

## Chapter 2

### PREPARING FOR TRIAL

#### § 2.01 INTRODUCTION

Preparation is the key to successful trial practice. Contrary to what you may see on television, no part of trying a case is extemporaneous. From opening statement, to cross-examination, to the objections you make, to your impassioned closing argument attacking the credibility of an adverse witness, everything you do and say in the courtroom is planned in advance. Any lawyer who tells you differently is simply justifying his or her own laziness.

Consider these introductory words from BYRON & WILLIAM ELLIOTT, *THE WORK OF THE ADVOCATE* 3–4 (1888):

Preparation is the foundation of success in advocacy. Neither genius nor talent, neither tact nor cunning, can equip an advocate to try a cause as it is the duty of advocates to try causes, without a foundation well laid by thorough and complete preparation. The first step is to acquire a knowledge of the facts. It is not enough to obtain a knowledge of them in outline; they must be known in their breadth and depth and in their relation to each other and to the ruling principles of law. Knowledge less thorough will not enable an advocate to acquit himself with credit nor will it enable him to do his duty to his client. Cicero says: “What Socrates used to say, that all men are sufficiently eloquent in that which they understand, is very plausible but not true. It would have been nearer the truth to say that no man can be eloquent on a subject that he does not understand.” No man can be strong where his knowledge of his subject is feeble. Preparation alone supplies the knowledge which makes trial lawyers strong. Biographers of advocates, like biographers of military heroes, sometimes take up the pen of the romancer, and, to magnify the man of whom they write, invent pleasant fictions. It is to this class of biographers that legal literature owes many stories of verdicts won, as they say, “by a flash of wit or a torrent of eloquence.” There is more of rhetorical flourish than of sober truth in these stories. For the most part, legal controversies are not fields for display, but fields for hard work. The advocate cannot too strongly lay it to heart that preparation is absolutely essential to success. Speeches that are lauded as remarkable examples of extemporaneous speaking are almost always found, when the truth is known, to be the result of careful and laborious preparation.

The cornerstone of preparation is the development of a theory of the case. A case theory is your view of the best realistically possible interpretation of the facts and law. What do you think really happened, given the evidence and common sense? What is your best legal ground? In what areas is your case strong, and where is it weak? How would a verdict for your client advance the cause of justice? Not until after you develop a theory are you ready to plan

any other part of your case. You will have to make decisions concerning which witnesses to call, what questions to ask, whether to introduce particular exhibits, and what arguments to make. You cannot expect to make sensible decisions about how best to try your case until after you have a clear overall theory of the case.

This chapter covers a range of issues that fall into the general concept of structuring your trial as a whole and getting ready for trial:

- Interviewing witnesses and fact gathering.
- Preparing a case theory.
- Developing and analyzing your evidence, and planning how you will fill in the gaps.
- Forming a general trial strategy concerning such issues as the order of proof, the main points to emphasize, and selecting a theme.
- Selecting and ordering your witnesses.
- Submitting trial briefs, filing motions, attending the pretrial conference, requesting jury instructions, and other pretrial events.
- Compiling a trial notebook.

One important thing to remember throughout this chapter and throughout your trial preparation: the best way to prepare is to write it down. Facts gathered will be forgotten if not recorded; ideas may dissipate if not written out; clever arguments may prove harder to actually write out than you thought. A trial is like a book, consisting of characters, a conflict, a plot, and a dramatic trial scene. The true labor in preparation consists of writing and rewriting the book until all the pieces fit together in an intelligent and plausible whole. This is a time-consuming process, but it is the closest thing there is to a guarantee of a successful trial.

## § 2.02 THE DUTY TO PREPARE

Preparation is not only a good idea tactically, it is legally and ethically required. Rule of Professional Conduct 1.1 provides:

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

The Commentary explains:

Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standard of competent practitioners. It also includes adequate preparation.

Competent representation includes both investigation and preparation.

[U]nless the lawyer is prepared in a given case, the client will suffer. Proper preparation or attention to the details of the matter, both to the law and facts, is mandatory. [Adequate preparation] encompasses knowledge of the current law on the subject, ascertainment of the facts

from the client, independent investigation, and employment of necessary discovery proceedings after a suit is started. . . . The attorney must . . . make an adequate investigation of the facts, both as they are favorable and unfavorable to the client.<sup>1</sup>

Failure to prepare adequately for trial constitutes ineffective assistance of counsel and can lead to disciplinary action. Consider the court's opinion in *Shack v. State*, 231 N.E.2d 36 (Ind. 1967), reversing a conviction based on the defense attorney's inadequate preparation:

Mr. Nedeff [the defense attorney] devoted approximately eighteen (18) hours to the preparation of the defense of Mr. Shack. [He] did not [search for witnesses or ] request any instructions on behalf of Mr. Shack from the Trial Court. . . . Vanderman Shack did not have competent counsel in his trial nor did he have an adequate defense. We can decide as a matter of law that Mr. Nedeff did not make adequate preparation when he expended only eighteen (18) hours in factual investigation, legal research, inquiry concerning sanity, and all of the other facets of inquiry properly to be disposed of by an attorney in the preparation of a felony as serious as Murder in the First Degree. This is particularly true since Mr. Nedeff had never tried a homicide case. This would probably be true even with one of the legal giants of trial practice; but, a seasoned trial lawyer would deem it unthinkable to go to trial with only eighteen (18) hours of preparation. He would deem it malpractice not to seek a psychiatric examination of his client in order to determine whether or not a plea of insanity would be interposed. A mature practitioner who had tried many cases would spend several times eighteen (18) hours in legal research alone in order to properly prepare, for the Court's consideration, tendered instructions touching on the various elements of murder.

It is the concern of the bar of this State and this Court, which fixes the standard of competency, to have to set aside a conviction because of incompetency of a member of the bar representing a defendant in a criminal case. I therefore feel the competency of the attorney involved in this case should be referred to the Disciplinary Commission for investigation and report as to whether or not disbarment proceedings or other disciplinary action should be taken.

The A.B.A. Standard Relating to the Administration of Criminal Justice 4-4.1(a) provides:

Defense counsel should conduct a prompt investigation of the circumstances of the case and to explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction. The investigation should include efforts to secure information in the possession of the prosecution and law enforcement authorities. The duty to investigate exists regardless of the accused's admissions or statements to defense counsel of facts constituting guilt or the accused's stated desire to plead guilty.

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<sup>1</sup> Lee Gaudineer, *Ethics and Malpractice*, 26 DRAKE L. REV. 88, 98-99, 108-09 (1977).

In the official commentary, the following steps are mentioned as ethically required in criminal cases:

- Search for and locate potential witnesses and try to secure their cooperation.
- Obtain independent laboratory analysis of fingerprints, handwriting, clothing, hair, blood, and weapons.
- Request formal and informal discovery from the prosecutor.
- Talk to the police who investigated the case and arrested your client.
- Investigate your client's background, education, employment record, mental and emotional stability, family relationships, and the like.
- Investigate the backgrounds and character of opposing witnesses to prepare for impeachment.
- Find out the conditions at the scene, especially those that may have affected eyewitnesses' opportunities for observation.

### § 2.03 INTERVIEWING WITNESSES

It is beyond the scope of this book to present an in-depth analysis of the interviewing process. Interviewing may be the single most important part of preparing for trial, because you cannot present a case to a jury effectively unless you first gather, sort, analyze, select and then effectively present facts. Those facts are acquired largely through interviews. Thus, the primary goal of interviewing is to maximize the flow of accurate information from the witness to you.

The interviewing process is not as simple as asking witnesses to tell you everything they know about an event. Many factors influence the information flow, distorting and limiting it. The witnesses themselves will be of all personality types and come from all levels of society. Your own personality, attitude, and manner of asking questions will have a profound impact on the information you receive. Interviewing is a dynamic process that depends upon interaction between two persons.

Interviewing is useful not only for discovering facts, but also for learning something about the witnesses as people. Knowing how witnesses appear and how they react to questioning is essential for preparing their direct examination.

#### [A] BARRIERS TO GATHERING ACCURATE INFORMATION

You must accept the fact that the information you gather from your witnesses, no matter how thoroughly you interview them, will not be entirely "accurate."

- Witnesses get the facts wrong. In one classic experiment, a professor staged a simple assault in front of his class and then asked his students to describe what had happened. The student who was most

accurate nevertheless gave twenty-six percent erroneous statements; the least accurate witness was wrong eighty percent of the time. The witnesses put words into the mouths of people who had been silent, attributed actions to participants that had not been done, and completely forgot essential parts of the event.<sup>2</sup>

- Witnesses “see” what their preconceived ideas tell them they will see. In another famous experiment, subjects were shown a photograph depicting a white man holding a razor confronting a well-dressed black man in a subway car. When asked later to describe what they had seen, over half the witnesses erroneously reported that the black man was holding the razor.<sup>3</sup>
- Witnesses have great difficulty making accurate identifications of strangers, especially across racial lines. The most widely cited study on this point compared the ability of students at a predominantly white university with students at a historically black university to identify photographs of black and white males. The students were able to recognize faces of their own race two to three times as often as faces of another race, whether those students were black or white.<sup>4</sup>

Witness’s memories can be distorted at three different stages. At the acquisition stage, information simply may not have been perceived because the witness was not looking, the lighting was bad, the event did not seem important, or many events took place in a very short time. During the retention stage, memory can become distorted through forgetting or through superimposition of new information over the old. A witness may “remember” details learned from newspaper accounts or conversations with other witnesses. Finally, even the way in which information is retrieved from memory can alter it. Asking specific questions to probe for details causes witness to remember as many false details as true ones.<sup>5</sup> In another famous experiment, subjects were shown a film of a car accident. Some were then asked how fast the cars were going when they “smashed,” “hit,” or “contacted” each other. When the word smashed was used, answers averaged 41 miles per hour; when “hit” was used they averaged 34 miles per hour, and when “contacted” was used, answers averaged 31 miles per hour.<sup>6</sup>

Robert Gorden, in his book *INTERVIEWING: STRATEGY, TECHNIQUES AND TACTICS* (2d ed. 1975), lists the following additional factors that can inhibit the free flow of accurate information during an interview:

<sup>2</sup> The earliest reference to this experiment is HUGO MUNSTERBERG, *ON THE WITNESS STAND* 49–51 (1908).

<sup>3</sup> GORDON ALLPORT & LEO POSTMAN, *THE PSYCHOLOGY OF RUMOR* 56–62 (1947).

<sup>4</sup> Roy Malpass and Jerome Kravits, *Recognition for Faces of Own and Other Race*, 13 *J. PERSONALITY & SOCIAL PSYCHOLOGY* 330 (1969). See also Christian A. Meissner and John C. Brigham, *Thirty Years of Investigating the Own-Race Bias in Memory for Faces*, 7 *PSYCH., PUB. POL & LAW* 3 (2001).

<sup>5</sup> See Jack Lipton, *On the Psychology of Eyewitness, Testimony*, 62 *J. APPLIED PSYCHOLOGY* 90 (1977); Keith Marquis, James Marshall and Stuart Oskamp, *Testimony Validity as a Function of Question Form, Atmosphere, and Item Difficulty*, 2 *J. APPLIED SOCIAL PSYCHOLOGY* 167 (1972).

<sup>6</sup> Elizabeth Loftus et al., *Reconstruction of Automobile Destruction: An Example of the Interaction Between Language and Memory*, 13 *J. VERBAL LEARNING & VERBAL BEHAVIOR* 585 (1974).

- **Competing demands for time.** The witness may have other things the witness wants or needs to do.
- **Ego threat.** The witness may withhold information which threatens the witness's self-esteem. In extreme cases, embarrassing information may have been repressed; more commonly, it is just embarrassing and the witness will be reluctant to talk about it.
- **Etiquette barriers.** Witnesses may feel that it is inappropriate to tell you something that involves sex, immorality, or bad taste, or that would create an inappropriate intimacy. Especially if you are a young attorney, witnesses may be afraid the things they have seen will embarrass or shock you.
- **Trauma.** It may simply be too painful for the witness to talk about some things.
- **Chronological confusion.** The witness may confuse the chronological order of events, either by being unsure of the sequence in which two distinct events happened, or by incorrectly assuming that a condition existing at one time probably existed at other times.
- **Inferential confusion.** A witness may make mistakes because of faulty induction when converting details into a general conclusion, or by faulty deduction when asked to give details in support of a conclusion.
- **Unconscious behavior.** A witness may have difficulty answering questions about things done out of habit, reasons for an emotional response, or actions taken in times of severe stress and shock.

DAVID BINDER & SUSAN PRICE, LEGAL INTERVIEWING AND COUNSELING 10–14 (1977), suggest a number of other potential inhibitors:

- **Case threat.** Some witnesses may have a specific interest in the outcome of the litigation. If such a witness believes that revealing information will be harmful to the case, he or she may withhold it. In this manner, a defendant may falsely deny that he or she had a motive for or was in the vicinity of a crime.
- **Role expectations.** Clients and witnesses have certain preconceived ideas of what attorneys look like, how they talk and dress, what their offices will look like, and so on. These role expectations may be barriers in themselves, e.g., a client may expect the lawyer to define what is important and therefore wait to be asked specific questions. Also, if a witness expects a lawyer to be a well-dressed, middle-aged, white male, and meets someone of different appearance, this failure to fulfill expectations can cause distrust and reluctance to communicate.
- **Perceived irrelevancy.** If the witness does not think information is relevant, he or she is not likely to offer it, and the witness may not give serious consideration to the answer even if asked.
- **Greater need.** A witness may have a more immediate need to discuss one issue than another, and may be unable to concentrate on topics the lawyer wishes to explore. A first offender in jail

awaiting trial, having heard stories about sexual attacks, may be so desperate to get out on reduced bail he simply is unable to talk about the facts of the offense. Similarly, a witness to a crime may believe her life is in danger if she testifies, and this greater need will cause her to deny that she knows anything relevant.

## [B] TECHNIQUES FOR FACILITATING INTERVIEWING

The news is not all bad. Psychologists suggest a number of techniques that can facilitate the flow of reliable information in an interview. Gorden suggest the following factors:

- ***Fulfilling expectations.*** Making your expectations clear will help. The witness will tend to try to fulfill the reasonable expectation of the interviewer, especially when the interviewer is the “expert” in the legal system. Most witnesses will tend unconsciously to conform to the norms of legal interviewing process.
- ***Recognition.*** Giving the witness sincere praise and recognition will encourage responsive communication. Witnesses, especially if they are new to the legal system, want to feel appreciated and recognized for playing the game well.
- ***Altruistic Appeals.*** Some witnesses, but not all, may respond well to altruistic appeals to provide information helpful to other innocent people (e.g., other potential rape victims).
- ***Sympathetic understanding.*** Human beings need the sympathetic understanding of others with whom they are intimate. Some witnesses develop close relationships with attorneys, others (e.g., police detectives) do not. This desire to have someone offer a sympathetic ear will help elicit information from many types of witnesses: teenagers who need to complain about their parents, older people who have problems which no one takes time to hear, and so on.
- ***New experience.*** An interview can provide a new experience for a witness who welcomes the adventure of becoming involved in a lawsuit. As long as the risks are not too high, the witness may respond favorably to the prospect of being at the center of a case.
- ***Catharsis.*** A witness who has pent up feelings and frustrations, especially of guilt concerning events related to your case, may respond well to an opportunity for catharsis. The release of tension, especially if not judged harshly, may facilitate communication.
- ***The need for meaning.*** Witnesses caught up in a tragic case may need to understand why they or their friends were victims. The question “Why do events happen as they do?” often is a strong motivation for the witness to talk things out if you communicate that you, too, are interested in a search for meaning.
- ***Extrinsic rewards.*** A witness may be motivated to participate by extrinsic rewards — the prospect of a few days away from work with pay, being treated to a fancy lunch, or the prospect of being in the

spotlight (maybe even appearing on television). The police have used this system for decades to convince accomplices to provide information against a prime suspect in exchange for leniency in their own cases.

### [C] FACTS VERSUS CONCLUSIONS

Effective communication requires that the witness provide details, not conclusions. Conclusions communicate meaning only if the speaker and listener share a frame of reference. Is Des Moines a big city? People from New York City and Podunk Center, Iowa, probably would answer differently.

When probing for information, you must listen carefully for the kind of conclusory statement that means different things to different people. Suppose, for example, you have a custody hearing coming up, and are interviewing the child about his new step-mother. He tells you “She’s really cool. I like her a lot.” You must recognize that your definition of “really cool” and the child’s may be quite different, and ask a follow-up question:

Q: That’s good. Why do you like her?

A: Maggie lets me stay up late and doesn’t make me do my homework. Mom always made me do my homework, but Maggie lets me play Nintendo all day.

or

A: Maggie plays with me and takes me to neat museums and stuff. We saw dinosaurs last week.

Your strategy at the custody hearing may be quite different depending on which answer he gives.

### [D] TYPES OF QUESTIONS

Questions can be divided into four types depending on how broadly or narrowly they define the information sought:

- **Open-ended questions** provide no guidance to the witness, but allow the witness to select both the subject matter and the relevant information about it. For example, “What happened on November sixth?”
- **Directed questions** limit the witness to a particular subject, but allow the witness to select which details to talk about. For example, “Will you describe the fight between the bartender and the defendant?”
- **Narrow questions** define both the subject-matter and the particular detail sought. For example, “At the start of the fight, who actually threw the first punch?”
- **Leading questions** define the subject-matter and the particular detail sought, and also suggest a particular answer. For example, “At the start of the fight, the defendant threw the first actual punch, didn’t he?”

Standard interviewing technique moves from open to narrow questions. Starting with open-ended questions permits the witness to tell the story in his or her own words. This is necessary at the beginning because the lawyer does not yet know enough about the facts to direct the witness. Social psychologists also point out that the facts reported by witnesses in a free narrative will be those the witness is most confident about, and therefore the most accurate information you will get. Once you start probing with more specific questions, your interference will affect the witness's memory and the kind of information the witness gives you, reducing its accuracy.

However, open-ended questions alone do not usually provide enough details. People tend to speak in conclusions and to withhold information about which they are uncertain. After the witness has told the story once, most lawyers go back over it with directed questions to fill in logical gaps and elicit details where the witness gave only conclusions. Finally, specific narrow questions can be asked to flesh out the details. Leading questions do not gather information, they provide it from the lawyer to the witness. Therefore, leading questions are not generally used in interviewing.

### [E] A FIVE-STAGE INTERVIEW MODEL

To conduct an effective interview, it may help to conceptualize the interview in five stages:

- **Mutual evaluation.** An introductory stage where you break the ice, explain your purpose, and begin the process of building trust and rapport. This stage can be quite short, especially if you previously have met the witness.
- **Witness's overview.** Obtain the witness's recollection of the events in narrative form, without interrupting to ask for details. Your job during this stage is to listen, not to talk or take notes. This phase provides you with the outline of the important events from the witness's perspective. If you need to probe for information during this stage, do not resort to narrow questions. Try using silence, non-committal remarks like "I see," or neutral questions that do not contain a suggested topic, like "what happened next?"
- **Find the starting point.** Before you begin to probe for details, you must identify the point at which the witness's story begins. A probable starting point will have emerged from the witness's summary version of the events. You need only to probe briefly to see if anything relevant might have happened earlier. Common sense is your only guide. Ask the witness about the specific people, things, and events in the story — whether the witness had any previous contact with them or knew anything about them before the main event. For example:

Q: You said you got to the laundromat about 1:30. Before that, did you see the guy who got arrested or his girlfriend anywhere?

A: No.

Q: In the parking lot or getting out of a car or anything?

A: No. I was sitting inside when they arrived.

Q: Had you ever seen them before?

A: No, I'm pretty sure.

Q: Okay. Let's start when you arrived at the laundromat. . . .

- **Detailed Chronology.** In this stage, you fill in the details with directed and narrow questions. In most cases, a straight step-by-step chronological order will maximize the completeness of the information. Some system of note taking usually is recommended during this phase, since particular important details, such as the names and addresses of other witnesses, are difficult to remember accurately. During this stage, you must take control of the tempo and the scope of detail of the interview, preventing the witness from jumping ahead, and probing for explanations, details, and clarifications.
- **Conclusion.** It is recommended that in conclusion, you summarize the main facts for the witness and make sure the witness agrees with them. You need also to set an agenda for any future meetings, including whether the interview will be reduced to a witness statement you will want the witness to read over and sign.

### NOTE

**Using leading questions in interviewing.** DAVID BINDER & SUSAN PRICE, *LEGAL INTERVIEWING AND COUNSELING* 92–96 (1977), suggest one instance in which leading questions are used in interviewing — when you are seeking sensitive or embarrassing information from a client.

There are many instances when a lawyer must talk with a client about a situation involving socially aberrant behavior. In these instances, the lawyer may well wish to use leading questions as a means of obtaining reliable information. Thus, to the extent it is pertinent to get into the subject of a past criminal record with a client whom the lawyer strongly suspects has such a record, the lawyer might try a phrase such as: “I guess you’ve had trouble with the police before?” Stated with an accepting tone of voice, this question may make the client more willing to talk about the record than a question such as: “Have you ever been arrested before?”

## § 2.04 PREPARING A CASE THEORY

Developing a theory of the case will be the single most important thing you do. This theory must be developed early, and will serve as your blueprint from which you will construct your case. As you prepare for trial, you will face a myriad of decisions, from which witnesses to call to which jury instructions to request. None of these decisions can be made intelligently unless you have a clear picture of the strengths and weaknesses of your case and how you intend to prove it. Thus, the development of a viable theory is the first order of business.

A theory is not a recitation of every fact nor a pursuit of every remotely possible legal avenue. Presenting all the information you have gathered, or

making every conceivable legal argument, will simply overwhelm the jurors and obfuscate the important matters. A theory is the simplest model that explains what happened and why you are entitled to a favorable verdict. To formulate a good theory, you must decide what evidence and arguments to ignore as well as which ones to emphasize. Your final product should be a cohesive, logical view of the merits of the case that is consistent with common everyday experience, that builds on your strengths and finds ways to compensate for your weaknesses.

A case theory contains the following elements:

- **Facts.** First and foremost, your case theory is about the facts. Juries decide cases based on the facts, not the law. What do you think really happened? The factual part of your theory must be as consistent as possible with both your client's version of what happened and the weight of the other 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 discern helpful from confusing information, recognize when evidence may be inadmissible, and build your theory around the main facts that support your client and will be heard by the jury.
- **Weaknesses.** You must recognize, acknowledge, and have an explanation for weaknesses, gaps, inconsistencies, and improbabilities in your case.
- **Law.** Your theory must also indicate the proper legal outcome of the case. You must understand the elements of your cause of action or defense, and how you can prove them. If there are multiple legal issues, you must decide what is your strongest legal argument, considering your evidence and weaknesses. 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 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.
- **Emotions.** A good theory also includes an emotional component. What injustice has been committed? Why is your client morally deserving of a verdict? You must find a way to get the jury to want to return a verdict for your side.
- **Opponent's case.** Recognize that there is another side to the story. Analyze your opponent's case to determine where the disputes will arise, what the strengths and weaknesses of the adverse case are, and develop an explanation for why your opponent's version is wrong.

### NOTE

***What do you do with false and unreliable evidence?*** It is not uncommon to encounter false evidence. Family and friends may provide false alibis. A battered woman may falsely recant her statement that her boyfriend has beaten her. How does this evidence fit into your case theory? It doesn't — throw it out! It would be unethical for you to use it, even if it is favorable. Rule of Professional Conduct 3.3(a)(4) provides quite clearly that a “lawyer shall not knowingly offer evidence the lawyer knows to be false.” If someone gives you a phony receipt, you may not offer it. If a witness offers to lie and create an alibi, the lawyer may not call that person. These principles are ethically indisputable. See ALI RESTATEMENT OF THE LAW GOVERNING LAWYERS § 120 (2000).

But what about small fabrications rather than major ones? What if a witness will testify truthfully most of the time, but will probably insert one or two pieces of false testimony here and there to strengthen the case? The attorney cannot overreact and refuse to present the truthful evidence in order to keep the false evidence out of the trial. If an attorney learns of a witness's intent to commit partial perjury before trial, the lawyer's first duty is to try to dissuade that person from giving the false testimony. See *Nix v. Whiteside*, 475 US 157, 169 (1986). The attorney should point out that exaggerations and small lies are easily exposed on cross-examination and easily detected by the jury. False favorable testimony therefore will end up hurting rather than helping. In addition, perjury is a crime that can be separately prosecuted.

If dissuasion does not work, the attorney must develop a plan for avoiding the false evidence during direct examination. This may not solve the problem, however. Despite the attorney's best efforts, the witness may give the false testimony anyway — slipping it in on direct, or volunteering it during cross-examination. See Alan Dershowitz, *Is Legal Ethics Asking the Right Questions?*, 1 J. INST. STUD. LEGAL ETH. 15, 20 (1996). In these situations, you will not be relieved of ethical obligations just because you tried to avoid it. You must have thought about this possibility, and be prepared to take steps to mitigate the damage, including revealing the falsity to the court. See RESTATEMENT, *supra*, § 120 (if a lawyer has offered false evidence, “the lawyer must take reasonable remedial measures”).

## § 2.05 DEVELOPING THE EVIDENCE

The major task of trial preparation is working with the facts — organizing the evidence you have, identifying and locating additional evidence you need, and planning effective ways of presenting it. Developing the evidence is an integral part of refining your case theory.

### [A] IS THE EVIDENCE ADMISSIBLE?

If you have engaged in investigation and discovery, you already know about 90% of all the evidence that might be offered at trial. That means you can anticipate in advance evidence that should be objected to, and places where your opponent may object to your evidence. You need to decide whether the judge will sustain any of these objections and exclude the information. A good

theory of the case must be based on a reasonably accurate prediction of what evidence will be admitted and what evidence will be excluded at trial. It is a waste of time to develop a theory premised on evidence that is inadmissible.

### [B] DIAGRAMMING THE CASE

One of the most common ways of organizing your presentation of evidence is to diagram or chart the case. This technique involves making a chart in which the elements you need to prove are matched with a list of witnesses and exhibits available to you. You can then comb your interview notes, witness statements, exhibits, and the depositions, recording on your chart every important piece of admissible evidence that will help you prove your theory of the case. The chart can form an outline of your case and help assure that you call all witnesses and introduce all exhibits that help you. Figure 1 illustrates how a prosecutor might diagram a simple assault and battery case.

**Figure 1**

State's Diagram of Assault and Battery Case

| Elements:                       | ASSAULT   | INJURY   | IDENTITY OF DEFENDANT                             | MOTIVE  | NEGATE SELF-DEFENSE  |
|---------------------------------|---|--|---|---|--|
| Evidence:<br>VICTIM'S TESTIMONY | defendant hit face with hand, felt something hit head                     | knocked out, woke up in hospital               | knows defendant, can make in-court identification | defendant laid off after poor performance report prepared by victim | had beer in hand when hit, did not strike or threaten defendant, received prior threat |
| WITNESS TESTIMONY (BARTENDER)   | heard shouting, saw defendant hit victim with fist, then with beer bottle | saw victim fall, saw blood, victim unconscious | can describe defendant                            |   | did not see victim hit defendant, saw victim's hands on table                          |
| ARRESTING OFFICER'S TESTIMONY   | found victim on floor, table overturned                                   | victim unconscious                             | when arrested, stated victim had it coming        |   | no visible injury to defendant   |
| DEFENDANT TESTIMONY             | hit victim  |  | knows victim, told police he had it coming        | laid off, victim foreman, gave him poor performance report          |  |
| EXHIBITS                        | diagram to aid in description of attack                                   | police photo of bruises, hospital record       |   |   |  |

### [C] CORROBORATION AND CREDIBILITY

Assembling a factually effective case requires more than making each of your main points once. If you have minimally sufficient testimony on each element, you may survive a Rule 50 motion for judgment as a matter of law but still be a long way from persuading the jury to believe your witnesses. One witness may be *legally* adequate, but two witnesses and a corroborating document are persuasive. Your goal is to make your case *persuasive*, not merely adequate.

Part of the preparation process is to do what you can to bolster the credibility of your witnesses. You have no control over some things — nuns are more credible than prostitutes. The background of those who happen to be witnesses already has been determined. However, you can make the testimony given by every important witness more credible by corroborating everything that witness says. Corroboration does not mean just repetition — several witness saying the same thing. Repetition is important but not always available. Not all litigated events happen in front of crowds. Corroboration, however, is available in every case.

For example, suppose you represent a client who claims she was defrauded in the door-to-door sale of a food freezer plan. She understood the salesman to say that she was leasing the freezer and could cancel at any time. She tried to cancel, but the company now insists that no such option was offered and is suing her for the balance. If the client's story were true, what else would be true? The following possibilities come immediately to mind: (1) the freezer, not the food plan, would be the money-maker for the company; (ii) the salesman might have been "working" the area and made similar representations to other purchasers; (iii) there may be company training manuals or written instructions to salesmen on the sales "pitch"; (iv) complaints about similar practices may be on file with better business or consumer protection agencies; (v) the salesman may have been under some particular pressure to make sales at the time he visited your client. Each of these suggests possible lines of inquiry and could lead to facts that corroborate your client's story.<sup>7</sup>

### [D] PLANNING FOR OBJECTIONS

Evidence does you no good unless you can get it before the jury. For this reason, you must devote some preparation time to maximizing the likelihood that your key evidence will be admitted. To do this, of course, you must first understand the rules of evidence. There is not sufficient space here to review them in detail, and we assume you have already taken an evidence course as a prerequisite to this course. The suggestions here are examples only.

To prepare the evidentiary side of your own case, you must separate two kinds of evidence rules — those that exclude evidence, and those that require foundations.

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<sup>7</sup> GARY BELLOW & BEA MOULTON, *THE LAWYERING PROCESS* 321 (1978).

The exclusionary rules exclude evidence unless it falls within an exception. Most rules of relevancy and privilege are of this type. If you anticipate that your opponent might object to some of your evidence under an exclusionary rule, you will need to look for an exception that allows it into evidence. For example:

- Evidence of subsequent remedial measures is not usually admissible, unless offered to prove ownership or control, or the feasibility of safety measures. Fed. R. Evid. 407.
- Evidence of settlement negotiations is not usually admissible, unless offered show the bias of witness who agreed to testify as part of settlement. Fed. R. Evid. 408.
- Evidence that a party carries liability insurance is not admissible except to show agency (if defendant insures someone, that person probably works for defendant); ownership or control (the person who insures property probably owns or controls it), or the bias of a witness, e.g., that an investigator is employed by the defendant's insurance company. Fed. R. Evid. 411.
- Specific acts of bad character are inadmissible except to show motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident; or to impeach credibility. Fed. R. Evid. 404.
- Communications between doctors and patients are privileged, except for court-ordered examinations, evidence of child abuse, when the patient has waived the privilege, or for conditions placed in issue by a plaintiff's claim for damages.

The foundation rules exclude evidence unless a specific foundation is laid. The rules governing the personal knowledge requirement, lay and expert opinions, hearsay, and exhibits are of this type. For these rules, you must assume that your opponent will object if you fail to lay the complete foundation, so you will need to make sure you understand exactly what is required. You will have to plan in advance for how you will establish the personal knowledge of every witness you call, every opinion you elicit, every hearsay statement, and every exhibit. For example:

- The personal knowledge and opinion rules require that you prove that the witness was present at and perceived an event before the witness may describe it or characterize it in terms of an opinion. This foundation may be satisfied by either direct testimony from the witness that he or she was present and saw or heard what happened, or circumstantial evidence that it is likely the witness was present.
- Expert opinions require a complicated foundation and careful planning, and are treated thoroughly in Chapter 8.
- Exhibits and demonstrative evidence also requires a complicated foundation and careful planning, and is covered in detail in Chapter 6.

For hearsay, you must decide whether you will argue that it is not hearsay, it is not being offered for its truth, or fits into an exception, and then plan to lay the appropriate foundation before offering it. For example:

- If you are going to argue that evidence does not fit the definition of hearsay because it is not an assertion of fact, you must first lay a foundation that will show the judge what kind of statement it is.

**Wrong:** “What did Laura say?”

**Right:** “What question did Laura ask?” or “What threat did Laura make?”

- If you are going to argue that evidence does not fit the definition of hearsay because it is not being offered for its truth, you must first lay a foundation that will show the judge what other purpose it is being offered for.

**Wrong:** “What did Ben say?”

**Right:** “What did Ben say that caused you to change your mind?” or “Did Ben say something to you inconsistent with his trial testimony?”

- If you are going to argue that evidence falls within one of the hearsay exceptions — e.g., an excited utterance — you must first lay a foundation for that exception.

**Wrong:** “What did Mark say?”

**Right:** “A few minutes after the accident, did Mark look excited and upset?” “Did he say something to you about the accident?” “What did he say?”

## § 2.06 FILLING IN THE GAPS IN YOUR CASE

You will inevitably find factual weaknesses in your case — gaps in evidence, and places where you have only the uncorroborated testimony of a single witness. Often there will be nothing you can do but strengthen the other aspects of your case and hope that the logic of your argument will carry the jury safely over the weak spots. Sometimes, once these weaknesses are identified, a review of the witnesses and exhibits will disclose ways of shoring up your vulnerable points without additional witnesses, by using presumptions, stipulations, judicial notice, views, or depositions.

### [A] PRESUMPTIONS

A presumption is simply a rule of law that says something is presumed to be true. Like other rules of law, they are found in appellate cases and statutes. If you can find one that applies to some aspect of your case, you can get the judge to instruct the jurors that they are supposed to presume something is true. For example, criminal defendants often incorporated the presumption of innocence into their theories of the case. Prosecutors routinely invoke presumptions that a person in close proximity to contraband is in possession of it, or that the unexplained possession of recently stolen goods is evidence

of theft. In civil cases, a wide range of statutory and common law presumptions exist — from *res ipsa loquitur* to the presumption that a death is not suicide.

In civil cases, presumptions generally relieve the party with the burden of proof of the necessity of presenting evidence on an issue.<sup>8</sup> If the opponent offers no contrary evidence, the presumption usually becomes conclusive. If the opponent does offer rebuttal evidence, the presumption may either “disappear,” in which case the party who relied on it must now present evidence on the issue, or remain as “evidence” that may be considered by the jury. The specific procedural details of individual presumptions vary considerably.<sup>9</sup>

In criminal cases, presumptions are controlled by the constitutional principle that the state must always prove guilt beyond a reasonable doubt. A presumption that relieved the prosecution of this burden would be unconstitutional, so presumptions in criminal cases are always permissive and never mandatory.<sup>10</sup>

## [B] STIPULATIONS

A stipulation is an agreement between the parties to a lawsuit that certain facts are true, or that certain exhibits are admissible. Parties may not stipulate to matters of law. Stipulations that simplify facts and expedite litigation are favored by the courts.

Stipulations are often used for mutual convenience of the parties, to save the time and expense of proving uncontested facts. They are binding contracts. Once a fact has been stipulated, it is no longer contested and therefore not a material issue. Evidence contradicting the stipulation is strictly prohibited. Evidence consistent with the stipulation is generally irrelevant, because the issue is no longer disputed, but is not strictly prohibited. Many courts permit evidence consistent with a stipulation if it is helpful to the jury in understanding the complete context in which the litigated events took place.<sup>11</sup>

Generally speaking, stipulations must be introduced into evidence in some way in order to have any practical effect. Because a stipulation is an admission by your opponent, you can offer it at almost any time. Most judges will permit you to read it, although some prefer to read all stipulations themselves. It is inappropriate to ask a witness to read a stipulation.

Should you stipulate? While stipulations certainly make for efficient judicial administration, there are some tactical considerations that may militate against entering into them:

- The party having the burden of proof usually gains more by a formal stipulation than the defendant.

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<sup>8</sup> See *Tevolini v. Tevolini*, 783 A.2d 1157 (App. Ct. Conn. 2001).

<sup>9</sup> Compare *Roberts v. Wabash Life Ins. Co.*, 410 N.E.2d 1377 (Ind. App. 1980) (presumption that person missing for seven years is dead can be rebutted by any “competent” evidence) with *Cooper v. Cooper*, 608 N.E.2d 1386 (Ind. App. 1993) (presumption that child born during marriage is legitimate may be rebutted only by “clear and convincing” evidence).

<sup>10</sup> See *Sandstrom v. Montana*, 442 U.S. 510 (1979); *County Court v. Allen*, 442 U.S. 140 (1979).

<sup>11</sup> See *Young v. State*, 451 N.E.2d 91 (Ind. App. 1983) (even though identity of decedent stipulated, other evidence of decedent’s identity admissible); *In re Nevil*, 704 P.2d 1332, 1334 (Cal. 1985) (evidence not admissible to contradict a stipulation, but is admissible if consistent).

- Items in a stipulation can be read and reread and emphasized in argument, often more effectively than ordinary testimony.
- Sometimes the language of a stipulation can become a subject of bitter controversy when an unscrupulous opponent tries to stretch it beyond its actual intent.

All of this suggests that a formal stipulation should be worded with meticulous care.

When writing a stipulations, remember that it will be read verbatim to the jury, without explanation. It should be phrased as if it were a statement to the jury. Whatever you want explained about the effect or extent of the stipulation must be in the stipulation itself. For example:

In order to save time, both sides have agreed that the following facts concerning the accident are true, so no witnesses will be called to prove them:

- 1) The defendant was 15 years old and did not have a driver's license.
- 2) The traffic signal at Walnut and 10th Streets was not working properly. Lightning had struck a nearby utility pole, causing the traffic signal to blink red in all directions rather than show the usual red and green signals.

This agreement is not intended by either party as an admission that any particular person was or was not at fault in the accident.

It is also common to phrase a stipulation in terms of what a witness would testify to if called, i.e.:

The parties stipulate that if called as a witness, Officer Mark Malooley would testify that he found a .38 caliber Colt revolver in the glove compartment of the defendant's car and turned it over to Detective Darrick Hooker in the same condition as when he found it.

An offer to stipulate during trial also can be an effective weapon against relevant but prejudicial evidence. If you offer to stipulate to the contested fact, the evidence is no longer needed, and the balance between probative value and prejudice may swing toward exclusion.<sup>12</sup>

Stipulations that constitute important parts of your case should usually be read to the jury near the beginning of your case in chief. Stipulations that go only to formal matters, such as foundations, should be offered in connection with other testimony logically related to it. If you have stipulated to an evidentiary foundation, e.g., that a document is admissible, there is no necessity that the stipulation be read to the jury at all. When the document is offered, you can remind the judge that its admissibility has been stipulated.

## [C] JUDICIAL NOTICE

Judicial notice is available to get before the jury facts not subject to reasonable dispute. Federal Rule of Evidence 201 provides for judicial notice

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<sup>12</sup> See *Old Chief v. United States*, 519 U.S. 172 (1997) (court abuses its discretion by spurning defendant's offer to stipulate to a prior conviction and instead allowing prosecution to admit full record); *Herrera v. State*, 710 N.E.2d 931 (Ind. App. 1999) (offer to stipulate to status as felon renders other evidence of criminal record inadmissible).

of two kinds of indisputable facts: (1) those “generally known” in the community, and (2) those facts which are “capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.” In the “common knowledge” category are facts such as that a local building is a school,<sup>13</sup> that golfers do not always hit their balls straight,<sup>14</sup> and that O’Hare airport is located in Chicago, which has no shortage of telephones, drug detection dogs, and federal magistrates.<sup>15</sup> In the “readily ascertainable” category are facts such as that Busch beer contains more than 0.5% alcohol,<sup>16</sup> that a city was located in a particular county,<sup>17</sup> and that the scientific principles underlying DNA testing are reliable.<sup>18</sup> If you seek to prove facts of the second type, you bear the responsibility for supplying a reference book to the judge.

If the judge agrees to take notice of a fact, he or she will instruct the jury that it should accept the fact as true.<sup>19</sup> Judicial notice relieves you of the necessity to find and call witnesses, but has some of the same drawbacks as a stipulation, since it may not be as persuasive as the testimony of live witnesses.

If a party knows in advance that it will request judicial notice, that request should be made pre-trial with supporting documents attached and reasonable notice to the opposing party.<sup>20</sup> If judicial notice is unanticipated, a request may be made for the first time during trial. The opposing party may object and/or request an opportunity to be heard as to the propriety of taking notice and the tenor of the matter noticed.

## [D] VIEWS

A “view” is a procedure in which the jury gets on a bus and visits the scene at which a disputed event took place. Although courts have an inherent ability to permit the jury to leave the courtroom to view the scene, statutory authority also exists in most jurisdictions.<sup>21</sup> In a typical view, the jury is transported by a bailiff to the scene and permitted to view it, but nothing else. In many jurisdictions, the judge, lawyers, and a court reporter accompany the jury.<sup>22</sup> It is improper for the lawyers or the bailiff to explain the significance of certain

<sup>13</sup> *E.g.*, *Lovelady v. State*, 65 S.W.3d 810, 812–13 (Ct. App. Tex. 2002); *Haley v. State*, 736 N.E.2d 1250, 1252–53 (Ct. App. Ind. 2000).

<sup>14</sup> *Geddes v. Mill Creek Country Club*, 751 N.E.2d 1150, 1156 (Ill. 2001).

<sup>15</sup> *People v. Shapiro*, 687 N.E.2d 65, 71 (Ill. 1997).

<sup>16</sup> *Commonwealth v. Harvey*, 666 A.2d 1108, 1113–14 (Super. Ct. Penn. 1995) (determined by looking at records of Liquor Control Board).

<sup>17</sup> *Thomas v. State*, 784 So.2d 247, 249–50 (Ct. App. Miss. 2001).

<sup>18</sup> *State v. Butterfield*, 27 P.2d 1133, 1142 (Utah 2001) (referring to study by National Research Council).

<sup>19</sup> In civil cases, the judge will instruct the jury that the fact is conclusive. In criminal cases, if the fact helps the prosecution sustain its burden of proof, the judge will only instruct the jury that it may find the noticed fact to be true. *See* Fed. R. Evid. 201(g).

<sup>20</sup> *See In re Marriage of Mulvihill*, 471 N.E.2d 10 (Ind. App. 1984).

<sup>21</sup> *See, e.g.*, Ind. Code § 35-37-2-5 (in criminal cases); Minn. Stat. § 546.12 (civil cases).

<sup>22</sup> *E.g.*, *Esposito v. State*, 538 S.E.2d 55, 59–60 (Ga. 2000). *See also Payne v. United States*, 697 A.2d 1229, 1235 (D.C. Ct. App. 1997) (view held without attorneys is error).

details or to direct the jurors' attention to particular features.<sup>23</sup> Despite what you see on television, it is extremely rare for a judge to reconvene court at the scene to enable witnesses to testify about it,<sup>24</sup> and rarer still for the judge to authorize a re-enactment of the events.

It is more common for a view to be granted when land is involved than in cases not involving real property. Nevertheless, Wigmore argues that views are appropriate for any kind of object that must be seen in order to be properly understood and which cannot be brought into the courtroom. He cites cases in which jurors have been allowed to view automobiles, machinery, manufacturing plants, cattle, horses, trucks, and trains.<sup>25</sup>

Whether and under what circumstances to permit a view is a decision left to the trial court's discretion. Courts generally consider four factors in deciding whether to allow a view: 1) the importance of the evidence; 2) how likely it is that a view will aid the jury in reaching the correct verdict, 3) whether the jury can adequately visualize the scene from testimony or other evidence, such as photographs or videotape, and 4) whether current conditions at the scene are sufficiently similar to conditions at the time of the event.<sup>26</sup> Views are disruptive and expensive, and are becoming uncommon.

## [E] USING DEPOSITIONS

Generally speaking, using depositions as evidence is a bad idea. They are really, *really* boring. But occasionally you may have no reasonable alternative, because the witness needed to fill a hole in your case or corroborate your client has become unavailable. If you will need to use a deposition, you must first prove that it falls within a hearsay exception — usually because it is an admission of the opposing party under Fed. R. Evid. 801(d)(2), or falls within the former testimony exception, Fed. R. Evid. 804(b)(1). Depositions are also useful on cross-examination to impeach a witness, which topic is covered in Chapter 7.

If you must use a deposition, what is the proper procedure? First, in many jurisdictions, you will have to file the deposition with the court in advance of trial. At trial itself, lawyers use various methods to avoid boring the jury with monotonous presentations. Some place an associate in the witness chair and read questions while the associate reads the answers, so as to create a visual impression of the witness testifying. Others prefer to sit in the witness chair and read both questions and answers themselves. The matter is usually left to the tactical decision of the lawyer and the discretion of the trial judge, although at least one state supreme court has a preference for the two-person format.

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<sup>23</sup> *E.g.*, *State v. Musgrove*, 582 P.2d 1246 (Mont. 1978).

<sup>24</sup> *E.g.*, *Esposito v. State*, 538 S.E.2d 55, 60 (Ga. 2000) (witnesses should not be permitted to attend a view).

<sup>25</sup> 4 J. WIGMORE ON EVIDENCE 364–65 (Chadbourn rev. 1972). See, e.g., *People v. Goodfriend*, 436 N.Y.S.2d 826 (1981) (request that jury view dog to see if it was of meek or aggressive disposition).

<sup>26</sup> *E.g.*, *State v. Ruiz*, 34 P.2d 630, 642 (Ct. App. N.M. 2001) (testimony, scale model and photographs of scene were adequate; no view needed); *State v. Cintron*, 665 A.2d 95, 98 (App. Ct. Conn. 1995) (defendant failed to establish similarity of conditions; no view required).

The examining attorney would obtain the services of an individual who would act as the deponent; as the examining attorney read the questions from the deposition, the individual acting as the deponent would read the answers given by the deponent. When this method is used, the opposing party would have an opportunity to object to any irrelevant, immaterial or incompetent evidence. In no event, unless by agreement of the parties, should the deposition itself be admitted into evidence as an exhibit, whether the trial is before the court without a jury or before the court and a jury.<sup>27</sup>

### NOTES

**1. Examples of Presumptions.** The range of presumptions available can be illustrated by these examples, taken from among the more than 150 specific presumptions listed in J. ALEXANDER TANFORD, INDIANA TRIAL EVIDENCE MANUAL (4th ed. 1998):

- (a) All persons are presumed to know the traffic laws. *Scott v. Krueger*, 280 N.E.2d 336 (Ind. App. 1972).
- (b) For chain of custody purposes, there is a presumption of regularity in the handling of exhibits by S public officers, and they are presumed to discharge their duties with due care. *Shepherd v. State*, 690 N.E.2d 318 (Ind. App. 1997).
- (c) Anything sent by first class mail is presumed to have been delivered. *Conrad v. Universal Fire & Cas. Ins. Co.*, 686 N.E.2d 840 (Ind. 1997).
- (d) A person is presumed to intend the reasonable and natural consequences of his or her acts. *Heavrin v. State*, 675 N.E.2d 1075 (Ind. 1996).
- (e) A person who bounces a check is presumed to know the account had insufficient funds. Ind. Code § 35-43-5-5(c).
- (f) Fires are presumed to start by accident or natural causes, not arson. *Alexander v. State*, 600 N.E.2d 549 (Ind. App. 1992).
- (g) A person with a blood alcohol level of 0.08% is presumed to be intoxicated. In. Code § 9-13-2-131.
- (h) A deed or other written instrument attached to a pleading is presumed to be valid. Ind. Trial Rule 9.2.
- (i) Every person is presumed to be of sound mind to execute a will. *Kronmiller v. Wangberg*, 665 N.E.2d 624 (Ind. App. 1996).
- (j) Transactions that shift property from the deceased to a fiduciary are presumptively the result of undue influence by the fiduciary. *Matter of Estate of Neu*, 588 N.E.2d 567 (Ind. App. 1992).
- (k) Violation of a safety regulation presumptively constitutes negligence. *Witham v. Norfolk and Western Ry. Co.*, 561 N.E.2d 484 (Ind. 1990).

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<sup>27</sup> *Century Plaza v. Hibbett Sporting Goods*, 382 So.2d 7 (Ala. 1980).

- (l) Children under fourteen are presumed incapable of contributory negligence. *Creasy v. Rusk*, 730 N.E.2d 659 (Ind. 2000).
- (m) Products that are state-of-the-art or comply with safety codes are presumed to be non-defective. Ind. Code § 34-20-5-1.
- (n) Employment is presumed to continue in the future. *Keith v. Mendus*, 661 N.E.2d 26 (Ind. App. 1996).

**2. Judicial notice of indisputable scientific facts.** You must be careful to distinguish facts of common knowledge from scientific facts in determining whether a particular fact is subject to “reasonable” dispute and therefore ineligible for notice. If a matter of basic science is generally accepted within the scientific community, it should be noticed, even though some segments of the general public may disagree with it. A scientific fact is not *reasonably* disputed if the disagreement with it stems from fear, ignorance or religious objection. An example of the potential confusion is *Stewart v. Stewart*, 521 N.E.2d 956 (Ind. App. 1988), in which the court erroneously refused to take judicial notice of ways in which the AIDS virus is transmitted, apparently because of a widespread *public* belief that science does not know the answer.

## § 2.07 DEVELOPING A PERSUASION STRATEGY

Once you have developed a theory and planned your evidence, you need a strategy for selling your case to the jury. This advocacy strategy will help you organize your overall case and the individual components within it. A successful strategy should be solidly based in what social psychologists know about effective communication and persuasion. We suggest that you adopt some variation of the following general principles that are based on the empirical work of social psychologists:

- **Start strong**, to take advantage of the principle of “primacy.” Primacy refers to the tendency of jurors to remember and be heavily influenced by what they hear first. Psychologists have confirmed what our mothers always told us: first impressions are important.<sup>28</sup> This principle suggests not only that your first encounter with the jury is critical, but also that the first minutes of each phase of your trial — your opening statement, each direct and cross-examination, and your closing argument — are critical points in which you should focus on something you especially want the jury to remember.
- **End strong**, to take advantage of the principle of “recency.” Recency refers to the tendency of jurors to remember what they hear last in a sequence. This principle suggests that your final encounter with the jury, as well as the final minutes of each individual phase of the trial, are critical points in which you should focus on something you especially want the jury to remember.
- **Use themes and stories.** Familiar stories will be easier for jurors to remember than lots of small details. Try to package parts of your case in ways that take advantage of this. For example, suppose that

<sup>28</sup> See SAUL M. KASSIN & LAWRENCE S. WRIGHTSMAN, *THE AMERICAN JURY ON TRIAL: PSYCHOLOGICAL PERSPECTIVES* 132–37 (1988).

the opposing experts contradicted each other in several important ways so that it casts doubt on the credibility of their opinions. You can remind the jury of the story of Goldilocks and the three bears, each of whom evaluated the temperature of the porridge differently. Similarly, jurors may have trouble envisioning what the scene of a crime was like until you tell them the victim's home looked like a scene from "Deliverance."

- **Concentrate on a small number of points.** What are the five or ten most important facts in your case? Identify them in your case theory, and then emphasize them throughout your trial. 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.
- **Use repetition and corroboration.** Your main points should be repeated several times so that the jury is sure to remember them. Although too much repetition of the same message may cause boredom, you should plan to remind the jurors of your main points and facts several times, varying slightly the way you present it so that your presentation is corroborative rather than repetitive.
- **Admit your weaknesses.** Every case has weaknesses, e.g., witnesses with unsavory backgrounds or evidence that defies common sense. You cannot ignore these problems, because 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.<sup>29</sup> 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.

### NOTE

**What is a "theme"?** A good trial presentation, like a good symphony, needs a central theme. Themes can be found in the elements of your case or in the characteristics of your client that arouse natural sympathy or coincide with universally admired principles. Themes should be familiar to the jury and their lives. For example, "An episode of *Ally McBeal*" would be a better theme than "Marriage of Figaro;" and "getting laid off" is better than "getting wiped out when the stock market falls." It is especially helpful if you can come up with a clever and easily rememberable title for your theme. For example:

- **David and Goliath** — if you represent an individual against a large corporation.

<sup>29</sup> See Daniel Linz and Steven Penrod, *Increasing Attorney Persuasiveness in the Courtroom*, 8 LAW & PSYCHOLOGY REV. 1, 13–14 (1984); Robert Lawson, *Relative Effectiveness of One-Sided and Two-Sided Communications in Courtroom Persuasion*, 82 J. GENERAL PSYCHOLOGY 3 (1970).

- ***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.
- ***Against all odds*** — if you represent a heroic plaintiff who has fought back against the odds and refused to give up despite paralysis, blindness, or other serious, permanent injury.
- ***Sold a bill of goods*** — if you represent a products liability plaintiff who can be portrayed as the victim of relentless, high-powered sales tactics, convinced to use a product by the half-truths of modern advertising.
- ***Caught in a sea of red tape*** — if you represent a small business trying to comply with contradictory and arbitrary regulations and laws.
- ***Law and order*** — if your case is weak on sympathetic factors, but your client's actions were legally justified.

You should be cautious about overdoing it. Your presentation often can be structured so that the theme is invoked by inference rather than by hitting the jurors over the head with it. You do not have to explain to the jurors what it means to be an underdog or to be frustrated trying to correct an error in a computer-generated bill. As long as the subject is a familiar one, the jurors will recognize and respond to it.

Themes should be positive, reflecting the strengths of your case. In general, you should stay away from “negative” themes which focus on a weakness in your adversary's case. Negative themes may seem petty. For example, if you represent the defendant in a criminal case where the victim's identification is shaky and the police did a poor investigation, you may be tempted to focus on the weaknesses of the State's case with the theme “the blind leading the blind.” However, if you have a plausible alibi, you are probably better off with a less clever, but more positive theme, such as “You can't be in two places at once.”

## § 2.08 SELECTION AND ORDER OF WITNESSES

The following discussion on the strategy of witness selection assumes that you are in the happy situation of having more witnesses available than are necessary to establish your claim or defense. This often will not be the case. Frequently you will have to call every witness with relevant information in order to make out a minimally persuasive case. But whether you have available four or forty witnesses, you should make a positive choice of whether to call each individual, and not put every potential witness on the stand as a matter of course.

### [A] WHETHER TO CALL ANY WITNESSES.

A decision to call no witnesses is rarely an option for any party except a criminal defendant. If you intend to prove your claim or defense, or to contest your adversary's proof, you must present evidence. Unless you stipulate to

a set of facts or can introduce a deposition, this evidence will have to come from witnesses.

A criminal defendant is in a unique position. Because of the rigorous burden of proof placed on the prosecution, the accused may choose to present no evidence, relying instead on an argument that the state has failed to prove guilt beyond a reasonable doubt. This is rarely a good strategy, however, because failure to call any witnesses is tantamount to admitting to the jury that you have no defense. For that reason, criminal defense attorneys generally recommend planning your case under the assumption that you *will* call witnesses. Then at trial, if the state has put on a weak case, you can consider resting without presenting any evidence if your own defense is flimsy or if it might bolster a weakness in the state's case. For example, if an assault victim is unable to identify the defendant at trial, you might choose to rest without evidence if you had been planning a self-defense case. If you put on your evidence, you would have to concede the identity issue. However, if you had planned an alibi defense, you would obviously go ahead with it. Only in a most hopeless case, in which your client admits guilt and no defenses are applicable should you plan ahead not to call witnesses.

## [B] CRITERIA FOR SELECTING WITNESSES

There are a number of criteria for selecting witnesses. They range from the obvious — whether a witness is available and has relevant testimony to give — to the not so obvious intricacies of personality. The goal, of course, is to call “good” witnesses and avoid calling “bad” witnesses. This is easier said than done.

### Indications that you should call a witness:

- The witness is necessary to prove a prima facie case. If a witness is the only one who can supply testimony on an essential element of your case, that witness must be called.
- The witness will corroborate important points in your case. Repetition will increase the likelihood that the important facts will be remembered.<sup>30</sup>
- Taken as a whole, the witness's testimony is more favorable to you than to your opponent.
- The person was directly affected by the events, such as the client or victim.
- Your client's testimony will refer to the witness. The law allows the jury to draw an adverse inference from the failure to call an available witness with natural ties to your client. Thus, if your client claims three friends were in the car, you should call all three, even if they saw or remember little. Otherwise, the jury may infer that the missing witness was not called because he or she would have contradicted your client. Potential witnesses who are friends,

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<sup>30</sup> See John T. Cacioppo and Richard E. Petty, *Effects of Message Repetition and Position on Cognitive Response, Recall, and Persuasion*, 37 J. PERSONALITY & SOC. PSYCHOLOGY 97 (1979) (suggesting that three repetitions is the optimal number).

family members, employees, or agents of your client should be called if the jury has any way of finding out their existence.

- The witness is a “res gestae” witness. For the party with the burden of proof, especially the prosecution in a criminal case, the jury may expect to hear from all the witnesses present at the scene, even those who saw or remember little. Failure to call one may be viewed in the same negative light as failure to call friends and family.
- The witness has a clear memory.
- The witness is attractive. Social scientists have shown that physically attractive witnesses are perceived as more intelligent and competent than unattractive witnesses.<sup>31</sup>
- The witness holds a professional job or is well educated. Psychologists have shown that professionals are often regarded as more trustworthy than representatives of power groups or people in low status occupations.<sup>32</sup>
- The witness has a likeable personality or is an entertaining speaker. The more good-natured witnesses you can call, the more the jury will evaluate your case favorably.
- The witness possesses sympathetic characteristics, such as physical disability, youth, and old age.<sup>33</sup>
- The witness is likely to be of similar race, sex, and socioeconomic status to members of the jury,<sup>34</sup> although this may be hard to predict in advance.

Indications that you should not call a witness:

- The witness will do damage to your case when facts favoring your opponent are brought out on cross-examination.
- The witness shares responsibility for the event and will be seen as trying to blame others.
- The witness was intoxicated, sleepy, or otherwise probably had difficulty accurately observing the events.
- The witness bears personal animosity toward the opponent or personal bias in favor of your client.<sup>35</sup>
- The witness has a prior criminal record or bad character.
- The witness will contradict your client or important witnesses.

<sup>31</sup> See Ellen Berscheid and Elaine Walster, *Physical Attractiveness*, in 7 *ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY* 158 (L. Berkowitz ed. 1974).

<sup>32</sup> See Rotter & Stein, *Public Attitudes Toward the Trustworthiness, Competence, and Altruism of Twenty Selected Occupations*, 1 *J. APPLIED SOC. PSYCHOLOGY* 334 (1971).

<sup>33</sup> See generally HARRY KALVEN & HAN ZEISEL, *THE AMERICAN JURY* 193–218 (1966) (empirical study of characteristics of criminal defendants as witnesses).

<sup>34</sup> See Ellen Berscheid, *Opinion Change and Communicator-Communicatee Similarity and Dissimilarity*, 4 *J. PERSONALITY & SOCIAL PSYCHOLOGY* 670 (1966) (the more similar two persons are, the more they like each other, which increases the likelihood of persuasion).

<sup>35</sup> For example, after the racial animosity of Mark Fuhrman was brought out in O.J. Simpson’s criminal trial, the plaintiffs’ lawyers in the second civil trial decided not to call him as a witness.

- You already have several witnesses on the same point. Some repetition is good, but too much may cause boredom.
- Character witnesses for the defense should be avoided. Most experienced lawyers think they are useless, and some empirical research suggests they actually may make your case worse.<sup>36</sup>
- You fear that the witness will lie or exaggerate. It is unethical to present false evidence, and it will taint your whole case if the lie is exposed.

### [C] WHETHER THE ACCUSED SHOULD TESTIFY.

Part of the witness selection process for the criminal defense attorney is the often difficult decision whether to put the accused on the stand. Many factors are involved, and there are risks either way. Of course, if your client is a sympathetic witness with no prior record and you have a strong defense and many corroborating witnesses, the decision to call the defendant is easy. Conversely, if the state has presented a weak case, and your client has a long record, an evil appearance, and a patently incredible (and uncorroborated) story, the decision to keep the defendant off the stand is also easy. Most cases fall somewhere in between.

Most attorneys favor calling the defendant in the majority of cases. Despite the presumption of innocence, it is commonly believed that jurors do assume that the defendant is probably guilty if he or she fails to take the stand and offer a reasonable defense. A series of surveys by the National Jury Project revealed that 30–60% of prospective jurors expected a defendant to prove his or her innocence despite an instruction on the presumption of innocence.<sup>37</sup> Thus, the chances of conviction increase if the accused does not testify.<sup>38</sup>

Other factors militate against calling the defendant as a witness. The most obvious is the existence of a criminal record. Studies have shown that a record of similar criminal activity increases the likelihood of conviction.<sup>39</sup> Other considerations include: whether the defendant's story is incredible or contradicts better defense witnesses; the weakness of the prosecution's case; and the unattractive dress, voice, speech patterns, physical characteristics, or body

<sup>36</sup> In two classroom experiments, students in evidence classes at Indiana University Law School were asked to decide the guilt or innocence of a defendant based on a summary of the evidence for and against him (before the students had studied character evidence). When given facts identical in all respects except for the presence of a character witness, the conviction rate was fifteen percent to thirty percent higher when the defendant offered evidence of his good character.

<sup>37</sup> NATIONAL JURY PROJECT, *JURYWORK: SYSTEMATIC TECHNIQUES* § 2.04 (2d ed. 2001) (Figure 2.2).

<sup>38</sup> See David R. Shaffer and Thomas Case, *On the Decision not to Testify in One's Own behalf: Effects of Withheld Evidence, Defendant's Sexual Preference, and Juror Dogmatism on Juridic Decisions*, 42 J. PERSONALITY & SOCIAL PSYCHOLOGY 335 (1982). In an experiment at Indiana University, hundreds of evidence students (who ought to know better) were given a trial transcript and asked whether they thought the defendant guilty. The conviction rate jumped thirty percent when the defendant did not testify (all other evidence being identical).

<sup>39</sup> See Anthony Doob and Herschi M. Kirschenbaum, *Some Empirical Evidence on the Effect of § 12 of the Canada Evidence Act Upon the Accused*, 15 CRIM. L. Q. 88, 89–95 (1972); ROSELLE WISSLER AND MICHAEL SAKS, *ON THE INEFFECTIVENESS OF LIMITING INSTRUCTIONS*, 9 LAW & HUM. BEHAVIOR 37, 41–44 (1985).

language of the defendant.<sup>40</sup> There is one final danger: the client's testimony may make admissible otherwise excludable evidence. Confessions suppressed because the defendant was denied counsel or not given adequate warnings can be used to impeach if the defendant testifies. Unconstitutionally seized evidence likewise may become admissible.<sup>41</sup>

## [D] ORDER OF WITNESSES

After selecting your witnesses, you must decide the order in which you will present them. This determination obviously will be influenced by practical factors beyond your control, such as the times when particular witnesses are available or the rules of evidentiary foundations that require calling some witnesses before others. However, within these practical restrictions, the effective ordering of witnesses will help you present a logical, understandable case that highlights your strengths and hides your weaknesses as much as possible. Consider the following suggestions:

- Start with a strong, important witness who can describe the event.
- Start with witnesses who can set the scene, authenticate pictures of it, and describe the motives of the main actors.
- In general, call witnesses in chronological order, e.g., the plaintiff and eyewitnesses first to describe the accident, then witnesses to prove damages.
- Call corroborating witnesses after a primary witness has testified.
- Call weak or minor witnesses in the middle of your case.
- If several witnesses are needed to lay a foundation, such as a chain of custody, call them seriatim.
- If you must read depositions or other documents, try to disperse them throughout your case so you do not bore the jury to tears.
- Call lay witnesses first and expert witnesses near the end, since they are generally drawing conclusions that will not make sense until the jury understands all the facts.
- Finish with a strong witness. This takes advantage of the principle of recency.
- Call all your witnesses in your case-in-chief. Never withhold evidence so you can "surprise" your opponent with it in rebuttal.

## NOTES

**1. Who are the most respected witnesses?** The Gallup Poll conducts an annual survey of the relative prestige of various occupations. In PUBLIC OPINION 2000, at 388-89 (2001), the occupations are ranked for honesty and

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<sup>40</sup> Henry Rothblatt, *The Defendant — Should He Testify?*, TRIAL DIPLOMACY J. at 22-23 (Fall 1979).

<sup>41</sup> *United States v. Havens*, 446 U.S. 620 (1980); *Harris v. New York*, 401 U.S. 222 (1971). See also Craig Bradley, Havens, Jenkins, and Salvucci and the Defendant's "Right" to Testify, 18 AM. CRIM. L. REV. 419 (1981).

integrity as follows: (1) nurses, (2) pharmacists, (3) veterinarians, (4) physicians, (5) school teachers, (6) clergy, (7) college professors, (8) dentists, (9) engineers, (10) police officers, (11) judges, (12) accountants [poll taken before Enron scandal], (13) bankers, (14) funeral directors, (15) politicians, (16) builders, (17) TV reporters, (18) auto mechanics, (19) business executives, (20) journalists, (21) stockbrokers, (22) real estate agents, (23) labor union leaders, (24) lawyers, (25) insurance agents, (26) advertisers, (27) car sales agents.

**2. *Selecting your first and last witnesses.*** Most good trial practitioners follow a strategy that you should start and finish with “strong” witnesses to take advantage of primacy and recency effects. If you have two strong witnesses, the usual advice is to call first the one who can give a more complete overall picture of the occurrence. BYRON K. ELLIOTT & WILLIAM ELLIOTT, *THE WORK OF THE ADVOCATE* 238–39 (1888); Mortimer Hays, *Tactics in Direct Examination*, in *CIVIL LITIGATION AND TRIAL TECHNIQUES* 366–67 (H. Bodin ed. 1976) (the plaintiff will often be the appropriate witness). There is some disagreement. Rothblatt advocates selecting the first witness solely on the basis of his or her ability to withstand cross-examination, since this will take the wind out of subsequent cross-examination attempts. HENRY ROTHBLATT, *SUCCESSFUL TECHNIQUES IN THE TRIAL OF CRIMINAL CASES* 83 (1961). Psychologists suggest that the first witness should be one who can testify to the single most important item of evidence in your case. For example, the prosecutor could call either an eyewitness who can confidently identify the accused, or a police detective who can introduce the defendant’s confession. SAUL M. KASSIN & LAWRENCE S. WRIGHTSMAN, *THE AMERICAN JURY ON TRIAL: PSYCHOLOGICAL PERSPECTIVES* 135–36 (1988).

A number of trial practitioners recommend that your client be the last witness, so that he or she has the opportunity to observe the whole proceeding and explain any inconsistencies in the testimony. ANTHONY AMSTERDAM, *TRIAL MANUAL 5 FOR THE DEFENSE OF CRIMINAL CASES* § 396 (1988). Others suggest that an expert witness is a good one to call last because it enables you to summarize testimony through a hypothetical question. *See, e.g.*, Robert Hanley, *Working the Witness Puzzle*, *LITIGATION* at 9 (Winter 1977).

What if you have only one strong witness? Should that witness be called first or last? If the answer is not dictated by the nature of the testimony or other practical considerations, some assistance can be found in the social science studies on the relative effect of primacy and recency. Although the results have been occasionally inconsistent and are affected by other factors (such as the characteristics of the individual witness), experiments seem to indicate that the plaintiff should call his or her strongest witness first and the defendant should save the strongest witness until last. One study determined that a juror’s initial, tentative decision as to guilt or innocence had a disproportionate influence on final decisions, so the plaintiff or prosecution benefits from calling the strongest witness first. Vernon Stone, *A Primacy Effect in Decision-Making by Jurors*, 19 *J. COMMUNICATION* 239 (1969). Another study supports the defense tactic of calling the strong witness last. Norman Miller and Donald Campbell, *Recency and Primacy in Persuasion as a Function of the Timing of Speeches and Measurements*, 59 *J. ABNORMAL & SOCIAL PSYCH.* 1 (1959) (recency effect stronger when two messages are separated in time).

**3. Whether to use live witnesses or pre-recorded testimony.** As a general rule, live testimony is required from available witnesses. They cannot testify via telephone, *In re Bieganowski*, 520 N.W.2d 525 (Ct. App. Minn 1994); *Bonamarte v. Bonamarte*, 866 P.2d 1132 (Mont. 1994); nor by videotape. *United States v. Huang*, 827 F.Supp 945 (SDNY 1993). In criminal cases, the defendant has a right to confront the witnesses against him, which greatly restricts the prosecution's use of videotape. *State v. Apilando*, 900 P.2d 135 (Haw. 1995); *State v. Medina*, 875 P.2d 803 (Ariz. 1994). However, for minor witnesses or with consent of the other side, you may occasionally get permission to use substitute testimony for a witness for whom it would be inconvenient to testify in person. It is generally assumed by lawyers that you should use live witnesses anyway, because it is more persuasive than other forms of testimony. However, there is little objective support for this proposition. In one experiment comparing live with various kinds of recorded testimony, the results showed that there is no "best" format for presenting testimony. Some witnesses seemed to fare better when they did not appear in person, others worse. Gerald Williams, et al., *Juror Perceptions of Trial Testimony as a Function of the Method of Presentation: A Comparison of Live, Color Video, Black-and-White Video, Audio, and Transcript Presentations*, 1975 B.Y.U. L. REV. 375. See also Gordon Bermant, *Critique — Data in Search of Theory in Search of Policy: Behavioral Responses to Videotape in the Courtroom*, 1975 B.Y.U. L. REV. 467, 475–85 (cautioning that there are many untested variables in the Brigham Young study which makes evaluation of the results difficult).

In another experiment, researchers studied whether jurors remembered more facts from a live witness than a recorded one. They discovered that jurors actually remember more when testimony is presented on videotape than by a live witness — probably due to the novelty of it causing them to pay closer attention. Gerald Miller, et al., *The Effect of Videotape Testimony in Jury Trials: Studies on Juror Decision Making, Information Retention, and Emotional Arousal*, 1975 B.Y.U. L. REV. 331, 357–64.

**4. Presenting deposition testimony.** When it is necessary to present a witness's testimony by deposition instead of in person, is there any reason to prefer playing a videotape to reading a transcript? Most lawyers would intuitively select the videotape, since it seems more like live testimony. There is some experimental evidence that bears this out, although the answer is far from clear-cut. In one experiment, mock jurors were asked to decide the value of condemned land, based on the conflicting testimony of two witnesses — one presented on color videotape and the other by transcript. The award they would have given favored the testimony of whichever witness was presented on videotape. Larry C. Farmer, et al., *The Effect of the Method of Presenting Trial Testimony on Juror Decisional Processes*, in *PSYCHOLOGY IN THE LEGAL PROCESS* 59–76 (B. Sales ed. 1977).

**5. Planning rebuttal witnesses.** Too often, lawyers pay little attention to planning rebuttal witnesses. Plaintiff can (and should) give some thought to the evidence that probably will be introduced by the defendant, and plan whether to call any witness to contradict or impeach that evidence. You must remember, however, that rebuttal is properly limited to responding to new

matters raised by your opponent — either by contradiction or by impeaching the defense witnesses. It generally is not proper to introduce evidence in rebuttal that could have been introduced in your case-in-chief. If the defense merely contradicts your case, introducing no new issues, you cannot call rebuttal witnesses to strengthen your case-in-chief. *See generally* 3 FRANCIS X. BUSCH, *LAW AND TACTICS IN JURY TRIALS* 960–97 (1960) (with extensive citations).

If you expect the defendant to raise an affirmative defense, and you have a witness who can negate it, should you call that witness in your case-in-chief or save the witness for rebuttal? Despite the temptation to “take the wind out of defendant’s sails,” most practitioners advise against trying to anticipate an affirmative defense or other new issue the defendant might raise. Not only may it be irrelevant to attempt it, but it may open up new lines of cross-examination favorable to your adversary. The defense evidence may never materialize, or may come out differently than expected, leaving the jurors confused as to why you introduced the testimony. In a few situations, however, anticipatory rebuttal may be advisable — when you are certain of the defense, and the rebuttal evidence fits together with your theory in your case-in-chief. This is especially true when the defense is a common one familiar to the jurors. For instance, in a self-defense assault case, the plaintiff will usually prove the attack was unprovoked in its case-in-chief. *See Starr, Rebuttal and Surrebuttal*, in *CIVIL LITIGATION AND TRIAL TECHNIQUES* 608–11 (H. Bodin ed. 1976).

**6. Assuring attendance of your witnesses.** Your planning and selection of witnesses will be for naught if they do not show up to testify. It is not enough to call them the day before trial and tell them to come down to the courthouse. Assuring that your witnesses will be there when you need them is a four-step process:

- 1) Keep track of witnesses during the months or years it takes for the case to go to trial. People move, change jobs, change telephone numbers, and take vacations. You have to know how to contact a witness if you expect that person to show up. Witnesses also are curious about what is happening to a case in which they are involved. An occasional telephone call will keep you informed about the witness and the witness informed about the progress of the case.

- 2) Issue subpoenas. A subpoena is a formal request that the witness attend the trial, and it legally requires the witness to show up. In some jurisdictions, you obtain signed but otherwise blank subpoena forms from the clerk of court; in others you prepare your own and sign them as an officer of the court. *See Fed. R. Civ. P. 45(a)*. Once the trial has been scheduled, all witnesses should be subpoenaed, not just “unfriendly” witnesses. Subpoenas to friendly witnesses will provide them with written reminders of the date and place of trial, give them the necessary documentation to be excused from their jobs, and will eliminate the appearance that they are partial to and anxious to testify for your client. If you need a document or exhibit, especially if it is in the possession of a hostile witness, a subpoena duces tecum should be issued describing the object to be brought to trial. If you expect to introduce a hearsay declaration or use the deposition of an unavailable declarant, you probably will have to show that you tried to subpoena

that person as part of the foundation. Do not forget to subpoena your opponent's witnesses if you need them to be present for identification purposes.

3) Personally talk to each friendly witness and make sure they know where the courthouse is, which courtroom is being used, and where the witness room is. If possible, have an associate or paralegal meet witnesses, get them to the courthouse, and keep track of them.

4) Keep witnesses available once the trial has started. If a witness is allowed to leave too early, the witness may not be available if you need unexpected rebuttal evidence.

## § 2.09 PRETRIAL MOTIONS

A motion is simply a request that the judge issue an order concerning the case. It describes what the attorney wants and the legal basis for requesting it. Most motions are made in writing<sup>42</sup> and accompanied by a memorandum of law in support of it, and by a draft of a proposed order prepared by the attorney. If the motion depends on facts, those facts are submitted by affidavit attached to the motion. An affidavit is a written statement of fact signed by a witness and notarized. Motions of all kinds are common throughout the pretrial phase of litigation, and are usually ruled on by the judge based solely on the paperwork you submit, without a formal hearing.

There are innumerable pretrial motions you can make in the final stages of your trial preparation. If you want permission to deviate from the usual rules of trial procedure, to make special arrangements for witnesses and exhibits, to arrange a jury view, to have the court impose restrictions on who can attend, to obtain an interpreter, to set up video equipment, to bring a weapon into the courtroom that would normally not get past the courthouse metal detectors, or to bring a cell phone into a federal courthouse, you make your requests in the form of a motion. If there is time, these motions should be made in writing and served on opposing counsel sufficiently in advance of trial so that your opponent can respond and the judge can give the issue thoughtful consideration. However, trial lawyers often are working on their cases up until the day of trial, so motions made orally at the start of trial are also common.

Among the more common motions made in anticipation of the trial are:

- **Suppression motions.** Motions to suppress illegally obtained evidence should be considered by the defense in all criminal cases. If the police have committed any constitutional errors in their investigation, you should consider filing a suppression motion. In some states, evidence obtained constitutionally but in violation of statutory guidelines also may be suppressible. These motions are usually made soon after the arrest, but may be made at any time after your investigation is completed.

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<sup>42</sup> Some kinds of motions, such as motions to strike improper evidence heard by the jury at trial, cannot be prepared in advance and put into writing. In these circumstances, oral motions are acceptable.

- ***Motions in limine.*** A motion in limine is a pretrial motion asking for a ruling on a matter of evidence. Usually, the motion asks that the opposing attorney be prevented from referring to inadmissible evidence during voir dire, opening statement, or witness examination. Occasionally the motion may ask for a ruling that anticipated evidence will be *admissible*, so the moving party be allowed to use it.<sup>43</sup> Judges have inherent discretion to hear this kind of anticipatory motion, both in advance of and during trial, but are not *required* to rule on them. The court is not likely to grant your motion unless the evidence is inadmissible as a matter of law. Rarely will a court entertain such a motion just because the evidence is irrelevant,<sup>44</sup> or if its admissibility depends on the laying of a foundation.<sup>45</sup> For example, you can move successfully to exclude evidence of an offer of compromise, but you probably will not be successful in moving to exclude hearsay on the grounds that it falls within no exception. In some jurisdictions, you may be *required* to make certain kinds of objections by pretrial motion or risk waiver. For example, Fed. R. Civ. P. 26(a)(3)(c) requires that all objections to exhibits other than relevance be raised before trial, although it does not require the judge to rule on them until trial.
- ***Motions requesting specific jury instructions.*** You cannot generally complain about the way the judge instructed the jury unless you submitted specific requests for the instructions you wanted. Although in theory the judge is responsible for preparing jury instructions, and has a copy of the applicable pattern jury instruction manual, most judges expect you to undertake the task of actually deciding which of the hundreds of pattern instructions you want, and making copies of them for the judge to read. Your requests should be prepared in advance as far as practicable, and in writing. Bear in mind, however, that most jurisdictions the court is required to use the pattern jury instruction if it is applicable, so it is rarely worth the trouble to ask a judge to give an instruction that differs in any way from the approved instruction. If you want an instruction that is not in the pattern book, or if you want an instruction that deviates in any way from an approved instruction, you are engaging in an uphill fight. Each such request must be accompanied by a legal memorandum that clearly explains why your proposed instruction more clearly states the law for this case than the pattern.
- ***Motions to separate witnesses.*** Federal Rule of Evidence 615 provides that at the request of either party, the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses. This rule does not apply to the client, of course, who may

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<sup>43</sup> See *Davidson v. State*, 558 N.E.2d 1077, 1086 (Ind. 1990) (prosecution moved to be allowed to use polygraph evidence).

<sup>44</sup> *Powell v. Alan Young Homes*, 554 S.E.2d 186, 190 (Ga. App. 2001) (motion to exclude evidence of assumption of risk as irrelevant must be reserved until trial).

<sup>45</sup> *Lanham v. Idaho Power Co.*, 943 P.2d 912, 918 (Id. 1997) (motion to exclude expert opinion properly denied; judge should wait to hear actual foundation laid at trial).

remain in the courtroom throughout the trial. Witnesses are separated in virtually every trial. The judge has discretion to allow anyone shown to be essential to the presentation of the case, such as the chief investigator or expert witness, also to remain in the courtroom at counsel table to assist the lawyer in conducting the trial.

- **Motions to address problems of prejudicial publicity.** Several motions are available to limit the harmful effects of publicity and media attention. Although there is a general guarantee of a “public” trial, you can move to have certain parts of it closed. Motions to close the trial during the testimony of a child who was sexually assaulted or when trade secrets will be discussed, are common. If adverse publicity has been widespread, you can move to change the trial to a different venue or ask for a continuance until the publicity attenuates.<sup>46</sup> If adverse publicity seems to be coming from statements to the press by your opponent, you can seek a gag order to prevent future press conferences.<sup>47</sup>
- **Motion for a change of judge.** In unusual circumstances in which a judge is biased, prejudiced or has a financial interest in the case, or is related to one of the parties or an attorney, you may file a motion seeking a change of judge. Procedures vary widely among the states. In some, you have an automatic right to a change of judge, in others you must show good cause, and in some the matter of recusal is left entirely to the judge’s own discretion.<sup>48</sup>

## NOTES

**1. Pretrial motions.** For an extensive discussion of motions and written notices that should be considered, see FRED LANE, *LANE’S GOLDSTEIN TRIAL TECHNIQUE* §§ 7.01 to 7.80 (3d ed. 1984). See also STEPHEN HRONES, *HOW TO TRY A CRIMINAL CASE* 57–113 (1982) (extensive list of possible pretrial motions with sample forms); MARK KADISH AND RHONDA BROFMAN, *CRIMINAL LAW ADVOCACY — TRIAL INVESTIGATION AND PREPARATION* ¶ 14.02 (2001); ANTHONY AMSTERDAM, *TRIAL MANUAL 5 FOR THE DEFENSE OF CRIMINAL CASES* §§ 223–264 (1989).

**2. Motions in limine and preserving the record.** A ruling on a motion in limine is not final. If the judge rules that the evidence is inadmissible, it does not absolutely exclude the evidence; rather, it prevents your opponent from raising the matter in open court without first obtaining specific permission from the judge. See *Onstad v. Wright*, 54 S.W.3d 799, 805-06 (Tex. Civ. App. 2001). In the context of the evidence as it develops during trial, the judge has

<sup>46</sup> See *United States v. Angiulo*, 897 F.2d 1169 (1st Cir. 1990) (mafia trial); *Powell v. Superior Court*, 232 Cal.App.3d 785, 283 Cal.Rptr. 777 (1991) (Rodney King trial).

<sup>47</sup> See *In re Application of Dow Jones & Co*, 842 F.2d 603 (2d Cir. 1988) (gag orders authorized when extrajudicial statements by parties or witnesses are likely to interfere with the a party’s right to a fair trial).

<sup>48</sup> Compare La. Code Crim. P. arts. 671–674 (parties may file written motion for recusal based on fixed list of factors), with Alaska R. Crim. P. 25(d) (one change of judge permitted as matter of right; no grounds needed).

the discretion to reverse his or her ruling and permit the evidence to be introduced. *E.g.*, *Henderson v. Fields*, 68 S.W.3d 455, 468-69 (Mo. App. 2002). If excluded evidence is presented to the jury despite the order, you must make a new objection in order to preserve the issue for appeal. *E.g.*, *ADP Marshall, Inc. v. Brown Univ.*, 784 A.2d 309, 313 (R.I. 2001). Similarly, if the evidence is ruled admissible pretrial, and the evidence is later presented at trial, you cannot appeal the decision unless you preserve the issue by a timely objection during trial. *But see Vehorn v. State*, 717 N.E.2d 869 (Ind. 1999) (error preserved if judge says ruling is final and no objection is needed at trial). If your own evidence is excluded by a motion in limine, you must approach the bench during trial, make an offer of proof, and ask to be allowed to present the excluded evidence, in order to preserve the issue. *E.g.*, *Henderson v. Fields, supra*.

**3. Separating witnesses.** If you wonder why we separate witnesses and make them spend long boring hours in a witness room instead of listening to the trial, consider the well-known story of Susannah and the Elders from the Book of Daniel:

Two elders coveted Susannah, a very fair woman and pure, the wife of Joacim; they tempted her, but she resisted. They were angry; then they plotted, and charged her with adultery; and she was brought before the assembly.

The elders said: “As we walked in the garden alone, this woman came in with two maids, and shut the garden doors, and sent the maids away. Then a young man, who there was hid, came unto her, and lay with her. Then we that stood in the corner of the garden, seeing this wickedness, ran unto them. And when we saw them together, the man we could not hold, for he was stronger. . . . But having taken this woman, we asked who the young man was, but she would not tell us. These things do we testify.” Then the assembly believed them. . . .

But Daniel, standing in the midst of them, said: “Are ye such fools, ye sons of Israel, that without examination or knowledge of the truth, ye have condemned a daughter of Israel?” Daniel said unto them, “Put these two aside, one far from another, and I will examine them.”

He called one of them and said unto him: “Now then, if thou hadst seen her, tell me, under what tree sawest thou them companying together?” who answered, “Under a mastick tree.”

And Daniel . . . put him aside, and commanded to bring the other, and said unto him: “Now therefore tell me, under what tree didst thou take them companying together?” who answered, “Under an holm tree.”

With that all the assembly cried out with a loud voice and praised God who saveth them and trust in him. And they rose against the two elders, for Daniel had convicted them of false witness, by their own mouth.

**4. Closing the trial.** Closing the trial is an extraordinary event, disfavored by the courts. The Sixth Amendment guarantees “a speedy and *public* trial;” and the First Amendment assures access by the press and public to important

community events. *See Press-Enterprise Co. v. Superior Court*, 464 U.S. 501 (1984) (closing trial during six weeks of jury selection to assure that potential jurors gave truthful answers was error; community has a right to see how its justice system enforces the law); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982) (closing trial permitted only when absolutely necessary to further a compelling governmental interest, and is narrowly tailored to serve that interest).

**5. Recusal of trial judge.** Recusal under federal law is governed by 28 U.S.C. § 455. Section 455(a) states that a judge “shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.” *See Liteky v. United States*, 510 U.S. 540, 548-49 (1994) (recusal required if facts create a reasonable doubt concerning the impartiality of the judge in the mind of a reasonable person). Section 455(b) requires recusal if a judge has “personal bias or prejudice concerning a party.” *See Ullmo v. Gilmour Acad.*, 273 F.3d 671, 681-82 (6th Cir. 2001) (the personal relationship and bias must have been acquired extra-judicially).

**6. Judicial conflicts of interest.** In *Sierra Club v. Simkins Industries*, 847 F.2d 1109 (4th Cir. 1988), the Sierra Club sued a paper company under the Clean Water Act, seeking statutory damages of \$1 million. The district judge revealed to counsel for both sides that he had formerly been a member of the Sierra Club, but that he had resigned from the organization when he became a federal judge. The trial judge refused to recuse himself, and the defendant appealed. The Fourth Circuit affirmed, holding that such prior association did not, in itself, form a reasonable basis for questioning a judge’s impartiality. *See also Brody v. President & Fellows of Harvard College*, 664 F.2d 10, 11 (1 Cir. 1981) (trial judge’s graduation from defendant university does not in itself constitute reasonable basis for recusal motion). Litigants are entitled to a judge free of personal bias, but not to a judge without any personal history before appointment to the bench.

## § 2.10 PRETRIAL CONFERENCES

Pretrial conferences normally are associated with civil cases. Only rarely are they held in criminal actions.<sup>49</sup> The purpose of the pretrial conference is to save trial time by resolving as many problems as possible in advance. In most civil cases the parties will hold at least two conferences with the court — one at the beginning of the litigation to set a discovery schedule and litigation timetable, and one shortly before trial. *See Fed. R. Civ. P. 16*. We are concerned here only with the latter.

The attorneys are expected to meet informally before the conference to exchange exhibits and witness lists, enter into stipulations, obtain admissions, and explore the possibility of settlement. This is followed by a formal conference with the trial judge, in which differences between the parties are ironed out, motions may be ruled on, and questions about procedure resolved. A formal pretrial order (drafted by one of the parties) generally will be agreed on that embodies all the agreements and rulings.

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<sup>49</sup> *Cf.* Fed. R. Crim. P. 17.1 (court may order pretrial conferences).

Judges differ in their attitude toward pretrial conferences. Some are informal, others formal. In many federal courts, these conferences take place in the courtroom and on the record. Some judges take an active role, trying to encourage settlement and suggesting compromises on points of disagreement, while others are more passive, letting the attorneys control the issues raised and ruling only when requested to do so. Whatever the procedures, you should not forget that the pretrial is part of the formal proceedings in the litigation of your case. A pretrial conference should be taken as seriously as the other aspects of trial, and adequately prepared for in advance. The conference should not be scheduled at all until you are fully prepared and ready for trial.

### § 2.11 LEGAL MEMORANDA AND TRIAL BRIEFS

Many experienced lawyers prepare trial memoranda or trial briefs for the presiding judge. A trial brief sets out the legal issues, explains your theory, lists your witnesses and exhibits, and outlines the evidence you expect to prove to demonstrate a prima facie case. It can include a description of how you will lay the foundation for particularly important hearsay documents, or establish a chain of custody for narcotics. If a witness must be called out of order, the brief can show how the testimony will be connected up to later evidence. Such a brief is likely to be of great help to the judge in following the evidence and understanding your argument on major evidentiary issues. It may even influence a judge who is uncertain how to rule on a particular point. Trial briefs are so helpful that some judges now require them.

You probably must serve a copy of the memorandum on your adversary unless specifically exempted from doing so by the judge. Rule 3.5(b) of the Rules of Professional Conduct prohibits ex parte communication with the judge. This raises a potential dilemma if you serve a copy of your trial brief on your opponent but your opponent does not give one to you. If you cannot arrange mutual exchange of trial briefs, then you probably should wait until the day of the trial to hand in your copy. The judge is unlikely to look at it before then anyway. However, the fear that you will give something away by telling your opponent your theory of the case is overblown. With modern discovery, it is unlikely that there will be many surprises.

Some lawyers advise against including anything specifically about evidentiary issues in your brief. They argue that you should not cross a bridge before you come to it. What you anticipate as a question of evidence may not even be objected to. Mentioning it in a brief may tip off the opponent to grounds for objection he or she had not thought of. Therefore, they suggest that questions of evidence should be discussed on separate pages to be handed to the judge as needed.<sup>50</sup>

### § 2.12 THE TRIAL NOTEBOOK

The final stage of trial preparation is to gather all that you have prepared and organize it into some kind of convenient format for use during the trial.

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<sup>50</sup> See Harry S. Bodin, *Final Preparation for Trial*, in *CIVIL LITIGATION AND TRIAL TECHNIQUES* 199 (1976).

Practicing attorneys have developed a number of different solutions to this problem. By far the most popular is the trial notebook — a standard three-ring binder with tabbed dividers, into which all your notes can be placed and organized. An alternative format uses a large expanding file or briefcase filled with ordinary manila folders for individual topics. Many litigators are also experimenting with electronic notebooks stored in laptop computers. The goal is to provide a central, easily transportable storage place for everything you may need at trial, and to organize it so that you immediately can locate any part of that material. The general rule is that if you cannot find something within fifteen seconds at trial, it might as well not exist.

Although there are disagreements about the order, there is consensus among trial practitioners that the following sections should be included in your notebook. Some of them refer to material with which you may not be familiar, that will be discussed in subsequent chapters.

- ***Dramatis personae.*** The names, addresses and telephone numbers of everyone important to the case: judge, clerk, court reporter, opposing lawyer, client, and witnesses.
- ***Case theory.*** A section at the front containing your case theory and a diagram or outline of your proof. The outline of proof lists witnesses and exhibits that will establish all the elements of your and your opponent's cases. It makes an excellent quick reference in answer to a Rule 50 motion for judgment as a matter of law based on failure of proof, to support an offer to connect up evidence through later witnesses, or to answer any inquiries from the judge about your case. An outline of what your opponent needs to prove may enable you to make an intelligent motion for judgment as a matter of law if your adversary neglects to offer evidence on a necessary element.
- ***Trial schedule.*** A section for your trial schedule listing everything you intend to do at trial in the actual order you will do it. If you write down the scenario and refer to it as you go along, you will not forget to make a motion, ask for a recess so you can telephone a witness, submit a jury instruction, or call a witness. For example, the first part of a trial schedule might look something like this:
  1. Approach bench, ask for preliminary instruction on cause of action.
  2. Move to have voir dire recorded.
  3. Move to separate witnesses.
  4. Voir dire.
  5. Telephone Jackson (ask for 5-minute recess).
  6. Move to have opening statements recorded if voir dire request not granted.
  7. Opening statement.
  8. Direct examination — Jackson.
  9. Opponent's cross-examination.

10. Request that Jackson be allowed to leave courthouse and return to work.
  11. Request judicial notice of traffic law § 9-142 (twenty-mile speed limit in school zone).
  12. Read “school zone” stipulation.
  13. Direct examination — Stevens.
  14. Etc.
- ***Last minute reminders.*** A section containing checklists of things to do at the last minute, such as calling witnesses, getting a treatise from the library, arranging for a pitcher of water at your table, and so forth. It is better to have a place to write yourself notes than to rely on your memory when you are under the stress of an imminent trial.
  - ***Pretrial.*** A section containing a list of queries for the judge at the start of trial, e.g., whether she will permit an exhibit to be used in opening statement and whether she prefers objections to be argued at the bench or in open court.
  - ***Court documents.*** A section for the pleadings, rulings on motions, pretrial orders, and any other official court documents.
  - ***Jury selection.*** Your notes for jury selection, a copy of the statute concerning grounds for challenge for cause, and a jury seating chart or other form on which to record information about the prospective jurors.
  - ***Opening statement.*** Your notes for your opening statement.
  - ***Witnesses.*** A separate section for each witness, both favorable and unfavorable, with copies of statements and documents relating to that witness and an outline of the direct or cross-examination. Prior statements and depositions should be carefully indexed so you immediately can locate passages needed to refresh recollection or impeach. You may find it beneficial to include an introductory paragraph about each witness’s personality, intelligence, susceptibility to cross-examination, temper, and anything else you learned during interviews that will help remind you about how you intended to handle the witness on the stand.
  - ***Trial motions.*** Notes pertaining to your argument for or against an anticipated motion for judgment as a matter of law.
  - ***Closing argument.*** Your notes for final argument, including sketches of any diagrams you plan to draw on the chalkboard.
  - ***Jury instructions.*** A copy of the jury instructions approved by the court, and any requests for additional instructions.
  - ***Exhibits appendix.*** Originals or copies of all documents you will use at any time during trial and a checklist for keeping track of which ones have been admitted into evidence. Keeping track of exhibits (your own and your adversary’s) can be one of the most difficult tasks in the trial. Exhibits are marked, shown to witnesses,

talked about, offered, withdrawn, admitted and passed to the jury. Laying adequate foundations may require more than one witness. Few things are more frustrating than being told you cannot use an exhibit during closing argument because you neglected to move it into evidence. An exhibit checklist can help you keep a running record of the status of all exhibits.

- **Evidence research appendix.** Copies of your evidence research and any briefs you have prepared to support your objections or arguments for admissibility. If a convenient state evidence manual exists, you may be able to dispense with this section.
- **Discovery appendix.** A section for answers to interrogatories and requests for admissions, and for transcribed depositions, if they are too bulky to include in the file set aside for the particular witness.
- **Index.**

## NOTES

### 1. *Example of exhibit checklist.*

| EXHIBIT CHART  |                             |                           |                 |         |          |          |               |
|----------------|-----------------------------|---------------------------|-----------------|---------|----------|----------|---------------|
| Exhibit number | Description                 | Marked for identification | Foundation laid | Offered | Admitted | Excluded | Shown to jury |
| 1              | Letter dated February 16    | X                         | X               | X       | X        |          | X             |
| 2              | Return letter dated March 2 | X                         | X               | X       | X        |          | X             |
| 3              | Bill of lading              | X                         | X               | X       |          | X        |               |
| 4              | Cancelled check             | X                         | X               |         |          |          |               |
| 5              | Receipt                     | X                         |                 |         |          |          |               |

**2. *Where to file exhibits.*** A potential problem arises if you need to use a document or photograph in opening statement, during witness examinations, and again when giving your closing argument. Where should you put it in your trial notebook? The usual advice is to put documents in a separate file at the end. See ANTHONY AMSTERDAM, TRIAL MANUAL 5 FOR THE DEFENSE OF CRIMINAL CASES § 297 (1989). However, if you use this approach, you may not be able to find it when you need it. Two solutions are possible. First, you

might make enough copies so that one be filed on each section where it will be needed. However, this system will not work if the best evidence rule limits you to using the original, or if witnesses will be making marks on a diagram which you will need in closing argument. The second solution is to place the exhibit within the section in which it will be used first, accompanied by a written note reminding yourself where next to put it when you are done.

