YOUNG ADVOCATES
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TABLE OF CONTENTS

ARTICLES

Opening Statements: Tips for Effectiveness in 15 Minutes or Less

By William F. Sullivan and Adam M. Reich

Remember kindergarten, when your teacher would invite you to sit in a circle for story time? Can you picture how mesmerized you were no matter how short the story? Fast-forward and think about a movie that you recently watched that involved a trial. Chances are you were equally captivated and the script did not have long opening statements. Remember these thoughts when you prepare to deliver an opening statement, as the key to an effective opening statement is to be a superlative storyteller in 15 minutes or less.

Many lawyers overlook this truth. They begin opening statements with commonly bad phrases such as "good morning, ladies and gentlemen of the jury"; "first and foremost, thank you for your service"; and "please allow me to introduce you to my client." They drone on and on and become mired in minutiae in a valueless attempt to explain every detail of their case. They employ unnecessary adverbs and haphazardly make bold promises. Such strategies do not create a remarkable first impression, let alone a lasting one.

How exactly should you begin your opening statement? And how should your opening statement continue through its conclusion? There is no set piece that will work for every trial. If there were, legal practice would be boring and trial outcomes would be predictable. However, there are guidelines that lawyers should adhere to.

1. Have the right approach. As the opening statement is one of only three opportunities to talk directly to the jury during trial (and arguably the most important), it is imperative that you approach this task with the right mindset. You need to be a storyteller like Aesop or M. Night Shyamalan. This means you need to be engaging, dynamic, thematic, and persuasive. You also need to form a positive connection with your audience and spotlight important issues for them.

2. Learn the fundamentals of effective storytelling at trial. There is an art to storytelling at trial. While "once upon a time . . ." worked when you were younger, it is infinitely less likely to be effective at trial. Instead, think about common experiences, such as watching a television show or a baseball game or witnessing an accident; tell your story to the jury as you would tell the story of the event you saw to a colleague or a friend. Do not get lost in a thicket of ancillary facts; explain what happened in common parlance.

Chronological organization is generally effective because people have an easier time following a linear story. Think about it: If you were telling your friend about a perfect baseball game and you started your story with the first pitch, jumped to the seventh inning, rewound to the fourth inning, inserted a tangent about the hot-dog vendor you met in the sixth inning, and concluded with the closing pitch, your friend would not only have difficulty following you, he or she might tune you

out. Just as you would not want to lose the interest of your friend, telling a story linearly helps ensure juror attentiveness and receptivity.

When telling your story to the jury, do not tell them what you are going to tell them, e.g., "here are a bunch of things that I am going to tell you. . . ." You would not preface a story about a television show to your friend with such advisement, so do not do that to the jury. Just tell the story. This is not to say that an opening should not include the phrases "the facts will show . . .", or "witness X will testify about. . . ." Indeed, such phrases are helpful to signaling to the jury key facts or witnesses that they should look for during trial.

Reach the point quickly. Talented screenwriters have shown through various legal-themed television shows that an effective opening statement can last 10 minutes or less. Consider along with this fact that in the last decade, the average adult attention span has decreased from 12 minutes to 5 minutes. Neil Vidyarthi, "Attention Spans Have Dropped from 12 Minutes to 5 Minutes—How Social Media is Ruining Our Minds," *SocialTimes*, Dec. 14, 2011. Bearing this in mind, do as President Franklin Delano Roosevelt once advised: "Be sincere. Be brief. Be seated." Franklin D. Roosevelt's advice to his son James on how to make a public speech, *quoted in* Paul L. Soper, *Basic Public Speaking*12 (Oxford Univ. Press, 3d ed. 1963).

3. Know your audience. One of the most important things for lawyers to note before delivering opening statements is the composition of the jury. Are they educated? What are their professions? Genders? Backgrounds? Family status? Race? Age? Did the jurors say anything during voir dire that gave insight into their likes or dislikes? In all likelihood, the jury deciding your trial will not have people with expertise in legalese or with the backgrounds necessary to understand technical issues in your case. You need to craft an opening story that is easily accessible to your entire jury and allows them to reach your desired conclusion. While accessibility requires simplification, do not oversimplify or be pedantic. When you are trying a case that involves a highly technical subject, give the jurors some help. Reduce the high-level subject matter to basic concepts and introduce the jury to a user-friendly "glossary" of technical terms.

Another important characteristic to note about your jury is the region of the country they come from. This is essential because pop-culture references or attempts at humor may play better in one region than in another. The one general exception to this rule is self-deprecating humor; for some reason, no matter where you are, juries are invariably amused by lawyers poking fun at themselves.

4. Do not confuse the opening statement with the closing argument. Unlike your closing argument, an opening statement should not be argument. Rely on your facts and use them to create a story. Credibility and persuasiveness can still be achieved without positing things in an argumentative way. Jurors need a reason to believe you and believe in your case. Just tell a story that makes sense and refrain from arguing to the jury that the way your opponent will couch the facts is wrong.

5. Explain bad facts. You need to offer a reason for dealing with bad facts during your opening statement; you should not hide from them. Ignoring bad facts will damage your credibility with the jury. Address problematic issues in a way that makes sense in the general order of your story. For example, if you are defending a company sued for breach of contract, you might point out that the plaintiff breached the contract first, introduce a superseding agreement, or establish an excuse. Similarly, if your client has been charged with a crime, you might discuss that the arresting officer has a history of false arrests or has a motive to cause your client harm. No matter the type of case, you should strive to explain bad facts in one to two sentences and make sure that your explanation has proper context in your story. Give jurors a reason to understand that the bad facts are not bad for your case. Addressing a bad fact out of context may lead the jury to give it undue weight.

6. Do not rely too much on visual aids. George Lucas, the famed producer of the *Star Wars* and *Indiana Jones* movies, once said, "A special effect without a story is a pretty boring thing." *From Star Wars to Jedi: The Making of a Saga* (Lucas Film 1983). He was talking about movies, but his comments are instructive for lawyers giving opening statements. If at the close of your opening statement the predominant thought among the jury is only that your graphics were cool, you have a problem. In terms of visual aids, less is generally more.

You need not go to the extreme and avoid visual aids. Used correctly, visual aids will help you gain credibility and maintain juror attention. For example, if your case involves an alleged breach of contract, the jury might find you more believable and easier to follow if you display an overhead graphic showing the contract's key provision(s). Because opening statements allow you to present the jury with an outline of your case-in-chief, you also might consider a graphic that identifies the witnesses you intend to call and the roles they play in your story. If you opt for a chronological case presentation, jurors should respond positively to a timeline graphic.

7. Practice. While there is something to be said for spontaneity, practice increases the effectiveness of an opening statement. Practice is especially important when you plan to use visual aids. If you are going to use a PowerPoint presentation, practice will help you perfect the timing for clicking through your slides. As for how to practice, this is an individual preference. Some attorneys practice by themselves. Others practice in front of colleagues unfamiliar with their case. Some attorneys practice while walking up and down office hallways. No matter how you do it, just make sure you practice before facing the jury.

8. Promise only what you know you can deliver. Young lawyers often over-promise during opening statements. This is risky. Failure to deliver on promises made during opening statements leads to loss of credibility. To avoid the problem of under-delivery, promise to show only what you are certain you will. You need not restrict your promises to a single document or a single witness. Pull things together; for example, promise that while document "A" will show "motive" and witness "B" will demonstrate "opportunity," the jury should interpret "A" and "B" collectively as establishing "liability."

9. Consider whether to comment on the trial process. While the trial judge will instruct the jury about trial process prior to opening statements, it may be worthwhile to add further cues. Think of this as the table of contents for your story that outlines what comes where and when but does not necessarily need to happen right in the beginning. Identify witnesses, including who they are and when they will appear, and the evidence that you will present. If you anticipate having to call witnesses out of order, advise the jury that this is a normal occurrence during trial and does not carry any special significance. You also may want to comment on burdens of production and persuasion or an important jury instruction. If you are a defense attorney, consider reminding the jury that the defense case-in-chief comes after the plaintiff's/prosecution's case-in-chief and ask them to be patient and give you equal attention.

10. Remain flexible. This guideline primarily applies to defense attorneys who deliver their opening statement second. When preparing your opening statement, you must anticipate the bad facts that your opponent will emphasize and prepare to address them in your story. While your opponent is delivering his or her opening statement, (1) listen closely to see how anticipated bad facts are presented, or if others, not anticipated, are referenced; and (2) jot down notes about the promises that your opponent makes or the witnesses that are mentioned. When it is your turn to deliver your opening, work a response to these bad facts into your story. If your opponent emphasized certain witnesses, advise the jury that you will present rebuttal witnesses, or alternatively, attack the credibility of the referenced witnesses. Consider confronting any promises of proof offered by your opponent: "We do not think they will be able to prove X, no matter their representations, because. . . ." While you need to remain flexible and incorporate a response to your opponent's opening statement, do not let your opponent dictate the format or tone of your opening statement; stick to your plan, but weave in contextually appropriate responses.

11. Conclude with your theme. When you reach the end of your opening statement, you want to make sure that the jury remembers your story and the theme that you developed throughout. To do this, try and devise a word, phrase, or tagline that summarizes your story and the theme of your case, which the jury will easily remember.

Keywords: litigation, young lawyer, opening statement, storytelling, visual aids

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Mastering Voir Dire

By Robert Bates

If you Google "voir dire," you may find some mind-numbing articles claiming voir direis the process by which attorneys find the jurors that they want on their jury. When you perform voir dire, however, you are better served to think of it as a process to find and eliminate the jurors that you *do not* want, rather than to find the jurors that you do want. Ultimately, the success of your voir dire depends on whether you have removed potentially unfavorable jurors from your panel.

There is no special formula for voir dire. There is no special outline to follow. Yet, there are certain tips and guidelines.

Rule 1: Prepare for an Effective Voir Dire

Preparation is essential to an effective voir dire. When you set your pretrial motions or at your final status conference before trial, ask the presiding judge about voir dire, back-strikes, time restraints, questions the judge will ask, and any prohibitions regarding what you may ask. In addition, if you practice in a state such as Tennessee where you get the jury venire well in advance of trial, vet your prospective jurors. A basic Google search, a Facebook search, and a little digging can reveal significant information about the people slated to decide your case. Once you collect as much information as you can regarding your jurors, prepare a juror board. You can use technology—iPads make tracking who is put on the panel easier—or even a simple manila folder with square sections and Post-it notes may work.

Rule 2: Make a Good Impression

One of the most over-used, memorable adages, "you cannot judge a book by its cover," is not relevant when it comes to voir dire. The minute you stand up in front of prospective jurors, they begin to judge you. They want to know what you want and why you are trying to take them from their jobs, from their homes, and from their families for however long your trial will last.

As voirdire is your only opportunity to make a first impression, you must make it a good one. This is particularly true in those instances where you need a unanimous jury verdict to prevail—e.g., a personal-injury trial in Tennessee—because if one person finds you not credible during voir dire, that can end up being the difference between a win and a loss. Preparation is critical to appearing credible with the jury. Know the law at issue, but also know how to relay it to non-lawyers. Prepare to engage in a conversation with each juror regarding intrusive, awkward questions that you might not normally ask. If you appear equally as awkward as the questions you are asking, prospective jurors are unlikely to be candid with their replies and may distrust you.

Rule 3: Plant Seeds

You also should use voir direto begin convincing prospective jurors to vote your way if empaneled. Think about the one big question that you want to ask every prospective juror, and phrase it in a persuasive manner. For example, the one major question that plaintiff’s lawyers

tend to want to know from every prospective juror is "Will you award money damages for an injury?" Instead of asking this question straight out, you should rephrase in such a manner that plants seeds that may bear fruit in your favor later on—e.g., "Does anyone here feel that they should not award money damages to a mother and father when their son is killed in a car accident?"

Rule 4: Don't Be a Jerk
Just like a comedian or other live performer, the attorney conducting voir direneeds to be cognizant of his or her audience. I once saw a plaintiff's attorney stand up in front of an East Tennessee jury and say, "I am here to find the 12 jurors that will find in favor of my client and help me win." Ultimately, the jurors who were empaneled, some of whom were visibly annoyed by this attempt at humor and/or candor, delivered a defense verdict. Remember this story when you engage with potential jurors. Make them feel comfortable so that you can get a sense of their beliefs and opinions before making any attempts at humor. Also, do not call prospective jurors by the wrong name or noticeably shrug off their opinions, as this can turn them against you if they are empaneled.

Rule 5: Engage the Jury
During voir dire, it is imperative that you ask questions designed to acquirekey information from each juror. If you represent the plaintiff in a personal-injury suit, you need to figure out if any prospective jurors have strong feelings against suing for money. If you are prosecuting someone in a murder trial, you must learn if any prospective jurors have family members who they feel were wrongfully convicted of a crime. If you are defending a company in a wrongful-termination suit, inquire about the prospective jurors' employment history, including whether anyone ever filed a similar suit against a former employer.

While the information that you need to acquire at voir direvaries case by case, all of this information is invariably personal and people may be reluctant to share it with you. To elicit this personal information, you need to have a conversation with each prospective juror and not talk at them. In the South we call it "visiting." You want the prospective jurors to feel that you are sitting there exposed, vulnerable, and nervous, and that you are no better than they are. This can be accomplished by making eye contact, being responsive, and, above all, being respectful.

Rule 6: Actively Sit
Perhaps the most important advice I have to share regarding voir dire is to know when to sit down. As in everything else, there is a balance. If you ask too few questions, you will get insufficient feedback. Conversely, if you ask too many questions, the jury will think that you are annoying or that you are facing an uphill battle.

There is no set number of questions to ask at every voir dire; you have to trust your gut. When you feel that you have gone as far as you should, sit down and watch. Take note of whether and how the prospective jurors react to opposing counsel. Contemplate what it means if they are taking their own notes. Determine whether they are paying attention or falling asleep. Be

perceptive about the clothes the prospective jurors are wearing, especially the shoes, because a person's clothes can tell you a lot about his or her background and help you estimate how that person will view your client's case.

Rule 7: Know When to Ask for Help

Finally, to paraphrase my father, be smart enough to know when you are stupid. There will be cases where the stakes are just too high to "trust your gut." For those cases, hire an expert jury consultant.

Keywords: litigation, young lawyer, jury selection, voir dire

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Observing Jurors During Trial

By Cynthia R. Cohen

Observation of jurors' body language begins during jury selection and continues through trial. The best time to get a read of any juror is during voir dire. At that time, you observe verbal and nonverbal behaviors. After that, it is harder to gauge what jurors are thinking because they cannot speak to you. During trial, jurors often communicate nonverbally. While knowing how to read them is an asset to your trial presentation, it is impossible to tailor arguments to each individual juror. Strategies for improving jurors' responses to your arguments include focus on clarity in graphics and persuasive themes that touch juror emotions.

Juror Body Language: Separating Myth from Reality

Trial skills involve the art of communication. Getting jurors to talk and listening to their answers during jury selection is an art. Watching body language during voir dire is critical if you want to interpret juror reactions toward your case during trial and establish a baseline of behaviors. There are several myths about juror body language that are perpetuated by limited knowledge and deficits in observational skills:

Myth: A juror smiling during your voir dire likes your case.
Reality: Some jurors smile with both sides. There is a continuum between those who try to please others and those who do not. Be wary of the stealth juror who hides opinions and smiles because he or she wants to vote against you.

Myth: Jurors are truthful.
Reality: Sometimes yes and sometimes no. Some jurors lie to get off jury duty. Others lie to stay because they prefer to be away from mundane jobs. Even worse, there are stealth jurors who lie to stay on the jury for vindictive motives.

Myth: Note-taking during your case means jurors like what you said.
Reality: Jurors who take lots of notes are paying attention but may be poking holes in your case. This also goes for interpreting juror questions during trial; if a juror asks a basic question—e.g., requesting a definition for a medical term in a medical-malpractice lawsuit—there may be no special significance, as sometimes a cigar is just a cigar.

Myth: Sleeping jurors do not contribute in deliberations.
Reality: I have learned during post-trial juror interviews that even jurors who did not take notes or napped during testimony may have a grasp of the evidence. Some sleepers are responsible jurors who work at their jobs overnight and voice strong opinions. The other jurors fill in gaps during deliberations. Sleeping jurors often believe they know what happened even if they did not hear every word.

Detecting Stealth Jurors

Mastering the art of reading juror body language is critical to detecting stealth jurors. These

jurors seek power and retribution, and to change societal norms. They often believe that they can make a difference or accomplish their goal by sending a message through high dollar awards, particularly against corporations, hospitals, or insurance companies.

The most illustrative example of a stealth juror is Nicholas Easterly in John Grisham's *Runaway Jury*. (Unlike in *Runaway Jury*, trial consultants typically do not burn jurors' houses.) In jury selection, Easterly originally acted like he wanted off the jury; but he actually wanted to get on the jury and advance a personal agenda. Like Easterly, a stealth juror does not appear eager to be on the jury. A stealth juror hides true feelings and experiences.

Who purposefully hides answers? Who lies to get on the jury? How can you spot jurors who resent a defendant or want to punish a corporation? Stealth jurors are generally uncovered when they claim in court that they know nothing about your client or case but express strong opinions on social media. Yet, there are ways to detect a stealth juror before empanelment.

> **Sharpen and trust your intuition.** Intuition is like common sense: We all have it to certain degrees. Our intuition tells us to trust our instincts. Without feedback, however, our own intuition may miss the mark. For example, we may believe that those we like, like us back; but, this is not always true. While jurors are a separate, unpredictable component of a trial, lawyers can sharpen their intuition with education to gain a better read on jurors.
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> First, lawyers can learn to detect lies. Mastery of this skill requires understanding when and why lies succeed or fail and recognizing common myths about lying behavior. A juror who appears nervous or sweats is not necessarily lying. (The ability to detect lies is also valuable to witness preparation. *See, e.g.*, Cynthia R. Cohen, "Demeanor, Deception and Credibility in Witnesses," ABA Section of Litigation Section Annual Conference Materials, Chicago, IL 2013.)
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> Lawyers also need to appreciate that jurors use intuition to judge demeanor, deception, and credibility in their daily lives. Because jurors bring life experiences with them to court, understanding their perceptions of truthfulness and lying behavior is critical. Whole books are written on the topic of lying, and a television series, *Lie to Me*, was derived from the work of Dr. Paul Ekman, the renowned psychologist specializing in human emotion and lying. Knowing the myths that jurors believe will help you not only weed out prospective stealth jurors, but also recognize what empaneled jurors deem credible and how they interpret behavior. Paul E. Ekman, *Telling Lies: Clues to Deceit in the Marketplace, Politics, and Marriage* (1985); *The Detection of Deception in Forensic Contexts* (Pär Anders Granhag, & Leif A. Strömwall eds., Cambridge Univ. Press 2004).
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> **Identify deception.** "Liar, liar, pants on fire!" children often shout, as if lying created effects that were immediately obvious to the onlooker. As we grow older, we rely on more subtle signs in deciding whether to trust someone. We refer to untrustworthy people

as "shifty eyed" or imagine a trustful person as having an "honest face." Often, we are convinced that we can judge others' characters on the basis of how they look and behave. Despite what we believe, however, reliance on this kind of common sense often leads to errors and may be fatal to your case. Learning the psychology of deception is critical to detecting stealth jurors and other jurors not on your side.

Can you detect deception? Not all people can readily detect deception. Researchers have sought to identify which people are likely to recognize a liar when they meet one. A seminal work in this area is Paul Ekman and Maureen O'Sullivan's nurse experiment. Paul E. Ekman & Maureen O'Sullivan, "Who Can Catch a Liar?," 46(9) *Am. Psychologist* 913–20, (Sept. 1991). The researchers asked individuals to interpret whether nurses were truthfully describing a scene at the beach, as represented, or were actually viewing a bloody surgery. Those who were least successful relied on fidgeting and speech content to draw conclusions. On the whole, those who were good at recognizing emotions were more accurate in judging who was lying. Ekman and O'Sullivan's work confirmed that there is not one solo indicator for lying behavior but that physiological expressions of emotions may be useful for detecting deception. Researchers have since found that most people are not better than chance in detecting deception but some groups of police professionals have demonstrated significant lie detection accuracy, which is possibly due to specialized training. Maureen O'Sullivan et al., "Police Lie Detection Accuracy: The Effect of Lie Scenario," 33(6) *Law & Hum. Behav.* at 530–38, (Apr. 2009).

Misconceptions about deceit. Stereotypes can be hazardous for lawyers and their clients at trial, particularly stereotypes regarding the significance of nonverbal behavior such as avoiding eye contact, scratching, picking, crossing one's arms, or tapping one's foot, in terms of signifying lying. These generalizations are unreliable. It is best to understand the person's baseline to define the behaviors and mannerisms. For example, does a person normally tap his or her foot while sitting down? During the person's usual conversations, does he or she have a pattern or rhythm of looking at someone and looking away?

Shifting eyes may be indicative of a lie if it is linked with other signs. Eye contact is a learned behavior and there are cultural differences. Looking away often occurs when someone is carefully constructing an answer. It is not a sign of lying.

Ums, ahhs, and inarticulate words used to fill pauses also are not necessarily signs of lying. Rather, they tend to be signs of thinking.

Misconceptions about Deceit

- Crossing arms
- Lack of eye contact, looking away, shifting eyes
- Movement (fidgeting, scratching, picking hands, tapping foot)

- Nose is growing
- Sweating or nervousness
- Ums, ahhs—filling pauses

Understand who lies. Some people lie more successfully than others. Good liars, like professional actors, have the ability to become the role they are playing. They do not believe they are lying; they believe the events they describe are actually happening. Pathological liars, on the other hand, cannot choose to be truthful. They know they are lying, but they cannot stop themselves. They fool people sometimes—usually in brief encounters. These brief encounters may involve a clerk at a store, a new person met at a bar, or online date prospects. People tend to lie for sport. Whether an individual lies under oath depends on whether he or she has gotten away with lying in the past. Pay close attention to pronounced feelings about lying, as these often betray liars.

Look for emotional cues. While there is no certainty that a stealth juror is amidst your jury panel, there is a certainty that all jurors have emotions and hidden biases. Jurors more engaged in judging the credibility of your case will turn and observe parties directly while witnesses testify. They have no fear about making eye contact with lawyers or witnesses. Many juries will decide among themselves to mask emotions and not reveal anything to observers. Being able to detect emotion is integral to determining credibility or lying behavior. Each emotion (i.e., anger, contempt, disgust, happiness, sadness, surprise, fear, and guilt) has a different significance and different cues. For example:

- **Fear.** A person who manifests fear may be afraid of being caught in a lie. Fear cues include higher pitch, faster and louder speech, pauses, speech errors, and indirect speech. The greater the liar's detection apprehension, the more evident these fear cues should become. Liars appear more fearful as the stakes become higher and the anticipated probability of success becomes lower.
- **Guilt.** Emotions are often briefly revealed through leakage. If someone feels guilt about lying, the first time that person tells the lie is the easiest time to spot tell-tale micro-expressions. Micro-expressions are small bits or physiological blips of the emotion being felt, such as noticeable changes in face and body. If you believe that you observed a micro-expression on a juror's face, first determine whether there is a compelling reason for the juror to feel guilty before concluding that a lie has been told.
- **Contempt.** The same emotional leakage that reveals feelings of guilt occurs with feelings of contempt. Take, for example, Anita Hill during the Clarence Thomas Senate hearings. She was a semi-reluctant witness confronted with details about her accusations of sexual harassment. When asked to recall specific incidents, Ms. Hill displayed micro-expressions indicating contempt (e.g., raising one eyebrow).
- **Sadness.** One of the easier emotions to identify is sadness, as people generally cry when they are sad. Not all tears should be taken at face value. Remaining vigilant for so-called crocodile tears can help you determine whether the sadness is genuine. A sure indicator is the person's facial muscles; true sadness engages more facial muscles than feigned tears.

Final Recommendations

The more you know about reading emotions and what strangers think of your case, the more strongly prepared you will be for obtaining a favorable jury verdict. Fine-tune your juror-perception and communication skills with mock trials and jury research to measure juror attitudes, experiences, and reactions to case issues. If your client has limited funds, brainstorm case themes with a tutor for critical feedback. Using your themes, develop voir dire questions and juror profiles. Jurors' experiences trump attitudes, so look for the issues at the epicenter of the case. Know your venue and community attitudes. If there is anything in particular that affects the local economy, voir dire the jurors on it. Once the case is rolling, observation is telling. Shadow experts or shadow juries express feedback, but only the jurors your eyes gaze upon have the answer.

Keywords: litigation, young lawyer, voir dire, jury selection, stealth juror, lying, deception

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Direct Examination: How to Lead Your Witness in a Non-Leading Manner

By Eric S. Wolfish and David R. Singh

On direct examination, counsel's task is two-fold: to bring out the facts necessary to support the case-in-chief and to help the witness appear credible. To do this, counsel must lead the witness without *leading*; counsel must steer the witness's testimony without asking questions that suggest the answer. Questions should be short and open-ended, and begin with "who," "what," "where," "when," "why," or "how" or short phrases such as "tell us" or "please describe." An open-ended question might ask "What did you observe?" while leading questions relating to the same subject might ask "You observed Mr. Jones accelerate through the red light, didn't you?" or "Was Mr. Jones driving north?"

Although leading questions are usually appropriate for cross-examination, they are generally objectionable on direct examination. Not only does Federal Rule of Evidence 611(c) prohibit leading questions on direct examination, "except as necessary to develop the witness's testimony" (more on that later), but also it makes sense not to lead on direct. On direct, the witness is supposed to be the "star" and the jury's focus should be on the witness's testimony. When a witness is asked leading questions, the jury's focus shifts to the lawyer; and the witness, who is being spoon-fed the answers, may lose credibility.

In the days and weeks leading up to trial, preparation for direct examination is key. Counsel should prepare a direct examination outline with questions and anticipated answers, do several run-throughs with the witness (but not so many that the testimony sounds rehearsed), and tweak the outline as necessary. The outline should be organized, chronologically or by theme, to allow the witness's testimony to flow naturally. Yet, even when a witness is fully prepared for trial, pitfalls may arise on direct examination. For example:

- The witness doesn't understand the question.
- The witness understands the question but doesn't recall the answer.
- The witness gives an incomplete answer or skips in time.
- The witness gives a damaging answer.
- The witness becomes anxious or looks like a "deer in headlights."

This article suggests four strategies for leading a witness without inviting a leading objection, and one tip for leading when absolutely necessary.

1. Consider leading questions where permitted. On direct examination, Rule 611(c) permits leading questions that are "necessary to develop the witness's testimony." Fed. R. Evid. 611(c). Thus, counsel may lead the witness when addressing preliminary matters, such as the witness's education and employment history or matters not in dispute. Counsel may also use leading questions on direct when the witness is hostile, an adverse party, a child, a mentally disabled person, or a person with language barriers. Although leading is allowed in these instances, it is a

matter of preference whether to ask leading questions and counsel should be cognizant of the jury. For example, counsel may conclude that a jury may be more compelled by a witness's description of his or her personal background than by counsel's summary.

2. Give a road map. Providing a road map (also known as signposting), reminds the jury of what they just heard and signals how the testimony will proceed. This is particularly helpful when moving to another date, location, or topic. For example, "You just told us about the events of July 1. I'd like to turn to what happened on July 15." Or "We just learned about how the product was developed; let's switch gears and talk about how the product was marketed." A road map is an essential, non-leading tool for organizing a witness's testimony and ensuring that counsel and the witness are on the same page. In addition to making it easier for the witness to know where the examination is headed, road maps also make it easier for the judge and jury to follow the testimony.

3. Employ verbal and physical cues. The way that you phrase a question may help direct the witness's attention to the essence of the issue. In particular, counsel should consider asking a series of narrow questions in lieu of one all-encompassing, open-ended question. Open-ended questions tend to invite a great deal of information all at once, and when a witness provides such answers, he or she is likely to overlook important details. To illustrate, imagine that your expert witness is on the stand and your goal is to use him or her to impugn the credibility of an opposing expert witness's report. Rather than ask "Which statements in the report do you disagree with?" ask the expert pointed questions about specific sections of the report, such as "Do you agree with Section I's conclusion that the product was defective?"

Eye contact, body language, and inflection also give a witness important cues. Maintaining eye contact instills confidence in the witness. Body movements, such as gestures by the hands or movements of the face, can signal the introduction of a new topic. Taking a short pause before asking a question indicates that the next question will be important. Using vocal inflection is also key. For example, asking "What *conclusions* did you reach?" or "How *fast* was the car going?" signals the focus of the question and also encourages the witness to give more demonstrative testimony.

4. Use documents and visual aids. The effective use of documents and visual aids can engage the witness and help illustrate the witness's testimony. It is common, particularly in trials involving a large number of exhibits, for each witness to have his or her own binder with the subset of exhibits to be discussed on direct. Although the witness binders provided to the judge and opposing counsel should be clean, each witness's binder may have the relevant passages highlighted. Upon turning to the next tab and seeing the highlighted selection, the witness will anticipate which questions will be asked. Alternatively, if witness binders are not permitted, counsel could display a highlighted document using software or an overhead projector.

Summaries, charts, graphics, diagrams, visual aids, real evidence, and other forms of demonstrative evidence are useful tools for guiding a witness's testimony. Visual evidence

reduces the stress of testifying, as the witness is given an "open-book exam" rather than a "memory test." In turn, counsel may feel more comfortable asking an open-ended question, such as "What does this spreadsheet show?" when he or she knows that the witness can view the spreadsheet and demonstrate familiarity with the topic. Ultimately, this enables counsel to readily guide the jury through the spreadsheet entries and their significance. Demonstrative evidence also has the benefit of corroborating and visually reinforcing the witness's testimony.

When a witness doesn't recall the answer, his or her recollection can be refreshed using a document (or any other item). *See* Fed. R. Evid. 612. First, counsel must establish that the witness's memory is exhausted. The witness can then be shown a document, given time to examine it, and then asked if his or her memory has been refreshed. If the witness answers affirmatively, the document may be removed and the witness can continue testifying. Because a document used to refresh recollection is not evidence, counsel may use an inadmissible document to refresh the witness's recollection. However, that document must be shown to opposing counsel, who may use it on cross-examination.

5. Use leading questions only when necessary. Finally, sometimes it is necessary to lead a witness in circumstances where leading questions are generally prohibited. Although it is generally preferable to ask non-leading questions, if opposing counsel does not object, a leading question at the opportune time may go unnoticed. But if you interpose many objections during an adversary's case, your adversary will surely return the favor. In the event that your adversary does object and the question posed was indeed leading, the best course is to withdraw the question and ask a proper one. For example, suppose your witness gives an answer that you were not expecting:

> Q: What color was the plaintiff's car?
> A: It was green.
>
> Q: Excuse me, didn't you mean that the car was red?
>
> Objection, leading!
>
> Q: Withdrawn. What color was the car?
> A: It was red.

As shown in the above example, the leading question will suggest the correct answer to the witness who, when faced with a proper question, will *hopefully* give the correct answer. Because this tactic is risky and may undermine the credibility of the witness's corrected testimony, it is best used only after understanding the presiding judge's preferences. Judges will have different interpretations of what constitutes a leading question and different preferences about hearing objections during direct examination. Some judges may view objections during direct examination as obstructionist. Other judges may apply the rules of evidence strictly and expect objections to leading questions.

These tips are best used not only at trial but also during your pretrial preparation. If your direct-examination outline has leading questions where permitted, provides a road map, narrows the breadth of open-ended questions, and uses documents to support the witness's testimony, your run-throughs will be more effective and the witness will ultimately feel more comfortable at trial.

Keywords: litigation, young lawyer, direct examination, leading questions, jury, visual evidence

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Preparing and Conducting Effective Cross-Examinations

By Matthew A. Passen

The success of your cross-examinations at trial depends on the work that you do beforehand. As with all stages of trial advocacy, there is no substitute for preparation. The most prepared lawyer in the courtroom—the one who has analyzed his or her case inside and out—is able to craft and execute a cross-examination that methodically exposes the witness's true colors and tells the cross-examiner's story in a compelling way.

Before I cross-examine a witness at trial, I want to know as much information about that witness and his or her anticipated testimony as possible. This is particularly important with expert witnesses whose proficiency in specialized fields makes them more difficult to fluster or impugn. I investigate relevant databases (such as TrialSmith or LexisNexis) and search the Internet, including professional websites, social-networking sites, and news stories, for anything mentioning the witness. I review their prior testimony and written publications. I talk to other lawyers who have deposed or examined the witnesses. While this takes time, I have found that a thorough background investigation often returns at least one "gold nugget" that can be used during cross-examination to elicit a critical admission or expose an expert witness's lack of expertise or bias.

In addition to research, pretrial discovery also provides valuable information to use during cross-examination at trial, particularly for impeachment. In the case of deposition testimony, I prefer to use videotaped depositions for impeachment at trial because a video tends to be more effective for a jury than an attorney re-reading contradictory portions of a deposition transcript.

While a well-prepared cross-examination can be effective, ill preparation will have the opposite effect. As opposed to "scoring points" for your side, the jury may perceive an attorney who does not adequately prepare for cross-examination as incompetent or a bully. To avoid such a devastating outcome, I suggest the following guidelines.

Consider a Dynamic Cross-Examination

All trial lawyers at one time or another have been told of certain "rules" of cross-examination, such as "only ask leading questions" or "never ask a question to which you do not know the answer." I believe a more dynamic and flexible approach can be extremely effective.

An important goal of cross-examination is to tell your story through the witness and have the jury look to you for information rather than the witness. This can be accomplished by using short, leading questions—statements, really—that elicit a "yes" or "no" response. You are not seeking information from the witness; instead, you are giving information to the witness (and jury).

A cross-examination comprising only leading questions may not be advisable, though. Using leading questions exclusively can be repetitive, lends itself to "bullying" or appearing unfair with

the witness to the jury, and also reveals the cross-examiner's beliefs, allowing the witness to readily devise an unhelpful response.

Consider whether to incorporate non-leading questions into your cross-examinations. Sometimes the witness's own answer to an open-ended question—rather than simply an affirmation of the cross-examiner's statement—makes your point more powerfully than any statement you could have crafted. Do not confine your cross-examination to admissions that you elicited at the witness's deposition. Consider asking a question to which you do not know the answer but for which the answer cannot hurt you. This dynamic approach to cross-examination must be done strategically, with extreme care, and only after thorough case evaluation and preparation.

Organize with Primacy and Recency

Organization of cross-examination is important, especially the concepts of primacy and recency. Jurors are more likely to remember the first and last part of your cross-examination, so it is important to start strong and end strong.

I like to begin most cross-examinations by eliciting important admissions from the witness (those that I want the jury to believe) before calling the witness's credibility into question. If I believe the witness has seriously damaged my case on direct examination, I try to start with something stronger.

The harder question to consider is how and when to end a cross-examination. As my legal-writing professor told my class in law school, a good strategy is to "hit it and quit it." That is, make your points, elicit what you need for closing argument, and then sit down.

Always Keep the Jury in Mind

You are the thirteenth juror. Everything you do at trial, including cross-examination, must be seen through the eyes of the jury. Do not assume the jurors know your case. Consider conducting focus groups before trial to learn how a jury might perceive certain facts or themes, even if that means informally "testing" your case with your significant other, friends, colleagues, or office-building employees. Remember that the goal is not to win the cross-examination; it is to win the trial. If you are conducting a cross-examination and start feeling that "this is fun, I am on a roll," alarm bells should start sounding in your head. Slow down and consider your audience. Does the jury understand the points you are making? Could the jury think you are being unfair with the witness? Overly sarcastic or aggressive?

Stay one step behind the jury. Do not attack the witness you are cross-examining unless you are absolutely sure that the jury has given you permission to attack the witness; even then, use extreme caution.

Be Yourself

Everyone has his or her own personality and own style as a trial attorney. While you should take calculated risks at trial based on what you have learned, do not try and be anyone but yourself.

The jury will see right through you if you are trying to imitate someone else, and your credibility will be jeopardized.

The best way to find your own style is to try cases. Try big cases, small cases, and difficult cases. Talk to jurors after the trial has ended. The more trials under your belt, the more confident you will become in your own style and approach and the more you will learn about areas for improvement.

Keywords: litigation, young lawyer, cross-examination, witness, jury

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Basics in Preserving the Record on Unfavorable Evidentiary Rulings

By Adam J. Sheppard

Appellate courts are reluctant to reverse a judgment based on an evidentiary ruling. *Messina v. Kroblin Transp. Sys., Inc.*, 903 F.2d 1306, 1310 (10th Cir. 1990) [login required]. For one thing, such rulings are reviewed under the deferential abuse-of-discretion standard. *Old Republic Ins. Co. v. Emp'rs Reinsurance. Corp.*, 144 F.3d 1077, 1082 (7th Cir. 1998) [login required]. Second, it is difficult to convince an appellate court that an evidentiary ruling may have substantially affected the outcome of the case—i.e., that it is not a "harmless" error. Third, appellate courts will deny a claim of error where the appellant failed to properly preserve the argument in the trial court.

Federal Rule of Evidence 103

Many states have their own rules of evidence—practitioners should consult their local rules—but Federal Rule of Evidence 103 is reflective of general principles surrounding claims of evidentiary errors. The rule provides:

A party may claim error in a ruling to admit or exclude evidence only if the error affects a substantial right of the party and:

1. if the ruling admits evidence, a party, on the record:
   (A) timely objects or moves to strike; and
   (B) states the specific ground, unless it was apparent from the context; or

2. if the ruling excludes evidence, a party informs the court of its substance by an offer of proof, unless the substance was apparent from the context.

Fed. R. Evid. 103(a).

Objecting

The first step to preserving a claim of error is "timely" objecting or moving to strike. *See* Fed. R. Evid. 103(a). An objection will be considered timely if it is made when the ground for the objection first becomes apparent. *United States v. Gibbs*, 739 F.2d 838, 849 (3d Cir. 1984) [login required]; *United States v. Kanovsky*, 618 F.2d 229, 231 (2d Cir. 1980). To that end, it is advisable to raise all foreseeable objections in amotion in limine. (Motions in limineare also favored because they obviate the need for lengthy sidebars during trial, which may irritate juries and judges.)

Pursuant to Federal Rule of Evidence 103(b), if a party raises an objection in a motion in limineand the judge "definitively rules" on that motion "on the record," then the party need not

renew the objection at trial. Fed. R. Evid. 103(b). A "definitive ruling" forecloses the possibility that the evidence will be admitted at trial. *See* Long v. Fairbank Reconstruction Corp., 701 F.3d 1, 4 (1st Cir. 2012) [login required]. If a judge provisionally or tentatively grants or denies a motion in limine, that is not a "definitive ruling." *See* Walden v. Georgia-Pacific Corp., 126 F.3d 506, 517–20 (3d Cir. 1997) [login required]. In that situation, a party must renew the objection at trial when the evidence is offered.

For issues not addressed in motions in limine, objections must still be made before the objectionable testimony is given. "'An objection to a question, made after an answer is given, is not timely and will not preserve the issue for review.'" *Roper v. State*, 695 So. 2d 244, 246 (Ala. Crim. App. 1996) [login required], *cert. denied*, 695 So. 2d 249 (Ala.1997) [login required] (citations omitted); *see also Sanders v. Ahmed*, 364 S.W.3d 195, 207 (Mo. 2012) ("A party should make any objection to the trial process at the earliest opportunity to allow the other party to correct the problem without undue expense or prejudice."); *Glover v. State*, 956 S.W.2d 146, 147 (Tex. Ct. App. 1997) [login required] (because the ground for the objection was apparent at the time that the question was asked, the appellant's objection, made after the answer was given, was untimely).

In those instances where the witness answers before you have had time to object, immediately move to strike the answer and request the judge to instruct the jury to disregard the evidence. *See* Fed. R. Evid. 103(a) (authorizing motions to strike); *Trachta v. Iowa State Highway Comm'n*, 86 N.W.2d 849, 854 (Iowa 1957) [login required] (motion to strike was timely "for it was made as soon as convenient following the witness's voluntary statements subsequent to answering a proper question"). If the judge declines to strike the testimony, consider requesting a "limiting instruction"—i.e., an instruction to the jury to consider the evidence for a particular, limited purpose. *See* Fed. R. Evid. 105. It is incumbent on the party who wants the limiting instruction to request it. A judge has no obligation to sua sponteissue a limiting instruction. *See, e.g.*, *United States v. Aranda*, 963 F.2d 211, 216 (8th Cir. 1992) [login required] (if a party fails to request a limiting instruction at trial, it cannot claim on appeal that the judge erred in failing to issue one).

Specifying the Basis of Your Objection

Objections must not only be timely; they must be specific. Fed. R. Evid. 103. The requisite level of specificity is that which adequately apprises the court of the true basis of the objection. *United States v. Parodi,* 703 F.2d 768, 783 (4th Cir. 1983) (citation omitted). A general objection such as "I am going to object to that, Judge" is insufficient. *See Owen v. Patton*, 925 F.2d 1111, 1114 (8th Cir. 1991).

Sound trial strategy is to state the word "objection," followed by a concise description of your objection—e.g., "objection, hearsay" or "objection, assumes facts not in evidence." So-called speaking objections—the attorney elaborates on the basis of the objection in front of the jury, often in an argumentative fashion—are disfavored. *See, e.g., United States v. Dunn*, Nos. 11-3255, 11-3257, 11-3258, and 11-3318, 2013 WL 3779581, at *10 (8th Cir. July 22, 2013). If you

believe that the judge needs additional information before ruling on your objection, ask to approach in side-bar.

On some occasions, there may be more than one basis for an objection. For example, the evidence might be hearsay and it might also constitute improper proof of other crimes. In that instance, it is important to state each ground for your objection. "The specific ground for reversal of an evidentiary ruling on appeal must also be the same as that raised at trial." *United States v. Taylor*, 800 F.2d 1012, 1017 (10th Cir. 1986) [login required]. A party cannot object at trial on one ground but use a different ground to attack the same evidence on appeal. *United States v. Laughlin*, 772 F.2d 1382, 1391–92 (7th Cir. 1985) [login required] (defendant's objection at trial that certain photographs were not relevant, or alternatively were more prejudicial than probative, did not preserve for appeal the separate issue of whether the photographs constituted proof of other crimes). Thus, if there are multiples grounds for an objection, it is better to favor inclusiveness.

Excluding Evidence

The above paragraphs deal with objecting to the other party's evidence. There are separate procedures for preserving the record when the trial court has refused to admit your evidence. Federal Rule of Evidence 103 provides: "If the ruling excludes evidence, a party informs the court of its substance by an offer of proof, unless the substance was apparent from the context." Fed. R. Evid. 103(a)(2). An offer of proof puts on the record—outside the presence of the jury—the substance of the proposed evidence. Federal Rule of Evidence 103 does not prescribe a particular form for offers of proof. In general, an offer of proof must "first, describe the evidence and what it tends to show and, second, identify the grounds for admitting the evidence." *United States v. Vazquez-Botet*, 532 F.3d 37, 51 (1st Cir. 2008). Sometimes an offer of proof involves a question-and-answer session with a witness, on the record, but outside the presence of the jury. *E.g.*, *United States v. Adams*, 271 F.3d 1236 (10th Cir. 2001) [login required]. In that scenario, the proponent of the evidence asks questions to which the objections were already sustained. In many situations, judges prefer a "narrative" offer of proof—counsel summarizes what the evidence would show if admitted. *E.g.*, *United States v. Janusz*, 135 F.3d 1319, 1323 (10th Cir. 1998) [login required]. Where counsel can only speculate as to what a witness would say, the offer of proof is inadequate to preserve the issue on appeal. *E.g.*, *People v. Slaughter*, 371 N.E.2d 666, 673 (Ill. App. Ct. 1977) [login required]. The offer of proof must be detailed, not conclusory, and not based on conjecture. *See id.*

Post-Trial Motions

In addition to making timely and proper objections at trial, raise all alleged evidentiary errors in a post-trial motion. Several jurisdictions hold that issues not raised at trial *and* in post-trial motions are waived for purposes of appeal. *See, e.g.*, *People v. Enoch*, 522 N.E.2d 1124, 1130 (Ill. 1988) [login required]; *Hopper v. M & B Builders, Inc.*, 583 S.E.2d 533, 535–37 (Ga. Ct. App. 2003) [login required]. The most important thing to do when contesting an evidentiary ruling in a post-trial motion is to establish how the error affected a "substantial right" of a party. *See* Fed. R. Evid. 103(a). An evidentiary ruling affects a "substantial right" only if it is likely to

affect the outcome of a case. *Ricketts v. City of Hartford*, 74 F.3d 1397, 1412 (2d Cir. 1992) [login required]. Appellate courts will not grant relief based on mere "harmless" errors. *E.g.*, *United States v. Cerro*, 775 F.2d 908, 916 (7th Cir. 1985) [login required] (harmless error analysis applies to erroneous exclusion, as well as to erroneous admission, of evidence).

Conclusion

Trial judges have discretion in deciding the admissibility of evidence, and practitioners will undoubtedly encounter adverse evidentiary rulings. To properly preserve those issues for review, you should follow five steps: (1) timely object or move to strike the evidence; (2) state a specific ground for the objection; (3) request a limiting instruction if appropriate; (4) if the ruling is one excluding your evidence, make a detailed offer of proof on the record; and (5) file a post-trial motion that demonstrates how the ruling substantially affected the outcome of the case. By following those steps, you will at least have preserved the issue for review.

Keywords: litigation, young lawyer, evidence, Federal Rules of Evidence, FRE 103, motion in limine

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Closing Arguments: 10 Keys to a Powerful Summation

By Dennis S. Ellis and Adam M. Reich

An effective closing argument may turn a closely contested trial in your favor. It can move jurors who are on the fence to your side or, more likely, provide jurors in your corner with the ammunition necessary to turn the voting your way during deliberations. Because closing argument is your last chance to talk to the jury and make a positive impression before ceding control to 12 strangers—admittedly a tough task for even the least narcissistic trial lawyer—you must not squander this opportunity. To maximize the effectiveness of your closing argument, consider the following approaches.

1. Prepare the outline of your closing argument before your opening statement. Do not wait until the end of trial to start preparing your closing argument. Begin drafting your closing argument even before you prepare your opening statement. This will help you develop the themes of your case and present unified, easy-to-follow arguments throughout the trial. Conceptualize three to five "ultimate conclusions" that you want the jury to reach. At the end of your opening statement, ask the jury three to five corresponding questions that will lead to your desired conclusions. When it is time to close, repeat those three to five questions and argue that the jury must reach the "ultimate conclusions" that you desire.

2. Condense your argument. A lengthy trial is not license for an interminable rehash of everything the jury witnessed. Like a conclusion in a brief, your closing argument should present a concise summary of your argument and state your desired relief. Again, consider condensing your entire case into three to five "ultimate conclusions." Marshal the evidence and summarize how it supports these conclusions.

3. Employ a three-act structure. Organize the closing argument like a screenplay; your closing argument should have a beginning, a middle, and an end. The beginning should identify the initial conflict. Talk about the parties and begin developing the key characters. In the middle, present the evidence in a favorable light, and show how the conflict was the opposing party's fault. This should be done whether you represent the plaintiff or the defendant. If you represent the defendant, do not just argue that the plaintiff did not prove his or her case. Instead, convince the jurors that the plaintiff is responsible for his or her own failures or those of the parties.

4. Know which points to emphasize. Be selective about what you emphasize during closing argument. Emphasize that "now we know who the characters really are." Remind the jury of the questions posed during your opening statement and emphasize the key evidence that leads to the desired "ultimate conclusions." Emphasize that the point of trial is the search for truth and that your marshaling of the facts and evidence points to only one possible conclusion, i.e., the one favorable to your client.

5. Do not ignore problems. It is foolhardy to ignore problems or bad facts. Do not act like an ostrich with its head in the sand; identify and explain away problems for your case. But,

remember that while you need an answer for bad facts, it is important that you do not spend too much time with such subject matter because it may cause the jury to attach undue importance to such information.

6. Use the evidence. Trials tend to involve testimony from more than one witness and more than one exhibit. Use whatever evidence was presented at trial to your advantage. Do not paraphrase documents or reference witness statements; instead, quote them, and display them on an overhead projector, an easel, or a chalkboard. Highlight for the jury the key points of the trial and give favorable jurors the material that they need to win arguments during jury deliberations. Use the actual admitted evidence to lend credibility to your closing argument; a passing reference to what "the evidence has shown" may cause the jury to question the accuracy of your statements.

7. Cast yourself as a steward, not an advocate. Convince the jury that despite serving as the attorney for one side, you are merely a steward of the facts who is searching for the truth. If at the end of your closing argument the jury believes that you presented evidence as objectively as possible and told the truth rather than pursued a contrived agenda, you are more likely to receive a favorable verdict. One way to encourage a neutral impression is to refrain from "tit-for-tat" arguments. Present your own view of the facts without expressly referring to your opponent's viewpoints or theories.

8. Identify integral jury instructions and discuss any special verdict form. It is important to highlight key jury instructions during your closing argument. In particular, focus on any burdens of proof or persuasion mentioned. At the same time that you are discussing jury instructions, you also should discuss any special verdict form and show the jury precisely how they should fill it out. Sometimes, when trying to apply the facts to the law, jurors may conclude that your recitation of the facts does not support the legal verdict. Help the jurors in this respect by meticulously applying the facts to the law they are charged to follow.

9. Do not read your closing argument. Your closing argument should be fluid and somewhat conversational. The jury needs to perceive you as loose, confident, and convincing. If you read your closing argument from a podium, jurors are not likely to form a strong bond with you and your client. They may distrust you, find you too rigid, or simply tune you out. To avoid this, do not read your closing argument; rather, be spontaneous and engaging.

10. Conclude with a memorable phrase, sentence, or anecdote. Conclude your opening with a memorable phrase or anecdote. Remind the jury not just of the important role that they play in the legal system and the impact that their verdict will have on your client, but also the message that any verdict will send to our society as a whole. Plaintiffs want their jurors to be agreeable, so implore all members of the jury to consider the viewpoints of their fellow jurors, as the collective will of the panel is more important than individual beliefs. Defendants want their jurors to feel empowered. Remind them that their individual voices must be heard. Acknowledge that it is humbling to entrust 12 strangers with the fate of your client, but that you are confident the facts you have presented will lead them to conclude in your client's favor. Finally, leave the jury with

a phrase, sentence, or anecdote that they will remember when they go to deliberate; perhaps a historic quote or something that they can rely on when considering the case. For example, “Facts are stubborn things; and whatever may be our wishes, our inclinations, or the dictates of our passion, they cannot alter the state of facts and evidence.” John Adams, Closing Argument in Defense of the Solders in the Boston Massacre Trials (Dec. 1770).

Keywords: litigation, young lawyer, closing argument, jury, evidence, verdict

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Accurately Predicting the Outcome of Your Case

By Jessica Hoffman Brylo

This article focuses on your ability (or inability) to predict the outcome of your case and where you may be going wrong. Your ability to predict the outcome of the case is important in informing your judgment on when to settle and what amount to settle for, what amount to ask for in trial, as well as whether to take on a case to begin with. If your judgment is off, you may be doing yourself and your client a great disservice.

There *is* such a thing as too much information. Often, attorneys know their cases so extremely well that it hampers their ability to predict the case outcome, which ironically is precisely the reason that they study the case so intently in the first place. Attorneys work countless hours to know their cases inside and out, but in becoming so familiar with the case, they become dissociated from the people who are hearing the facts for the first time and ultimately deciding the outcome—the decision-makers. Facts and legal issues that became, over time, significant to the attorney's understanding of the case—even things that he or she thinks are the cornerstones to the case—can be completely irrelevant to decision-makers such as mediators, jurors, or judges, who have much less familiarity with the case. If the purpose is to persuade these decision-makers, attorneys need to learn to rely on strategies for preparation other than their own intuition.

Let me give you some examples from real cases. What follows are very brief synopses of cases followed by quotes from jurors in focus groups. Although you may find these quotes surprising, does it mean you would have inaccurately predicted the outcome of trial (or value of the case)? Not necessarily, but the more points your decision-makers find important that you do not address or foresee, the less likely you are to have a reliable measure of the outcome.

Case Background 1: Medical malpractice case against a hospital. Plaintiff lost large amounts of blood during a 5-6 hour surgery. Surgeon and nurses did not find or fix the leak for a while. Plaintiff died a month later still at the hospital from kidney failure related to the blood loss. Plaintiff had pre-existing conditions and was overweight.

***Juror**: "I think she had a death wish because she was in bad health anyway and she brought in a living will when she entered the hospital. If you have a living will and you bring it to the hospital, you're giving up on life." [Note that this issue showed up in both focus groups with one or two jurors in each group believing the plaintiff wanted to die and therefore awarding no damages]*

Case Background 2: Brain injury from car accident case. Plaintiff still holds a job as a professor at a community college. All doctors and all neurological testing shows brain injury. Pre-existing anxiety which was controlled by taking Xanax.

Juror*: "I think he had a drug problem. Taking Xanax that long over time could cause a brain injury or his symptoms."*

Juror*: "I think he had a drinking problem. My father was an alcoholic and he died from the alcohol use. He often forgot things too, so I think the plaintiff's issues are from drinking." [No evidence was presented of any drinking.]*

Case Background 3: Car accident case with back and neck injuries. Plaintiff is on morphine multiple times a day to control the pain.

Juror*: "I think she wants money to be hopped up on morphine her whole life…she's on morphine for dramatic effect and will probably quit when the lawsuit is over."*

Would you have foreseen these issues? Without knowing that a living will was important to Case Background 1, you may have thought you had a strong case which could easily have yielded a zero verdict at trial. Remember this Case 3 next time you assume that jurors will believe your client is severely injured because of the amounts of pain medication they are on.

Would you have accepted the right settlement offer on these cases?

To become better counselors and better serve their clients, attorneys need to become more accurate predictors. One way of doing so is learning whether previous predictions were correct. Mock trials can test these predictions as can post-trial juror interviews.

People as a whole often overestimate their abilities on tasks. This is not specific to attorneys. Many attorneys are overly confident in their ability to predict outcomes. This is due to many factors. Attorneys are supposed to be advocates for their clients. In doing so, attorneys display a confidence about their position. This confidence can, over time, skew the attorney's reasoning and make him/her overly confident about the likelihood of success. It is human nature to become more confident in a goal when expressing confidence to others. The more one espouses one's beliefs, the stronger those beliefs become. Further, attorneys wish for a good outcome. In wishing for something, they convince themselves that it is true. This is a strength for zealous advocacy but a weakness when it skews the attorney's ability to predict and therefore make sound decisions. Attorneys may also exhibit overconfidence due to a failure to recognize that they are not fully in control of the outcome. Judges, mediators, and jurors make up their own minds. To the extent that attorneys do not incorporate those individuals' control over the outcome into their analysis of a case's strengths and weaknesses, they disillusion themselves in making decisions or forming strategies.

A study done by Goodman-Delhunty, Granhag, et. al. (2010), tested attorneys' abilities to predict case outcomes. Goodman-Delahunty, Jane, et al., *Insightful or Wishful: Lawyers' Ability to Predict Case Outcomes,* 16(2) Psychol. Pub. Pol'y & L., 133–57 (2010). Participants consisted of 481 litigating attorneys, the great majority of whom were civil litigation attorneys. The attorneys

were asked what they would consider a "win" in terms of a minimum goal for the outcome of the case. They were also asked what their degree of certainty was for achieving that minimum goal or better. In 32% of the cases, the final outcome matched the minimum goal set by attorneys. In 24% of the cases, the outcomes exceeded the attorneys' minimum goals. In by far the majority, 44% of the outcomes were less satisfactory than the minimum goals. In a large proportion of the cases where the minimum outcomes were not met, the attorneys erred on the side of being over confident. Further, the higher the confidence level, the farther off the attorney's prediction was from the outcome. The study also found that experience had no effect on the ability to predict case outcomes: Experienced attorneys were no better at predictions than were inexperienced attorneys.

If you accept that you may not be the most reliable predictor of case outcomes, how can you better serve yourself and your clients? Get input from people who are not handling the case—someone who can see the case with fresh eyes and without any stake in the outcome. When at all possible, run focus groups and mock trials. The only way to find out what jurors are likely to think is to ask people who match your juror demographics. If done before mediation, focus groups and mock trials can direct you as to whether to settle and what range of settlement figures are acceptable for that case based on what jurors would do at trial. Without the input from outside sources, you may feel confident in the decisions you make concerning your case, but chances are that you may not be accurate.

Keywords: jury, mock jury, case outcome, case prediction, focus group.

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NEWS & DEVELOPMENTS

Court Addresses Liability of Remote Texter in Vehicle Accident

In a case of first impression, a New Jersey Appellate Court held that the sender of a text message can be held liable in limited circumstances for causing a motor-vehicle accident. The case, *Kubert v. Best*, No. A-1128-12T4 (N.J. App. Ct. Aug. 27, 2013), involved a married couple severely injured when the motorcycle they were riding was struck by a pick-up truck driven by an eighteen-year-old, Kyle Best, who was texting while driving and crossed the center line of the road. After settling with Best, the plaintiffs filed suit against Best's 17-year-old friend, Shannon Colonna, who was texting Best throughout the day and sent a text message to him immediately before the accident.

The trial court granted Colanna's motion for summary judgment, ruling that a remote texter does not owe a legal duty to avoid sending text messages to one who is driving. The appellate court disagreed that such a duty *never* exists. Instead, the court held that a legal duty arises "if the texter knows, or has a special reason to know, the recipient will view the text while driving." In such cases, the texter is liable for injuries to third-parties caused by the distracted driver who is texting while driving.

In *Kubert*, the evidence suggested that Colonna sent only one text while Best was driving, the contents of the text were unknown, and no testimony established that she was aware Best would read her text as he was driving or would respond immediately. According to the appellate court, the plaintiffs failed to present sufficient evidence to prove that Colonna knew Best would read the text message while driving and would be distracted from attending to the road and the operation of the vehicle, and therefore affirmed the dismissal of the action.

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Rare Fortuneteller Case Goes to Trial in Federal Court

On August 28, 2013, the trial of Rose Marks, a clairvoyant, who is accused of defrauding clients of over $25 million dollars over a period of decades, will begin in South Florida federal court. Her attorney has said Marks, 62, has psychic powers that have run in her family for over 1,500 years. Marks was mostly a life coach, but her services included tarot card readings, palm readings, astrology readings, and numerology readings.

According to prosecutors, Marks and members of her clan used their positions as fortunetellers to bilk emotionally fragile clients of money and other valuables. Marks allegedly scammed $17 million from Jude Deveraux, who is a best-selling romance novelist and the government’s star witness in the case. The indictment states that “the conspirators would offer services to walk-in

customers, some of whom would be suffering from mental or emotional disorders, who had recently gone through personal traumatic events and/or were emotionally vulnerable, fragile, and/or gullible." The client "would need to make 'sacrifices, usually consisting of large amounts of money (but also at times jewelry, gold coins and other property) because 'money was the root of all evil.'"

Fortune-teller scams are common and have gone on for years. However, police and prosecutors rarely know how to investigate these kinds of crimes. Victims are often too embarrassed to seek help or the police find the matter to be civil rather than criminal. Fortunetelling also has the perception as a small-time fringe activity and not a big business. The Marks case is proving that perception wrong.

Generally fortunetelling is a local issue, but with the mail-and-wire-fraud statues, the federal government can make almost anything a crime. It's possible the federal government indicted Marks because of the millions she is accused of defrauding clients.

There have also been allegations of prosecutorial misconduct in the case. The indictment included charges involving victims the government had never spoken to. At least one alleged victim filed an affidavit saying he had not been victimized despite paying Marks $500,000. Many victims refuse to believe they have been victimized, making the Marks case in federal court a rare occurrence.

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