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C O U N S E L O R S   A T   L A W

# CASE PREPARATION & TRIAL OUTLINE<sup>1</sup>

by S. Gerald Litvin

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<sup>1</sup> The attached outline is based on excerpts from a series of articles on trial preparation and trial skills prepared by S. Gerald Litvin, considered by many to be the dean of the Philadelphia trial bar, who serves as senior counsel, a valued litigator and trial consultant at Morgan Lewis.

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## A. Theory of the Case

1. The formulation of a winning litigation plan must begin with the evolution of *a theory of the case*.
2. The theory of the case is the totality of three interrelated concepts:
  - a. The *logic* of the trial lawyer's argument, *i.e.*, the prose of the advocate's thesis as distinguished from the poetry or passion which may ultimately be woven into the fabric of a trial theme.
  - b. The *vantage point* from which the trial advocate will want the trial judge, the jury and, ultimately, the appellate court to view the facts of the case within the framework of the applicable principles of law.
  - c. The *structuring of the questions of the case* in such a manner that -  
- once the drama of the story unfolds and presents itself on the lighted courtroom stage where there will be no dark corners to obscure any of the known facts surrounding the events which are the basis of the dispute -- the most reasonable answers to the questions posed will be those which point to the result sought.
3. The *theory of the case* may involve the need for the trial lawyer to develop *multiple theories*.
4. The theory of the case will become the laser beam which will direct the course of discovery and all other aspects of the litigation.
5. While it may not be possible to set forth a specific formula or regimen for developing or, more accurately, *discovering* the winning theory with which to prosecute or defend each case, three general guidelines are available from the experiences of the past which may help to ignite the creative processes that will be required if we are to prevail in our future challenging cases:
  - a. Avoiding routine – Need comprehensive fact-seeking process which is required to assure that no potential theory, whether offensive or defensive, remains buried or obscured.
  - b. Immersing self into the totality of the facts - No way to know with certainty what facts *may* be relevant until all possible theories and approaches are explored.
  - c. Recognizing “the winning theory” when you come upon it - the theory that survives the entire process will be *the winning theory* because, by definition, it will be supported by the most believable facts, make more sense than any other position we can promote

and, thus, will have evolved as the very soundest view that the facts of the case will permit. The job of transforming this *theoretical* winner into a winner *in fact* then simply becomes a matter of first-rate advocacy.

6. While these recommendations may sometimes seem to be limited to liability issues, they must be applied to damages and every other disputed area of the litigation.

## **B. Witness Preparation**

1. Preliminary questions for each witness –
  - a. What is the proper role or function of the witness in the litigation process?
  - b. How valuable is testimony which, while substantively helpful, does not reverberate with “the ring of truth?”
  - c. What are the pitfalls which may permit a cross-examiner to destroy or wound an honest witness who has helped your cause?
  - d. What fears, concerns and anxieties are likely to plague your witness in anticipation of the deposition or trial in which he will be interrogated?
  - e. How the trial lawyer assesses and deals with these questions will determine the framework and substance of the orientation process which should be the initial phase of the preparation session.
2. Responsibilities and Non-Responsibilities of Witnesses
  - a. Testifying Truthfully and Convincingly. The job of the lay witness can be simply put: it is to answer factual questions truthfully and convincingly. The role of the expert witness is virtually identical: to answer both factual and opinion questions honestly and persuasively. The evidence adduced from both, together with the exhibits, admissions and other evidentiary submissions, will constitute the factual predicate for whatever offensive or defensive theories are to be advanced. It is no more complex than that.
  - b. Avoiding Combativeness. The witness should not bear the burden of out-fighting or out-smarting opposing counsel when subjected to cross examination. Combative and forensic skills are the proper domain of the advocate, not the witness. And, if the witness has been properly oriented with regard to the interrogation process, there should be no need for the witness to spar or duel with opposing counsel.

- c. Making Admissions and Concessions Whenever Necessary. The witness should not feel required to give exclusively favorable or helpful testimony. While the witness' testimony will presumably be largely supportive of your position in the case -- if not, why would you have called that the witness to testify at trial or identified the witness as a potential witness who will be subjected to pretrial examination? -- every witness is required to tell the truth and, in the case of an expert, to give honest opinions. If, therefore, the cross examiner is reasonably astute and skilled, various admissions or concessions will sometimes flow from even the most helpful witnesses.
- For example, in response to the cross examiner's, "Sir, if all of the facts upon which you relied in forming your opinions were different, your conclusions would also be different, wouldn't they?" the only reasonable (and truthful) answer is "Yes."
  - The honest witness may very well give some answers which will lend substantive support to certain of your adversary's arguments.
  - Proper preparation should make clear that the witness is not expected to give "favorable" answers to every question which may be asked. The witness should concentrate on making sure that the witness hears and understands the question before responding, and then simply answer the question which was asked.
- d. Not Assuming the Burden of Winning the Case. Every witness needs to know that, no matter how important the witness' testimony, the witness does not bear responsibility for winning the case. It is the trial advocate who must assess, marshal and present the facts; design theories of liability or defense which will optimize the chances for success; and, of course, persuade the trier of fact that the propositions put forth in support of those theories are more reasonable or acceptable than those advanced by opposing counsel.
3. Credibility. The overwhelming majority of cases are won or lost on credibility. Witnesses must not only tell the truth but must also *appear* to be telling the truth. The lawyer has enormous responsibility and opportunity for facilitating the *perception* that the witness' account is honest. How the witness is prepared, as well as the manner in which the lawyer conducts the direct examination, are essential to enhancing the perception as well as the fact of truthfulness.

4. Pitfalls. Even a knowledgeable and totally honest witness can often be discredited or tarnished. During direct examination, a witness whose testimony lacks spontaneity and is perceived as having been rehearsed, *i.e.*, programmed to give “canned” responses, may appear unworthy of belief. Worse yet, once a witness is thought to have deliberately lied, that individual’s entire testimony may very well be discounted or totally disregarded by the fact finder
5. Anxieties. Fear can impact adversely on both the substance and credibility of that individual’s presentation and, thus, the problem must be addressed in the preparation sessions
6. Three Basic Rules for All Witnesses. The “*three relatively simple rules*” are:
  - a. Do not answer any question until you hear it. What is crucial is that *no* question is to be answered until it is heard in its entirety.
  - b. Do not answer any question until you understand it. What is crucial is that no question is to be answered until it is heard in its entirety.
  - c. Just answer the question that is asked.
7. Clarification of Witness Knowledge. Any question that may be put to a witness must necessarily fall into one of three categories but the witness must understand the difference.

Category 1: What the witness does not know, and never knew (e.g. who invented the game of golf).

Category 2: What the witness once knew, but no longer remembers (e.g. what movie did you see Saturday night).

Category 3: What the witness does know (e.g. what is your mother’s first name).

  - a. What the witness knows precisely (e.g. how many children do you have).
  - b. What the witness knows, but does *not* know precisely (e.g. how long you have been carrying on a particular conversation – can use “approximately”).
8. Preparing the Witness for Cross Examination
  - a. Remember the above basic rules.

- b. Explain the difference between direct and cross examination – the cross examiner is not only permitted to lead but may actually be permitted to *mislead*.
- c. Preparing for Trial Testimony – Strategy Question: Should we make available to that client or independent witness a copy of the deposition – *the script*, as it were – with directions or permission to study it? Or would it be preferable to keep the transcript out of sight?

One option: In anticipation of the first preparation session, provide a copy of the deposition transcript to the witness with the following specific instructions as to be observed:

- Read the deposition transcript only **once**!
- Upon that single review, if the answer given to each question was accurate at the time the examination was conducted, simply go on to the next question.
- If, for whatever reason, the answer to a particular question was (a) wrong, or (b) the witness is not sure now whether it was correct or erroneous. or (c) the answer may have been accurate when given, but would not be accurate now, or (d) the witness did not really understand the question or answer as recorded, then those colloquies should be marked with a big “X” to review them when meeting with the witness.
- At the preparatory session which follows, begin by reviewing the questions or answers that were of concern to the witness and, in each instance, determine the nature of the problems noted and, if possible, the reason for any inaccurate answer which the witness may have given, *e.g.*, Did the witness lie? Not understand the question? Simply make a mistake? Did the court stenographer record the question or answer inaccurately? Once these problem areas have been adequately explored, you are then ready to begin the orientation of the witness a review and reinforcement of the orientation which was conducted before that deposition.

## 9. The Expert Witness

- a. Basic Orientation. The basic orientation of the expert witness should include the same indoctrination. Cover the basic thesis -- *hear the question, understand the question, and just answer the question asked.*

- b. The Hypothetical Question. Although hypothetical questions have not been required in the federal courts since 1970 (Fed. R. Evid. 705), those who like to use them are still free to do so. The hypothetical can be a very powerful device, particularly in a lengthy trial when it can legitimately be used to serve many of the functions of a closing speech: the most compelling facts of the case can be incorporated into the hypothetical and recounted clearly, authoritatively, affirmatively and interestingly. Care must be taken not to include any assumed facts for which there is no evidentiary basis.
- c. Standard Questions. Ask three separate and distinct questions.
- The *first* – “Dr. Jones, do you have an opinion with a reasonable degree of scientific certainty as to . . . .” The answer to that first question can only be “Yes” or “No.” Since we are asking the question of our own expert, presumably the answer will be in the affirmative; if not, the expert would not be there to testify.
  - The *second* question will invariably be, “What is your opinion?” The witness should give as terse and pointed an answer, as possible, without explanations or digressions.
  - The *third* question: “Dr. Jones, will you please explain to his Honor and the members of this jury why you came to that conclusion?” Witness is to give his/her reasoning; tell us what information and which documents you found to be crucial or important in forming the opinion. The answer to this third question, unlike the very curt answers to the first two questions, may take fifteen or twenty minutes. In answering this question, the expert is to explain why the opinion was formed -- educate us, the jury and explain your reasoning in such a way that every single juror knows *how and why* the expert came to his/her decision, then we should prevail. It is your explanation which is vital, and the third question will provide you with a full opportunity to give it.”
10. Preparation of the Witness on the Specifics of the Case. Review appropriate style of preparation – Conversational versus rehearsed questions. Giving feel for questioning style and getting a sense of how witness may respond to it by pursuing a partial line of inquiry on a particular subject for, say, ten or twelve questions may be more effective than going through a complete set of all questions. Give the witness immediate, candid feedback. Must make strategic decisions whether to have witness give answers to limited number of questions or complete

*practice answers.* Concern of *perception* of honesty versus spontaneity and being natural in answers versus complete review of questions and answers.

11. Preparing the Witness for Handling Mistakes - Dealing with the Stress of the Courtroom.
12. Conclusion – General Admonitions:
  - a. If a witness does not know the answer to any question, the response must be, “I don’t know;”
  - b. If the witness does not remember the answer to any question, the response should be, “I don’t remember;”
  - c. Since, by hypothesis, the answer to every other question *will* be known, the witness should simply give it. Special attention must be paid, however, to insure that the witness distinguishes that which the witness knows precisely versus what the witness “knows” but can only estimate. Witnesses should never testify that they do not know or do not remember when, in truth, they do know and do remember but can only offer an approximation or estimate.

### C. Opening Statements

1. Preliminary Comments
  - a. Many experienced trial lawyers believe that the opening statement is the single most important part of the trial. This view seems to be confirmed in studies reported by respected sources which indicated that the impressions formed by most jurors upon completion of the opening speeches and before any evidence is heard are consistent with the verdicts they return at the end of the trial. The apparent rationale for this phenomenon is that once a juror has formed an opinion as to the merits of the case, it is very difficult to change that view or, as it is sometimes stated, “un-do the mindset.”<sup>2</sup> This dynamic is frequently referred to as *the law of primacy*.
  - b. Whether or not this thesis is valid in most cases is beside the point. What cannot be disputed is the fact that trial lawyers who want to win cases must treat their opening statements with the same respect and diligence they apply to the preparation of the direct examinations of their most crucial witnesses, the cross examinations of the opposing party’s expert witnesses and, of

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<sup>2</sup> An alternate explanation, of course, would be that those trial lawyers who are most effective in their opening statements are likely to be the most persuasive during the entire trial.

course, their closing arguments. At the very least, the opening statement -- particularly where the trial judge, rather than counsel, has conducted the *voir dire* examination of the jurors -- is the first opportunity to *begin* to win the battle of persuasion.

While each case has its unique problems, many of which the trial advocate will want to address initially in the opening statement, these general observations and recommendations discussed below may be worthy of consideration.

2. Do not Argue or Characterize: Let the Facts Operate as the Primary Element of Persuasion
  - a. In addition to the fact that it is improper for counsel to argue in their opening speeches -- the trial judge will invariably instruct the jury that the purpose of the opening statements is for the attorneys to set forth what each *intends to prove during the trial* -- arguing to the jury before it has heard the evidence is generally ineffective and frequently counterproductive. Stated differently, argument in the opening speech, even when it is permitted, is *premature*.
  - b. At the beginning of the trial, the jurors are not particularly concerned with which party should win and which should lose. Rather, they are anxious -- especially after having so recently survived the unexciting ordeal of the *voir dire* process -- to hear *the story* of the case, that is, the facts that form the basis of the dispute which has brought everyone to the courtroom. And those facts, if expertly handled by the skilled trial advocate, can be much more powerful, much more persuasive, than the trial lawyer's arguments and characterizations.
  - c. In an effective opening address, the competent trial lawyer speaks *the language of facts*, not *the jargon of conclusions*. Consider, for example, two distinct approaches to the first part of an opening statement by counsel for plaintiff in a tort case in which the plaintiff was rendered quadriplegic by the trauma suffered in the accident for which defendant is charged with being responsible:
  - d. The judgment of the trial lawyer as to what is relevant, what will generate maximum interest and what will be most persuasive *at the opening statement stage of the trial* will determine which facts should be dealt with at that time. If the distinctive colors and unique flavors of the facts can be presented in an interesting and effective manner, the jurors on their own will quickly begin to draw the conclusions that the trial advocate has not yet expressly articulated by direct argument. Stated differently, the trial lawyer can be most persuasive in the opening statement when her theories

of the case, those involving damages as well as liability, become obvious to the jurors merely from the manner in which the story of the case is presented to them.

- e. Regardless of the subject matter of the litigation or the degree of technicality involved in the dispute, in the opening address the first-rate trial lawyer will find the most effective way to tell *the story of what happened* in such a way that the facts will be persuasive and the impressions of the jurors as they listen will prepare them to accept the theory that will be advanced by the plaintiff.

### 3. Do Not Shout

- a. When in the course of an opening address a lawyer raises his voice above a universally acceptable, conversational decibel level, it invariably *sounds as if* he is being argumentative. Even when no substantive argument is actually being made, if the advocate shouts or even speaks at too powerful a volume level during the course of the opening speech it may very well lead to an objection followed by an admonition from the trial judge not to argue, or, at the very least, to **“simply tell the jury what you expect to prove.”** At best, this will be distracting to the jury and perhaps unnerving to inexperienced counsel. No trial lawyer, young or old, likes being “put in short pants” by the judge, particularly at the very beginning of the trial when the jurors have not yet had an opportunity to identify or empathize with the attorneys who appear before them.
- b. On the other hand, if the trial advocate can adjust or control her voice volume so that the opening statement *sounds* calm and reasoned, it is much less likely that an objection based on “argument” will be made; opposing counsel is likely to be lulled into passivity by a dispassionate sounding presentation. And even if an objection is interposed, it is unlikely to be sustained by the trial judge who will have little enthusiasm for suppressing a subdued presentation. Our point is not that an acoustically tempered speech will afford an opportunity for counsel to “slip in” or “get away with” an argument but, rather, that screaming, shouting and other verbal forms of finger-pointing will substantially increase the incidence of interruption which, in turn, will interfere with the lawyer’s ability to control the pace and ambience of the intended opening address.
- c. While the opening statement is not the time for trial lawyers to weave their spells that will capture the minds of the newly formed and highly impressionistic jury, the lawyer who is delivering an opening speech does enjoy a captive audience, the stage to himself

and a legitimate opportunity to be persuasive at a time when opposing counsel has been excluded from the spotlight of attention. The undisciplined advocate who raises his voice or makes pointed accusations in the opening address runs the risk of letting opposing counsel reappear on “center stage” with the spotlight now repositioned and -- perhaps with the assistance of an unwelcome ruling or a discordant comment from the elevated authority in the black robe -- interrupt the flavor and taste of the speaker’s oration. Why forfeit the advantage and opportunity which normal trial procedure affords through careless or misguided enthusiasm in the form of increased volume?

4. Be Interesting

- a. A good trial lawyer will never be boring or even unexciting in the opening statement. It is extremely difficult, if not actually impossible, to be persuasive when your audience is not interested in what you are saying.
- b. There will be times during many trials, of course, when some careful planning or novel execution will be required to avoid being tedious. During certain portions of a direct examination involving inherently uninteresting subject matter which simply must be covered -- for example, establishing the “chain of custody” of an important exhibit, or laying an adequate foundation for the introduction of certain laboratory or other technical data -- keeping the jury or even the judge involved and interested in what is transpiring may be a difficult project in itself. There is never a valid reason, however, to be uninteresting or lack-lustre during an opening statement. At this stage of the trial, lawyers normally have great latitude regarding the subject matter to be covered, how their stories are to be told and how long they may spend in their presentations. Unlike the closing argument which must be adjusted and fine-tuned to comply reasonably with the evidence which was actually presented and received during the trial, a lawyer’s presentation in the opening address does not depend upon how well a particular witness answers questions or what success opposing counsel may enjoy in cross examination.
- c. The story told in the opening may be chronologically presented or *backflashes* may be employed, as the advocate sees fit. The voice, the modulation, the facial expression, the pace, the entire execution of the opening statement -- as well as the substance of the speech -- are all entirely within the control of the trial lawyer who is presenting it. Since the advocate has total command over both the substance and delivery of the opening address, there is hardly an excuse for not making it interesting whatever the particular factual

context may be. Moreover, the trial lawyer who generates a favorable response from the jury with an interesting style, combined with a compelling substantive presentation, sets the stage for the duration of that trial of a responsive jury that will anxiously look forward, consciously or subconsciously, to what that lawyer will have to say later in the trial. Is there anyone who does not like to listen to a good story teller?

- d. A common problem in opening statements, one which generally results in a tedious presentation, is the recitation of *too many* facts. Trial lawyers should make every effort to avoid *unnecessary detail* in their opening statement. Most of the *precise* details of an event -- that minutia of specifics with which the trial lawyer's post-investigation, post-discovery brain is necessarily overstuffed -- should not be recited in an opening address as if the verdict were to be won by that lawyer who is best able to spew forth with reasonable accuracy the greatest number of precise facts and details about the events in question.
- e. Obviously, a sensible balance must be achieved between the avoidance of unnecessary detail and the failure to orient the jury as to the important facts and problems at hand. We trial lawyers frequently live with a case for several years or more before we are finally able to present it in a courtroom. During those years, we are inundated with reports, answers to interrogatories, deposition testimony, motions and other assorted volumes of fact-intensive material. By the time the trial finally begins we are possessed of so many facts and details that it becomes very easy to lose our way among those trees of data, no longer able to recognize the structure of the forest, *i.e.*, the theories upon which we will successfully prosecute or defend the case. If we are incapable of segregating those facts upon which we will actually rely from all the others which have accumulated in our file, we are likely to confuse the jurors as well as bore them.
- f. In order for a trial lawyer to deliver an effective opening address, he must be able to simplify the issues -- the more complex or technical the case, the greater the need for simplification. And, while telling the jury what the important facts are, the advocate should never be unmindful that the jury is hearing the story of this case for the very first time. Thus, for a lawyer to begin an opening statement with a discussion of the details of "the contract" which is the subject of the litigation without first telling the jury who the parties are and explaining what each was trying to accomplish in the business arrangement which was negotiated, would indicate that he is not properly oriented to the jury trial process.

- g. A good way for lawyers -- those who are veterans of many trials as well as beginners -- to comprehend fully the characteristics of an ineffective opening statement in order to improve their own performances would be to sit as jurors in a case about which they know absolutely nothing before the lawyers rise to address them in their opening statements. Since attorneys are generally stricken when they become part of a jury panel, it may be necessary to seek out a good trial advocacy training program -- such as those offered throughout the country by the National Institute for Trial Advocacy and many law schools as part of their CLE programs -- to see if there is a need for an "outside juror." It may be easier and even more effective to visit a nearby courthouse, find out when a trial is scheduled to start -- preferably one in which you know none of the lawyers and absolutely none of the facts or contentions of the parties -- and simply listen to and observe the lawyers' presentations as though you were actually in the jury box. The learning experience for the trial lawyer from one such day of "jury service," particularly with respect to what is effective and ineffective in an opening speech, what should have been discussed and what should have been omitted, may well be worth a year of lectures and two volumes on trial advocacy.

5. Be Accurate

- a. Trial lawyers should be particularly careful neither to misstate nor overstate the facts which they present to the jury in their opening speeches. While it is not necessary to preface every comment with "**I expect to prove that . . .**" or "**I anticipate the evidence will show that . . .**" -- or other such distracting verbiage -- the truth of the matter is that all facts discussed in the opening address must have an evidentiary basis. Not only will the trial judge instruct the jury that the statements made by counsel are not evidence, but opposing counsel will have an opportunity in closing argument to remind the jury what facts were *promised* in the opening speech as contrasted with the credible evidence which was actually produced. Indeed, a highly skilled advocate may have an opportunity to turn a losing case into a winner on the basis of a careless opening statement by her opponent which contained facts or representations which the jury now, at the end of the trial, has either not heard or simply does not accept as true.
- b. There is no guideline or instruction which will assure total accuracy in our opening statements. The best we trial lawyers can do is to be as careful as possible. But the development of good habits in trial lawyering will help to minimize these problems. For example, the lawyer who is unable to avoid unnecessary detail in the opening statement will not only be less effective and less

interesting, but is constantly at higher risk of including inaccurate information.

6. Avoid Legalese and Formalized Style: Use “People Words”

- a. The unnecessary use of legal jargon and pomposity of language are distracting and generally ineffective in an opening statement or, for that matter, at any other time during the trial. Even words such as “*prior*” and “*subsequent*” should not be used when “*before*” and “*after*” will do. While an advocate’s pleadings are routinely filled with “*aforesaid*s” and her briefs are invariably concluded with “*respectfully submitted*s”, the truly effective trial lawyer has not forgotten to talk like the person she was -- and, indeed, still may be -- before her graduation from law school.
- b. Even trial lawyers invite friends over for “*a drink before dinner*” rather than for “*an alcoholic beverage prior to the evening repast.*” Yet, all too frequently, the sensible, appropriate use of the English language becomes troublesome when a lawyer rises to speak in a courtroom. The most interesting and effective opening statements will always sound more like a discussion with the family at the dinner table than an appellate argument.
- c. Some believe that this phenomenon is most frequently observed in young or inexperienced trial lawyers. Whatever the reasons for or origins of these manifestations of verbal pomposity and formalization of style, they should be permanently exorcised from the speech and mannerism of trial lawyers who want to win verdicts. The competent advocate knows the difference between oration and *speech*.

7. Keeping the Options Open

- a. While preparation for the opening statement should properly begin with a consideration of the arguments which are likely to be made in your summation, that is, you should not prepare an opening statement until you know the theory of your case and have a pretty good idea as to what you intend to argue at the end, there will be some situations where the *precise* arguments which will be relied upon in closing argument cannot be determined until the evidence in the case has been presented. For example, there may be a serious question as to whether certain evidence will be admitted; or there may be a problem as to how credible the anticipated evidence on a particular subject may be. These kinds of uncertainties may require counsel to have an alternative theory or argument which cannot be selected until later in the trial.

- b. The trial lawyer must prepare and deliver the opening statement so that all potential options on the subject remain available until counsel is able or required to exercise a choice. Where an attorney unnecessarily “closes off” such an option or “commits” to a position which may later be discarded, a serious or perhaps fatal blow to the client’s cause may have been suffered.
- c. Skilled counsel will know how to avoid such disasters. For example, when an option as to alternative theories must be preserved until later in the trial but logic dictates that silence on the subject in the opening address would be awkward or even suggest vulnerability, the appropriate use of carefully phrased and well articulated rhetorical questions may not only be helpful, but may actually be effective in focusing the jury’s interest upon the point in question and, simultaneously, even communicate an aura of confidence and strength.

8. Removing the Sting

- a. In almost every case, one side or the other -- sometimes both -- will have a serious problem which will have to be addressed and overcome. For example, a plaintiff in a tort case may be faced with a troublesome contributory negligence or causation problem arising from the fact that he was intoxicated at the time of the accident. Or a defendant may be faced with a sticky credibility problem because the version of the event which he gave to the investigating police officer simply was not true. In such situations, counsel should at least *consider* the advisability of first presenting the problem in the opening statement so as “to remove the sting” or, at the very least, blunt its adverse impact by an early, forthright disclosure and candid discussion of this weakness in the case.
- b. The decision whether to be the first to “expose” the nasty little problem, depends on many factors such as: Will you be the first or the last lawyer to give an opening statement in the case? How strong or weak is your explanation or excuse? Is the efficacy of your “explanation” dependent upon your prevailing on a disputed evidentiary question? Will your explanation be more acceptable if it is articulated initially by an unusually credible and persuasive witness?
- c. In those courtrooms where the lawyers themselves are still permitted to conduct the *voir dire* examination of prospective jurors, delicate or troublesome problems may even be addressed at that early stage of the trial.

9. Paint the Damage Particulars with a Light Brush
  - a. Certain detail, such as the projected lost earnings and other minutia, should be avoided if the opening statement is to achieve its proper purposes of information, interest and persuasion.
10. Use Exhibits or Demonstrative Aids Where Appropriate
  - a. Just as we lawyers use diagrams and other demonstrative aids to help us understand a case, so too a jury's ability to comprehend a situation will be enhanced with the appropriate use of such physical materials. Indeed, it is frequently difficult or impossible to understand an oral presentation if such demonstrative aids are not utilized. In every case, therefore, trial counsel should *consider* whether the use of exhibits or other physical materials would be helpful and, if so, how they can best be utilized in the opening address.
  - b. Of course, no exhibit should be used without first obtaining the court's approval and this should be routinely given if opposing counsel has no objection or if the proponent is able to explain to the trial judge why its use would be helpful and not unfairly prejudicial. The use of a blackboard or flip chart for making diagrams, sketches or even setting forth some written presentation such as a chronology of a complicated event -- if such a drawing or writing is made contemporaneously with the lawyer's oral presentation -- does not necessarily require the prior approval of the trial judge (although, it would be well for counsel to be aware of particular idiosyncrasies or attitudes of the particular judge on this subject). If, however, an actual trial exhibit or any other prepared-in-advance material is to be utilized, this should certainly be cleared with opposing counsel and the trial judge before its use in front of the jury is attempted.
  - c. The overuse of demonstrative aids, however, should be avoided. An enlargement of one critical page of a document, for instance, could be particularly effective in the opening address if it is "the smoking gun" part of the record and helps focus the jury's attention (and passion?) on the theory counsel intends to develop. On the other hand, the attempted use of twenty blow-ups from the company records in the initial speech to the jury may be counter-productive and make for a confusing and ineffective address.
11. Use Rhetoric When It May Help
  - a. Trial lawyers should be masters of rhetoric, or at least comfortable with its use. This is not intended to suggest that they should be

wizards of the spoken word and use speeches to disguise or entrap. What we have in mind, rather, is that advocates should be comfortable with the many options which are available to them in the use of language

- b. The use of the *rhetorical question* can be especially appropriate in the opening statement where argument is neither proper nor, as we have suggested, advisable. Among other things, the rhetorical question involves the jury in the decision making process -- as though there were now a shift into a **“Let us reason through this together”** mode -- and, in our view, constitutes a more powerful statement of the defendant’s culpability than when offered in the form of the trial lawyer’s articulated conclusion.
- c. Whatever other rhetorical devices may assist in making the opening statement convincing -- irony, understatement, anticlimax and so forth -- should be considered, so long as the presentation does not get “hokey” or insincere. And, obviously, the use of rhetoric need not be *confined* to openings; they also can be extremely powerful tools in the closing speech.
- d. Whether an effective opening statement takes ten minutes or two hours should depend on the nature of the case, its complexity and the number and kinds of problems which are to be addressed -- unless, of course, the trial judge has already established guidelines by which counsel are to be limited in their opening speeches. Even where the judge has not imposed time limitations, however, good trial lawyers will attempt to be reasonably brief. As a matter of fact, many of the guidelines set forth above will determine how long the opening statement should be. That is, counsel must orient the jury as to the factual setting of the case, present *the story of the case* so that the jury will understand it, avoid the use of unnecessary detail and articulate the facts in such a manner that they are in themselves persuasive, *i.e.*, cry out for the justice which you seek for your client in this litigation.
- e. The amount of time that is necessary to accomplish these goals should determine the duration of the presentation. Perhaps this is the same as saying that *lawyers should start at the beginning and finish when they get to the end*. The genius, of course, is knowing *how* to begin so that there will be a sense of electricity in the air, knowing *what* to say that will create in the jurors a potential passion for the theory which the lawyer intends to develop and knowing *when* the legitimate end of the presentation has been reached. If an opening speech is boring, fifteen minutes may feel like an eternity. But if the presentation is interesting and the jurors, as they listen to the tale unfold, become eager or even

excited about their participation in the particular quest for justice which the case poses, a one hour opening speech may seem to end too quickly.

12. Be Appropriately Succinct

- a. Whether an effective opening statement takes ten minutes or two hours should depend on the nature of the case, its complexity and the number and kinds of problems which are to be addressed -- unless, of course, the trial judge has already established guidelines by which counsel are to be limited in their opening speeches. Even where the judge has not imposed time limitations, however, good trial lawyers will attempt to be reasonably brief. As a matter of fact, many of the guidelines set forth above will determine how long the opening statement should be. That is, counsel must orient the jury as to the factual setting of the case, present *the story of the case* so that the jury will understand it, avoid the use of unnecessary detail and articulate the facts in such a manner that they are in themselves persuasive, *i.e.*, cry out for the justice which you seek for your client in this litigation.
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13. Conclusion.

- a. A precious opportunity to command the jury's interest and get it leaning in your direction before the evidence has even begun will be squandered if the opening speech is mediocre. Other than those general references to the subject matter of the dispute which may have been made during *voir dire* or in the preliminary instructions given by the trial judge, the jury will know nothing about the case which is to be tried when the lawyers rise to give their initial statements. The challenge for the advocate is to make "the story of the case" clear, accurate, interesting and compelling.

- b. These goals can best be achieved with a presentation which engages each juror in the substance of the litigation from the perspective of the party on whose behalf the lawyer is speaking: a riveting recounting of the pertinent facts so organized that the jurors themselves will draw the inferences that the trial advocate intends. If, hearing this preview of the case, the jury becomes psychologically comfortable with the theories which will be articulated later during the trial, the battle will be well on its way to being won. Arguments, accusations and other forms of verbal finger pointing should be avoided at this early stage of the proceedings; the facts themselves should be used as the essential weapons of persuasion.
- c. Trial lawyers who, as they give their opening statements, are perceived as fairminded, honest, rational and sincere human beings will effectively dilute those anti-lawyer biases which so many of today's jurors bring to the courthouse. The jury will accept guidance and instruction only from those who are respected and trusted; the process of gaining such acceptance begins in the opening speech.

#### **D. Direct Examination**

##### 1. Basic Observations

- a. Every direct examination has two essential purposes:
  - To put in evidence those facts or opinions which will either support your theories in the case or refute your opponent's contentions; and,
  - To do so as convincingly as possible.
- b. The guidelines on "witness preparation" above provide general guidelines.
- c. This section focuses upon what the trial advocate can accomplish through questioning techniques and forensic skills in the *courtroom* to enhance the aura of truthfulness and, in a more global sense, make each direct examination as compelling and persuasive as possible.

2. Developing an Advocate's Sixth Sense. Good trial lawyers need to develop a reliable sixth sense that will provide them with a continuous stream of trustworthy messages telling them how the jury is reacting to the participants in the well of the courtroom -- how it is receiving their speeches, testimony and conduct *as they are occurring*. Advocates must develop the ability to see and hear themselves as they are speaking and to

assess their own performances as well as that of the witnesses who are testifying.

3. Maintaining Interest. A common failing in many direct examinations is their tendency to become dull. Whatever the precise reason for the tedium, it is difficult for the advocate to be convincing when the minds of the would-be convincees are elsewhere. Some approaches/techniques are discussed below.
4. Warming Up. Such matters as name, address, age, education, occupation, marital status, credentials and special knowledge about relevant matters in the controversy logically come first in any event, but it provides a good opportunity for the witness to “warm up” and *find his voice*. Having answered a series of initial questions, albeit simple and uncontroversial ones, where neither lawyers nor jurors stared at him in visible shock or apparent disbelief, his courage may awaken and begin to stir. This will fortify the witness with a baseline level of confidence before the time comes to answer the most important questions which will be put to him.
  - a. The initial warm-up period offers a safe opportunity for the affinity between the witness and the lawyer -- as well as the witness and the jury -- to evolve and take shape, before the more critical portions of the testimony are explored.
  - b. But every rule, as we are so frequently reminded, has its exceptions. Special circumstances may present an opportunity for a creative advocate to intensify or dramatize his presentation by eschewing the usual forensic foreplay and, as soon as his witness is sworn, immediately asking several pointed questions which go directly to the heart of the case
5. Paying Attention to the Witness. A common fault which contributes substantially to ineffectual direct examinations is the failure of the questioner to look at and listen to the witness as she answers questions. This serious transgression materializes whenever the interrogating attorney, as will frequently happen, is more concerned with the next three questions than with what the witness is saying and how she is saying it:
  - a. Variations in pace. Each lawyer proceeds through a witness examination at a somewhat distinctive pace and, when more skilled advocates are at work, that tempo will vary depending upon the subject matter of the questions and the emphasis intended. Extended pauses, i.e., periods of silence which are longer than those established by the rhythm of the examination, can by themselves suggest new “paragraphs or subsections of the text.”

- b. Variations in position. The end of a chapter or major section in the direct examination, and the commencement of another, can be effectively communicated when the examiner rises from a seated position or moves with deliberation from one location in the well of the courtroom to another. A noticeable pause will generally accompany this restructuring of the physical ambience, this rearrangement of sight lines, to emphasize the fact that we are now moving to a new and perhaps more portentous aspect of the case.
  - c. “Permissible” asides. Notwithstanding the prohibition against making speeches or affirmative statements while examining a witness, some leeway is generally available for letting the jury and everyone else in the courtroom know that the subject under discussion is completed and a new topic is beginning. The most common form of aside is no doubt the simple word **“Now”** at the beginning of the question which may very subtly signal that some sort of change in subject matter or emphasis may be taking place. There are, of course, many variations of the *permissible aside* which may be used to let the jury know the category of the present inquiry as well as to preview the subject matter of the next chapter in the testimony:
  - d. Announcements to the court (while the jury listens). There may be occasions when it is appropriate to advise the trial judge that the questioning of the witness will be restricted to a particular subject e.g. analogous situations will present themselves from time to time when such a declaration is perfectly appropriate and can help the jury keep on track with regard to the specific topic under discussion. Care must be taken, however, not to abuse this opportunity by making *substantive* statements or representations in such announcements; the prohibition against trial lawyers testifying should not be violated.
6. Leaping Forward and Backward in Time – Chronological Presentation of Facts versus Change or Order. In every direct examination the interrogator has enormous discretion, not only with regard to *what* he will ask the witness and *how* he will ask it, but also *when* he will ask it. Except in the case of an expert who must be qualified before opinion testimony may be elicited, or a prospective witness whose competency to testify must first be established to the satisfaction of the trial judge, there is generally no requirement that the order of the direct testimony follow any particular prearranged scheme. The witness, for example, does not have to present whatever story she has to tell in chronological order. The lawyer conducting the direct examination can “flash backward” during the questioning or perhaps “flash forward,” as he may see fit.

7. Keeping the Spotlight on the Witness – Guidelines:
  - a. Physical positioning. Where possible, position questioning attorney behind jury box.
  - b. Voice modulation. Experienced trial lawyers have the power to regulate many characteristics of the witness' voice and speech by the manner in which they themselves speak. As the witness gains some confidence and grows more comfortable in his new role as a "public speaker," the examining attorney can begin to gradually lower his own speaking volume until that of the witness is slightly greater; this will also tend to emphasize the role of the person testifying.
8. Avoiding the Unnecessary Use of Leading Questions. Lawyers should try to avoid the use of leading questions, even when they suspect that no objections will be raised, because it is generally not the *most effective way* of presenting live testimony. Leading questions suggest to the jury, whether overtly or subliminally, that it is the lawyer's story, not that of the witness, that is being presented; that the interrogation has been rehearsed; and that the witness is not particularly important in the questioning process, but only a prop that keeps agreeing with whatever the lawyer suggests.
9. Using Exhibits for Emphasis, Drama and Support. - Documents, photographs and other forms of exhibits are introduced into evidence because of their substantive value to the party offering them. But *when* and *how* they are offered, as well as the *specific uses* that are made of these exhibits once they have been marked for identification or received into evidence, are largely a matter of discretion. Exhibits may be marked for identification and referred to in some manner during the direct examination of a witness, but not actually placed in evidence until after the last live witness has testified, when they are "offered" just before the proponent rests his case. In fact, some trial judges adhere to the notion that that is the proper time for a party to offer its exhibits into evidence. While there could be a tactical reason to do so with *particular* exhibits under certain circumstances, we rarely deem it effective to delay our offers and frequently find ourselves having to resist the instruction of the court, which we prefer to receive as a mere *suggestion*, to "defer your offer of your exhibits until you are about to close your case."

There are several reasons why the offering of exhibits into evidence should not be postponed until the close of a party's case in chief:

- a. If the rules of evidence are being scrupulously followed, when an exhibit has been identified but not yet admitted, its scope of permissible use during the testimony of the witnesses is quite

limited. While it may be used to refresh the recollection of a witness or for other specific, narrow purposes, it should not be shown to the jury nor read into evidence -- at least, not without a sufficient foundation first being established. Thus, while counsel in the case and the court may know exactly what the photograph reveals or what the medical record says, the jury is deprived of the probative impact of whatever is shown or stated; this may be unfair to the jurors and unwise for the party which deferred or tactically lost the opportunity to persuade.

- b. If the substance of an exhibit is critical to the proponent's theory of the case, that party must know to a certainty whether it will be received in evidence by the court *well before* he is about to rest so that, if the trial judge should sustain an objection to its receipt, alternative methods of proof -- perhaps the calling of another witness -- can still be undertaken. Conversely, when the proponent of the exhibit does not know to a certainty that it will be received in evidence, it may be impelled to call a witness -- frequently dangerous business -- that it otherwise would not have had to risk calling.
- c. If an exhibit is not received into evidence while witnesses are still available to explain or otherwise testify about it, when *will* it be seen or heard or read by the jury? While it is possible that the substance of the exhibit may be revealed to the jury later in the trial -- perhaps during the cross examination of an opposing party's witness or when the exhibits are made available to the jury during their deliberations -- there are risks attendant to any such delayed presentation. The adverse witness may not appear, or the court, for one reason or another, may not permit the use of the exhibit in cross examination as had been anticipated. What use a jury will make of the exhibits which are sent out with them -- *assuming* that the trial judge *will* send out all the exhibits which were received, an assumption that, while perfectly reasonable, is not universally valid -- is problematic. Even if the substance of the exhibit is, by one such means or another, ultimately made known to the jury, the capacity of the trial lawyer to *control* the presentation may have been lost or seriously compromised if it is not undertaken during a direct examination.
- d. But the principal reason for offering the exhibit into evidence during the direct examination of an appropriate witness is that its revelation can be orchestrated for maximum impact. Once an exhibit has been stamped with the imprimatur "in evidence," it may be used *during* a direct examination in a variety of ways:

- It can be shown to the jury in its original condition, presented in some projected or enlarged form or, with the court's permission, passed among the jurors for hands-on examination and scrutiny;
- Either the complete document or certain relevant parts may be read to the jury by the witness or by the interrogating attorney;
- It can be used not only to refresh the witness' recollection - - as can any other document or object, whether or not admitted into evidence -- but specifically as a crutch in assisting the witness with regard to such specifics as dates, times, amounts of money, exact complaints made to medical personnel and so forth
- It can be used as a demonstrative or physical anchor for a portion of the direct examination, with the witness making such references to the exhibit as the questioning may invite and giving such explanations and interpretations as the nature of the controversy may require. When exhibits are so utilized during a direct examination, they can serve the additional purpose of *validating* what the witness has said, or is about to say. This method of authentication by the use of confirming documents or other objects can, if done effectively, enhance both the credibility and stature of the witness.

10. Conclusion.

- a. Because we generally have little choice as to which witnesses to call, i.e., we are most frequently stuck with those persons who just happened to see or hear the events in question or who otherwise possess first-hand information of relevant facts, and because those individuals come in so many different shapes, sizes, levels of intelligence and personalities, we are continuously challenged to make the most of the rough and imperfect material with which we sometimes have to work.
- b. Opening statements, cross examinations and closing arguments are potentially more electrifying and more exhilarating than the interrogation of one's own witnesses. Still, solid direct examinations are the essential building blocks upon which courtroom victories must be constructed.

## E. Cross Examination

1. Basic Objectives: With rare exception, every adversarial examination has one or both of these objectives:
  - a. To discredit some or all of the witness' testimony by demonstrating that it is untruthful, inaccurate or unworthy of acceptance for some other reason;
  - b. To elicit facts or opinions which support the cross examiner's theories in the case or, conversely, are inconsistent with the positions advanced or other testimony proffered by the party who called the witness.
2. General Caveat. At the outset, prior to reviewing the special risks attendant to every cross examination, a mandatory threshold question should be asked and answered every time an opponent completes her direct questioning: *Should I cross examine this witness at all?*
  - a. To Cross or Not to Cross. A decision in favor of proceeding with a cross examination should be based upon the trial lawyer's answering these two subsidiary questions in the affirmative:
    - Did this witness do some damage to my case?
    - Are there any important and *specific* objectives I am reasonably likely to achieve if I challenge this witness?
  - b. Where the testimony of the adverse witness, however untrue or unwelcome, is not actually inconsistent with any of the theories on which the claim or defense is predicated, the decision should *almost always* be against proceeding. An exception to this guideline might be justified where:
    - The opportunity exists to develop some substantive points which refute the testimony offered or positions advanced by the opposition, or support one's own, but *only* if an adequate control mechanism, such as a written statement or the deposition testimony of the witness confirming what is to sought to be elicited from him on cross, is available, or
    - The need is *great* and there is good reason to believe that the witness can be controlled so as to avoid the infliction of additional damage.
  - c. Even when there is a legitimate reason to go forward, the *second* part of the test must also be satisfied: specific and attainable objectives must be identified. There must be a plan -- one or more

specific objectives that are reasonably likely to be accomplished -- before any cross examination is initiated. In the absence of distinct targets, it may even be difficult to know when the cross examination is over, *i.e.*, when maximum benefit has been attained and further risk should be averted.

- d. Before accepting the opportunity to begin any cross examination, consideration must also be given to what damage *could have been* inflicted -- but was not -- during the direct interrogation which has just been completed. Since any cross examination will afford opposing counsel an opportunity to conduct a re-direct interrogation, if there was a failure on the part of one's adversary to obtain certain critical testimony in support of its theories which easily could have been elicited from that witness, it may be best to decline the invitation to cross examine at all, even at the risk of leaving some adverse testimony unchallenged.
3. Maintaining Control. During the adverse questioning, the jury's attention should generally be focused upon the interrogating attorney rather than the witness (*cf.*, direct examination). This orientation does not happen on its own. The cross examiner must *command* the jury's attention by the totality of these components: the substance of the questions; the volume, pace, inflection, emphasis, variety and intensity of the cross examiner's speech; the *attitude* adopted toward the witness; where positioned in the courtroom; posture and movement during questions; and, of primary importance, the ability to exercise adequate control over whatever answers are evoked.
- a. It may not always be possible to confine the responses of an adverse witness to simple affirmatives or negatives. Still, it is the impact of the question -- *what* is asked and how it is asked -- which must be paramount, not the answer.
  - b. In discussing his "Ten Commandments of Cross-Examination," the late Irving Younger would frequently admonish trial lawyers not to ask questions to which they did not know the answers. Whether or not the cross examiner believes he/she knows the answer to the questions put to the adverse witness, the cross examiner had better anticipate that a damaging response may be given. Sometimes, this may require that the interrogator refute it . . . or concede it! The true genius of a great cross examiner, in fact, is the ability to ask only those questions the *possible* answers to which she can successfully direct, control or parry.
4. Control Mechanisms, a/k/a Ammunition, Weaponry. Successful cross examinations are more frequently the result of thorough and imaginative preparation than the product of adroit inquisitorial skills.

- a. Special attention should always be given to whether any of these exists, is “discoverable” or otherwise obtainable and may be effectively employed as a weapon at trial:
- Written, taped or other forms of recorded statements given by or obtained from the witness;
  - Oral, unrecorded statements of the witness;
  - Deposition testimony of the witness in this or other cases;
  - Diary entries, calendar notations, letters, memoranda or other notations -- whether in written or electronic form -- written by the witness which may relate to any aspect of her testimony;
  - Statements, memoranda, correspondence, pleadings or other written materials received by the witness from others concerning any subject involved in the litigation;
  - Any document or object received by the witness in preparation for his testimony;
  - Books, articles or other publications authored by the witness;
  - Books, articles or other published material of others relied upon or reviewed by the witness in preparation for her testimony;
  - Books, journals or other published material which an expert witness owns, subscribes to, or otherwise considers authoritative;<sup>3</sup>
  - Incidental records maintained by others which may be relevant to any part of the witness’ testimony, *e.g.*, home, business or cellular telephone records; time records and logs maintained by an employer; educational or training records; hospital charts and other medical documents; public transportation schedules; etc.
  - Police, coroner and other investigative reports;

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<sup>3</sup> While it may not be possible to cross examine an expert with published materials which he does not consider authoritative, once he concedes that he has a book in his own library he will be disinclined to contend that it is not authoritative. Who, after all, will admit to owning junk?

- Photographs, movies, videotapes and acoustic tapes;
  - Patent applications, shop drawings, construction documents, engineering reports, test studies, promotional materials and so forth, which may contain data relevant to the witness's testimony;
  - Governmental reports and statistical data;
  - Materials obtainable through an FOIA request;
  - Admissions in the pleadings, discovery responses or oral statements of the party who will call the witness.
- b. These broad categories are not all inclusive. For example, the oral testimony of another witness, if sufficiently credible, can also serve as a control mechanism.
- c. In preparation for each trial and in contemplation of each adverse witness who may appear, creative thought must be given to (a) what the witness is likely to say during his direct testimony and *may* say during cross, as well as (b) what documents or other forms of control mechanism may exist which, if obtained, could prove useful if that witness is to be challenged. Some of these control mechanisms will be the natural products of a comprehensive investigation; some will be obtainable through routine discovery procedures; and others will be gotten only with a great deal of imagination and determination.
- d. While much of the weaponry which will be used in questioning the witness at trial will be assembled in advance (and placed into a special cross examination folder), some may not be identified until the witness answers the questions put by the direct examiner. Then, as new and unanticipated testimony is given, known materials which effectively refute or contradict it can be added to the cross examination file for that witness.
- e. Once the direct testimony is completed and the two threshold questions -- Has this witness hurt my case? Are there specific objectives which I can accomplish if I interrogate the witness? -- have been answered affirmatively, the final plan for cross examination can be more precisely refocused upon the specific areas of the testimony in which the witness is most vulnerable and for which there are available documents or other ammunition to assure the success of the confrontational incursion.

- f. Normally, the two most promising and potentially devastating subjects for attack should be earmarked for the *initial* and the *final* areas of questioning. In between can be sandwiched those points which, while important and strong enough to be used, are not quite as decisive as those reserved for the first and last attacks. Where, however, the cross examiner has documentation or other adequate support for attacking the *concluding* portion of a witness's direct examination, it may be most effective to begin there. When the challenger can rise and effectively defeat the witness on the very last segment of his testimony, the psychological impact can be devastating, particularly in light of the obvious spontaneity of the attack
5. Effective Use of Available Ammunition. Whether its availability is the result of hard work, quick thinking or simple good fortune, strategically significant ammunition must always be treated with care and respect. Whenever it is possible to keep its existence confidential -- and this may very well depend upon the precise discovery requests made by an opponent, the procedural requirements of the court in which the case is to be tried and a variety of ethical and tactical judgments -- its potency will be enhanced. Precisely because of its potential power, its existence must never be dissipated through misuse. When a prior inconsistent statement or other control mechanism is used carelessly, it will be of little use in impeaching the witness.
6. Limiting the Areas of Cross Examination. In his "Art of Cross Examination" monograph, Professor Younger cautioned that "Unless he is Clarence Darrow, [a lawyer] should never make more than three points on cross examination . . . ." While the wisdom of any arbitrary limit may be debated, the temptation to explore every area of questioning for which some ammunition is at hand should be resisted. No matter how vulnerable an adverse witness may seem, and no matter how strong the control mechanism which may be available to contradict or refute the witness' direct testimony, there is never any *assurance* that a particular attack will be successful.
  - a. Where a safe alternative to direct confrontation exists, its employment should at least be considered: *caution* must always be an option. If, for example, there are multiple subjects upon which a witness can be challenged, an assessment should be made of their relative strengths and weaknesses. As previously suggested, the surest and most dramatic points will normally be reserved for the beginning and the conclusion of the cross examination. Other important and reasonably safe issues on which to challenge the witness will be used in the middle. But if there are tentative areas for attack which are relatively weak, or of questionable significance, or for which the control documents are arguably

ambiguous, it may be wise to let them remain in the file where, while they will do no good, they will at least cause no harm.

- b. There will be occasions, though not in every trial, when meticulous preparation, skillful advocacy and good fortune happily combine to reward the cross examiner with a *knockout* punch. Where, however, the very best area of confrontational questioning which has been earmarked, say, for the concluding assault on the witness is clearly too powerful to be abandoned, at least the other, less definitive points for cross examination should be forgotten after a knockout punch has been registered.
7. Alternatives to Cross Examination. Alternatives to direct confrontation are frequently available and it is the responsibility of the trial lawyer to assess the advantages, the disadvantages and the risks attendant to each choice.
8. Calling an Adverse Party “As on Cross Examination”. One of the options to be considered in every trial is the calling of an adverse party “as if under cross examination,” *c.f.*, Federal Rule of Evidence 611 (c). Whether proceeding under the federal “hostile witness” rule or similar state evidentiary rule (which defines more broadly those who may be so called and examined by leading questions or similar state law evidentiary rule), this ploy is daring and risky, but in addition to its capacity for sudden calamity, it offers the potential for dramatic and momentous advancement of the case.
  - a. As a practical matter, it is an option more commonly available to plaintiffs than to defendants for the obvious reason that, so long as a plaintiff testifies in her own cause, there will already have been an opportunity to cross examine her at that time and, generally, no good reason not to have done so. Yet, because of unanticipated testimony or developments after the plaintiff has left the witness stand, there may be occasions when defense counsel, too, will have to grapple with the risks of calling the plaintiff “as on cross” during the presentation of its case.
  - b. The principal motivations for calling a party, or a “hostile witness” include:
    - Shock, terror and incomplete preparation. Most individuals do not perform at their optimum levels when they are subject to unusual stress. More importantly, while the adverse party who is called to testify by his adversary will no doubt have recently reviewed his deposition testimony, pleadings and other relevant documents with his lawyer, he cannot possibly be as well prepared now as he will be later

in the trial by which time, for example, he will have heard the direct and cross examinations of the opposing expert witnesses and, perhaps, even several of his own. These and related considerations may very well increase the likelihood of a successful confrontation.

- Proving or “nailing down” certain facts. The major justification for calling an opponent to testify in one’s own case is to prove a necessary fact which cannot otherwise be established. Since lawyers seldom, if ever, try civil cases in which the parties themselves were not deposed, the evidence which needs to be proved is usually contained in a deposition transcript and presumably can be read into evidence from that document without having to call the party himself. For one reason or another, however, the fact in question may not have been elicited in the pretrial examination, or may not have been developed with that degree of specificity necessary to satisfy the precise requirements at trial. Or, perhaps, the facts sought to be elicited from an adverse party may be an essential component of a hypothetical question to be put to one’s own expert so that, even though it was generally covered in the defendant’s deposition, it would be prudent to have the point firmly “nailed down” in front of the jury.
- The “pizazz” factor. Special opportunities exist, particularly when there are strong control mechanisms at hand, to portray the defendant in the least favorable light when his initial appearance before the jury is in the hands of plaintiff’s counsel, rather than the gentle and protective aura in which he will later be cloaked when his own lawyer initiates the questioning.

c. But the calling of an adverse witness to testify in one’s own case also carries with it potential risks and substantial disadvantages. These include:

- Not proving what you thought you would prove. A party called “as on cross examination” is not a witness who will have any reason to be helpful or cooperative. Indeed, the very worst must be expected from him. The prospects are substantial, then, that what is sought will not be forthcoming, certainly not without the reigning force of a statement, a deposition transcript, a pleading or some similar weapon that will virtually compel him to “come clean.” Not only may a “good” response be denied the cross examiner, but a “bad” answer may be given in its

stead. This may be troublesome, particularly if the answer is inconsistent with one of the questioner's essential theories in the case and there is no other evidence to refute it.

- Proving your opponent's case together with or instead of your own. Whenever the option to call an adverse party is exercised, the floodgates may effectively be opened for your opponent to present his case in the middle of your own. While this does not have to be a disaster, it has the potential for calamity and, so, must be considered before the "as on cross" ploy is initiated.
- Tactical considerations. When a defendant is called to testify "as on cross examination," his attorney becomes the beneficiary of certain tactical options. Opposing counsel may even decide not to call the defendant to testify at all when presenting defendant's case. Because defendant's counsel will have been able to conduct the examination of the client during the plaintiff's presentation, there may be no need to question the witness again. If the defendant is vulnerable as a witness -- and how often, for that matter, has any witness been offered who did not bring with him to the witness stand at least one area of vulnerability? -- and plaintiff intentionally (in order, say, to reserve significant ammunition for defendant's anticipated "main appearance" on the witness stand) or even inadvertently failed to exploit each of those weaknesses, it may be prudent not to recall the defendant, effectively depriving plaintiff from ever using his or her best ammunition. Or, if there is no critical testimony to be extracted from the defendant beyond that which was adduced when called by plaintiff's counsel, defendant's counsel may refrain from bringing the witness back to testify so as to impress the jury favorably with a crisp, no-nonsense and let's-not-gild-the-lily defense

## **F. Closing Arguments**

### **1. Three Essential Elements of Every Compelling Summation**

- a. Logic. One indispensable component of every effective closing speech is the soundness of the logic employed. While an appropriate dose of passion may be required to turn a fine speech into a winning one, if the contentions advanced do not actually make much sense, if they are not rooted in reason, emotion alone will not produce the desired result. The essential logic of the summation should be a carefully documented and cogent

articulation of the theories on which the case was presented throughout the trial.

- b. Credibility. The second crucial aspect of every persuasive closing address is a credible factual predicate for each argument advanced. If the jury does not accept as true the facts on which the theory is based, no amount of effective persuasion will be adequate. Like everyone else, jurors don't want to feel as if they are being "taken in." If they conclude that a particular party or a key witness has deliberately lied to them, it is unlikely that they will reward the offender with a favorable verdict. That prospect, of course, must be addressed long before the trial begins. In designing their theories of the case, advocates must, in considering all of the available facts of the situation, wrestle carefully with what they themselves believe actually happened at the time of the events in question. Since we trial lawyers, presumably, are reasonable people -- at least before the emotional juices of zealous advocacy begin to dilute the strength of our objectivity -- what we believe, after considering all of the available evidence, actually occurred is in all likelihood what the jurors who consider the same evidence will also conclude. If it is to create a road to victory, the theory advanced must be based on facts which will be accepted as true.
  - c. Persuasion. A third ingredient of a triumphant summation is, of course, persuasive delivery. A first-rate trial advocate must have both the skill and talent to be extraordinarily persuasive in her final speech making performance (as well as in the conduct of the entire trial). The truth and logic of the final argument should reveal itself in a convincing harmony of reason, rhetoric and passion so that the jury will be inspired to render its judgment with a sense of mission and righteousness.
2. Using the "Battle Plan. Long before each new trial, a synopsis of the case should be prepared in a "battle plan." This compact document should be a summary or outline of the precise theories and their major evidentiary and argumentative underpinnings. Thus, long before the closing argument phase of the trial, the battle plan should function as a personal guide to steer the trial lawyer through the trial.
    - a. As the time for summation approaches, that same battle plan now facilitates the preparation of the closing speech by serving as the initial framework of the presentation. The raw skeleton of the theories, together with the most crucial evidence and arguments which support them -- in short, the essential strengths of the case -- are already outlined in the plan.

- b. As the closing argument is prepared, we must breathe fresh life into our battle plan by adjusting and refining the original scheme to conform with the substance of what has been taking place in the courtroom: opening speeches, testimony, exhibits, demonstrations, even, perhaps, telling outbursts from the judge or counsel, revealing attitudes of key participants and the peculiar ambience of the entire event.
3. Synthesizing, Abstracting and Simplifying. Three basic processes are always employed as we go about constructing a compelling recapitulation of our case:
  - a. Synthesizing. Because the closing argument represents the first opportunity the lawyers will have had since their opening statements to speak directly to the jurors and explain, or explain away, what has been happening in the courtroom, it is important that the advocate be prepared to synthesize, i.e., fit together the most significant pieces of testimony, documents and opinions into an intelligible whole so that the multiple parts -- at least those which are not irreconcilable with the theories advanced -- when so joined, make sense and validate the conclusions sought.
  - b. Abstracting. There will be a need, then, to identify and select from the array of the whole those contentions which are of primary or particular significance. Just as the trial advocate was judicious in presenting her evidence, continuously making decisions, for example, about how far to delve into particular subjects with each witness so, too, must she be selective with regard to positions to be articulated in the final speech and the facts and arguments which will be quoted, or even referred to, in buttressing those contentions.
  - c. Simplifying. The lawyer who is able to reduce a presentation to its essential parts, i.e., the core of the thesis proposed, will enjoy a clear advantage over those who make it more difficult to see the fullness of the forest because of excessive treatment squandered upon relatively insignificant trees.
4. The Beginning . . . of the Ending. The start of the summation should command immediate attention.
  - a. A pointed and attention-commanding preamble to the closing argument is one which, in an instant, reminds the jurors why they are there and inspires enthusiasm for their impending task. Frequently, this will be an electrifying articulation of the theme of the case. On occasion it will be a simple but poignant statement of the questions which require resolution. Or, perhaps, it will be a

powerful reminder of some erroneous representation made by opposing counsel in his opening statement or some inaccurate testimony given by an important adverse witness which, now that the evidence has been completed, is clearly fallacious (if not actually villainous).

- b. The beginning of the closing speech is a good place to introduce -- or, if it has already been advanced in the opening statement or in the examination of witnesses, to re-introduce -- the theme which will constitute the battle cry of the summation.

5. Quoting an Opponent's Opening Speech. As we listen to our opponents' opening statements, we should be alert for errors and other likely subjects for exploitation in our closing speeches. Notes should be made and, if the mistake is sufficiently portentous, a transcript might even be ordered from the court stenographer. Where a consequential blunder can serve as a legitimate launching pad for a winning argument, it might be especially effective to have the transcript in hand. Care must always be taken, however, not to blow out of proportion innocent or inconsequential mistakes. Overreaching is always offensive and, when detected, destroys the aura of sincerity.
6. Incorporating Portions of the Testimony into the Speech. Bits and pieces of crucial testimony or select excerpts from key exhibits should be used to buttress the development of the principal arguments as they are articulated during the speech.
7. Dealing Forthrightly with Troublesome Parts of the Case. While some trial lawyers may not credit the collective intellect of the jury with the capacity to delve much beyond the emotional surface of the controversy, we believe that all legitimate problem areas should be confronted head-on and dealt with candidly in the closing speech. The advocate who does not offer some effective response to every significant attack subjects her client's case to grave risk. This admonition is not intended to suggest that there will always be available a perfect parry to each troublesome thrust. As is true in other areas of conceptualization, the winning tack must be defined as the best that is available in light of the facts and conditions which exist.

In short, unless a "problem" is inconsequential or, as occasionally will be the case, the answer is so obvious that it doesn't require comment, weaknesses in one's case should be addressed directly, and not left awaiting the moment when opposing counsel seizes upon it during closing argument.

8. Generating Appropriate Levels of Passion. Because all experienced trial lawyers develop unique styles which best utilize their individual strengths

of intellect and personality, some can be just as effective with a subtle and quiet delivery as others whose presence is more commanding and robust. But the tranquil and dispassionate, as well as the resonant and excitable should not undertake to camouflage the genuine enthusiasm which drives them, lest they appear disinterested participants, emotionally uninvolved in the high drama of the confrontation.

9. Exploiting Strengths and Weaknesses. We have already suggested that areas of weakness should be dealt with candidly in the closing speech, never ignored. The heart of the advocate's argument, however, should always be constructed upon the solid foundation of the major strengths in his case. As indicated previously, the major strengths of our case were already detailed in the battle plan prepared before the trial began. However, a restructuring of those strong points must be undertaken against the backdrop of the actual evidence to which the jury was exposed. And each of our principal contentions should now be authenticated with highlights from the live testimony and pertinent excerpts from the written materials which were admitted in evidence.

We will also focus in the summation upon our opponents' weaknesses: What crucial mistakes or unfulfilled promises did our adversaries make in their opening statements that can now be recalled, exposed and openly condemned so as to provide powerful rhetorical fodder for our verbal offensive? What critical pieces of evidence -- some specific testimony of the opposing parties or their key witnesses, perhaps, that was proved to be pure bogus during cross examination or convincingly rebutted by another witness or document -- can be woven into the fabric of our argument for devastating emphasis? These flaws in the enemies' position, together with the strongest points of our own case, must now be drafted into a compelling presentation that will direct the jury to the only verdict that justice will tolerate and righteousness will allow.

10. The Ending . . . of the End. Just as the beginning of the summation should focus the immediate attention of the jurors upon the import of the case, so too must the end of the speech be compelling and commanding.

In addition to a logical argument which persuasively weaves the relevant threads of evidence into the fabric of the theories advanced, jurors are entitled to an inspirational reminder of the great responsibility they bear for deciding momentous events in the lives of others. A trial lawyer's final plea should in no way trivialize the momentous ritual which is now approaching its culmination.

11. Using Rhetoric (Revisited). Similar to opening statements, the use of litanies and rhetorical questions can be valuable tools. In the closing speech, too, these devices can be extremely potent. An argument might be more effectively made with a series of questions in which the jury

becomes involved with the decision making process instead of being commanded, as it were, to accept the assessment of plaintiff's or defendant's.

12. Rebuttal. In those jurisdictions where the applicable rules of engagement permit a plaintiff to respond to an opponent's final speech, care must be taken that this precious opportunity to have "the last word" not be wasted. Unlike most of the tasks which an advocate undertakes in the courtroom, advance preparation plays a relatively minor role in the rebuttal speech. Rather, agility in quickly organizing a decisive refutation of what one's opponent has just argued is paramount. A good job requires adherence to the following disciplines:
  - a. Critical listening. As the rebutter-to-be is listening to the summations of his opponents, his focus should be to identify false factual assertions, specious reasoning and other significant faults in their presentations.
  - b. Selecting the specific topics to be addressed. The process for identifying points to be addressed in rebuttal argument -- as well as the order in which they will be covered -- is analogous to the method employed in selecting the areas of cross examination. From all *possible* points which might be attacked -- all those scribbles which were made while the opposing lawyers were speaking -- the strongest, the clearest and the most decisive must be quickly culled.
  - c. Taking special precautions. Two particular areas of rebuttal strategy warrant special mention. The first relates to what is and what is not *legitimate rebuttal*. The second deals with intentionally reserving arguments because they may "play better" or be "safer" when offered in rebuttal than in the initial speech.

Good trial lawyers should know the difference between a legitimate rebuttal argument and a repetition of a point already asserted in the first speech, else they may lose their momentum and their composure when they are stopped dead in their tracks for an infraction. The rebuttal is *not* a very good place to lose either!

In planning for the closing speech, a trial lawyer is sometimes tempted to withhold a particular argument on a crucial point in order to save it for the rebuttal. The risk in such a ploy is that an opponent, conceivably, may not "cooperate" by offering an argument in her speech to which the *hidden* gem would be a legitimate rebuttal. Under these circumstances, the trial judge could very well preclude any discussion of the subject in the

rebuttal speech and thus “the little jewel of an argument” would be concealed from the jury as well.

13. Conclusion. The effectiveness of the closing address is not to be measured in the frequency of its dazzling phrases, the incidence of its emotional climaxes, the number of its oratorical “spells” cast and other rhetorical excesses. The test, rather, must be the capacity of the speech to have the jury see and *feel* the controversy from the vantage point of the party on whose behalf it is given. A prudent balance of *reason*, how the pieces of evidence and components of argument are interpreted, and *passion*, how the intensity of the presentation inspires and motivates the jury toward the desired conclusion, will be required in order to dominate the last debate.