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Special Edition: Trial Skills

… Inside This Issue …

If It's Broke, Fix It

by Robert R. Siderius, Jr.

A partner of mine came to me several weeks ago with a perplexed look on his face and an $1,800 copying bill in his hand. He had recently made a records request of a local hospital and, in response, received an invoice with the charges. He wondered whether the hospital could charge that much for production of medical records.

I shared with him that WAC regulations establish the fee that can be charged for production of medical records, having made multiple medical records requests in the past. That code section, 246-08-400, allows a health care provider to charge $1.02 for the first 30 pages and $.78 for all other pages. In addition, they can charge a $23 clerical fee. The WAC regulations allowed for the $1,800 copying charge.

After sharing that, I began to think about the $1,800 bill for making hard copies of medical records in an age when health care providers rarely maintain hard copies of anything. Most medical records are now maintained electronically, and the process of creating hard copies to send to attorneys in response to a records request seems archaic and unnecessarily expensive.

So why are we (or our clients) still paying to have hard copies of medical records made for us when, for the cost of a compact disc and 15 minutes of staff time, the records could be produced in an electronic format?

The conclusion I reached was we do this because this is what we have always done. We update our computers in our offices, we update our cell phones and we read books on iPads, but we have a hard time keeping the rules and regulations that govern our practices in step with advancing technology.

That leads me to the point of this article. The Bar Association and its members have a vested interest in reviewing, amending and updating our court rules, our statutes, our administrative regulations and the other rules and regulations that govern not just our practices but our lives and the lives of our clients. The Bar Association has various sections that focus on practice areas, such as the Real Property, Probate and Trust Section, the Family Law Section, the Creditor Debtor Rights Section, the Litigation Section and others. Most of these sections are governed by a volunteer executive committee, and executive committees typically monitor legislation that affects that practice group. In addition, when appropriate, the section's executive committee can propose legislation or amendments to legislation, court rules, WAC regulations and other rules and regulations.

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But who is in the best position to identify statutes and regulations that are outdated or simply don't work? You are. Members of our State Bar Association are the ones who work in the trenches. You are the ones who make the records requests and pass the $1,800 bills along to your clients. You are also the ones who understand why these regulations are flawed and who are in the best position to fix statutes that are oppressive, archaic or simply don't work.

How do you go about that? Proposing legislation, or legislative amendments, is a tedious and time-consuming process. The Bar Association, however, has resources to assist the sections and their members. In particular, the Bar Association has a legislative liaison and a Legislative Committee dedicated to reviewing proposed legislation and, where appropriate, finding sponsors for bills that introduce new legislation or proposed amendments. The various sections can make proposals that are then reviewed by the Legislative Committee and, when approved, will receive the support of the Bar Association in Olympia.

The process is not an easy one. Even the simplest, noncontroversial "cleanup" changes can take years to implement, require someone to write the bill or amendment, require a legislative sponsor, and require review and approval through committee before heading for vote. The process can seem overwhelming.

So who in their right mind would undertake the process? First off, those persons who receive a paycheck, generally lobbyists, have the time and motivation to do so. By definition, however, lobbyists are attempting to advance the goals of a particular group on a particular issue, not necessarily looking at either improving the process or ensuring that all affected parties are treated fairly.

You are the only ones out there who have an interest in advancing the process evenhandedly, and in correcting outdated legislation or simply amending or eliminating legislation that is oppressive or unfair. Members of the Board of Governors and the executive committees are volunteers, and while we also have that same interest in updating and amending the rules and regulations governing our practices and our lives, we need help.

Get involved. Don't expect someone else to fix the problems that you deal with in your practice. Work with your section's executive committee to make the changes that will improve your practice, the practice of your colleagues and the lives of your clients. Respond to the surveys that you receive from your sections regarding proposed legislation. When a particular proposal strikes a raw nerve, make your voice known.

This newsletter focuses on trial practice. The Rules of Evidence and the Civil Rules, along with local rules, dictate how we conduct trials. Someone years ago had the brilliant idea of proposing ER 904, the evidence rule that provides for the admissibility of exhibits without the need for authentication when identified 30 days before trial. I cannot imagine the amount of time that has been saved by trial lawyers, and the money saved by their clients, by the adoption of this simple rule. Someone identified a problem with our process and took the time to propose a fix.

You know the problems. Help with the fix.

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Choosing a Theme for Trial: In a Courtroom, the Facts Don't Speak for Themselves

by Lisa M. Marchese

"Oral delivery aims at persuasion and making the listener believe they are converted. Few persons are capable of being convinced; the majority allow themselves to be persuaded."
– Johann Wolfgang von Goethe

I. Introduction

The next time you hear someone say, "good facts, not good lawyers, win cases" – you need to cover your ears. And remember that cool Latin phrase we all learned in Torts - "*Res Ipsa Loquitor*" ("the thing speaks for itself")? It may sound cool to say when discussing a legal issue; however, when it comes to trying cases, no fact ever speaks for itself. No evidence ever speaks for itself. If facts and evidence speak at trial, it is only because we empower them to speak. We give our case a compelling voice that persuades a jury when we use themes to communicate. This article will discuss the importance, identification and effective use of themes at trial.

II. Importance of a Case Theme

Case themes aren't just for plaintiffs' lawyers who have the burden of proof. Successfully defending a case at trial also requires an effective theme. Here, I feel compelled to debunk the conventional wisdom that says if you don't have a burden of proof, you don't need a theme – you can simply rely upon the "octopus defense." Like the octopus, you just shoot ink in the water, raise issues and hope that the picture gets sufficiently clouded so that the jury won't be able to see anything at the end of the case. This approach is never the strategy of the skilled trial lawyer. Whether we have the burden of proof or not – we have a position. To the extent that we seek to convince a jury of our position, we need an effective theme.

The absence of a case theme allows your opponent to define the issues at trial. The party that controls the definition of the case also influences the discussion in the jury room. A story without a theme isn't a story worth listening to. Thus, trying a case without a theme is like going to trial without a purpose.

Over the years, jury verdict research has shown time and time again that jurors deliberate in themes. They use themes to organize and characterize the evidence they receive during trial. They use themes to decide disputed facts and they use themes to reach decisions that are expressed as verdicts. To successfully try cases, therefore, we must communicate with the jury by using themes.

What are "trial themes"? Themes are the concepts and ideas which best capture the essence of your case. They are extrapolations of common life experiences that find resonance in the minds of jurors. A theme is a distinct and unifying idea. For example, "negligence" is not a theme – it is a legal theory. However, "safety first, not last" is a theme that enables you to prove your negligence case. Themes can also present a choice or a moral dilemma that compels us to take a position. The right theme motivates jurors to adopt our view of the case. For example, "David versus Goliath" can provide a powerful theme for the plaintiff who takes on a Fortune 500 company in a commercial dispute.

Labels and tag lines also provide us with powerful trial themes. We all remember the phrase "sour grapes" from *Aesop's Fables*. In the context of a trial, that phrase can put a persuasive label on a party's conduct and motivation. Similarly, phrases convey powerful themes. The movie *Wall Street* is a popular source for plaintiffs' lawyers who sue corporations. As someone who spends a lot of time defending corporations at trial, I wish I had a dollar for every time I heard, "Ladies & Gentlemen, do you remember in the movie *Wall Street* when Gordon Gecko said, 'every dream has its price'?" That statement, along with the imagery of the evil Mr. Gecko provides the plaintiff with some powerful ammunition. (I was really hoping *Wall Street II* would give us defense types some rebuttal fodder… but evidently, "greed" is still "good" in Hollywood). For the at-fault plaintiff in a negligence case who was texting his girlfriend at the time of the accident, why should Good Guy Company have to pay for someone else's mistake? Tell this plaintiff to "look in a mirror." Or, "it is hard sometimes to admit when we are wrong." These are but a few of many examples of tag lines and phrases that contain persuasive trial themes.

The themes we use to try our cases are really no different from those we encounter in our everyday lives. The events that lead to lawsuits occur in the real world where people are motivated by love, hatred, greed, jealousy – all of the things that make for great movies, books and advertisements. The explosion of electronic communication has only heightened our exposure to themes as a means of messaging. Electronic media has also raised the bar for us as trial lawyers when it comes to using concise and effective themes when we tell our story to jurors. Our theme must be strong enough to carry and convey not just a message, but *our* message. Ultimately, it is the effective identification and use of our case theme at trial that persuades the jury to agree with us and to express that agreement in its verdict.

III. Identifying a Persuasive Theme

Hermen Melville once wrote that, "(t)o produce a mighty book, you must choose a mighty theme. No great and enduring volume can ever be written on the flea, though many there be that have

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tried it." *Moby-Dick, Chapter 104*. In the modern world of trial practice, we need mighty themes to persuade juries. How then do we identify our trial theme?

First, our theme must be simple and easily understood. The more complicated the case, the greater the risk that you – and your jury – will become lost in the details. Here, I am reminded of a famous Will Rogers quote, "(t)he minute you read something you can't understand, you can be sure it was drawn up by a lawyer." Great trial lawyers have the ability to describe any case – no matter how complex – in just a few short words. Having the ability to label your case in the minds of jurors is the mark of a successful trial lawyer. Arguably, this is the one skill that separates a litigator from a trial lawyer. Litigators see issues, trial lawyers see labels, themes and ultimately, the finish line. The litigator tries to explain the case in legal jargon. The trial lawyer, however, understands that the legal issues we think are important often are of little interest to a juror. So, to identify an effective theme you must think like your neighbor, the person in front of you in the checkout line at the grocery store or your favorite barista at Starbucks who makes your morning latte. What motivates these people? What do they care about? To answer these questions effectively, you can't think like a lawyer.

Finding a simple case theme can appear to be a daunting task – particularly in a complex case that we have been living with for a long time. Here again, it is imperative that we shed our legalistic mindset. Thinking in legalese – something we have been trained to do since our first day in law school and something we all do instinctively as we prepare our case – is of absolutely no help in identifying a persuasive trial theme. A theme should be one that resonates with our common life experiences. It should help us embrace a position and motivate us to act. For example, when we refer to someone as "Iago" it usually isn't a compliment. That label makes us think of a manipulative, deceitful egotist. If we hear someone decry "a pound of flesh" we think of an onerous debt and someone's unreasonable efforts to collect an amount well in excess of the amount actually owed. Lastly – and to balance Shakespearean comedy with tragedy – if we hear the phrase "et tu Brute?," we think of a profound betrayal by someone we love the most. Powerful themes can evoke common imagery and beliefs in the minds of jurors.

A theme should motivate a juror to care and to act. Why is a juror going to care about this case? What is going to compel this juror to adopt our position? Does our theme enable the jury to relate to our client? In the post-Enron world, for example, many jurors view corporations with considerable contempt and distrust. This perception can be quite a challenge when it comes to representing a corporate defendant. How then do we make a jury care about the company we represent? We can waste a lot of time in a defensive posture trying to explain why we aren't the corporate bad guys. Or, we can utilize an effective theme that enables the jury to humanize and identify with our client. After all, our corporate client is made up of people – just like jurors – who go to work every day and try to do the best job they can. Personal responsibility and accountability applies to individual plaintiffs as well as the principal managers involved who comprise the corporation. By using a theme to humanize our client, we enable the jury to identify with them. A jury that identifies with our client will care about our client. Most important, a jury that cares is a jury that will be energized to take action that, ultimately, is expressed in a favorable verdict.

There are many ways to identify an effective case theme. When I prepare for trial, I use an exercise with my trial team colleagues to zero in on our theme. I ask each team member to prepare a focused description of our case that can be no longer than 30 seconds. When everyone is ready, we sit down and go around the table and listen to each person's "elevator speech." Given the short time allotted, themes necessarily must be used to convey the message of our case. This deliberative process often yields different perspectives of what is and is not important in a case. It always surprises me how many different – but symmetrical labels, tag lines and metaphors a group like this can come up with. We have all lived with the case for a long time and we are all on the same page with how the case must be defended. Yet when it comes to choosing the right words to recreate the picture we all see in the mind of another – a juror – it is a different proposition entirely. Does that theme really convey our message? Is our case really captured by this analogy or that metaphor? The ensuing discussion and collaboration results in a concise theme that conveys a simple and integrated message. This exercise allows us to draw upon a diverse range of life experiences and attitudes that are essential to trial theme development.

IV. Effective Use of Themes at Trial

Ideally, we have identified our basic themes at the outset of the case and we have used discovery to refine them. We have now honed in on our case theme and we are ready to begin trial. From the moment we walk into the courtroom until the last words of our closing argument – our case theme must be our priority. Our actions, our advocacy and our choice of words all must be driven by our case theme.

As a young trial lawyer, I remember a mentor telling me that your closing argument begins when the jury panel walks into the courtroom. This valuable advice applies to trial theme development – which also begins with jury selection. Some of the best attention we ever get from jurors is during jury selection. This is our first opportunity to speak to jurors and it is their first opportunity to learn about the case. A skillful introduction of our case theme in jury selection, therefore, is imperative.

The "Donahue" or "struck method" is now the most common practice of jury

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selection in most federal and state court jurisdictions. Here, each side is allocated a block of time to question the panel as a whole. Arguably, this format presents the best opportunity to articulate and explore our case theme with those who will ultimately serve as our jurors. Using the struck method, we can construct hypotheticals and offer phrases and tag lines that facilitate a discussion of a broad range of topics to explore juror bias and life experiences. We can talk about our themes from a variety of different vantage points. Once the jury is empanelled, however, our theme focus is narrowed to the facts of our case. Thus, it is the latitude of the discussion that is allowed during jury selection that provides trial lawyers with a great opportunity to explore and impart case themes with jurors.

When preparing for jury selection, think about hypotheticals, adages, and movie plots that will facilitate a dialogue amongst prospective jurors. These discussion pieces should carry and convey a case theme. For example, do they allow for a discussion of sympathy or universally acknowledged principles? Does your venire root for David or Goliath? You will identify the troublesome jurors through this discussion – but you will also facilitate a dialogue around your case themes that will carry through the rest of the trial.

When I prepare for trial, I often bounce my discussion scenarios for jury selection off colleagues and friends – particularly those who know nothing about my case. After receiving their reactions and thoughts, I want to know one important thing, "based on the hypothetical I just gave you, what do you think my case is all about?" If they hit on my theme, I know I am headed in the right direction. If they don't, however, I know that either my theme needs work, my hypothetical needs work – or both.

Jurors tend to place the greatest emphasis on the information they receive first. This principle is often referred to as "primacy." Like the heightened attention we get from prospective jurors during *voir dire*, I firmly believe the best attention we get from a jury is during the first 30 seconds of our opening statement. Our most important dialogue with jurors, therefore, must occur in that first 30 seconds, for that is our best opportunity to label our case and motivate jurors to agree with us. That critical dialogue is effective only if we impart upon the jury our case theme.

Many lawyers make the mistake of developing a great theme for opening and closing, only to completely neglect that theme in the direct and cross examination of witnesses during trial. Our theme cannot sit on the sidelines. Our theme is our MVP. It doesn't come out of the lineup after opening. It stays on the field with us throughout trial.

When we examine witnesses, we must reinforce our theme. There are many different ways to do this. One effective technique is "anchoring." Stated simply, an anchor is a word or phrase that conveys a unified idea (*e.g.*, a theme or sub-theme) that is repeated throughout trial. We can weave anchors into our questions of witnesses. And, witnesses can use anchors when testifying (*e.g.*, "All I know is… "). Effective anchors reinforce certain evidence in the minds of jurors. Ultimately, they are important tools that enable the trial lawyer to control the definition of the case in the minds of jurors.

Having the knowledge to make and meet proper trial objections is a challenge in and of itself. However, developing the skill and instinct to know when objections should be made is essential to case theme development during trial. Over the years, I have had the opportunity to talk to many jurors post-verdict. One issue that comes up with frequency are questions from jurors about objections. *What was the evidence that was excluded? Why did you object to those questions?* My one important take-away is that jurors really don't care much for objections. They don't like it when evidence is excluded. When a line of questioning is objected to and sustained, jurors may speculate that the anticipated answers would have been harmful to our case.

This does not mean that objections should never be made during trial. There are plenty of important reasons to make objections. However, tactical considerations should also play a part in our decisions to make objections. If the testimony at issue is not hurting us – but is otherwise objectionable (*e.g.*, hearsay, etc.) – why do we care? Do we object just because we can and run the risk that the jury mistakenly will suspect we are afraid of something that would weaken our case? The point here is to think both legally *and* strategically about making trial objections. Let your case theme be your guide.

"Recency" refers to the principle that what people hear last – they retain in their memory. Unlike "primacy" – which entails the formulation and adoption of a belief system, recency relates to the jury's ability to recall the key details and most important facts of our case. Whether direct or cross – we always strive to end an examination on a high note during trial. This is the principle of recency at work. We end with our strong points so that we can put an exclamation mark on those compelling points we want the jury to remember.

Closing argument presents our final opportunity to reinforce our case theme. The techniques of recency are critical to this objective. For example, the introduction and conclusion are the most important parts of our closing. This is because we must start and end with our most powerful and persuasive points. We start with our most powerful points to draw our jurors back in to our case theme. We end with our strongest points because we want jurors to take these points into deliberations.

Recency is a technique that can be carried out in many ways. Here, the use of repetition is most effective. For example, Dr. Martin Luther King's "I Have a Dream" speech provides a wonderful illustration of the potency of

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repetition as a rhetorical device. In that great speech, Dr. King used two different forms of repetition. First, he used "anaphora," a technique where the speaker repeats a word or phrase at the beginning of a group of neighboring paragraphs. In that speech, the phrase "I have a dream" was repeated in 8 successive opening sentences. However, Dr. King also used 7 other key phrases in this way during the speech (*e.g.*, "One hundred years later," "Now is the time," "We can never be satisfied"). These phrases were used so effectively that even without the remainder of the text, we would have the essence of Dr. King's message by his persuasive use of anaphora.

Dr. King used another form of repetition in this famous speech. Here, he repeated key words and phrases that conveyed his theme throughout the speech. For example, the word "freedom" was used 20 times. "Dream" was used 11 times and "we" was used 30 times. By repeating key theme words throughout his speech, Dr. King imparted an inspiring and unforgettable message. As this memorable historical example illustrates, repetition is an important rhetorical device that we can use to further the principles of recency in closing.

Closing argument is our best opportunity to impart our 'anti' themes to the jury. There is no better anti-theme than thematic reversal. Here, we strive to use our opponents' themes against them. If we have scored points on a disputed issue during trial, if we have uncovered evidence to suggest that a party has lied on a material point, we need to hammer this home in closing. For example, if we have a photograph showing a plaintiff who isn't all that injured or an email in which a defendant made damning admissions – we need to highlight these points in closing through thematic reversal. ("Does this photograph really show a permanently disabled man?" or "The defendant says he didn't know? He sure knew a whole lot when he wrote this email after the incident!") Thematic reversal, when used strategically and effectively, furthers the objectives of recency as a persuasive rhetorical device.

In sum, as we prepare our closing argument, we should strive to accomplish the objectives of recency. We should consider techniques such as repetition and thematic reversal to highlight our strongest arguments both at the beginning and end of our closing. If done effectively, our last and strongest points will be the ones jurors take with them into deliberations and remember the longest. If we have done our job, the jury will express the strong points we have made in a favorable verdict.

V. Conclusion

Attempting to try a case without a theme is like going into battle without any weapons. It is a losing proposition. By identifying and using an effective case theme at every phase of trial, we arm ourselves for success. When it comes to jury trials, the facts won't speak for themselves. We give our case a persuasive voice when we use a unifying concept or idea – one that jurors can relate to, one that motivates them to act and leads them to our conclusion. If we have accomplished all of that, we know we have put a good case theme to its proper use.

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A Case for the Expanded Use of Supplemental Juror Questionnaires

by Theodore O. Prosise, Ph.D.

The goal of a jury trial is the evaluation of facts and evidence of a case, an application of the law, and an engagement by jurors in a rational process of judgment and group decision-making, free from sympathy, emotions, and other extra-evidentiary and extra-legal factors. But in order to approach this ideal, appropriate jury selection procedures and techniques are critical.

This article argues for the expanded use of supplemental juror questionnaires (SJQs). It does so based on an understanding of jury behavior, reasoning, and cognition. It is time to bring our understanding of jury behavior and its implications to jury selection into the 21st Century. By understanding the implications of human decision-making, cognition, and the role of attitudes and experiences that influence judgment and expression, we can approach jury selection in a manner that will better ensure that parties are evaluated by more open-minded and thoughtful jurors.

It must be made clear that the jury system is an amazing American institution. It is the practice of small group democracy where the views and votes of citizens matter. Verdicts are the product of hard work and sincere commitment by jurors. This system that allows ordinary people the ability to deliberate issues of significance is sacrosanct. But that does not mean that we should not improve the process of jury selection in order to heighten the inherent benefits of the jury trial and ameliorate the potential for extra-evidentiary and extra-legal influences in verdicts. There is little need to revisit horror stories of jury misconduct and costly retrials. These are salient concerns, but concerns with a solution.

The American Bar Association's *Principles for Juries and Jury Trials* makes the importance of adequate voir dire and supplemental jury questionnaires clear. The preamble states that "each principle is designed to express the best of current-day jury practice in light of existing legal and practical constraints." American Bar Association, *Principles for Juries and Jury Trials*, at 2 (2005), available at *http://www.abanet.org/juryprojectstandards/*. Principle 11 concerns the right of parties to a "Fair and Impartial Jury" *Id.* at 13. To that end, the principle states: "In appropriate cases, the court should consider using a specialized questionnaire addressing particular issues that may arise. The court should permit the parties to submit a proposed juror questionnaire." *Id.*

What Is an "Appropriate Case"?

This article does not endeavor to answer the question in detail, as the particularities and eccentricities of every case need to be evaluated. But, as the Honorable Judge Robert Alsdorf (ret.) has opined, difficult cultural, social or personal issues, controversial and personal issues that jurors may wish kept private (*e.g.*, views on sexual abuse, race and racial politics, immigration, sexual discrimination or harassment) are potential cases for supplemental juror questionnaires. "A view from the bench": An interview with the Honorable Robert Alsdorf (ret.), *The Advantage*, 4 (2), September 2007, p. 1. Cases that overlap with contemporary "hot" social issues or concerns (*e.g.*, attitudes toward crime and police practices, insurance and bad faith, anti-wealth bias following economic downturns) are all good cases for SJQs. Any issue which could be described as a potentially polarizing social or political issue could impact the way in which a potential juror evaluates facts, evidence, and even the law.

In order to support the general case for the increased utility and appropriateness of using a supplemental jury questionnaire, we need to become more sophisticated in our understanding of human reasoning and decision-making. These processes are also products of peoples' values, attitudes, emotions, and experiences.

What Is a Fair and Impartial Juror?

There is no such thing as a *tabula rasa* juror. People interpret facts, evidence, and the law through lenses influenced by their attitudes, beliefs, commitments, and experiences. This notion of the importance of values in persuasion goes all the way back to Aristotle, who argued that one must endeavor to find common ground with an audience before one can attempt to persuade that audience to accept more controversial issues. Bizzell & Herzberg, *The Rhetorical Tradition: Readings from the Classical Times to the Present*, 2d ed., Aristotle's *Rhetoric*, (Bedford/St. Martin's Press; Boston, MA., 2001), pp. 179-240. Stemming from the early work on cognitive dissonance, the understanding of how attitudes and views influence. Western, *et al.*, "Neural Bases of Motivated Reasoning: An FMRI Study of Emotional Constraints on Partisan Political Judgment in the 2004 U.S. Presidential Election." *Journal of Cognitive Neuroscience* 18 (11), 2006, pp. 1947-1958; Western, *et al.*, "Motivation, Decision Making, and Consciousness: From Psychodynamics to Subliminal Priming and Emotional Constraint Satisfaction." *Cambridge Handbook of Consciousness* (Cambridge, England: Cambridge University Press, 2007), pp. 673-702.

What is known as "motivational" or "bounded" rationality is a keystone to understanding why certain people accept or reject, selectively interpret (or even remember) evidence, facts, themes, principles, or other forms of information. In other words, based on a set of beliefs and attitudes derived partly through experiences, people are motivated to approach their decision-making in certain ways, to believe and accept certain things, and to reject data or information inconsistent with their beliefs. Kunda, "The Case for Motivated Reasoning." *Psychological Bulletin*, 108 (3), 1990, pp. 480-498. Ziva Kunda argues that "motivation

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may affect reasoning through reliance on a biased set of cognitive processes: strategies for accessing, constructing, and evaluating beliefs." *Id.* at 480. These phenomena can be seen daily in peoples' reactions to political communication. It happens in juries too.

Motivated reasoning comes through two general categories, one motivated by a desire for "accurate conclusion" and the other motivated by a "particular, directional conclusion," that is to say, one where the end-state drives the rationalizations. *Id.* The "cool" cognition that the court and most parties would prefer is not always what dominates deliberations. Rather, it can be the "hot" cognitive processes, driven by preexisting views or beliefs, heavily influencing a particular juror's interpretation of case facts. This is not to suggest that we must give up hope that parties can receive a fair trial. On the contrary, it is faith in the jury system that encourages a means to improve practices to further the effort to have open-minded and thoughtful jurors as triers of fact. The issue points toward the increased importance of being able to assess the degrees of impartiality and fairness in a more sophisticated fashion. The thing that is perhaps the most troubling is the false dichotomy that people are either fair and impartial, or hopelessly biased. Prediction and assessment of human behavior lies in the realm of probability and possibility.

When it comes to a juror's motivation to express views in deliberation, a lesson in the social significance of gossip is instructive. One may think that gossip is about the person who is the subject of the gossip, but it is also about the person who is gossiping. They are telling others what values they stand for, and which values, actions, and choices they abhor. They are impelled to talk because they want to express what is important to them. A juror can be motivated to do the same thing in deliberation. People are roused to fight for certain interpretations because a verdict is about values, principles, and justice, and which party they feel is right and which is wrong. The role of deliberation, using the terminology above, can quickly become a "hot" cognitive effort, even if people are doing their best to focus on the "objective" evidence and the law as provided to them by the judge.

For these reasons, adequate assessments of potential jurors' views, attitudes, experiences, etc., is critical to making an informed judgment about a particular person's appropriateness to sit as a juror. A key means of accomplishing that is through the use of SJQs.

Supplemental Juror Questionnaires

Questionnaires are powerful information-gathering tools. With appropriate application of social science methods of survey questioning, a great deal of information can be collected in relatively efficient and short questionnaires. Parties can assess a juror's system of beliefs and attitudes, and consider which jurors may be more likely to have "hot" cognition trump "cool" reasoning, based on their patterns of answers. The attorney can delve below the false generalizations based on demographics, and even help avoid constitutionally questionable peremptory strikes, by focusing on what people believe and have experienced, rather than what they look like.

The prospective juror's potential biases, the "boundaries" of their bounded rationality, in a sense, can be assessed and their relative risk can be considered. Voir dire can be targeted and efficient. Understanding and clarity is enhanced. Hardship, potential cause issues, and red flags for peremptory challenges can become so much clearer to all parties and the court.

It is important to consider the system of germane attitudes and experiences available in SJQs because judge-conducted and attorney-conducted voir dire may be inadequate to really eliminate those jurors with high potential for bias.

We have all been in court when jurors expressed concerns about an inability to be fair to one party or the other. Often what happens is the rehabilitation of that juror by the court. Judges exert great authority in a courtroom, and rightly so. Their questions (and the implications from those questions) carry great weight for jurors. So, when a judge asks if a juror can be fair, after the juror has expressed hesitation in evaluating elements of the case or parties in an "objective" manner, it follows that their answer will most likely be "yes" or "I will do my best." The danger is that *even if* this is the express desire of that individual, he or she may still evaluate the evidence and law through a troublesome extra-evidentiary lens. As evinced above, when it comes to "hot" cognitive efforts, the biases or influences may be implicit factors in memory, expression, and judgment. So, if one is earnest enough at expressing a potential for bias, but then affirmatively states that he or she will *try* to be "fair," the question remains whether he or she really can or will be.

Judges often encourage open participation in voir dire, but such efforts still do not ensure that a juror with bias will speak up. The courtroom is an intimidating place for many jurors. The mystery and formality of the setting can easily silence earnest expression. Being asked to speak publicly in voir dire, given that the fear of public speaking is close to the fear of death for many Americans, presents an additional impediment to honest and open answers to either judge or attorney-conducted voir dire.

Allowing potential jurors to document their experiences and express their views on a questionnaire increases the chance that they will more honestly answer the questions. In addition, each question calls for an answer. Thus, the response rate to germane questions is considerably higher, if not absolute.

Many judges and attorneys feel that simply providing the law, as delivered by the court, will resolve concerns stemming from a potential juror's expressed hesitation to be *fair* to the parties. But Kunda's work reminds us that "one should not assume, however, that accuracy goals will always eliminate biases

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A Case for the Expanded Use of Supplemental Juror Questionnaires *from previous page*

and improve reasoning." Kunda, "The Case for Motivated Reasoning." *Psychological Bulletin,* 108 (3), 1990, pp. 480. Once again, expressions of bias are not always conscious. If one is motivated to arrive at a particular conclusion, they try and act rationally as they strive to support that conclusion. This "illusion" of rationality goes beyond rationalization, but may also involve such fundamental "process(es) of memory search and belief construction biased by directional goals." *Id.* at 483.

There are practical considerations to implementing an adequate SJQ process. The ABA Principles make clear that "all completed questionnaires should be provided to the parties in sufficient time before the start of voir dire to enable the parties to adequately review them before the start of that examination." American Bar Association, *Principles for Juries and Jury Trials*, at 13 (2005), available at *http://www.abanet.org/juryprojectstandards/*. A good questionnaire without adequate time to evaluate the answers may be useless. The goal is still efficient and fair jury selection.

In terms of efficiency, attorneys can conduct targeted voir dire. This can make better use of limited voir dire time. Rather than asking general questions to a group, which can be, in some cases, met with the tumbleweeds and critics instead of engaging conversation, the attorney can follow up with specific individuals based on the answers on their SJQ.

Hardship can be dealt with on the questionnaires. Their hardship answers on a questionnaire can be more effectively and efficiently explored, rather than dealing with the multiple rounds of hardship requests. The court can avoid the evolution of hardship claims as the "learning curve" of the venire increases. Jurors unmotivated by civic duty often learn how to manufacture effective hardship cases by witnessing what others have expressed in open court.

Special draws of jurors can be used, which may take more work up front by the court and the parties, but it will secure the venire for jury selection rather than competing with other trials over a limited group of jurors when several significant cases begin on the same day.

Evaluation of the questionnaires can be conducted over the weekend, if it is a Friday special draw, or evaluated over even more time if the questionnaire is mailed to the members of the venire in advance. If the questionnaire is administered in the morning of trial, copies can be made, and a member of the trial team can assess the questionnaires while another member or members of the team deal with other procedural matters of the court (*e.g.*, motion practice, evidentiary issues related to opening statements, etc.). The questionnaires can be assessed over the lunch break, and oral voir dire can, in most cases, result in a jury selected by the close of the afternoon.

The trial team can shoulder the bulk of the effort in crafting and negotiating the questionnaire's content. Expenses, which are relatively low, can be handled by the parties. If there is a concern with copy machine adequacy, one of the trial teams can volunteer to pay and produce multiple copies of the questionnaires.

Conclusion

Our legal system is adversarial in nature. It is through such a system that a jury can arrive at the best decisions. Jury selection is actually a misnomer. It is really jury "de-selection." SJQs are not about "stacking" a favorable jury, since lawyers do not get to pick jurors they want. The goal of jury selection is to use limited opportunities to identify those jurors who pose the most relative risk and to attempt to de-select them from the pool. It is up to the other side to identify jurors who may be high-risk for them and use their opportunities to de-select them. The goal is to have an open-minded and thoughtful jury.

Well-designed and analyzed questionnaires that allow a look into the patterns and system of attitudes, beliefs, and experiences can help the court assess those individuals who may lie toward the "wrong" end of the "objective"/"biased" continuum. As Paul Thagard wrote in "Why wasn't O.J. convicted?," jury deliberations will still be driven, at least partly, by emotional coherence. Thagard, Paul, "Why wasn't O.J. convicted? Emotional coherence in legal inference." *Cognition and Emotion* 17 (3), 2003, pp. 361-383. But, effective jury selection mechanisms can better encourage a situation where "cool" reason prevails over the emotional or "hot" cognition. *Id.* at 380. It is important to encourage attorneys to approach jury selection in a manner most advantageous to their duty of zealous advocacy to their client. A judge's acceptance of the use of SJQs does not preclude efficiency. Even if some additional time is spent up front, the risk of juror misconduct and retrials is greatly reduced. It is time to modify the approach to jury selection by allowing wider use of supplemental questionnaires in order to meet that goal.

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Opening Statements: Construct, Communicate, Convince

by Salvador A. Mungia

The ultimate goal for any trial lawyer is to convince – convince either the jury or the judge what you yourself are already convinced of – that your client should prevail. (Of course, if you're not convinced that your client should win, you should probably pack your bags and take the time off – you'll be happier.) In order to convince, you have to communicate which, on one level, sounds easy enough but in reality is pretty complex. How many times have you heard yourself saying "but that's not what I said." Well, as the old saying goes, it's not what you say, it's what they hear. In order to communicate effectively, especially in a setting such as giving an opening statement, you have to give some thought, actually a lot of thought, to how you are going to construct your presentation.

The basic construction of any opening statement starts with the concept that you, the attorney, are a story teller. Mind you, not the type of story teller who can make up a "story" but instead a story teller who has undisputed facts to work with, good, bad, and in-between, and facts that are disputed. You've already made the tactical decisions on how to deal with the set of cards that have been dealt to you – which ones to throw away, which ones to show, which ones to hold close to your chest until the right time in the trial. So, with the cards you want to show and play in your opening, you have to make the conscious decision on how to present them. In this column, I'm not going to provide a comprehensive discussion on everything that should be considered in an opening statement. Instead, I want to focus on three areas to make your opening statements more effective: (1) having a theme, (2) speaking English, and (3) focusing on the other party.

Themes

I'm a big believer in the concept of primacy and recency: people remember what you've said first in your presentation and what you've said last. I'm also a big believer in the social scientist data that demonstrate that audiences generally give you between one and two minutes of their undivided attention before other thoughts start infiltrating their minds unless you give them reason to stay focused. Because of those two beliefs, I work hard at jumping right into my story and getting my theme firmly planted in the minds of the jurors.

A theme is simply a dominant idea that helps unify all the information that the jury will hear. If you have a good theme for your case, then you give the jury a familiar and memorable frame of reference for measuring the trial information against each juror's own values, beliefs, and life experiences. A good theme will resonate in the minds of the jury when evidence is presented that supports that theme. If the jury, or a judge, accepts your theme, then they are more likely to filter the evidence using that lens.

In a contract case, where I'm representing the party who is alleging the other side breached the agreement, a classic theme I've used is "a deal is a deal." We all grew up saying that as a truism. It's a point of honor in our culture and one, that when broken, we righteously condemn. If the jury, or the judge, agrees that a deal is a deal, then they are likely to view the evidence to fit within that theme.

Themes should be simple, clear, and ideally recognizable by members of all generations who may be on your jury. At its best, a theme will evoke in the juror's mind notions of fairness, hard work, morality, or personal responsibility. A good theme will be (1) easy to remember, (2) something a favorable juror can use during deliberations, (3) consistent with, and supported by, the evidence, and (4) logical and consistent with the jury's concept of fairness and justice.

Here is a sampling of themes that can be used in various situations.

She passed the buck. (Accountability.)

They looked the other way. (Accountability.)

They washed their hands. (Accountability.)

Children point, adults look away. (Disfigurement cases.)

There are no mirrors in ____'s house. (Disfigurement cases.)

____ is a prisoner in his/her own home. (Disfigurement cases.)

The first rule of medicine: do no harm. (Medical negligence.)

This case is about a doctor who knows too much and cares too little. (Medical negligence.)

An ounce of prevention is worth a pound of cure. (Negligence and product liability cases.)

A few seconds of inattention caused a lifetime of suffering. (Negligence.)

Videos don't forget, blink, or lie.

They circled the wagons.

Actions speak louder than words. (Credibility.)

Get your theme out early and use it throughout the trial so that it can provide an anchor to your closing argument.

Speak English

You not only have a college degree, you have a juris doctorate degree as well – usually at least seven years of higher education. Most of you are well-read, and your vocabularies are impressive. But guess what: that's not the education level of your jurors. The trick is to be able to communicate with your jurors: don't talk over their heads or talk down to them.

I don't know if he is right or not but Richard Lederer, who wrote *The Miracle of Language*, says that there are 11 words

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that account for 25% of spoken language. Lederer states that 50 of the most commonly spoken words have one syllable. Whether Lederer is correct or not isn't really important; instead, what is important is the message: use plain language if you want to communicate. As Kenny Rogers sang: "you've got to know when to hold them, know when to fold 'em." Well, hold the small, easily understood words and fold your ten dollar words or, as I like to say, "eschew obfuscation."

Now, being lawyers so long you may have lost all contact with reality such that words you may use every day without batting an eye aren't understood by your average juror. Luckily for you, and for me, Robert F. Erhard and Veda R. Charrow made exactly such a list of words and published that list in "Making Legal Language Understandable: A Psycholinguistic Study of Jury Instructions," Columbia Law Review, Vol. 79, No. 7 (November 1979). The following are the words they found that jurors are unfamiliar with, and often misunderstand, in the order of use and confusion.

1. Prior. 2. Subsequent. 3. Relevant.
4. Relative. 5. Magnitude.
6. Erroneous. 7. Foreseen.
8. Credibility. 9. Deem. 10. Submit.
11. Impute. 12. Thereon.
13. Thereupon. 14. Thereby.
15. Prudence/Prudent.
16. Insinuate. 17. Extrapolate.
18. Interpolate. 19. Proximate.
20. Stipulate. 21. Salient.
22. Demise. 23. Facetious.
24. Decelerate. 25. Epitome.
26. Indolence. 27. Variables.
27. Acquiesce. 28. Infer.
29. Diffuse. 30. Pursuant.
31. Antedate. 32. Divisive.
33. Malleable. 34. Anachronistic.
35. Rotund. 36. Blatant.
37. Dichotomy. 38. Censure.
39. Complacent. 40. Conjecture.

Okay, true confession time – how many of you have used "prior," "subsequent," or "relevant" when addressing a jury? Yah, me too. We, as lawyers, are very careful about the words we choose, and we have to especially be cautious when presenting to a jury. But we must never forget that the ultimate goal is to communicate with the jury, and the choice of words, while important, does not make up the bulk of how we communicate with one another. Communication principals have established that 55% of communication is visual, 38% is vocal tone, and only 7% of communication is by the words themselves. So, yes, words are important but remember that communication is much more than words. And for the part of communication that is conveyed by the words themselves, make sure that those words are understood.

Focus on the Other Party

You have a killer theme, you remind yourself to speak plainly, so you want to start off by telling the jury how great your client is. Wrong. If you do that, you will only start the jury down the road in thinking what are all the things your client did or did not do that resulted in this dispute.

In the late 1990s, the president of the association then known as the Association of Trial Lawyers of America, noticed that plaintiffs' lawyers were losing a disturbing number of good cases – cases that, objectively, they should not be losing. He asked two veteran trial attorneys to look into this trend and what they found should not be lost on any attorney, plaintiff or defense. *Lawyers Weekly USA*, "In Practice," October 18, 1999, B2.

What the study found was that the plaintiff's attorneys started off their opening statement talking about the plaintiff, what a good person she is, how much she has been injured, because they hoped to immediately engender sympathy from the jury. What the study found was when this sequence was used, jurors would find reasons for blaming the plaintiff for what happened. This was true even when the plaintiff was legally blame-free and the defendant did not make a claim for contributory negligence. Even in those circumstances, jurors would find reasons to blame the plaintiff. According to social scientists, this is known as the "availability bias." The availability bias is a phenomenon that governs how people formulate opinions and make decisions. As people attempt to understand something new, they seize upon the information presented to them first to develop a working theory of what happened and why, filling in the blanks and using whatever information is available. When they do this, they tend to fill in the blanks adverse to the person about whom they have the most information.

In light of these findings, ATLA started instructing its members to use their opening statements to focus on the conduct of the defendant so that the jury would focus on the defendant's conduct and fill in the blanks as to why the defendant was responsible for the acts that happened.

Whether you represent the plaintiff or the defendant, you should have your opening focus on the other party's conduct instead of talking about your client and how good they are. Keep the target on them. Make the opposing party's conduct the focus of the jury's attention.

Avoid Being a Cassandra

Cassandra, as we all know, was the Greek figure that, while she knew the truth, no one believed her. The Greek gods put a curse on her that she would never be able to convince anyone of the truth she knew. You know the truth. Don't be a Cassandra. Make sure you do everything in your ability to convince the jury, or judge, that in fact you do know the truth.

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Direct Basics

by Michael Wampold

I was asked to write an article on direct exams. So what can I add to a subject that has been dealt with by other authors extensively? Answer: very little. Then why should you continue to read this and why should I continue to write? My hope is to write a concise article that tells you everything you need to know about doing a direct exam and that you cut this article out, throw it in your file cabinet and bring out a yellowed copy years from now when that next trial finally gets out! Also, some of what I have to say is a bit unorthodox and may not be covered by that old copy of Mauet's *Trial Techniques* sitting on your bookshelf.

Be a leader.

As in all aspects of trial you have to keep your audience in mind when doing the direct examination. Remember that the jury may have no idea who this witness is. And even if they know who the witness is they don't necessarily know why you are calling him. So tell them.

"Dr. Jones, you treated Mrs. Smith after her accident. You are here to talk about your treatment of Mrs. Smith, what your diagnosis is and what her outlook is going forward."

"Officer Jones. You are here because you were the first responder to the scene of the crime. You are here to tell us what you saw when you got to the scene and the results of your investigation."

"Mrs. Client. One of the claims here is that you stole money. Before we get to your background, did you steal from Big Co.?"

Some of you may be thinking that leading like this is objectionable. It really isn't. ER 611(c) says "leading questions should not be used on the direct examination of a witness except as may be necessary to develop the witness's testimony." Most judges understand that leading on foundational questions is "necessary" to develop their testimony. If the other side objects, just say to the judge "it's preliminary" or "it's foundational." These responses seem to work.

Driving the narrative without driving it off the road.

The conventional wisdom is that you must allow your witnesses on direct to tell the story of your case. This is unmistakably true but there are caveats to this concept that will be discussed below. But before we get to the caveats, how do you drive the narrative? You accomplish this by asking open-ended questions that encourage the witness to talk. Such questions should start with your reliable friends on direct "Who? What? When? Where? Why?" They can be supplemented with questions like "Please explain… Please describe… Please tell us more about… What do you mean when you say…" These questions encourage the witness to talk.

The caveat is that while you want your witnesses to tell your client's story, you don't want the witness to talk too much. While this statement may seem like heresy, the truth is that there are real dangers to allowing your witness on direct to talk too much. The dangers are twofold: (1) When your witness gets too chatty he stops looking like a credible witness and seems more like an advocate. Your client already has an advocate – you! Your client doesn't need another one in the witness box. Instead he needs credible witnesses who answer questions in a tight, succinct way. (2) The more your witness talks the more trouble he can get into. I have seen lots of chatty witnesses hang themselves. The more witnesses blather on and on the more likely they are to say something stupid or attackable.

So how do you strike that balance of driving the narrative but not having your witnesses get too chatty? The answer is you can't use only the open-ended questions above. You must mix in more closed-ended questions that are not leading and therefore objectionable. Those questions are "Did you?" "Would you?" "Could you?" "Have you?" Such questions require more closed-ended, short answers. Mixing in the closed-ended questions with the open-ended ones creates a direct that drives the story without losing control.

Before you start eating, set the table.

Whenever you have an eyewitness, you want to make sure to set the scene adequately before the witness starts talking about what he or she saw, heard, felt, etc. Early in the direct have the witness explain in sufficient detail what the scene looked like—also, consider having the witness do a drawing to further describe the scene. Explaining the scene in detail is important for several reasons. First, without the scene being set at the outset, the direct can be confusing.

Second, setting the scene allows the jurors to see the story in their own minds as the witness explains what occurred. Testimony is much stronger, more concrete, and more memorable if the jurors can visualize it while the witness testifies.

Signposts help the audience know where you are and where you are going.

Signposting is one of the greatest techniques to make a direct hum. Just tell the witness and everyone in the courtroom what chapter you are covering in the direct exam. This makes it much easier for the jurors to follow along and understand the testimony.

> "Mr. Jones, before we get to the opinions you have in this case, I want to talk about your education."
>
> "Mrs. Smith, I want to turn to your employment at Big Co. now. Let's start by talking about the first two years. Who were you working for during the first two years?"
>
> "Mr. Johnson, I know you did a lot of work before forming your opinions in this case. I want to talk first about just your site visit. Tell us about that."

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Don't let exhibits interrupt your flow.

Most exhibits are offered during direct. The danger with offering exhibits is that all the verbiage that it takes to lay the foundation for admission clutters an otherwise beautiful direct. Jurors obviously don't really care if the document was created contemporaneously, done in the regular course of business and maintained in the regular course of business. That's all legal gobbledygook. To avoid this clutter as much as possible, I have two recommendations. First, make the offers simple. "I'm handing you Exhibit A. Please tell me what it is." Avoid doing all of the complicated legal foundation unless you're forced to by opposing counsel when you offer it. If opposing counsel objects every time and forces you to go through the proper legal foundation (aka "gobbledygook"), then she will be the one to look bad in the eyes of the jury.

Also consider not offering the exhibits until the end of the exam. If it is possible to offer them at the end of the exam, it creates substantially less clutter. "Your Honor I offer Exhibits 4-20 at this time." The fewer superfluous words in your direct the better.

So tell me, where do I stand?

You want to position yourself in a place that does not block the witness. Whereas with cross you want the focus on you, during direct you want the jury to focus on your witness when they are talking and on you when you are talking. So standing directly in front of the witness but behind the jury box is the best place to position yourself in most courtrooms. What you want to create is the "tennis effect." The eyes of the jury should bounce back and forth between the witness and you just like a tennis ball.

Loop.

Looping is a great technique that allows you to re-emphasize good testimony. You never know if some juror was thinking about his shopping list at the exact moment that you scored the big one. So you need to get that sweet testimony in front of them again (and preferably a third time!). "So Officer, after you found the gun on the defendant, what was the look on his face?" "Officer, after you found the gun and the defendant was looking guilty, what did he say?"

Use your notes as a checklist only.

The best directs look like the attorney and witness are having a genuine conversation. Obviously it is a somewhat contrived conversation since you are asking questions that you know the answers to. But just because it is contrived doesn't mean that it needs to look that way! To create the feeling of an interesting conversation you should try to avoid being tied to notes. When was the last time you were at Starbucks talking to a friend, asked your friend a question, and then looked away while he answered? The answer is never—obviously that would be rude. But yet every day in courtrooms that's exactly what lawyers do—don't do it!

During direct, ignore your notes. Stand up and have a conversation. Pretend you're keenly interested in the answers and that you're hearing them for the first time. When you're done with the conversation, only then look down and check your notes to make sure that you covered everything.

One way to be disciplined about not relying on notes is to not write down your questions—rather write down the answer that you expect. That way the questions will come naturally depending on the answer that the witness gives and you aren't tied to pre-ordained questions.

Pull those rotten teeth.

Figure out how the other side is going to cross-examine your witness and steal their thunder. It's always better to control how the witness explains a topic that is going to be raised by the other side. Besides, taking away cross drives the other side nuts so that alone is reason to pull the teeth.

When in the direct should you pull those rotten teeth? Not too soon and not too late. Before you talk about anything negative you want to make sure your witness has already built up credibility with the jury. I usually pull the teeth right before I get to my last chapter, which should be a solid one. Because of the power of primacy and recency, you always want to start strong and end strong.

Ending strong.

One good trial technique that many lawyers use is to check with co-counsel before finishing a direct. This is a great technique to avoid missing something during the stress of trial. But it's not exactly a scintillating finish. "Your Honor, may I have a minute to confer? [Whisper, whisper] "I'm done." What a let-down after a great direct! Instead of doing this at the very end, ask your co-counsel the question right before your final chapter. If you missed anything do it right before your last chapter. That way you end on a high note.

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Cross Examination

by Paul E. Fogarty

A. Introduction

Effective cross examination occurs through the use of simple and targeted leading questions where the examiner essentially declares the answers in the questions and the witness affirms. If the witness disagrees, the examiner impeaches the witness or shows why an answer is wrong. Cross examination is about technique buttressed by careful preparation and organization. The same technique generally applies regardless of the facts and witnesses: 1) have a goal for the particular witness; 2) ask leading questions to achieve the goal; and 3) be able to prove the answers. Think of cross examination as scripted theater where the attorney is the director, producer and actor, and where the witness plays a minor supporting role.

B. Cross Examination Technique

1. Have specific goal(s) for the witness.

Have a goal with the particular witness as to the answers you need to elicit from the witness. The goal typically involves establishing facts needed to prove or dispute one or more elements of a claim or defense and/or promoting your case theme and/or challenging (or sometimes promoting) the credibility of the witness.

Planning for cross examination starts with understanding the elements of the claims and defenses and developing a case theme. Ideally, this understanding was developed early in the case, before or at the beginning of discovery, and the facts relating to the primary issues and themes have been covered in discovery.

2. Ask leading questions that declare the answers to achieve your goal.

A fundamental difference between direct examination and cross examination involves the form of the question. In direct examination, open-ended questions are used. The witness tells a story and is the center of attention. In cross examination, leading questions are used. The examiner tells the story and is the center of attention.

A leading question is a question that states, declares or suggests the answer. A leading question should be simple and contain only one fact. Multiple facts in a question can be cumbersome, make impeachment more difficult, and may draw a compound objection. By keeping the questions simple, the witness has less room to wiggle out of the answer or feign ignorance as to what the question means.

A leading question is essentially a statement that has been converted into a question. For example:

- You took the cookie out of the jar, didn't you?
- Isn't it true that you took the cookie out of the jar?
- You took the cookie out of the jar, correct?
- You took the cookie out of the jar? (voice inflection indicating a question).

A leading question does not provide the witness with an opportunity or opening to explain or provide a narrative answer. Avoid asking "why" during cross examination. If you ask "why" or give the witness an opportunity to explain or qualify an answer, you risk the witness undoing your cross examination. You risk losing control of the witness.

3. Be able to prove the answer you want to elicit.

For most questions you ask during cross examination, make sure you can prove the answer with the witness' deposition testimony, interrogatory answers, admissions, report or other documents. That way, regardless of how the witness answers, you can obtain a good answer or, if not, you can at least show that the witness is incorrect and/or lying and/or lacks credibility.

Being able to prove the answers you are eliciting during cross examination typically starts with discovery. A key part of any cross examination is having sound bites from discovery responses, depositions, admissions and/or documents that you can use to prove the answer to your question if the witness gives you a bad answer.

Initial interrogatory answers, for example, can provide sound-bite admissions that you may be able to use during cross examination. Additionally, documents produced in the case may contain admissions that can be used in cross examination.

Deposition testimony is a key source of material for cross examination. In addition to learning facts about the case and evaluating the witness' credibility in a deposition, another deposition goal is to pin down the witness' factual testimony with sound bites that can be used for impeachment.

For example, if the goal is to establish that the defendant ran a red light and caused the collision, you might ask the witness in the deposition:

> Attorney: What color was the light for Mr. Smith when he entered the intersection?
>
> Witness: Red.

Then, in cross examination at trial, you would ask the witness:

> Attorney: Mr. Smith's light was red when he entered the intersection, correct?
>
> Witness: Yes.

Or:

> Attorney: Mr. Smith ran the red light, correct?
>
> Witness: Yes.

If the witness later changes his/her testimony and answers "no, the light was green," you can easily read the deposi-

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tion question and answer to the witness to impeach the witness with the earlier deposition testimony.

In the deposition, if the witness gives a rambling answer, and buried in the answer is the fact that the light was red, you need to follow up and re-summarize the answer into a sound bite question. For example, in response to your deposition question "what color was the light when Mr. Smith entered the intersection," the witness may give a rambling, problematic answer, such as:

> Attorney: What color was the light for Mr. Smith when he entered the intersection?
>
> Witness: At the time of the collision, your client was going too fast, was smoking crack, his music was blaring, he swerved around another car, honked his horn, gave a pedestrian the finger, *so even though the light was red*, it didn't make a difference, because your client should have seen what was about to happen, and he caused the accident, and then he got out of the car, ran away, got into a fight with a bystander ….

Based on this answer, if at trial, you were to ask the witness, "Mr. Smith's light was red when he entered the intersection, correct?" and the witness changes his/her testimony to "no it was green," the impeachment value of reading the above deposition question and answer is diluted by all the bad facts buried in the deposition answer.

Therefore, if the witness gives a rambling deposition answer and the key fact is buried within an answer that contains irrelevant or bad facts, consider objecting as to responsiveness and re-state the question by focusing on the color of the light:

> Attorney: So Mr. Smith's light was red when he entered the intersection, correct?
>
> Witness: Yes.

Now you have an impeachment sound bite to use at trial.

C. Sequence for Cross Examination

I have heard that one should start cross examination with a bang, finish with a bang, and if you have to explore potentially dangerous testimony, do it in middle of the examination where it is more likely that the jury may forget it or not listen to it. I have also heard that one should ask a number of leading questions at the beginning of the cross to elicit a string of "yes" answers from the witness, one after another, and get the witness into a flow of answering "yes" to your questions. I have also heard that one should not cover more than three issues during cross examination. While these rules of thumb seem to make some sense and perhaps should be considered, the sequence and content for cross examination depend on each case and the specific witness. The most important considerations are: (1) will the examination make sense? and (2) will you achieve your goals for the witness? Can the fact finder understand the point being made by the cross examiner? How will you obtain sufficient evidence to argue your case during closing?

Early in the trial, before many facts have been established, you may have to elicit foundational facts first so that when you score a point later with the witness on cross, the jury has some context to understand the point.

On cross examination, you may also want to attack the witness' credibility. The timing of the attack depends on whether you believe you can obtain helpful testimony from the witness. If you know, based on the deposition, that the witness will be hostile, you may want to attack credibility early, so that hopefully everything the witness says after that point is tainted. If you believe you can obtain helpful testimony, you may want to attempt to elicit the helpful testimony before attacking credibility, or based on the helpful testimony, instead of attacking the credibility, you may want to boost the witness' credibility. Whatever sequence you choose, make sure you analyze the timing of the various subjects you plan to cover so that the story you tell makes sense.

D. Controlling Cross Examination

Controlling cross examination requires the use of leading questions and having immediate access to impeachment materials.

The best way to control a non-responsive or evasive witness is through the use of simple, one-fact leading questions and through impeachment.

Always remain polite and calm. If the witness will not answer your question or is evasive, you may want to point out the evasive nature or non-responsiveness of the answer and repeat the question. Avoid debating with the witness. Instead, if the evasiveness or non-responsiveness continues, impeach the witness, or show the witness the document or deposition testimony that has the correct answer or fact. After one or two attempts to be evasive or non-responsive followed by impeachment, the witness may become more forthright. You can attempt to "train" the uncooperative witness with a series of questions that must be answered in the affirmative, and if the witness strays, hammer him/her with impeachment. Once the witness realizes you have the goods, cooperation follows.

When impeaching the uncooperative witness with prior deposition testimony, you should be the one to read the deposition question and answer, have the witness follow along, and then confirm with the witness that you have correctly read the question and answer. You may also want to display the deposition testimony or play an excerpt from a videotaped deposition for added impact.

A witness may be uncooperative because he/she is associated with the opposing party or has a stake in the outcome. Point out the witness' bias or other credibility issues so that the jury can understand why the witness is being evasive or uncooperative.

If a witness is being evasive or non-responsive, the *last resort* may be to ask

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Cross Examination *from previous page*

the judge for help, which depends on how important the answer or witness is. This tact is risky because the judge may not help you and you may look ineffective in front of the jury. Also, if you cannot control an evasive or non-responsive witness, it may be that your questions are bad (*i.e.*, not simple and leading) or you are not adequately prepared to impeach.

E. Pitfalls to Avoid During Cross Examination

Pitfall No. 1: Not having a goal. Know what you need or want to cover with a witness, and why, before cross begins. Once you know what you need or want, formulate how you intend to obtain it.

Pitfall No. 2: Not knowing or not being able to prove the answer to your question before asking it. Cross examination is based on controlling the witness through questions. Part of the control is being able to show the witness and fact finder what the "correct" answer is, regardless of the answer given by the witness. Cross examination occurs in real time. You must be immediately ready to impeach a witness as soon as he/she strays from the answer you want.

Pitfall No. 3: Asking open ended questions. Open-ended questions allow the witness to control the examination. Control the witness with leading questions by telling him/her the answer in your question. Control, control, control.

Pitfall No. 4: Asking "why." See Pitfall No. 3. Control, control, control.

Pitfall No. 5: Asking long or compound questions. Cross needs to be concise. It needs to be easy to understand. With a long or compound question, impeachment becomes less understandable.

Pitfall No. 6: Not developing sound bites in depositions for use in cross. Generally, the easiest way to impeach a witness is with his/her deposition testimony. The deposition answers you want to use for impeachment need to be concise so that they are understandable when read to the fact finder. The longer and more convoluted the deposition answer, the more difficult it is to show the contrast between the deposition testimony and answers given at trial.

Pitfall No. 7: Not knowing when to sit down and shut up. Direct and cross examinations develop facts that can be argued during closing argument. Once you develop the facts you need with a witness on cross examination, be careful not to undo your good work by re-asking about the facts. Otherwise, you give the witness an opportunity to think about revising or explaining the answer. Avoid asking questions for the sake of speaking. Sometimes the best course of action for a difficult witness is to not ask any (any more) questions, reducing the chance that you will emphasize bad facts.

Pitfall No. 8: Bullying the sympathetic witness. Be strategic about attacking witnesses. If you do not need to, don't. You do not want to become a villain in front of the jury or judge. Understatement often speaks louder than overstatement.

Pitfall No. 9: Failing to be courteous. Always be polite. You can be assertive and dogged without being rude.

Pitfall No. 10: Acting like anybody but you. Just be yourself. Trial is not the time for a personality makeover.

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Tips for an Effective Closing Argument

by Kasey D. Huebner

Closing argument is your last opportunity to influence the jury. It is essential that you make the most of every second you spend before the jury during closing to assure that what you say is persuasive, meaningful, and memorable. Below are some tips that will assist you in developing and presenting an impactful and effective closing argument.

Organization Is Key.

You will be sure to lose the jury if your closing argument jumps around from topic to topic without reason or explanation. Present your closing in a clear, logical, and organized fashion. Most importantly, let the jurors know how your comments relate to the decisions they will have to make in the jury room.

You will not insult the jurors by signposting for them where you are headed and why. After having sat in silence for days or weeks while the attorneys bombarded them with information, they will appreciate understanding what your point is and why they should care about it. This can be accomplished by simply saying: "Now let's discuss Dr. Smith's testimony and how it relates to the cause of plaintiff's injuries."

Visuals Have Impact.

We have all heard of the studies showing that people learn best if they are presented with information both verbally and visually. Closing argument may be the single most important time to remember this approach. If you can show a short, compelling visual to go along with the key portions of your closing, the jury will be more likely to remember what you have to say and why it is important.

For example, do not simply say, "As the evidence shows, defendant agreed not to work for a competing business for one year." Instead, say, "as Exhibit 22 shows, defendant agreed not to work for a competing business for one year." Then, show Exhibit 22 on a screen and call out or highlight the specific language upon which you rely to support this point.

Your visuals do not need to be limited to excerpts from exhibits. Visuals can support your discussions of jury instructions, your theme, and important sub-points. Assume your case involves the opposing party's changing statements about whether a light was red or green. If you want to discuss all of the ways in which the opposing party has changed her story, you can create a slide to increase the impact of what you are saying. The slide can be as simple as one large word.

CREDIBILITY

Alternatively, the slide could include bullet points summarizing the ways the opposing party has demonstrated a lack of credibility throughout the trial. Rather than showing the entire list at once, reveal each bullet point separately, after describing the opposing party's specific statement about the color of the light.

CREDIBILITY

- July 15, 2007, Statement to Police: Red Light
- July 15, 2007, Medical Record: Red Light
- August 15, 2007, Statement to Mother: Red Light
- May 22, 2009, Complaint: Green Light
- January 25, 2011, Trial Testimony: Green Light

Remember, however, not to let your visuals take over. You want the jury to spend closing listening to what you have to say, not reading a screen. It is not effective to present PowerPoint after PowerPoint containing paragraphs in 10-point font, nor is it helpful to have the slides simply parrot your speech word for word. Any visuals you present should be short, impactful, and should underscore – not overtake – the points you make orally.

Remember the Jury Instructions.

The jury instructions provide the rules by which the jury will decide in favor of your client or against your client. Make the instructions an important part of your closing argument. Explain to the jury what they mean, how the evidence relates to the instructions, and how the instructions require a verdict in your client's favor.

Don't Drone.

By the time closing arrives, you have been living with the case for months or years and may have been in trial for weeks. You have absorbed a great many facts; you know the law, and the case has made up a large part of your waking hours. It is easy to feel that you need to explain *everything* about the case to the jury during closing. If you do this, it will be at your (or more accurately, your client's) peril.

Your closing should address the key jury instructions and evidence you need to prevail. It is not necessary to spend hours delving into the minutiae of each witness' testimony or the introductory jury instructions read by the court. The jury will soon conclude that if everything is equally important, then nothing presented at the trial should be seen as particularly compelling or noteworthy, including any evidence that is particularly helpful for your client's case.

Arm Your Adversaries.

As you head into closing argument, some jurors already will have a favorable view of your case. When closing arguments are over and the lawyers have stopped talking, these jurors will take over as your client's advocates in the jury room. You want to make sure that these favorable jurors are well armed to fight on your client's behalf. Provide your allies with ammunition by address-

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Tips for an Effective Closing Argument *from previous page*

ing specific evidence and instructions, which they can use to persuade other jurors who take a less favorable view of your case.

Do not merely say, "As the evidence has shown, plaintiff has not proven causation" or "Plaintiff must prevail under the plain language of the contract." This is pure argument without any legal or evidentiary support. Instead, be specific.

> Instruction No. 16 states that plaintiff must prove causation by a preponderance of the evidence. However, as plaintiff's expert, Dr. Mitchell, admitted, plaintiff's slipped disk undoubtedly pre-dated the accident. As you all heard, Dr. Richardson reached the same conclusion.
>
> The contract, Exhibit 23, at page four, reads "defendant will reimburse plaintiff for all costs associated with the development of the property." (Display contract language.) Defendant's CEO, Deborah Smith, admitted during her testimony that defendant did not reimburse plaintiff for $350,000 related to development of the property.

Be specific about how you want supportive jurors to use the information you provide them when they are in the jury room. One way to do this is to tell the jury, "If someone in the jury room says my client should not win because of "x" (he is not seriously injured; she could have avoided the accident) then you tell them "y" (Dr. Jones testified that my client lost 50% of the movement in his right arm; the accident reconstructionist testified that my client was hit by a car going 95 miles per hour and that the accident took place in less than six seconds).

Such concrete examples will allow your advocates in the jury room to fight for your client using specific references to the jury instructions and evidence presented at trial.

Disarm Your Detractors.

Just as you are likely to have jurors who enter closing argument with a favorable view of your case, other jurors might not view your case as favorably. They may be willing and able to go into jury room and attack the weakest points of your client's claims or defenses. For this reason, do not shy away from any perceived weaknesses in your case. Face challenges head on in closing and explain to the jury why they do not prevent your client from winning. If you avoid addressing the opposing party's critiques of your case, it will only help the unfriendly jurors argue against your client in the jury room, and the jurors who favor your client will have little or nothing to say in response.

Of course, as other articles in this newsletter have mentioned, you need to keep the theories of primacy and recency in mind: Jurors are most likely to remember the beginning and end of your closing argument. For that reason, be sure to address any potential weaknesses in your case in the middle of your closing.

Connect with the Jury.

Closing argument is one of the rare times during trial when you, as an attorney, can directly address the jury. Make the most of this opportunity. Talk directly to the jury. Make eye contact. Make your presentation conversational and change your tone from time to time.

Make Movement Meaningful.

Standing still during your presentation is boring, and constant movement is distracting. Try to strike a balance between standing still during closing and wandering about aimlessly by making your movements underscore the points you make.

For example, I once argued in closing that plaintiff's evidence required the jury to take several logical leaps in order to find in plaintiff's favor on one of the elements of his claim. I underscored this by describing the evidence presented, the related jury instruction, and the numerous unsupported inferences – or "steps" – the plaintiff was asking the jury to take to enter a verdict in his favor. Each time I described one of the "steps" the plaintiff was asking the jury to take, I physically took a step. By the end of that section of my closing, I had traveled the entire length of the jury box, and I was able to point back to where I had started to demonstrate to the jurors what an enormous logical leap the plaintiff was asking them make.

Do Not Forget to Rebut in Rebuttal.

If your client has the burden of proof, you will have the opportunity during your rebuttal to have the last word before the jury renders its verdict. Too often, attorneys waste this opportunity by merely restating the arguments they made during their initial closing argument. Don't make this mistake. Instead, use rebuttal to respond to two or three of the specific arguments made during opposing counsel's closing.

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