

TRIAL ADVOCACY

TRIAL NOTEBOOK
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ARKANSAS TRIAL NOTEBOOK

CHAPTER 1

PARALEGAL PREPARATION

Sherry Joyce and Alice Cook

Paralegal/legal assistants are trained to assist attorneys in their trial preparation. By delegating many aspects of trial preparation to a legal assistant, attorneys are able to come to trial better prepared, better organized, and more focused on the legal, evidentiary, and substantive matters involved in a trial. In addition, a well-utilized paralegal can save the client money and allow an attorney to increase his/her caseload without increasing his/her work time.

A legal assistant ethically can perform almost any task if the assistant is adequately supervised by an attorney and the attorney assumes the ultimate responsibility for the work product. There are only four functions that a legal assistant may not perform: (1) give legal advice; (2) appear in court (except as authorized by certain administrative agencies or local rules); (3) accept a prospective client's case; and (4) establish or accept a fee for legal work. This section lists the kinds of tasks that paralegal are trained to perform for attorneys.

1. Documents.

(a) Many legal documents can be drafted by a paralegal for final review by an attorney. These include but are not limited to: interrogatories, requests for admissions, notices of depositions, answers to interrogatories and requests for admissions, witness and exhibit lists, and affidavits.

(b) When a case involves documents (medical records, bank records, etc.), paralegal can save an attorney many hours of time by organizing the documents so that they are immediately accessible to the attorney. (An example of a Document Log Sheet is attached as Appendix "A.")

2. Depositions.

(a) Paralegals are trained to summarize and index depositions. This saves time so that an attorney does not have to read every page of a deposition in order to find the most critical parts of a witness's testimony. At trial a paralegal can tab pages in a deposition if there is a variance in the witness's testimony, thus freeing the attorney to concentrate on the testimony and impending cross-examination.

(b) Paralegal can assist an attorney in preparation for an upcoming deposition by securing a place, arranging for a court reporter, and gathering records and potential exhibits from which a deponent will be examined.

3. Witnesses.

(a) Locating witnesses, preparing subpoenas, making arrangements for service of process, and filing the proof of service are important tasks that can be performed by a paralegal.

(b) Travel arrangements and accommodations during trial, if needed, can be made by paralegal. Often during trials, witnesses will be needed to testify at an earlier or later time

than originally anticipated. Paralegal can communicate with witnesses and keep the case presentation flowing smoothly.

(c) Witnesses often have many questions about testifying in both depositions and at trial. By communicating with a witness about procedures and other nonsubstantive matters, a paralegal can assist in deposition and trial testimony preparation. In most cases, character witness preparation can be completed entirely by a paralegal.

4. Research.

Many experienced paralegal have such an understanding of the area of the law in which their attorney/employer practices that they are quite capable of doing other kinds of research, such as medical research and research into public records or newspapers.

5. Exhibits and Examination Files.

(a) Designing exhibits, making arrangements for the production of exhibits and blowups, ensuring that the needed exhibits are in the courtroom, and arranging for audiovisual equipment for use in depositions or courtrooms are all tasks that can be delegated to a paralegal.

(b) Paralegal can be invaluable in maintaining witness files by ensuring that all relevant information on a particular witness -- such as notes, memos and documents needed for direct and cross-examination -- are intact and ready for court.

6. Jury Investigation.

This is a critical area of trial preparation that can be done entirely by a paralegal. Securing the list of potential jurors, circulating the list, coordinating with a trial consultant -- if one is utilized -- and putting the information into a useable form for the attorney are very important tasks that the paralegal can perform, leaving the attorney with more time to prepare for the trial.

7. Client Communication.

Often clients and their families are very anxious about their impending "day in court," whether their case is criminal or civil. They have many questions about what is happening and what is going to happen next. Most of their questions and comments can be handled by a paralegal. Many times clients -- once they feel comfortable with a paralegal -- will ask to speak to the paralegal in order to keep from interrupting an attorney during trial preparation.

8. At Trial.

In addition to the tasks that have been mentioned above, a paralegal can be utilized during trial to tend to many details that can divert an attorney's attention away from the substantive issues at hand. Taking trial notes, arranging with the court reporter for portions of testimony, keeping track of introduced and excluded exhibits of both sides, ensuring that everything an attorney will need is available in the courtroom, making out-of-town accommodations, and arranging for courthouse meals are some ways that a paralegal can be utilized at trial. (Examples of Witness and Exhibit Tracking Forms are attached as Appendices "B" and "C.")

9. Calendar.

In many firms, it is the responsibility of paralegal to keep track of the dates responses are due and deadlines mandated by the court must be met. The paralegal's job is to keep attorneys apprised of approaching dates and deadlines in such a way that all dates and deadlines are responded to in a timely manner.

Good, well-trained, experienced paralegal understand the importance of all aspects of trial preparation and trials. They

perform not only the tasks assigned to them, but they also look for ways to assist their attorney/employer during both preparation and trial.

CHAPTER 2

LITIGATION NOTEBOOK Samuel A. Perroni

Many trial lawyers rely heavily, for organizational purposes, on their litigation notebook. While it may not be something that is beneficial to everyone, a trial lawyer can organize a litigation notebook in such a manner as to have important pleadings, Orders, checklists, witness lists, and the like, at his fingertips. To some, the litigation notebook may even serve as a security blanket, of sorts. In any event, the litigation notebook can make life in the courtroom much easier for the trial lawyer, and the authors encourage its use.

While there is no fixed table of contents for an effective and useful litigation notebook, the following constitutes a list of possible sections and contents:

- I. THINGS TO DO.
 - A. PRETRIAL MATTERS.
 1. Interview witnesses.
 2. Amend pleadings, if necessary.
 3. Subpoenas to issue.
 4. Obtain jury list.
 - B. TRIAL MATTERS.
 1. Motions in limine or other motions not previously ruled on by the court.
 2. Matters which the court needs to handle before trial, such as the number of jury strikes in multi-party cases, and so forth.
 3. Specific factual contentions that may come out during the trial that need to be rebutted.
 4. Specific jury instructions.
- II. INDEX OF WITNESS FILES AND EXHIBITS.

(Note: The following items are not in the trial notebook, but may be included in the index.)

 - A. CORRESPONDENCE -- Broken Down by the Person Writing It.
 - B. PLEADINGS -- Separated by the Party Making the Pleading.
 - C. DEPOSITIONS -- Listed by Number.
 - D. EXHIBITS.
 - E. WITNESS FILES -- As They Are Listed.
- III. COMPLAINT AND ANSWER.
- IV. EXHIBIT LIST.
- V. ORDER OF PROOF.
- VI. OPPOSING PARTY'S WITNESS LIST.
- VII. JURY LIST.
- VIII. VOIR DIRE QUESTIONS (specific voir dire questions to be asked or points to be covered during voir dire).
- IX. OPENING STATEMENT NOTES.
- X. POLICE REPORT (automobile accident cases).
- XI. JURY INSTRUCTIONS.

XII. CLOSING ARGUMENT NOTES.

XIII. POINTS FOR APPEAL.

In criminal cases, the litigation notebook might also contain the following sections:

1. INDICTMENT.

II. SUMMARY OF FACTS.

Of course, a trial notebook can be as all inclusive as a trial lawyer might desire or can merely contain the essentials. For example, a trial lawyer might want a separate section for witnesses. In that section, the trial lawyer might include for each witness notes of testimony that must be brought out through the witness; what legal point might need to be established through the witness; or, in some instances, a detailed narrative of the witness's testimony previously recorded in question and answer fashion to be used solely as a guideline. In addition, a trial lawyer might want to include a copy of any deposition abstracts for the witness. Finally, a trial lawyer might want to include specific cross-examination questions or an outline of cross-examination.

In the jury instructions section, a trial lawyer might want to include an outline of potential objections; cases supporting the proponent's position on specific instructions; and a notes section to include all arguments that are made on the record concerning instructions, irrespective of whether the instruction was granted or refused.

As for the section on points for appeal, this could be utilized by the trial lawyer for notes during the trial on legal points that might arise. During the heat of battle, often specific points will be raised and ruled upon. After the trial is over, it is sometimes difficult to remember all of the issues so that they can be promptly evaluated. A section on points for appeal would allow a trial lawyer to make notes on those points and, where appropriate, use those points as the basis for a motion for new trial. This becomes increasingly difficult when lengthy trials are involved and, therefore, a section of this sort can assist the trial lawyer in being able to promptly evaluate and research a particular point before the clock starts running on a briefing schedule.

There is, however, one caveat to utilizing a litigation notebook. Don't have it so complex that you can't find anything. Its usefulness will be minimized if not completely destroyed.

APPENDIX "A"

DOCUMENT LOG

NUMBER:

DATE:

PERSON:

ENTITY:

DOCUMENT:

BOX:

SUBJECT:

NUMBER:

DATE:

PERSON:

ENTITY:

DOCUMENT:

BOX:

SUBJECT:

NUMBER:

DATE:

PERSON:

ENTITY:

DOCUMENT:

BOX:

SUBJECT:

APPENDIX "B"

WITNESS FORM

NAME:

BUSINESS:

ADDRESS (B):

CITY, STATE, ZIP:

ADDRESS (H):

CITY, STATE & ZIP:

TELEPHONE (H):

TELEPHONE (B):

TELEPHONE (CAR):

CHAPTER 3

WITNESS PREPARATION

James M. Moody

The experienced lawyer calls witnesses at trial for a very specific purpose. The half-hearted witness whose testimony fails to impress the jury or who does not clearly support your client's position can obviously hurt your case. This situation can be avoided with thorough preparation of each witness.

Effective witness testimony is a matter of communication between the lawyer asking the questions and the witness answering them. To maximize the effectiveness of this communication, the witness must be familiarized with his role in the process and the need to be prepared for the experience. Before contacting the witness, the lawyer must first prepare himself for the evidence he will present to the jury through that witness. The facts about which the witness will testify should be analyzed and arranged into a logical outline. Exhibits should be prepared for introduction into evidence and listed for ease of identification by the witness.

Preparing witnesses for trial includes two basic elements. The testimony must be adequately prepared by extensive and repetitive review with the witness. The witness must also be prepared for the experience of testifying. The preparation process involves fine tuning the evidentiary component of your case by teaching your witness the skills needed to maximize the effectiveness of his or her testimony.

Each witness must be prepared to testify to facts which support a theme or theory of the case. Preparation involves reviewing those facts which each witness can provide and considering those exhibits which are to be identified and presented by that witness. Witness preparation, therefore, involves both evidence selection and testimony preparation. The following illustrate some of the steps that can be taken to ensure that both purposes are accomplished.

MEET THE WITNESS PERSONALLY

There is no substitute for direct personal contact between the lawyer trying the case and the witness testifying. Do not send another lawyer to handle the important task of preparing the witness. Questions and answers should not be rehearsed, but should be discussed so that there are no surprises. Getting to know the personality of your witness will enhance the sincerity and credibility of both lawyer and witness.

REVIEW DEPOSITIONS AND PRIOR STATEMENTS

It is very important for the witness to review all depositions, statements, written interrogatory answers, or any other material which he has given before testifying. The lawyer should determine if any of these prior statements are inconsistent with the witness's present version of the events, and if so, it should be explained to the witness that the material may be used for impeachment.

If the witness's testimony has changed, discuss with the witness possible explanations, such as intervening events which have refreshed his memory, or his having misunderstood the question. Above all, the witness should be admonished to tell the complete truth at all times.

If the testimony on separate occasions varies substantially, it is usually best to elicit the testimony on direct examination to allow an explanation under more controlled circumstances and to defuse the effect of cross-examination.

VISIT THE SCENE OF THE ACCIDENT

It is crucial that the witness visit the scene in an automobile accident or slip-and-fall case, or that he be presented with the product in a products liability action. If this step is omitted, there is substantial risk that the witness will inaccurately describe some essential detail which will totally discredit his testimony. Photographs of the scene or product can also perpetuate the object and assist the witness's memory at a later date.

DISCUSS ANTICIPATED UNFAVORABLE TESTIMONY

The lawyer should carefully review the prior testimony of the witness for statements that would have a negative impact on the case. If it appears inevitable that opposing counsel will bring this testimony out on cross-examination, bring it to the jury's attention on direct examination and avoid your witness being discredited. This technique enhances the credibility of your witness and avoids subjecting the witness to devastating cross-examination. Develop whatever background you can on the negative information to minimize its impact on the jury.

OUTLINE OF DIRECT TESTIMONY

Review the essential facts with your witness and explain to him his role as a witness and the purpose of the evidence he will provide to the case. Make sure the witness can actually testify to what you are attempting to offer into evidence and that he can establish the foundation for all exhibits.

Establish a general outline of the questions within the framework of the evidentiary requirements. Explain to the witness that he can only testify to what he saw, heard, or did, and that he will be limited in the opinions he may express or provide as an expert.

To simulate actual testimony from the witness stand, take the witness to a courtroom and let him get familiar with the surroundings. Put him through a dry run of direct and cross-examination so he can get the feel for what to expect during the real thing.

ANTICIPATED AREAS OF CROSS-

EXAMINATION

Advise your witness what to expect from opposing counsel on cross-examination. Remind the witness to listen carefully to the question and to collect his thoughts before answering. Emphasize that the witness should be respectful and courteous to opposing counsel without appearing to be overly friendly.

EXHIBITS

Review all exhibits that the witness will be asked to identify, and explain how the exhibit will be used to support your theory of the case. Go over the testimony necessary to lay a foundation for the introduction of the exhibits.

If the witness will draw a diagram in front of the jury, have the witness practice what he is doing before going into the courtroom. A better procedure is to have all diagrams prepared in advance so that distances and other details can be verified.

ENHANCING A WITNESS'S STYLE OF COMMUNICATION

Even if your witness has favorable facts to present, if he does not tell his version credibly and effectively, the impact of his testimony may be minimal or even unfavorable. Discuss with the witness the best means of projecting himself and thereby effectively communicating with the jury.

The following is a checklist prepared by William B. Fitzgerald of Dixon, Carlson and Campillo of Santa Monica, California which was

originally printed in For the Defense, July 1992. It can be provided to the witness and reviewed with him. It is reprinted here by permission.

CHECKLIST FOR THE WITNESS

by W. B. Fitzgerald

SUGGESTIONS FOR GIVING ACCURATE TESTIMONY

These are useful pointers to assist you in giving accurate testimony in court or in your deposition. Even if you have testified many times already, these pointers will be helpful. While testifying is potentially stressful, you will comfortably provide accurate and truthful testimony if you carefully review and follow these suggestions. You can minimize anxiety, confusion, and other problems by remembering and following these rules.

The first and most fundamental rule is to TELL THE TRUTH. This sounds easy, but it is not. To tell the truth, you must follow many other rules.

1. Understand the Question

Listen to the question. Pay attention. You cannot tell the truth if you have not heard and understood the question. If you do not understand the question, you must ask the questioner to make the question crystal clear before you answer it. Many problems arise from failure to listen to the question. This often happens when the witness assumes that he knows what the question is and stops listening before it is finished. Watch out for ambiguous references to "he/she," "they," "it" and vague time references in the question. Here's an example.

Question: She says that you were there an hour later when she did this. Is that true?

To answer this truthfully, you must know what is meant by "she," "there," "this," and "an hour later."

It is not a sign of ignorance, weakness, or lack of cooperation to require reasonable clarification of questions. It is a sign of ignorance and a casual attitude to the truth to answer questions that you do not understand. Know that lawyers often ask confusing questions because they are thinking ahead to the next question, are not using notes, have confused or misstated the facts, have misunderstood your earlier answers, or are intentionally ignoring your earlier answers.

2. Think before Answering.

Do not say "no" if the true answer is "I do not recall." "No" means absolutely not. "I do not recall" means what it says. The latter answer may well be more accurate than the former.

Question: Have you ever met a person named David Jackson?

This question refers to your entire life and is so broad that it is doubtful that you can truthfully say "no." It is not the truth to say "no" if the correct answer is "I am not sure."

Question: Have you ever seen this document before?
If your answer is "yes," the true answer is likely "I do not recall" or "I am not sure," because, otherwise, you are stating, under oath, that you know absolutely that you have never seen that document in your life.

3. Don't Accept Opposing Counsel's Statement.

Do not accept a "fact" merely because the attorney questioning you says it. While the fact may be accurate, if you do not know that, you cannot truthfully accept it.

Question: You discussed the problem with Mr. Smith when you reviewed this letter with him, didn't you?

While you may have discussed "the problem" with Mr. Smith, if you do not recall having reviewed the letter with him, say so.

4. Do not "play lawyer."

Don't try to figure out why the attorney is asking you a particular question or set of questions if the reason is not immediately apparent. This distracts you from listening to the question and answering truthfully. Indeed, the lawyer may be confused. She may not even know why the line is being pursued and she may not know what she is talking about.

Do not assume, particularly in a deposition, that the line of questioning is relevant to anything. There is not necessarily a reason for every question. In a deposition, the lawyer may well ask a broad range of questions on subjects about which you know absolutely nothing simply to learn whether or not you know anything about those matters.

5. Focus on the Question.

Devote all of your energy to answering the question accurately and not worrying about why it was asked. Give every question your complete concentration and focused attention. There is no such thing as an unimportant, minor, or "throwaway" question. A careless answer to a casual, "unimportant" question is not the truth. If you are distracted, say so and pause to collect your thoughts. Never answer without complete focus on the question.

6. Remember the First Rule.

You are not required to know everything. Do not hesitate to answer "I don't know" when that is the truth. Do not react to counsel's disbelief or skepticism and decide that you know something which you do not. There are endless possible questions to which you do not know the answer. Do not let counsel make you feel that you are hopelessly uninformed or concealing something because you truthfully answer those questions "I don't know."

If the true answer to a question is "no," that is the truth no matter how many times and in how many different ways the question is asked. You can expect opposing counsel to repeat questions on points when he or she is not pleased with your answers. Do not feel that counsel's repetition somehow requires you to give a different answer unless, of course, you decide to change your testimony because it is not accurate.

When in doubt or in panic, remember the first rule, "Tell the truth." If you are confronted with a surprise question, and you remember this rule, you cannot go wrong. Do not be concerned about whether you "should" say something that the question calls for. If the question requires an answer, give the true answer.

Be accurate in everything you say. Understand that the best way to cause the jury to disbelieve all your testimony is to make an inaccurate, exaggerated, unfounded, or false statement. This is true of the most minor matters as well as major matters. The jury expects and deserves the truth you have sworn to give.

One answer shown to be untruthful can sink all of your testimony. The judge can instruct the jury that a witness who has falsely testified on a material matter may be regarded as having falsely testified on other matters as well, which is only common sense. It matters little to the jury whether the false or inaccurate testimony concerns a minor matter or an important one.

Since the jury cannot talk back to the witness or ask questions, some witnesses forget that every juror is listening to your every word and evaluating you constantly. The jury will welcome your candid, accurate testimony.

An attorney may ask you if anyone told you what to say in your testimony. Understand that the only thing I am telling you to say is to tell the truth. Everything else I am telling you is simply how to do that.

7. Documents and Statements.

Prior to testifying, you must review all statements or communications you have made about the matter, and you must know any factual allegations made in any complaint or answer filed in your behalf. You should be familiar with all answers which you have made to interrogations, to requests for admissions, and you must review any documents which you have produced to the other side. You must review all of your own correspondence on the matter or written material that came to you, e.g., copies of letters authored by others. If other parties have given interrogatory responses or deposition testimony about you, you should know what they said. Take all the times you need to review all such written material.

Unless you are required, by subpoena or by a notice to produce documents, to bring documents with you to your deposition or court testimony, it is not necessary to bring documents. If you want certain documents available to you for reference during your testimony, be sure to review them with us during your preparation.

8. Analyze Documents Carefully Before Answering Questions About Them.

If a document is important enough for the attorney to use in questioning you, you should give it the same importance and scrutinize it carefully before you answer. Do not assume that you know the document already. You can easily confuse it with some other document. For example, if you are asked to "look at" a letter, before answering questions about it, do just that and take all the time you need. Look at:

- (a) the letterhead, if any;
- (b) the date;
- (c) the person to whom it was sent;
- (d) the recipient's full address;
- (e) the name of the author of the letter; and
- (f) persons to whom copies are noted.

Only after examining these parts of the letter should you read C carefully C the content of the letter.

If you follow these rules, you will indeed have "looked at" the letter and you will be prepared to tell the truth in answering questions about it. You cannot do this if you simply glance at the letter and ask for the question.

If the document is lengthy, you are not required to review and absorb it instantly. You can request a recess from the

deposition or the trial and take all the time you need or, if you can do so comfortably, you can simply and slowly review that document for as long as necessary while everyone waits. Do not be rushed.

9. Do Not Argue.

Lawyers argue. Witnesses testify. Answer questions truthfully without arguing with the attorney asking the questions. You will be distracted by argument. You will be diverted from telling the truth and you will not focus on the question.

Remember that the attorney may indeed be trying to upset and/or confuse you and that if you permit yourself to be confused or upset, you cannot tell the truth. If a pitcher in a baseball game permits himself to be upset, he cannot perform well, which is why the opposition tries to upset him. This does not mean that your answers must be devoid of emotion or conviction. It does mean that you do not want to let your emotions control you and cause you to say things you do not mean.

Let the questioner be the one who is upset. Know that if the questioner harasses or bullies you, it is because you are a strong witness and your testimony is frustrating the lawyer. Stay above the battle. Let the jury focus its anger on the lawyer by your contrasting patient and reasonable behavior.

10. Harassment.

Know that I can object if opposing counsel harasses you, but I will not necessarily object at every single opportunity. I want the jury to hear from you, and not me, as much as possible. If opposing counsel is argumentative, but you are handling that comfortably, I may not object, even though I can. The jury will identify with you and will not welcome the examiner's antagonism as long as you are testifying truthfully.

Do not be distracted if opposing counsel's sequence of questions seem to jump around in time, or if counsel is otherwise disorganized in presenting the sequence of events.

11. Do Not Volunteer.

Respond only to the question asked. Do not volunteer information not requested. If you are asked for your name, do not give your address, social security number, date of birth, and the names of all members of your family, as some people do through nervousness. None of those things were asked for and they are not responsive to the question. You need only answer the question asked. If the attorney asking the questions wants more information, he will ask another question. If you volunteer, you will needlessly prolong your testimony.

At trial, do not worry if the questioning by opposing counsel leaves an incomplete impression. We will deal with those matters with our own questioning to you if they are important.

12. Cross-Examination.

While being questioned by opposing counsel, pay no attention to: (a) the tone of voice of the questioner; (b) suggestions in the question that tell you what the answer is; or (c) the attitude of the person asking the question.

The questioner's attitude is irrelevant. All that counts is the question. Disregard sarcasm, skepticism, raised voice level, suggestions that the answer is obvious, and all other attempts by counsel to influence your answer. Be wary, also, of the attorney who is

friendly and congenial as he quietly and subtly tries to discredit you. The lawyer cross-examining you is not your friend, whatever his or her style.

Know that if counsel cannot attack you on important points, he or she may attempt to magnify and emphasize some minor point. Thrashing around on some minor point will not make it important and the jury knows that. Do not cooperate in this tactic by denying the obvious or refusing to admit something that is true.

Look at the jury or, if there is no jury, look at the judge. You are testifying to the jury or the judge and not to the lawyer asking you the questions. While you will occasionally look at the examining attorney, do not forget the jury. It is important that you do this even though your natural tendency is to watch the examining lawyer at all times. Your eye contact should be with the jury and not with the attorney. Speak up and speak clearly. You must be heard by every member of the jury.

Understand that you, not the examining attorney, are the centerpiece. You are there to tell the facts to the jury, not to convenience the lawyer. The jury wants to know what you have to say.

13. Pay Attention.

You must concentrate on the proceedings at all times while testifying. Do not relax and become inattentive after you have become comfortable in the witness chair. Pay attention to everything that occurs while you are testifying. Do not permit occasional boredom with familiar and irrelevant questions to affect your close attention. This is more often a problem in depositions than in court.

14. Be Cooperative.

The jury is anxious to hear the truth. The jury does not like the witness who acts too important to be bothered with having to answer questions, who resents that something she says is open to question, who is pompous, who is always right no matter what, who is sneering or disrespectful to anyone, including opposing counsel or who, worst of all, says things that insult the intelligence of the jury.

Cooperative does not mean meek or timid. When you are sure of something, let the jury know that. That is the truth.

15. Take Your Time.

You are not subject to a time clock, or a deadline, particularly in a deposition. If you need time to tell the truth, take the time. Pause after every question (a) to be sure you have heard and understood it, (b) to decide if you know the answer, and (c) to consider the accurate answer. Remember that if you were giving your testimony by writing your answers instead of orally, you would devote time and energy to writing accurate answers. Your oral answers require the same time and concentration.

In a deposition you can take all the time you need to consider the question before responding.

Do not let the examiner control the rhythm of the testimony by giving quick, rapid answers to rapid questions. Take your time to answer even the simple questions so you will remember to take time with the more complex questions.

Do not be lulled by a sequence of quick short questions, e.g., four in a row to which the answer is a simple yes and a fifth throwaway question at the end to which the answer is not a simple yes.

Question: You told Mr. Smith to write this letter?

Answer: Yes.

Q: And you told him what to say?

A: Yes.

Q: And he wrote the letter?

A: Yes.

Q: And he sent the letter?

A: Yes.

Q: And you had approved it?

A: (Be alert not to give an automatic "yes" answer.)

16. Correct Mistakes.

If you realize that you have said something that was not accurate, interrupt the questioning and correct your answer. Otherwise, you are not telling the truth. You should do this even if the inaccurate statement was given long before you realize your error. You should not finish your testimony without correcting testimony that must be corrected if you are to tell the truth. Everyone makes mistakes and it is perfectly normal; but you do need to correct it. You are not telling the truth if you knowingly leave the mistake uncorrected. If you do not realize a mistake has been made until your deposition has finished or you have left the witness stand at trial, inform us as soon as possible of this mistake.

17. Preparation.

Understand that it is perfectly proper for you to have reviewed these suggestions and to have met with counsel in preparation for your testimony. You will likely be asked to describe all documents which you reviewed in preparation for your testimony and to identify any persons, in addition to counsel, with whom you spoke as part of your preparation.

18. Depositions.

Your role at deposition is to answer only the questions asked. This is not the trial. The judge and jury are not present to hear your side of the matter. You will likely be asked no questions by me at your deposition unless, perhaps, a few questions are necessary to clarify some ambiguity. Do not be concerned that the "whole story" is not told at your deposition. The deposition is for the exclusive benefit of the party asking the questions and that party is entitled to learn only the information asked.

Just as you direct your answers at trial to the jury, and not to the lawyer asking the questions, at your deposition you can direct your answers to the court stenographer who is taking down your testimony. This will remind you that everything you say is being recorded and that you must take your time to be accurate. Focusing your gaze on the stenographer will also help you to avoid looking at counsel asking the questions, if counsel is distracting you.

19. Your Own Knowledge.

Be sure to distinguish between what you know from your own knowledge and what you have heard. Assume your wife told you she came home at 10:00 p.m. on a certain night. You came home at 11:00 p.m.

Question: What time did your wife come home that night?

Answer: I don't know.

home?
Q: Do you have any knowledge about when she came home?
A: I know that she was home when I came home at 11:00 p.m.
Q: Do you have any other information about when she came home?
A: Not of my own knowledge, but I know what she told me.
Q: What did she tell you?
At this point, there may or may not be an objection to what she told you. Note that each of these answers accurately responds to the question but does not volunteer information.

20. Objections.

Listen to the objections made during your testimony. If you do not immediately understand the objection, pay no attention to it. Do not get distracted by objections which are not clear to you. If the objections mean something to you, fine. If they are confusing, forget them.

21. Refreshing Recollection.

If the other attorney shows you a document or a photograph or tells you someone else's testimony, and asks if that refreshes your recollection, tell the truth. If your recollection is not refreshed, say so. Do not accept the lawyer's suggestion that your recollection must be refreshed by this material.

If your own lawyer tries to refresh your recollection with something, and your recollection is not refreshed, do not worry about this. If you do, you will not pay attention to the questioning.

22. Estimate.

The jury is entitled to your reasonable estimates on matters, but you are not telling the truth if you guess. If, for example, you have a basis to give a reasonable estimate of a distance, date or time, do so, but do not guess.

Question: How long were you there?
Answer: About an hour.
Q: Could it have been two hours?
A: My best estimate is about an hour.
Q: Could it have been an hour and a half?
A: My best estimate is about an hour.
Q: But you are not absolutely certain, are you?
A: Not absolutely.
Q: Well, then it could have been about an hour and a quarter, couldn't it?
A: My best estimate is about an hour.
Q: So you won't change that, even though you are not absolutely certain.
A: An hour is my best estimate. Anything else would be a guess.

If you expect a question on an important matter concerning your recollection and you have carefully considered the matter, e.g., the time estimate in the foregoing sequence, you can truthfully state, when asked the question, that you expected that the question would be asked and that you have given the matter a lot of thought and that your best estimate is one hour. This shows that you did not make your estimate casually. That too, is the truth.

23. Photographs and Diagrams.

Do not acquire "new knowledge" from photographs and do not interpret diagrams you do not understand. Again, this is simply a matter of telling the truth. Photographs are notoriously unreliable for distances or measurements. Do not interpret diagrams which you did not prepare yourself or which are not familiar to you. There is a great difference between testifying about your own knowledge of something which happens to be shown in a photograph or diagram and attempting to interpret the photograph or diagram.

Question: Look at this photograph. The shut-off switch is about a foot away from the red button, isn't it?

Answer: I can't tell the distance from this photograph.

If you know the distance from your own knowledge, you can give it. If you do not know it, do not try to estimate it from the photograph. Do not agree that a photograph or diagram is "accurate" until you know what part or parts of the exhibit the lawyer is talking about.

Q: Does this photograph accurately depict the machine?

A: This is a front view of the machine. It looks generally accurate for a front view. I cannot tell if it is accurate as to specific details.

This answer assumes that you are sure that the machine in the photograph is the subject machine and not some other machine. If no serial number or other identifying marks appear, do not assume that this is the same machine, in which case you might answer:

A: This looks like a front view of the machine in question, but I cannot tell if this is actually the same machine.

In answering specific questions about the machine, use the photograph only as it may refresh your recollection, but testify from your own knowledge and not from "new knowledge" gained from looking at the photograph, which will typically distort the relation between the objects shown.

24. Assumption.

If you make assumptions in your answer, state them so your answer is understood.

Question: When the steam pressure goes above that level, this safety valve opens, doesn't it?

Answer: Yes, if the safety valve is properly set and working.

The question did not include the conditions that the valve was properly set and working so you must add them to make your answer true.

25. Explanations.

If your answer requires an explanation because otherwise a simple yes or no would be misleading, be sure to explain that to me before you testify and, when you testify, be sure to give the answer before the explanation.

26. Depositions Used At Trial.

If an attorney is telling you what you said at your deposition, you should request a copy of the deposition to read along with the attorney. Do not take the attorney's word for what is in the deposition.

26. Testimony of Other Witnesses.

Testimony of other witnesses may refresh your recollection, but if it does not, do not testify to facts simply because someone else has done so and you believe them and are reluctant to contradict them. You must limit your testimony to your own knowledge. People very rarely all remember things the same. The jury understands that and would be quite skeptical if they did.

28. Personal Behavior.

Do not take medications before your deposition or trial testimony or, if you must, be sure to tell me what effect it may have on you. Do not chew gum or candy while testifying. Do not smoke at your deposition.

Use your own words and not someone else's. Avoid phrases like, "to tell you the truth," or "to be hones." Do not repeat the question before answering.

29. Interruptions.

If opposing counsel interrupts your answer before you have finished, politely ask to finish it and, if necessary, ask the judge if you may finish your answer. Expect interruptions from opposing counsel when she does not like your answer. If the truthful response requires your complete answer, you must resist the interruption.

Likewise, unless you are trying to correct prior testimony, do not interrupt the questioner, even when the question is misstating your testimony or the facts. Wait until the question is finished. The court reporter can only record the words of one person at a time and, at trial, the jury can only listen to one person at a time. So you must wait until the question is finished before answering, even when you think you know the complete question before it is finished.

30. Testimony of Others.

Unless you are excluded by order of the court at trial, I will arrange to have you hear one or more other witnesses testify before you do, so you may become familiar with the courtroom surroundings and the procedures. When i court, do not display any reaction to the testimony of any other witness. The judge and jury will not welcome signals of your opinions.

When you are on the witness stand, do not look at me for help in answering a question. The jury wants your answer, not mine, but if you need a document from me, ask for it.

31. Questions by the Judge.

The judge may ask you questions during your testimony. All of these guidelines apply to questions by the judge as well, including, in particular, the importance of being polite and cooperative.

32. Called by Opposition.

If you are a defendant, or a representative of a defendant company, plaintiff may call you as a witness as part of plaintiff's case before we call you. We will discuss this and you should not be surprised if this occurs.

33. Videotape Deposition.

If your deposition is to be videotaped, you must remember, at all times, that you are speaking to the judge and jury on videotape and

not simply to the attorneys in the deposition room. Address your answers to the camera and act appropriately for court testimony. While attorneys at the depositions who are off-camera may act less formally, you are on-camera at all times. Avoid distracting mannerisms such as tapping your pen on the table or moving a water glass around because all sounds will be picked up by the microphone. Never assume that you are off-camera until the camera operator so states.

34. Recesses.

If, at deposition or trial, you become tired or unwell, say so and request a recess. You cannot testify truthfully if you are distracted by fatigue or illness. Fatigue is more often a problem at depositions when there are fewer scheduled breaks than in court testimony. Know that it is not a sign of weakness to ask for a break in a deposition whenever you need it.

In a deposition, but not in court, you may be permitted to ask for a recess to confer with your counsel. The need to confer may arise, for example, if you suspect that a question calls for you to reveal privileged material such as communications with your attorney or trade secrets or testimony which is subject to a protective order. We will try to identify these areas during your preparation.

If you follow the rules listed above, you will testify confidently, comfortably, accurately, and patiently. The jury will know that you are doing your best to tell the truth and that will come from your general demeanor and body language as well as from your words.

CHAPTER 4

USING EXHIBITS AND DEMONSTRATIVE AIDS Nicholas H. Patton

Demonstrative evidence can enthrall a jury or bore them to tears. The proper use of the proper demonstrative evidence is the easiest and best way to get the attorney's whole case to the jury. Without the proper use of this type of evidence, the jury is left with nothing but what is often boring, tedious testimony and any written records introduced into evidence. But with the proper and imaginative use of demonstrative evidence, testimony comes alive and the jury is taken back to the actual occurrence which is the basis of the lawsuit. When one can see something, rather than be told about it, the explanation is greatly aided and opportunities for persuasion are greatly enhanced. Not only is the use of evidentiary tools helpful to the jury, it can also help the witness tell his story in a more cogent and orderly manner. In short, a picture is worth a thousand words. A color picture is worth a hundred black and white pictures. A moving picture is worth ten color pictures, and the real thing is best of all.

While it is easy to characterize demonstrative evidence as "things versus testimony," the labeling of what constitutes demonstrative evidence is very difficult. Terms such as "real," "objective," "demonstrative," and many others have been used. For the purposes of this chapter, all will be considered "demonstrative" evidence. However, documentary evidence such as business records, medical records, etc., and how they are properly used and admitted into evidence will not be discussed herein.

Demonstrative evidence is often attacked or labeled as being "prejudicial" because of the force it can have on a jury. The opponent of effective demonstrative evidence will often argue that the evidence is repugnant, misleading or appeals to the jury's sympathies in such a manner that the prejudice created by introducing it far outweighs any probative value of the evidence.

The opponent may also argue that introduction of the evidence is causing undue delay, is a waste of time, or that the evidence is cumulative of other evidence in the case. These arguments are certainly allowed by, and contemplated in, the Rules of Evidence.

Of these rules, the most important when considering demonstrative evidence is Rule 403, which permits the trial judge to exclude probative, relevant demonstrative evidence if the judge feels that its value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay waste of time, or needless presentation of cumulative evidence. This rule is important, not only for what it actually says, but for the fact that the trial judge's discretion in making these rulings is almost unlimited. With few exceptions, whatever the trial judge lets in gets in, whatever he keeps out stays out, and his rulings will almost always be upheld on appeal. Be ready to fight at trial for the introduction of your demonstrative evidence, because it is really the only chance you have to do so.

PRETRIAL CONSIDERATIONS

There are a few things that the lawyer should be sure to cover in his pretrial preparations concerning demonstrative evidence. First, the lawyer should know when he plans to offer an exhibit and through which witness that exhibit will be offered. Second, a lawyer should have with him some type of checklist of his exhibits, including the requirements necessary to authenticate that exhibit and lay the proper foundation. Lastly, the lawyer should have some way of keeping a record of whether each of his exhibits has been identified, offered, admitted, or excluded, so that prior to closing his side of the case, all exhibits are used as he intended prior to trial.

TYPES AND PURPOSES OF DEMONSTRATIVE EVIDENCE

The types and purposes of demonstrative evidence are really unlimited, except to the extent that the admissibility of all demonstrative evidence is limited to the broad discretion of the trial judge. From the other rules, we have learned that the requirements for the admissibility of evidence generally include that the evidence be relevant and that it can be authenticated by the testimony of some witness or as otherwise required by the rules of law with the proper evidentiary foundation having been laid [see footnote 4, p. 31]. Keeping all of the foregoing in mind, let's move to some different types of demonstrative evidence, keeping in mind that labeling is always a tricky endeavor.

Direct evidence is the actual thing involved in the litigation, whether that thing is an inanimate object or a person. For example, the switch that shorted out causing the machine to malfunction and the plaintiff in the courtroom who was injured and lost an arm because of the machine malfunction can both be used as direct demonstrative evidence. No inferences of any kind are required from the jury. What they see is what they get. Such types of direct demonstrative evidence are almost always admitted because they really are the best evidence of what point you are trying to show. Certainly a severed finger or arm,

or the scar caused by the injury, is relevant and usually can be shown to the jury unless the proponent goes too far so as to make the presentation prejudicial. For instance, having the plaintiff raise his severed arm on the witness stand to show where his injury occurred is generally permitted, but to allow the jury to touch the arm or to have the injured plaintiff purposely do anything which induces pain will often be considered prejudicial. A good rule of thumb is that a person who is a direct piece of evidence can be briefly shown in court but cannot be the subject of touching, demonstration, or experimentation.

The other broad category of demonstrative evidence can be labeled circumstantial evidence. Where circumstantial demonstrative evidence is used, an inference of the trier of fact is required. The trial judge has much discretion under Rule 403 to exclude the evidence for the reasons contained in that rule. For instance, if a party wished to present a different kind of safety switch from that involved in the accident in an attempt to have the trier of fact infer that safer alternatives were available, the trial judge could very well rule that the dangers of confusion of the issues, misleading the jury, or needless presentation of cumulative evidence outweighed the probative value of that exhibit. Thus, circumstantial demonstrative evidence is much more amenable to attack than direct demonstrative evidence.

Another dichotomy that can be drawn in the realm of demonstrative evidence is between real or original evidence as contrasted with illustrative or demonstrative evidence. Real or original evidence is evidence that played a real part in the action made the basis for the lawsuit, e.g., the failed part of a machine component, a defective tire rim, etc. In order to use real or original evidence, the attorney should lay the proper foundation through testimony of a witness that the object is the object which was involved in the occurrence made the basis of the lawsuit and, ideally, that the object is in the same condition or substantially the same condition as it was at the time of the original occurrence. Oftentimes, however, the condition of the object is not substantially the same. When this occurs, the attorney can have the witness explain any changes or differences between the current condition of the object and its condition at the time of the occurrence and that will usually result in the judge allowing its admission. Of course, we again here enter the area of the court's discretion. Should that situation arise, the lawyer might argue that any changes in the condition of the object go to the weight to be given the evidence versus the admissibility of the evidence. Presenting the above-required foundation is usually simple if the item is readily identifiable or unique; however, if the item is not readily identifiable or easily changeable, the court in its discretion may require a much better foundation for the introduction of the evidence, including the chain of custody of the item through testimony of several witnesses. Of course, oftentimes such problems can be addressed through stipulation of counsel prior to trial.

To be contrasted with real or original evidence, illustrative or demonstrative evidence consists of items which played no part in the actual occurrence that formed the basis of the lawsuit, but which are offered to help the trier of fact understand what actually happened during that course of events. Testimony from the witness is the usual method of explaining what happened during the course of an accident or other event leading to a lawsuit. The jury can better understand the testimony, however, if the jury can see an illustration of what is being discussed. Moreover, the witness himself will often be aided in his testimony by having a picture or chart on hand to use as his own

visual aid to help explain his testimony. Of course, visual aids are used constantly by expert witnesses.

SOME EXAMPLES OF DEMONSTRATIVE EVIDENCE

Some common examples of illustrative or demonstrative evidence include charts, models, maps, graphs, drawings, photographs, videos of all types, x-rays, and one of the latest and newest ideas, computer simulated re-creations. In general, in order to introduce and use any of these types of demonstrative evidence, the lawyer must show that the evidence fairly and accurately represents what it purports to be and that it is relevant because it will potentially help the trier of fact understand the issues. This foundation requirement is generally accomplished through the testimony of a witness on the stand who simply points out that the evidence fairly and accurately represents the object or scene which it is being offered to show. Of course, the judge has discretion to exclude this relevant evidence for the reasons outlined in Rule 403. Again, despite the above examples, the types of demonstrative and illustrative evidence which can be presented are really unlimited or limited only by counsel's knowledge and imagination. Despite whatever type of demonstrative evidence that is being used, such evidence can be used during trial without being formally offered and admitted into evidence or being admitted, offered and taken into the jury room as a piece of evidence. For instance, if a chart or picture is used by one's expert witness during his testimony but is not introduced into evidence, the jury will not be able to examine that piece of evidence as closely as they would be able to if they had it in the jury room. Further, there will be no evidence for the appellate court to review should the case be appealed. However, an expert can still use a piece of evidence in this manner, even without the laying of a proper foundation, if it will be helpful to one's case. Conversely, if the evidence being used during trial is offered, admitted into evidence, and taken to the jury room, the jury can examine that piece of evidence closely and even possibly conduct experiments themselves. While jury experimentation gets into another issue, the opportunity for such experimentation can obviously be a concern or a wish of counsel, depending on the exhibit and the strength of his case.

Having the real object in the courtroom is usually the best exhibit one can have. However, if the real object is a car or an oil field platform, size, inconvenience, or impossibility may require that pictures, models, drawings, etc., be used rather than the actual thing. Again, the admissibility of all models, diagrams and pictures are subject to the discretion of the trial court under Rule 403, because if such pieces of evidence are not to scale, or for some other reason too inaccurate, the danger always exists that the jury might be misled. But in the event inaccurate exhibits are allowed in by the trial judge, you are advised to make your attack right then as, almost certainly, his discretion will not be overturned on appeal.

Photographs are one of the most commonly used pieces of demonstrative evidence, as they are easy to obtain and generally their accuracy is not in dispute. In order for photographs of scenes, for example, to be admitted, it is necessary that the witness testify that he is familiar with the scene depicted in the photographs and that the photographs fairly and accurately represent the scene at the time of the occurrence made the basis of the lawsuit. If any changes have occurred in the scene between the time of the occurrence and the time

that the pictures were taken, a simple explanation by the witness of what those changes are is generally acceptable and sufficient to have the photographs admitted into evidence. Photographs of objects generally require a similar foundation for admissibility. However, photographs of objects (e.g., metallurgical samples) made months or years after an occurrence are admissible if identified by a witness as fair and accurate representations of the subject matter of the photographs. Interestingly, there is no need to know how or when the photographs were taken or to be there when the photographs were taken in order for a witness to testify about what the photographs depict.

Motion pictures or videotapes are also commonly used types of demonstrative evidence. Just as in the case of photographs, a witness will generally state that he is familiar with the scene or object being depicted and that the motion pictures or video fairly and accurately represents what the scene or object is purported to be. Motion pictures can be very useful, such as when a personal injury claimant can be shown playing basketball to impeach his testimonial claims of disability. Conversely, a motion picture can be used to show the extent of the personal injury claimant's disability and damages. One of the innovations of the last few years is to show a "day-in-the-life" video of a disabled personal injury claimant to show the injured party's -infirmities, as well as that party's and his family's mental anguish. Although certainly not a necessity, it might also be advisable to have the cameraman who took the "day-in-the-life" video present at trial to support the film and to describe in detail the actual filming of the scenes so that the jury will know that nothing was staged and that there have been no alterations in the filming. The use of reconstruction films or computer simulated videos require the same foundation as the other demonstrative evidence, but can be trickier for the court to accept. As long as the reconstruction films show operations or positions or activities which are undisputed among the parties, there would seem to be no difficulty. But, of course, such films and videos usually illustrate just the plaintiffs or defendant's version of what occurred, and one always runs the risk of exclusion by the trial judge under Rule 403, as the jury may be confused or misled into thinking that the video is real and not one side's version of the facts. Generally, though, these are admitted.

Experiments conducted in the courtroom are also available as a type of evidence to be presented to the jury, but are clearly subject to the court's discretion to disallow them on the basis of waste of time, confusion, delay, etc., under Rule 403. In the event that courtroom experiments are allowed, they must, of course, fairly and accurately represent the conditions which existed at the time the incident in question occurred. More often today, out-of-court experiments by experts on videotape are used, but they again must be under conditions substantially similar to those at the time of the occurrence or should be excluded by the trial judge.

CONCLUSION

I trust that the foregoing discussion of demonstrative evidence will aid you in your trial preparations. As long as the evidence sought to be introduced fairly and accurately represents what the proponent claims it to be and does not run afoul of the concerns of Rule 403, you should have no trouble presenting whatever evidence you think would be helpful to your case. There are many articles and reference books on demonstrative evidence available to you and I have greatly relied upon two in the preparation of this paper. They are

McCormick on Evidence, 2d Ed., ' ' 212-217 (West Publishing Company), and Dorsanio, William V., 111, Texas Litigation Guide, ' 120A (Matthew Bender Publishing Company). Many of the ideas, thoughts, and examples contained herein came directly from these two sources and therefore they are being acknowledged here. However, unlimited information on demonstrative evidence is contained in treatises and law review articles which are easily accessible to you. The real key, however, to the effective use of demonstrative evidence is your vivid imagination.

CHAPTER 5

EXPERT WITNESS TESTIMONY John R. Clayton

INTRODUCTION

Expert witnesses come in all sizes and shapes, some with credibility, some with no credibility; some win cases, and some lose cases. The problem all attorneys face in using expert witnesses is determining if the case is one in which the trier of fact would benefit from an expert opinion. One must then find an expert who is credible, has sufficient knowledge, and can convince the trier of fact that your client's position is scientifically and practically correct.

This is a tall order for most trial attorneys and expert witnesses. We all have made mistakes by calling an expert witness when we shouldn't, using the wrong expert and, in certain cases, not calling expert witnesses when he or she was required to give the trier of fact a clear understanding of technical aspects of our client's case. Regardless, we all find ourselves with expert witnesses and the issue of admissibility facing us square in the face, both at trial and prior to trial.

The admissibility issue of an expert's testimony arises at the pre-trial level in the form of motions in limine, motions for summary judgment where a party's causation issues are challenged, and after trial on appellate review. The adoption of the Federal Rules of Evidence liberalized the admissibility of expert testimony. And, as we will see, once the threshold requirements for admissibility have been met, the challenging party faces a heavy burden when attempting to exclude such testimony at any stage in the litigation.

QUALIFYING THE EXPERT

Federal Rules of Evidence govern the admissibility of expert testimony. More specifically, Rule 702 and Rule 703 dictate upon what basis expert testimony will be admitted and whether a particular individual will qualify as an expert within the guidelines of these rules.

Rule 702 sets out the guidelines for experts' qualifications. Rule 702. Testimony by Experts. If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence to determine a fact in issue, a witness qualified by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise.

Rule 703 gives the guidelines for the facts upon which experts may rely in formulating opinions. Rule 703. Bases of Opinion Testimony by Experts. The facts or data in the particular case upon which an expert bases an opinion or inference may be perceived by or

made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

As we look more closely at Rule 702, we see that the testimony of an expert witness must meet two conditions. First, the person must be qualified as an expert by knowledge, experience, training or education, and second, the trier of fact will be assisted by the scientific, technical or other specialized knowledge possessed by the expert. It is important to note that both of these conditions must be met; they are not mutually exclusive.

In addition, the trial court may reject testimony on the grounds that the expert lacks a sufficient foundation for the opinion he or she is rendering under Rule 703.

As for the issue of a properly qualified expert under Rule 702, the courts have consistently held, as in *Fox v. Dannnenbura*, 906 F.2d, 1253, 1256 (8th Cir. 1990), that there is no preference given for academic training over practical experience. This becomes very important in selecting expert witnesses. Sometimes the best expert for the operation of a riding lawnmower, tractor or any piece of equipment is your local dealer or repair person rather than a mechanical design engineer or someone from the manufacturing plant in some distant state who has no ability to relate to the locale of the trial, or the practical application or repair of the particular piece of machinery. Certainly the trier of fact, particularly if it is a jury, has a basis for understanding the local dealer and/or repairman, and can more easily relate to his explanation rather than to an advanced-degree design engineer trying to explain everyday operations and failures. The Eighth Circuit has stated many times that an expert need not be an outstanding practitioner in a particular field nor have certifications of training or education in that particular subject matter. *Davis v. American Jet Leasing*, 864 F.2d 612, 615 (8th Cir. 1988). The courts tend to follow the rule that once the expert's qualifications have passed the admissibility threshold, the expert's relative skill or knowledge goes only to the weight to be given the testimony and not to its admissibility. History dictates that the courts treat objections to evidentiary questions alleging that the testimony is outside the witness's expertise as only a credibility issue for the jury once the minimum level of expertise has been shown.

The Eighth Circuit has, on occasion, upheld the trial court's exclusion of expert testimony. In *Skull v. Fuqua Industry, Inc.*, 906 F.2d 1271, 1275 (8th Cir. 1990), the court upheld the exclusion of a mechanical engineer's testimony regarding what impact a lawnmower would have on the human anatomy. The Court reasoned that the expert possessed, and had demonstrated, no expertise in human anatomy and thus could not testify as to the exact cause of injury to a particular part of the body relative to the lawnmower operation.

The Eighth Circuit is often quite lenient when evaluating whether or not a particular witness's testimony would be helpful to the trier of fact to understand the issues. The cases indicate that the minimum amount of "helpfulness" is all that is required and doubts should be resolved in favor of admissibility. The recent case of *Williams v. Protech. Inc.*, 908 F.2d 345 (8th Cir. 1990), gives a very broad interpretation of Rule 702 requirements in that it states, "The broad and general stated tests for determining the qualification for a given witness to testify as an expert is whether his knowledge of

the subject matter is such that his opinion will most likely assist the trier of fact in arriving at the truth." This, as you can see, is a very liberal interpretation of Rule 702, but one which comes down on the side of allowing testimony that has the slightest chance to aid the trier of fact.

The key portion of Rule 703 indicates that facts or data reasonably relied upon by experts in the particular field in forming opinions or inferences need not, of itself, be admissible in evidence. The Eighth Circuit cases state, generally, that the fact basis of an expert opinion goes to the credibility of the testimony, not to the admissibility. It is therefore the responsibility of the opposing party to examine the factual basis for the opinion during cross examination. In *Loudermill v. Dow Chemical Co.*, 863 F.2d 566, 569 (8th Cir. 1988), the court clearly stated that the factual basis for expert opinion is sufficient unless it is so fundamentally unsupported that it can offer no assistance to the jury, indicating that opinions based on mere conjecture are not admissible under Rule 703. Therefore, it would seem that the factual basis is sufficient as long as it is not too speculative or questionable to constitute a reliable basis for an expert's opinion.

Lastly, expert testimony must also meet the requirement of Rule 403: Rule 403. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion or Waste of Time. Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by consideration of undue delay, waste of time or needless presentation of cumulative evidence. Rule 403 is commonly known as the "prejudicial test" and allows the trial judge the discretion to exclude the testimony if the probative value of the expert testimony is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. Therefore, there must be a proper balance between the probative value and potential prejudices as weighed by the trial judge. As a practical matter, this type of evidence is rarely disallowed under Rule 403.

The discussion of the above rules indicates that courts have adopted a very liberal approach regarding the qualification of witnesses and satisfying the factual basis requirement for the expert's opinion. Also, the interpretation of these rules over the years has allowed experts to testify somewhat outside their area of expertise to such an extent that, from a practical standpoint, the burden of challenging an opponent's causation expert appears almost insurmountable. It is arguable that the rulings have evolved in this manner since experts are most often used in complex cases where technical testimony is necessary for a more complete understanding of the fundamental operation of advanced theories such as equipment, disease, or treatment.

USING THE EXPERT AT TRIAL

A. When to Use an Expert. The most successful approach generally entails the use of an expert only when necessary to explain technical issues to the trier of fact, and when the trier of fact would be at a disadvantage to find for your client without the aid of an expert. Experienced trial attorneys sometimes attempt to discredit the other expert witness without calling an expert of their own. In some instances, the opposing party's expert is discredited to the point that the need for one's own expert is minimal. In those situations, the

trial lawyer should carefully weigh the "balance" at that particular point of the trial; simply because you have arranged and paid for the expert to be available at court does not necessarily mean that you should call him or her. To bring your expert into the trial after you have totally discredited the opposing expert may not only be unnecessary, it will also subject your own expert witness to a desperate cross-examination. "Thou shalt not overkill" sometimes is a good motto to follow regarding expert witnesses.

However, do not be lulled to sleep by thinking that the trier of fact does not have the need to understand what the true explanation is of the event at issue. This is a judgment call that gives us all gray hair and one which tends to be answered by how communicative your expert is, how understandable and focused he or she may be with the jury or judge, and how well he or she can communicate your client's position in a very fundamental fashion, with the purpose of making your client's position more believable.

At any rate, based on your sound judgment, if you choose to use an expert, do not, under any circumstances, permit the expert to be condescending, pretentious, or talk down to the trier of fact. Some experts tend to teach class, and in some instances that is good. But be certain that proper preparation has occurred, considering the forum in which you find yourself, and that this expert does not in any way intimidate or make the jury uncomfortable. So many cases are put in jeopardy by your expert's attempt to over-explain, overkill or overreach. You should attempt to strike a happy medium of practical application for very technical issues and employ very straightforward, understandable, everyday terms to the trier of fact. Remember, the judge or jury must relate to expert witnesses as well as lay witnesses before understanding is reached.

I once had an expert who was well educated and versed on the subject matter of thermodynamics, and after hours of trial preparation, I felt would be a reasonably good witness for my client. He began to testify, and although I interrupted as often as I dared, I was not successful in stopping him from "teaching a class" to the jury for 40 minutes. On cross examination, the opposing counsel asked only one question, "Mr. Expert, what was the question that you were asked that launched you into the 40 minute recitation which we have just heard?" To my utter dismay, I heard the response, "I really don't remember."

B. Cross Examining the Expert. One of the first things to do to prepare for the cross examination of an expert witness is to insist that your written discovery be answered early on in the discovery stage of the particular case. Either in interrogatories or in deposition, the expert will establish the limits of his expert opinion. On cross examination, those limits must always be kept in mind by the examiner should the expert exceed those limits. If this occurs, your cross examination should display to the jury or judge that the particular expert is straining to "help" the party that has paid him.

To further prepare for cross examination, be sure that you take the opportunity, if necessary, to use a consulting expert or your own testifying expert to help you determine areas of weakness in theory, assumption or factual data of the opposing expert, any of which could cause opinions or conclusions to vary. Also, during the preparation for cross examination, read the opposing expert's testimony in other cases similar to the one at issue to determine if there are any variances in his or her opinions.

One of the most helpful approaches to cross examining an expert witness is to be certain that you have a rhyme and reason for the questions that you ask during your cross examination. All good trial lawyers have a theme or philosophy of their particular case and this theme should be carried through on cross examination of the opposing expert. So often attorneys simply cross examine the expert for the sake of cross examining and never touch the theme of their own case. In other words, for the sake of cross examination, the story line for your own case is forgotten and an additional opportunity to sell your client's position is wasted. Careful preparation prevents this common mistake.

In addition, there are certain cross examination techniques for the opposing experts which are universally followed and which are time-tested and successful. Certainly, the first one is to challenge qualifications if they are questionable or hard to explain to the average person. Doubt can creep in to the trier of fact if you can get the opposing expert out on a limb relative to qualifications. If they are not subject to challenge, you only solidify the person's qualifications and this avenue of questioning should be totally avoided. If you are certain the expert will be qualified, a casual "we will stipulate to her expertise" often dampens the thunder of sterling qualifications. The writer was successful in disqualifying an expert witness from testifying about the corrosiveness of the metal of an airplane because the only association with airplane metal the expert had over the years was piloting a plane. This is an area in which the trial lawyer should be very careful and one which can backfire very quickly; but nothing can be better than to disqualify an expert in front of the trier of fact. It immediately creates credibility problems for the opposing party's entire case. Often in depositions, or in the answers to interrogatories, it has been determined that the opposing party's expert must have certain basic facts, or certain facts must have been established, for him or her to have given the expert opinion. So often, experts will begin overreaching at trial trying to "win the case" and forget that there are factual bases or links missing from which their opinion is derived. Be very aware in cross examination of what the experts have established in pretrial discovery to be the factual basis for their testimony. So often, the two factual bases differ and the credibility and weight of the expert's testimony diminishes immensely when this is brought to the jury's attention.

On cross examination, attempt to maneuver the opposing expert into acknowledging the validity of opposing opinions. In most cases there are many opinions on the subject matter which is being advanced and the mere acknowledgement that there are other opinions diminishes the weight of the expert's position. This is particularly true in the medical profession. Doctor's opinions are limited by a particular combination of experience, training and education, and diagnosis and prognosis often become somewhat subjective. Also be aware that in most technical areas there are disagreements among competent experts in the field on certain theories. Most experts, at one time or another in their careers, have believed or promoted several sides of the issues in question. It is very helpful to have them admit to this on cross examination. Extensive research may show that 10 years earlier a particular expert's opinion on certain issues was in the other camp of understanding or belief rather than the one that is being advocated in the courtroom.

A word of caution -- if you cut into the expert's position on an issue, move on; don't give him the opportunity to think up a recovery

statement or you will find yourself arguing theory with the expert, and you may not win. You have found your point for closing argument; move on. If the expert does get in a recovery statement later, you can argue he was unsure, changed his position, or was weak at best on this point and not sufficiently familiar with the facts or theory.

LOCATING EXPERTS

In locating and choosing an expert, the attorney should look at the reputation, the hometown prejudices that may occur where the case is to be tried, and how conservative the expert is in his opinions. It is not only important to the unquestionable expertise of the expert in the area he is to be testifying, but also whether or not the expert will fit into the forum where the lawsuit will be tried. As stated before, a local expert with less training, or in fact no formal training, will be a better witness than a highly sophisticated, trained, educated, experienced expert brought in to "save the day" in the wrong forum.

In choosing an expert, the attorney must also determine whether the expert has the ability to present the testimony in a manner which is understandable. A face-to-face inter-view with the proposed expert is the best way to determine whether or not he or she will make a good witness, let alone a good expert witness. Another important way to resolve this issue is to talk to other attorneys for whom this witness has testified and get their opinions as to how the expert performs.

Locating experts can be infinitely easier if, over the years, the trial attorney has kept his own expert witness file and can call on his own personal contacts and personal experience with certain witnesses in various areas of expertise. Other lawyers, partners, colleagues, and corporate clients which you may represent are also sources for locating expert witnesses in a particular field. Often clients have the exact expertise needed within their own staff, or the individual on your client's staff may have attended seminars and training schools with other people expert in the field for which you are searching.

The Defense Research Institute (750 North Lake Shore Drive, Chicago, IL 60611) has computer expert witness indexes, as well as the ATLA exchange (1050 31st Street, N.W., Washington, DC 20007) or the American Bar Association litigation section. WESTLAW (West Services, Inc., 50 Kellogg Boulevard, P.O. Box 64526, St. Paul, MN 55146-0526) and LEXIS/NEXIS (Mead Data Central, 9443 Springboro Pike, P.O. Box 933, Dayton, OH 45401) have services that identify expert witnesses. The American Medical Association (Department of Physician Biographic Records, 535 Dearborn Street, Chicago, IL 60610) and National Jury Verdict Review and Analysis (24 Commerce Street, Newark, NJ 10127) all have databases to obtain credentials and locate experts in virtually every conceivable field. Colleges, universities and public libraries also are valuable sources for expert witnesses, as well as the yellow pages and classified advertising sections of legal periodicals.

CONCLUSION

Choosing an expert and handling him in the courtroom on direct or cross is a function of preparation. A complete analysis of your particular case and the facts thereof, at a very early stage, is necessary for this proper preparation. During that process, it will be apparent whether or not an expert is needed to offer proof on certain issues. At this point, you may determine that a consulting expert is needed rather than a testifying expert. If a consultant is to be used,

obviously the most important qualification for this expert is knowledge and competency in the subject field; whereas, an expert that will testify clearly must be an effective, believable and communicative witness.

Finally, don't be afraid of the expert witness. If you are, be sure it is yours that you are afraid of -- not the opposing side's expert. If you are hesitant with the opposing expert, you have very little chance with this witness and the trier of fact will see it as clearly being unprepared.

CHAPTER 6

JURY SELECTION

Dennis L. Shackelford

INTRODUCTION

The voir dire process is important to the success of any trial. It is the selection of jurors who decide your client's case. The goal in the process is the seating of a jury that will listen attentively to the testimony and be receptive to the case. When the attorney is allowed to participate in the questioning, an opportunity is afforded to make a favorable impression in the minds of the juror. You must establish credibility with the potential jurors.

PREPARATION

You must determine the extent of your participation in the jury selection process. Exclusive judge-conducted questioning or questioning where attorneys are permitted to submit questions to be asked by the judge is usually limited in scope. This makes it important to conduct a complete pretrial investigation. However, where the initial questioning is conducted by the judge, but attorneys are allowed to ask questions directly, the selection process takes on different dimensions.

You should plan your questioning as thoroughly as opening or closing statement. To do so you gather what information is available from reliable sources. This includes obtaining a copy of the jury handbook, jury questionnaires, and a list of cases and the results of those cases tried to the current jury panel (what kind of case, who was struck by whom, who did not sign the verdict, who was foreperson, who were the attorneys).

Your information should be organized to be readily available. A simple method is a chart in your trial notebook to make your notes on observations and thoughts about potential jurors during the questioning. You may wish to have a separate jury notebook in which a separate page is devoted to each potential juror and on which your investigation is reported. A copy of a suggested form is included in the appendix to this chapter.

An outline of your questions is essential. Remember, your purpose is to acquire information from potential jurors in order to strike for cause or use in determining peremptory challenges. Also included in the appendix are questions from which you may develop a format for your questions.

CONDUCTING VOIR DIRE

1. Information about Jurors

Simple observation of the potential jurors is helpful. Race, sex, dress, grooming, reading material, and apparent health are obvious. Develop information about the characteristics of the potential juror. This includes prior litigation experience, occupation, marital and family status, education and special training, prior jury service, condition of health, and relationship with a party, witness or attorney. You should consider asking if the potential juror has previous information about the case, is opposed to this type of lawsuit, or may be financially affected by the case.

2. Information to Jurors

This is your first opportunity to tell the potential jurors something about your case. You should establish credibility and trustworthiness. Be concerned about your appearance. Try not to attract attention with your manner of dress. Appear organized. Arrange your trial material neatly. Have concern for the appearance of your client. Always be courteous to the trial judge, opposing counsel and parties, and witnesses. Be in control of your case. Your expertise will be obvious. Conduct your voir dire at the rail or any location where you can be clearly seen and heard.

Avoid at all costs offending the potential juror. You are not conducting cross-examination. Never make an accusation of prejudice or ignorance. Do not say: "Do you have any bias or prejudice against my client?" An open-ended question is better, or a more acceptable form, as "Of course, you do not have any bias or prejudice against my client because of his [occupation, race, religion, etc]?"

You should be permitted to impart information to the potential jurors. Make a point and conclude "don't you agree?" or "you can accept that proposition?" Expose any troubling weakness of your case. If your client has a prior history of a similar injury, or a criminal record, it is best to establish this up front. Or, if you anticipate other problems at trial, it will be beneficial to explain in voir dire that you will cross-examine a child or an elderly person in this manner: "An elderly person will testify for the defense. It is my responsibility to cross-examine that witness to determine whether truthful answers have been given, or the memory of the witness is accurate. It will be a disservice to my client if I fail to do this. Will you agree not to hold it against my client because I cross-examine this elderly witness?" Tell the potential jurors about lengthy depositions that will have to be read, and ask them if they will agree to give that testimony the same attention as if it were a live witness.

EXERCISING CHALLENGES

Your first effort to exclude an objectionable potential juror is to the trial judge on a challenge for cause. Do this at the bench out of the hearing of the jury panel; otherwise you may be forced to exercise a peremptory challenge should your challenge for cause be denied. A challenge for cause is based on bias, prejudice, a formed opinion about the case, or any grounds that would prevent the potential juror from being fair and impartial.

When you exercise your peremptory challenges you will call upon all the information you have accumulated and rely upon your judgment and experience in doing so. Most times these challenges are obvious; for example, in personal injury actions the plaintiff will want to avoid those who are likely to be hardened to pain (nurses, doctors), and the defendant will wish to avoid blue collar workers or union members.

CONCLUSION

The following are some tips to remember about voir dire:

1. Be mindful to establish a rapport with the potential jurors at the beginning. No early personal questions.
2. If you represent the plaintiff, make it clear that your case has merit. If defendant, that the case is defended because your client believes it has no merit.
3. Ask questions about damages if you are the plaintiff. If defendant, damage questions can be troublesome as they tend to diminish your conviction of a no-merit case.
4. Tell the potential jurors that fault is an issue. For the plaintiff, accept the challenge to establish fault. For the defendant, contend that the happening of an accident does not mean that anyone was at fault.
5. Important areas for background questions are: employment, prior jury or litigation experience, personal health and special training.
6. If opposing counsel objects to a question, strongly consider acquiescing and accomplishing your objective by posing a different question.
7. Be courteous, be credible, be prepared, and be professional.

APPENDIX

JURY SELECTION

VOIR DIRE QUESTIONS

Background questions:

1. Are you employed?
 - (a) If so, where do you work?
 - (b) What type of work do you do?
 - (c) How long have you worked in that position?
 - (d) If employment brief, or potential juror retired, where did you work before your current position [or before retirement] and what did you do?
2. Are you married?
 - (a) [If so,] do you have children?
 - (b) Does anyone in your family work outside the home?
 - (c) [if so,] where do they work and what do they do?
3. Do you have any particular hobbies or other interests which occupy much of your time?
[If so,] what do they consist of?
4. Have you ever served on a jury before?
[If so,] where and what type case?
5. Have you ever brought a lawsuit or been a defendant in a lawsuit?
 - (a) [If so,] when was that and what did that case involve?
 - (b) Did the case come to a conclusion, and if so, were you satisfied with the result?

Opinions

1. Will you keep an open mind about the case until you have heard all the evidence and the law?
2. Will you apply the law which the judge gives to you during the trial?

3. Do you understand that you will have to evaluate the credibility and honesty of witnesses who testify in this case?

4. Will you promise not to speculate or guess about the facts, or assume facts to be true which have not been presented during the trial?

5. Do you understand that this is not a personality contest and that your verdict should not be based upon whom you like or dislike?

6. Do you understand that the fact that a lawsuit was brought does not mean that the claims have any merit, and that anyone can bring a lawsuit for any reason?

7. If the reliable evidence is in favor of my client, will you render a verdict for him[her] even though it means that a substantial sum should be awarded [or that the plaintiff will not receive one cent]?

8. Do you understand that it would be wrong to render a verdict against the claim of the plaintiff if you find the defendant was negligent and caused the plaintiffs damages [or it would be wrong to render a verdict against the defendant if he was not negligent]?

9. If you sit on this jury, will you promise to render a fair and impartial verdict based upon the evidence and the law that applies to this case?

JURY LIST

NO:

COURT:

AGE:NAME:ADDRESS:CITY/ST/ZIP:EMPLOYMENT:EDUCATION:HEALTH:SPOUSE

NAME:SPOUSE EMPLOYMENT:SERVED ON

JURY BEFORE:ABILITY TO SERVE:COMMENTS: Use ONLY TAB to go from line to line in COMMENTS.

CHAPTER 7

THE OPENING STATEMENT

Samuel A. Perroni

INTRODUCTION

Over the years, I have become a student of the opening statement. I have read virtually every trial advocacy text on the subject and I have searched constantly for new techniques and ways to improve my product. I have become convinced that next to voir dire, the opening statement is the most important part of a trial.

Why do I believe that the opening statement is the most important part of a trial? The answer is simple! Try as we might (with our voir dire and jury instructions), we cannot keep an average juror from making up his or her mind when they begin receiving information. This generally begins in earnest with the opening statement.

There is also the psychological principle of "primacy and recency." This principle teaches us that the things which make the deepest impressions on people are the things they hear first and the things they hear last. Therefore, I am persuaded that opening statements make deep impressions on jurors.

BASIC PRINCIPLES OF THE OPENING STATEMENT

I have discovered that there are five basic trial practice principles that apply to opening statements. These are:

1. Never waive your opening statement.

The opening statement is far too important to give away. If you have the burden of proof, you need to come out of the starting blocks strong. If you have a defenseless case, develop the art of appearing to say something without saying anything.

2. The opening statement should rarely, if ever, be reserved.

A trial court will typically grant a defendant's request to reserve opening until the conclusion of his opponent's case-in-chief. However, this is generally not a good strategy.. The reasons are simple. First, the jury expects what Irving Younger called "symmetry." The jury also expects the trial to be a contest between two sides. If one side does something, they expect the other side to do likewise. If the defense fails to follow the plaintiffs opening, the appearance of symmetry is lost. Secondly, a reserved opening may signal a lack of certainty on your part about your position in the case. This lack of certainty could diminish credibility with the jury.

Of course, as always, there are some exceptions to the general rule.

3. An effective opening statement may become indistinguishable, at times, from a closing argument.

How many times have you heard someone say, "He made a good opening argument." Of course, an opening statement is not supposed to be argumentative. But, if you get an objection during your opening, turn to the judge and say with a perplexed look on your face, "But this is what we intend to prove."

The secret of an effective opening statement is being able to tell the jury about the case in such a convincing fashion that, after you have finished, they want to decide the case in your favor.

4. Keep it simple, stupid!

This should be your motto when preparing your opening statement. Avoid legalese and technical terms. Don't overload the jury with facts, and clearly define the theme of your case. Finally, tell the jury what you want.

5. Listen to your opponent's opening statement.

If you have time, you might even request a transcript. Identify any promises of proof that may not be capable of delivery. Return to discuss those promises in your closing argument.

CHECKLIST FOR OPENING STATEMENTS

The following is a list of items you should consider to make your opening statement more effective:

1. Prepare and rehearse your opening statement in advance of trial. Don't put off preparing your opening statement until the night before trial. Instead, begin thinking about your opening while you are preparing your proof. Then, rehearse your opening sufficiently in advance of trial to allow for changes in strategy, if the need arises.

2. Be completely familiar with your case. You must know every detail of your case.

3. Give your opening statement without notes. You should never read to a jury or act like you are trying the case according to a script prepared in advance of trial. You will lose credibility if you do.

4. Communicate with the jury. As a fine trial lawyer once told me, "You have to get into the jury box with the jury."

5. Make eye contact with every juror. Be sincere. If you don't convey a sense of belief in your case, how can you expect the jury to believe in you? Remember, the psychology of a lawsuit is about trust. Who does the jury trust to bring them the facts? Remember, this is a "performance." The jury expects you to know your lines. Don't let them down.

6. Characteristics of the opening:
- (a) Simple;
 - (b) Short;
 - (c) Clear;
 - (d) Pointed; and
 - (e) In plain English.

An opening statement containing these characteristics will communicate trustworthiness on your part.

7. An opening statement should have a beginning, a middle, and an end. Again, this communicates trustworthiness. Tell the jury your story and do it in such a manner as to show you are in control.

8. Don't say anything you know you can't prove. You may be able to eliminate doubt about proof by a motion in limine, but don't take chances that may hurt your credibility.

9. Take the sting out of problems in your case. If there is a problem in your case, admit it in opening. It will always hurt you more if you let your opponent reveal the problems in your case. Ignoring the problem will not make it go away. Hit it straight on.

10. Help the jury absorb the information. Remember, the jury knows nothing about the case. You, on the other hand, have lived with it perhaps for months. The jury must be helped to filter and distill the information.

11. Use silence to get the jury's attention. Silence in the courtroom is a powerful commodity. Some would argue that we would do much better with nothing but silence in the courtroom. Although that isn't likely to occur, silence is often forgotten as an attention--getter.

12. Don't spill all of the beans. Strategically, you are always better off if your opponent is left somewhat in the dark after opening.

13. Give the first opening in a multi-party case. This may not always be possible, but you need to work for it because it gives you the opportunity to make the first impression.

14. Avoid objections if you can. While it is proper to object to improper matters occurring during the opening statement, the best strategy is to refrain from objecting and to use the statement against your adversary in closing argument. Also, objections during opening statement run the risk of offending the jurors because it is not polite to interrupt someone while they are talking. If you do object, do it in such a manner as to apologize for the interruption and to make it clear that the objection is only being made because your adversary has stepped out of bounds.

CONCLUSION

Your opening statement should always end in such a manner as to communicate to the jury that you are ready, in control, and welcome the opportunity to present your case.

In a civil case, the opening gives the plaintiff an opportunity to persuade the jury to side with the plaintiff. On the other hand, the opening for the defense presents the opportunity to call into doubt

those aspects of the plaintiffs case which are weak or susceptible to equal argument.

In a criminal case, the opening statement gives the prosecution an opportunity to fortify the charges contained in the indictment or information. On the other hand, the opening statement gives the defense an opportunity to balance the scale by letting the jury know that there are doubts about the accusations.

CHAPTER 8

DIRECT EXAMINATION

W. Dent Gitchel

A trial lawyer's most essential skill is the ability to conduct effective direct examinations. No matter how mesmerizing and persuasive your opening statement, cross-examinations and summation are, most cases cannot succeed unless your witnesses tell your client's side of the story clearly.

To conduct competent direct examinations is far more difficult and complex than simply asking your witnesses to tell what they know. However, many inexperienced lawyers think the task is easy and, consequently, they prepare and perform it poorly. Your task on direct examination is to control the flow of information from the witnesses to the jury in a way that ensures the jury's understanding and enhances the witnesses' credibility.

There is no substitute for meticulous preparation of your witnesses. You must meet with each witness before trial, tell the witness what questions you will ask, and learn what the witness's answers will be. This is no job for a law clerk or paralegal. You must do it yourself.

The following techniques will help you organize and execute effective direct examinations.

ORGANIZING A DIRECT EXAMINATION

Arrange the sequence of each witness's testimony carefully, so that the jury will understand the witness's story and how it fits into your theory of the case. Emphasize the most important facts. While chronological order usually is the most logical way to present facts, your witnesses are not bound to describe events in the order in which they occurred. If some other order of presenting a witness's testimony will be more effective, organize the direct examination that way.

Do not allow witnesses to launch into their stories immediately. Take time to ask each witness some questions calculated to put the jury in a receptive frame of mind. Before asking a witness to tell what he or she knows about the case, allow the witness to offer the jury some personal information that will serve to enhance the witness's credibility. Most direct examination should be organized into the four segments that follow.

A. Allow the witness to introduce and personalize himself or herself. After eliciting the witness's name, bring out other special data about the witness that will cause the jury to like, respect, or identify with him or her. For example, you should ask a police officer to describe his or her experience and training. A witness who is a solid, upright citizen should be given the opportunity to share some of his or her attributes with the jury. If a witness will offer an expert opinion, you must establish the witness's qualifications.

B. Have the witness establish his or her connection to the case. After the jury has become acquainted with the witness, have the witness describe his or her connection to the case. For instance, if the witness was an eyewitness to an accident, have the witness place himself or herself at the scene by asking, "Where were you at 3:00 p.m. on Tuesday, August 18, 1992?"

C. Have the witness describe the scene.

This segment of direct examination serves two purposes: It helps each juror create mental picture of the scene and it enhances the witness's credibility by demonstrating the specificity of his or her recollection. Do not simply ask the witness to describe the scene. You must ask narrowly focused questions about particular things. Questions like "Were there traffic lights on the corner?" "How many?" and "Where were they?" will draw out the specific information jurors need in order to form vivid mental images of the scene. By describing the location precisely, the witness also establishes the accuracy of his or her perception and recollection.

D. Let the witness tell his or her story.

After you have provided a backdrop to the action, it's time to let the witness describe what took place. Your questions should encourage the witness to relate what he or she perceived simply, logically, and clearly.

Ask precise, tightly-crafted questions designed to elicit specific facts, and instruct your witnesses to answer them succinctly. Every important fact is worth at least one question, and you can emphasize a fact's importance by asking several questions about it. Every question accentuates the fact's significance and affords the witness an additional opportunity to add rich detail to his or her testimony. For example, rather than asking, "Tell us what you saw when you arrived at the scene?" you can ask, "When you arrived at the scene, what was the first thing you noticed?" If the witness answers, "I saw Joe standing over Jim holding a smoking gun," you can emphasize that fact by asking follow-up questions like, "How was Joe standing?" and "Which hand was he holding the gun in?"

To maintain continuity, you can use a previous answer by the witness as an introductory clause to a question. For instance, after the witness in our present example has told everything he recalls about the way Joe was standing, you can move smoothly to your next area of inquiry by asking, "When you saw Joe standing there holding the gun, what was the first thing you did?"

PERFORMING DIRECT EXAMINATION

Evidence comes from witnesses, not lawyers. Therefore, your demeanor and questions during direct examination must focus the spotlight on your witnesses.

A. Your demeanor

Make yourself inconspicuous. Get out of the way. Position yourself near the far end of the jury box, so the jury is between you and the witness. Stand still. Don't pace; don't fidget; don't fiddle with a pen; don't jingle the change in your pocket.

Project your voice so the jury can hear your questions. Force the witness to speak up. From your position at the far end of the jury box, both you and your witness will have to speak loudly enough to hear each other. Because the jurors are between you, they will also be able hear.

Give each witness your undivided attention. Fix your eyes on the witness so that when a juror's attention strays to you, your

interested appearance will direct that juror's mind back to the witness. Listen to the witnesses' answers and don't read your next question while a witness is responding. If you watch and listen, your witnesses will lead you through their stories, and each of your questions can be framed to follow logically from each previous answer.

Act as if you are absorbed in the witness's testimony, as though you were hearing the witness's story for the first time. Your demeanor sets an example for the jurors; when you seem interested, you telegraph a subliminal message to them that your witness's testimony is important.

A word is in order about the use of notes. You must use them. No lawyer can try a case competently without them. You should prepare a set of notes pertaining to each witness. Many top lawyers write out all their questions; all have at least a checklist. However, no effective lawyer reads questions. An effective direct examination must appear to be an informal, spontaneous conversation with the witness. A conversation cannot appear spontaneous when one party reads his part.

B. Your questions

Do not ask leading questions. Arkansas Rule of Evidence 611(c) states, "Leading questions should not be used on the direct examination of a witness except as may be necessary to develop his testimony." As is often the case, the law of evidence forbids what good judgment proscribes anyway. Leading on direct examination is ineffective as well as improper; witnesses are more believable when they tell their stories in their own words without prompting from a lawyer. Therefore, unless leading is absolutely necessary, as in the case of a very young or mentally incompetent witness, do not lead on direct. To avoid leading, ask questions that begin with the words, "who," "what," "when," "where," "why," or "how."

SOME SPECIFIC TECHNIQUES

A. Headline

A newspaper headline enables readers to discern at a glance what the article that follows will be about. It also serves to mold opinion by emphasizing one ingredient of the story over others. You can "headline" a witness's testimony by asking a question early in the examination that allows the witness to state the essential fact you want the jury to remember about his or her testimony. When a witness prefaces his or her testimony with a headline, the jury learns immediately why you called the witness and the jurors are more likely to understand the significance of the facts the witness relates. For example, after an eyewitness places himself or herself at the scene of an accident, you can ask, "What did you see?" The witness's answer, "I saw that man (pointing) run a red light and crash into that man (pointing)," sums up the essence of his testimony in thirteen words. After presenting the headline, you can elicit the fine detail of facts the witness observed.

B. Anticipate cross-examination

If your witness is subject to being impeached with some matter that will substantially diminish his or her credibility, such as a prior conviction, and you are sure the cross-examiner will raise it, you should bring that matter out during direct examination. Such negative information will probably be less damaging if the witness admits it forthrightly on direct.

However, you should not use this technique indiscriminately. Even though you bring the information out, it will still damage your witness's credibility; it will just hurt less.

A cross-examiner's questions on a subject not closely relevant to the present case, but embarrassing to the witness, may have the net effect of arousing sympathy for the witness. Therefore, do not anticipate the cross-examiner's questions unless you are reasonably certain that the matter will be raised and that, when raised, it will significantly lessen the witness's believability. If you conclude that the cross-examination will be perceived as a cheap shot, don't raise the subject on direct. When you decide to reveal negative information during direct examination, mention it off-handedly; don't dwell on it. Bring it up near the end of the witness's direct testimony, but don't make it the last question and answer.

CHAPTER 9

CROSS-EXAMINATION

Frederick S. Ursery

In preparing this chapter I have read several of the articles which have been written about the topic of cross-examination. These articles agree on a number of guidelines which the lawyer should follow in conducting a successful cross-examination. I have attempted to analyze the common points made in these articles and to add some suggestions based both upon my own observations and war stories from fellow lawyers. A list of the articles which I have relied upon and which I recommend to you is included at the end of the chapter.

WHETHER TO CROSS-EXAMINE

The first decision to make is whether to cross-examine. Leon Jaworski wrote that the most difficult words for a lawyer to say are "No cross-examination." However, if the witness has not harmed your case or if the cross-examination is likely to do more harm than good then it will be to your benefit to forego cross-examination. A pointless cross-examination often gives the witness a chance to enlarge upon and strengthen his direct testimony. You can state "No questions, your honor" in a manner which conveys to the jury that the witness has not harmed your case and that an examination would be a waste of everyone's time.

If the witness testifies to undisputed facts there is no need for cross-examination. For those witnesses who are testifying to both undisputed and disputed facts, but who cannot be impeached, the best approach may be an apparent cross-examination which merely affirms the undisputed facts. The apparent cross-examination is used to avoid the appearance that you have accepted all of the witness's testimony as true.

THE OBJECTIVES OF CROSS-EXAMINATION

The primary objective of cross-examination should be to elicit facts which support your theory of the case and which will assist you in making the closing argument to the jury. This can be achieved by several methods: 1) bring out any helpful material which the witness did not mention on direct and emphasize the favorable portions of the direct testimony; 2) if the witness has given damaging testimony then attempt to impeach, contradict or discredit him.

PREPARATION FOR CROSS-EXAMINATION

All of the experts agree that preparation is the most important component of a successful cross-examination. Many hours and even days may be necessary to prepare for the cross-examination of a key witness.

Preparation will, of course, depend upon the witness and the case, but it should include a careful review of relevant documents such as police reports, medical records, witness statements, governmental reports, advertising brochures, et cetera. In cross-examining expert witnesses, it is often invaluable to obtain copies of previous depositions which the witness has given.

A review of discovery depositions, witness statements, pleadings and exhibits is essential. Preparation of a thorough index will allow reference to relevant documents and pleadings and deposition testimony as you proceed through the cross-examination outline. Prepare a list of points to be made with each witness.

TECHNIQUES OF CROSS-EXAMINATION

Professor Irving Younger enunciated the "Ten Commandments of Cross-Examination" and they have been widely quoted, if not always followed, by trial lawyers. These rules provide a good framework for a discussion of cross-examination.

1. Be Brief

If you are brief the jury will remember. You can lose a jury's attention by asking too many questions. Never try to make over two or three main points. A common error is to belabor minor inconsistencies and to discuss minutiae. This often bores the jury and dilutes the impact of the major points. If you are in the position to impeach a witness with a deposition or written statement or otherwise, go forward with the impeachment at the beginning of the cross-examination. At that point the jury is alert to see what will happen and the witness is more nervous and less poised. A long and boring cross-examination before the impeachment dilutes its effectiveness. Once the witness has been impeached it is best to wrap up the examination as quickly as possible. Further examination often obscures the impeachment and gives the witness the opportunity to re-establish and rehabilitate himself.

2. Ask Short Questions and Use Simple Words

Use plain English and short sentences. Avoid using legal jargon which neither the witness nor the jury may understand. For example, many jurors do not know to whom the terms plaintiff and defendant refer. It is better to refer to the parties by name. Also, some nonlegal terms such as "prior" and "subsequent" create confusion for many witnesses and jurors. "Before" and "after" are more conversational and understandable.

3. Ask Only Leading Questions

Leading questions are not ordinarily allowed on direct examination. However, they are allowed on cross-examination and give the examiner a distinct advantage. It is easier to control the witness. The witness can often be limited to "yes" and "no" responses. Leading questions can suggest the desired answer. Do not ask "why" questions or other open-ended questions which allow the witness to take the ball and run with it. However, cross-examination which asks only leading questions can be boring. It is a good idea to intersperse leading questions with some open-ended but safe questions. Most of the non-controversial part of the cross-examination can be conducted with open-ended answers. In the more controversial areas restrict the witness to "yes" or "no" answers or short responses. 4. Ask Only Questions To Which You Already Know the Answers

This is probably the most famous of all the commandments. Younger bases the rule on the fact that if you do not know everything there is to know about the case you should not be trying it. However, there are two exceptions to the commandment: (1) you may ask the question if you do not care what the answer is, and (2) you may ask a question without knowing the answer in order to lead into a series of questions which will allow you to determine what an answer will be.

5. Listen to the Answer

Many of us have observed lawyers reading questions from a list and marking them off as the witness responds. Often the lawyer is so intent on asking his next question that he ignores the answer to the present question. Occasionally the witness may give an unexpected response which should prompt an entirely new area of inquiry.

Along the same line, listen carefully to the witness on direct examination and observe his demeanor. We are often so intent on taking notes during the direct testimony that we fail to observe the witness and the jury's reaction to the witness. Brief notes should be made on only those areas of the direct examination which are contrary to expectations.

6. Do Not Quarrel With the Witness

The jury identifies with the witness and not the lawyer. If it appears that you are attempting to bully or take advantage of the witness, you risk alienating the jury and creating sympathy for the witness. There may be times when the occasion calls for the questioner to express emotions through pace, voice level and physical movement, but badgering or browbeating a witness will evoke sympathy for the witness. Likewise sanctimonious or condescending attitude is offensive. Generally an attitude of fairness and politeness to the witness is the best rule to follow. You are more likely to get a favorable response if you are friendly with the witness. Also, obtain any possible concessions from a witness before you attack the witness's testimony.

7. Do Not Permit a Witness on Cross-Examination to Simply Repeat What He Said on Direct Examination

It may be appropriate to ask the witness several questions in regard to his direct examination in order to set up some questions on cross-examination. However, if the witness repeats large segments of his direct testimony it will only reinforce that testimony in the minds of the jurors. Do not rehash damaging direct testimony unless you are laying the foundation to impeach the witness with a prior inconsistent statement.

8. Never Permit the Witness to Explain Anything

A question which permits an open-ended response risks the loss of control of that witness. A cross-examiner is not a newspaper reporter who is supposed to ask "how" and "why." Questions put to a witness on cross-examination can often be in the form of statements. The examiner uses voice inflections to turn these statements into questions. For example: "You were the officer who investigated the accident?" Use of this technique allows the examiner to avoid ending-phrases such as "isn't it true" or "isn't it correct." These phrases are surplusage and they become repetitive and monotonous and interfere with the flow of the examination.

9. Avoid One Question Too Many

This is frequently-heard advice. The problem, of course, is in recognizing the question before it is asked. Once you have asked it, you will recognize it. This error normally occurs when you have

obtained a concession from a witness and you then try to press the witness too far. The best procedure is to make the point and move on. When a favorable answer is given, do not linger on that point too long. We have all seen a lawyer obtain a favorable response from a witness and then return to that topic again, only to have the witness change his answer or expound on it in such a way that the beneficial effect is diluted or destroyed.

10. Save It for Closing Argument

The goal of cross-examination is to develop facts and inferences from those facts which you can use in your closing argument. Do not use the cross-examination questions as a subtle attempt to argue the case. For example: "Well, isn't it true that you were not in a position to have seen the mugger's face and therefore cannot identify him?" The witness will seldom if ever respond favorably to such a question. It is much more effective to establish favorable facts on cross-examination and then argue logical inferences from the facts to the jury in closing argument.

In addition to the above rules for control of the witness, the following is A LIST OF DO'S AND DON'TS FOR CROSS-EXAMINATION:

Start With a Strong Point

The jury is attentive at the beginning of the cross-examination. Do not squander this opportunity by going over marginally relevant points or some minor inconsistencies that are not central to the case. If there is something that will materially impeach the witness's credibility, start with that point.

Be Yourself

We have all seen lawyers who copy the style of someone they admire. A cross-examination style which works well for one person may not be successful for another. Each lawyer should use a style that is compatible with his or her own personality.

Take Charge

Stride to the podium and take command. Self-confidence is helped by planning and organization. Do not shuffle through a disorganized stack of papers and constantly confer with your co-counsel. Have the cross-examination outline, exhibits and impeachment material organized in an annotated outline so you can proceed with your questioning without groping and fumbling.

Stay in Control

Avoid showing despair, concern or argumentative conduct. All trial lawyers have had witnesses blow them out of the water with an unexpected response. It is helpful if you can refrain from an outward sign of the impact of the answer. An agitated or excited response only worsens the situation. The jury often takes its cues from the lawyer's reaction to testimony.

Review of Witness's Notes or Documents

If the witness brought notes or documents with him to the witness stand, ask if he has relied upon the material in giving his testimony. If he replies affirmatively then ask the judge for the opportunity to review the documents. Ask for a brief recess, if necessary, to review the material before you begin your examination.

End on a High Point

The only way to do this is to have the question planned in advance. You cannot count on it coming out of the blue as you struggle through an unprepared cross-examination. Do not make the final high point a rehash of some concession or victory you have been able to score earlier in the examination. Not only is this repetitious, but

the victim will often wiggle off the hook if the topic is brought up again.

CONCLUSION

Preparation and common sense are the primary ingredients of a good cross-examination. Few lawyers can wing it successfully. Observation of some of the time-tested suggestions discussed above will often be of assistance in conducting a competent cross-examination.

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CHAPTER 10

OBJECTIONS, MOTIONS AND MAKING YOUR RECORD

William R. Wilson, Jr.

Keep in mind that appellate courts want to uphold trial court decisions. It is extremely embarrassing, to say the least, if the trial court is affirmed because you failed to make your record. It is extremely important, therefore, that you make a record that will "hold" in the appellate court.

First, one must know Rule 103.

In determining what a "substantial right" is as that term is used in Rule 103(a), courts proceed on a case-by-case basis. After considerable experience some lawyers may be able to determine what will obviously constitute reversible error, and what obviously will not. However, in case of doubt, make your record.

When an objection should be interposed is a question of trial advocacy, as much as a matter of evidence and procedure. As McCormick

puts it, "No objection should be made unless there is reason to believe that the making of the objection will do more good than harm."

Note that Rule 103(a)(1) requires that a "timely objection or motion to strike" be made. At the same time, this same subsection requires that the objection be correct ("stating the specific ground of objection"). This means, of course, that a trial lawyer must have a good working knowledge of the rules of evidence and the rules of procedure. The requirement of speed and accuracy often puts the trial lawyer in a quandary. As Judge Weinstein aptly puts it:

The need for speed often leads attorneys to object generally rather than specifically as required by Rule 103(a)(1). The attorney may sense that something is wrong with the question but have insufficient time to analyze it fully in the split moment that he is rising to his feet. Judges generally understand this and permit the attorney a moment to get his bearings by engaging in what, to an outsider, sometimes seems to be a bit of pointless colloquy. If possible, the judge should assist floundering counsel by suggesting the specific ground for objection even though he intends to overrule it.

But, don't count on the judge being so helpful; i.e., know the rules of evidence and the rules of procedure.

A full catalog of almost every possible objection, with thumbnail definitions, appears in McElhaney, "I Object!" which appears at page 90 of the ABA Journal (November 1992).

Under Rule 103(a)(2), the party whose evidence has been excluded must make an offer of proof showing, on the record, the substance of what the evidence would have been had it been admitted. If a document or tangible object is excluded, then counsel should have it made a part of the record as an offer of proof. If testimony is excluded, then counsel should state what the testimony would have been, in substance, if admitted; or a written statement may be attached to the record as an offer of proof. In rare instances, counsel may want to actually question the witness, out of the hearing of the jury, to make the offer of proof.

Furthermore, counsel should always, in making an offer of proof, give the intended purpose of the proposed evidence.

We are taught since early childhood that it is rude to interrupt, and that it is rude to whisper in public. Nonetheless, sidebar conferences are often necessary to keep the skunk out of the jury box. Rule 103(c) states the obvious, i.e., that, "proceedings shall be conducted, to the extent practicable, so as to prevent any inadmissible evidence from being suggested to the jury."

It is generally agreed that jurors may be distracted by too many sidebar conferences. Pre-trial rulings on questionable evidence may be desirable (motions in limine will be discussed below), so that sidebar conferences can be reduced. No matter how distracting, such conferences are not nearly as bad, in seeking justice, as the admission of prejudicial, inadmissible evidence. The necessity for objections and sidebar conferences can be explained in voir dire, in the hope that jurors will not be unduly distressed by them.

Do not take comfort in subdivision (d) of Rule 103 (the "plain error" subdivision). It is extremely rare, particularly in civil cases, for an appellate court to reverse when a proper record has not been made.

Of course, a proper question may prompt an objectionable, unresponsive answer by the witness, or later in the trial a ground for objection to an answer may become evident for the first time. In these

instances, counsel should move to strike the objectionable material, and ask the court to direct the jury to disregard it.

PRE-TRIAL

Rulings on pre-trial motions should be obtained on the record, or an order should be entered which definitively sets forth the trial court's disposition. Failure to get rulings on pre-trial motions "on the record" can result in the appellate court's refusal to review the ruling.

It should be kept in mind that in criminal cases some motions must be made prior to trial, absent unusual circumstances. For example, a motion to suppress illegally seized evidence must be filed no later than ten (10) days before the trial date. In addition to a motion to suppress, which must be filed prior to trial, it is often good to obtain pre-trial rulings on other points. A motion in limine raising evidentiary objections, and other matters, is a useful tool. Moreover, the Supreme Court of Arkansas has held, as a general rule, that a pre-trial ruling on a motion in limine will preserve the record on appeal. To be safe, however, it is probably best to make an objection contemporaneously, at least in shorthand form.

Some trial courts are inclined to have informal, off-the-record discussions to resolve issues before the trial. If at all possible, have such discussions, and any rulings made, taken by the court reporter. If this is impossible, be extra careful that you get a definitive order signed by the court and filed with the clerk.

TRIAL

A. Conference/Hearing on the Morning of Trial

Again, many trial courts hold a brief conference with counsel before "making the jury." Often, important decisions are made during this conference, and you should ask that these proceedings be reported. If the trial court refuses to grant your request, make sure that you re-state your objections at the first opportunity when you are permitted to go "on the record." You should also note that you asked to make your record contemporaneously, but that this request was refused by the court. Most courts will grant your motion to have this early conference reported if you make the request politely, but firmly.

Many trial courts also decide motions in limine either immediately before the jury is made, or immediately thereafter. Here again, it is important to have these proceedings taken by the reporter.

There are an infinite number of things that may come up for consideration during these last minute conferences. All concerned generally want to keep the time for these conferences to a minimum out of consideration for the jurors who are waiting. For this reason, it is often better to have a pre-trial hearing shortly before the trial date, if at all possible.

If, prior to making a jury, you know something about a prospective juror which may disqualify her or him, it is often better to bring this up in an in-chambers hearing. As an example, if you have evidence that a prospective juror has been convicted of a felony (and thus disqualified as a juror, you should ask, in chambers, that this juror be quietly excused. As another example, you might have a lawsuit pending against one of the prospective jurors. Certainly you wouldn't want this discussed in front of the other members of the jury panel. If the court refuses your request to have the prospective juror excused, make sure that your request, the reason for it, and the court's ruling are on the record.

B. Voir Dire Examination

Many trial judges, as a matter of course, do not have the voir dire examination taken by the court reporter. You should make a specific request that the voir dire examination be on the record. If this request is refused, get it on the record that you made the request and that it was refused. Then, when any significant matter arises during voir dire, request the opportunity to approach the bench and ask again (each time) that this matter and the remainder of voir dire be taken by the court reporter. If this request is refused, ask to make your record at the first opportunity the court will permit it. Most judges, at this point, will direct the court reporter to take the remainder of the voir dire proceedings. If not, you must continue to attempt to make your record. After voir dire is completed, but before strikes are made, ask again to put each of your objections on the record. After the jury is struck, it is a good idea to briefly restate your motions which were not granted and objections which were not sustained.

In most instances, you must use all of your peremptory strikes before you can raise a point on appeal claiming an error in jury selection. In addition, if you use a peremptory strike on a juror to whom you objected, you must show that you had good grounds for striking one of the accepted jurors, but could not for lack of another peremptory.

C. Opening Statement

Again, it is the custom in some circuits that opening statements are not taken by the court reporter. You should request that opening statements be on the record. If this request is refused, make sure that this request and the refusal are entered into the record. When you have an objection during opening statement, you should state the objection, then ask to approach the bench and again ask that the statements be reported. If this is again refused, ask for an opportunity to make your record on opening statement objections immediately at the conclusion of opening statements.

At any time a trial judge flatly refuses to allow you to make a record on a motion or objection, rather than risk contempt, simply file a written motion setting forth the facts and circumstances, specifically including your motion or objection, the reasons for it, and the fact that you weren't allowed to make a contemporaneous record. It may mean, that you will have to prepare a motion during a lunch or during the evening, but it is the safest way to make sure that you preserve a point for appeal.

D. Evidentiary Stage of Trial

As noted above, Rule 103(a)(1) provides that a timely objection or motion to strike must appear of record, stating the specific ground for objection -- if the specific ground is not apparent from the context. It is virtually always better to state the specific ground, because what might be apparent to the lawyer making the objection might not be quite so apparent to an appellate court.

Objections should be specific, but spare and to the point. Objections which are really mini-closing arguments, attempts to coach the witness, and so forth, are bush-league, and may draw a rebuke in front of the jury. Responses to objections such as, "if she doesn't want the jury to hear that, I'll just withdraw the question, Your Honor," are equally bush--league and should be met with stern measures by the trial judge.

The objection "incompetent, irrelevant and immaterial" is a bromide and likely will not preserve your error unless the evidence truly is not relevant under Rule 401. This means that the trial lawyer

must be familiar with the rules of evidence and procedure, and be able to call up this information on a moment's notice.

When a witness blurts out objectionable information, or his/her subsequent testimony makes it clear that something was objectionable, a motion to strike should be made as soon as the error becomes apparent.

A motion for a mistrial, like other objections and motions, must be made, in a timely manner. Although a motion for mistrial may, in some instances, be necessary to preserve the record for appeal, this is not always true.

What should the trial lawyer do when a motion for mistrial has been denied, but the court offers to give the jury an admonition?

There were some earlier decisions that held that a failure to renew a motion for a mistrial, after an admonition, would waive the point for appeal (on the questionable theory that the movant had "accepted" the admonition as sufficient). Now, however, it is clear that you must object to the admonition, and, to be safe, you should renew your motion for a mistrial after the admonition.

E. Motion for a Directed Verdict

Both at the close of the evidence presented by the party having the burden of proof, and again at the close of all of the evidence, the defendant in Arkansas must move for a directed verdict in order to preserve the issue of sufficiency of evidence on appeal.

F. Instructions

It is the better practice (much better) to have a hearing on the proposed charge to the jury before the jury retires, and specific objections should be made at that time. Often, however, the trial court, in an attempt to save juror time, will hold an informal discussion on proposed jury instructions, allowing the lawyers to state objections informally, and stating that "formal" objections may be made after the jury is charged. This is an unfortunate practice. You should request that you be allowed to state your objections, on the record, prior to the charge to the jury. If this request is denied, you should ask that your request to do it in this matter be made on the record prior to the giving of instructions to the jury. In fact, Ark. R. Civ. P. Rule 51 specifically provides:

No party may assign as error the giving or failure to give an instruction unless he objects thereto before or at the time the instruction is given, stating distinctly the matter to which he objects and the grounds of his objection.

(Emphasis added)

Rule 51 also provides that "no party may assign as error the failure to instruct on any issue unless such party has submitted a proposed instruction on that issue." What about the situation where the party objects to the opposition's proposed instruction, and doesn't want the particular issue submitted to the jury at all? In *Hess v. Treece*, 286 Ark. 434, 693 S.W.2d 792 (1985), cert. denied, 477 U.S. 1036 (1986), the defendant objected to a punitive damage instruction of any nature at trial and raised the issue on appeal. In rejecting this assignment of error, the Arkansas Supreme Court stated, "Appellant did not submit a proposed instruction on punitive damages, and his objection was general, not specific." *Id.* at 442, 683 S.W.2d at 797 (emphasis added). Fortunately, in *City of Little Rock v. Weber*, 298 Ark. 38, 387, 767 S.W.2d 529, 532 (1989), the court removed this cloud by holding that "[w]hen a party objects to an erroneous instruction of

law which should not be given, all that is required is to timely state valid reasons for the objection."

After the jury is out, the objecting party may attempt, knowingly or unwittingly, to change the nature of an objection. A complete record will help to avoid this problem.

CHAPTER 11

SUMMATION

Winslow Drummond

Summation is argument. Its purpose is to persuade the trier of fact to resolve factual issues in favor of your client.

Summation is the summing up of the theme of your case. This theme should have permeated your entire presentation -- established initially and perhaps only implicitly during voir dire, identified explicitly in opening statement, developed through testimony and exhibits, protected by cross-examination, and buttressed by the court's instructions.

Whether through personal interview or review of materials provided by a client, counsel's first contact with a matter destined for trial should suggest the theme to be pursued. At that time, you should make a mental outline of your closing argument. Although the tentative theme may be modified and refined or even discarded before trial, counsel should not hesitate to revisit an initial choice of theme, as first impressions may indeed have validity when tested in the light of second thoughts. Unanticipated developments during trial itself may dictate modification of the theme of summation.

At some point prior to delivery, the mental outline of summation, if not committed to memory, should be reduced in writing to exactly that -- an outline. Although some have recommended that the text of a summation be committed in its entirety to writing and memorized and even rehearsed, none has suggested that a summation be read to a jury.

With adequate time for preparation, a memorized summation can be effectively utilized by counsel for plaintiff in a civil case or for the prosecution in a criminal case for the opening portion of summation. Counsel for the defense, on the other hand, should be wary of that approach, since the substance of any rebuttal will be dictated by the preceding argument of the adversary.

Rehearsal of summation before an individual or a group is almost invariably of value in terms of trying out an overall theme as well as arguing specifics in support of it. But this type of rehearsal is not necessarily synonymous with a memorized presentation.

Summation is not summarization of the evidence. It is not a rehashing of the testimony of the witnesses and a listing of exhibits. The most effective of summations may never mention a single witness.

Effective argument requires a melding of facts and law. The favorable aspects of each must be emphasized; that which hurts must be acknowledged and its effect diminished or explained away. The underlying theme may emphasize either facts or law or both.

Summation is essentially a verbal exercise. The advocate must "grab" the attention of the jury immediately and, after thus whetting the collective appetite, continually stimulate their interest. The verbal presentation can be punctuated by visual aids. Enlargements of

significant exhibits and extracts of testimony should be used selectively. Summation is not a slide show.

Similarly, enlargement of the text of selected, significant jury instructions may be virtually essential. Jurors cannot be expected to adequately comprehend principles of law read a single time by the court. Clearer understanding can be achieved through counsel's oral reading of an instruction simultaneously with the jury's hearing and visually reading its text. If, as in some federal courts, summation precedes the court's delivery of instructions, first ascertain that the court will permit utilization of this technique with appropriate qualifying language such as, "I anticipate that the court will instruct you . . ."

The opening portion of summation, whether delivered by counsel for plaintiff in a civil case or for the prosecution in a criminal case, must contain two components -- first, the basis for civil or criminal liability, and second, the relief sought. Both must be argued so as to afford the defense an opportunity to rebut all phases of the adversary's case. The "opportunity" to rebut is precisely that; there is no obligation to rebut. The most devastating rebuttal may be a refusal to address an argument at all. Any rebuttal by the defense or by opposing counsel in the closing portion of summation should incorporate final emphasis of counsel's choice of an underlying theme.

As a cautionary note, counsel should consider carefully whether to use humor in summation. The trial of a matter is serious business. While potentially dangerous, humor can be extremely effective if it is appropriate and if it is consistent with counsel's personality and method of presentation. If in doubt, don't use it. This leads to a final admonition: Be yourself; do not imitate. Jurors intuitively sense insincerity.

A good summation will outline to the trier of fact why it should find for your client. A great summation will, in addition, tell a jury why it should want to find for your client. The most carefully crafted and magnificently delivered summation may not necessarily win your case. But a poorly prepared and ineffectively presented summation will most certainly lose it.