Trying the Case. . . by the Masters

Introduction

Much has been written about "trying the case." We have all attended numerous seminars about openings and closings, direct and cross examination and the like. We have all read numerous articles and materials on these subjects. You probably have a big file somewhere where you keep excellent articles on "trying the case." Someday you might read them . . . but right now you are just too busy.

Several authors have suggested that before each trial you should read five or six articles on "trying the case" - opening and closing, direct and cross - by experienced trial lawyers.

We have tried to make this easy for you. We have reviewed many of these articles for you and tried to synthesize their ideas into small sections, giving you a "quick read" list of ideas about "trying the case." But just remember, these are someone else's ideas. Consider them, but do what works best for you.

They are categorized below as follows:

A. OPENING STATEMENTS, CLOSING ARGUMENTS AND REBUTTAL

B. DIRECT EXAMINATION

C. CROSS EXAMINATION

D. DEALING WITH THE EXPERT WITNESS

A. OPENING STATEMENTS AND CLOSING ARGUMENTS

It's easy to look back at a successful trial and assume that it was your eloquent argument that cinched the deal and brought the jury along to your way of thinking. In fact, there is no magic way, nor any "cookbook" way, to "teach" someone how do it right. There are so many factors working on the jurors' minds when they decide the case, it is difficult to say what effect the opening or closing had on them.

Many of the articles on the subject state that 80% of jurors decide the case in the opening statement. This was based on a University of Chicago study of jury trials. Suffice it to say, if you convince the jury of your position in the opening, and if they carry it with them throughout the trial, then there's a good chance that they will support your position in the jury room. That is the goal of a proper opening statement. You can certainly foul it up by not coming across with

the evidence you promised them in your opening. The same is true for the closing.

Most authors suggest that we keep the following concepts in mind during the opening and closing:

Cicero's Maxims of Persuasion

Marcus Tullius Cicero, the greatest advocate of the Roman world, boiled down persuasion into 6 maxims:

1. Understand what reaches the mind and moves the heart.
2. Understand motives to understand behavior.
3. Move from the particulars of a case to universal truth.
4. Draw the audience into a story.
5. Expose the illogic of the opponent.
6. Communicate your passion and logic in the language of the listener.

Persuasion

Lawbooks tell us that the purpose of the opening is to provide the jury with a preview of the trial so that they will have some idea of what the case is about, what they will be seeing and what they will be called upon to decide.

We all know, however, that the most important goal of opening and closing is to capture the minds of the jury and fill them with your theory of the case. Pure and simple.

The persuasion process does not begin when you stand before the jury and say, "Ladies and gentlemen of the jury," it begins the first time the jurors see you. That is usually when they are herded into the courtroom, but they might even see you before that - like when you drive up to the courthouse in your Mercedes Benz (or in your pickup truck with a Marilyn Manson bumper sticker on it.) Think about it.

To persuade you need:

1. To be listened to;
2. To be understood; and
3. To be believed.

You are trying to make a favorable impression from the beginning. Your impression on them may have begun when you forgot to get that haircut or when you got dressed the morning of trial.

Voir Dire - In many jurisdictions, the first time you get to address the jury is not the opening statement; it is in the voir dire. You may be permitted to stand before the jury and

give them a “thumbnail sketch” of the case, introduce the parties, and tell them briefly what the case is about to see if anyone has any knowledge of the case. Many lawyers meticulously prepare their openings and closings and stumble through the first words they utter to the jury. Remember, you are trying to persuade them from the start. Prepare your comments you will present at the beginning of the voir dire as persuasively as you can. Prepare this “thumbnail sketch” as carefully as your opening.

The First Minute

The first minute of your opening statement should set the story, draw the jurors into the picture, set the theme and provide the framework for the jurors to understand your case. The opening statement is the time to draw the jury into your story and your visceral theme. The first minute is the best opportunity to capture the jurors attention. Attention spans are extremely short and all of us have been raised on television sound-bites. Television commercials approximate 30 seconds. Any case can be boiled down to a simple story and unified with a simple theme. For example, the automobile intersectional collision case for the plaintiff can open like this.

> This is a case of success, failure to yield and 15%. Why success? . . .because Jim Gable was a success at home, in his work, and in his family life. That all ended on June 6th when that defendant failed to yield to Jim's car. Why is failure to yield important in this case? The reason is that defendant was in a hurry and refused to follow the rules of the road. I also said this case was a case of 15%. Unfortunately for Jim Gable, he falls into the 15% of the people who, after having dislocated an elbow, never get the full use of their arm. We are here, members of the jury, to ask for your help to tell that defendant to own up to his responsibility and to pay the debt that is owed because of his failure to yield."
>
> At 2:00 a.m. on January 15, Mary Jones was asleep at her apartment. At 2:02 a.m. she awoke and thought she heard something. She listened again and then tried to go back to sleep. About a minute later, she heard a noise. She listened again and heard a board creek in the hallway of her apartment. She knew then that she was not alone in her apartment at 2:00 a.m.

Preparation

Read the pleadings. Read the pretrial order. Read your jury charges and the verdict form. Master the facts. Read all of the depositions and witness statements again. Don’t depend on the deposition summaries your paralegal did for you. Review all discovery materials. Outline the opening. Choose an order, i.e., chronological, reverse (from today back to the accident), flashback or flash forward. Plan the closing when you plan the opening to be sure that they will mesh together.

Focus

Boil your case down to a few sentences which will tell "What this case is ABOUT."

"This case is about a bulldozer with a defective transmission that backed over Mr. Jones and killed him."

“This case is about a man who knew the ladder was bent but used it anyway.”

“If the company would have spent 37¢ this accident would not have happened.”

Order of Proof

Have a written order of proof. Every cause of action has certain elements which need to be proven. List them in writing. Put them on a big chart on the wall in the room where you are preparing for the trial.

List exactly what you need to prove. List how you are going to do it.

If it is a personal injury case, you need to prove liability, causation and damages. What are the elements of liability? Who will your witnesses be? What documentary evidence do you need to introduce? Through which witnesses? What evidentiary problems do you have? Do you need more than one witness to get it in?

Be Yourself

In giving the opening, if you are not Clarence Darrow, don't pretend to be. Don't try to give someone else's opening, as good as you thought it was. Everyone has their own style, and you will be more comfortable being yourself and not acting. The sort of person you are will inevitably make itself known. Being comfortable in the jury's presence, combined with an ability to explain to them what the case is about, gives you credibility. There is no one way to learn this; it comes with practice, with experience, and with a sense of self.

Dress Correctly

If you don't dress like this is a serious matter, that will come across to the jury. If you don’t think it’s important, neither will they.

Rehearse

Try out your argument on your family and on other lawyers. Lay persons have a keen sense of right and wrong. They also will tell you if you are speaking above the level of an average person or if you are talking down to them.

See if your arguments work. Sometimes we get too close to the case. We want to win so badly that we find what we believe to be THE argument. Sometimes that argument is ridiculous, but we are desperate so we don't know it. Try it out on someone who is not so close to the case.

Be Brief

Don't lose the jury by a giving a long speech about every aspect of the trial. The more organized you are, the shorter the opening and the more effective you are. Cover what is necessary, but remember, today's juries have been conditioned by L.A. Law, Law and Order and Ally McBeal. They expect a short, crisp, to-the-point opening.

Take the Wind Out of Your Opponent's Sails

Expose your weaknesses first. You know that this case has a big problem. If it didn't, it would have settled by now. Deal with it. You know where your case is weak. Tell the jury before your opponent does. She will if you don't. Turn your negatives into positives if you can.

Use Strong Words

Use strong words, not weak words. Don't say (as most of us do), "I suggest to the jury that we intend to show that the plaintiff had knowledge that the ladder was bent and used it anyway." That sort of language implies that you are only suggesting this to them for their consideration - that they can take it or leave it. Then it suggests that you INTEND to prove all of this - so they now have to wait to see if you do. Instead, just tell them, "He knew it wsa a broken ladder."

Instead of saying, "There are two sides to every story and let me explain what the evidence on behalf of my client is . . ."; say, "Sometimes things happen which are the fault of no one and sometimes it's the fault of the injured person. . ."

Look at the Jury

Maintain eye contact with them. Look at each individual juror. Watch their body language. Many times you can tell if they are with you by looking at them. You may not be able to tell if they are with you or against you, but most times you can tell when you are boring them.

Be Conversational

Don't give them a speech. Talk to them.

Notes

Many modern trial advocacy teachers suggest that you give your opening and closing without notes. If you are able to do that, then you should. If you need notes (and most of us do), then you should do what is necessary to minimize the AMOUNT of notes that you need. Put your opening in outline form on one or two large index cards. Don't get up with a transcript or 30 pages on a legal pad and attempt to read it to them.

Artist's Distance

While making brush strokes, a painter is too close to his work to evaluate it. To properly evaluate a painting, the artist has to back up and look at it from across the room, from where a viewer will see it. The same is true for a trial. The jury knows nothing about the case and is looking at it from a different perspective. We have lived with this case for years. We know how the accident happened, the names of all of the people who were on the jobsite and for whom they worked. The jury knows nothing. We have to try to look at it from their vantage point and see if we are being clear and logical.

Personalize your client

Personalize your client, depersonalize theirs. Your client is "Billy", theirs is "International Valve Corporation," or their client is "the plaintiff" and your client is "Mr. Jones," the nice elderly gentleman with grandchildren who founded International Valve Corporation.

Explain legal terms

Don't throw around terms like "negligence," "proximate cause," "standard of care." Parents, upon hearing the crash of a cookie jar in the kitchen, don't rush in and ask the kids, "Who was negligent here?" People don't talk about things in these terms. Use "fault," "responsibi1ity," "duty."

Planning

Plan a response to your adversary's opening. While preparing their opening statements, many inexperienced trial lawyers make the mistake of not giving adequate consideration to how they will respond to their adversary's opening. Try to guess what your opponent will bring up in his opening and be prepared to respond. (This is where your knowledge of the case becomes crucial.) This will eliminate your becoming flustered and the opposing counsel taking advantage of the situation.

Courtesy

Be courteous to your adversary. Like most people, jurors do not like to deal with hostility or anger. Do not demean, insult, or bait your adversary. You are inviting the jury to dislike you and sympathize with the other side. Even in the most hostile litigation, there is room for courtesy and basic decency before the jury.

Discussing Damages

Get a commitment in voir dire that the juror has no problem in awarding monetary damages or awarding the plaintiff no damages if he does not prove his case.

The parties must discuss damages in the opening. Although many lawyers do, there is no reason to limit the majority of your opening statement to the liability aspects of the case.

The plaintiff's attorney should take considerable time in actually laying out in detail how the injuries occurred, what the injuries are, how they were treated, and the resulting pain and disability. He should also discuss future problems and the very important elements of special damages, such as past and future medical expenses and past and future loss of earnings.

"The Hook"

Many authors on the subject suggest the use of a "Hook" to get the jury's attention from the beginning. The hook is simply an attention grabber. It may be a title, a slogan, a word, a catchy phrase, a logo, a jingle, or whatever. It may be simply the description of an event, or a theme of the case. The hook is designed not only to get someone's attention, but to stick in the mind. It should be image-evoking, easily remembered, and symbolic. Examples of hooks used in advertising might be Coca- Cola's "the real thing," Pepsi-Cola's "The Pepsi Generation"; in literature, Dickens' "It was the best of times, it was the worst of times. . ."; in oratory, Lincoln's "Four score and seven years ago. . . ."

The hook is an excellent device to pique the jurors' curiosity, arouse their interest, and bring focus to your case from the earliest moment.

In opening the opening, if you can use a hook, a direct approach, an attention grabber that will not only stimulate the jury's interest and curiosity, but will have a lasting effect, even possibly sloganize the case or its major theme, you will be off to a great start, possibly even insuring a great finish.

An example of a hook in a child death case would be as follows:

> On March 5, 1979, Johnny Jones was five years old. It was his last day on earth. How he died, and why he died, and why he never should have died is what

this case is all about.

A hook in a child burn case might go as follows:

> On April 6, 1979, Amy Jones was going to have her seventh birthday party. But she never had it, because on April 5th, her dress caught fire from the kitchen range, and burned her to death.

You can devise your own hooks from any given set of facts. Other examples are as follows:

> This is the story of an uneven contest - between a forty-five pound little boy and a two-ton truck. On August 8, 1980, Jimmy Jones, six-years-old, was playing ball with his friends. He went out in the street to get the ball and was run over by defendant's truck. He was crippled for life. But never should have happened, and I will tell you why.

> "June 8, 1979 started out like any other day for Mary Green. She got up early, watched a beautiful sunrise, and went to work. By the end of the day, she was blind. She would never see another sunrise. What happened to her on that terrible day, and why it never should have happened, is what this case is all about."

> [Quoted from Matthew-Bender's Art of Advocacy, Section on "Opening Statements".]

Policy

Juries want to feel that they are doing the right thing for the right reason. They feel that they are the policymakers for our society. We should therefore give them a good policy reason why they should decide the case in our favor - a reason that fosters societal interests. There are certain principles that Americans live by. Pick one as a theme - one with a broader social purpose than the facts of your case.

Storytelling

Structure:

Every story that we tell has a structure to it. Sometimes we structure our stories on what happened yesterday, what happens today or what will happen tomorrow. When we try cases it's important for us to structure a story and then retell that story in voir dire-capsulize it. Tell that story in opening. Tell that story again through the witnesses, in direct and cross, and again in closing. Each time it is told the story has nuances added to it, information added to it, but the basic story is the same.

One of the most compelling ways to tell a story is in the present tense, because we actually carry the listener with us. Instead of saying "he walked up the stairs," we say " he walks up the stairs, each step brings him closer and closer."

Another structure is introduction, body and conclusion. Every story has a beginning and a middle and a conclusion. As we begin the story, we try to capture attention in the first three minutes and then we tell the story itself and then we conclude with a punch.

We can use five W's to structure the story. Who was there, *when* did it happen, *where* did it happen, *What* happened, and Why did it happen.

Nursery Rhymes, Fairy Tales and Fables:

We communicate numerous ways and we do so from an early age. Nursery Rhymes, "Jack be nimble, Jack be quick." "Little Miss Muffet sat on a tuffet." Fairy tales; "Snow White and the Seven Dwarfs." There is always a Hansel and Gretel, the good children and the bad witch . . . Aesop's fables are rich in example. The Troll that lives under the bridge is another apt villain from a folk tale.

Sayings and Common Sense Maxim:

Louis L'Amour has an old western saying, "You never know how sweet the water is 'till the well runs dry." That saying seems to convey, in story form, that "you really never know how good your health is until you have lost it."

Folk Songs:

Old folk songs are great. Here is an Irish folk song for example; " The Wild Rover;" "I've been a wild rover for many a year and I spent all my money on whiskey and beer. I went down to the ale house I used to frequent and I told the landlady all my money was spent. No, ney, never will I be a wild rover no never more." A story is told in lyrical form.

Pop Music:

Country and western music is filled with stories. One of the reasons that country and western lyrics appeal to a broad-based listening public is that they are in story form and easy to remember and recite. Charlie Pride has recorded a song, "No One Knows What Goes On Behind Closed Doors."

Personalization and Pronoun Use:

Storytelling can move six or more individual jurors to action. It can bring them into an atmosphere in which they originally felt excluded. The use of words, such as, "we", "we know," "we see," "we understand," - we is a pronoun of inclusion. It personalizes. "They," "them",

"those," are pronouns of exclusion. The words exclude the other side. "We" puts the jury and the trial lawyer on the same side of the issue. "They, them" and "those" are on the other side. The words that we use, the pronouns that we use, are extremely important.

The Rule of Three:

"I came, I saw, I conquered." We remember that. It grabs our attention because there are three items said rhythmically.

Repetition:

Repetition is the exciting reconstruction and redundancy of ideas. We are helped to remember by repetition. We don't necessarily repeat the same words over and over, though we can. But we repeat the same ideas in the same sequence. Repetition also gives structure.

Revelation:

In a story we don't reveal everything at once. Remember the Wizard of Oz? We are lead to believe that the wizard is all powerful. In the story he is expected to give the tin man a heart, the scarecrow a brain, and the lion courage. Dorothy wants to go home. All are terrified and mystified by the bit voice of "The Wizard" and at the end of the story, Dorothy comes over and reveals that the Wizard of Oz is a helpless charlatan. And we say "Oh..." Build the suspense, the expectation and then revelation.

Clustering:

Theme development is important. Cluster one theme on top of another: "good and bad," "right and wrong," themes that are universal, theme to which we all of us relate.

Clustering is also the use of more than one rhetorical technique at the same time. For examples, if you combine a memory device (the first letter of each word of your theme) with the Rule of Three - (using only three concepts or three words to express a theme or argument) then you have "clustered" two devices. In the O. J. Simpson trial, the defense team developed a chart which attacked the physical evidence as "3D: Discrepancies, Distortions and Deceptions"

Rhetorical Questions and Empowering:

Don't answer all the questions in your story. Sometimes leave questions for the jury to answer. Let the person who listens to the story answer the questions. The listener becomes empowered. Give the jurors the power. You may want to say, " the judge doesn't have the power, the President of the United States doesn't have the power, I don't have the power. You have the power to answer the questions in this case. We can just put before you what happened. What are the facts here?

"Why is it this man was where he should not be? Why didn't he follow the safety

procedures? I don't know the answer but the answer rests with you."

Analogies:

Analogies are universal common sense examples which relate one experience to another. We might analogize to a baseball game, particularly if we have a juror that likes baseball.

Common Language:

Try to use the language of the people. Don't talk down. Don't be condescending. There is no reason to use words like "subsequent" and "precedent" and "proximate" when you can say "after" or "before" or "close to." Picture yourself at a social event with two or three of your friends and tell what happened at the office during the day. The language you use is "common."

Demonstration:

When we tell a story, we unconsciously demonstrate our feelings and what we believe. We reach out. We want to touch and we want to appeal by sight, sound and bring all sensations to the listener. We can't bring the smell of an apple pie into the court room, but we can describe it. We can say, "My mother bakes a French apple pie and I can taste the cinnamon and I can smell the aroma of apples coming through the crust. Even though mother hasn't baked for eight years now, I can still smell those apples, taste that cinnamon." So, we recreate with our voices and gestures our story which in telling also appeals to the senses of taste, smell and touch. We also use visuals, movement and models.

Primacy:

What people hear first they tend to believe longer. That is why it is important to capsulize the story. To get the case reduced to two or three sentences. The kernel of the case, its bare bones, can be expressed in the form of a telegram. For example: "Foreign company ships uninspected defective pipe to plant. Welds on pipe break, no safety valves, pipe splits open. Ammonia escapes. Bums John to death." The story is the first story heard by the jury on Voir Dire and in Opening.

Recency:

What people hear last they remember better. The structure of the case may begin and end with the same capsule of the story - repetition and consistency are then added to the device of recency. Plaintiff has the advantage where plaintiff argues last in rebuttal or final argument.

Sequencing:

One variation of primacy is the notion that if three words or ideas placed in sequence, the first word has the most impact and determines the listener's frame of understanding. For example, if you say, "John is hot headed, bright and mild mannered" most listeners will think of

John as "hot headed."

Mnemonics:

Memory devices which help us to learn and remember are also employed to assist the listener's memory. Acronyms can be particularly helpful. Using "the theory of three" reduces the case, or a part of it, to three words and use the first letter of each word to form a memory device.

Universal Heroes and Universal Themes & Clustering:

In arguing to the jury, in telling the story, identify your cause or theme with an identifiable universal hero. (David and Goliath - big v. small)

Positives:

Positives are more memorable and convincing than negatives. "It is true that he was a highly skilled worker," rather than "It's not true that he wasn't highly skilled."

Parallelism:

A rhetorical device in which words and ideas have memorable impact according to the structure in which they are written or spoken. For example: "The captain of the ship, the pilot of the airplane" are parallel statements as are the "shepherd and his flock," "teacher and his class." Parallelism adds eloquence and elegance to analogy, maxims and other figures of speech. It creates a rhythm with the spoken word and also adds structure.

Disclosure of Weakness - Strong-Weak-Strong:

In any presentation the weakness should be explored and disclosed by you first. You have the opportunity to put the weakness in the best light, to disclose and take the sting away - and to use a weakness as a strength. Give a strength, disclose a weakness, end with a strength. Witnesses follow the same order on direct; the strongest witnesses go first and last. It is better for you to deal with the weakness in the case, than to have your opposition surprise the jury with it when it is too late for you to handle.

Closing Argument

Start strong. When you stand up to give your final argument, you have the full attention of each juror.

You need a dramatic opening.

Considering starting with your theme and them pausing several seconds to let that them sink in.

Challenge your opponent on the weaknesses of his case. By asking a series of rhetorical questions during closing argument, you can force your opponent to explain the weaknesses of his own case. For example, you might ask “If the accident occurred as defendant claims, why hasn’t he produced one witness to verify his version of the facts?”

Back to the Opening

Opening statements are usually recorded. It might be helpful to have the openings transcribed before closing. Then you can review what you said you would prove to the jury, explain how evidence and testimony introduced during the trial supports your opening, and tie it all together for them in the closing.

Conversely, if opposing counsel overstated what she was going to prove in her opening, you can use this transcription to point that out to the jury. Example: "In his opening statement, defense counsel told you he would introduce testimony and evidence to prove that the accident happened in this way . . . In fact, he stated exactly as follows. . . However, you will recall that Officer Smith testified that. . ., and the eyewitness at the scene of the accident testified as follows. . ."

Closing is the last opportunity for you to testify. Use it to your best advantage.

It is a chance to sum everything up and persuade the jury of the reasonableness of your position.

The theme or "hook" that you chose in the opening should be carried forth in the closing, emphatically urging the jury to decide the case the right way, your way.

The closing should put the elements of the case together into a simple understandable theory of your case. It should be a fitting conclusion of the continuum that began with your opening statement.

Argue Your Case, Not Theirs

Many times, an attorney will spend much of his allotted time arguing the negative points of his opponent's case and ignore the positive points of his case. It is best to take a positive approach. Stress your own strengths and attack your opponent on a few major points. An excessive argument of your opponent's weaknesses may lead the jury to believe that your own case is weak. Tell the jury why your client should win, not why your opponent should lose.

Challenge Your Opponent on His Weaknesses

Ask pour opponent to give an explanation of the weaknesses in his case, i.e., "I ask Mr. Jones to stand before this jury and tell us why. . ." Just pick an indefensible point and challenge him to explain it.

Jury Instructions

Before the closing, you should have access to the jury instructions. Tell the jury what the judge is going to tell them about certain key issues, i.e., comparative negligence, and when the judge uses the very language that the jurors have heard you use in your summation, they are apt to remember it. It also aids your credibility when you tell them, "The judge is going to tell you . . ." and he does, using the exact language you used.

Simplify the Instructions

The judge is apt to hurriedly run through the instructions. Emphasize the important ones in common sense everyday language so that the jury will be able to understand them and remember them.

Quote from the Record

If cost effective, order daily transcripts. If this is not cost effective, order transcripts of the key witnesses. If you can't do that, at least write down verbatim the damaging things your opponent has said. Argue the exact wording of key evidence to the jury in closing.

Anticipate Jury Instructions.

In most jurisdictions the judge will give you a copy of the jury instructions prior to your closing argument. You should interweave the judge's important jury instructions into your closing argument and quote what the judge will tell them. First, it tells them what the law will be. Second, when the judge reads the instructions to them they will be reenforced as to the important parts of law and third, it will add to your credibility in that you told them what the judge was going to tell them and in fact he or she did.

If there is one very critical piece of physical evidence in the case, consider starting your closing argument by putting that piece of evidence on the bar in front of the jury box. Pick it up. Look at it from all angles and put it down again. Then say, "This is the most important witness in the case. All of the other evidence simply helps you understand what this witness is saying and this witness is saying . . ."

Drive Home Your Theme

Everything you do during the trial should have already supported your theme. Every successful political campaign centers around one theme. Remember "It's the economy, stupid."? Every good advertising campaign revolves around one theme. The energizer bunny just keeps on going and going and going. Find a theme for your trial. Use it in your opening and reenforce it in your closing.

> Many lawyers use phrases that they have heard other attorneys use without any specific purpose. Perhaps the most common is: "This is final argument. Final argument is the attorney's chance to discuss what he believes the evidence has proven." If you start this way, you've just wasted that wonderful first ten seconds of rapt juror attention with little hope of regaining it. Let the judge tell the jurors about the purpose of final argument. If you're statement does nothing to add to your credibility or support or your them, leave it unsaid. Do not make statements that detract from your authority. Often lawyers say "what I say is not evidence." Why tell the jury not to pay attention to what you're saying.

> The greatest weapon in the arsenal of persuasion is the analogy, the story, the simple comparison to a familiar subject. Nothing can move the jurors more convincingly that an apt comparison to something they know from their own experience it is true. The reason is simple. First, good stories command the attention for the audience. They want to find out what happened. Second, analogies challenge an audience to test their appropriateness to the point made. When someone tells a story to prove a point, it is almost impossible to resist testing it to see if it fits the situation. The net effect is that the audience perceives that you are correct. It reasons the problem through and reaches the conclusion on it's own. Analogies are a distinguishing mark about standing final arguments. They lead juries to draw their own conclusions, which they believe more fervently than if they had merely been told what conclusion to reach.

Analogies can help solve this communication problem. When you choose stories to argue for you, it is much easier to tailor them to suit the relative importance of the issue. Take stories about circumstantial evidence. First, suppose that circumstantial evidence is a minor point, but one that must be dealt with. Here is how you might approach it.

> Well, you have heard the defense attack our evidence and say it is 'Just circumstantial.' [pause] 'Just circumstantial.' [pause] You know, the people upstate have a saying about circumstantial evidence. They say that if you go into the woods and find a turtle on a tree stump, you know he didn't get there by himself.

> There are, on the other hand, more involved circumstantial evidence stories for use when it is a bigger part of the case. Craig Spangenberg's "Robinson Crusoe" is one:

> This reminds me of my father reading *Robinson Crusoe* to me when I was a little boy. Remember when Robinson Crusoe was on the island for such a long time all

alone? One morning he went down to the beach and there was a footprint in the sand. Knowing that someone else was on the island, he was so overcome with emotion, he fainted.

And why did he faint? Did he see a man? He woke to find Friday standing beside him, who was to be his friend on the island, but he didn't see Friday. Did he see a foot? No. He saw a footprint. That is, he saw marks in the sand, the kind of marks that are made by a human foot. He saw circumstantial evidence. But it was true, it was valid, it was compelling, as it would be to all of you. We live with it all of our lives. So let's look at the facts of this case-for those tracks that prove the truth.

It is a good story about circumstantial evidence, and it deserves a little extra comment. Not only does this analogy explain its basic point, it serves another function as well. It tells you that the lawyer who is telling the story had a father who loved him and read to him. At the very start there is a subliminal picture of a boy sitting beside his father, listening raptly as his father reads *Robinson Crusoe.*

Do Not Stretch

To the extent possible, use the exact words the witnesses used in their testimony and what you proved in your case. This will reenforce the message that you are the only attorney in the courtroom who can be trusted.

Write Your Closing Argument as the Trial Unfolds

Keep track of key points that you are making with your exhibits and witnesses. When a witness makes a particularly damaging statement, write down the exact words used by the witness and read them to jury off your legal pad in your closing argument. Accurate references to precise testimony does wonders for your credibility.

Reference Your Opening Statement

Be sure to include the points that established that you kept your opening statement promises about evidence that would be introduced and demonstrate that your opponent did not keep promises about what they would introduce.

Tell the Jurors Exactly What You Want Them To Do

Many lawyers understandably feel uncomfortable about discussing damages with the jury or telling the jury to send the plaintiff home with no recovery. Jurors seek guidance. They want to know what you want them to do. Remember they are unfamiliar with this process. You have spent either days or weeks or months trying to convince the jury that your position is correct and developing a relationship of trust. You must tell them at the conclusion of the case what you

want them to do. If it is a personal injury case, you should show them a copy of the jury verdict form (preferably blown up so they can see it) or ask the judge to pass each of the jurors a jury verdict form so that you can reference it and explain to them that this is how the case will be concluded, but their filling out this jury verdict form and then go through it to show them how you want them to fill it out.

Finish Strong

Just as it is critical to start strong, it is imperative to finish strong. Your final argument should build to a climatic and dramatic ending.

Rebuttal

If you represent the plaintiff, the very first part of the argument that should be prepared is the closing rebuttal argument. This is the point in the trial where the plaintiff gets to say anything within the bounds of law and ethics and whatever he or she says will be totally unrebutted by any argument from the defendant. Most lawyers waste this incredible opportunity. They spend their few minutes of rebuttal talking about what the defendant argued in its closing. What the plaintiff should do at the beginning of his rebuttal is to reenforce his theme, then briefly discuss the matters brought up by the defendant in its rebuttal and then rapidly go back to the theme and finish with an analogy which exemplifies what the case is all about. We suggest that the first thing that should be written is the analogy that should be used in the closing rebuttal argument of the plaintiff.

The Final Five

No matter what else happens in argument, never give up the final five-those last five minutes of rebuttal.

In view of how important and difficult it is, it is surprising how little attention rebuttal is given by writers, speakers, and trial advocacy training programs. Pick up the typical book on trial advocacy; see how thoroughly it discusses rebuttal. Scan the continuing legal education brochures that describe the lecture series on trial advocacy; try to find rebuttal. Go to an intensive workshop on trial advocacy for one, two, or three weeks; see how much time they spend on rebuttal.

It reflects what lawyers actually do with rebuttal. Some have developed it into nearly an art form all its own. But most lawyers just use it for a few minutes of repetitious urging, going over what they have already said several times before. They use it as a reprise of the sermon they have already preached.

Thousands of lawyers know the advantages of primacy and recency. The chances are, if they have heard of one, they have heard of the other. They understand primacy-how the opportunity to go first is an advantage because it improves the chances that an argument will be accepted or that a fact will be believed. They carefully fashion persuasive opening statements and direct

examinations to take advantage of primacy.

And they understand recency, too. They know that the last word continues to ring in the minds of the jury, and is most easily recalled. But they do not prepare redirect examinations or rebuttal arguments to take advantage of recency. Instead, they rely on the whimsical (and lazy) gods of momentary inspiration to supply magic words that will turn everything around.

If you want a brilliant rebuttal, you should prepare it before trial.

Anticipate Rebuttal

Meet the arguments in advance. Do not just respond to your opponent's first argument, look forward to his rebuttal. If you do it right, you can even get the jury to start thinking of themselves on your side:

> This is the last time I will be able to talk to you bout this case, and there is no much more that I would like to say. The plaintiff's lawyer, Mr. Rawlings, is going to get to talk to you one more time. The rules of this court let him get the last word, and I do not get a chance to answer what he says. So there is something important that I want you to do. You know that there will be things he will say that I would answer if I could. And you know what all the evidence is in this case. So please listen carefully to everything he says, and whenever he makes an argument, make the response I would make if I could. And if you do that, I know that you will be fair.

B. DIRECT EXAMINATION

You want the jury to believe your client and to believe your client is credible and therefore a truth teller.

Cases are won on direct examination and preserved on cross-examination.

Generally you will win your case because it is strong, not because the other side's case is weak.

Let the witness be the center of attention. Your role, as the lawyer, is that of a catalyst. Let it look like a conversation. Questions should be short.

Your client should give narrative answers on direct examination and only "yes" or "no" answers on cross-examination.

Like everything else in life, direct examination has a beginning, a middle, and an end. With direct examination, each must be prepared.

Most lawyers start by accrediting the witness. This means introducing the witness to the jury, humanizing him or her, and easing the witness's tension. It is more important than most of us think. Jurors tend to be very attentive when a witness first takes the stand. How you accredit your witness can keep the jury awake and interested or drive it into a coma.

“Please state your name for the record" is the invariable opening of direct examination on television. Unfortunately, the phrase is heard in real courtrooms, too. It is not the record that will decide your case; it is the jury. "Tell us your name" would be better. With clients and critical witnesses, "introduce yourself to the jury" is a good way to start.

Witnesses are not machines under oath; they are people. Let the jury know that. Let them feel it. There is something unique and fascinating about each person. But you cannot communicate those qualities to the jury unless you have already discovered it-another part of your preparation.

Unless the witness is a professional testifier, terror is likely the witness's dominant emotion. Ask a few questions to ease that feeling. Ask things that cannot be challenged by the opposing lawyer and the jury. "Where do you live," "Where do you work," "Are you married," "Do you have any children ... .. Where do your children go to school" are a few such questions. Even if the witness goofs in answering these questions, no one else will know.

A juror's attention can be maintained only as long as the rear end can endure. This rule of thumb ought to guide you. Keep your direct examination short and get to the important matters early. While reading this article, you may get tired and decide to stop and pick it up later. Jurors cannot stop trials. They hear each witness once and that is it. If you bury the important elements in a mass of testimony, they will be missed easily.

To keep the important elements at the front, you need a well thought-out approach. Some authors recommend a determined combination of the chronological and topical. You want to recreate something for the jury that can be recalled easily. Since you cannot recreate it as it actually happened, try to do it the way people naturally recall events. Usually one or two happenings dominate and are recalled first, before we put the event together chronologically. The chronology puts the dominant happenings in a context for us to evaluate. We get confused when we try to combine too many events at once. For organizing a direct examination, the events are the topics, the dominant happenings are the critical elements of these topics, and the chronology is the context.

The best direct examination will begin topically. Many witnesses are only going to testify about one topic or event. Others may testify about several. Approach each topic or event separately. Announce to the witness and the jury what the topic is. This is not so much a question as it is the foundation or predicate. for the question. Once you are into the topic, bring out the dominant happenings; then go back to the chronological context.

Prepare Your Own Witnesses

At some point you will be tempted to let someone else prepare your witnesses. Resist the temptation. Preparing witnesses is not fun, but the time spent with the witness is valuable for you, and it sends a message that you think the witness is important. The success of your examination will be directly proportional to the amount of time you spend preparing the witness.

It is important to let the witness know the questions you will ask to illicit the critical responses. If you have written down the key answers you need from the witness and the questions to go with the answers, this job ought to be easy. Of course, this method assumes you already know what critical answers this witness has to offer. Be careful however, not to feed witnesses answers of your making. You want to help witnesses make a clear presentation, not to put words in their mouths. If you do the results will be stilted and credibility will suffer.

Examining a Witness on Direct

Direct examination is not the same as having a conversation, but it should sound like one. Do it right, and you guide the witness every step of the way - without ever sounding like you are putting words in the witness' mouth. You don't want to sound like you are telling the witness what to say for three very good reasons: First, leading questions are an open invitation for your opponent to interrupt the witness' testimony. Second, leading on direct sends the message that the witness is not a good source of information and needs to be told what to say. Third, leading on direct also tells the jury that the witness is happy to say whatever you want which hurts the credibility of both you and the witness. So you want to guide the witness - direct where the testimony goes, point out the areas that need filling in with more detail - without looking like you are testifying. Doing all that so that it sounds conversational is one of the reasons why direct examination is much harder than cross. One method of doing it properly is using the headline method of direct. Before each new series of questions, announce the topic - the headline that tells the witness (and everyone else) what the subject is going to be. It points the witness in the right direction and lets everyone know where you are going. For example: "Mr. Dugan, I'm going to ask you some questions about your association with Mable Schuster. How long have you known her." You can also use the headline to get wandering witnesses back on track, so comfortably that they may not even notice. "We'll get to your engineering work in just minute, Mr. Dugan. Right now I'd like to ask a few more questions about you and Ms. Schuster."

The Paragraph Method of Direct Examination

One author suggests "The Paragraph Method of Direct Examination." Here's how it works.

When you organize direct, divide it into separate topics. These are the oral paragraphs that make up the entire direct examination, Just like written paragraphs, they are separate

groupings of information and ideas.

But unlike written paragraphs, oral paragraphs do not stand out because of indentation, capitalization, or punctuation. To be sure, you can do some of this with your pace and tone of voice. But if you really want your oral paragraphs to make a difference, they must stand out because of what you say as well as how you say it.

The key is the topic sentence. The technique is simply to announce each new topic before asking questions about it. For example, suppose you have a case against a hospital that ignored a seriously ill cardiac patient who was waiting in the emergency room. You call an expert to explain that the way the hospital was organized let that happen.

"Doctor, we need to understand how the Mercy Hospital emergency room was set up to handle heart attack victims." Then you start asking specific questions, such as, "Did the emergency room have any specific plan for heart patients?" and, "Was anyone responsible for checking on people who were waiting to talk to the nurse in charge of admissions?"
Wait a minute, you say. You are not a witness. You are not permitted to testify. You are just supposed to ask questions. Isn't a topic sentence an improper comment of counsel?

No. First, the topic sentence is not an editorial comment on what the witness says. Second, it is not even a leading question. Even if it were, it is preliminary, and you are permitted to lead on preliminary matters on direct examination. (Rule 611(c) Fed. R. Evid.) Third, the topic sentence is proper since it gives meaning to the questions that follow.

Like a boldface headline, the topic sentence stands out. It divides direct examination into manageable bites the jury can chew and digest. It also adds interest to what might otherwise be the continuous drone of direct examination.

But that is just the start. The paragraph method does a lot of other good things that you might not think of right away.

First, it helps the witness stay on track. Because of the formality of the courtroom and the stilted way in which many lawyers ask questions, witnesses often wonder what the question is calling for anyway. If on top of that You ask a series of questions without telling the witness the general topic, confusion is almost guaranteed.

Second, the paragraph method helps the judge and jury understand the examination. Unlike you, they are hearing everything for the first time. If they are not told what topic is under discussion, they have to figure it out for themselves, which takes attention away from the details they need to hear. Besides, organizing and labeling information requires some genuine intellectual effort.

Third, breaking direct examination down into separate topics helps you keep track of all the information you need to cover. When the subject is finished you know you are ready to move on to the next. Needless repetition is reduced, and testimony becomes lean and more vigorous.

Fourth, topic sentences make it easier for you to ask simple, nonleading questions on direct examination. Go back to the doctor who was telling us about Mercy Hospital's emergency room. You announce a new topic: "Doctor, I want to ask you about your connection with Mercy Hospital." See how easy it is to ask follow-up questions: "Have you ever been on its staff?" "When did you start?" "How long did you stay?" "Why did you leave?" "Where do you practice now?"

Finally, visible and audible organization conveys a powerful message. It says that not only do you know the material, you have thought about it. You understand it well enough to make it clear to other people. You are the one who can be counted on to call witnesses who can be believed and make arguments that can be trusted. Impressions like that are worth developing

C. CROSS-EXAMINATION

Ask leading questions
Ask leading questions
Ask leading questions

Do not conduct a tedious cross-examination on every disagreement between you and the witness. Instead, conduct a focused examination that makes two or three memorable points instead of leaving the impression that you've performed a comprehensive quibble-fest leaving no mole hill unexplored.

Following the order of direct examination in your cross actually makes it a subtle reprise of the witness' direct testimony.

You should only choose strong points, fights you can win that will support a simple coherent plan that you should have worked out before you came to court. There are three basic and distinct approaches you want to consider:

1. Attack the witness
2. Fill in the blanks - that is tell the rest of the story
3. Use the witness constructively to prove part of your case.

When in doubt leave it out.

Use headlines. For example, "Mr. Randall, we're going to talk about three different subjects. First ______, second _______, third ________. And we're going to take them one at a time."

Avoid open-ended questions that begin with words how and why. Ask for only one fact per question. Keep questions short, precise and simple. Ask about the facts, not about conclusions. The witness may not agree with your conclusions and it is foolhardy to ask a

question that allows a witness to state his or her conclusion. As a question only if you already know the answer or you don't care what the answer is. Never argue with the witness. It only emphasizes negative testimony.

Don't repeat what was covered on direct. This only reemphasizes the opponent's constructive information.

Another Ten Commandments of Cross-Examination by Charles L. Becton, Fuller, Becton, Billings and Sislifkin, Raleigh, North Carolina:

1. Have a theme - have a purpose. You should not ask questions merely because it is your turn. Every question on cross-examination must lead to a response that helps you in your closing argument.

2. Assertions and Agreements - Asking questions is a direct examination technique. Never ask a question on cross-examination. Rather, make assertions and seek agreement. For example, "The sun rises in the east, doesn't it?" is an assertion that seeks agreement. If the witness has only one option - to affirm your assertion, there is not room for argument.

3. Control -- You control the witness not only by assertions in the form of leading questions, but also by pace. As soon as the witness gets a "yes" or "no" answer out, the next question should be rolling off your lips. If the witness is bracing for the next question before he completes his answer, he is not likely to embellish his testimony or ramble. A sure way of losing control is to begin questions with words that are typically used on direct examination, words like "what" "where" "when" "how" "who" "why".

4. Know the answer - Cross-examination is not the time for discovery. Only ask a question if you know the answer or don't care what the answer is.

5. Strong beginning triumphant ending - Begin strong and end strong. You should plan your first question and your last question. The principle of primacy and recency is especially applicable during cross-examination.

6. Short, simple questions - Short questions produce short answers. Simple intelligible questions allow the jurors to understand the question, the answer and it's importance. Simplicity is a must. Say, "The light was red, isn't that true?" Don't say, "Now, sir, at the time that you saw the traffic on September 8, 1999, the light was green for the northbound traffic on Main Street and red for the eastbound traffic on First Avenue, wasn't it?"

7. Avoid Evaluative Words such as extremely, unusual, normal, rarely and very. If the witness is asked, "Isn't it true that you rarely do whatever" he

is likely to say it depends on what you mean by rarely.

8. No explanations - Never ask why, how, explain, describe.

9. One fact per question - One fact per question makes it more difficult for the witness to give an evasive answer. The witness who is asked "Haven't you stolen sheep and coveted your neighbor's wife?" can respond no, even though he is guilty of one of the offenses. A good lawyer will first ask, "Didn't you once steal sheep?" followed by "Haven't you coveted your neighbor's wife?" A second reason for using one fact per question is that cross-examination can be like feeding a family in a time of famine. Often counsel will find little food with which to feed the jurors as with the family having little meat to feed it's guests, slicing the cross-examination as thinly as possible makes it appear a considerably more ample mean.

9. Stop - Sit Down - Once you have made your points, sit down. Do not lose the impact of the cross-examination by asking the one question too many or the sum up question. You can make the ultimate point in your closing argument.

10. Spontaneous Loops - A spontaneous loop is a repetition of all or part of an unexpectedly good answer. You cannot craft expected spontaneous loop questions if you have not listened carefully to the witness' answer. Here is an example: A. . . .and after the shooting we got into the car and drove away like any normal family would do . . . Q. Sir, you said that you were like any normal family? A. Yes. Q. Like any normal family you left town in the dead of the night? A. Yes. Q. Like any normal family you gave aliases to each member, including the five year old? A. Yes. Q. Like any normal family you stole license plates every other day as the five year old watched? A. Yes.

Irving Younger's Rule: The Number One Rule of Cross-Examination is, **"Don't."**

Cicero on Cross-Examination

Translated and Edited by Irving Younger

Everything at trial must be planned. Everything must be anticipated. Because if it is not, it will go wrong. The courtroom is the most intricate of institutions. So much happens, there is so much for the advocate to do, to know, to sense, that none of it can be done *ex termpore*.

What follows is that the summation must be worked up in advance. Indeed it must. Before the trial starts, the advocate knows what he will say to the jury when it is over. Yes,

before the trial starts, the advocate knows what he will say to the jury at its conclusion about the credibility of the opposing witnesses.

There is the secret of cross-examination. The advocate will cross-examine only to the extent necessary to obtain the information he needs to support the argument he has planned in advance to make in his summation about the credibility of the cross-examined witness. And once he has obtained that information, he will stop. Stop. S-t-o-p. That four-letter word is the most important in the advocate's vocabulary. When things are going well, what should he do? Stop. When things are going badly? Stop. When he doesn't know what to do? Stop. When he is ahead? Stop. When he has blundered? Stop.

Stop.

Stop.

Here, then, are the ten commandments of cross-examination.

1. Be Brief

The cross-examiner's purpose, always remember, is to obtain the information necessary to support an argument in summation about the credibility of the witness. Well, never more than three such arguments. Two better than three. One best of all. So obvious is the reason for this commandment that it is often overlooked. No matter how simple a case may be to the advocates, to the jurors it is always confusing. They have not studied it in advance: they learn about it for the first time in the courtroom, and what's more, they learn about it not by reading, which is how we are accustomed to learn, but by listening, which we are not at all accustomed to do. There is a very low limit on the capacity of the juror to absorb information by ear. Once that limit is reached, he can absorb no more. Ask him to do so by dragging out the cross-examination and he becomes bored and sullen. The interminable advocate, in short, is rarely the victorious advocate.

2. Short Questions, Plain Words

For some reason, many lawyers think that the sign of a lawyer is the habitual use of fancy words, long sentences, and elaborate syntax. Why don't lawyers understand, as do practitioners of all other arts, sciences, and mysteries, that simplicity marks the master? Simple words and sirnple sentences are not only good style; they are also good sense. The jury probably includes two or three simple folk, and the advocate must talk to them as well as to the learned. He cannot talk to them if his tongue drops only tangled clumps of twisting polysyllables.

3. Ask Only Leading Questions

The law of evidence contains a single rule about the form of questions on direct examination. Leading questions are forbidden. They are forbidden because they suggest the desired answer, because they put words in the witness's mouth. Therein lies the vice of the leading question on direct examination, and therein lies its utility on cross-examination. On

crossexamination, an advocate never asks anything hut a leading question. Every question on cross-examination should put words in the witness's mouth: all the witness need do is reply, in strict rhythm, "Yes," "No," or "I don't know." That is how a clever advocate controls a witness, and controlling the witness, making him say only what the advocate wants him to say, is the whole idea of cross-examination.

4. Never Ask a Question to Which You Do Not Already Know the Answer

Cross-examination is not an examination before trial. It is hardly the occasion for discovering what the case is all about. If a lawyer doesn't already know what the case is all about, he shouldn't be trying it. This fourth commandment is a direct corollary of what I said earlier concerning the secret of cross-examination. Knowing before the trial starts what he will argue in summation about a witness' credibility, the advocate also knows the information he needs to support that argument; and in cross-examination he will seek nothing else. Hence the advocate always knows the answer to the question before he asks it. If he doesn't know the answer, he won't ask it.

Two qualifications are necessary here. First, even though he does not know the answer, a good cross-examiner may ask a question when he does not care what the answer is. Second, it is possible not to know the answer to a particular question at the start of the cross-examination, but to discover the answer by cunning use of preliminary questions to which the answer is either known or unimportant. The advocate closes doors, he eliminates possible explanations, and gradually escalates himself to the point where he does know the answer. He has learned it in the course of the cross-examination, and so he may now ask the question.

5. Listen to the Answer

From time to time, a witness will say something extraordinary. It is contradicted by other testimony; it is contrary to human experience; it is inconsistent with the way the universe is organized. Yet the cross-examiner goes heedlessly on, as if somehow lie hadn't heard the answer. Correct. He hasn't heard the answer, and the reason he hasn't heard it is that he wasn't listening, and the reason he wasn't listening is that he was so immersed in his own fright that he had left no reserve of attention for listening to the witness. Now, fright is natural, but if the lawyer wishes to be a true advocate, he must train himself to overcome it. Not that fright ever disappears. It does not. It must be mastered, however, controlled, limited, so that the cross-examiner can turn from himself and listen to the witness.

6. Do Not Quarrel with the Witness

It is only human for the cross-examiner to be tempted to respond to the witness's absurd or patently false answer with "How dare you say that?" or "Do you really expect the jury to believe such bilge?" Resist the temptation. To quarrel with the witness infallibly elicits a sustained objection on the ground that the question is argumentative. And it serves to permit the witness to rationalize an absurd or patently false answer, diminishing or altogether avoiding its adverse impact on the jury. Better, should the witness give such an answer, for the advocate

simply to S-t-o-p.

7. Do Not Permit the Witness to Explain

The good advocate asks leading questions only, as required by the third commandment, questions to which he already knows the answer, as required by the fourth commandment, and questions which do not quarrel with the witness, as required by the sixth commandment. He gets his "yes" or "no" or "I don't know," and briskly moves on. He does not permit the witness to explain an answer, for that would be to hand control of the cross-examination to the witness, and the good advocate allows no one but himself to control the cross-examination. Of course, the judge may interrupt and give the witness an opportunity to explain. That is one of life's misfortunes. And, of course, the proponent of the witness may come back on redirect examination to elicit an explanation. Let him. Do not do it for him. Possibly he will neglect to do it, and in any event, to the jury the explanation that comes later always has the false ring of an afterthought.

8. Do Not Ask the Witness to Repeat the Testimony He Gave on Direct Examination

If the jurors hear something once, they may believe it or they may not. If they hear it twice, they will probably believe it. And if they hear it three times, they will certainly believe it. Thus, when a lawyer asks a witness on cross-examination merely to repeat his direct testimony, all he accomplishes is elevation of the witness' credibility.

9. Avoid One Question Too Many

After a while, the advocate develops an instinct for this commandment. He cross-examines; he asks an especially good question; he gets an especially good answer; and he stops. Without this instinct, he will not stop. He Pursues the point with a question following up on the especially good question. Sometimes, as he asks it, the cross-examiner says to himself, "I just know I shouldn't ask this." But too late. The question has been asked. It cannot be recalled. And invariably it turns out to be one question too many.

10. Save the Explanation for Summation

Assume this case: a lawyer has conceived in advance of trial an unanswerable argument to make to the jury in summation about the credibility of an opposing witness. The argument rests upon information the lawyer can obtain by cross-examining in scrupulous compliance with these commandments. The only difficulty is that the argument is so profound, the cross-examination so masterful, that the jury will not then and there, while the cross-examiner is cross-examining, grasp the point of the cross-examination. The lawyer now feels the desire to draw out the cross-examination so that the jury comprehends at once the nature of the questioning and the brilliance of the questioner. Should he succumb, he is lost. In drawing out the cross-examination, it is inevitable that the lawyer will violate one or more of these commandments and thereby dissipate the force of the cross-examination. All the better for the lawyer that the jury not understand. There is no keener state of mind, none better calculated to help the jury concentrate

and remember, than unsatisfied curiosity. Let the jurors wait. In summation, the lawyer will recall the puzzling cross-examination and at last make everything clear. The jurors' relish of satisfied curiosity will render the lawyer's argument irresistible and a favorable verdict inevitable. All this because the cross-examiner saved the explanation for summation.

Controlling the Witness on Cross-Examination

Professor Irving Younger's lecture on "The Ten Commandments of Cross-examination" is a classic. The commandments provide rules for lawyers to avoid embarrassment and defeat on cross-examination.

1. Be brief.
2. Short questions, plain words.
3. Always ask leading questions.
4. Don't ask a question, the answer to which You do not know in advance.
5. Listen to the witness's answers.
6. Don't quarrel with the witness.
7. Don't allow the witness to repeat his direct testimony.
8. Don't permit the witness to explain his answers.
9. Don't ask the "one question too many"
10. Save the ultimate point of your cross for summation.

But the commandments command without telling us how to obey. What are short questions? How can you avoid quarreling with the witness or asking the one question too many?
The commandments can be summed tip in a single phrase: control the witness. Several basic principles that the cross-examiner should follow to control the witness will lead to obedience of Younger's ten commandments.

To satisfy the second and third commandments, each question should be short and contain a "leading phrase." There are two ways to accomplish this and to control the witness. First, do not ask any question that contains more than one new fact. Second, do not ask any question that contains more than five words per question, excluding the leading phrase and connecting words.

A leading phrase is like a spoon to put the castor oil of unpleasant facts into a witness's mouth. For example, you want the witness to say: "The light was red." That is the castor oil. To convey those words to the witness's mouth, there are a variety of spoons such as: "Isn't it a fact that the light was red?" or "The light was red, isn't that correct?" or "The light was red, was it not?" The witness does not answer the statement "the light was red" but the leading phrase: "Isn't it a fact that . . . ."

Limiting questions to one new fact allows thern to be brief while still leading. For example, you want the witness to testify that when he saw that the light was red, he was sitting in

his car listening to the radio while parked next to the curb. A long question might be: "Isn't it a fact that you were sitting in your car parked by the curb with the radio on when you noticed that the light was red?" He may answer "yes." However, he may seize the opportunity to disagree with the order of the facts in the question and deny the statement, even though it is otherwise true.

But, notice what happens with short or one new fact questions:

Q: You were in your car, were you not?
A: Yes.
Q: You were, at that time, seated, were you not?
A: Yes.
Q: And Your car was then parked, was it not?
A: Yes.
Q: Parked next to the Curb, isn't that a fact?
A: Yes.
Q: The radio was on, was it not?
A: Yes.
Q: And while sitting in Your car which was parked next to the curb with the radio on, you noticed the light, did you not?
A: Yes.
Q: And the light was red, was it not?
A: Yes.

Wait a minute, you say. The sixth question contained more than one fact. Indeed it did, but all the others contained only one fact and this question contained only one new fact-"you noticed the light." The witness had already conceded all of the other facts in the question.

Review the seven questions above. The first question contains five words and a leading phrase. The second question contains three-"you were seated" plus a connecting phrase, “at that time," plus a leading phrase, "were you not?" The third question contains four words: "Your car was parked," the connectors, "and" and "then," and a leading phrase, "was it not?"

Short questions control the witness. By obtaining his concession to each new fact, you close off avenues of retreat that the witness could use to defeat a line of cross-examination.

Remember, you rely almost exclusively on the jurors' ears. A juror might miss the details of a long question. Short questions paint a word picture that even the least attentive juror can receive and store in the mirld's eye. Final argurnent that relies on facts established by these short questions triggers the jurors' recall of the word Pictures. One picture is worth a thousand words.

To become a Picasso of the Courtroom and to gain further control over the witness, familiarize yourself with the use and artistry of plain words. Plain words are the speech of the common person. One of the top Nielsen-rated shows was a situation comedy about two women who worked in a Milwaukee brewery, "Laverne and Shirley." Before choosing a word for a question in cross, ask yourself: Would Laverne say this to Shirley? If the answer is "no," do not use it. Avoid legalese, terms of art, and multisyllable words that are uncommon and that the witness and jury may not understand. The simpler the word, the less the opportunity for the witness to take some semantic exception to your intended meaning and give you a "no" when your plan

required he answer "yes." Bear in mind that the witness asks no questions. The choice of words is solely yours. Be precise in your choice, and you will exercise power over the witness and control his testimony. The jury must understand each word exactly as you intend. Otherwise, the picture the jury sees might fall far short of the one you were attempting to paint.

Commandments four, six, seven, and eight address some of the ways a witness gets out of control. When this happens, the lawyer begins to feel frustrated and embarrassed. The lawyer then quarrels with the witness and asks questions Without knowing the answers. How does the witness get out of control?

Don’t Lose Control

A lawyer can lose control by long questions or nonleading questions. He can also lose it if lie uses phrases Such as "You testified on direct examination that. . . ." Avoid such phrases at all cost.

A cross-examiner likes things neat. He wants to set the witness up for a devastating inconsistency with the witness's direct testimony. But what the witness said during direct is never relevant, What is relevant is the fact described by the witness during direct examination. Almost every time a lawyer has prefaced a cross-examination question with the words, "You testified on direct examination that. . . " the response from the witness has invariably been: "That wasn't my testimony"; "I don't recall saying that"; "You're trying to put words in rny mouth"; or some such complaint. A "no" answer, where a "yes" was expected, is another frequent reply. The expected "yes" almost never occurs.

There are other reasons why you should never use those phrases. You ask the witness to repeat his direct testimony, which violates commandment seven. Since the witness has focused on the offensive statement he made on direct examination, you invite him to explain it away: "Oh yes, but what I really meant to say was This violates the eighth commandment: "Don't permit the witness to explain his answers." Finally, if you are afraid "he jury will not recall the statement made on direct examination by the witness, then you probably do not have a basis for an effective cross-examination on that statement. If you are sure the jury will recall the statement, then there is no need to repeat it.

If the witness says he did not testify to the statement or claims he cannot recall it, you could ask the court to have the reporter read it back. But, that is surely one of the most boring, time-consuming, and ineffective approaches to cross-examination.

Every time a witness is able to escape a "yes" answer by claiming he does not recall or is able to force You to start a time-consuming search for the precise words he used on direct, that witness is out of control. You may also be in the middle of a quarrel with the witness and his lawyer over what the witness said.

The cross-examiner is also sure to provoke arguments when he inserts a modifier or generalization even in short, leading questions.

Consider these questions asked on cross:

Q: The radio played loudly, did it not?
Q: You saw him very clearly, did you not?
Q You always apply your brakes, do you not?
Q: You made a carefid investigation, isn't that a fact?

In the first question, the word "loudly" modifies the phrase "the radio played." Using the modifier provides an escape hatch for the witness.

Q: The radio played loudly, did it not?
A: Oh, I wouldn't say loudly. or
A: What do you mean by loudly? or
A: That depends. or
A: As a matter of fact, I could barely hear it.

If the cross-examiner had asked himself: What fact or facts make up the descriptive word "loud," he might have restructured his cross:

Q: The radio was on, was it not?
A: Yes.
Q: Had you turned it on? (Nonleading, because the answer literally doesn't matter.)
A: Yes.
Q: you turned it on to listen to it, did you not?
A: I turned it on for background music.
Q: You turned it on to hear it in the background, did you not?
A: Yes.
Q: And you could hear it, could you not?
A: Yes.
Q: It was loud enough to hear, was it not?
A: Yes.
Q: Louder than the street noise, wasn't it?
A: Yes.
Q: Because you could hear it, could you not?
A: Yes.
Q: Above the noise of the traffic, did you not?
A: Yes.
Q: Above the noise of the people on the street, isn't that a fact?
A: Yes.
Q: It was loud enough to hear above the traffic and the people, was it not?

Now, the jury has a word picture that the radio was playing loudly. The witness is still under control, where he belongs.

The witness on cross-examination is primed to resist giving the examiner the answer sought. The witness will invariably seize any opening to escape. Using modifiers and

generalizations, before cutting off the paths of retreat, enables him to take issue with the descriptions. It also telegraphs what it is we want the witness to say. When a resistant witness knows this, he will try to say the opposite. When this happens, quarrels result. the witness is out of control and a carefully planned cross is lost.

The only time that modifiers and generalizations may be used in cross-examination is when, with short questions and plain words, the examiner has already committed the witness. At that point a jury would view a "no" answer to the question: "Isn't it fair to say then that you could see him clearly? " as an obvious, stubborn refusal to speak the truth.

The ninth and tenth commandments address a similar problem-trying to get too much from the witness, whether by the "one question too many" or getting him to testify to the ultimate point. How can it be avoided?

"You Testified . . ."

The "one question too many" often begins with the phrase, "You testified on direct that . . .," which should not be used. Sometimes, it uses a modifier or generalization before the examiner has pinned the witness down. But there are other tirnes when the lawyer rushes headlong into the "one question too many." Like the twenty-game winner who knows, as soon as the pitch leaves his hand, lie has just thrown a home run pitch, we shout to ourselves, "Please, let me have that one back!" Why do we do this to ourselves?

A cross-examiner is like a baseball pitcher. He tosses a question at the witness. If the witness gives a "yes" or other expected answer, the examiner has pitched a strike. A series of such strikes and the witness strikes out. A few bad pitches and the cross fails or, worse yet, the witness hits a home run.

A witness is like a batter facing a premier pitcher. He is powerless, and he knows it. His only hope lies in the chance that the cross-examiner will become overconfident and toss the witness a bad pitch. The crossexaminer has all the power until, motivated by his subconscious desire to show the jury just how powerful he is, he abuses it. As soon as that happens, watch out for a late-inning rally by the witness. How do you avoid abusing power?

First, recognize the problem. You can watch for signs of abuse of power when you realize the potential for abuse. Second, plan each cross-examination to evoke a "Eureka!" response from the jury-not from the witness. A "Eureka!" response is the satisfying glow when you are able to pull all the pieces of the puzzle together.

We are more likely to defend vigorously any conclusion we reach ourselves. When others tell us their conclusions, we may resist and dispute the accuracy of the conclusions. It is easier and more powerful to persuade the listener with his own conclusions. Cross-examination should lead the jury to a conclusion, not confront it with one. You can avoid asking the "one question too many" by allowing the jury to reach the ultimate conclusion.

Obeying the fifth commandment by listening to the witness may lead to a "Eureka!"

response in a cross-examiner. The witness, struggling to avoid a trap, may say something that is better than expected.

The examiner is sometimes so involved in the cross-examination, thinking of the next question, that he misses the opportunity. Many lawyers also do not know how to handle an answer that does not fit their expectations.

Consider a cross-examination at a recent NITA Regional. The witness is Henry Fordyce, a young forest ranger who is suing two other men for having assaulted him outside a bar. The cross-examiner knows that Fordyce has been arrested twice for drunk and disorderly conduct. He hopes to show that Fordyce was so intoxicated the night of the assault that his identification of the defendants is unworthy of belief.

Q: You were with Miss Long that night, weren't you?
A: Yes.
Q: Before you picked Lip Miss Long, you were at Fenster's bar'?
A: Yes.
Q: You were drinking at Fenster's, weren't you?
A: I don't know what you mean by "drinking."
Q: How many is more than one?
A: I don't understand your question.
Q: You had some drinks, didn't you?
A: No. I had two drinks.
Q: So you were pretty high, weren't you?
A: High, counselor? No, to the contrary.
Q: You had a lot of drinks, hadn't you?
A: If you consider two a lot.

The examiner did not apply some control techniques. But, perhaps most importantly, he did not listen when the witness handed him a golden opportunity.

Q: You were drinking at Fenster's, weren't you?
A: I don't know what you mean by "drinking."'
Q: You don't know what I mean by drinking, do you?
A: No.
Q: But you know what drinking means, do you not?
A: Yes.
Q: And You knew what drinking meant in March of 1978, did you not?
A: Yes
Q: And You were drunk and disorderly in March of 1978, were you not?
A: No.
Q: You do know what drunk means, do you not?
A: Yes.
Q: And disorderly, You know what that means, do you not?
A: Yes.
Q: And you knew the meaning of both those words on January 1, 1979, did you not?

A: Yes.
Q: And you were drunk and disorderly on that date, too, were You not?
A: I don't recall.
Q: You don't recall, do you?
A: No.
Q: But, you do recall Fenster's, do you not?
A: Yes.
Q: You recall being there, isn't that right?
A: Yes.
Q: And you recall having a drink at Fenster's, do you not?
A: Yes.
Q: In fact, You had more than one drink, did you not?
A: Yes.
Q: Now, you understand that You were drinking at Fenster's, do YOU not?
A: Yes.
Q: And when a person drinks, he sometimes gets drunk, does he not?
A: Yes.
Q: And sometimes disorderly as well as drunk, true?
A: Yes.
Q: And sometimes he gets so drunk, he can't recall being drunk and disorderly, isn't that a fact?
A: No. (The answer doesn't really matter, does it?)

In the second examination, the examiner controlled the witness throughout. He turned the witness's words about not understanding the word "drinking" against him. He got the answer he originally wanted and more. How did he accomplish this? Look at the second question. The examiner took the words the witness used in the answer which preceded it and made those words into the next question. By doing this, the examiner forced the witness to answer "yes." At the same time, he pinned the witness down to an indefensible position. Every time a witness gives an answer other than the expectd "yes" or "no," he is trying to avoid being trapped. If the witness senses what it is you want him to say, he will, in all likelihood, equivocate. Whenever he does, he hands the examiner a perfect opening for just such an examination. This technique of using the witness's answer as the next question, takes away the fear of not knowing how to deal with the unexpected answer. In every instance, the witness's answer will become the next question. You no longer have to be overly concerned with the problem of thinkinu about what the next question will be. If you do not listen to the witness, You will not hear his exact answer. Without that, you cannot use this technique effectively.

Professor Younger says that every time a trial lawyer disobeys one of his commandments, that lawyer wishes the courtroom floor would open beneath his feet, swallow him, and hide him forever from further embarrassment. I hope that these suggestions will help keep you for that fate.

You do not have an obligation to cross-examine every witness. Only the novice cross-examines every time. How do you know when to cross-examine and when not to? Well, you have (or should have) a theory of the case and a theory as to how each witness affects your

theory. You should know what you are going to say in summation about the credibility of the other side's witnesses. You should cross examine the other side's witnesses only to the extent necessary to acquire the information you need to support your argument about that witness' credibility - then STOP.

D. DEALING WITH THE EXPERT WITNESS

Make Him Your Witness

First, do not attack any witness-especially an expert-unless it will help your case. Cross-examination is a lot easier if you and the witness do not disagree. True, you say, but so what?
Simply this. Say you represent the plaintiff in a traumatic brain-injury case. The defendant'sdoctor has just testified on direct examination that your plaintiff's seizures are not due to trauma, but to a congenital abnormality.

You can take the doctor head-on if you want, but maybe that will not be necessary. The doctor's only adverse testimony is on the cause of the plaintiif's injuries. He admits they are there; he only disputes how they arose.

Note that the defendant's own doctor admits that the plaintiff will be subject to sudden seizures for the rest of his life; that this form of epilepsy can only be treated, not cured; and that the plaintiff's condition puts him out of work as a machinist and means he can never drive a car again.

If you have a strong case on causation, you may decide it is better to make this witness your own on the issue of damages than to try to beat him down on the subject of cause.

Attack His Field

Attack an entire field of expertise? This one is likely to make you snort in derision until you think about it a bit. Just because the court lets a witness testify does not mean you have to dignify the field-which is what a lot of cross-examination does.

Attack His Qualifications

The range in this option is wonderful, It covers training, experience, accomplishment, and awards. No matter how well-qualified the witness, there is always a higher level he has not reached. Approached subtly, you even can have the witness accredit your own expert's standing.

Expose His Bias

Of course, any witness can be blased because of friendship or enmity, but experts are special. They can be biased because of money-their fees for testifying. Because bias is never collateral, it is always a proper subject for cross-examination, and if it is denied, it may be proven with other witnesses.

You must have a sense of proportion. just because a witness gets paid for his time does not suggest his integrity is for sale. But witnesses who spend a disproportionate amount of time in court or who charge large fees are surely vulnerable to attack.

Attack His Facts

An expert witness is an explainer. And while the explainer himself may be unimpeachable, his explanation is no more reliable than the facts he is relying on. Attacking the information (instead of the expert) is particularly suited for the expert witness who has done no factual investigation himself, but relies entirely on the reports of others.

Vary the Hypothetical

Changing the hypothetical is closely related to attacking the facts on which the expert relies. You are permitted to change the facts around to see at what point they alter the expert's opinion-depending on whether the question on direct examination originally was asked as a hypothetical.

You can insert facts you feel were left out on direct, or take out facts you feel should not have been included. But watch out. This does not mean you are free to invent facts like some first-year torts teacher, just to see how the witness responds. You must have a factual basis for all your changes. If the basis for your question is not already in evidence, you must be able to connect it up later.

Impeach with a Treatise

The point is simple. If the expert differs with others in his field, he may be wrong.

One way to attack him is with a learned treatise - a book or article by a recognized authority - that disagrees with what the witness has said on the stand.

Before the Federal Rules of Evidence, the expert had to have relied on the treatise in forming his opinion, or at least recognized it as being authoritative in the field.

Unfortunately, this put the witness in charge of his own impeachment. Properly prepared, few expert witnesses would admit that any works were truly authoritative. So Rule 803(18) of the Federal Rules of Evidence lists three ways to establish that a learned treatise is authoritative: from the testimony of the witness himself, from the testimony of some other witness, or by judicial notice.

Attack Him Head-on

Notice that until now everything has been indirect. The most difficult and dangenous way to cross-examine an expert is by fighting him on his own ground. You can do that in any number of different ways, such as trying to show he erred in his factual investigation, his computation, or his logic.

But be careful. This is a game that is easy to lose, so you should not play it unless you must. It is usually better to base your cross-examination on some combination of the other options.

Tell the jury why the witness is being offered at the beginning. If you go directly into the doctor's qualifications the jury won't have any reference as to why that person is here. Start off with something like

Q. Dr. Wertz, you are a thoracic surgeon?
A. Yes, that's right.
Q. Which means you are a surgeon who specializes in operating inside the thorax - the upper part of the body, where the heart and lungs are?
A. That's correct.
Q. And doctor, are you familiar with the operation that was performed on the late Mr. John Wells?
A. Yes, I am. I have gone over every aspect of Mr. Wells' operation in some detail.
Q. And have you come here ready to give your professional evaluation of whether that operation was properly performed?
A. Yes, I have.
Q. Before we get to the operation, doctor, I'd like to take a minute to go into your professional background - what qualifies you to tell the jury what went wrong with Mr. Well' operation?

Now they won't have to remember the witness' qualifications and connect them up later - the relevance hook is already in place.

Lead on the Qualifications

Start With the Conclusion

Have the Expert Speak in English

Don't Hire an Advocate

Have the Expert Tell the Story

Use Exhibits

Create Visual Images

Find an Expert Who Can Teach

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