

TRIAL ADVOCACY

GUIDE TO HOW JUDGE LOOKS AT PRE-TRIAL AND OPENING STATEMENTS

JUDGE THREEE

PRETRIAL

1. If a **student/lawyer** calls his client witness to testify at trial but fails to request the court to exclude that client/witness **prior conviction**, would you consider this a **weakness** in that student-lawyer's presentation?

(Check the most appropriate response)

Possibly

Probably

Certainly

I would assume the student/lawyer knew the prior would/would not be able to come in and had already weighed the risks. Also, the only way the student/lawyer could have raised it would be pretrial and since they can only do one motion, I probably wouldn't hold it against the student if he chose a different motion.

2. The student/lawyers have been taught in **Basic Evidence (Federal)** that there are several **balancing tests** applicable to **prior convictions**. Will you consider it a **weakness** in the **student-lawyer's** presentation if she/he does not recognize the various tests?

(Check the most appropriate response)

Possibly

Probably

Certainly

3. The student/lawyers have been taught in **Basic Evidence (Federal)** that after **Daubert +/Kumho** many courts prefer lawyers to raise issues regarding **expert testimony prior** to trial.

Do you:

agree with this approach?

disagree with this approach?

(Check the most appropriate response)

However, due to strategy, one side or both might wish to hide behind the log until trial to be better prepared than his adversary.

4. Consistent with **Federal Rule of Evidence 607** student/lawyers have been taught in **Basic Evidence** that if **they fail to secure the pretrial exclusion of prejudicial** evidence (i.e., prior convictions/bad acts), they may disclose the prejudicial nature of this evidence **before** his/her opponent.

Do you:

accept this interpretation/approach?

OR

reject this interpretation/approach?

(Check the most appropriate response)

5. Student/lawyers are taught in **Basic Evidence (Federal)** that trial and appellate courts adhere to a "**contemporaneous objection**" rule:

Do you:

follow that rule?

OR

reject that rule?

(Check the most appropriate response)

6. Student/lawyers are taught in **Basic Evidence (Federal)** that when the judge rules against them they should **make a record** consistent with Federal Rules of Evidence **103**.

Do you:

follow that approach?

OR

reject that approach?

7. Student/lawyers are taught in **Basic Evidence (Federal)** that a judge may consider **admissible** or **inadmissible** evidence when deciding whether a witness is **qualified to testify** or whether a **privilege** exists.

Do you:

follow this principle?

OR

reject this principle?

8. Student/lawyers are taught in **Basic Evidence (Federal)** that a judge **may only** consider **admissible** evidence when **determining a relevant matter conditioned on a fact**.

Do you:

follow this principle?

OR

reject this principle?

OPENING STATEMENT

1. Consistent with **Federal Rule of Evidence 607**, student/lawyers have been taught in **Basic Evidence** that if **they fail to secure the pretrial exclusion** or prejudicial evidence (i.e., prior convictions, etc.), they **may** disclose that prejudicial evidence during the **opening statement**.

Do you:

 X **accept** this interpretation/approach? (If they have a good faith belief that they will be able to bring it into evidence).

OR

 reject this interpretation/approach?

(Check the most appropriate response)

2. If the student/lawyer presents his/her **opening** in a “**story**” format, will you **evaluate** the “story” format as a “**strong**” point?

 X **Yes** (Most of the time, but I tell them if they do an effective opening in a different manner it’s OK, but it has to be effective).

OR

 No

3. If the student/lawyer **reads** his/her **opening**, will you **evaluate** such an aspect of the presentation as a “**weak**” point?

 X **Yes** (I stress eye contact, knowledge of the facts and issues, sincerity - all of which can’t be conveyed by a reading unless you’re John Houseman).

OR

 No

4. If the student/lawyer's opponent **misstates the law** in his/her **opening** statement, will you **evaluate** a student/lawyer's failure to object as a "**weak**" **point**?

 X **Yes** (Assuming I catch it).

OR

 No

5. If the student/lawyer "walks" around the courtroom throughout his/her presentation of the **opening**, will you **evaluate** such movement as a "**weak**" **point**?

 Yes

OR

 No

If it is purposeful movement - making sure the jurors are following or stressing a point then I encourage walking a little. I discourage nervous walking or distracting walking.