to key language. In criminal cases, photographs and diagrams are commonly marked to show the locations of witnesses, victim, and defendant, and, if a night-time crime, the light sources. In personal injury cases, diagrams are routinely marked to show where the accident happened, and important locations, distances, and speeds.

Remember what you are trying to accomplish. With documents and records, you are drawing the jurors' attention to key words, sentences, and paragraphs. Highlight by using a yellow highlighter, drawing lines under the key words, or circling them. Show what abbreviations, terms, and other entries on business forms mean by labeling them. With a live witness, you can simply ask the witness the appropriate questions and ask the witness to do the appropriate highlighting or labeling.

With photographs, diagrams, and maps, you are drawing the jurors' attention to key facts that witnesses have testified about. In civil and criminal cases, these usually include the locations of vehicles and people; paths the vehicles and people took; and distances, speeds, times, and lighting. If it's important to your case, always see if you can get a witness to mark it on a large demonstrative exhibit.

Decide next what colors to use for the various things that will be marked on the exhibit. Colors stimulate associations and emotions. For example, in an accident case, you may decide to use a red car figure for the defendant's car, a green car figure for the plaintiff's car, and blue circles around a "W" to mark the locations of witnesses. If you are going to use more than one demonstrative exhibit, use the same colors consistently on each exhibit.

Decide what symbols to use. Symbols also convey associations and emotions. For example, you can use an X to mark the location of a person on the ground, but a stick figure may be better. You can use a rectangular box to represent a vehicle, but a car or truck figure may be better. You can use three car figures, and place a 1, 2, and 3 on them, to represent the location of a car before the collision, at the point of impact, and where it came to rest. You can use arrows to show the direction of movement. You can use dotted lines to represent the path a person took. You can use a yellow marker to circle the locations of

street lights. You can use lines to label distances between two points. You can label cars with the speeds they were traveling. In short, put on the exhibit the key facts that prove what you need to prove. Once those facts are marked on a big demonstrative exhibit, jurors will not forget them.

Last, decide which witness or witnesses can most persuasively mark each exhibit, and then practice with those witnesses. Tell the witnesses during preparation sessions exactly what you will be asking them to do, and then practice it. Tell the witness exactly what you want her to do and how you want her to do it. Don't ask the witness to "mark," "show," or "indicate" something. Give the witness specific directions on where to go, where to stand, and how to mark. Train the witness to face the jury when talking, then turn to the exhibit when asked to mark it.

Example (civil case):

LAWYER: Your honor, may Ms. Johnson continue her testimony by the exhibit?

JUDGE: Yes.

LAWYER: Ms. Johnson, please step down from the witness stand and walk over to where I've set up the easel in front of the jury. Please stand to the left of the easel and face the jury. [Witness does so.]

Q: Does this diagram. Plaintiff's Exhibit No. 3 in evidence, show the location where the two cars collided?

A: Yes, it does.

Q: Using this adhesive red car figure, please place it where the Chevy was when it collided with the Ford.

A: It was right here. [Witness puts figure on diagram.]

Q: Using this adhesive green car figure, please place it where the Ford was when it collided with the Chevy.

A: It was right here. [Witness puts figure on diagram.]

Q: How fast was the Chevy going at the time of the collision?

A: About 30 miles an hour.

Q: Using this red marker, please write "30 mph" by the Chevy. [Witness does so.]

Q: How fast was the Ford going at the time of the collision?

A: Almost nothing. Maybe two or three miles an hour.

Q: Using this green marker, please write "2-3 mph" by the Ford. [Witness does so.]

Q: Finally, at the time of the collision, what color was the traffic light for Elm Street?

A: It was red.

Q: Using the red marker, please label the traffic light in the middle of the intersection "red." [Witness does so.]

Q: Thank you, Ms. Johnson. Please return to the witness stand.

Note that when you tell the witness exactly what to do and what to use, you make a clear record at the same time. This makes everything more efficient and clear, because there is usually no need to make statements for the record (e.g., "Your Honor, for the record the witness has just written the word 'red' next to the traffic signal on the diagram.").

Example (Criminal Case):

Q: Officer Williams, please step down and stand to the left of State's Exhibit No. 5, already in evidence, which I'm putting on the easel. Have you seen this photographic blow-up before?

A: Yes.

Q: What scene is shown in State's Exhibit No. 5?

A: This shows the alley outside the bar where the shooting took place.

Q: When you got there, did you see the defendant?

A: Yes, he was standing over here, by the wall.

Q: Using this yellow marker, please draw a stick figure and label it "Defendant" to show where the defendant was standing. [Witness does so.]

Q: When you got there, did you see Mr. Smith?

A: Yes, he was lying on the ground by the back door to the bar.

Q: Using this red marker, please draw a stick figure and label it "Smith" to show where he was lying. [Witness does so.]

Q: How far apart were the defendant and Mr. Smith when you first saw them?

A: About 20 feet.

Q: Using this blue marker, please draw a pointed line between the defendant and Mr. Smith and write "20 feet" on the line. [Witness does so.]

Q: Thank you, officer. Please return to the stand.

Your large demonstrative exhibits (e.g., a blow-up of a key document or record, an intersection or crime scene diagram) are the exhibits that contain the key facts supporting your position on liability and damages. These are the exhibits you want in the jury room during deliberation, so that the jurors will be looking at your key exhibits as they discuss liability and damages.

Finally, plan how you can protect the integrity of your exhibits, particularly the large demonstrative charts and diagrams. You spent time planning how they should look and money to make them look right, and you don't want the other side to mark them up and dilute their impact. Can you keep the other side from asking witnesses, either during the cross-examination of your witnesses or the direct examination of their witnesses, to mark additional things?

It is clear that lawyers can use any admitted exhibits during cross-examination. Less clear is whether the cross-examiner can have the witness mark additional things on the exhibits. Judges commonly permit this under FRE 611(a), as long as the lawyer is having legitimate things marked, rather than simply trying to clutter up the diagram to make it confusing. However, the better approach is to avoid the problem altogether. Provide a copy of the diagram and ask the judge to have the cross-examiner mark what he wants on the copy, or provide a plastic overlay and ask the judge to have the cross-examiner mark only on the overlay. Most judges will be sensitive to your right to protect the integrity of your exhibits, particularly if you provide reasonable alternatives. However the judge rules, the ruling will apply to you as well as your opponent.

7.8 Trial Notebook

The lists section of your trial notebook should contain an exhibits list for your exhibits and an exhibits list for every other party. The lists help you keep track of the admissibility status of each exhibit as the trial progresses. Exhibits lists are usually organized like the following.

EXHIBITS LIST—PLAINTIFF

Ex. #:	Exhibit description:	Status:
1	Police accident report	reserved ruling
2a-d	Hospital x-rays	admitted, no obj.
3	Hospital records	admitted over obj.
4	Intersection diagram	

In civil cases, the parties are usually required to list the exhibits they intend to offer during the trial in the final pretrial statement. It is usually convenient for both sides to have the court clerk use the same numbers you used to list your exhibits in the pretrial statement, and have your exhibits list reflect the same numbers. Give the court clerk your exhibits list when the trial begins. In criminal cases, the exhibits are usually marked by the court clerk as the trial progresses. However it is done, your exhibits list must be marked appropriately as new exhibits are offered and their admissibility ruled on.

7.9 Common Problems

What are the recurring problems that inexperienced lawyers encounter when using exhibits?

1. No Overall Visual Strategy

There is more to exhibits than merely getting them in evidence. You need an overall visual strategy for exhibits and visual aids that covers the trial from opening statements through closing arguments, that tells the story of your case visually, that presents information consistently, and that integrates smoothly with witness testimony. This strategy obviously has to be thought through well before trial.

2. Exhibits and Visual Aids Fail the "Billboard Test"

A common problem in trials is exhibits that have too much information, are too cluttered, and fail to send a clear message in a few seconds. Always remember the billboard test: Does this visual aid or exhibit immediately send a clear message to the jurors?

3. Too Many Exhibits

Simplicity and clarity win trials. In document-intensive commercial cases resist the urge to introduce every paper that is admissible. Instead, focus on the 10 to 20 documents that are the key to your case, and decide how you can best present these documents so that they grab and hold the jurors' attention.

4. Not Providing Smooth Judge and Jury Foundations

Foundations make a difference. Judges are impressed by lawyers who know how to get any kind of exhibit into evidence smoothly and efficiently. Jurors use the foundation procedure to assess which lawyer is more competent. Establishing foundations for exhibits should never be seen as a boring but necessary ritual. It's an opportunity to impress both judge and jury.

5. Not Anticipating Objections and Raising Issues Early

Anticipate that the opposing side will object to each exhibit and visual aid and prepare your responses. If an objection has merit, concede the point and find another way to prove what you want to prove. If the objection has no merit be prepared to show the judge why the evidentiary rules have been satisfied.

Raise anticipated evidentiary issues before trial. It gives the judge notice of possible disputes and time to make a considered ruling. Raising evidentiary issues early, both as proponent and opponent, shows the judge that you are prepared and confident of your positions—messages that are always important to send early in any case.

Design the Final Argument²²

How to Start

Start by creating -- listening to the right side of your brain. Conceptualize your ideas, which ideas are at the core of your case, what theme of the trial is the basic one, which theme is right and according to any standard whether it be the Bible, the Koran, Charles Dickens, etc. Find the vigor, the anger, the tension. Decide who you shall finish.

After the conceptualizations are completed, then design the content and the structure. Give the jurors reason to listen -- and remember they will listen if they identify with you and your client and your theme. They will listen because it is in their own interest to listen and you must show them that what they will hear, they need.

Establish that basic theme grounded in justice and ethics. "This is a story of greed ...", "This was an accident, and Jim is not to blame." Show the jury how this theme threads all the way through each and every bit of this case, the testimony, all of the evidence!

Eliminate unnecessary issues and use only recognizable references to everyday living and to the evidence in this case. Humanize the argument -- use human emotions and responses and then bring overwhelming logic to corroborate all of this. Through this process show and explain why you care. Remind the jurors of the testimony and the significance of that testimony. Show them what the testimony means and how the testimony fits not only logic but emotions and righteousness. Use those descriptive words concerning witnesses testimony. "Do you remember that elderly gray haired physician who testified? He told you that ...". "Look at defendant's Exhibit No. 1 -- here it is. Do you remember when I asked the witness to read it? Look for yourself -- it says ...".

Emphasize and underline testimony and words. "Just listen to this ...", "Think about that", "I want to make sure this is very clear ...", "This is so important that I wanted to write it out ...". "Was Larry at the scene?" "Let's put Mary back on the witness stand. Mary did you see the traffic light? Yes, and it was green."

²² T. Mauet & D. Gianna, *A Day On Trial!*, ch. 11

This is the time to clear up technical data and put it all into perspective. "You know now that the product known as Chymopapain is completely harmless." "Dr. Williams explained to us that this is how this product works."

The final argument is the time to anticipate the judge's charges. "I believe her Honor will instruct you ...", "I believe you will hear the judge tell you that a product is defective only if it is unreasonable. Let me tell you why and how this product was reasonably designed."

Persuasive Techniques and Argument

The trial lawyer must let the jury do its own work. The trial lawyer is the guide, the thinker if you will. However, there are few more satisfying experiences in this life than coming to the right conclusion, being able to think out something for one's own self. As such, let the jury do the work. Get them involved. Show them, ask them -- don't just tell them. Use powerful analogies and rhetorical questions. Build more bonds with the jury. "You and I have lived through this". Show them through everything you do and everything you say and how you say it that you truly believe in your case. Pace yourself -- build passion and energy. Talk at their level -- never down to them and don't ever patronize those jurors. Handle their empathy with a particular part of a case. "The law requires you only to decide about the facts of this case", "We all feel bad about this accident. I do as well as you do." "Your job is to move past feelings and think", "You gave me your word and I believed you then and I believe you now."

Winning Arguments

The common denominator in those great closing arguments are the uses of basic morality and universal ethics. Analyzing the issues in the case down to their most simple, common denominator components -- what's at the heart? What's right? Why did something go wrong? The trial lawyer should first find out how he or she feels about these issues. Who are the good guys and who are the bad guys? Find where those basic beliefs come from. Ask yourself, "Who teaches people that?" "Why do we think they are the good guys?" "What did the bad guys do that is bad?" Invoke the old laws -- the old ways. "My grandfather used to say ...".

Analogies

Analogies are excellent devices for clarifying complex or abstract concepts. They are usually stories or examples drawn from life. They have one thing in common -- they have instant appeal. ("Good -- a story. This will be interesting or different. Let's listen.") The best feature of an analogy is the recognition of the end -- when the lawyer connects the point of the analogy with the point that is to be made in the case. That is when the light goes on. But be careful -- make sure the analogy makes sense. Does it give the right image? What out for the lawyer turning the analogy around.

Rhetorical Questions

Another very powerful tool is the use of rhetorical questions. "Do you believe what you heard?" "Do you remember how she looked when I asked her if she hadn't said something different before this trial began?" "Is that how the world works?" "Does that make sense?" "Did she have any reason to come here and lie?" In short, rhetorical questions get the job done.

Questioning an Opponent's Use of the Facts

"I need to do some clarifying, here -- I need to take this opportunity to straighten out what we all heard." Questioning an opponent's use of the facts and illustrating to the jury that what the other lawyer says does not make common sense is a powerful tool. Question the credibility of witnesses if that is an important feature. Show them the facts and let the jurors mull those facts over. Call personal character into question or match the facts of the case that don't match with the breaching of a universal law. Or, establish your own witnesses' credibility.

Visualizing the concepts of law in the case is also a powerful argument tool; likewise comparing normal behavior with the events in the case. Louis Nizer has always said that if he can show a jury that what the other side tells them to believe is improbable, then he will always win the case.

Use of the Law

Jurors do not like to make unpopular or uncomfortable decision. For example, the defense of a products liability case requires the jury to reject the plaintiff's injury in favor of a large corporation or business entity or worse, an inanimate object. Help for the jury comes by explaining the concept of law, why laws are written as they are and why they make sense. Empathize with the juror's dilemma. "This really sounds unfair and hardhearted, but this is the only right thing to do." Use well-known references and familiar situations. This will, in effect, give the jury an excuse for an unpopular decision.

Use a story to make it simpler. Raise the jury to the dignity the jury system deserves. For example, the story of the King and the Prosecutor and "...never", is a powerful one. All of these tactics will help those jurors overcome those natural obstacles. Stories also will help the jury transcend any natural prejudices.

Do's

1. Capture their imagination with the first lines;
2. Finish with a flourish and a flare -- be eloquent;
3. Compliment them;
4. Do some bonding ("We have lived through this unique experience together", "Only we in this courtroom know what took place and how we felt";
5. Remind them of the lighter moments;
6. Be vulnerable;
7. Show faith in them;
8. Describe their tasks;
9. Describe what you are going to do.

Don'ts

1. Don't make it too long;
2. Don't thank them;
3. Don't apologize for anything;
4. Don't say "My client";
5. Don't say "This case is very simple";
6. Don't say "This is the most important decision you will ever make".
7. DON'T USE NOTES.

AND ABOVE ALL -- Don't tell them what to do --

Tell them why -- Look each of them in the eye --

Let them experience you and feel what you are feeling.

Be kind to yourself. Forget "How would the ultimate lawyer do this?" Instead, think of what will reach and explain this to the jury, what do they need and want. Use repetition. "And what did they do?" "Then they ran". And then, faced with that decision "What did they do?" "They ran." "And again, with many choices what did they do?" "They ..."

Make it come alive. "... and then, in an instant, she died". Go to another place and explain what was happening to the people who would be affected by this child's death: "In her home, the telephone rang, her mother turned ... and then, in an instant, she died." Then, talk about where the child was going, what was going to happen: "... and then, in an instant, she died."

In short, the final argument is the conversation designed to persuade. The persuasive communication is one that is supercharged with emotion, but substantiated with fact. It is truly, the persuasive finish.

9.10 Common Problems ²³

1. Boring

A boring closing argument turns jurors off just as they're getting ready to deliberate. This must be avoided at all costs. Watch the jurors. Are they still listening and watching? Do they appear interested? By the time of the closing arguments, jurors are tired and want to start deliberating. Jurors will let you know through their body language whether your argument is making points or is wasting their time.

2. Weak First Minute

The first minute must grab the jurors' attention. It must say: I'm still worth listening to, so stay tuned. The slow, traditional start — thanking the jurors, telling them we're in the home stretch, and so on — will not work today. Strong beginnings are carefully planned, given without notes, and delivered with good eye contact, confident voice, and reinforcing body language.

3. Not Using Opening Statement's Themes and Labels

Jurors are sensitive to inconsistency. They notice if your theory of the case has changed, and they notice if you are using different themes and labels than the ones you used during opening statements. This problem also arises when different lawyers do the opening statement and closing argument. When this must be done, both lawyers must make sure that the opening and closing are consistent with each other, and must agree to themes and labels that both lawyers feel comfortable with.

4. Not Arguing

The heart of closing argument is argumentation. Arguing is making a point, then backing it up with testimony, exhibits, law, and common sense. Inexperienced lawyers frequently just review the evidence or go over what the witnesses said. The jurors don't want you to summarize the evidence. They

²³ T. Mauet, *Trials*, '9.10

heard it as well as you did and, in those jurisdictions that permit it, some took notes. The jurors want you to explain what the evidence means, what it proves or fails to prove.

5. Not Using Visual Aids

This is the age of visual learning, and the ramifications of that fact apply just as much to closing arguments as to anything else. Always consider ways to use admitted exhibits, actual witness testimony, summaries of key jury instructions, and visual aids containing bullet points of key arguments. Consider using a combination of poster boards, PowerPoint projections, and other presentation media. Use butcher paper to write things down as you talk. Weave these visual aids throughout your closing argument, so that you are never a talking head for more than three or four minutes without giving the jurors something new and visual to focus their attention.

6. Too Much Law

Good closing arguments use the law. The jurors want to know how the evidence fits the law and proves, or fails to prove, the claims and defenses. However, inexperienced lawyers frequently read long jury instructions verbatim or spend substantial time discussing the law. This is rarely useful. Instead, summarize the key instructions orally or, better yet, make a poster board containing only the key words or short phrases from the instructions. This is much more efficient and focuses the jurors' thinking.

7. Not Dealing with Weaknesses Candidly

An important part of closing argument is addressing juror concerns and apparent weaknesses. Inexperienced lawyers frequently ignore the weaknesses, hoping that the jurors will forget them. This never works. Jurors don't forget, nor will the other lawyer, who will enjoy pointing out that you are avoiding the unfavorable evidence. Good lawyers always deal candidly with the jurors' concerns and look for ways to turn apparent weaknesses into strengths.

8. Weak Ending

Like the first minute, the last minute must be strong. The last minute must be carefully planned, delivered without notes, and done with good eye contact, confident voice, and reinforcing body language. The last things you say must convey that you have the winning side.

9. Too Many Notes

Inexperienced lawyers frequently write out their planned closing argument and then deliver it. This rarely works well. First, written language does not sound like spoken language. You can always tell when a lawyer is reciting a previously written closing argument, and so can the jurors. Second, extensive notes interfere with maintaining eye contact and using your voice and body to reinforce your words. If you are constantly looking at your notes, the jurors get the impression that you are giving a canned speech, that your argument is not coming from the heart. Instead, put your key ideas and phrases on a one- or two-page outline where they will be available if you lose your train of thought.

10. No Passion

During closing arguments jurors are thinking: Who sounds like a winner? Are you just saying this because you've been paid to say it, or do you really believe it? In short, jurors are looking between the lines, because delivery is at least as important as content. Lawyers are different, of course, and passion comes in different packages. In closing arguments, jurors can still be influenced by the lawyer who makes strong points and delivers them with total conviction.

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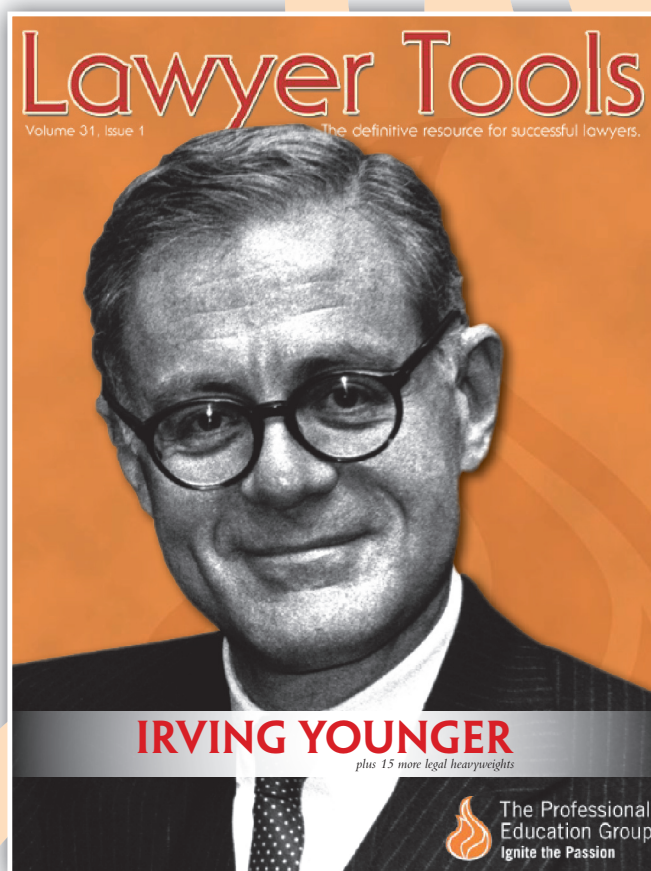
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