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Trial Advocacy
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SETTING YOURSELF APART FROM THE HERD: A JUDGE'S THOUGHTS ON SUCCESSFUL COURTROOM ADVOCACY

I. INTRODUCTION

Joseph Story, Supreme Court Justice, Harvard law professor, and poet, once wrote that the art of courtroom advocacy "is far more various and difficult than that which is required in the pulpit, in the legislative hall, or in popular assemblies." [1] One of my fellow federal judges, G. Ross Anderson, Jr. observed that "[t]here are no child prodigies among trial lawyers. Seasoning and actual experience are absolutes." [2] In short, one can become a master advocate only with continuing study and experience.

One of the lamentable facts about modern-day legal practice is that demands on an attorney's time and attention leave little opportunity for the average practitioner, much less the young associate, to observe other lawyers in the courtroom. Consequently, the craft [3] of advocacy suffers as attorneys, caught up in a cycle of client development, office management, continuing legal education, and time-consuming discovery among other things, miss the one experience that was once viewed as an indispensable component of legal education [4] --the experience of observing real lawyers in a courtroom arguing real cases. [5] Even when they do have that opportunity, the time is seldom ***618** available to reflect upon and analyze the good and bad of what has been observed.

My years on the bench have given me the opportunity rarely afforded practicing attorneys: to observe extensively courtroom behavior both in trials and at oral argument of motions. The judge's bench is placed, physically, at the highest level in the courtroom. This placement is symbolic of the intended position of the judge: not above the participants, but above the fray. While even the most seasoned and temperate judges may occasionally find themselves drawn into the emotions of the courtroom, this "heightened" perspective affords an opportunity for extensive, and generally objective, observation.

It is from this perspective that I offer the following observations on what I consider to be the best in advocacy skills as well as some of the typical errors attorneys commit. This Article is not a traditional law review piece punctuated with numerous, scholarly footnotes. Neither does it suggest any particular pattern to follow. As one scholar has observed, "There is no handy recipe for becoming a good trial lawyer." [6] Rather, this Article is one judge's informal observations about trial advocacy, from the perspective of a trial judge, which will hopefully be of some assistance to both the new advocate and the seasoned litigator.

II. TRIAL SKILLS

A. Preparation

> [Preparation] is the be-all of good trial work …. Everything else, felicity of expression, improvisational brilliance, is a satellite around the sun. Thorough preparation is that sun.[7]

--Louis Nizer

Regardless of one's skill level, there is no substitute for thorough preparation for trial. My sense is that far too many lawyers believe that they can carry the day by the sheer force of their innate abilities. Even worse, some attorneys fully delegate the task of organizing the file to a legal assistant. While some degree of delegation is essential for any busy attorney, you should not be at the mercy of a legal assistant at trial. If you need a document, you had better know it exists and in what form.

Anecdotal evidence of successful procrastinators perhaps leads some lawyers to conclude that they can "wing it" at trial. Two examples come to mind: Lincoln writing the text of his Gettysburg Address on the back of an envelope while riding the train to the battlefield and Douglas MacArthur ***619** speaking extemporaneously when he delivered his celebrated "duty-honor-country" address to the cadets at West Point. Neither story is true. Lincoln spent weeks composing his famous speech,[8] and MacArthur carefully prepared his address prior to delivering it.[9] Those attorneys who believe that the degree of preparation required for trial varies in inverse proportion to their years at the bar would do well to consider the example of Irving Younger, one of the true giants of our profession: Younger said that he routinely spent two to three hours preparing a ten minute speech.

The attorney presenting the case should have a thorough knowledge of the facts of the case, favorable and unfavorable. Similarly, that attorney should be familiar with the legal arguments relating to any unusual evidentiary issues anticipated at trial. Even if someone else did the research, the trial attorney should have read any related memoranda and all of the key cases. Copies of both the cases and memoranda should also be within ready reach during trial.

Complete knowledge of pretrial filings and rulings is critical. Prior to trial, attorneys should review the complaint(s) and answer(s), both sides' written discovery responses (especially those filed with the court), any memoranda related to issues that could still arise at trial, and all pretrial orders. These documents should be assembled in an accessible fashion, preferably in a notebook. I know of nothing that will provoke the ire of a trial judge more than a witness who blurts out inadmissible and highly prejudicial matters in front of a jury thereby necessitating a mistrial. Offers to settle and insurance coverage are two obvious examples, but there may be other less-obvious subjects about which your witness should be cautioned.[10]

If any prior orders relate to or could result in the exclusion of evidence, the witnesses should be properly prepared so that they will not volunteer the prohibited evidence. Similarly, if you are aware of any dispute regarding admissibility as to which the court has deferred ruling, alert your witness that the issue will need to be ruled upon before the disputed evidence is introduced. If the judge's ultimate ruling is against admissibility, it is critical that your witness understand the ruling. While many judges will undertake to explain exclusionary rulings to any witness that is on the stand, the ultimate responsibility for compliance rests with the attorney. Do not hesitate to ask the ***620** judge to interpret the ruling for a witness or for a brief recess to be sure an upcoming witness is aware of and understands the ruling. Finally, if you feel that the witness may not comply with the ruling despite understanding it, ask the judge to instruct the witness on the potential consequences of noncompliance.

The effective trial advocate uses checklists. Trial is both exhilarating and mentally exhausting. As a result, it is easy to miss a step, and that step may be critical to the case. Having checklists will ensure that you do not fail to put in an essential element of proof (your elements checklist) or fail to introduce a supporting piece of evidence that can be introduced only through the testimony of one crucial witness (your witness-evidence checklist). Simply preparing your checklists will help you remember what needs to be done at trial. [11] Consulting them before releasing your witnesses or resting your case can prevent missing any critical steps.

Checklists of another type are helpful, particularly for the newer advocate. Have an outline of the steps necessary for introducing exhibits, laying a foundation, impeaching with prior testimony, and any other courtroom rituals that you have not yet reduced to habit. Frankly, you probably will not need any of them, but if you have taken the time to prepare them and have them handy (preferably in a trial notebook), you will avoid the distraction of worrying about these technical steps.

A close companion of preparation is confidence. The best way to have confidence is to know you have prepared as well as possible and will present the case to the best of your ability. No trial ever follows a predetermined script. In the give and take of trial, some plans will need to be jettisoned and some modified. The skilled trial attorney must be able to adapt to unexpected situations, much as a military officer must adjust to the vicissitudes of battle. Thorough preparation and a reasonably high confidence level will equip you with the mental tools to deal with the inevitable surprises of trial.

Your confidence level can be enhanced by a good working relationship with court personnel. If you do not already know them, it is advisable to get to the courtroom early on the morning of the trial to introduce yourself to the bailiff, courtroom deputy, and court reporter. Finally, when the trial begins, focus only on the steps ahead--never on the ones already taken, whether good or bad. However, do not err too far on the side of overconfidence. That will give the impression of arrogance and self-importance, which is just as likely to repulse the jury as would a lack of self-confidence.

*621 *B. Focus*

If you represent the plaintiff, you have two goals: to get your case to the jury and to get the jury to give you a favorable verdict. The first goal is easy if you hit each of the elements on your checklist. The second goal requires your focused attention. Defense counsel, conversely, must watch for holes in the plaintiff's proof to support a motion for judgment as a matter of law or for use in closing argument and must carefully present the evidence to counter the plaintiff's claims. Each of these functions requires focused concentration.

If you are trying to impress your client, the judge, your associates, or the media, you cannot focus on your presentation. Regardless of who is in the courtroom, your attention should be solely on the jury. While some suggestions from your associates may be helpful during trial, full blown critiques should be avoided until trial is complete.

In 1995, Judge W. Ross Foote of the Louisiana Ninth Judicial District conducted “exit interviews” with over 400 civil and criminal jurors to gather their impressions of the judicial process. [12] From these responses, he composed a list of the top ten pieces of advice jurors would give lawyers. They are:

1. Be brief, succinct and accurate. Get to the point.

2. Don't repeat evidence, questions and other points so often.

3. Don't confuse the jury. Establish as many facts as possible, leaving no questions or doubts. Give more background on some points. Cover all bases of a case sufficiently.

4. Be more organized and prepared and familiar with the information required. Make sure your client also is prepared with factual information at hand.

5. Keep in mind a lay person's lack of knowledge of legal and … medical terminology. Speak in simple terms and have witnesses do so, also.

6. Do not underestimate the intelligence and ability of the jury.

7. Be factual, fair and courteous. Don't make the other attorney's questions look stupid and ridiculous. Don't show hostile attitudes, at least not to the jury.

8. Don't object so often.

9. Try to settle out of court.

10. Use less theatrics. Don't be a big fake. Be nice but don't take it to extremes.[13]

622** ***C. Evidence

Possibly more than any other area, mastery of the law of evidence requires practical experience and constant study. A national survey of federal judges found that knowledge of the rules of evidence is one of the areas of trial competence in which improvement is most needed.[14] It is not so much that the law of evidence changes as it is that the circumstances in which it must be applied are so diverse. Mastery of evidence can be achieved only through constant study, not merely by taking a single academic course.

To acquire and retain an adequate knowledge of the law of evidence, the advocate should dedicate several hours a year to legal education in this area in addition to the usual professional reading necessary to keep abreast of recent developments. Attending a continuing legal education course dedicated to the topic is certainly one option. Many attorneys find it equally effective to use driving time to listen to a set of study tapes. You will find that a good set of tapes can be used for review year after year. Each time you play the tapes you will "listen" with a new set of experiences from recent trials

that will help you gain a deeper understanding of the law. Because evidence law, like any other body of law, is not static, you should periodically invest in new tapes which can often be shared by several practitioners.

If you add to this the practice of reviewing the topics you find most difficult, as well as following recent significant decisions on evidence issues, you will have little difficulty addressing the evidence issues that arise during trial. A one-page "Objections at a Glance" sheet can also be an excellent trial reference.

It is not at all unusual to see attorneys, who are otherwise well prepared for trial, stumble when they seek to introduce documentary evidence without a witness in the courtroom to lay an appropriate foundation. Far too many attorneys incorrectly assume that their adversaries will not object to authenticity. When a problem arises at trial, the judge's options are limited to excluding the testimony or interrupting the trial so that a proper witness can be brought to the courtroom. One inexpensive yet effective way of avoiding this problem is to *always* serve a request to admit on your opponents seeking authentication of all the documentary evidence you intend to introduce. If your opponents admit, you need not worry about bringing foundation witnesses. If they object, you can come to trial prepared to deal with the issue. You can also recover the costs of proving authenticity if your opponents have unreasonably denied your requests to admit, [15] thus creating the unnecessary burden of proving authenticity.

***623 *D. Motions* in Limine**

For obvious reasons, trial judges are usually loathe to interrupt a trial to perform legal research on evidentiary issues. However, evidence questions occasionally arise that demand more study because the law is unclear and the evidence is so critical that the case may be reversed if the trial judge is wrong. In those situations, a pretrial motion *in limine,* accompanied by a memorandum of law, will be welcomed by most judges.

While such a motion may not result in a pretrial ruling, it will allow for pretrial thought and research that should allow for a quick ruling if and when the issue arises at trial. It also puts your opponent on notice not to offer the challenged evidence until a ruling is made, and it gives the trial judge the luxury of ample time to review and decide issues that would otherwise have to be decided on short notice in the middle of trial.

E. Respect and Candor

The participants in a trial include the court, the jury, the attorneys, and the litigants. The jurors will, in almost every case, see themselves as aligned with the judge. They will perceive themselves as sharing in a truth-seeking enterprise with the judge. Most jurors also hold traditional views as to the respect to be accorded the court. Unlike attorneys, they have had little opportunity to realize that judges also make mistakes. For these reasons, you should always act with utmost respect towards the judge in the presence of the jury. As much as possible, you should defer any debate on contentious issues to times when the jury is not present.

Candor with the court is also critical. Whether in the jury's presence or not, you must never mislead the court. "Credibility with the judge handling your case is the most precious resource in your satchel, and one of the most fragile." [16] Be forthright and direct. Evidence should never be falsified or overstated. If it is, you are likely not only to lose the court's confidence, but may draw a rebuke in front of the jury. Judge Charles W. Joiner summed up the advocate's responsibilities to the court as follows:

> [T]he foundation of our civil system of justice is fairness, both in procedure and result. The public, and more specifically clients, have no right to expect a system biased in their favor. Lawyers are the guardians of our system of justice; they operate it, and they must be on constant guard to put down tactics that are

> perceived unfair. This requires advocates to live up to standards that ensure the system will ***624** work, and work fairly.
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> In fulfilling his or her responsibilities to the client, an advocate must be conscious of the broader duty to the judicial system that serves both the attorney and the client. When the duty to the client conflicts with the duty to the system, the duty to the system must prevail. This dual responsibility can create tension. However, if we think that before we can be an advocate we must have a fair system of justice, it is clear that activity as a client advocate must be junior to the duty as a court officer ….[17]

Candor is at least as important in pretrial proceedings as at trial. In the courtroom judges attempt to maintain an even temper and unbiased demeanor. You may not, therefore, realize it when a judge is gratified by counsel's concession of a weak point or offended by a statement of fact unsupported by the record. However, these things do have a genuine impact on the judge's willingness to accept your arguments. If the judge hears a misstatement of facts or an illogical argument by an attorney, that judge will listen to all of that attorney's representations and arguments with a more cautious ear. As Judge Francis Murnaghan of the United States Court of Appeals for the Fourth Circuit has aptly observed:

> Resourceful lawyers … often desire to be thorough and to overlook nothing in their commendable zeal to afford first-class representation. Consequently in many cases they tend to excess as they inundate us with a plethora of arguments, some good and some not so good. Sometimes one wonders whether such lack of selectivity is not counterproductive, for a party raising a point of little merit exposes himself to the risk of excessive discount for a better point because of the company it keeps.[18]

Finally, do not argue with the judge once he or she has ruled. The jury will see you as pitted against their ally, the judge. It also annoys the judge. This may not be fatal, but it is not a particularly good idea. If you make it a practice not ***625** to argue with a judge, you will find that the judge will generally listen to your initial arguments more keenly. This rule, like most, is not without exception. In very rare instances, a judge's ruling during trial may be so critical and so clearly wrong that remaining silent would do a disservice to all concerned. If you have not made it a practice to argue after other rulings, the judge will likely listen to you in those instances when it really matters.

Above all, one's courtroom behavior should exude fairness in front of the jury. I know from experience that many jurors come to court with a jaundiced view of our legal system and of lawyers in particular. If they view you as simply another swashbuckling lawyer from the All-Night Drive-Through Litigation Center, rather than a professional advocate subject to higher ethical standards than any other profession, then you, the client, and the case will suffer.

F. Time

Respect for time is another important aspect of respect for the court. The judge will certainly know if you were prompt. In many cases, the jury members, who generally have other places they would rather be, will also know. Therefore, all participants--the attorney, the client, and the witnesses-- should be at the courthouse well before the scheduled time of trial. This allows everyone to be settled in and familiar with the surroundings before trial begins. If witnesses are sequestered, they should be brought into the courtroom when there are no proceedings taking place so that they will be somewhat familiar with the trappings of the courtroom when they are called to testify.

The trial attorney should ensure there are more than enough witnesses for each day of trial so not to extend the number of trial days. Jurors generally prefer to go a bit longer each day rather than to lose more days at work. Do not put yourself in the embarrassing position in which the judge tells you to call your next witness, and you have to respond that the witness is not in the courthouse.

Proper organization of exhibits is also a component of respecting time. You must avoid excessive fumbling and paper shuffling during trial. It is annoying, it wastes time, and it makes you look utterly disorganized. This is an area where it can be very helpful to have an assistant at trial, especially if it is a document-intensive case. The assistant's job should be to locate the document and not to tell you if one exists.

Proper preparation of exhibits is also critical to a smoothly conducted trial. Before trial, you should list, mark, and exchange exhibits with opposing counsel. This pretrial activity is mandated by the Local Rules for the District of South Carolina and is an exceptionally good idea in all cases. Two key points are in order here. First, a generic description such as “Photos of Scene” is not at all helpful. Unless documents are identifiable by some numbering system, actual exchange of marked exhibits is critical to achieve any benefit. ***626** Second, do not renumber after marking and exchanging trial exhibits. If you do, all benefit is lost. Instead simply withdraw exhibits leaving gaps in the sequence. Juries usually will not notice, but if you are concerned, you can request that the judge give an appropriate explanation during closing instructions.

Sidebar conferences are sometimes unavoidable, but good attorneys will do what they can to minimize these interruptions during the trial. Sidebar conferences disrupt the flow of testimony, they are puzzling and distracting to the jury, and the court reporter frequently has a difficult time transcribing them. If at all possible, matters that would otherwise be discussed at sidebar should be addressed in the pretrial conference. When matters come up that need to be discussed out of the jury's presence, it is advisable to bring them to the judge's attention over the lunch break or during normal recesses.

Well-prepared trial advocates will always have extra copies of documents on hand. If you have a case on a key evidentiary point, or a piece of evidence is likely to need review before introduction, have a copy for the judge, a copy for the judge's law clerk, and at least one copy for opposing counsel in addition to maintaining your own copy. Handing these up promptly will save time, will emphasize to the jury that you are fair and forthcoming, and will enable the court to address the issue without undue delay.

If you have a case involving a significant number of documents, it is generally advisable to seek the court's permission to prepare exhibit notebooks for the jury. The ritual of passing one document from juror to juror is time-consuming and virtually guarantees that the jury will not be paying attention to all of the evidence. Tabbed notebooks containing all of the exhibits admitted into evidence makes you look professional, saves time, and ensures that each juror will avoid distractions by looking at all exhibits at the same time.

Stipulate what you can, particularly as to the authenticity of evidence, but get your brownie points with the jury as you do so. For instance, rather than simply stating “no objection” when the documents are offered, it may be appropriate (at least once) to state that, in the interest of time, you agree to admission of these or all medical records without a foundation witness.

G. Over-Trying a Case

It is impossible to over-prepare a case. It is easy to over-try one. Part of preparation should be winnowing down the witness list to those you really need. Pick your best witnesses on each point. Absent significant issues of credibility, it is usually adequate to have one witness on a given issue and rarely necessary to have more than two.

If you have many witnesses who could testify on a given issue, but do not know the degree to which your opponent may challenge your position, you may want to hold most of those witnesses in reserve, and call on them only if necessary. If you feel compelled to call them because a particular point is challenged, consider putting them up in rapid succession (in defense or on ***627** reply) asking only a few identifying questions and the key point (*e.g.,* name, occupation, ability to have knowledge, and point in issue). Do not be tempted to cover all other information these witnesses may have just because they are now in the courtroom. It is better to have witnesses angry with you for calling them to answer only one question than to leave the judge and jury wondering why you are wasting their time.

Occasionally, one party will try to take unfair advantage of another's decision not to over-try the case by asking questions during closing which suggest that the other side would have called more witnesses if they had support for their claim. If you anticipate this possibility, be sure you have listed all of your potential witnesses in your trial brief then, when you rest your case, advise the court that while you have additional witnesses whom you had listed to call, you will withdraw them in the interest of time because their testimony might be duplicative and unnecessary. If your opponent then suggests that you failed to call necessary witnesses, and assuming the criticism is unfair (that is, the referenced witnesses were among those listed and withdrawn), then you can probably respond to the criticism in closing argument with a reference to the withdrawn witnesses. If the comment does not come until reply argument, an objection may be appropriate.

The testimony of all witnesses should be kept as short as possible. As a general rule, cross-examination should be shorter than direct. However, this rule bends significantly when the proponent of an expert witness has the witness testify to the conclusion on direct and leaves it to the cross-examiner to challenge the basis for the opinion. You need to be prepared for either eventuality so that your cross-examination will be thorough, yet as brief as possible. Juror attention spans are short, and the more technical the discussion, the sooner their eyes will glaze over.[19] As Judge Leonard B. Sand observed, "[A] jury overwhelmed by the volume of evidence or the length of the trial is more apt to go astray than a jury directed to key issues and exhibits. If you inundate the jury with trivia, you will dilute the impact of your case."[20]

If possible, questions should be grouped for impact. For instance, instead of asking a series of questions on cross-examination such as whether the expert saw a certain relevant piece of evidence before forming an opinion, whether it is the type of evidence that an expert might consider, and whether it could affect the opinion, and then repeating the same as to each piece of evidence, consider asking a series of questions more along the following line (obviously well supported by a deposition):

***628** Q: You formed your opinion on June 10, 1998, didn't you?

Q: You first saw the autopsy report on June 17, 1998, didn't you?

Q: You first examined the wreckage on June 25, 1998, didn't you?

Q: You saw photographs of the scene on July 1, 1998, didn't you?

Q: Now experts in your field generally consider things like the wreckage, autopsy reports, and photographs of the scene in deciding if a product failure caused death, don't they?

> Q: And you wrote in a recent article that it is important to consider all of these things when determining cause of death, didn't you?
>
> Q: But you didn't have any of those things when you formed your initial opinion that product failure caused plaintiff's death, did you?

The last query here could be the proverbial one question too many and might better be reserved for argument. Whether to ask this question depends primarily on how well any prior deposition pinned down the witness.

If you plan to return to an issue, you may want to signal the jury that you will do so. However, you should avoid a repeated litany of the phrase, "we'll come back to that." To the extent you do promise to return, be sure you do. Jurors may sometimes have short attention spans, but they have excellent memories.

In summary, prior to trial, the attorney should carefully consider how to get the most impact out of a given witness's testimony without losing the jury in the details. This is true for all witnesses, but particularly for cross-examining experts as you need to be prepared for either the long or short version of direct.

Advocates should heed Melvin Belli's admonition that attorneys should never attempt to *tell* a jury something when they could *show* it to them instead.[21] Many psychological studies indicate that jurors retain more of what they see than what they hear. It has been my experience that jurors are favorably impressed with enlarged photographs, scale models of machinery, computer animations of accidents, and the like. For example, consider an expert describing for the jury the following object:

> A prolate spheroid, 4 panel; radial dimension: 6.73 inches; radial circumference: 21.25 inches; length: 11 inches; longitude: 28.5 inches; weight: 14 ounces; pressure: 13 pounds per square inch.

Few jurors, upon hearing such a stilted description, would be able to formulate a good mental picture of the object being described. The attorney would be better served by producing the object, a football, and passing it among the jurors.

Finally, one way to break the monotony and tedium of a lengthy fact witness is to announce, by way of a prefatory remark to the witness, that you ***629** are leaving one area of inquiry and beginning another: "Now that you have told us about your education and training, let me ask you some questions about your investigation of this particular accident;" or "That's all I need to ask you about your application for the homeowner's insurance policy, so let's turn to what happened on the day your house caught fire." Such transition sentences help the jurors understand where you are headed, much as road signs do on the highway.

H. Impeachment

Impeachment is an art. You need to vary your technique to suit both the witnesses and the evidence you have with which to impeach them. If a witness is vulnerable or particularly likable, it is much more effective to suggest a faulty memory than to brand the witness a "liar." If the witness is perceived as powerful, you may make a stronger attack. Similarly, if the evidence against the witness is clear--for example, a prior letter that the witness signed with a clearly

contrary statement--you may be able to use a more confrontational approach. But if it is an issue of semantics, such as a different word tense used in their deposition that suggests, but does not require, a different meaning than at trial, the attorney must tread softly.

Many attorneys do not sufficiently capitalize upon a prior inconsistent statement made in a deposition. These attorneys unceremoniously pull a copy of the deposition from their file and hand it to the witness to read. Almost invariably, the witness stumbles when reading the prior inconsistent statement, pretending that the passages are hard to read and frequently adding editorial comments that soften the impact of the earlier statement. The jury is confused because it is not clear what the witness actually said under oath at the deposition and what the witness is adding extemporaneously while pretending to read the transcript.

A far more effective method of impeaching with a prior inconsistent statement is as follows: Walk to the clerk's bench and ask the clerk to unseal the "official" copy of the witness's deposition. While holding the original deposition, obtain the witness's agreement that, although the deposition was not given in a courtroom, it was part of the "official" proceedings related to the case and that the witness was under oath at the time. Then, request permission to approach the witness and stand alongside the witness while *you* (not the witness) read the passages containing the inconsistent statement. When you have finished, simply ask the witness if you have correctly read what the witness said at the deposition. It is generally advisable to resist the temptation to then ask the time-worn question: "Were you lying then or are you lying now?" More often than not, this type of question merely gives the witness a chance to explain the discrepancy. For this reason, it is better to move on to other topics and revisit the issue of the inconsistent statement in your closing argument.

*630 *I. Sequestration of Witnesses*

In my view one of the best procedural devices available for getting to the truth is sequestration of witnesses, particularly when multiple eyewitnesses to a critical event will be called. Under the Federal Rules of Evidence, witnesses *must* be sequestered if requested by either side.[22] Sequestration normally applies only to fact witnesses, not experts, but one should ask if in doubt. Obviously, if a witness is sequestered, you cannot provide the witness with anything that is the equivalent of being at trial such as notes of the trial's progress or copies of transcripts.[23]

It is probably improper to tell an impeachment witness even generally what has been said by a prior witness on a single topic. It is also unnecessary. You can ask a witness for a response to a given question without telling him what another witness said. Judges may vary somewhat on what is prohibited when witnesses are sequestered, but counsel skate on thin ice when they share the content of any prior testimony with sequestered witnesses. Also attorneys should be cognizant of the potential need to call a witness in reply. Witnesses that have remained in the courtroom after giving their initial testimony may be barred from use as rebuttal witnesses.

J. Witnesses

As a matter of courtroom etiquette, you should ask the judge before approaching a witness. I have not yet seen an objection to or denial of this simple request, but the failure to make the request may bring an objection or rebuke which may give the impression that the attorney is taking advantage of the witness.

Jurors tend not to believe witnesses who appear nervous, who stumble over their words, or who will not make eye contact with the jury and the questioning attorney. Unfortunately, these characteristics may be demonstrated by the most truthful of witnesses who are simply overwhelmed by the prospect of being in a courtroom. By contrast, jurors may also disbelieve a witness who appears too perfectly practiced, too smooth, too cocky, or who maintains an eye lock with the jury. The advocate's goal in preparing witnesses is to find a middle ground.

You should personally meet all of your witnesses prior to trial so that you can gage their comfort level and prepare them accordingly. Of course, there is a vast distinction between preparing witnesses for the courtroom and telling them what to say once there. I suggest that you focus on understanding fully the scope of the testimony your witnesses might give, and then prepare *yourself* to ask the right questions in the appropriate manner (rather than preparing the witnesses to give the right answer to your preconceived idea of how the ***631** question should be asked). If you take this approach, you will generally find that your witnesses will be more comfortable in the courtroom. That comfort level, in turn, will increase their credibility with the jury.

Sometimes, during your pre-testimony discussions, a witness might make a word choice that you believe distorts what the witness is trying to say. Without telling the witness what to say, you may be able to redirect the testimony appropriately during your pretrial preparation by further inquiry: "Now when you say 'we don't like that kind in our neighborhood,' I'm not sure what you mean. Are you saying you didn't like his nationality? His occupation? The kind of car he drove? What?" This type of inquiry should lead to one of two results. It will either assist witnesses in getting across what they really meant to say while avoiding words or phrases that have unintended and damaging connotations, or it will assist you in narrowing down the witnesses to be called at trial.

Before trial, write down the words that your witness uses frequently which are acronyms or technical terms. Ask the witness to try to remember to use layman's terms at trial, but tell them not to be worried about it because you will stop them during testimony and ask them to define these words if they forget. Then you need to watch for these words at trial and gently correct or remind your witness with questions such as: "Mr. Jones, you referred to a widget. What exactly is a widget?" or "When you say EOB, is that the same as the Explanation of Benefits we were just discussing?" Interruptions of this form can also help slow down a witness and break up what can be somewhat monotonous, technical testimony. Remember to listen with the ears of a juror and ask the questions you imagine are in their minds.

It is a good rule of thumb to remember that a jury usually holds your witnesses against you. That is, you start out with one strike against you for having called a witness. Therefore, you have to first prove that calling the witness was not a waste of the jurors' time before you score any points on the merits. Generally, an advocate can accomplish this by quickly establishing that the witness knows something about an important issue. The less important the issue, the faster you had better get to the point and get that witness off the stand.

Except in unusual circumstances, the jury expects that the witnesses you call will want to testify in your client's favor. In any case, the jury will quite reasonably presume that you would not call witnesses unless they helped you more than they hurt you. Disappointing jurors in this respect will have them wondering why you put the witness on the stand in the first place. Instead of one strike against you for putting the witness up at all, you will have two.

In those unusual circumstances in which you must call a hostile witness, I recommend laying a brief foundation, in front of the jury, as to why you should be allowed to treat the witness as a hostile witness (even if this was thrashed out during a pretrial conference). Do not waste time with a lengthy foundation, but provide just enough to establish that the witness is aligned with your opponent and to confirm that the court previously ruled that this witness ***632** could be examined as a hostile witness. Obviously, a reference to the rule number would not be nearly as effective here as the descriptive adjectives "adverse" or "hostile."

Jurors are sometimes surprised when an attorney does not ask the ultimate question while the client is on the stand. Many attorneys eschew questions on the ultimate issue, believing that it is patronizing to the jury to ask a question that calls for an obvious, self-serving answer. Whether your client is accused of robbing a bank, running a stop light, or infringing a copyright, the jury wants to hear the critical words from the lips of the litigant. Therefore, your question should be bold, direct, and to the point such as: "Look the jury in the eye and answer this question. Did you …?"

K. Following the Court's Lead

One phenomenon that I am unable to understand is how frequently lawyers fail to heed subtle (and sometimes not so subtle) hints from the judge. This failure can occur in the argument of motions before the judge and in the presentation of a case to the jury. In motions practice, judges sometimes directly or indirectly indicate that they might be inclined to reach the result that is being sought, but by a different route. Similarly in jury trials, attorneys sometimes seek to introduce a piece of evidence under one theory, but the judge suggests that another argument might be more successful. It is surprising how frequently attorneys remain wedded to their initial approach and ignore or cavalierly discard the judge's suggestion.[24] Of course in many instances, there may be a quick and definitive answer as to why the judge's proposal will not work, and my sense is that lawyers sometimes shy away from responding directly for fear of alienating or embarrassing the judge.

Quite to the contrary, most judges appreciate the candor of an attorney who simply indicates why the judge's proposed course of action is not feasible and then returns to the original argument. This is much better than leaving the judge wondering why you have not pursued his or her suggestion: Is it because the suggestion is wrong or because the lawyer is unreasonably committed to sticking to the original game plan?

*633 *L. Objections*

1. Objections to Evidence

Most jurors have seen enough television courtroom dramas to expect a certain number of objections. Most also realize that the reason for an objection is to keep evidence from them. Therefore, excessive objections tend to make a jury believe that you are hiding something. For this reason, you should minimize objections.

The first and most obvious issue to consider is whether the offered evidence will actually harm your case. If not, leave it alone. If the evidence may be harmful, consider whether it will open the door to another area of inquiry that may benefit your case. If you decide to object, make your point quickly and precisely[25] without unnecessary explanation: "Objection, hearsay." Anything more is generally an inappropriate speaking objection: "Ms. Jones isn't here, she wasn't under oath, how do we know she was telling the truth?" The judge will let you know if more explanation is desired.

After the judge rules on an objection, you should avoid two things. First, do not "thank" the judge. Second, do not argue with the judge.

Attorneys should also avoid cutting off a witness in mid-answer with a new question. Jurors repeatedly tell me that they see this as rude and sneaky. If a witness begins to give unnecessarily long and convoluted answers to direct questions, you should first try to guide the witness gently with a self-effacing: "Perhaps I'm not phrasing my question well. What I'm asking is …" Even if this approach is not effective with the witness, it likely will be with the jury. Jurors are pretty quick to catch on when witnesses are being difficult or evasive. If the problem continues, you should ask the court to instruct the witness appropriately.

2. Objections in Closing

Objections in closing are discouraged, but not prohibited. Nonetheless, objections are necessary to preserve any issue for appeal based on improper argument.[26] If the objectionable argument is a matter that can be addressed in your own closing, such as a misstatement of testimony, it is generally better simply to address it then. If an improper argument is made that cannot be corrected in this manner, a prompt objection should be made. However, before objecting you should be confident as to what is permissible argument and what is not.

634** ***M. Addressing Counsel and Witnesses

No matter how good a friend or entrenched a foe opposing counsel may be, address them by their last name in the courtroom. Witnesses also should be addressed formally unless familiarity is called for, as in the case of a child witness.

Opposing counsel should never be directly addressed during court proceedings. In other words, do not argue "laterally." I am amazed at how frequently good lawyers with years of trial experience allow this to happen. If you have a complaint or concern, address it to the judge. Similarly, if you believe a witness needs instruction, that instruction should come from the judge. Therefore, your request for such an instruction should be to the court.

N. Closing Arguments

Attorneys do not draft good closing arguments in the corridor of the courthouse during a fifteen-minute break. They are carefully crafted before trial begins, or at least early in the trial process, and are revised as the trial progresses. If you are working on your closing argument during lunch on the last day of trial, it should be for the purpose of putting on a few finishing touches and not for selecting its key components.

During closing argument, the carefully planned use of literary allusions, short stories, or historical incidents as analogies may drive home a point with the jury in a way likely to be remembered during deliberations. In her textbook on jury attitudes, Sonya Hamlin observed: Jurors say that "when a lawyer has used a repeated phrase, an alliterative statement, [or] a slogan, they are almost always able to repeat it with some pleasure. It's reassuring to them to 'know the outcome,' to recognize the familiar." [27] New York lawyer Daniel Levitt likened analogies in closing argument to "powerful music … that grips the audience, transmutes the pedestrian into the unforgettable, and provokes deep insights and understanding that the plain word cannot." [28]

There are several cardinal rules to keep in mind when selecting the rhetoric to be used in closing. First, do not overdo it. Do not simply string together one cute saying after another. Your goal is to win, not to entertain the jury. Second, be sure your analogy is not something your opponent can turn around and use against you. I have seen this happen and it can be more devastating than the proverbial "one question too many" on cross-examination. Also, be sure your analogy is safe enough to use without drawing an objection from your opponent, or even worse--an objection from the court, that you are "going outside the record." Argument that discusses facts not in evidence is clearly improper and may well constitute reversible error in many cases.

***635** Most judges appreciate a good summation and agree with the Colorado Supreme Court when it said that "courts should not smother the genius of some rising orator, nor lay an embargo upon the ancient art of oratory by undue limitations." [29] Parables that illustrate universally recognized principles and quotations from famous leaders are usually safe. Beyond that, you must carefully consider whether the court will view your analogy as an over-reaching appeal to passion or prejudice.

Your general word choice both in trial and during the closing is critical. Attorneys should speak to the common level of the jury--never above or below them. Avoid big words and legalese, staying away from words like *voir dire, res ipsa,* and tort. Many jurors do not even understand what a "smoking gun" is. Refer to the parties by name rather than as "plaintiff," "defendant," or "my client." [30] Avoid what may sound like pompous phrases. Do not tell the jury you are going to "publish" a document; tell them you are going to read it. Do not tell the jury you "impeached" a witness; tell them you caught him changing his story. Be direct. Use words that your jurors will understand.

One closing argument technique favored by trial advocacy teachers, but rarely used in court, is understatement. As Lloyd Paul Stryker put it:

> [N]o point is ever better made than when not directly made at all but is so presented that the jury itself makes it. [People] pride themselves on their own discoveries, and so a point which the jury are allowed to think their own ingenuity has discovered can put the advocate in a position where the jury begins to regard him as not only their spokesman but their colleague. [31]

Understatement is a widely recognized method of empowering the jury. Studies repeatedly show that, during deliberations, jurors remain more firmly committed to conclusions that they have reached on their own.

You must ensure that your closing flows smoothly, that it allows the previously disjointed portions of your case to fit neatly together. Generally, this can be accomplished by working with a single theme, setting it out early, and emphasizing it repeatedly but not to the point of tedium. You must also ensure that your key points of the closing are easily remembered. There are various techniques that might help in this regard, such as using sets or subsets of three.

During closing, the advocate should avoid criticizing the opposing party or attorney. Such criticism is seldom helpful and can often backfire. For ***636** instance, if your client is a relatively powerless plaintiff taking on a Goliath corporation, personal or unnecessary attacks may cause the jury to view your otherwise sympathetic client as a whiner who is simply looking for anyone else to blame for his troubles. You, in turn, may look like a money-grubbing attorney looking for a deep pocket. By the same token, if your client is the big corporation, gratuitous attacks on the individual plaintiff may make the jury suspect that the corporation has no regard for the "little people." Treating others with respect may improve your client's case, and it certainly cannot hurt.

Finally, and perhaps most importantly, humanize your case and your client to the jury. Obviously, this is relatively easy if your client is a child, a disabled individual, or a relative of a deceased person. While more challenging, it is still possible if your client is a large corporation. For instance, if you have likable individual actors involved in the events at issue, the focus should be on these individuals: "A judgment that XYZ Stores was negligent is a judgment that these three hard working store employees were negligent." If there is no other way to humanize your client, try the obvious: explain that corporations are nothing more than the sum of their employees and shareholders--people with jobs and people with pensions.

Do not express personal belief or opinion about the merits of the case or the credibility of the witnesses. There is almost always another way to make the same point. Simply laying out the reasons why the jury should or should not believe witnesses is more effective. Just how harshly or gently you do so depends on the witnesses and how much sympathy they may elicit from the jury. For example, parents of crime victims and parents of criminal defendants may both be seen as victims by the jury. Therefore, in either situation you may want to focus on the strength of a testifying parent's desire to believe that the facts are a specific way, rather than suggesting an intentional misrepresentation.

Here is a quick checklist of the "Dos" and "Don'ts" of closing argument:

Closing Argument "Dos"

- Do choose your words carefully.

• Do use repetition.

• Do stick to your argument, without rearranging your structure just to meet your opponent.

• Do discuss the burden of proof.

• Do discuss and explain the verdict form.

• Do demonstrate conviction in your position.

• Do use pattern or boilerplate arguments where appropriate.

• Do lead jurors to make their own conclusions.

• Do use visual aids and blow-ups of testimony.

• Do wear comfortable, conservative clothing and avoid excessive or distracting jewelry.

• Do establish a theme.

• Do study the body language of jurors.

***637** • Do remind the jury of promises your opponent made during opening statement and did not keep.

• Do use rhetorical questions.

• Do keep it simple.

• Do observe time limits set by the court.

• Do rehearse in front of a mirror or with a friend or spouse.

• Do strike a balance between reason and emotion.

• Do make eye contact with each juror at least once.

• Do (for defendants), attack the weakest part of the plaintiff's case first.

• Do moderate the volume of your speech.

• Do look for ways to connect emotionally with those jurors you think will be leaders.

• Do exude fairness.

• Do know the limits of proper argument.

• Do tell the jury what you want.

• Do use rhetorical techniques appropriate for your case:

- Analogies;

- Humor (cautiously, if at all);

- Understatement;

- Theme;

- Arranging concepts into groups of three;

- Leaving questions for your opponent.

Closing Argument "Don'ts"

• Don't thank the jurors for serving; instead, commend them for their hard work and careful attention.

• Don't merely recite what each witness said.

• Don't shout, point your finger at the jury, or pound on the lectern.

• Don't become unnerved or untracked by an opponent's objection or by the judge's ruling on the objection.

• Don't use inappropriate humor.

• Don't apologize.

• Don't argue against a patently obvious fact or conclusion. You don't make a strong argument stronger by adding a weak argument to it--you only dilute your stronger argument.

• Don't use legal terms not understood by the jury.

• Don't go outside the record or misstate the facts.

• Don't waste time telling the jury, "What I say is not evidence."

• Don't end on a weak note.

• Don't refer to evidentiary or procedural rulings by the judge.

• Don't tell the jury, “This is a complicated case.”

***638** • Don't parade back and forth. [32]

O. Receiving the Verdict

> And do as adversaries do in law, / Strive mightily, but eat and drink as friends. [33]

--William Shakespeare

When the verdict is returned, resist the temptation to celebrate in front of the jury if you have won. Do not try to thank the jury or shake hands with them after they have been dismissed. My post-trial interactions with jurors make it clear the jurors prefer not to speak to either side, at least while they are still in the courthouse. [34]

Instead of concerning yourself with the jury, you should speak graciously and courteously to the opposing attorney and shake hands. Whether you have won or lost, remember that other trials, with different results, await you. Never concern yourself with your win-loss ratio. As Judge Alex Sanders is fond of saying, “Does anyone remember how many times Cardozo was reversed?” [35]

Let me add one final dollop of advice. It is a legacy passed down to me by my father, who received it from Judge J. William Thurmond. That legacy is nothing more, and nothing less, than a mind set that may assist you in making the innumerable decisions that arise in a trial; decisions which may test not only your legal abilities, but also your ethical foundation:

> The true measure of an attorney is not found in the number of cases won or lost or in the fee he or she commands. Many of the finest attorneys take on only the toughest cases, those least popular with the public, those least likely to generate significant income. Even the sloppiest lawyer sometimes rings the bell. Measure your worth by the quality of your representation and the steadfastness of your oath. You are an officer of the court. You are sworn to uphold our system of justice. You do so only when you serve your clients loyally and to the best of your ability, but always within the bounds of the law. [36]

Footnotes

a1 United States District Judge, District of South Carolina, Columbia, South Carolina. The author wishes to acknowledge the assistance of his law clerks, Virginia Vroegop and Shahin Vafai, in the preparation of this Article.

1 Joseph Story, Value and Importance of Legal Studies, Inaugural Lecture as Dane Professor of Law at Harvard University (Aug. 25, 1829), *in* THE MISCELLANEOUS WRITINGS OF JOSEPH STORY 503, 529 (William W. Story ed., 1852).

2 G. Ross Anderson, Jr., Address at the South Carolina Solicitors Convention (Oct. 2, 1994).

3 I use the term "craft" in the same sense that columnist and author George F. Will uses it in describing his passion--the game of baseball: "By craft I mean discipline, a set of physical and mental skills subject to constant refinement on the basis of cumulative knowledge." GEORGE F. WILL, BUNTS: CURT FLOOD, CAMDEN YARDS, PETE ROSE AND OTHER REFLECTIONS ON THE GAME OF BASEBALL 165 (1998).

4 *See* Warren E. Burger, The Special Skills of Advocacy, John F. Sonnett Memorial Lecture at the Fordham University Law School (Nov. 26, 1973), *in* DELIVERY OF JUSTICE 187, 188 ("All English barristers are trained in a centuries-old school conducted by the four Inns of Court. After training in this school of advocacy, the aspiring barrister must spend a period of 'pupilage,' or apprenticeship, with an established barrister.").

5 *See* Patrick E. Longan, *Bureaucratic Justice Meets ADR: The Emerging Role for Magistrates as Mediators,* 73 NEB. L. REV. 712, 720 (1994) ("[T]here is an entire generation of litigators for whom trial remains theoretical.").

6 IRVING YOUNGER, THE ADVOCATE'S DESKBOOK: THE ESSENTIALS OF TRYING A CASE 6 (1988).

7 Jerrold K. Footlick et al., *Lawyers on Trial,* NEWSWEEK, Dec. 11, 1978, at 98, 99 (quoting New York lawyer Louis Nizer).

8 GARRY WILLS, LINCOLN AT GETTYSBURG: THE WORDS THAT REMADE AMERICA 27-29 (1992).

9 WILLIAM MANCHESTER, AMERICAN CAESAR: DOUGLAS MACARTHUR 1880-1964, at 699 (1978).

10 In this regard, "instructing" your witness can be a bit tricky. Depending on how comfortable your witness is with giving testimony, advising the witness can be effective or disastrous. If the particular witness is likely to become overanxious about what she is not supposed to say, it may be best to deal with the issue primarily by agreeing with opposing counsel to avoid completely the relevant subject matter until a ruling is obtained. You should also alert the judge to the need for a hearing without the jury well before the subject matter is approached. A jury simply will not understand the innocence of a witness statement such as, "Well, is that the thing you told me not to say in court?"

11 In addition to focusing counsel's attention on what must be done to prevail at trial, checklists also prevent critical mistakes which may be fatal in post-trial motions or on appeal. For example, defense counsel must make a motion for judgment as a matter of law at the close of the evidence in order to preserve the right to make a similar motion after the verdict is received. *See* FED. R. CIV. P. 50(b). Also, an offer of proof is sometimes necessary to preserve a ruling excluding evidence for appellate review. FED. R. EVID. 103(a)(2).

12 W. Ross Foote, *$6,000,000 Deposition … and Other Jury Observations: Things That Bug Juries,* 42 LA. B.J. 526 (1995).

13 *Id.* at 528. (emphasis ommitted).

14 ANTHONY PARTRIDGE & GORDON BERMANT, FED. JUDICIAL CTR., THE QUALITY OF ADVOCACY IN THE FEDERAL COURTS 6-7 (1978).

15 *See* FED. R. CIV. P. 37(c)(2).

16 Michael B. Reuben, *Advance Sheet: The Whole Truth and Everything But,* LITIG., Summer 1989, at 55, 55.

17 Charles W. Joiner, *Our System of Justice and the Trial Advocate,* 24 U.S.F. L. REV. 1, 7 (1989) (footnotes omitted).

18 United States v. Computer Sciences Corp., 689 F.2d 1181, 1183 (4th Cir. 1982), *overruled in part by* Busby v. Crown Supply, Inc., 896 F.2d 833 (4th Cir. 1990). Beaufort County Master in Equity Thomas Kemmerlin, Jr. theorizes that attorneys who utilize a shotgun approach to claims and defenses are merely putting into practice lessons learned well in law school. Law

professors write exams setting forth complicated factual situations and challenge their students to "point out and discuss every conceivable cause of action … and every possible defense." Thomas Kemmerlin, Jr., *From the President* (Charleston County Bar Ass'n, Charleston, S.C.), Summer 1998, at 1, 2.

19 The mindset that jurors sometimes bring to trial was pointedly illustrated in a 1991 civil action tried in the United States District Court for the District of South Carolina. During the second day of testimony of an expert who had been on the stand for 10 hours, the jury sent the trial judge a note observing that the witness had given testimony for what was the equivalent of 10 episodes of the then-popular television drama *L.A. Law* and suggested that the trial should proceed in a more expeditious manner.

20 Leonard B. Sand, *From the Bench: Getting Through to Jurors,* LITIG., Winter 1991, at 3, 3.

21 1 MELVIN M. BELLI, MODERN TRIALS § 1, at 2-3 (1954).

22 *See* FED. R. EVID. 615.

23 *See, e.g., In re* Air Crash, 982 F. Supp. 1092, 1098-1101 (D.S.C. 1997) (sanctioning counsel for providing daily trial transcripts to fact witnesses).

24 For example, I am amazed at how often attorneys make just one attempt to offer a piece of evidence and give up. Judges who say, "You can't get it in that way," are frequently suggesting that there may be another way to introduce the evidence. Before giving up, consider whether you have laid a proper foundation, whether this is the right witness to establish the foundation, and whether the evidence can be offered for another purpose, if not for this one.
Even more astounding is the number of times attorneys ignore a judge's suggestion that the attorney ask a question or introduce a piece of evidence in a particular way such as: "Why don't you just ask him where he was that night?" Whether the judge is wrong or right, it is unlikely the judge will rule against you if you follow the suggestion.

25 The rules of evidence require that the objecting attorney "stat[e] the specific ground of objection, if the specific ground [is] not apparent from the context" in order to preserve properly the objection for appeal. FED. R. EVID. 103(a)(1).

26 *See id.*

27 SONYA HAMLIN, WHAT MAKES JURIES LISTEN 347 (1985).

28 Daniel P. Levitt, *Rhetoric in Closing Argument,* LITIG., Winter 1991, at 17, 17.

29 Colorado & S. Ry. Co. v. Chiles, 114 P. 661, 666 (Colo. 1911).

30 Judge Leonard B. Sand reports that in one case, a juror handed up a note in mid-trial, wanting to know, "'Which side is the plaintiff?'" Sand, *supra* note 20, at 52.

31 LLOYD PAUL STRYKER, THE ART OF ADVOCACY 125 (Charles Evans Hughes Press ed., Charles Evans Hughes Press 1979) (1954).

32 JOSEPH F. ANDERSON, JR., THE LOST ART: AN ADVOCATE'S GUIDE TO EFFECTIVE CLOSING ARGUMENT 44-46 (1998).

33 WILLIAM SHAKESPEARE, THE TAMING OF THE SHREW act 1, sc. 2 (William J. Rolfe, Litt. D. ed., Harper & Bros. 1898).

34 *See* S.C. DIST. CT. R. 47.05 (prohibiting certain post-trial contact).

35 Alexander M. Sanders, Jr., *Everything You Always Wanted to Know About Judges But Were Afraid to Ask,* 49 S.C. L. REV. 343, 349 (1998).

36 Oral remarks of Joseph F. Anderson, Sr., paraphrasing advice given to him by J. William Thurmond circa 1934.

50 SCLR 617

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