EVERYTHING YOU EVER WANTED TO KNOW ABOUT TRIAL PROCEDURE AND TACTICS
(college/high school mock trial edition)

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A. THE CARDINAL RULES OF SUCCESSFUL TRIALS

1. Act respectful toward the judge. Stand when he/she enters or leaves the room. Address him/her as "your honor."
2. Be brief.
3. Don't waffle, whine or say sarcastic things.
4. Be formal and professional at all times.
5. Prepare.
6. Smile.

B. USUAL ORDER OF TRIAL

1. The plaintiff/prosecutor gets the table nearest the jury and always goes first.
2. The bailiff calls the court to order, attorneys stand and the judge enters the room.
3. The judge asks for the attorneys' names, which side they represent, and whether there are any preliminary requests of questions.
4. The attorneys make three kinds of requests (called “motions”)
   a) A motion to separate witnesses so they can't hear what other witnesses say.
   b) Motions to prevent the other side from bringing up specific inadmissible evidence.
   c) Requests that the judge clarify his or her procedures on several common issues;
      i) May exhibits be used in opening statement?;
      ii) May leading questions be used on preliminary or uncontested matters?;
      iii) Should you state grounds for an objection in open court or at the bench?;
      iv) Will the judge give jury instructions before or after closing arguments. If instructions are not given until after arguments, will the judge permit you to refer to specific pattern jury instructions during argument.
5. Jury selection (not usually done at trial competitions).
   a) A jury panel is brought in, given preliminary instructions by the judge, and questioned by the attorneys about whether they can be fair and impartial.
   b) During the questioning (called “voir dire”), either side may challenge a juror for cause whenever grounds become apparent. A challenge for cause is made when a juror is related to a party or is so biased for or against a party that they cannot be fair and impartial.
   c) After the questioning, the lawyers may exercise a peremptory challenge against any juror.

Peremptory challenges are used to remove jurors you think might be biased against you but they wouldn't admit it.

6. Opening statements, plaintiff (or prosecutor) first.
7. Plaintiff's case in chief
   a) Plaintiff calls Witness No. 1.
      i) Bailiff swears the witness
      ii) Plaintiff conducts direct examination
      iii) Defendant conducts cross-examination
      iv) Plaintiff conducts brief rebuttal
   b) Plaintiff calls remaining witnesses. Same pattern
   c) Plaintiff announces that s/he rests
8. Defendant stands up and makes a motion for "judgement as a matter of law," arguing that the plaintiff has not presented enough evidence to justify a verdict in plaintiff's favor. These motions are always denied.
9. Defendant's case-in-chief
   a) Defendant calls Witness No. 1.
      i) Bailiff swears the witness
      ii) Defendant conducts direct examination
      iii) Plaintiff conducts cross-examination
      iv) Defendant conducts brief rebuttal
   b) Defendant calls remaining witnesses. Same pattern
   c) Defendant announces that s/he rests
10. Plaintiff presents its rebuttal case. Rebuttal is only allowed to present evidence in response to new facts, issues or defenses raised during the defendant's case-in-chief. Rebuttal is rarely allowed at trial competitions.
11. Closing arguments
    a) Plaintiff presents the first argument.
    b) Defendant presents his or her argument
    c) Plaintiff presents the final argument.
12. The judge instructs the jury on the law
13. Jury deliberation (not usually done at competitions).

C. BASIC PRINCIPLES OF ADVOCACY

<u>(1) Develop a theory of your case and stick to it.</u> Make sure that everything you do furthers that theory, and don't waste time on anything irrelevant to it. A case theory is the simplest model that explains what happened and why you are entitled to a favorable verdict, and forms a cohesive, logical view of the merits of the case that is consistent with common everyday experience. A case theory contains the following elements:

a) Law. Your theory should clearly indicate the proper legal outcome of the case. You must understand the elements of your cause of action or defense, and whether and how you can prove them. If there are multiple legal issues, you must decide what is your strongest legal argument.

Just because an issue could be argued does not mean you must do so. For instance, a defendant in a personal injury case could argue that the plaintiff cannot prove liability, or that plaintiff suffered no damages, or both. If you represent a defendant who, at the time of an accident, was drunk, speeding, driving in the wrong lane, and did not have a license, could you sincerely argue that your client was not negligent? If the plaintiff suffered only whiplash injuries that cannot be medically verified, your theory of the case can more comfortably rest on an argument that the plaintiff cannot prove any injury.

b) Facts. Your theory must be consistent with the weight of the evidence. It also should identify which are the most important items of evidence that support your version of the disputed events. Just because evidence is available does not mean it must be presented -- even if you have spent time and effort to gather it. You must develop the ability to discern helpful from confusing information and the discipline to limit yourself to the presentation of facts supporting your theory.

c) An explanation for your weaknesses. You must recognize, acknowledge, and have an explanation for weaknesses, gaps, inconsistencies, and improbabilities in your case.

d) An emotional component. What injustice has been committed? Why is your client morally deserving of a verdict?

e) What is the one big problem with your opponent's case? Why is s/he wrong?

(2) Keep it simple. Concentrate on the five or ten most important facts in your case? Identify them in your case theory. If you can simplify your case, edit your presentations, and keep the jury focused on your main points, resisting the temptation to go off on less important tangents, you will present the jury with a case they can understand and remember.

(3) Be realistic. Never build a case around what a judge or jury might do, build it around what they will probably do. Sure, it's possible that jurors might believe that a drooling child molester with "Born to Lose" tattooed on his forehead is a credible witness, but it is not likely.

(4) Think carefully about the language that you use. Use words that personalize your witnesses and depersonalize your opponent's. Use colorful labels as mnemonic devices for the main facts -- if 2 people are killed it is a “slaughter,” not a homicide.

(5) Corroborate rather than repeat. Exact repetition is boring, but corroboration from several angles is convincing. You can make the testimony given by every important witness more credible by corroborating everything that witness says, through exhibits, demonstrations, and the testimony of other witnesses -- especially your opponent's witnesses. For example, a defendant claiming self-defense may ask the arresting officer to describe the overturned furniture suggesting mutual combat, or verify that a knife was found near the victim's body

(6) Illustrate. Use themes, stories, examples and anecdotes to illustrate your main points. Jurors may not remember all the details of your argument that an opposing expert witness's opinions are purely subjective; but they will remember the story of Goldilocks and the three bears.

(7) Be positive rather than negative. Emphasize the strengths of your case, rather than the weaknesses of your opponent's.

(8) Start strong. Psychologists have confirmed what our mothers always told us: first impressions are important. This principle suggests that the first thirty seconds of each phase of your trial -- your opening statement, each direct and cross-examination, and your closing argument -- is a critical point in which you should focus on something you especially want the jury to remember.

(9) End strong. The psychological principle called "recency" suggests that the final thirty seconds of each phase of your trial -- your opening statement, each direct and cross-examination, and your closing argument -- is a critical point in which you should focus on something you especially want the jury to remember. Have a good punch line.

(10) Admit your weaknesses. Every case has weaknesses, e.g., witnesses with unsavory backgrounds or evidence that defies common sense. You cannot ignore these problems; weaknesses do not just go away. You cannot explain them away, but you can disclose them yourself in a way that makes them appear trivial. Psychologists have shown that you will usually be more persuasive if you bring out both sides of an issue yourself than if you adopt the "used-car-salesman" approach of trying to hide obvious points of vulnerability. As a corollary to the principles of primacy and recency, however, weaknesses should usually be buried in the middle of each phase of your trial.

D. OPENING STATEMENT

(1) The Rule: You are supposed to talk only about the facts you intend to prove; you may not argue.

- a. You may discuss your evidence, as long as you think it will be admitted during trial.
- b. Don't talk about the other side's evidence.
- c. Don't argue. Don't say negative things about the other side, don't make comparisons, and don't draw broad conclusions.
- d. You may state your basic legal claim or defense, but may not spend time discussing the law.
- e. Don't read the pleadings or tell the jury how much was sued for.

(2) The technique of opening statement

a. Find a theme that relates to the elements of your case or in the characteristics of your client that arouse natural sympathy or coincide with universally admired principles. It is especially helpful if you can come up with a clever title for your theme. E.g.,

1. David and Goliath -- if you represent an individual against a large corporation.
2. Fighting city hall -- if you represent a person who has been the victim of inflexible policies of government bureaucracies or the unreasonable decisions of faceless officials.
3. Caught in a sea of red tape -- if you represent a small business trying to comply with

contradictory and arbitrary regulations and laws.

4. Law and order -- if your case is weak on sympathetic factors, but your client's actions were legally justified.

b. Use chronological order. The more common is to following your client chronologically through the event. E.g.:

Ellen Gaston left her house at 3:15 to drive to the supermarket. She put on her seatbelt and drove east on Second Street. As she passed Rogers Elementary School on her right, she slowed down. She was watching the road in front and the schoolyard on her right, when she heard a sudden screeching of tires and was smashed into by the defendant coming out of a driveway on her left.

You also may use a timeline, in which the movements of several people are charted minute by minute, but there is no protagonist. For example:

It's 3:15. Ellen Gaston is leaving her house to go to the supermarket. The defendant is finishing his fourth beer in his apartment on Second Street. Kim Chua is sitting in his fifth grade classroom at Rogers Elementary School. At 3:16, Ms. Gaston gets in her car and fastens her seatbelt. The defendant goes to the refrigerator for another beer, but the cupboard is bare. Kim looks anxiously at the clock. From 3:16 to 3:20, Ms. Gaston drives east on Second Street. The defendant decides to go out for more beer, puts on his coat, and walks down to his car. Kim counts the minutes to the end of the school day. At 3:20, Ms. Gaston approaches Rogers School. The defendant guns his car down the driveway. The bell finally rings and Kim races out of the schoolhouse. At 3:21, these three people come together. Kim runs across the schoolyard. Ms. Gaston looks to her right to make sure he's not going to run into the street. The defendant flies into Second Street without stopping and smashes into Ms. Gaston's car.

c. Tell a story. Be entertaining. Try to forget it's a courtroom; imagine you're sitting around a campfire.

d. Give a conclusion and tell the jury what verdict you expect the evidence to support. Keep it specific and brief.

e. Admit (but don't emphasize) weaknesses. Every case you take to trial will have some inherent weaknesses -- gaps in your evidence, witnesses who lack credibility, the absence of corroboration on an important issue, unavailable witnesses, and so forth. By bringing them out yourself in as positive a manner as possible you take some of the sting out of them, appear honest, and lessen the negative impact when your opponent points them out. This does not mean you should tell the jury about every trivial piece of conflicting evidence nor anticipate disputes your adversary may raise. Rather, you must bring out and explain away those weaknesses that will emerge from your own presentation of evidence or that inhere in your theory of the case, regardless of what your opponent does. For example, suppose your client was angry. You might say:

Jack was angry when he got into his car. He had fought with his girlfriend. But the he

had gotten over it and calmed down 10 minutes later when he got home.

f. Performance suggestions:

a. Use as few notes as possible.

b. Maintain eye contact with the jurors, looking from one to another. If looking directly at an individual juror makes you nervous, look between two jurors.

c. Use simple words and plain English. Don;t try to talk like a lawyer.

d. Don't get too dramatic -- save it for closing.

e. Vary your pace, pitch and loudness. A monotonous, droning speaking voice will put jurors to sleep.

f. Keep up the pace of your speech, without letting it get so fast the jury cannot follow you.

g. Slow speech is boring.

h. Use good posture. Despite what you see on television, the slouching country lawyer approach is not very effective.

E. DIRECT EXAMINATION

1, What topics to cover

a. Sufficient facts to make out a prima facie case on every issue on which you bear the burden of proof.

b. Any testimony from the witness on one of your main points of emphasis.

c. Testimony that corroborates your other witnesses, especially your client.

d. Information about the witness's background that makes their particular evidence more credible. You may have to supplement the meager information in the packet.

e. Testimony that is necessary to lay a foundation for other evidence

f. Testimony that provides continuity and makes the story understandable.

2. Suggested order

a. Something dramatic and important

b. Background that bolsters witness's credibility.

c. Set the scene.

d. Maintain chronological order. A story is easier to follow if it is in chronological order. Rarely is there any reason why you should deviate from it.

e. Get witness to tell the story.

f. Big finish

3. Attract and keep the jurors' attention. Most direct examination is boring. Much of it is not very important. Therefore, you want to assure that the jurors' attention is focused on the witness before you cover the most important parts of the direct examination. You can attract jurors' attention to the witness by having the witness do something unusual. For example, you can hand the witness an exhibit, have the witness get up and demonstrate something, or have the witness walk to a diagram. You can keep the jurors' attention by being brief and using visual aids.

4. Clever techniques

a. Subdivide direct examination into smaller units. If you break up a long story into "episodes" it will be easier for the jurors to understand and remember it. Thus, you might divide up the plaintiff's story of a traffic accident into six segments: the plaintiff's happy and active life before the accident; the events of the day leading up to the accident; a detailed account of the accident itself; the minutes immediately following the accident; the next few days in the hospital; and what plaintiff's life has been like since the accident.

b. Plan transitions between segments. It will be easier for the jury to follow your story if they understand when one "episode" stops and another starts. You should therefore plan verbal and visual transitions between segments. A transition is made up of three parts: a clear closure on one segment, an interruption of the flow of the direct examination, and then a clear beginning to the next segment. You can close a segment with a question such as, "Do you recall anything else about the accident?" For an interruption, you may remain silent for a few seconds, move to a different location, have the witness sit down if the witness was standing, and/or insert a phrase such as, "Let's move on to the events following the accident." You can open the next segment with the same kind of topic question you use to start the chronology: "Directing your attention to immediately after the accident, tell us what happened."

c. Elicit facts and details, not conclusions. Conclusory testimony depends for its success on the witness and jurors sharing a common frame of reference. It is unlikely that all jurors will share the witness's view on what constitutes "large," "fast," or "a good look at the suspect." The more you are able to provide the jurors with the details of important points, the more certain you can be that the jury will understand it. Thus, you want your witness to say "six feet tall and two hundred pounds" rather than "large," "going over eighty miles an hour" rather than "fast," and "close enough to read the words 'born to lose' tattooed on his upper arm" rather than "got a good look at the suspect."

d. Use appropriate visual aids. Miscommunication is least likely if you can show the jury the actual objects and places involved in a litigated event. Photographs, diagrams and other illustrations also reduce the likelihood of misunderstanding.

e. When you get to important facts, go into detail, for example:

Q: What color was the gun? A: Black.

Q: About how big was it? A: Pretty compact, about the size of an open hand.

Q: Short barrel or long barrel? A: Short. I would call it a snub-nosed gun.

Q: Automatic or revolver? A: Revolver.

f. Use visual aids.

5. Several techniques help enhance the witness's trustworthiness.

a. Enhance the witness's personal credibility. You can show the witness is unbiased, has good social standing, has experience, etc.

b. Enhance the credibility of the witness's story by proving that the witness has a good memory, did things to preserve recollection such as taking notes, and by eliciting detailed testimony about the event itself. Why does the witness remember? How can the witness be sure?

c. Prove the witness's expertise and familiarity with the subject-matter. A witness's opinions

and observations of other events and people is more credible if the witness is familiar with that type of event or the people involved. If a witness is going to describe a traffic accident, bring out that the witness used to be a cab driver.

d. Establish motives that are consistent with conduct. People do things for reasons. If the reasons and motives are explained, the conduct makes more sense. If a witness acted out of habit, jealousy, love, shame, curiosity, or any other common emotion, proving the emotional state will make the conduct seem more logical.

e. Have witnesses admit weaknesses and offer explanations.

6. Ask good questions

a. Ask only one question at a time, and not a question with several parts.

b. Avoid negatives in the question, if possible. Don't ask questions like: "You do not know whether Jones was there?"

c. Make the question brief.

d. Use simple words that everyone will understand.

e. Avoid leading questions. Let the witness testify in his or her won words.

7. Performance suggestions:

a. Be honest and sincere. Your personal integrity is vital. No "cheap shots."

b. Manifest confidence and belief in the witness. Show the jury that you believe in the case you are presenting. Act like you care.

c. Be professional. It is always better to err on the side of being too formal than let your performance slide into sloppiness, laughter, or slouching.

d. Respect the judge.

e. Address all remarks to the judge. Do not speak directly to the opposing lawyer, and do not make comments to the jury.

f. Ask permission to approach the bench, the witness or the jury, or to have the witness step out of the witness chair.

g. Use a conversational tone of voice. Better to be too loud than too soft.

h. Let your voice reflect the emotional level of the examination. You probably should question a physician in a formal, professional manner, but when you examine an injured child, let your voice reflect your compassion and understanding.

i. Don't let negative feelings show in your face and voice. If disaster happens, don't reveal that you are angry, irritated, or frustrated.

j. Do not try to suppress all human emotion. Laugh if something funny happens. If you win a difficult battle over an objection, allow yourself a quick smirk of triumph.

k. Watch the witness, so you see what the jury is seeing. Watch for signs of nervousness or confusion. Be careful not to get distracted staring at your notes.

l. Watch the judge. Look for signs of irritation or a raised eyebrow. You also need to watch for visibly negative reactions that could affect the jury, such as the judge shaking her head in disbelief.

m. Watch the jury for their reactions. Are they attentive, bored, falling asleep? Have they

begun to look at your witness like the witness has some loathsome disease?

n. Keep an eye on opposing counsel. Some unethical attorneys may try to distract the jurors' attention away from the direct examination.

8. Exhibits have their own special procedure:

a. Mark the exhibit with a letter or number for identification. This is often done by the attorneys before trial, but you also may request the clerk or court reporter to mark exhibits just before you use them.

b. Lay the appropriate foundation through your witness, referring to the exhibit only by its identification mark. You may not state what the exhibit is; only the witness may do so.

c. Show the exhibit to opposing counsel or ask the court if opposing counsel would like to examine it. Remember that you are not supposed to make any remarks directly to your adversary, so it is improper to turn to your opponent and ask, "Marva, do you want to examine this?" or for you to walk over to the other counsel table and engage in a whispered conversation about the exhibit.

d. Formally offer the exhibit into evidence, referring to it only by number or letter. For example, "Your Honor, we offer defendant's exhibit C into evidence."

e. If appropriate, hand the exhibit to the bailiff (or directly to the judge) for the court to examine. You probably should in all cases ask if the judge wishes to view the exhibit.

f. The opposing lawyer may conduct a voir dire examination of the witness concerning foundation matters, and/or may make objections to the admission of the exhibit.

g. The court rules on whether to admit or exclude the exhibit.

h. If the exhibit is admitted, publish it to the jury. With simple documents and photographs, you can distribute copies to individual jurors. Real evidence can be passed among them. In either case, you should request the court's permission to approach the jury. Large diagrams or charts can be placed where all jurors can see them. If anything about the exhibit needs to be explained, you must do so through witness testimony -- you are not allowed to talk about the exhibit yourself at this time without explicit permission from the court.

7. Whether to allow a demonstration is a matter left to the discretion of the judge. The demonstration must be relevant and not unduly prejudicial. The witness must first testify that s/he can accurately recreate the event. Never conduct a demonstration without rehearsing. Bad things will happen.

8. Redirect examination. Give some advance thought to planning your redirect examination. You should be able to anticipate what kinds of impeachment your opponent will attempt, so you can plan how you will rehabilitate those witnesses.

F. CROSS-EXAMINATION

1. The most important facts to bring out on cross are facts that help you prove your case:

a. Favorable testimony on a contested issue. Occasionally, a witness called by your opponent to testify against you on one issue will possess significant information you need to help prove a contested issue. If the favorable testimony was mentioned on direct, you can reemphasize it on cross. If the matter was avoided, then you should bring it up on cross-examination unless the topic cannot be raised because of limited scope rules.

b. Testimony corroborating your main witnesses. It often will be possible to elicit testimony on cross-examination that enhances the credibility of your witnesses by corroborating parts of their testimony. The possibilities are endless. It can be as simple as eliciting testimony that your witness was present at the scene, or as complex as bringing out evidence of the truthful character of one of your witnesses. The most fruitful line of inquiry is likely to concern the opportunity for your own witnesses to observe the events. An adverse witness, especially one who uses a diagram of the scene to aid his or her direct examination, always should be able to corroborate that there would have been a good line of sight from another location. Using opposing witnesses to corroborate the actions of your client also is important. For example, if opposing witnesses saw your client trying to avoid an accident, rendering assistance to the victim, or driving safely just before it occurred, or if they overheard your client's explanation of the events, you should bring out these facts.

c. Testimony consistent with your theory of the case. Rarely are more than a few issues really contested in a trial. The controversy usually boils down to a few disputed facts. Even if nothing else is possible on cross-examination, you always can elicit testimony about those uncontroverted facts that form part of your theory of the event. Prof. Bergman uses the example of a petty theft charge for shoplifting a calculator. On direct, the defendant admits putting the calculator in his pocket, but denies intent, claiming he stepped out of the store only to get his checkbook from his wife. The cross-examination of the defendant could consist of the following questions on uncontested facts:

Q. So you did pick up the calculator?
Q. And you put it in your pocket?
Q. Then you walked to the nearest exit?
Q. And left the store?
Q. And all the time you never took the calculator out of your pocket?

2. If the witness has hurt you, you will also want to impeach the witness's credibility.

a. The witness has a personal motive to testify falsely based on bias, prejudice, or interest

b. The witness has previously been convicted of a crime, which shows the witness to be the type of person who would lie.

c. Prior inconsistent statements may indicate that the witness has lied on one occasion.

d. Prior inconsistent statements cast doubt on how well the witness is able to remember the events.

e. Inability to recall collateral details of similar importance may cast doubt on the reliability of a witness's memory. For this kind of cross-examination to be successful, the facts forgotten must be of equal importance to the facts remembered. If a witness claims to remember a startling event ("I saw the defendant pull a shotgun and shoot two people."), it probably will be a waste of

time to ask if the witness remembers what other people were doing.

f. Prove the witness was at an unfavorable vantage point from which to view the events.

g. Demonstrate that the witness has physiological limitations, such as poor eyesight or hearing.

h. Show that the witness was in poor condition to observe at the time of the event due to intoxication or fatigue.

i. Show physical conditions limiting the witness's opportunity to observe the events, such as objects obstructing the witness's view, inadequate lighting, a great distance separating the witness from the event, distractions, or a very short time in which to make observations.

j. Bring out testimony that is impossible or inconsistent with common sense (but don't confront the witness about it).

k. Establish inconsistencies with other, more credible, witnesses.

3. Avoid high-risk topics.

a. Safe topics are those where you have a reason to believe that the witness will give a favorable answer and you have the ability to refute a bad answer:

1. You are asking for information the witness has previously given in a statement or deposition that would be admissible as a prior inconsistent statement if the witness testifies differently.

2. You are asking about information the witness should know which is also contained in admissible exhibits, such as photographs or records of criminal convictions.

3. You are asking about information the witness should know that other more credible witnesses will testify to.

b. Medium-safety topics are those where the nature of the case raises a likelihood that the witness will give favorable testimony, but you have no direct way to refute a bad answer. Use them cautiously.

1. You are asking for facts consistent with human experience where an unfavorable answer would contradict common sense.

2. You are asking the witness about facts in situations in which the witness assumes that an independent refutation witness is available.

3. You want the witness to confirm something implied in a prior statement, but the witness has not previously been asked directly about it.

4. You are seeking to prove that something did not happen because the witness says nothing about it in an otherwise detailed prior statement. For example, if a police officer's accident investigation report is silent on whether your client had been drinking, there is a likelihood that the officer will admit that there was no evidence of intoxication. Common sense tells us that a police officer would have reported intoxication.

c. High risk topics are those where you engage in wishful thinking. Circumstances suggest that a witness might know something relevant, but the witness has never said anything one way or the other. Thus, you have no solid basis to believe the witness's testimony will actually help

you, but the witness also has never explicitly said anything to the contrary, so (you think) maybe the witness will unexpectedly provide favorable evidence.

1. The witness acted inconsistently with the fact sought. For example, a witness who says he was "eating pizza and watching TV" will probably not confirm that there was a knife fight going on, because it is unlikely that anyone would calmly eat pizza while knives are being waved about.
2. The weight of the testimony of other witnesses is to the contrary.
3. The evidence would contradict common sense. For example, if you are cross-examining an eyewitness to a crime that occurred at night but in a well lighted parking lot, it would be risky to ask whether it was too dark to see clearly.
4. It contradicts something in the witness's own prior statement.

4. Order of topics

High safety favorable evidence on contested issues.
High safety evidence that corroborates your main witnesses.
Medium safety favorable evidence.
Medium safety impeachment evidence.
High safety impeachment attacking the witness's testimony.
High safety impeachment attacking the witness personally.
Final topic that scores a big point

5. What does a good cross-examination question look like?

Leading
Simple and brief
Non-argumentative. Ask about facts, not conclusions.
Use the witness's own words whenever possible.
Break your topics down into the smallest possible units, and ask about each one separately.
Ask only one fact per question.
Do not repeat damaging direct examination.
Don't ask the witness to explain an answer.

6. Preparing to cross-examine.

a. Assemble the file before trial. You should have with you in court, in one file, all the necessary documents for cross-examining the witness: 1) your written cross-examination questions; 2) all prior statements, depositions, or other writings of the witness that could be used to impeach inconsistent trial testimony; and 3) any exhibits or certified copies of convictions you may want to introduce.

b. Listen to the direct examination. Never assume a witness will testify in exactly the same way at trial as the witness did in a deposition. Witnesses occasionally will say extraordinary things or may open the door to previously inadmissible evidence that you may miss if your attention is focused elsewhere.

c. Decide whether to abandon any planned questions. Based on the direct examination, you

may face a decision whether to forgo questions because they were covered on the direct examination. Generally, of course, you should proceed with your planned cross-examination. Repetition of favorable evidence is a good idea. However, in three situations you may choose to forgo a line of questions: 1) You may have to drop some topics because your opponent limits the scope of the direct examination; 2) You may decide to forgo impeachment if the impeaching effect of some prior act is explained away; or 3) The witness may unexpectedly put evidence in a more favorable light than you expected, and might retract it or dilute it if you repeat the question on cross-examination.

d. Decide whether to impeach by prior inconsistent statement. Obviously, you cannot know in advance whether a witness will give direct testimony inconsistent with prior statements. Listen during direct examination, and decide whether it is worth impeaching any inconsistencies. In general, the only statements you are concerned about are those where the witness changes from favorable to unfavorable testimony. If the witness gives inconsistent statements on unimportant issues, you probably should forgo impeachment, unless you can string together a lot of small inconsistencies.

7. Difficult or evasive witnesses.

1. Repeat the question/
2. Ask the witness to limit his or her answers to "Yes" or "No"
3. Move to strike volunteered or evasive portions of the testimony
4. After several evasions, ask the judge to instruct the witness to limit his or her answers to "Yes" or "No"

(8) Impeaching With A Prior Inconsistent Statement

a. Impeachment is not the same as refreshing recollection. If, in answer to a safe question taken directly from a prior statement, a witness testifies he or she does not remember, then you may choose to refresh recollection. However, if a witness gives an answer unexpectedly different from one contained in a prior statement, it does not mean the witness has forgotten the facts. You cannot refresh memory when the witness claims to be able to remember (nor has a proper foundation been laid to allow it); you must impeach and show the current memory to be unreliable.

b. You are not trying to talk witnesses into changing their testimony, but to prove they are unreliable. You are supposed to be impeaching, not trying to talk the witness into changing his or her testimony. You must accept the fact that the witness's memory has changed. No matter how sure you are that it was just an inadvertent misstatement, you will not convince the witness to testify differently, no matter how many times you ask the witness to re-read a prior statement. The only thing that will happen if you try is that the witness will just repeat and emphasize the unfavorable testimony, you will have completely lost control of the examination, and you will have wasted the opportunity to impeach. If it turns out the witness actually had made only an inadvertent misstatement, the witness probably will make the correction anyway when

confronted with a prior inconsistent statement, so you lose nothing by assuming the worst and impeaching accordingly.

c. Inconsistent testimony does not mean the witness is evil. When a witness testifies to facts different from those contained in a prior statement, it may be an inadvertent misstatement, a result of the natural process of erosion of memory. It might be an intentional change due to deliberate perjury, but is not necessarily so.

d. You impeach direct examination testimony, not cross-examination. The general rule governing impeachment by prior inconsistent statements is that you may impeach facts testified to on direct examination only. If you bring up an issue for the first time on cross-examination and get bad answers, your only recourse is to abandon the line of testimony.

e. You may impeach specific factual assertions, not inferences. You can impeach a witness who disagrees with a specific fact or opinion written down in a previous statement. However, if the witness disagrees with your interpretation of those facts, that cannot be impeached. For example, suppose a witness stated in a deposition that the defendant's car was traveling 60 miles an hour, If she testifies the car was going 30 miles per hour, you can impeach. If you ask for an interpretation, such as "Was the car going very fast?" and the witness says "No," you cannot impeach her by proving that she once said the car was going 60 miles per hour.
Impeachment always entails risk. Witnesses will often be able to explain away an apparent inconsistency, and you will often be unable to successfully complete the impeachment. Therefore, conduct this kind of impeachment with other risky cross-examination -- in the middle.

f. Technique
Lock the witness into a definite answer without unnecessarily repeating the unfavorable testimony. Emphasize the prior version, not the damaging trial version. E.g.:

Q: The light was green, wasn't it? A: No, it was red.
Q: Not green? A: No.

Prove that a prior statement on the subject was made by asking the witness about it, being specific about the time, place, and circumstances. E.g.,

Q. Do you remember talking to an investigator named Sarah Frandsen at your house? A: Yes.
Q: That was on September 16? A: Yes.
Q: She asked you about the facts of this case, right? A: Right.
Q: Do you remember answering questions about the scene of the accident? A: Yes.

Reveal to the jury that the prior statement on this specific subject was materially different. The easiest way to do this is to read aloud the precise inconsistent passage and ask the witness to confirm that he or she made it.

Q: Directing your attention to the second line in the second paragraph of that statement, did you say: "When the car drove through the intersection, it had a green light?"; or
Q: Directing your attention to page four, lines four through seven, is it true that you were asked these questions and gave these answers: Question: " What color was the light?";

answer: "Green"; question: "Are you certain?"; answer: "Yes"?

As a courtesy, you might lean over and show the witness the page and line you are referring to, but do not hand the document over to the witness and ask the witness to peruse it. You are not trying to convince the witness the testimony is inconsistent, but the jury. But do not introduce the statement itself unless the witness denies or does not remember making it, in which case you may introduce it and read the inconsistent portion to the jury. Under Federal Rule of Evidence 613, the statement is admissible without further foundation.

G. CLOSING ARGUMENT

1. Improper arguments

a. Appeals to sympathy, e.g., referring to the tears of the victim's parents or the client's recent heart attack.

b. Attempts to arouse racial prejudice

c. Appeals to religious prejudice, e.g., anti-Semitic remarks

d. Xenophobic arguments against foreigners

e. Appeals to prejudice against corporations as large, wealthy or unfeeling

f. Raising the relative financial conditions of the parties, discussing insurance (unless already in evidence), or otherwise arguing that the verdict should depend on ability to pay

g. Asking jurors for vengeance, especially arguments that they should listen to the demands of the community and use this opportunity to get even for all the wrongs done to society, e.g., by linking a defendant with the problem of crime and drugs that is out of control, and suggesting that the community wants something done about the drug problem

h. Asking jurors to make an example of the defendant or send a message to the community that they will not tolerate violence

i. Appealing to jurors' fears for their personal safety or suggesting that they will personally suffer (through higher taxes or insurance premiums) if they return a particular verdict

j. Personal attacks on other lawyer

k. Personal comments about yourself or your opinions.

l. Arguments that jury should ignore or evade unpopular laws

m. "Golden rule" arguments that jury should put themselves in the position of a party and ask what they would want.

2. Should you object to improper argument?

a. Reasons to do nothing

1. The improper argument is trivial

2. The argument is unimportant to your theory of the case

3. You've already made several objections and you sense that the jurors are growing impatient

4. Your opponent is exaggerating or misstating the evidence and you have no further opportunity to respond. It is unlikely that the judge will remember precisely what the witnesses

said, and he or she will probably overrule you, instructing the jury that their recollection of the testimony controls.

b. Reasons to object

1. You've already given your last argument and have no opportunity to retaliate or respond
2. The improper argument concerns a misstatement of law
3. Your adversary is committing serious error that will prejudice your client: asking the jury to speculate, quoting damage verdicts from other cases, making a direct appeal to emotion or prejudice, or commenting on suppressed evidence or the defendant's silence

3. Last-minute preparation: Making changes during trial

During opening statement, note overstatements or exaggerations made by your opponent. These can be used later to argue that the other side has failed to prove the case they promised.

During the examination of witnesses, you can note the exact words used by a witness at a critical time, so that they can be quoted accurately. If any evidence is unexpectedly excluded, that too should be noted so that you do not inadvertently refer to evidence outside the record.

If either side is granted a partial directed verdict, or concedes an issue, whole sections can be eliminated from your argument.

4. General principles of argument

a. Reiterate your theory of the case and make sure the jurors understand it. The importance of having a single, clear, simple theory cannot be overstated. It provides direction to your jurors. Alternative theories merely divide your forces into two groups that may start fighting with each other. Stick to it.

b. Emphasize favorable evidence, but don't waste time with a detailed rehashing of every detail as if the jurors were too stupid to remember anything. Spend your time arguing your own case, not your opponent's. Emphasize your strengths and concentrate on your main points.

c. Discuss your opponent's case only to the extent necessary to refute it briefly.

d. Rebut your opponent's allegations.

e. Explain the law and show how the evidence satisfies all legal requirements for a verdict in your favor.

f. Most importantly, reduce your case to a good story, including plot, motives, adventure, battles between good and evil, human weaknesses, temptation, drama, and a moral at the end. Keep it simple. Simple does not mean simplistic; it means uncomplicated. Concentrate on the real disputes, resist the temptation to offer several alternative theories, and avoid becoming bogged down in reviewing uncontested or trivial matters. Experiments by social psychologists indicate that about seven points are all you can argue persuasively. After that, arguments become confusing.

g. Be specific. Facts are more important than generalizations or rhetoric. Be specific about the important factual points, and the details that corroborate them. Don't just say you have proven that the goods were delivered, remind them which witnesses testified to the delivery and show them the warehouse receipt.

h. Be explicit. Psychologists have demonstrated that an argument is more persuasive if the desired conclusions are explicitly drawn than if you leave it up to the jury to draw its own conclusions. Although in theory jurors might hold more strongly to a conclusion they reach on their own, if you do not suggest a conclusion, the juror may reach a conclusion you do not like.

i. Be organized.

j. Use visual aids. Presumably, you introduced exhibits during trial for a reason. Use them! But do not limit yourself to exhibits already introduced. Charts can be prepared specifically for closing argument, and arguments can be illustrated on the blackboard. The uses of descriptive exhibits are as varied as your creativity. You can list the elements of a cause of action, summarize evidence, calculate damages, draw a sketch of an intersection, and so on. The only requirement is that your exhibit be supported by the evidence. Some attorneys prefer the apparent spontaneity of blackboards; others prefer charts prepared in advance because they cannot be erased by your opponent and you cannot make an inadvertent error on them.

k. Support your positions with jury instructions. Rather than just summarize all the law at one time, weave instructions into the fabric of your argument. If you are arguing that a witness is not credible because the witness made a prior inconsistent statement and is the plaintiff's friend, that would be a good time to read a jury instruction that prior statements and bias may be taken into account in determining credibility.

l. Use the theme from your opening statement.

m. Personalize your client and depersonalize the adverse witnesses. You should make conscious efforts to personalize your client by referring to him or her by name and telling the jury personal things about your client's life. Similarly, you should depersonalize the other side's witnesses, e.g., by referring to the adverse party generically (e.g., the defendant, the corporation, the deceased) or with negative labels (e.g., the toxic-waste company).

n. Use analogies to common experiences. If you think a jury may have difficulty understanding a legal concept, try to analogize it to some common experience. The classic example is the explanation of circumstantial evidence: suppose you got up one morning and saw a foot of snow on the ground that was not there when you went to bed. You can be certain it snowed during the night even though no eyewitness saw it.

o. Admit your weaknesses. Every case has weaknesses. You should confront those inherent in your theory, admit them, and deal with them as best you can. The jury is probably already aware of them from the evidence, and your opponent is sure to bring them up, so you cannot make them go away. Therefore, you might as well at least earn points for candor and honesty. However, the dividing line between a candid discussion of your weaknesses and a defensive argument that focuses on your opponent's evidence is a fine one. It is not necessary to confront every piece of contradictory evidence. Rather, you should discuss and explain away the major weaknesses in your own theory.

p. Be consistent with physical evidence and common sense.

q. Try to make it appear that your case has more support -- a greater quantity of evidence, or a greater number of credible witnesses.

r. Avoid rhetorical questions

5. Presentation suggestions

a. Informality is usually better than formality, but don't get too sloppy or casual

b. Maintaining a courteous, professional demeanor is usually better than sarcasm, anger, or any other childish outburst. Try not to be rude, abrasive, or obnoxious.

c. Histrionics should be used sparingly. You are likely to be more effective if you adopt a friendly, conversational manner than if you attempt to mimic the dramatic techniques of the actors who portray lawyers on television. However, this does not mean you should never use dramatic techniques, only that you should save them for the most important points in your argument.

d. When the facts are emotional, you should display an emotional reaction yourself. If you represent a client who was crippled in an automobile accident, or are prosecuting a rape case, don't talk about the victim's plight in dry, matter-of-fact terms. Let your voice express your sympathy and your outrage.

e. Be careful about using exaggeration and hyperbole. Remember that your person credibility is on the line, and if you say outrageous things that are not true, the jury will believe you less.

f. Notes should be used as minimally as possible so that your overall presentation is extemporaneous and conversational. Above all, do not read your closing argument.

g. Maintain eye contact with the jury. Look from juror to juror during your argument, not at your notes or the floor. If looking directly at jurors makes you uncomfortable, look between two jurors.

h. Avoid standing behind a lectern. If you need the security of a lectern, try standing beside it rather than hiding behind it.

i. Contrary to what your mother told you, don't speak slowly and distinctly. Slow speech is boring. Vary the pace, and don't be afraid to talk quickly.