Advance preparation is essential!

INTRODUCTION

The attached fact patterns are provided to the NYSBA's Young Lawyers Section for the Trial Academy courtesy of The Texas Young Lawyers Association. We thank them for the use of these materials for this program.

The problems provided in these materials are intended to simulate realistic courtroom situations. Advance preparation is essential to their successful utilization as instructional materials.

These case files have been designed to simulate the materials a trial lawyer would have on the eve of trial. The materials must be mastered before attempting to perform the problems in a courtroom setting.

All years in these materials are stated in the following form:

*YR-0 indicates the actual year in which the case is being tried (i.e., the present year);

*YR-1 indicates the next preceding year (please use the actual year);

*YR-2 indicates the second preceding year (please use the actual year); etc.

At the outset we should acknowledge that it is impossible for one person to teach another how to become a trial lawyer. Advocacy is an art, the performance of which is dependent on talent and mastery of skills. One becomes a trial lawyer through a mixture of predisposition, motivation,
observation, doing it, reading how others have done it and then constantly repeating the latter three - doing, observing, and reading.

It is possible, however, to simulate some of the intellectual, ethical, emotional and physical demands of trial lawyering and advocacy teaching in a mock courtroom or classroom setting. That is what is done at the NYSBA Trial Advocacy. These materials are intended to serve as the basic teaching materials for trial advocacy courses and programs that are based upon the learning-by-doing method. Although the materials have been prepared especially by and for The Texas Young Lawyers Association, they have been donated for use by NYSBA. These materials are adaptable for use in this as well as other settings.

Most of the skills learned in a trial advocacy course will be applicable to trial work generally, without regard to the nature of the case. Obviously, however, different kinds of cases present different problems.

The student should read the assigned case file as soon as possible. A reading of the complete case file early will permit the student to fit an individual problem into the context of the entire litigation. The student should then read the assigned problems and do as much preparation as possible in advance of the program. Preparation time during the program will be limited. Thus, advance preparation will allow a more efficient use of the limited time available during the program.

METHOD OF INSTRUCTION

The NYSBA Young Lawyers Section Trial Academy, and other learning-by-doing programs, have certain unique characteristics to which these materials are particularly suited. These programs typically use teaching teams comprised of law teachers, practicing trial lawyers and judges. The programs are highly intensive, all-day sessions lasting from five to sixteen working days. All make substantial use of videotape to record student performances for later playback and critique.

The following are some ideas for use of the materials whether they are used at an intensive NITA-type session or in a longer law school program.

It is contemplated that the materials will be used in a simulated courtroom session. A judge, whether actual or portrayed, will preside at the front of the classroom. A student lawyer will be called on to begin the problem. The examining lawyer will be opposed by an adversary, who will be portrayed by another member of the class, the entire class or, when a teaching team is available, by a visiting lawyer. The witness will have been prepared and will respond to a proper examination. The lawyer may complete the examination or be interrupted so that another lawyer can continue the examination. Several lawyers may be called on to represent both sides before the problem is exhausted and the next problem begun.

At the NYSBA program, a group of sixty students will remain together in the morning for a lecture on a particular aspect of the trial process and then in the afternoon they will break out into groups of 10-15 students. The students will work on the case problems in these groups.

During the course of any presentation by a student, whether in large or small groups, another lawyer may be called on to substitute for the participating lawyer. The substituting lawyer may pick up where the other left off or, with permission of the instructor, may begin again. In short, the students may be called on at any time to undertake an assigned examination.

Many teachers require universal preparation; each student must be prepared to perform at least one side of each problem.

DIRECT, CROSS, AND REDIRECT EXAMINATION

The ability to examine and oppose the examination of witnesses in open court in an adversary setting is the most basic skill of the trial lawyer. Yet, the most common criticism of trial lawyers is that they are unable to conduct proper, intelligent, and purposeful examinations and to oppose these examinations.

As with any skill, practice is the only sure way to achievement. The practice should be conducted with some guidelines in mind.

1. The purpose of any witness examination is to elicit information.

2. The basic format is an interrogative dialogue.

3. The witness is probably insecure. She is appearing in a strange environment and is expected to perform under strange rules. This is a handicap you must overcome on direct and an advantage you have (and may choose to exploit) on cross.

4. Your questions should be short, simple, and understandable to the witness, the judge, and the jury on both direct and cross examination.
   (a) It is imperative that your audience, the judge, and the jury understand your question so that they can reasonably anticipate and comprehend the answer.
   (b) On direct examination, the insecurity or anxieties of the witness will be increased if he does not understand your questions.
   (c) On cross examination, the complex argumentative question provides a refuge for the witness to evade the point.

5. As a general proposition, you may not lead on direct except as to preliminary matters or to refresh the recollection of the witness. Both of these exceptions are discretionary with the judge.

6. In any event, on direct examination leading questions and the perfunctory answers they elicit are not persuasive.

7. On cross examination you may lead and you should do so. Control of the witness on cross is imperative.

8. At the outset of direct examination, have the witness introduce herself. Then, place her in the controversy on trial, and elicit the "who, where, when, what, how, and why" of the relevant information the witness has to offer. Then quit. Do not be repetitious.

9. If you know that the cross examination will elicit unfavorable information, consider the possible advantage of eliciting it during your direct examination.

10. Do not conduct a cross examination that does nothing other than afford the witness an opportunity to repeat his direct testimony.
(a) If there is nothing to be gained by cross examination, waive it.
(b) If you can accomplish something by cross examination, get to it. Organize your points and make them.
(c) Be cautious about cross examining on testimony elicited on direct that was favorable to your position. You may lose it.
(d) Be cautious about asking questions to which you do not know or cannot reasonably anticipate the answer. Be particularly cautious in these situations if the only evidence on the point will be the unknown answer.

11. Listen to (do not assume) the answers of the witness. As an examiner, you are entitled to responsive answers. Insist on them by a gentle repetitive question on direct or a motion to strike on cross. Of course, if the answer is favorable, accept it and return to the pending question.

12. Objections to the form of the question must be made before an answer is given. If the question reveals that the answer sought will be inadmissible, an objection must precede the answer. The grounds of the objection should be succinctly and specifically stated. If the question does not reveal the potential inadmissibility of the answer, but the answer is inadmissible, a prompt motion to strike should be succinctly and specifically stated. Only the interrogator is entitled to move to strike an answer on the sole ground that it was unresponsive to the question. If the answer is unresponsive and contains objectionable matter, then the opposing counsel is entitled to object.

13. If an objection to the content of the answer (e.g., relevancy, hearsay, etc.) as opposed to the form of the question, is sustained, then the interrogator should consider the need for an offer of proof at the first available opportunity. If an objection to the form of the question is sustained, then the interrogator should rephrase the question to cure the objection.