TRIALS OF THE CENTURY

6 CLE Hours
1 Ethics Hour | 6 Trial Practice Hours

Co-Sponsored By:
General Practice and Trial Law Section
Institute of Continuing Legal Education
The Institute is especially grateful to our outstanding speaker, Todd Winegar, for providing this program.

Also, a special thanks to each of you who are attending this seminar and for whom the program was planned. All of us hope your attendance will be most beneficial as well as enjoyable. Your comments and suggestions are always welcome.

March, 2017

Tangela S. King
Interim Director, ICLE
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Trials of the Century

Todd Winegar
toddw.com
Trials of the Century

Workbook

Trials we remember - the last decade

Was Justice Done?

1. O.J. Simpson  Yes  No
2. Rodney King Officers  Yes  No
3. Erik and Lyle Menendez  Yes  No
4. Woodward Nanny  Yes  No
5. Byron De La Beckwith  Yes  No
6. McDonald's Cup of Coffee  Yes  No
7. William Jefferson Clinton  Yes  No

The One Rule

Read a dozen books on trial, and you'll find a dozen sets of rules. They contradict each other. One set demands aggression, another tells you to be your penitent self. One set of rules is backed with great logic and examples, the contradictory set equally so.

There are few rules in trial which are universally applicable. For every rule there is an exception. Every exception has its own set of exceptions. A fabulous technique with one attorney's personality wreaks havoc for a second attorney. An ironclad rule with one witness is disastrous with another. A wonderful technique in a personal injury trial dumbfounds the jury in
a patent trial.

There is one rule of trial, and one rule only. Think, think and think again. Think it out thoroughly! Think it out with partners. Think it out with lay persons. Think it out with your fifteen year old daughter and your spouse. Think, think, then think again.

GREAT GUIDELINES OF CROSS-EXAMINATION

While there is only one “rule,” there are some great guidelines. Each has its time and place. In fact, they should be disregarded only after careful thought. Without your careful thought and application to the specifics of your case, each great guideline will create trouble at one time or another. Take the great guidelines, then apply the one rule: “Think, Think, then Think again.”

THE O.J. SIMPSON TRIAL - 1995

"GREAT GUIDELINES OF CROSS-EXAMINATION"
(In the order of the O.J. case, not in order of importance or order of use.)

1. Don’t ask why. It gives the witness the opportunity to explain themselves and look reasonable. Of course, if there is a reasonable explanation, that will be brought out on redirect anyway, you should probably not be cross-examining on the subject.

2. Demand detail. You lose with generalities.
   a. Demand Detail. Most witnesses cannot remember detail. Time has eroded the memory. If they make up detail, they get caught in a lie, and witnesses contradict each other. Witnesses tend to estimate, and you can usually show the estimates are wrong. Look particularly for any numbers, times, distances. Take the witness "step by step" through a particular time period or procedure. Cross-examine on non-essentials such as weather, lighting etc. The non-essentials are forgotten more easily.

   b. A good cross seeks specifics. Generalities give the witness "wiggle room" to later change testimony and claim no contradiction; to later claim your arguments are not soundly based on the witness' testimony. Make sure you demand specific times, dates, details - who, when, where, what, why and how.

   c. Detail also works to discredit a witness' testimony. Most witnesses cannot remember most of the details. Showing the witness' inability to remember many details discredits those details the witness does remember.
3. **Control the Witness.**
   Control is: a clear response to your question -
   a. Specific, Clear Answers;
   b. Short Answers;
   c. The Answer Only (don't volunteer).
   d. Methods of controlling the witness:
      i. Demand a specific action (give a short answer, don't volunteer etc.);
      ii. Give a reason for your action (in order to save the court's time, you answered
         your attorney's questions briefly, won't you please do the same for me? etc);
      iii. Graciously persist. (A good witness will battle you constantly for control,
         using slight deviations at first, and increasing the battle until you fight back for control. Persist,
         but always graciously.)
      iv. Sometimes, when the witness has been cooperating, but starts to fight for
         control, if you go back to some obvious questions, and get the witness in the "mode" of giving
         short, direct answers again, you can then go back to the more difficult questions, and the witness
         will cooperate.
      v. This method of control tends to work with a cooperative witness, a scared or
         shy witness, or a witness who needs to look good. For control techniques on a difficult witness,
         see the examination of Herman Goring at Nuremberg, below.

4. **Tie the Answer Down.**
   a. Witnesses will give vague answers, often intentionally. They will avoid the question
      asked, change the subject, give half an answer. It is your job to follow up and tie the answer
      down.

5. **Don’t Give the Witness a Chance to Change a Bad Answer.**
   a. Covering the same ground twice, or trying to reiterate a bad answer to the jury, allows
      the witness to change, or refine, an answer they now realize was poor. Don't give them that
      second chance.

       b. Judgment. Tying the answer down, and not giving the witness a second chance to
          change a bad answer are competing principles. By trying to tie down a decent answer, you give
          the witness a chance to correct. Only good judgment will tell you when you have gone as far as
          the particular witness will go, and it is time to quit. Sometimes, going for re-enforcement makes
          you lose the better answer you had.

6. **Close all escape doors.**
   a. Do not leave "doors" open for the witness to escape. If you are cross-examining on
      what a witness did for fifteen minutes, because he cannot account for the entire time, you close
      the door by asking: "Did you do anything else in those fifteen minutes that you have not yet
described to us?" A "no" answer closes the door.

7. Decide on the correct attitude of your cross examination.
   The attitude in one cross examination may be aggressive, angry the witness is lying. Another may be nonchalant, inferring that the testimony is irrelevant to the case. Only rarely will the attitude be aggressive, showing anger that the witness is lying. When used, strong emotions should be justified, and natural. Don’t aggressively go for the jugular without careful thought. Instead, calmly give the witness the rope needed to hang themselves.

8. Conduct a risk/reward analysis to understand the purpose of this witness' cross-exam.
   a. Before any cross-examination, conduct a risk/reward analysis.
      i. How does this witness' testimony hurt my trial theme?
      ii. How does this witness' testimony help the opposing theme?
      iii. Is the witness lying or merely mistaken (if she is merely mistaken, she may cooperate if you show her the truth)?
      iv. On what points will I win/lose with the jury (even though you may be factually correct, the biases of the jury may compel them to disagree)?
      v. What emotional factors exist (will an aggressive cross of the widow create great sympathy, even if it shows she is exaggerating)?

9. Make a plan of cross examination.
   Before any cross-examination, make a PLAN including:
   a. What critical points will be the focus of the cross;
   b. What subjects will be avoided in the cross.
   c. What order will likely obtain the best results.
   d. What cross-examination techniques will likely obtain the best results.
   e. Example. The purpose of one witness' cross-exam may be to combatively devastate the witness by pointing out consistent lying through contradictions with earlier documents. The purpose of the cross-examination of the next witness may be to de-emphasize the importance of the witness by asking only a few questions, and pointing out the testimony is really irrelevant.

10. Absent compelling new information, focus on your plan of cross-examination.
    a. Cross-examination is a walk through a mine field. The witness is usually trying to hurt you. Make the few points you need, and get out. Wandering needlessly around is dangerous!
    b. Focus on the purpose of the cross. While it sounds obvious, there is a "bulldog" that lives deep within every trial lawyer. Despite our best planning in our calm hours of preparation, we can be sorely tempted to take a bite at stray issues which accidentally arrive, and like the bulldog, once we have our teeth into the stray issue, we are loath to let go. Note however, that a great cross-examination will make expert judgments about these stray issues, and follow a few of them to spectacular results.

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11. **Start the cross on a strong point.**
   a. Impress the jury with a strong point right upfront. It begins with a good impression that the witness is not credible, and makes other points look stronger.
   b. Occasionally, you will want to obtain a few admissions first, while the witness is still cooperative.

12. **Know the probable answer to each question asked.**
   Thorough preparation will allow you to focus the cross on the subjects which emphasize the witness' weaknesses. If you don't know the answer, you're either not prepared, or you shouldn't ask.

13. **Ask only leading questions.**
   a. Avoid open-ended and general questions. They give control to the witness to change the subject, divert attention, and give long answers.
   b. Particularly in critical areas, only leading questions should be used.

**Cross-examination of Ellen Aaronson**

Which "Great Principles of Cross-examination" are violated in Ellen Aaronson's cross? What is the result of violating these principles?

Decide on the correct attitude of your cross examination.
Conduct a risk / reward analysis to understand the purpose of this witness' cross-exam.
Make a plan of cross examination.
Absent compelling new information, focus on your plan of cross-examination.
Start the cross on a strong point.
Know the probable answer to each question asked.
Ask only leading questions.
Have the "goods" to prove the witness wrong.
Don't argue with the witness.
Choose your battles carefully - Win each battle.
Condense your cross to a few critical points.

14. **Have the "goods" to prove the witness wrong.**
   a. If you are going to cross on the witness drinking alcoholic beverages (to argue their memory / judgment was affected), make sure you have "the goods" (COMPELLING EVIDENCE - receipts, documents, contrary testimony, photos, etc.) to show the witness is wrong, or at least cast serious doubt.

15. **Don't argue with the witness.**
   a. Make your factual points and leave the argument for closing.
b. Argument includes: comparing the testimony of one witness with another; or trying to get the witness to say another witness is lying or mistaken; or trying to get the witness to agree with your conclusion, rather than asking questions to elicit facts.

c. If you argue, you will get an objection which is likely to be sustained, and it is a rare witness who will agree with your argument.

d. A commonly used argumentative question is to ask the witness to conclude that any testimony contrary to their own testimony, means the other witness is lying or mistaken. Q. "So if Mr. Thurgood testified the contract was not signed on the day indicated, he would be lying or mistaken?"

16. Choose your battles carefully - Win each battle.

a. Control the bulldog in you. Don't try to fight every battle, contest every issue. Chose those issues critical to the case, and concentrate your energies.

b. Control the subject matter of the cross-examination. If the witness is allowed to chose the subject matter of the cross, they will win big points by picking easy subjects for which they have great answers.

c. You will select the subject matters for which there are no good answers.

d. Make sure the witness is not allowed to change the subject, either by leading you astray or by volunteering additional information not requested by the question.

17. Condense your cross to a few critical points.

Attorneys are tempted to try to score on each possible point. If you have ten "good" points, raising all ten loses the three "best" points in a long cross. Occasionally, numerous points, of near equal value, add up to a large score against the witness' credibility.

Emory Buckner:
- limit cross to the vital points
- unimportant errors, neither help nor hurt either side
- time is consumed, to no purpose
- the cross examiner loses momentum, and the high spots of his case are forgotten
- the best advocate is he who never leaves the turnpike of his case, who is never lured into attractive country roads

18. Ask short, clear, specific, factual questions.

a. Avoid confusing negatives.

b. Avoid using "tags."

c. Short, simple, factual statements are often the best questions.

19. Demand clear, specific answers.

20. Surprise! Great cross-examiners do detailed homework which results in something
unexpected. Witnesses always have more difficulty dealing with the unexpected.

21. **Pounce.** Great cross-examiners nearly always come across unexpected information or nuances that they immediately “pounce” on. It requires “ad libbing,” although great preparation will usually give you help to know which direction to go.

22. **Always end the cross on a strong point.**

**Summary of the Evidence Against O.J.**

Did O.J. do it?
Was justice done?
The trial.

**Demonstration of the Gloves**

As in anything you do in trial, always conduct a risk / reward analysis.
Conducting a Risk / Reward Analysis – the pros and cons for each side.
Reevaluate when you receive new information.
Traits of trial attorneys – be calm under pressure, not goaded on by opposing counsel.

**Cross-examination of Criminalist Dennis Fung**

(By Barry Scheck)

23. **Ask short, specific, factual questions that call for a “yes” answer.** When the witness answers “yes” to question after question, your cross is nearly always going well.

24. **Show the jury you scored:** The unanswerable question, tone of voice, gesture, surprise.

25. **Prepare early, prepare well.** Good cross is seldom impromptu. Prepare from the moment you get a new case. Have a folder you label “cross” and keep notes, ideas, contradictory documents in. As the case progresses, have a folder for each witness. Some good ideas never return a year later at trial

26. **Victory is in the documents!** Most witnesses are willing to at least put a good spin on bad facts. Some are willing to fabricate. Documents are a good indication of what the people were saying and thinking at the time.

27. **Pick your subjects carefully – the ones for which there is no good response.**
Defense Theory of Cross – when the evidence is against you
   Don’t stand still merely defending, go on the offense.
   Put the accusers on trial – attack, demonize (Fuhrman was compared to Hitler).

Three general lines of attack
   – Mistakes (including evidence that could have been gathered but was not)
   – Motives
   – Policy and procedure violations
Then give at least a general theory the jury can use as a plausible excuse
   Dr. Henry Lee re the DNA: “Something’s wrong”

28. Practice the cross. Try different techniques, consider what the witness might say and how you could respond.

How to lose the “no brainer,” “slam dunk” case (per Vincent Bugliosi)

1. Incompetence, lack of credibility of counsel.
2. Prejudice – the “race card.”
3. Celebrity.
4. Venue matters.
5. Failure to follow the advice of the jury consultant.
   I add a sixth:
6. The L.A.P.D. lied on the stand.

SCOPES MONKEY TRIAL - 1925

Great Cross-examination is Goal Oriented

Even good cross is a chase – you can’t read questions from a computer or yellow pad.
   You must adjust each question to fit the last answer
   Instead of reading questions – use theme oriented cross
   Theme – A series of related goals that prove a point
   Goals – Facts and admissions, to support the theme
   Steps – logical steps toward a goal

Darrow’s Theme - You can’t read the Bible literally; You must interpret it, construe it.
Darrow’s Goals – The earth was not created in six literal, 24 hour, days; Joshua did not stop the sun to lengthen the day; All humanity could not have been killed in the flood 4,000 years ago.
Darrow’s cross examination of Bryan in the Scopes case.
A chase between two great minds.
Notice the Great Guidelines of Cross-examination are followed here.

THE LINDBERGH KIDNAPPING – 1935

Cross-examination Style
The cross-examination of Richard Hauptmann
The prosecution’s cross examination style-
Aggressive – it works well when the facts are on your side, and you can prove the witness is lying.
Dramatic (addresses the emotional points, such as lying; strong voice laden with emotion; large gestures, pointing an accusing finger at the witness) – it keeps the attention of the jury, and emphasizes key points.
Sometimes, the prosecution simply tells its side of the story, and really does not care what the witness answers. Because the witness has lied consistently, the jury will believe the prosecutor’s assertion in the question, not the witness’s answer.
The prosecutor has the goods – he is prepared with prior statements which showed Hauptmann lied.
Notice, of course, the prosecutor has no notes he is reading from.

Some of the questions are clearly objectionable, and probably should have been objected to. For example, compound questions – ‘You lied to the police, you lied to the attorneys, you lied to the grand jury!’

Emory Buckner:
- in some cases "annihilating" cross examination is open to the humblest;
- exhaustive preparation arms you with the right document;
- Cases are often won or lost with a single sheet of paper;
- in most cases, however, the lawyer must grapple with strong, bare hands against the forces of perjury, partisanship, or cunning;
- This requires the highest skill which manifests itself differently with every lawyer, with every case, and indeed with every witness.”

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ALGER HISS – STATESMAN OR SPY?
THE ETHICS OF RAMBO LITIGATION TACTICS
AND DEALING WITH DIFFICULT COUNSEL
(and witnesses and clients)

I. ETHICS – THE ALGER HISS TRIAL. Litigation as a game.

II. “RAMBO TACTICS” - McLoud v. Quarles, 894 F.2d 1482 (5th Cir. 1990).
   A. Abusive tactics: “…from lack of civility to outright hostility and obstructionism.”
   B. “The lawyers who use abusive tactics, instead of being part of the solution, have become part of the problem.”

III. AVOID DIFFICULT SITUATIONS – The best way to deal with most difficult attorneys.
   A. Start the case off with a good tone.
      1. Recent Survey: 80 percent of attorneys prefer cooperative litigation, if the opposing side will cooperate also.
   B. Get to know counsel. Deal with them socially.
      1. Deal personally:
         a. Phone calls;
         b. Meetings;
         c. Not just letters and briefs.
   C. When civility deteriorates - Make “The call.” 80 percent will reciprocate given the proper chance.
   D. Officers of the Court - Hamilton: “Responsible Opposition.”
   E. The Legal Community’s Tolerance:
      a. (New York City v. Rural North Carolina)
      b. Practice eventually degrades to where the court or bar steps in.
      1. Rambo Tactic - Boiler Pate Objections to Legitimate Discovery Requests.
      2. General “boiler plate” objections, without specific references to evidence, are sanctionable.
      3. M.R.P.C. 3.4(): “[A lawyer shall not:] Make a frivolous discovery request or fail to make reasonable diligent effort to comply with a legally proper discovery request by an opposing party.”
      4. A judge’s sanctions can be creative - personally research and submit for publication a article on the ethical rule you breached.

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1. “TREAT OTHERS (INCLUDING LAWYERS, PARTIES, WITNESSES AND COURT STAFF) AS YOU WOULD LIKE TO BE TREATED.”
   a. Goal: Fair, peaceable and efficient resolution of disputes, and to seek the truth.
   b. Best interest of clients to bring litigation to a close.
   c. Easier to abide by the rule by occasionally breaking bread with one’s adversary.

2. Penalties for breaking “The Rule.”
   a. Loss of respect and good will of colleagues.
   b. Less enjoyment of practice of law.
   c. Donations to charities.
   d. Court sanctions.

H. An active judge is important.

1. A small percentage will do anything to win unless stopped.
2. A significant percentage will reciprocate to avoid losing.

I. Harlan v. Lewis example.

1. Rambo Tactic - Infer to a Witness That They Should Not Cooperate to Give Relevant Testimony or Evidence.
2. “Attempting to restrict the flow of relevant information by implanting implied threats in the minds of potential witnesses.”
3. M.R.P.C. 3.4(f): “[A lawyer shall not:] Request a person other than a client to refrain from voluntarily giving relevant information to another party . . .”
4. The Federal Court’s Inherent Ethical Power: “A district court judge must have the power to deal with conduct of attorneys in litigation, without delegating this responsibility to state disciplinary mechanisms.”
   a. See M.R.P.C. 8.5, Disciplinary Authority; Choice of Law. A lawyer is always subject to discipline where the lawyer is licensed, no matter where the misconduct occurs, and may be subject to other jurisdictions where admitted, or where the conduct occurs-for the same conduct.

IV. DEALING WITH THE DIFFICULT ATTORNEY

A. Two general types of attorneys- Gerald Williams, Legal Negotiation and Settlement, West (Context of Negotiating).

B. TYPE A - Aggressive (40% of attorneys).
   1. Dominating, forceful, aggressive, clever, views as a game:
a. Use ridicule, intimidation, criticism;
b. Intimidate, exploit, create mistrust;
c. Attack opposition to divert attention;
d. Exaggerate very effectively;
e. Generate tension, misunderstanding.

2. Type B - Cooperative (60% of attorneys):
a. Courteous, personable, tactful, truly sincere;
b. Establish open, trusting relationship;
c. Show good faith;
d. Open and fair, believe opponents will reciprocate;
e. Do not exaggerate very sincerely.

C. Most Effective Attorneys:
1. Are Prepared: most important characteristic;
2. Perceptive - skilled at reading cues sent by opponent;
3. Reasonable, realistic, convincing;

D. BOTH TYPE “A” AND “B” HAVE INEFFECTIVE ATTORNEYS
1. TYPE “A” - Aggressive ineffectives:
a. Irritate and bluff;
b. Use toughness as substitute for preparation.
2. Type “B” - Co-operative ineffectives:
a. Too cooperative;
b. Want to be friends;
c. Too trusting.

E. Optimal Style - Master both:
1. Use when appropriate;
2. Blend best characteristics of both.
a. Cooperative, trustworthy, yet tough.

F. Dealing with Different Types of Difficult Attorneys.
1. The Situational S.O.B.
a) Can be: mean, abrasive, manipulative.
b) Reacting to having been in litigation against real S.O.B.’s.
c) Don’t reciprocate or escalate, they have a cooperative side.
d) Establish a personal relationship.
   (1) Show trust, and expect it.
2. The A-hole.
a) Can be:
   (1) Sarcastic;
   (2) Abrasive;
b) Make mountainous problems from molehills.
c) They do themselves more harm than anyone else.
d) To deal with the A-hole:
   (1) Hold your temper. Otherwise you’ll both get sanctioned.
   (2) Practice patience. Don’t get in a pissing contest with a skunk.
   (3) Be kind. No one else is.

3. The Incompetent.
   a) Responds late or not at all.
   b) Makes claims without facts or law.
   c) Whines and argues endlessly.
   d) To deal with the incompetent:
      (1) Document the delays;
      (2) Insist on facts and law behind claims;
      (3) Start early on everything.

4. The Game Player.
   a. Wants to win, at any cost.
   b. Usually smart, technical, aggressive.
   c. Doesn’t care about “reputation,” because to them, “reputation” means winning.
   d. Dealing with the “Game Player.”
      (1) Do your best work - they will interpret laxity as a weakness to target.
      (2) *Quid Pro Quo* - meet their toughness.
      (3) React sternly to any disregard of rules or breaches of legal etiquette.

5. The True S.O.B.
   a. Can be rude and sarcastic to the extreme.
   b. Openly disregards rules.
      (1) Blames you for their disregard of rules.
   c. Generally have to be good, everyone is gunning for them.
   d. Have a cooperative face they put on for the judge.
   e. Dealing with the True S.O.B.
      (1) Politely, calmly set the rules.
         (a) Be specific about what conduct is inappropriate - Abusive language, yelling, heavy sarcasm will not be tolerated.
         (b) Indicate the court will be contacted.
      (2) Document the incidents. In depositions, make sure the court reporter has a tape recorder so the tone of voice, volume etc. will be available for the court.
      (3) Contact the court when appropriate, or your threats become idle.
V. DEFUSING DIFFICULT SITUATIONS.
A. Don’t over react. Particularly if:
1. The situation is unusual - counsel is usually well behaved;
2. There is no tactical advantage being sought or lost;
3. Opposing counsel appears to have temporarily “lost it.”
B. Escalation is easy. Your over-reaction, or even reciprocation, can raise the
playing field to a new level of “hardball.”
C. Evaluate why it is happening.
1. What is counsel’s personality, reputation?
2. Is there an identifiable reason - new information just came out that changes case evaluations?
3. Is there a tactical advantage, short or long term, that is being sought with the action and will be won or lost depending upon your reaction? If there is nothing won or lost, react with the lowest possible response.
D. Sometimes, the best approach is to “grin and bear” it. Counsel may be abrasive, lack social skills, but it is not affecting the case, and you’re returning the irritation will just escalate the matter. Just feel sorry for the poor attorney.
E. Evaluate your response. If you have a win/lose counsel who will evaluate your low level response as a weakness to be exploited, you have to give a strong response.
F. Plan it out, do it in a responsible manner.
1. Document what is happening, in letters, or on a deposition.
2. If there are multiple counsel in the case, involve others.
G. Example.
1. Sarcastic, demeaning attitude during depositions is irritating clients and counsel, intimidating witnesses.
2. Make sure the court reporter is tape recording the deposition, not just making a transcript. Make sure the court reporter saves the tape - or have the depositions video taped. Make sure you have a record the judge can review herself, rather than hearing mere opposing characterizations of the record by counsel.
3. Make it clear to opposing counsel what specific acts are occurring, that they are not appropriate, and will not be tolerated. Begin low key, but firmly, in a non-combative or threatening way (you’re being recorded also) to list actions you will take if opposing counsel does not cease.
4. If the acts do not stop, gradually raise the level of sternness, still using calmness in attitude and voice.
a. You might point out that the acts continue despite earlier protestations.
b. Then point out that the actions have a tactical effect on the case,
and are unethical, unfair etc. Make sure you have a clear record.

c. Unless a single act is very egregious, most judges will not sanction an attorney for random acts. However, with some counsel, and the right judge, a prompt and stern reaction to a single act may end the problem.

d. Take a break, let heads cool down.

e. Take action.
   (1) Call the judge.
   (2) Adjourn the deposition, file a motion.

f. Make sure your actions are well thought out and prepared. If you are going to threaten to call the judge, have a couple of specific cases, rules, or ethical points to argue. Also have the court reporter ready to read the egregious portions of the record.

   g. Follow thru on your well prepared threats if the actions don’t cease. If you have made a good record, patiently warned counsel, and have the authority to back you up, most judges will take dim view of unprofessional tactics. If you do not follow up, the warnings will have less effect the next time.

H. *Cholfin v. Gordon* example.

1. Rambo Tactic - Sarcasm and Personal Attacks.

2. Language is sanctionable - “fool,” “liar,” “scumball,” “son-of-a-bitch.”

3. Your responsibility when faced with disruptive conduct: “to terminate the deposition and to seek judicial intervention, not to engage in retaliatory strikes.”

4. M.R.P.C. 4.4 Respect For Rights Of Third Persons: “...a lawyer shall not use means that have no purpose other than to embarrass, delay, or burden a third person. . .”

5. See also M.R.P.C. 8.4(b) “...engage in conduct that is prejudicial to the administration of justice.”

6. See also M.R.P.C. Preamble: “A lawyer should demonstrate respect for the legal system and for those who serve it . . .”

7. Control your emotions and your tongue. Deal with facts, not personal attacks. “Objection, the question is vague and lacks foundation,” not “That’s the stupidest question I’ve ever heard.”

VI. ETHICAL CONSIDERATIONS RE INTIMIDATION OF WITNESS AND COACHING OF WITNESSES.

A. *Paramount v. QVC* example.

1. Rambo Tactic - Intimidation of Witness or Counsel in Depositions.

   a. Sanctions available for extreme rudeness – “You could gag a maggot off a meat wagon.”
b. M.R.P.C. 4.4 Respect For Rights Of Third Persons: “. . . a lawyer shall not use means that have no purpose other than to embarrass, delay, or burden a third person . . .”

c. See also M.R.P.C. 8.4(b) “. . . engage in conduct that is prejudicial to the administration of justice.”

d. See also M.R.P.C. Preamble: “A lawyer should demonstrate respect for the legal system and for those who serve it . . .”

2. Rambo Tactic - Coaching the Witness in Depositions Through Use of Objections and Comments.

a. F.R.C.P. 30(c)(2) was changed “. . . to clarify the terms regarding behavior during depositions.” That is:

   (1) To stop objections which coach witnesses, argue with counsel and generally disrupt depositions.
   (2) Now – “An objection MUST be stated concisely and in a non-argumentative and non-suggestive manner.”

b. Example of coaching witness.

   (1) Attorney: “Objection, he already stated that he never discussed that with her at any time.”
   (2) Witness: “I never discussed that with her at any time.”

c. Example of coaching witness.

   (1) Attorney: “I object, she shouldn’t be required to answer that without reviewing Exhibit 34.”
   (2) Witness: “I’d like to refresh my memory of Exhibit 34 before responding.”

d. Example of coaching witness.

   (1) Attorney: “Objection, lacks foundation, answer if you can.”
   (2) Witness: “I don’t know.”

e. Examples of proper objection:

   (1) “Objection, the question is vague as to time.”
   (2) “I object, the question lacks foundation.”

f. Coaching a witness through objections is unethical because you cannot violate rules of procedure.

   (1) M.R.P.C. 3.4(c): “[A lawyer shall not:] knowingly disobey . . . a obligation under the rules of a tribunal. . .”
   (2) See also comment to M.R.P.C. 3.4.
   (3) See also M.R.P.C. 3.5(c): “[A lawyer shall not:] engage in conduct intended to disrupt a tribunal.”

3. F.R.C.P. 30(d)(1) limits a deposition to one day of seven hours unless enlarged by stipulation of the parties or court order, based on good cause.

   a. Good cause could include the necessity of:
an interpreter, lengthy documents (but the documents should be given to the deponent in advance of the deposition so they can be read, and if not read, may be cause for enlarging the deposition), multiple parties (but the parties should designate one attorney to question about common issues, and avoid duplicative questioning), or expert witnesses.

4. Rambo Tactic - Instructing The Witness Not To Answer in Depositions.
   a. Appropriate under the federal rules on two occasions only.
      (1) Claim of Privilege (State law generally governs, even in federal court):
          (a) Attorney / Client;
          (b) Priest / Penitent etc.
          (c) The examiner may still inquire into the basis of the privilege, to be able to assure it exists, or to contest it:
              i) When and how att. / client relation was established;
              ii) Circumstances of communication;
              iii) Date, were others present, etc.
      (2) A Court Order that the question not be answered.
          (a) Already entered; or
          (b) You may instruct not to answer, then recess depo to seek an order by bringing a motion to limit under Rule 30(d)(4).
              i) Rule 30(d)(3)(A) states a depo can’t be conducted:
                  a) In bad faith; or
                  b) In a manner that unreasonably annoys, embarrasses, or oppresses the deponent or party.
          (c) Common bases for the court order (where not relevant):
              i) Trade secrets;
              ii) Non relevant financial data;
              iii) Personal life (sexual, morals);
              iv) Manner of deposition is demeaning or sarcastic.
          (d) Likely court actions:
              i) Terminate the deposition;
ii) Limit scope and manner.

iii) Appoint a special master to preside at the deposition.

(3) Instructing a witness not to answer, without a basis in the rules (for example, so you can first review documents, to prepare the witness to better answer the questions, because you are surprised etc.) is unethical because you cannot knowingly violate a rule of procedure.

(4) M.R.P.C. 3.4(d): “[A lawyer shall not:] knowingly disobey . . . an obligation under the rules of a tribunal. . . .”

(5) See also comment to M.R.P.C. 3.4.

VII. RAMBO TACTIC - MISREPRESENTING YOUR POSITION OR A CASE HOLDING.

A. Caldera v. Microsoft example.

1. Counsel have found many judges do not have time to read the cases cited in legal memoranda.

2. Many judges make decisions based on the memoranda.

3. An overstatement of a case holding, the case facts, or even a misrepresentation can win a crucial motion - there is a growing tendency to overstate or even misrepresent.

4. M.R.P.C. 3.3: “[A lawyer shall not knowingly] make a false statement of fact or law to a tribunal.”

5. See also comment [2] to M.R.P.C. 3.3: “An assertion purporting to be on the lawyers own knowledge, as in . . . a statement in open court, may properly be made only when the lawyer knows the assertion is true, or believes it to be true on the basis of a reasonably diligent inquiry.”

6. See also the comment to M.R.P.C. 3.3 “Misleading Legal Argument; Legal argument based on a knowingly false representation of law constitutes dishonesty toward the tribunal.”

7. The court is entitled to more than a lack of misrepresentation, and good advocacy will go further - it will be fair.

8. “The court is entitled to a fair statement of the facts from attorneys . . . not an exaggerated, self-serving version . . . or an omission of crucial facts. When the court finds that it cannot rely upon the statement of a lawyer, the lawyer has lost his effectiveness with the court and has, therefore, in fact injured his client.” Comments on the Model Rules of Professional Conduct.

VIII. RAMBO TACTIC - Rudeness, Lack of Civility, Lack of Respect

A. IN RE SNYDER EXAMPLE -

1. “The necessity for civility in the inherently contentious setting of the
adversary process . . .” United States Supreme Court.

2. Failure to show respect to the court was “Conduct unbecoming a member of the bar” and resulted in suspension. Eighth Circuit Court of Appeals.

3. Ethical considerations of an attorney’s conduct can reach beyond the black and white of the ethical rules.
   1. See A.B.A. Model Rules of Professional Conduct (M.R.P.C.) 8.4(d): “[It is professional misconduct for a lawyer to:] engage in conduct that is prejudicial to the administration of justice.”
   2. See also M.R.P.C. Preamble: “A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers . . .”
   3. See also M.R.P.C. Preamble: “The Rules do not, however, exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules.”

NUREMBERG WAR TRIALS - 1946

The cross-examination of Reich Marshall Herman Goring, by United States Supreme Court Justice Robert H. Jackson.

Dealing with the difficult witness.

1. Establish Control Early.
   The difficult witness will go as far as allowed.
   If you begin soft, it is hard to get control back.

2. Control is:
   A short, relevant response
   No Volunteering - Change the Subject
   No Long Answers - Hide the Hurt
   Any Explanation is Brief and to the Point

3. Maintain Control
   a. Your #1 MEANS OF CONTROL is Your Questions!
      You can’t object to an answer to your own question.
      Your questions are the reins with which you can guide the witness where you have planned to go.
      Keep the reins tight in the witness’ mouth by asking great questions.
Prepare according to your witness.
The more difficult the witness, the better your questions have to be.

ASKING CLEAR QUESTIONS.
1. AVOID NEGATIVES.
"That is true, is it not?"
"You did do that, is that not correct?"
"It wasn't red, was it?"
2. NO "CRUTCHES."
Crutches invite misunderstanding
   “Isn't it true that . . .”
   “Is it correct that . . .”
Tags:
   “. . . right”
   “do you?”
   “yes or no?”
3. NO VAGUE QUESTIONS.
Vague Questions Invite
   Vague Answers
   Explanations
4. NO GENERAL QUESTIONS.
General questions invite
   Long explanations
   Rephrase the question
5. NO LONG QUESTIONS.
Long questions invite
   Long Answers
   Misunderstanding
6. NO THEORETICAL QUESTIONS.
Theoretical questions invite
   Long Answers
   Theoretical Discussions
7. NO SLANTED QUESTIONS.
Slanted questions invite
   Contradictions
   Explanations
8. NO COMPOUND QUESTIONS.
Compound questions invite
   Misunderstanding
   Objections
9. NO ARGUMENTATIVE QUESTIONS.
Argumentative questions invite arguments and objections.

10. SIMPLE STATEMENTS are good questions.

b. Your #2 MEANS OF CONTROL IS SUBJECT MATTER

If Goring is allowed to choose the subject matter, either by volunteering or because you did not think out the subject matter carefully, he will discuss the revamping of the German economy, the successes of the Luftwaffe. Your control will focus on his establishing the concentration camps, his contribution to the "final solution."

4. IF WITNESS TRIES TO CONTROL

By: Volunteering in order to Change the Subject
   Giving Vague Answers
   Giving Long Answers
   Giving Non-responsive Answers

MEANS OF RE-GAINING CONTROL

1. REPEAT THE QUESTION.
   Simply repeat the same simple question until you get a direct answer.
   The jury will understand the witness is not cooperating.

2. Please ANSWER "YES" OR "NO" if you can.
   Use when laying the foundation for a sensitive subject. While this method frequently works generally, the difficult witness will look for the opportunity to make you look like the "Gestapo."

3. INTERRUPT.
   Use with caution also.
   Pick a long, off-subject answer that the judge and jury will surely recognize as being unfair. Your interruption then appears fair.

4. SCOLD!
   Use with great caution.
   But occasionally, if the rules have been clearly laid out, and the witness continues to ignore them, a little scolding may be warranted.

5. APPEAL TO COURT.
   This is usually a last resort.
   It acknowledges that you need help.
   Know the judge - some insist on tight questions and answers, others do not
   Pick a GOOD point, on which the judge will sustain you
   If you lose, your control is further diminished.
“More cross-examinations are suicidal than homicidal.”
Excerpts from *Uses and Abuses of Cross-examination*, by Emory Buckner

Two reasons-
1. Misconception as to the function of cross-examination.
2. Misconception as to the technique of cross-examination.

The function of cross-examination-to find the truth, but only on critical points. “The witness makes an important error. The truth, if developed, will neither help nor hurt either side. Time is consumed, the cross-examiner has lost momentum, the high spots of his case are forgotten.”

Technique:
“Except in where the circumstances make it wholly natural, there should be no place in cross-examination for indignation, shouting, belligerent hospitality. A kindly voice and courtesy dig a better trap than high blood pressure.”

“The adroit cross-examiner will endeavor to have the witness destroy himself, keeping his own co-operation in the destruction well in the background.”

“Cross-examination is a combat, and therefore always interesting.”

**L.A. TIMES BOMBING - 1911**
Jim and J.J. McNamera

The *L.A. Times* / bribery closing argument is generally regarded as the best closing argument of Darrow’s illustrious career. He incorporates his favorite arguments into a compelling closing.

**Darrow's Favorite Arguments**

Clarence Darrow used these arguments in nearly every case he argued. The passage of time has not eroded their effectiveness. Most arguments you make should include these. These, and many more arguments, are contained in the “Closing Argument” section of your *Ultimate Trial Notebook*.

1. **Framing the issues** - this is a case about______, not a case about_________!
2. **White hats / black hats** - we presume consistency - a “good” person will not do a bad thing without a good reason.
3. **Sarcasm and humor** - great, but use with care.

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4. **Personalization** - making it hit home by putting the jury in the client's shoes.
5. **Apparent neutrality** - we judge an argument by its source.
6. **Flattery** gets you everywhere.
8. **Face the hard facts** - Admit the inevitable, deal with the tough issues.

**CLINTON IMPEACHMENT - 1999**

Senator Dale Bumpers (Democrat, Arkansas) was chosen by President Clinton as the “closer,” probably the most important position. Senator Bumpers was likely chosen because he had just retired from the Senate, and knew each person in the audience; he had their respect, and could speak to those issues that were important to them.

Note the use of the Darrow’s favorite arguments by Senator Bumpers, with a 21st century spin. These arguments are powerful, and should be used by your in most cases, in one form or another.

**LEARNING FROM THE TRIALS OF THE CENTURY**
The Ultimate
TRIAL
NOTEBOOK

Todd S. Winegar
The Ultimate Trial Notebook

Introduction

When I was in law school, a professor said trial was so complex that no one could remember everything necessary for success. He described a "trial notebook" and suggested that we start one immediately to record lessons learned and ideas to use in trial. We could then review the information shortly before trial and have it fresh in our minds. Wanting to be a trial attorney, I began compiling my trial notebook. In my trial advocacy classes and my moot court arguments I wrote down observations on advocacy, persuasion, cross-examination, and more.

Upon graduation, my moot court professor told me that I should work for the government for a year after law school, since "it is the only one foolish enough to allow new attorneys to try cases." He told me actual trial experience would be invaluable, and arranged for job interviews. I took a government job for 15 months, averaging a couple of trials each month. My trial notebook went with me. After each trial, I wrote down new techniques of direct examination, insights gained from interviews with jurors. I saw many additional trials of other attorneys, and built the trial notebook up with my notes of their strengths and weaknesses. Whenever I observed an effective technique, it went into my trial notebook.

Over the years, my trial notebook became a tremendous asset. After I constructed a direct examination for my next trial, I would open the direct examination portion of my trial notebook, and in 10 minutes I would draw on a wealth of information, observations and lessons I had learned, but frequently forgot during the moments I was putting the direct examination together. As a result of my trial notebook, I was a much better advocate, and obtained better results.

How to use this trial notebook

Much of the basic work of this trial notebook has been done for you. However, variations in practice and attorney's personalities and styles make it necessary, if the notebook is to become an invaluable tool for you, that you customize it for your specific practice and personality. A trial notebook is constantly changing with your practice, your learning, and with the law. Next time you sit down to prepare for a cross-examination I suggest you do it in the following manner.

1. Construct the cross-examination together, without the aid of any documents. This is your brainstorming session: New ideas, thoughts, and strategies without the forced structure of outside materials.

2. Go through your case materials carefully. Review notes which you've made over the course of discovery and placed in the file of this particular witness, the responses to interrogatories on both sides, the depositions, the pleadings. Add additional areas of questioning and strategy based on this review.
3. Bring out your Ultimate Trial Notebook. Use the cross-examination checklist to remind yourself of the many techniques and strategies of cross-examination. Further add to and refine your cross-examination outline based on the cross-examination checklist.

4. Organize the cross-examination. Order of the subjects is important.

5. Let your outline sit a few days, then review it again before using it.

6. After the cross-examination is over, go back to the cross-examination section of this notebook, and record your observations - What worked for you, what didn't work, and why. Make notes of what did you learned from this and other cross-examinations by other attorneys in the trial.

7. If you learn a lesson about cross-examination over lunch one day, take a minute to write it down in your trial notebook.

If you will consistently add your own comments to this notebook, over the years you will have no better trial preparation asset.
1. **PRETRIAL**

   Pretrial Order Checklist
   Writing Checklist
   Trial Folders Headings (Medium Case)
   Trial Folders (Small Case)
   Negotiating Form
   Case Summary
   Deposition Index First Page
   Deposition Index
   Witness Checklist
   Trial Countdown
PRETRIAL ORDER CHECKLIST

A pretrial order is usually entered by the court under Federal Rule of Civil Procedure 16. The following is a checklist of items to be considered for agreement by counsel, or to have the court rule on and become part of the pretrial order. Also included are housekeeping matters that, while not part of the pretrial order, are necessary to resolve before trial.

1. **JURISDICTION.**
   a. Stipulate to jurisdiction.
   b. Or have the court rule that jurisdiction is present.

2. **VENUE.** Venue is not disputed or determined by the court to be proper.

3. **GENERAL NATURE OF THE CLAIMS OF THE PARTIES.**
   a. Plaintiff's claims.
   b. All other party's claims.
   c. Default of non-appearing parties.

4. **UNCONTROVERTED FACTS** are established by admissions, pleadings, or by stipulations of counsel.

5. **CONTESTED ISSUES OF FACT** remaining for trial are defined in the pretrial order.
   [Work hard with these statements of fact to narrow the issues at trial. The time spent now will save much more later and will decrease your chances of being surprised.]

6. **CONTESTED ISSUES OF LAW** are defined or reserved.

7. **AMENDMENTS TO PLEADINGS.** Determine whether amendments to the pleadings are requested and whether they will be allowed.

8. **DISCOVERY.** Determine whether all discovery has been completed. If not:
   a. What additional discovery will be allowed;
   b. When must it be completed.

9. **REQUESTS FOR JURY INSTRUCTIONS.**
   a. Review local rules for the submission date, and vary only by court order.
   b. Determine the procedure for submitting additional instructions during trial on items not reasonably anticipated prior to trial.
   c. Does the judge have a stock set of instructions she uses?
   d. Do counsel meet and agree on as many instructions as possible?
   e. Will the judge submit the case to the jury on a general verdict or on a special verdict form? If a special verdict form will be used, when will the form be
determined?

10. **THE JURY.**
   a. Will all issues be submitted to the jury?
   b. Identify the number and order of peremptory challenges, particularly in multiple party cases.
   c. Consider stipulations that no juror be required to travel more than xx miles to the courthouse.
   d. Will a juror questionnaire be used to shorten *voir dire*? If so, agree on the details of whether counsel will meet and agree on a form, when the questionnaire will be submitted to the judge for approval and when the jury will fill it out.
   e. When will the names and biographical information on the jurors be available to counsel?
   f. Will pre-instructions (general instructions about the law, given at the beginning of the case) be given to the jury? If so, the details on working the instructions out between counsel and when they will be submitted to the court. (Encourage pretrial instructions. They give the jury a framework of the law that aids in understanding which facts are important.)

11. **JURY VOIR DIRE PROCEDURE.**
   a. When are the *voir dire* requests due (check local rules)?
   b. Will the judge conduct the *voir dire*, and to what extent (i.e. follow-up questions) will counsel participate?
   c. Does the judge have a standard set of *voir dire* questions?
   d. Will counsel meet to agree on as much *voir dire* as possible?
   e. Under what circumstances may counsel supplement requests for *voir dire* examination?
   f. To what extent does the judge allow counsel to deal with case facts in *voir dire*? (This is often best discovered in conversations with counsel who have experience before the judge. Some judges allow attorneys to pre-condition the jury to the facts of the case in *voir dire*. If the judge allows it and only one side does it, that side gains an advantage.)

12. **EXHIBITS.**
   a. When will proposed exhibits be identified?
   b. When will exhibits be exchanged?
   c. When will exhibits be marked?
      i. How will exhibits be labeled (Plaintiff 1; Defendant A; name of party etc.)?
      ii. Will exhibits offered by both parties be designated as joint exhibits?
   d. When must objections to exhibits be filed?
   e. Will objections to exhibits be resolved before trial? (If not, arrange to exchange
exhibits that will be used in opening statements, and address with the court any exhibits that are disputed.)

f. Absent an objection, will all of the exhibits be stipulated or ruled as authentic, subject to objections at trial as to their relevancy?

g. Will potential exhibits be kept with the court? If so, the court should enter an order allowing the exhibits to be signed out of the clerk's office, to be returned within a reasonable time, and to be available for inspection by all parties.

h. Determine the circumstances under which other exhibits may be offered if their necessity could not be reasonably anticipated (usually submitted to opposing counsel as soon as known, but not less than ___ days prior to use.)

i. In some document intensive cases, the parties are required to disclose which exhibits they will use 24 or 48 hours in advance.

13. **WITNESSES.**

a. Identify, in the absence of reasonable notice to opposing counsel to the contrary, which witnesses each party:
   i. Will call;
   ii. May call;
   iii. Will be called by deposition.

   (1) When must the party offering a deposition designate the portions of the deposition it will read (usually 1 to 2 trial days prior)?
   (2) When must the other parties designate additional questions to be read?
   (3) Will each party read the questions they have designated, or will each party read the questions they actually asked during the deposition?
   (4) Will objections made during the deposition be read and ruled on in open court, or will they be resolved beforehand?
   (5) Determine who will read each deposition for the witness. (You want a very personable reader for your depositions.)

b. Agree or rule on the disclosure by each party of the order of witnesses they will call, usually disclosed 1 or 2 trial days in advance.

c. Stipulations regarding subpoenaed witnesses. Can they come to trial, then be excused upon leaving home, business and cell phone numbers with the court, and remain under court order to appear upon 2 days notice?

d. Determine the scheduling of witnesses, particularly experts. Often witnesses, particularly experts, have restricted schedules, and must travel from out of town to testify. A fixed date, or at least a range of dates, must be agreed or ruled upon for their testimony, even if they must be taken out of order.

e. Determine the circumstances under which non-identified witnesses, whose use could not be reasonably anticipated, may be called at trial. (Usually a statement of their names, addresses, and subject matter of their testimony is served upon opposing counsel and filed with the court at least ___ days prior to trial or their
being called.) This restriction usually does not apply to rebuttal witnesses whose testimony could not reasonably be anticipated before trial.

14. **DEPOSITIONS.** Assure that all depositions in the case are filed with the court, have all exhibits, and that the court publishes the depositions so that they can be used in court. If there are disputes about the use of any deposition, address it now.

15. **PRETRIAL MOTIONS.** (Motions in limine, partial summary judgment, evidentiary motions, or motions of any other description.)
   a. When must they be filed?
   b. When are responses and replies due?
   c. When will the motions be heard by the court?

16. **TRIAL.**
   a. Date the trial will begin.
   b. The estimated length of the trial is____ trial days.
   c. What time will the trial days begin, break, and end? Does the judge use one day a week for law and motion, etc.?
   d. Will the court restrict counsel to a fixed number of trial days, and if so, how will the days be divided among the parties?
   e. Will the judge set limitations of time on:
      i. opening argument;
      ii. closing argument;
      iii. other restrictions?

17. **PHYSICAL ARRANGEMENTS IN THE COURT ROOM.**
   a. Seating of clients and counsel.
   b. Equipment location visible to all.
      i. Will counsel share an over-head projector, Elmo, LCD projector.
      ii. Video equipment.
      iii. Projection Screen.
      iv. Easel, markers, paper.
      v. Other equipment.
   c. Display of models, charts, etc.
   d. File cabinets / storage for the court and counsel.
   e. Security of records and equipment during weekends, non-trial days.

18. **HIGH PUBLICITY CASES.**
   a. Warnings to the jury about media coverage.
   b. Jury questionnaire about pretrial information, attitudes.
   c. Limits on counsel’s disclosures to the media.
   d. Possible sequestration of the jury.
   e. Reserved seating for parties, families, media, and lottery for the public.
f. Other similar issues to be resolved.

19. **PRETRIAL ORDER.**
   a. Who will draft the proposed order?
   b. When must the draft be submitted to counsel?
   c. By what date must objections be filed?
   d. When will the objections be resolved and the pretrial order signed and entered?

20. **OTHER MATTERS REGARDING THIS COURT.**

21. **OTHER MATTERS REGARDING THIS CASE.**

22. **POSSIBILITY OF SETTLEMENT.**
   Does the court require, or do the parties want to have, settlement conferences, mediation, etc.? If so, schedule the conferences before the bulk of the trial preparation must be completed.
WRITING CHECKLIST

Writing is careful, organized thinking. Poor writing irritates the reader (often a judge),
great writing persuades and changes case outcomes. Most poor writing is done too quickly, or
by not following accepted writing rules. This outline walks you through the process. Remember
Hemingway rewrote the last page of *A Farewell to Arms* thirty-nine times, in order “to get the
words right.” Few of us are as good as Hemingway, and it may take us more drafts.

1. BRAINSTORM.
   a. What are the strengths and weaknesses of each side?
   b. What emotional factors on each side might make it difficult to consider the matter
      without bias?
   c. What might make the judge, jury or counsel want to rule for one side or the other?
   d. What are the critical points upon which the matter turns?
   e. What specific examples or stories bring the issues to life?
   f. What are the stakes of winning or losing and how can you illustrate them?
   g. What reasons or arguments support both sides of the issues?
   h. What will opposing counsel argue and why?
   i. How can you meet those arguments or defuse them?

FIRST DRAFT
a. Outline it.
   i. How do the parts relate to each other and the whole?
   ii. What is the core idea/contention?
   iii. What is relevant and what is not? Delete (move to the end of your word
        processor rather than erase) everything that is not central to the core
        theme.
   iv. What ideas/contentions support the core and how?

b. Organize by time, subject, or other association.

c. Write it out.
   i. Circle important words - what is the main idea being expressed?
   ii. Choose KEY WORDS. Repeat the same key words - Don’t, without good
       reason, use several synonyms (there are few true synonyms).

d. Test your case theory against the facts. Look for discrepancies, other options.

e. Develop a theory which explains all the evidence, or at least most of it.

f. With the theory in mind, finish the draft by reorganizing and simplifying.

2. REDRAFT
The object is to simplify, clarify, and make it come alive. Simplification is hard work.

Theodore Cheney, in his excellent book, Getting the Words Right: How to Revise, Edit & Rewrite, suggests the following three-step process.

a. “REVISION BY REDUCTION”
   i. Shorten or remove entire sections “…which, however good, don’t ‘move the piece forward.’”
   ii. Shorten sentences. Remove superfluous, ineffective, or redundant sentences and words.”
   iii. “Replace longer words with shorter ones.”

b. “RETHINK AND REARRANGE”
   i. Unity
      (1) Consistent verb tense;
          (a) Unified episodes;
          (b) Unified and short paragraphs;
          (c) Unified and short sentences.
   ii. Coherence
      (1) Reorganize by time, space, specificity.
      (2) Check for:
          (a) Ambiguity;
          (b) Parallel structure;
          (c) Effective transitions.
      (3) Make sure the writing has:
          (a) A coherent beginning;
          (b) A consistent middle;
          (c) An effective and coherent ending.
   iii. Emphasis
      (1) Proportion - spend the most time on the most important parts.
      (2) Primacy / recency - put the important parts at the beginning or the end.
      (3) Make sure the reader is living the experience, not just being told about it (show, don’t tell).
      (4) Repeat important words, phrases, sounds, ideas.
      (5) Select active, precise words.
      (6) Vary the length of sentences, paragraphs, chapters.
      (7) Use word order to give emphasis. The most important words generally come early in a sentence.
      (8) Emphasize with spaces, pauses, italics, boldface, page layout.
      (9) Eliminate items which kill emphasis:
          (a) Passive verbs (any form of “to be”-is, am, was, were, are, will, be, been);
          (b) Excessive exclamation points.
c. “REVISE BY REWORDING”
   i. □ Recognize and choose an appropriate style.
   ii. □ Select the best word, phrasing.
   iii. □ Scrutinize the verbs.
   iv. □ Limit modifiers.
   v. □ Appeal to the senses.
   vi. □ Be sensitive to rhythm, sound, pace.
   vii. □ Use, but don’t misuse, figurative language:
        (1) analogy;
        (2) metaphor;
        (3) simile;
        (4) personification;
        (5) metonomy;
        (6) hyperbole;
        (7) allusion.
   viii. □ Check for sexisms, jargon (including lawyerisms).
   ix. □ Check for spelling and usage.

3. Always ask yourself: “Can I make this more specific?”
4. Ask also: “Is each word necessary?” If not, perhaps the word should be changed, or removed.
5. Let others review it, consider their input. We become too close to our writing.
6. Re-work it after several days or weeks. The passage of time lets you look at it more as the first time reader will.
7. Read a book on writing, or take a course.
Trial Folders Headings
(Medium case)

In order to facilitate quick access to any item that may come up, trial attorneys usually reorganize their files for trial. The file is divided into subject headings, and placed in three-ring binders, or manila folders, which are in turn placed in expandable folders by subject heading.

The following are samples of dividers in your trial notebook, or the headings on trial folders for a medium case. Modify the headings to fit your case.

Top Papers
TO DO
Case Theories, Issues & Elements
Trial Notes
Pretrial Order
Daily Checklists

Law
Rules of Evidence
Rules of Procedure
Evidentiary Research
Statutes in case
Case Orders/Rulings

Jury
Jury List/Info
Juror Profiles, plaintiff and defendant
Plaintiff’s voir dire
Defendant’s voir dire

Arguments
Pretrial Motions
Opening
Closing
Evidence Motions/Research
Other Motions

Plaintiff’s Witnesses
Plaintiff
Spouse
Eye Witness
Etc.
Plaintiff’s Experts
- Treating Physician
- Liability Expert
- Etc.

Defendant’s Witnesses
- Defendant
- Eye Witnesses
- Etc.

Defendant’s Experts
- Liability Expert
- Damage Expert
- Etc.

Exhibits
- Plaintiff’s Marked Exhibits
- Defendant’s Marked Exhibits
- Potential Exhibits
- Photos

Pleadings
- Complaint/Answers
- Interrogatories
- Production of Documents
- Admissions
- Plaintiff’s Motions/Memos
- Defendant’s Motions/Memos

Correspondence
- Opposing Counsel
- Client
- Other

Jury Instructions
- Defendant’s Requested Instructions
- Plaintiff’s Requested Instructions
- Instructions Given
- Jury Instruction Research

Medical Records
- Dr. A
- Dr. B
- Etc.
Post Trial

Notes re potential items for appeal, motion
Judgment
Motions
Trial Folders Headings
(Simple case)

The following are samples of dividers in your trial notebook, or the headings on trial folders for a simple case.

To Do
Case Theories, Issues & Proof
Pleadings
Legal Research
Pretrial Order and Motions
Jury Profile & Voir Dire
Opening Statement
Evidence Research/Motions
Plaintiff’s Witnesses
Defendant’s Witnesses
Exhibits
Rebuttal Witnesses
Jury Instructions
Closing Argument
Judgment
Post Trial Motions
Trial Notes

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NEGOTIATING FORM

I. PREPARE BY UNDERSTANDING THE FACTS, THE LAW, AND PERSON’S NEEDS.

A. FACTS
   Note: You tend to overestimate your case’s weaknesses and underestimate the opposing case’s strengths.
   1. What are the strong points of your case?
   2. What are the weak points of your case?
   3. What are the strong points of the opposing case?
   4. What are the weak points of the opposing case?

B. LAW
   1. What are the critical jury instructions?
   2. What instructions will the opposition request?
   3. What will the court likely instruct the jury?
   4. Always consider tax implications and the time value of money in structuring the settlement.

C. PARTY’S NEEDS
   1. What are your client’s needs and expectations? (Risk taker or risk adverse; affect of time and money on settlement vs. trial; psychological need of “day in court”, “victory”, apology; emotional impact of trial, unrealistic expectations etc.)
   2. What are the opposing party’s needs and expectations?
D. COUNSEL’S NEEDS

1. What are opposing counsel’s needs and negotiating style? (Reduce exposure of costs and time in case; make a name for self in trial; prove a point to client, does counsel try or settle cases, etc.)

2. What are your needs and negotiating style?

E. WHAT ADDITIONAL INFORMATION would be helpful to better evaluate the case?

How can you best obtain that information?

II. BASED ON YOUR UNDERSTANDING OF THE CASE, WHAT ARE THE OPTIONS?

A. What is the settlement range of the case?

B. What is your target settlement? (The best settlement - are you sure you can’t do better?)

C. What is the minimum settlement amount that you will go to trial if you cannot obtain it?

D. What is the best settlement the opposition would likely be elated with?

E. What is the minimum settlement the opposition will demand, or go to trial?

F. What factors will most likely lead to you obtaining your best settlement?

G. What factors will most likely allow the opposition to obtain their best settlement?

H. How can you influence these factors to your advantage?

I. What other options can you use to fulfill needs? (Mediation, structured settlements, client to client meetings, trial, arbitration, more discovery etc.)
J. What options does each side have if there is no settlement?

K. What is a neutral third party (judge, jury, mediator) likely to view as a “fair” settlement?

III. NEGOTIATION PLAN (Negotiation is not just an exchange of offers, but of information and attitudes to help evaluate the case and persuade the opposition (including YOU) to “favorably” settle.)

A. Based on the above (particularly the missing information and factors that will lead to a best result):

1. What information do you need to learn during the negotiations.

2. What information are you willing to disclose in negotiations in order to obtain that important information.

   NOTE: If you have information that can change the opposition’s evaluation of the case, it must come out early in order to change an evaluation before it is set in stone.

3. What information will you not disclose in the negotiations.

B. Timing

1. What party needs affect timing? (needs money; large expenses coming up; psychological needs etc.)

2. What counsel needs affect timing? (Case load, financial needs, can’t locate witness or expert etc.)

3. When will the case be going best for you? (After devastating information has come out; the opposition is having trouble meeting deadlines etc.)

4. What timing favors the opposition?

C. Offers

1. What offers and concession patterns will lead to your desired best settlement?

2. What facts, law, justifications will convince the opposition to give you a better settlement?
3. What offers, concession patterns, tactics will the opposition likely use?

IV. NEGOTIATIONS
   A. You are always “negotiating,” from the first day the case is in your office. Your work must persuade the opposition that you are prepared, through, will make a formidable opponent in trial. Consistently remind the opposition of your strengths and their weaknesses.
   B. Follow your plan. Alter it only after more thoughtful preparation.
   C. Persuade. Never make an offer without thinking out a persuasive way to justify the offer. Most often, send a brief letter (yet containing specific details) reminding the opposition of the mistakes their witness have made, the weakness of their case, the strengths of your case. (Be fair enough to maintain credibility.)
   D. Constantly monitor timing, changing needs, new information.
   E. Be a “true believer” in your position.
   F. The most significant “concessions” occur with the first offers (when the settlement range and expectations are established) and at the very end (when the parties have psychologically decided to settle). Pay attention to these times.
   G. To obtain new information, you have to listen. Get the other side talking. Listen twice as much as you talk.
   H. If the timing is good, open settlement negotiations. This is often viewed by counsel as showing weakness, and they find it difficult to do. Here are some common openings.
      1. “Before we spend a lot of money on discovery, we owe it to our clients to at least discuss settlement. Why don’t you send me an offer and well see if we can do our clients a favor.”
      2. “We now know enough about the case to evaluate it. What do you think the case is worth?” (Unprepared counsel will often give a nearly unbiased opinion of value, and unwittingly set a floor or ceiling.)
      3. Suggest mediation as a way of getting the files out of the cabinets and obtaining a respected third party’s evaluation.
   Be prepared for a comeback if counsel asks you to send the first offer over. Sometimes, when your expectations are very different from the oppositions, it is helpful to make the first offer, to try to influence the opposing expectations before they are solidly formed.

V. SETTLEMENT
   You draft the agreement. There are always details, inferences, language that makes a significant difference.

OFFERS

<table>
<thead>
<tr>
<th>Party</th>
<th>Date</th>
<th>Amount</th>
<th>Conditions</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Comments:

2.    |      |        |            |

Comments:
SUMMARY OF INFORMATION ON NEGOTIATING

The following are brief summaries and quotes from expert negotiators. Read Williams or Craver’s book, it will make you a better negotiator. Remind yourself of the principles before negotiating.


I. Two Negotiating Styles

A. Aggressive (40% of attorneys)
   1. Dominating, forceful, aggressive, clever, view as a game
   2. Make high opening demands, few concessions, have higher expectations
   3. Very perceptive, read and watch opponent very carefully
   4. Create false issues for the purpose of making dramatic concessions
   5. Use ridicule, intimidation, criticism. Intimidate and exploit or will be intimidated and exploited
   6. Attack opposition to divert attention from fact he is making no concessions
   7. Exaggerate very effectively
   8. Limitation - so strong can kill the deal; generates tension, misunderstanding and mistrust
   
   Causes opponents to be extremely well prepared the next time; often, opponents will prefer trial

B. Cooperative (60% of attorneys)
   1. Courteous, personable, tactful, "We'll work this out," truly sincere
   2. Establishes open, trusting relationship
   3. Makes many concessions; shows good faith by making concessions
   4. Believes if they are open and fair, and make concessions, opponents will reciprocate;
   5. Typically do not exaggerate very sincerely
   6. When a cooperative deals with an aggressive, there is a tendency to make more concessions; give the case away

C. All good negotiators have the following shared characteristics
   1. Prepared: most important characteristic; Perceptive - skilled at reading cues sent by opponent
   2. Reasonable, realistic, convincing, effective trial attorneys, self-controlled

D. Both styles have ineffective negotiators
1. Co-operative ineffectives are too cooperative: want to be friends; want no enemies; too trusting

2. Aggressive ineffectives irritate and bluff. Use toughness as a substitute for preparation

IV. Optimal Negotiating Style - master both styles and use them when appropriate
A. Blend best characteristics of both styles. Be seen as cooperative, trustworthy, yet tough
B. Collaboration vs. Confrontation. But assume deception is part of the process; what appears to be collaboration is really confrontation. Be careful in making concessions
C. Make strongest possible opening, then maintain small rate of concessions - frequency, size, number
D. Justify offers, don't just trade concessions and dollar figures
E. Sympathize with opponent; tell him you want to resolve the matter; don't intimidate
F. Make free concessions - Promise to convey offers, work with client; make and emphasize non-critical concessions; Promise concessions; a promise is nearly as good as a concession
G. Keep client informed and involved; Unprepared clients are a major cause of negotiation breakdowns
H. Keep case moving, get prompt scheduling order, avoid busy work, communicate with opponent regularly
I. Be prompt and well prepared at all hearings, motions, phone calls, discovery obligations etc.
J. Choosing time to settle is critical: is your client still interested in the principle or the principal?
K. Know your weaknesses better than you know the strengths of your case
L. Know your adversary if possible; this makes it much easier to read cues
M. Your credibility with opponent is strongest point
N. Listen carefully to the language of offers and watch cues. Perceive the effect of strategy on opponent

II. Suggestions for Cooperative dealing with Aggressive
1. Repeat outlandish demands back to opponent; helps him realize how ridiculous his position is
2. If you make initial concessions that are not reciprocated, stop.
3. Restate and justify your position regularly; convince your opponent of the strength of your case

III. Suggestions for the Aggressive
1. Give impression of being settlement oriented; Be less threatening and intimidating: blame toughness on client; characterize threats as "problems" to be overcome; take the "just doing your job" approach
2. Direct toughness against opposing party rather than his counsel

IV. The Negotiation Process
A. Stage One (usually months or years) - Critical, must precede settlement
1. Develop working relationship with opposing attorney
2. Positioning, Posturing - assess case, put dollar value on it; get other side to open
3. Pressure other side; persuade opponent you'll prevail at trial
4. Assist client to let off emotional steam; prepare client for the settlement and judicial process
5. Make no concessions; once concessions are made, you have entered stage two
B. Stage Two: Argumentation phase - Begins when parties really want to discuss settlement prospects
1. Settlement = Concessions. Aggressive wants unilateral concessions; cooperative begins concessions

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2. Remember other side doesn't know what her final demand will be, just as you don't. Negotiation is a decision-making process; as you receive information from the other side, you can make a more informed decision. Use opponent's indecision to your advantage by persuading, repeating your case.

C. Stage Three: Decision-Making Stage (If stalemate, must accept offer, make new one, or trial)

1. Wrap-up phase - Often tired and off-guard. Persist in details; can often improve settlement up to 40%; beware of “Oh, by the ways,” taxes. Reassure opponent, don’t gloat.

Andrei Gromyko

“The last twenty minutes of negotiations are the most important. It is then when concessions are made.”

Charles Craver, Professor of Law, George Washington University, author of *Effective Legal Negotiation and Settlement*, Michie, 1986.

**Recognize** that -

1. People perceive the value of the same case quite differently.
2. There is more involved in negotiations than the “issues of the case.” Egos and perceptions are very important.
3. Skewed outcomes tend to result from abbreviated negotiations.

**Definition of Negotiations.**

A. Satisfying peoples' needs.
B. Process not a result.
C. Accomplished through communication, both verbal and non-verbal.
D. Object is to get other side to doubt their position.
E. Most cases have a range of settlement. Goal is to end up on favorable side of the range.

The **most important factors** in negotiations:

1. A prepared plan (options, facts, law, high aspiration level, reasoned explanations).
2. Timing.
3. Belief in position. (He believed so strongly that I started doubting my own evaluation.)
4. Keeping the focus of the communications on your strengths and their weaknesses.
5. Perception of bargaining power.
6. Always draft the agreement.

The **most common errors** in negotiating:

1. Negotiating unprepared.
2. Underestimating your opponent.
3. Overestimating your own weaknesses.
4. Underestimating the strengths of the opponent's case.
CASE SUMMARY

Automobile case

This is a case summary that is helpful in larger cases with several attorneys and staff working on the case. The form is based on an automobile case. It can be easily adapted for a less complex case, or a different type of case. The form gives quick access to necessary information and case status.

The form is generally kept current by the secretary or paralegal of the partner in charge of the case.

CASE NAME:
OUR FILE NUMBER:
PARTNER IN CHARGE:
OTHER ATTORNEYS:
PARALEGALS:

I. CRITICAL DATES

ATTORNEYS MEETING:
AFFIRMATIVE DISCLOSURE OF EXPERTS ETC.;
DISCOVERY CUT OFF:
DISCLOSE WITNESSES:
EXCHANGE EXHIBITS:
TRIAL DATE:
NUMBER OF TRIAL DAYS:

II. CURRENT SETTLEMENT STATUS

DEMAND:______________ DATE__________
OFFER: ______________ DATE__________
COMMENTS:

DEMAND:______________ DATE__________
OFFER: ______________ DATE__________
COMMENTS:

III. GENERAL INFORMATION
ATTORNEYS ADMITTED:

IV. CASE INFORMATION

1. COURT:

2. CASE NO.
   
   JUDGE:
   
   DATE OF ACCIDENT
   
   COMPLAINT FILED:
   
   OTHER POTENTIAL PARTIES:
   
   LEGAL THEORIES ALLEGED:
   
   PUNITIVE DAMAGES ALLEGED?:

IV. VEHICLES

CLIENTS

BRAND

MODEL

MODEL YEAR:

SPECIALIZED EQUIPMENT:

MILEAGE

VIN NO.

OWNERSHIP HISTORY:

DRIVER
ALCOHOL IMPAIRMENT:

DRUG IMPAIRMENT:

LICENSE RESTRICTIONS OR OTHER IMPAIRMENT:

SEAT BELT IN USE:

EJECTED:

<table>
<thead>
<tr>
<th>OCCUPANTS</th>
<th>RESTRAINT</th>
<th>EJECTION</th>
<th>SEATING</th>
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<tbody>
<tr>
<td>POSITION</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

CHAIN OF CUSTODY HISTORY:

PRESENT VEHICLE STATUS:

A. LOCATION:

B. PARTY IN CONTROL:

C. CHANGES SINCE ACCIDENT:

PRE-ACCIDENT MODIFICATIONS TO VEHICLE:

DAMAGE TO VEHICLE:

POST ACCIDENT PHOTOGRAPHS:

PERSON/PARTY TAKING:
DATE TAKEN:
LOCATION OF COPIES:
LOCATION OF NEGATIVES:

**PLAINTIFF’S VEHICLE**

BRAND:

MODEL:

1. MODEL YEAR:

2. MODEL TYPE:

SPECIALIZED EQUIPMENT:

MILEAGE:

VIN NO.:

OWNERSHIP HISTORY:

DRIVER:

ALCOHOL IMPAIRMENT:

DRUG IMPAIRMENT:

LICENSE RESTRICTIONS OR OTHER IMPAIRMENT:

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POSITION

CHAIN OF CUSTODY HISTORY:
PRESENT VEHICLE STATUS:

A. LOCATION:

B. PARTY IN CONTROL:

C. CHANGES SINCE ACCIDENT:

PRE-ACCIDENT MODIFICATIONS TO VEHICLE

DAMAGE TO VEHICLE:

POST ACCIDENT INSPECTION:

DATE:

LOCATION:

PERSONS ATTENDING:

COMMENTS:

POST ACCIDENT PHOTOGRAPHS:

PERSON/PARTY TAKING:

DATE TAKEN:

LOCATION OF COPIES:

LOCATION OF NEGATIVES PERSON/PARTY TAKING:

OTHER VEHICLES IN ACCIDENT:

VEHICLE DESCRIPTION:

DRIVER:

DESCRIPTION OF INVOLVEMENT:

COMMENTS:

V. ACCIDENT

1. DATE:
2. TIME:
3. LOCATION:
   TYPE OF ROAD (FREEWAY, CURVE, HILL ETC)
   ROAD SURFACE (SNOW, ICE, DRY ETC)
4. WEATHER:
5. OTHER VEHICLES NOT DAMAGED:
   ACCIDENT DESCRIPTION:
   WITNESSES

VI. SCENE INSPECTION
   DATE       PLACE       ATTENDING

VII. PLAINTIFF INFORMATION
   PASSENGER/DRIVER
   WHICH CAR
   SEAT BELT USE
   ALCOHOL OR OTHER IMPAIRMENT:
   EJECTED
   ACCIDENT INJURIES:
       MAJOR INJURIES
       EXTERNAL INJURIES:
       PROBABLE INJURY MECHANISM
       MEDICAL TREATMENT RECEIVED:
       MEDICAL EXPENSES:
         HOSPITAL
         DOCTOR
         REHAB
         CHIROPRACTOR
   CURRENT INJURY STATUS:
   PERMANENT DISABILITY;
   PRE-EXISTING INJURIES:
   BACKGROUND:
   DATE OF BIRTH:
   SOCIAL SECURITY NO.:
   STATEMENT(S):
     BY WHOM
     DATE
   SUMMARY
   COMMENTS:

VIII. ACCIDENT REPORT - POLICE INVESTIGATION
   DEPARTMENT
   PHOTOS
   OBTAINED COPIES
   INVESTIGATING OFFICER
ADDITIONAL NOTES AVAILABLE
ASSISTING OFFICERS

SPEED OF PLAINTIFF
SPEED OF DEFENDANT
FAULT

IX. PLAINTIFF’S EXPERT WITNESSES
A. LIABILITY
   AREA OF EXPERTISE:
   REPORT?: DATE:
   DEPOSITION DATE: SIGNED:
   INTERROGATORIES, OTHER INFORMATION REGARDING:
   COMMENTS:

B. PLAINTIFF MEDICAL PROVIDERS:
   AREA OF EXPERTISE:
   EXPERT OPINION:
   REPORT?: DATE:
   DEPO DATE:
   LISTED AS WITNESS:
   COMMENTS:

C. PLAINTIFF DAMAGE EXPERTS (OTHER THAN MEDICAL PROVIDERS)
   AREA OF EXPERTISE:
   EXPERT OPINION:
   REPORT?: DATE:
   DEPO DATE:
   LISTED AS WITNESS:
   COMMENTS:

X. PLAINTIFF LAY WITNESSES

   NAME:
   ADDRESS:
   PHONE:
   DEPO DATE:
   STATEMENT BY: DATE:
   COMMENTS:
XI. DEFENDANT EXPERTS

A. LIABILITY

PHONE:  
AREA OF EXPERTISE:  
DEPO DATE:  
EXPERT OPINION:  
STATEMENT BY: DATE:  
MATERIALS SENT:  
COMMENTS:  

B. MEDICAL

PHONE:  
AREA OF EXPERTISE:  
DEPO DATE:  
EXPERT OPINION:  
STATEMENT BY: DATE:  
MATERIALS SENT:  
COMMENTS:  

C. DAMAGES (OTHER THAN MEDICAL)

PHONE:  
AREA OF EXPERTISE:  
DEPO DATE:  
EXPERT OPINION:  
STATEMENT BY: DATE:  
MATERIALS SENT:  
COMMENTS:  

XII. DEFENDANT’S LAY WITNESSES
XIII. CO-DEFENDANT'S EXPERTS

PHONE:  
AREA OF EXPERTISE:  
DEPO DATE:  
EXPERT OPINION:  
STATEMENT BY:    DATE:  
MATERIALS SENT:  
COMMENTS:  
LISTED IN INTERROGATORY BY:  
LISTED AS TRIAL WITNESS BY:  

XIV. NON-EXPERT DEFENDANTS

A. POLICE

NAME       DEPO DATE  
STATEMENT:  
BACKGROUND:  
COMMENTS:  

B. MEDICAL RESCUE

NAME       DEPO DATE  
STATEMENT:  
BACKGROUND:  
COMMENTS:  

C. ACCIDENT WITNESS

NAME       DEPO DATE  
STATEMENT:  
BACKGROUND:  
COMMENTS:  

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D. FAMILY MEMBERS
   NAME
   STATEMENT:
   BACKGROUND:
   COMMENTS:

E. TOW TRUCK OPERATIONS
   NAME
   STATEMENT:
   BACKGROUND:
   COMMENTS:

F. OTHER
   NAME
   STATEMENT BY:
   DATE:
   STATEMENT:
   COMMENTS:
   OTHER

XV. DISCOVERY

A. DISCOVERY TO CLIENT
   TITLE
   DATE SERVED
   DATE ANSWERED

B. DISCOVERY TO PLAINTIFF
   TITLE
   DATE SERVED
   DATE ANSWERED

C. DISCOVERY TO CO-DEFENDANT
   TITLE
   DATE SERVED
   DATE ANSWERED

D. DISCOVERY TO OTHER PARTIES
   TITLE
   DATE SERVED
   DATE ANSWERED

E. DOCUMENTS PRODUCED

F. OTHER DOCUMENTS
   TITLE
   DOCUMENT TYPE
   DESCRIPTION
   SOURCE
   DATE

XVI. REPORTS TO CLIENT
   AUTHOR
   DATE
   SUBJECT
XVII. WORK TO BE ACCOMPLISHED
SUBJECT:
ASSIGNED TO:
DATE:
NEEDED BY:

XIX. HOT DOCS:

XX. NOTES FOR TRIAL:

THEME:

POTENTIAL PROBLEMS:

VOIR DIRE SUBJECTS:

OPENING:

WITNESSES:

EXHIBITS:

CLOSING:

INSTRUCTIONS:
OTHER:
DEPOSITION INDEX/SUMMARY in

__________________________ V. ____________________________

Deponent ______________________ Depo Date ________________

Whose witness________________________ Witness type (expert, eye, etc.)______________________________

Deposed by____________________________

Summarized by____________________________________

ID of other depos, statements

__________________________________________________________________

Missing info., exhibits, items to do ______________________________________

________________________________________________________________________

Comments____________________________________________________________________

________________________________________________________________________

Page/Line | Testimony Summary | Issue Code
----------|-------------------|-----------

Page 1 of ___
WITNESS CHECKLIST

Witness Name:__________________________________________________________________

Circle one:   Plaintiff Wit.  Defendant Wit.  Indep. Wit.     Third Party Wit.______

Address________________________________________________________________________

Phone Numbers: Work:_________________    Home:______________  Cell:______________

Employment:____________________________________________________________________

Other Information:

Date to Testify:_________________________   Time to testify:________________________

Subpoena date:_________________________    Return date:____________________________

Brief Summary of Testimony:

Importance to case:

Exhibits to enter into Evidence:

    Must enter (only witness to lay foundation):

    May enter:

Important testimony to be covered:

Potential areas of cross:
COUNTDOWN TO TRIAL

This pretrial checklist covers most items needed to be done in preparation of a medium-size case. In a larger case, the time frame should be moved back, so items are completed earlier. In a smaller case, the time frame may be moved forward, since fewer items allow a tighter time schedule.

Make sure the timetable is adjusted to match your pretrial order or local court rules. Also be sure to add to this checklist after reviewing your local rules, checking with the court clerk, and asking around town about the judge. You must also add to the checklist after reviewing your own case needs and type of case.

Three Months before Trial

Case
1. Finalize all discovery. Check to see that the court files contain responses to all discovery, and is otherwise complete.

2. Make final settlement offers and consider mediation. Consider an offer of judgment if provided by law in your jurisdiction.

3. Use Requests for Admissions to narrow issues at trial, to save you the cost of bringing in witnesses to prove the items that are not seriously contested, and to recover the cost of proof if the opposing party does not cooperate. Requests for admissions are not necessarily a discovery device, and may generally be used after the court ordered discovery cut-off.

4. Review expert’s testimony, both yours and the opposition’s, for the possibility of limiting or eliminating expert testimony under Daubert and its progeny.

5. Have depositions summarized and indexed, if not done previously. Put together your trial theme and have it tested with mock jury or focus group. From this information, build a juror profile (both most favorable and least favorable jurors) for both sides of the case.

6. Outline key issues in case.

7. Outline key testimony in case.

8. Identify key exhibits and evidence.

9. Outline key jury instructions, and begin research on special instructions.
10. Create a trial theme using the Trial Theme Checklist.

11. Outline your opening statement.

12. Complete any investigation, including additional photographs for exhibits, summaries of complex data for charts and graphs, etc.

13. Contact your experts and give them updated information including final information created since depositions.

14. Notify all witnesses of the trial date, and the anticipated day of their testimony.

15. Have experts identify exhibits they will use to explain their testimony.

16. Using the pretrial checklist, stipulate with counsel on a pretrial order, and schedule a hearing for the court to resolve any issues which cannot be agreed upon.

17. Create a trial To Do list.

**Court**

1. Schedule the pretrial conference before the judge.

2. Finalize any arrangements for mediation, settlement conferences, etc. consistent with court rules or the pretrial order.

3. Call the judge’s clerk and obtain a copy of the judge’s stock jury instructions which she gives in most cases. Also, ask for the names of similar cases that have been tried in the last year or so, and obtain a copy of the requested instructions from both sides, and the instructions the judge actually gave.

**Personnel**

1. Schedule your personnel for research, preparing witnesses, secretarial, paralegal, errands, etc. Make sure they know the trial date, and resolve any conflicting vacations or assignments.

**Two Months before Trial**

**Witnesses**

1. After calling, subpoena all factual witnesses.

Facilities
1. Check with the court regarding storage of files, audiovisual equipment available, and placement of audiovisual equipment.

2. Make hotel reservations for witnesses, and counsel if necessary.

3. Arrange for hotel or office space to accommodate your war room, including witness preparation, and work space for support personnel.

4. If the trial is away from your office, make a list of office supplies, computers, printers, copiers, etc. that will be taken with you.

Personnel
1. Confirm secretarial, paralegal, research assistance, runners, etc., particularly if the trial is out-of-town.

Files
1. Reorganize your files for trial. Create trial binders or folders, using the heading outlines. Place statutes, jury instructions, depositions, documents, etc. in appropriate binders or folders.

Exhibits
1. Identify final exhibits, and assign to witnesses for introduction into evidence.

2. Have duplicates made of exhibits for your use (the court will have the original), and for opposing counsel, the court, and perhaps individual copies for jurors.

3. Review rules of evidence, and finish research on potential objections to exhibits.

4. Create a binder for your copy of the exhibits with an accompanying folder for original and any copies for court, counsel, and jury. Place research on potential objections with your copy of each exhibit, and create a list of arguments for admissibility of the exhibit.

5. Arrange to exchange exhibits consistent with the pretrial order.

Case
1. Read the discovery and mark the depositions for quick reference, color-coded by subject matter, cause of action, keyword, etc. This can be done physically or electronically. Set up your color coding subjects so they are uniform across the case.
2. Outline direct examinations and create visual exhibits to make each witness’s testimony memorable.

3. Outline cross-examinations and identify the exhibits you will use.

4. Create a file for each witness containing the deposition, pertinent interrogatory answers, direct and cross examination outlines, exhibits to be introduced, documents authored by or received by the witness, etc.

5. Finalize jury instructions and jury instruction research.

6. Outline closing argument.

7. Refine your opening argument with information obtained from other work in the case.

8. Make a draft of a trial brief.

9. Identify motions in limine and prepare to file them.

**Court**

1. Make sure original depositions have been filed with the court.

2. Review the court file for other filings and information is present.

3. Obtain information from other attorneys or the judge's clerk regarding the judge's preferences on:
   - Judge vs. attorney conducted *voir dire*;
   - Standing at the podium or roaming the court room;
   - Approaching the witness;
   - Evidentiary rulings (some judges let most evidence in, and let the jury sort it out. Other judges use a strict definition of what is “relevant”);
   - Has the judge tried a similar case recently? If so talk to counsel about the case, evidentiary rulings, judge’s predisposition and demeanor, etc.

**One Month before Trial**

**Court**

1. Finalize your trial brief and file it at the appropriate time.

2. Finalize motions and file at the appropriate time.
3. Schedule a hearing on pretrial motions.

4. Obtain the court's schedule including starting times, ending times, days off for law and motion, etc.

5. Obtain the jury list from the court. Within ethical considerations, find out what you can about jurors on the panel (Internet search, client, neighborhood, attorneys in office).

6. If the same jury panel has been serving for some time, ask around to find out what kinds of verdicts have been rendered.

7. Comply with the pretrial order including exchanging of exhibits, exchanging witness lists, exchanging jury instructions, meeting to agree on jury instructions, etc.

**Case**

1. Videotape your opening statement, watch it, have others watch it, and refine the statement. Get rid of all your tics and irritating habits of delivery.

2. Familiarize yourself with your trial folders or binders so you can quickly access all information.

3. Finalize juror profile and method of tracking juror information during *voir dire*.

**Exhibits**

1. Place exhibit numbers on exhibits pursuant to pretrial order.

2. Exchange exhibits according to pretrial order.

3. Place post-it notes on exhibits identifying the witnesses with knowledge, which witness will introduce the exhibit, and potential objections to the exhibit, with your response to each potential objection.

4. Review opposing exhibits for authenticity, objections, and verify information in summaries, graphs, etc.

5. Send a copy of opposing exhibits to your experts, and perhaps to some lay witnesses.

6. Place opposing exhibits in a numbered binder, and include objections to each exhibit, including rules, case law, and other arguments.
Witnesses
1. Make arrangements to meet with witnesses in preparation for trial.
2. Discuss what each witness will wear, if they must wait outside courtroom, and other final arrangements.
3. Visit scene with critical witnesses.

Facilities
1. Test your audiovisual equipment at the court to make sure it works well and can be seen by all in daylight.
2. Put together the equipment and office supplies for your war room.
3. Organize the war room in an in-city trial.

Two Weeks before Trial

Personal
1. Get your trial clothes from the cleaners.
2. Schedule your haircut.

Case
1. Remind witnesses to review depositions, documents, and exhibits as appropriate.
3. Argue pretrial motions which are still pending.
4. Create chart with information about potential jurors.
5. Polish your presentation and finalize details.
2. **TRIAL THEME**
Winning Trial Themes
Mock Juries on a Budget
DEVELOPING COMPELLING TRIAL THEMES

A well developed case theme is critical to the success of any case. The jury has the right answer if you have the right question. Cases are won and lost by framing the issues. A great trial theme will focus the jury’s mind on what is critical to the case. It can also change the way they perceive and organize the facts of the case.

I. THREE PART PROCESS. A trial theme is constructed in three stages.
   A) First is developing a theme which explains the facts of the case.
   B) Second, is to understand any biases or predispositions the jury will likely have, and construct the theme so that the jury wants to find for you.
   C) Third is putting the theme into a package that is catchy and easily remembered, then linking it to anchors and other evidence and adopting it through out every portion of the case.

II. A SINGLE THEME
   A) Lawyers love alternatives. We argue that the tort was not committed, and if it was, the plaintiff was not injured, and if she was injured, the injury was not proximately caused by the defendant. We plead ten causes of action on one set of facts.
   B) Pleading in the alternative is lawyer language. The jury presumes it is looking for the truth - the one single truth. Multiple arguments make a lawyer look duplicitous, not to be trusted.
   C) Even when multiple themes don’t contradict each other, they make the case complex. A single theme is easy to understand, compelling in its simplicity. Avoid the great temptation to argue multiple theories.

III. CREATE ANCHORS TO THE THEME
   A) Anchors are ‘sub-themes’ which outline the critical issues of the case, and help jurors (or the judge) tie the case together mentally. Of perhaps dozens of issues in the case, the anchors are the several defining issues on which the case turns, a structure on which to organize the rest of the case facts and theories.
   B) The anchors should be limited to about three, or they will not be remembered.
   C) Anchors may be:
      1) a critical fact in the case;
      2) a case strength or opposing case weakness such as a statutory requirement that is met or not met;
      3) some anchors should be tied to the juror’s attitudes and beliefs of right and wrong, fairness, and presumptions of life as it relates to the case.

IV. BRAINSTORMING POSSIBLE THEMES
   A) Brainstorming – At this stage, deal with possibilities, not probabilities. Think, think wild, search the boundaries of the case. Think quickly, so not make any judgment about the
quality of any idea. Just think and write them down.

1) What are the possible case theories?
2) If the jury rules in our favor, what are the possible/probable reasons the individual jurors may give? (Different jurors will give different reasons.)
3) If the jury rules against us, what are the possible/probable reasons the individual jurors may give?
4) What theory best explains all the favorable facts of the case?
5) What theory best explains all the unfavorable facts of the case?
6) What theory can best explain both sides of the case?
7) What is the truth of what really happened here?
8) Is there another theory, that while not accurate, has more appeal to the jury?
9) What witnesses will testify best and be believed?
10) What witnesses are less likely to be believed?
11) What are the critical facts the case is likely to turn on?
12) What are the possible theories of the opposition?

V. EXPLAINING ALL THE FACTS. “There is nothing more horrible than the murder of a beautiful theory by a brutal gang of facts.” Francois La Rocheffoucauld

A) Analyze the case. The word comes from Greek, “to break down.” Descartes said the most complex problem could be analyzed and solved by breaking it down into its smallest components, solving each component, then putting the components back together. He recommended one count the components to track them.

B) Gather the evidence.
C) Keep track of potential themes as you go.
D) Match the facts to the possible themes.
E) Find a consistent, plausible, persuasive, explanation for all the facts, or at least account for most of them.
F) Take into account the likely opposition theme. Develop several opposing themes and analyze how your theme will work against each.

1) Deal with contrary evidence.
   (a) First, integrate the contradictory information into your case if at all possible, rather than trying to dispute it. Broaden your theory to include as much of the opposing evidence as possible. Don’t fight any battle you’re not compelled to.
   (b) Second, try to take the sting out of it. Much contradictory evidence is really not crucial to the case or your trial theme. See if you can show how the contradictory evidence is irrelevant to the outcome of the case.
   (c) Turn the conclusion. Many times, the opposite conclusion can be argued from the same facts. Does the fact that the defendant did not see the plaintiff’s car mean he was not paying attention, or that the plaintiff was coming much too fast?
   (d) Third, dispute it only if you have to. Many attorneys have a tendency to fight every witness, on every point. Often, this just emphasizes contradictory testimony in a battle that cannot be won, and that is only tangential to the outcome of the case. Pick your battles carefully. Win the battles you pick.
   (e) No trial is ever totally consistent, if all the witnesses claimed they saw the same, remembered the same, you should be very suspicious.
G) Beware of unexplained facts, particularly unusual ones which attract interest. A jury loves a riddle, a mystery. You can’t explain the fact, your expert can’t, the other side can’t – the jury may be inclined to focus on it and solve the mystery for you.

VI. WHAT SELLS IN RIVER CITY.
A) It may be totally accurate, but if the jury does not want to hear it, they are unlikely to listen or believe. Each juror brings with them a lifetime of prejudices great and small; presumptions about life and people that you will not change during trial. Analyze the underlying presumptions and prejudices your jurors are likely to have. Adjust the theme to give the jury what it wants. Some times this is not possible, and then you have to confront the bias directly (see bias sections under closing argument).
B) Look at the underlying sympathies, prejudices, emotions, bias, and ignorance in the case. What will the jurors be predisposed to believe. From their backgrounds, what will they want to hear.
C) Adjust the theme to deal with jury sympathy, bias, and predisposition.
D) Spinning facts into gold. You can often turn the facts, and claim the opposite from what most people’s initial reaction is. In the Leopold and Loeb trial, the defendant’s fathers were both multimillionaires. The newspapers and the prosecutor claimed “the million dollar defense” – that Darrow would receive a million dollars to save two rich kids from the gallows. Darrow immediately issued denials, and said his fee would be set by the bar association (so he did not have to reveal what he hoped would be a large fee). But he also “spun” the facts – turned them into a positive rather than a negative. He said ‘even the rich have rights’ and that ‘money has been the biggest obstacle we have faced in this case.’ He argued that ‘the only reason the prosecutor was trying to hang the boys was because of their father’s money. If they had been poor, the state would accept a plea of guilty in return for life in prison.’

VII. MAKE YOUR CASE A “FEDERAL CASE”
A) However small, make your case a big “FEDERAL” case. Adopt social issues, argue for the future, for society, for the disadvantaged, for freedom and justice.
B) If you can tie your case to a larger social issue or principle with which the jury identifies, your verdict will grow in importance.
C) Tying your case theme to a social issue which affects the jury will increase not only the liability of the case but the jury’s perceptions of what damages should, or should not be awarded.
D) Example. Darrow argued his bribery case was not a bribery case at all, but a fight between the subjugation of the working class by the rich.

VIII. USE TRADITIONAL STORY LINES, ADAPTED TO YOUR CASE.
A) We all know and love these stories, we know the outcome and who is the hero and villain. If you get the jury analogizing to your story, they will feel comfortable applying the outcome.
B) DAVID AND GOLIATH. The world loves the underdog. The whistle blowing employee against the mega-corporation. The young, uneducated defendant against the powerful government.
C) ROMEO AND JULIET. The world cries in a tragic love story. True love ends in tragedy when a faulty medicine does not work as advertised.
D) DON QUIXOTE. The world cheers for the person fighting impossible odds for the impossible dream. The environmentalist trying to save the forest a tree at a time.
E) LES MISERABLE. The world knows not all laws are right. Justice and law can conflict. When they do, we all want justice to prevail.
F) HORATIO ALGER. Poor kid, worked hard, made it big, now serves society and helps other poor kids.
G) THE LIST IS INFINITE. Find the story line that matches your case theme.

IX. TIE COMMON PRINCIPLES INTO YOUR THEME.
A) There are a number of common principles which are nearly universally accepted in our society. These mores are basic to how we view justice.
   1) You should work hard, try your hardest.
   2) You should keep your word.
   3) Everyone should have the same chance.
   4) A wrong should be righted.
   5) Be polite (this has been eroded in younger jurors).

X. CATCH PHRASES. Synthesize the theme into an easy to remember, catchy phrase.
A) “If it doesn’t fit, you must acquit.”
B) Advertisers use catch phrases because they stick in the memory.
C) A good catch phrase is -
   1) Similar sounds.
      (a) A rhyme.
      (b) Alliteration (first consonant sound of the words the same).
      (c) Internal echo (internal vowel sound of the words the same).
   2) Rhythm;
   3) A play on words.

XI. SIMPLICITY SELLS. After gathering all this information, your case theory has grown complicated - numerous tenets of information tangled throughout the case. You must narrow them down - one simple theme. Throw out good ideas, good evidence. It is hard for an attorney to do. You never know what wild theory the jury could run off on. We tend to argue multiple theories. What would you think of a witness who testifies to multiple, contradictory, facts? It would be ludicrous. There can be only one true set of facts. There should also be only one simple theory you argue.

XII. WILL IT PASS THE JUDGE? Even if your trial theme is a sure jury winner, it has to pass the trial judge, and be upheld by the appellate court. Get the jury instructions out. List each element of your cause of action. List each possible defense. How will the court phrase the legal instructions the case? Adjust or change your trial theme to assure it not only meets the law, but sounds like it is the law.
XIII. ADOPT KEY WORDS THAT SUPPORT AND COMMUNICATE THE THEME.

A) In a case that is well tried between two experienced counsel, each attorney uses a different vocabulary set to describe the same facts. Throughout the trial, they will never adopt opposing counsel’s vocabulary. They both know there are no true synonyms. While two words may have a similar connotation, they have different denotations – a different feeling to them. Those feelings about the word are communicated to the jury also.

B) Adopt words which support your theme. Use the words beginning in *voir dire*, and throughout closing. If you’re fortunate, the judge and even opposing counsel will use them.

C) Example. Richard Hauptmann was tried in the Lindbergh kidnapping. When the police discovered that Richard was his middle name which he always went by, but his first name was Bruno, what do you think the prosecutor called him at trial? Why?

XIV. TESTING THE THEME.

A) Major cases do not go to trial without testing the jury’s reaction. Yours shouldn’t either. It’s a major case to you. Johnny Cochran first thanked his jury consultant. Marcia Clark ignored hers. The social scientist can tell us, for a fee, what the average juror’s predisposition will be to our trial theme. That science is far more accurate than your “gut feeling” about the theme.

B) Test the theme with a mock jury or a focus groups. See mock jury section.

C) If you can’t afford a focus group test the theme on the runner, your neighbor, your eighth grade daughter.
   1) Do they understand it, believe it?
   2) Does it make sense, explain the facts?
   3) Do they chose it over the opposing theme?

XV. AT TRIAL. Be sure the theme is introduced as early as possible, hopefully in *voir dire*, then repeated in opening, direct, cross, closing, exhibits - everything that is said or done in trial.

A) Attitude. Be sure the altitudes of you and your witnesses comport with the trial theme. One wise observer stated the reason for a runaway verdict in a doubtful liability trial, was that the young corporate defense witnesses “high fived” each other as they exchanged places on the witness stand. That arrogant attitude was at odds with the defense theme of ‘so sorry, but it was the plaintiff’s own fault.’

B) If there has been a horrible wrong, the plaintiff should act indignant in the trial. If the defendant said it was an unavoidable accident, counsel should be calm, warm and sorry.
MOCK JURIES
FOR CASES WITH A TIGHT BUDGET

Ever tried the same case twice? It’s a bad experience, but you sure learn a lot from that first trial. Your presentation in the second trial is more refined, more focused, and sometimes quite different than the first trial. A mock trial gives you the wisdom of a second trial, the first time.

The best mock trials are conducted by jury consultants. They have the expertise to help refine both your trial theme, and the presentation of both you and your witnesses. In a big case, they are well worth the tens of thousands of dollars they charge.

If your client is unwilling to part with that kind of money, you can conduct your own mock trial or focus group. If carefully done, it can provide you with valuable information to help you refine your trial theme, and your presentation. Hiring a marketing company to give you a cross section of the community, and putting on a half day mock trial can be done for as little as a few thousand dollars.

No money for a mock jury or focus group? Do the same with friends, family, associates and strangers. Ask them the questions outlined below. Get different views representative of the likely jury.

1. FOCUS GROUPS.
   a. I met a man who was originally a physician, but now practices law. He held about a third of the top ten verdicts in his state. One key to his success was focus groups. He held focus groups for every case he accepted, and a case that went to trial would have perhaps a dozen focus groups.
   b. In constructing a story of the case, people subconsciously insert into the story fragments of their own similar experiences, good and bad. His first focus group would often be telling the story, and asking the group what questions they had.
      i. In telling the story of a ‘bad birth’ case, the focus group had questions of: did she really want the baby (yes); was she married (yes); had she had other babies with birth defects (no); had she been on drugs during the pregnancy (no); were there problems with the pregnancy (no); and the list went on – technically irrelevant questions that jurors might subconsciously incorporate their wrong answers into the story, but that he could diffuse by adding a few lines to his story.
   c. Sometimes he lets panelists cross-examine key witnesses (the witness being played by someone else). That’s the only way you find out what the jurors really want to know from a witness – so you can add the questions to your cross.
   d. Later focus groups would identify key issues used by the “jurors” to make decisions and test arguments that would change the outcomes on those key issues, similar to the group questions discussed below.
2. MOCK JURIES HELP IDENTIFY WINNING ARGUMENTS.
   a. Use focus groups and mock juries in trial preparation. No matter how “good” you are, you still tend to think in the same way. The jury will think in ways different from you. Input from others who have similar backgrounds to the jurors is invaluable.
   b. Mock juries can be used to:
      i. Develop arguments, case themes and strategy;
      ii. Develop profiles in jury selection;
      iii. Evaluate witnesses and testimony;
      iv. Predict the actual verdict for settlement purposes; and
      v. Obtain feedback about the attorney’s performance and case.
   c. Mock juries range from focus groups with input on only a few issues to shadow juries which actually attend the trial every day. Most focus groups and mock juries participate for half a day to several days. Before proceeding with a mock jury, be sure you carefully think out your case, and structure the exercise to fit your case needs. PROCEDURE -
      i. Hire a jury consultant if your case can afford it.
      ii. If not, you can set up your own mock jury. The Focus Group Kit by Morgan & Krueger and Walter F. Abbot’s Surrogate Juries, published by ALI/ABA are good resources. Briefly-
      iii. A marketing company selects a representative panel and gives you background information on each juror.
          (1) Age, employment, neighborhood information, education, politics, race, religion, etc.
          (2) A less expensive way is to hire persons through Craigslist, and have your receptionist ask basic information like political party, education, race, sex, religion etc. in order to get a group balanced like your jury pool.
              (a) Offer them $50 or so (depends on your market, up it if you don’t get enough calls) plus lunch for four hours.
              (b) Call back and confirm the diverse group you want to come, and add a few extras because not all will show up.
      iv. You will need:
          (1) Reminder calls;
          (2) Conference Room;
          (3) Welcome & check in person;
          (4) Video taping;
          (5) Stipends (“S”) for panelists;
          (6) An attorney to vigorously ARGUE the opposing case.
      v. Jurors fill out a background questionnaire - education, politics, employment, etc.
      vi. Short voir dire - you select jurors, make your own judgment on preferred jurors, likely forepersons, to compare with the questionnaires and deliberations later.
vii. Listen to abbreviated (depending upon your case):
(1) Opening statements;
(2) Actual testimony of critical witnesses;
(3) Mock summaries of testimony;
(4) Closing arguments;
(5) Critical instructions.

viii. Case specific questionnaires are filled out, usually after every segment of the mock trial, to help identify the bias / point of view of jurors, and the facts and arguments which are most important to them.

See questions below.

ix. The mock jury deliberates and reaches a decision.

x. The deliberations are filmed for later review.

xi. Review questionnaires, deliberations. Identify what issues and arguments are important to jurors, what kinds of jurors favor which case, arguments. Consider restructuring your case and trial theme to appeal to what jurors thought were the important issues.

d. The use of sociological sampling techniques in building jury profiles and conducting voir dire is well accepted for being superior to traditional “legal wisdom.”

e. Sometimes show the best opposing case and worst case for your side. Then ask ‘what fact or argument would have made you change your mind?’

f. Sometimes it’s better that you argue the other side, and get a partner to argue your side. It gives you a better insight into the strengths and weaknesses of the opposing case.

3. The larger the number of persons who give you input, the more accurate the input is likely to be. Try to get enough to have two, six person juries and see how differently they reason and decide the case.

4. YOU have to LISTEN to the input. Many attorneys argue back when they receive negative input about their case. You must carefully listen and understand to learn from the mock juror.

**QUESTIONS TO ASK REGARDING THE CASE**

How would you vote?

Why would you vote that way?

What were the most important factors in your voting that way?

What information would you have liked to know that may have influenced your decision?

What was the point that, for you, the case turned on?

Which theory was most convincing and why?

Under what circumstances would you vote the other way?
What is the one most convincing argument in the winning / losing case?

What is the weakest part of the winning case?

What one issue in the case would you like to know more about?

What was the most important piece of evidence in the winning / losing case?

Questions and comments.

QUESTIONS ABOUT A WITNESS
Please give your impressions of ________________.

What was the strongest / weakest part of __________’s testimony?

What else would you like to hear about from this witness?

How believable was ________________? Why?

Please rate the witness, on a scale of 1 to 10 (1 being the lowest and 10 being the highest) on each of the follow matters:
- Honest;
- Clear;
- Believable;
- Confident;
- Persuasive;
- Knowledgeable;
- Interesting;
- Likeable.

QUESTIONS ABOUT THE ATTORNEYS

What did you think of the attorneys?

What could the attorneys do to improve their presentation?

What did you least like about the presentation?

Please rate each attorney, on a scale of 1 to 10 (1 being the lowest and 10 being the highest) on each of the follow matters:
- Honest;
QUESTIONS ABOUT THE DELIBERATIONS

What was the most important issue on which you based your decision?

What was the most important evidence which led to your decision?

How many votes were taken before a final decision was made?

How many jurors were in favor or against the issues in each vote?

What were the issues and evidence that changed the juror’s minds to come to an agreement?

How much money was discussed for damages?

ISSUE QUESTIONS

Was (list each important issue on both sides of the case) important to your decision?

Why or why not?
3.

**VOIR DIRE**

Jury *Voir Dire*

Jury Studies

Sample Juror Questionnaire
Voir Dire

“You can pick the facts if I can pick the jury.” Melvin Belli

Voir dire is the black art of obtaining information to rid the jury of those potential jurors most likely to hurt you, or help your opponent, and at the same time, obtain information about jurors which will later help you to construct the best arguments to persuade them.

Legal lore and literature is full of “conventional wisdom” to assist in selecting a jury. Some of it is wise, some merely conventional. Some may be applicable to one group or one locale, but not another. Before placing too much stock in the “common wisdom,” let’s review several items.

First, science is better than conventional wisdom. The marriage of social scientists and the law has been consummated. The social scientist can poll the nation and tell us, with great accuracy, who will win elections, and what issues various groups find important and will base their votes on. The jury consultant can do the same polling for your case. If your client has the money, you can gain a significant edge. Most clients do not, or are unwilling to part with it. You can do a “poor persons” substitute.

Elsewhere is an outline to hold your own mock jury. While clearly no substitute for a professional consultant, it will provide much needed information about jurors’ attitudes that will help you pick a jury and pick issues and arguments the jury is likely to accept.

Second, know the local practice. What types of questions will the judge allow in voir dire? Does the judge conduct the entire voir dire, allow the attorney to, or allow attorneys only follow up questions?

Some state court judges allow a wide open voir dire, conducted by the attorneys. For example, many judges allow direct questions by plaintiff’s counsel about whether anyone works for an insurance company, whether anyone has the same insurance company as the defendant, and allow other inferences about insurance that would result in a mistrial if mentioned an hour later.

Third, keep your voir dire goals in mind:
1. To obtain information about jurors’ attitudes and opinions without offending any juror;
2. To introduce your client and case facts and show they match jurors’ attitudes; and
3. To establish credibility, fairness and rapport with the jurors – the jurors are picking their lawyer while the lawyers are picking their jurors.
Fourth, you can't select a juror, only “deselect.”
You can’t select jurors, only “deselect” a couple. Who are the most likely leaders? Who are the outgoing, confident ones? Which ones are well spoken and sure of themselves? Who has higher social standing, relevant knowledge, establishes good relationships? Who may be a strong willed holdout?

You are basically looking for:
1. A leader who is against you;
2. A leader who is not for you (perhaps a wild card, a leader you can’t read well);
3. A follower who is against you.

Develop questions to obtain information to find those who are likely to be opinion leaders and holdouts. Be cautious your questions don’t develop information that could lead opposing counsel to strike those who are favorable toward your case.

Think through before the trial what kinds of persons are most likely to help and hinder you. More than half the jurors are unlikely to have a strong opinion for either side. A few will be opinionated and sway the remaining jurors. Carefully observe the jurors, or have someone else watch them.

Fifth, a small town has unique considerations. The jurors are likely to know each other. Some know each other well, may be related, went to school with some of the parties or witnesses, will have to see and deal with parties or witnesses the rest of their lives. Make sure you have a client, or hire someone in the town to help you sort all these relationships out.

Sixth, jurors lie. It is a rare person who, in front of peers, public and perhaps press can honestly confess their own biases and prejudices. In fact, most cannot even be honest with themselves. This means direct questioning seldom elicits critical information: “How many of you can be fair in this case?” Every hand will invariably rise.

Voir dire generally seeks information through the back door: similar experiences; attitudes judged from what a juror reads and does; rather than an outright request to acknowledge a bias. Don’t hesitate to ask the obvious questions however. Voir dire in a case involving the murder of a teenager never asked if any of the jurors had had a similar experience. One juror’s young son had been murdered several years before – she was naturally very influenced and very active in the deliberations.

Picking Your Jury

Social scientists have delved into how jurors process information and what characteristics affect their decision making processes. The findings must be considered in choosing your jury and presenting your case.
A Hierarchy of Information

1. Polling with Jury Questionnaires

   The most valuable information to use in picking a jury is a private poll matched with a detailed jury questionnaire based on the poll. In the O.J. case, the judge had each potential juror answer a seventy-eight page questionnaire. The defense primarily designed the questionnaire. They then computerized some 150,000 sub-pieces of information about each juror. When the jury sat in the box for the first time, the defense jury consultant felt ‘very comfortable’ about a defense verdict. Why? Because she had polled the L.A. population three times before trial and knew how the jury pool thought.

   For example, the polls showed some 75% of people who regularly read a newspaper believed O.J. was guilty; while some 70% of people who watched PM talk shows like Jerry Springer believed O.J. was innocent. 42% of those polled had had a negative experience with the police; 25% had a close friend or relative arrested; 42% said it was OK to use physical force on a family member (spousal abuse was the prosecution’s motive). Importantly, the polling found many of the attitudes were intractable.

   Based on these polls the defense built a juror profile of information that indicated a specific juror was more likely to believe O.J. was innocent - for example persons with less than a high school education. Each potential juror had a computer printout of critical data with a rating. And how many of the actual jurors regularly read a newspaper? None.

   One of the keys in constructing the questionnaire and jury voir dire is finding questions that will give you critical information, without tipping-off the other side. If your questioning shows the juror is very sympathetic to your arguments, that juror may be struck by the opposition.

   While private polls integrated with extensive juror questionnaires are by far the best tools in picking your jury, those tools are available only in mega-cases. Some jury consultants and marketing companies have a substitute – they have prior polls and can compare the poll results with general attitudes about your case issues.

2. Juror Attitudes

   In “Juror Judgments about Liability and Damages: Sources of Variability and Ways to Increase Consistency” (DePaul Law Review, 48, pp 301-325) Shari Seidman Diamond, Michael J. Saks, and Stephan Landsman present the results of experiments regarding which characteristics are best correlated with a juror’s decision at trial.

   They found juror attitudes considerably better predictors of verdicts than background information. Attitudes came out when the researchers asked jurors “whether plaintiffs generally receive too much or too little in a law suit.” The jurors who felt plaintiffs generally receive ‘too much money’ tended to find for the defendant while most of those who responded that plaintiffs generally ‘receive too little’ later found for the plaintiff.

   The case presented to the test subjects involved the liability of a company. The research
found that questions concerning juror attitudes about business were also strong predictors. Jurors who felt that regulations and lawsuits interfered with business were much less likely than the average juror to find liability. Jurors who expressed trust in the objectivity of experts were much more likely to find liability than the average juror.

Attitudes come out in more detail as you question why jurors think the way they do. Open ended and follow-up questions are more apt to bring out the ‘why.’ Asking “do you trust police officers?” is helpful; but it is more helpful to then ask “why don’t you trust police officers?” An answer such as “the police have it in for minorities” gives you a better look into the attitude. Similarly, “do criminals get off too easy?” is good, but the juror’s explanation of ‘why’ is better.


The juror life experiences create attitudes. Discovering their prior experiences is a back door into understanding the juror’s attitudes. A prior experience similar to the case facts generally creates empathy. This includes not only the juror’s own experiences, but experiences of close friends and family members. A person who thinks they were unjustly arrested is more likely to be skeptical in a mistaken identity case. But be careful, a similar experience can create a reverse attitude, particularly when the outcome of the experience was different (‘I was arrested wrongly, but they figured it out, apologized and released me with an hour’), or the expertise level differs (the plaintiff, a novice motorcycle rider, lost control on loose gravel and is suing the state highway department; a potential juror, an expert rider, may presume he would have avoided the gravel or presume he never would have gone down).

Prior jury experience also creates attitudes. Obtain as much information as possible about the juror’s prior service, the type of case, the case outcome, and the juror’s attitude about the service. Generally, jurors with prior service are more skeptical (‘this is the third guy who claims he’s totally innocent’). They also tend to compare your case to prior cases (the last guy was a lot more seriously injured, and he got less than what they’re asking).

4. Personality.

The ‘big five’ of personality types can be helpful in some cases. And some personality types can be easily discovered: the smiling woman who made three friends before the court was called to order is an extrovert; the dull man who gives one word answers and has to be asked to speak up is an introvert.

The big five are -

**Extroversion.** Extroverts are outgoing, fun-loving, sociable. Introverts are reserved, quiet, sensitive, and slow to engage with others.

**Agreeableness.** Some people are agreeable, trusting, cooperative. Others are suspicious, uncooperative, doubtful.

**Emotional stability.** Some people are slow to rile, stable and calm. Others worry, are insecure, and tense.

**Conscientiousness.** Some people are disciplined, organized, structured. Others pay little attention to detail, are spontaneous, impulsive.
Open-mindedness. Some people are open-minded, creative, independent, and enjoy new experiences. Others are opinionated, conforming, and have little tolerance of those who differ.

Few of these personality traits are black or white, and many people can be near the middle of a trait. Also, we tend to trust those who are most like ourselves. If you are a disagreeable extrovert, and the likely opinion leader of the jury an agreeable introvert, that juror may not trust you. Can you change? ‘A couple of carefully chosen words can make an enormous difference’: Use introvert words like “I think you would agree” rather than extrovert words like “it’s obvious to all.” (See The Greatest Trials Ever Held, by this author for more detail.) Most jurors have the ‘sheep gene’ and the extroverts or strongly opinionated will lead them. So focus on the personalities of your likely opinion leaders.

5. Demographics.
   In the De Paul study above, background information about age, politics, prior jury service, and prior witness service were poor indicators of verdict preference. Other background categories showed a weak but recognizable correlation. Minority jurors were slightly more inclined to find liability while women showed a slight inclination to find for the defendant. Jurors with less income and less education were also a little more likely to find liability. In general, background characteristics proved to be a weak and undependable signifier of verdict preference.

   There is a wealth of ‘conventional wisdom’ passed through the court rooms and barrooms and journals. Most of it is based on stereotypes. Yet much of this conventional wisdom is better than flipping a coin.

   While much conventional wisdom has its basis in fact, great care must be exercised. At best, conventional wisdom deals in broad generalities, some of which conflict. At worst, conventional wisdom is a close relative of astrology.

   A book, printed in the 90's (1990's) parrots that some noted lawyers ‘excuse all jurors with “thin lips”; that tall, skinny people are tight on damages while obese persons tend to award larger damages, with muscular people in between.’ I choke on such witchcraft.

   Some conventional ‘wisdom’ directly contradicts other ‘wisdom.’ It is rare to consult two sources and not have some contradictions. I strongly recommend you base your profiles and selection on more scientific means, and use this only as a backup. With those caveats, below is the conventional wisdom passed down over the generations.

Conventional wisdom warning

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Some conventional wisdom directly contradicts other wisdom. It is rare to consult two sources and not have some contradictions. I strongly recommend you base your profiles and selection on more scientific means, and use this only as a backup. With those caveats, here is the conventional wisdom passed down thru class rooms and bar rooms over the generations.

CONVENTIONAL WISDOM

Basis - we are all a product of our environment. Our attitudes tend to reflect those of our upbringing, education, employment, spouse, hobbies etc.

The mix - most persons are a complex mix of different environments. Their upbringing may indicate a conservative outlook, while their employment indicates a liberal one. Look at the whole person.

The following is the conventional wisdom in a civil case of types of people favoring plaintiffs and defendants.

OCCUPATION (also consider previous occupations and spouse’s occupations)

Plaintiff: (people persons) social workers, teachers, artists, musicians, students, intellectual professions (professors), construction workers, salespersons, union workers, unskilled, laborers, persons on welfare.

Defendant: (money or discipline persons) accountants, bankers, police, small business owners, middle class housewives, military officers, farmers, insurance industry, landlords, engineers, scientists, technical jobs.

AGE

Plaintiff: younger persons.
Defendant: older persons.

ETHNIC BACKGROUND

Plaintiff: (the oppressed) Blacks, Hispanics, American Indians, Puerto Ricans, Irish, Italians.
Defendant: (the non-oppressed) Northern Europeans, non-immigrant Orientals.

JUROR SERVICE

Plaintiff: first time jurors.
Defendant: experienced jurors, especially if a defense verdict.
CLASS
   Plaintiff: Lower classes, renters.
   Defendant: Upper classes, home owners.

EDUCATION
   Plaintiff: Less education, arts and soft sciences (psychology, sociology etc.)
   Defendant: More education, business and hard sciences.

URBAN / RURAL
   Plaintiff: Urban.
   Defendant: Rural.

SEX
   Plaintiff: Opposite sex as client.
   Defendant: Same sex as client.

PERSONALITY
   Plaintiff: Warm, caring, happy, emotional, activists.
   Defendant: Stern, sober, cool, calculating, traditionalists.

GROOMING
   Plaintiff: Long hair, ungroomed, casual clothes.
   Defendant: Short hair, well groomed, dressed up.

INCOME
   Plaintiffs: The poor, the very rich.
   Defendants: The middle class, the working rich.

Summary
   We all look at the world thru the rose colored glasses of our past experiences and our
   personalities. We are a complex mix of attitudes, and the attorney must search for all the
   information possible, and then consider often conflicting factors. The process is amongst the
   most important in trial work.

   Get the best information you can, use questionnaires if possible since they give you much
   more information, and carefully construct your questions to encourage the jurors to talk, not just
   respond. You can increase your effectiveness by obtaining better information, and knowing what
   it mean.
TRADITIONAL AREAS OF INQUIRY IN VOIR DIRE
(with sample questions (not a complete listing, but selected from an actual case) slanted toward a defendant in a small case)

QUALIFICATION OF PANEL

1. Is everyone able to hear me OK? If so please raise your hand.

2. Does anyone have a hearing or eyesight problem.

3. Is everyone able to read and speak the English language well?

4. Is there anyone who cannot sit for several hours at a time.

5. Is there anyone who has a physical or mental disability they believe may render them incapable of serving as a juror?

INTRODUCTION OF PARTIES

1. The Plaintiff, ________________, is represented by ________________ of ________________________.

Do any of you know ______________ or her attorney, ________________?

Do any of you know any of the attorneys in ________________‘s office?

Do any of you know any employee’s of ________________?

2. ______________ Enterprises Inc. is represented by ________________.

Do any of you know any employees of ______________ or its attorney, ________________?

Do any of you know any of the attorneys in ________________‘s office?

Do any of you know any employee’s of ________________?

3. The plaintiff may call the following witnesses:
  Candice
  Greg
  Becky
  Dr. Scott

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Don
Do any of you know any of plaintiff’s witnesses in this case?
4. __________ ENTERPRISES may call the following witnesses:
   Cory
   Jim
   Thomas
   Chelsea
   Do any of you know any of __________ ENTERPRISE’s witnesses in this case?

CASE GENERALLY

This case involves the plaintiff, __________, going to ________ during a snow storm to sell her designs or apply for a job. The date was November 22, 199_. While there, she went into the __________ to ask for directions. While coming out, she slipped on some stairs, injuring her __________.

1. Do any of you have any familiarity with the facts of this case?

2. Do any of you, or your immediate family members or close friends, have any special education and/or training in law, medicine, nursing, __________, __________, or other subjects involved in this case.

3. Do any of you, or your immediate family members or close friends, have involvement in pursuing claims or resolving claims.

PERSONAL INFORMATION

1. Let’s go around the room, beginning with juror number one. Please tell us -

   Where do you live?

   What do you do for a living now, and what other kinds of work you have done?

   And, if you’re married or living with someone, what your partner does for a living?

2. Each of you now please tell us how many children you have, and if they are adults, what they do for a living.

3. Each of you now please tell us if you have served as a juror before?

   If so:
   On what kinds of cases?
   What was the outcome of each case?
4. Have you, or any family members or close friends, ever been injured in an accident?  
   If so:  
   Who and what type of injury?  
   Was a claim made?  
   Was a lawyer involved?  
   Please tell us about the accident and injury.  
   Was a lawsuit filed?  
   How was the claim resolved?  
   Were you satisfied with the resolution?

5. Have you, or any family members or close friends, ever been involved in a lawsuit?  
   If so:  
   What kind of a lawsuit?  
   What was your involvement in the lawsuit?  
   Who represented you or them?  
   How was the lawsuit resolved?  
   Were you satisfied with the resolution?

6. Have you, or any family members or close friends, ever been a witness in a case or claim?  
   If so:  
   What kind of a case?  
   How was the claim resolved?  
   Were you satisfied with the resolution?

7. Do any of you belong to any clubs, fraternal or social organizations?  
   If so, which ones, how long have you been a member, and how much time do you devote to the organization?

8. Please tell us what magazines you read on a regular basis.

**CASE BACKGROUND**

1. This case took place__________. Please tell us how much time you spend near___________________.

2. Has anyone been to ___________Enterprises and come away with a less than pleasant experience?

3. The law is that you must consider this case as though it were between two individuals. The fact that ___________Enterprises is a corporation is of no importance. Is there anyone who feels that a company should be treated different than a individual?
4. This case involves a slip and fall. Is there any one who has been injured by slipping before?

5. The law is that if ____________ Enterprises was not negligent, or if plaintiff was more negligent than ____________ Enterprises, plaintiff is to be awarded no damages. Is there anyone who would feel that plaintiff should not be sent away empty handed, if the law dictated that result?

6. ________________ Enterprises is owned by ________________ (famous person). Is there anyone who would be disappointed if ________________ did not testify?
   Is there anyone who is associated with ________________?
   Does anyone have any feelings about ________________ that would affect their ability to try this case?

7. The law puts responsibilities on both a business, and the individual. Is there anyone who feels that an individual should not be responsible for her own choices and actions?

8. The law is that you must decide this case on the facts, and not be swayed by any sympathy, or passion. Is there anyone who could not put aside all sympathy for a person who was injured, and decide the case solely on the facts?

9. The law is that an individual or business need not keep premises free from snow, but has a reasonable time after a storm to shovel the snow, and then keep it reasonably clear under the circumstances. A___________ environment may be kept differently than a _____________ environment because of the different circumstances. Does anyone think that someone should be liable merely because of snow being on their premises during a snowstorm?

**GENERAL QUESTIONS**

1. Is there any reason why any of you, in your own state of mind, and feeling how you feel right now, could not fairly decide this case?

2. If there is there anyone who has missed having the chance to answer a question, please speak up now.

3. Is there anyone who has any other information they think the court and the parties should know, that deals with their jury service?

   ________________ Enterprises also requests permission of the court to ask follow up questions to the above voir dire.
ALSO CONSIDER

Questions about the law (such as burden of proof); attitudes on damages, law suits, parties, following the law, sympathy; additional personal information on each juror (if the court does not have the jurors fill out a questionnaire); taking out the sting of negative portions of your case.
Jury Studies and Articles
Understanding Jurors and the Jury Process
(Shortened summaries)

Presenting Information: The Story Model

In their study “The Story Model for Juror Decision Making”1 Nancy Pennington and Reid Hastie devised experiments to determine which factors most affect jurors’ decision making processes. Their findings show how attorneys must organize a case so it is persuasive. The results of the study are as follows.

- Jurors organize trial information in narrative form by incorporating it into stories. These stories are broken down into subsections called episodes.
- In the creation of episodes and stories, jurors draw from three principle pools of information:
  1. Case-specific information acquired during the trial;
  2. Knowledge about events similar to those in question; and
  3. Generic expectations about what makes a complete story.
- Because two of the three sources are juror specific, different jurors create different stories.
- Most jurors create multiple stories and will then use certainty principles to decide which story they believe to be the best fit.
- Pennington and Hastie identified three basic certainty principles:
  1. Coverage: How well does the story account for the evidence presented at trial?
  2. Coherence: Coherence is divided into three subparts
     - Consistency: Does the story contain internal contradictions?
     - Plausibility: Does the story correspond with the decision maker’s perception of how the world typically operates?
     - Completeness: Does the story have all its parts? Are there major events or pieces of evidence that are left unexplained?
  3. Uniqueness: If a decision maker decides that more than one story is coherent, the stories lack uniqueness and the decision maker will have less confidence in them.
- After deciding which story is the best fit, jurors attempt to understand the law. In criminal cases, this may involve learning the verdict definitions.
- Finally after choosing their story and attempting to understand the legal issues, jurors make a decision by matching their best story with the correct legal outcome as they understand it.

Reid and Hastie conducted one experiment that yielded a particularly striking result.

**Key Experiment: Order of Presentation**

In order to test their story model hypothesis, Reid and Hastie had a number of test juries hear the same criminal case. Next, they organized the defense’s and prosecution’s

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cases into either story order (chronological) or witness order (the way the evidence was presented in the real trial). The results were striking. Although all the juries listened to the same evidence, 78% of the juries that heard the prosecution’s case presented in story order and the defense’s case presented in witness order convicted the defendant; while only 38% of the juries that heard the prosecution’s case presented in witness order and the defense’s case in story order found the defendant guilty. When both the defense and prosecution presented their cases in story order 59% of the juries found the defendant guilty. When both cases were presented in witness order 63% of the juries found the defendant guilty.

**Conclusion:** Jurors are more likely to be persuaded when evidence is presented in “story order” rather than “witness order” – although the total information recalled may not be different.

**Summary:** Jurors take the evidence they are given and create stories of the case. The story that explains the evidence the most logically and completely and corresponds best with the juror’s understanding of the world will be chosen as the best fit and will dictate how the juror decides the case. With this in mind, litigators should present their evidence in story form so jurors can more easily create a story of the case and should assure that their stories conform with the evidence that will be presented and the jurors’ understandings of the world around them.

The Pennington/Hastie study is an example of the importance of jury studies in an attorney’s presentation of a trial.

### Summaries of Additional Jury studies


- **Key Points:**
  - **Purposes of voir dire:**
    - 1. to receive information (the most important)
      - There are three kinds of information you want to receive:
        - 1. Demographic/Historical Information (least useful)
        - 2. Opinion or Attitude Information (more useful)
        - 3. Rationale (How a person thinks) – This is even more revealing than their stated attitude.
    - 2. to give information
    - 3. to develop rapport
  - **Fundamental group dynamics:**
    - Potential jurors will hide their feelings from the judge and are more likely to respond to lawyers questions
    - People respond better and are more revealing when asked open ended questions
    - People are less likely to give information in large group voir dire
  - **Question Structure:**
    - Very Short
• No legalese or stilted language
• No conclusory terms
• Open ended

• Effective use of Challenges
  • 1. Don’t be hasty
  • 2. Don’t proceed immediately to close-ended questions
  • 3. Obtain the rationale of the juror
  • Use close-ended questions in the end to cement the challenge

• Remember “stereotypes can kill”

**Hastie, R., Is attorney-conducted voir dire an effective procedure for the selection of impartial juries?**

**Key Points:**
- Jurors are more honest and forthcoming during attorney conducted voir dire than they are during voir dire conducted by a judge.
- Peremptory strikes create a negative impression on the jury
- Professor Broeder – estimated about 80% of attorneys’ voir dire is trying to indoctrinate the jurors.
- Attorneys are not very accurate at predicting how jurors will vote (they scored the same as law students) but are fairly accurate regarding the size of the award a juror would recommend.
- Attorneys are faced with extremely difficult judgments in selecting jury members.
- Increased participation by the defense attorney increases the impression of fairness.

**Diamond, Saks, Landsman, Juror Judgment about Liability and Damages: Sources of Variability and Ways to Increase Consistency (1998)**

**Key Points:**
- Juror attitudes are much better predictors of verdicts than background characteristics.
- Background Characteristics – (note: the empirical research showed only a modest correlation and these were not strong indicators)
  - Minority jurors were more likely to find liability
  - Lesser educated and lower income jurors were more likely to find for the plaintiff
  - Women were more likely to find the defendant liable
  - Current or recent smokers were more likely to find for the plaintiff

- Juror attitudes were a better indicator:
  - Jurors’ responses to these questions were the strongest indicators
    - In general are plaintiff’s awarded too much or too little money in civil law suits? (this was the strongest indicator)
    - How legitimate is it to sue?
    - How easy or difficult is it to win a civil law suit.

- Suggestions for limiting verdict variability
  - 12 instead of 6 person juries help limit the idiosyncrasies of individual jurors

Key Points:
- Individually interviewing the potential jurors yields much more information than general questioning of the panel. Some of the additional information leads to jurors being struck for cause or through peremptory strikes.

William C. Smith, Challenges of Jury Selection

Key Points:
- “I don’t believe a case can be won during voir dire. But it can be lost.”
- Attorneys need to pinpoint the kind of attitudes and aptitudes they want and ignore stereotypes.
- Voir dire is a critical opportunity to develop a rapport with the jury. “While you’re picking a jury, they’re picking a lawyer.”

Marder, N., The Jury Process

- In the earlier times jurors exercised a great deal more power and judges were largely seen as a means to keep order in the court.
- Current Criticism of the Jury System
  1. Excessive Jury Damage Awards in Civil Cases – the truth is that win rates are low and when plaintiffs do win the verdicts tend to be modest.
  2. Jurors can’t understand complex evidence – may be true but this only means that it should be rendered more understandable though better presentation.
  3. Biased jurors in criminal cases – the evidence suggests otherwise.


Key points:
- Black potential jurors are not showing up for jury duty creating a representativeness problem.
- So some courts started “balancing” by randomly removing the names of people from overly represented racial groups (whites) from the jury selection pool so that the representation in the pool more closely resembles the representation in the community from which the juries are drawn.
- In US v. Ovalle the 6th circuit held balancing to be unconstitutional. The issues dealt with Hispanics being removed because they were not considered a cognizable group. People can not be removed from jury pools solely on the basis of their race.

Hans and Vidmar

Key points:
- This article provides an overview of Supreme Court cases dealing with jury size and the unanimity requirement:
  - 6 persons is likely the minimum number of jurors and six person juries must be unanimous


Key Points:
- Reducing jury size saves resources (courts, employers, etc.).
- Smaller juries are less representative, more variable and less likely to deadlock.
- Smaller juries are less predictable.
Larger juries are more likely to listen to minority opinions and are better at recalling facts (because there are more of them).

**Hastie, R., Penrod, S., & Pennington, N., Inside the Jury**

**Key Points:**
- Non-unanimous juries are:
  - More likely to convict
  - More likely to find a more serious charge
  - Finish deliberating sooner and cover fewer issues
  - Lead to lower juror satisfaction and public approval levels.
- Under the unanimous rule juries that started out 8-4 in favor of conviction often ended up hanging rather than rendering a verdict.


**Key points:** (from debate)
- Jury reforms from England that might be implemented in the US.
  - Empower the jury by changing the jury verdict to a ten-to-two vote. (This lessens the number of hung juries and stops one person nullification)
    - **Con:** Hastie study suggests that non-unanimous juries are not only more likely to convict defendants, they are more likely to find them guilty of the most serious charges
    - **Con:** The quality of deliberations is reduced. They don’t take as long or consider as many issues
    - **Con:** Juror satisfaction is higher with unanimous juries
    - **Pros:** less nullification and jury tampering
  - Allow the jury to ask questions during the trial
  - Allow the jury to discuss the evidence among themselves during the trial
  - Require the judge to summarize the law and facts for the jury during his instructions
  - Shorten the in-court *voir dire*
  - Abolish peremptory strikes

**BASTON Information**

**Musterman, et al.**
- Batson Enforcement
  - Batson creates a three step process:
    - 1. The opponent of a peremptory strike is given an opportunity to establish a prima facie case that the strike is being used in a discriminatory manner. If she meets the burden,
    - 2. The proponent of the strike is given the opportunity to give a nondiscriminatory justification for the strike
    - The judge then decides whether the justification is pretextual or not. And clearly states the reasons for her findings.


**Key Points:**
- Only 18 percent of attorneys accused of violating the principles of Batson were found to be in violation of the case, largely because courts are quick to accept
even the most minimal race neutral explanations. (i.e., job title starts with the letter “P”)

- Some reasons given for challenges:
  - Occupation
  - Demeanor/appearance (some of the toughest to challenge)
  - Politics
  - Crime related experience
  - Age
  - Area where juror lives

- Conclusion: if *voir dire* is expanded and attorneys are given more opportunities to learn about jurors, they may be less likely to use peremptory strikes in a manner that undercuts Batson.

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Key Points:
- By and large juries follow the facts and get the case straight
- Juries’ decisions, by and large, move with the weight and direction of the evidence

**Ellsworth, P., Are Twelve Heads Better Than One: Law and Contemporary Problems**

Key Points:
- A jury’s competence to make decisions comes from two attributes: its number and its interaction.
- Half the juries began by taking an initial vote.
  - Juries that postponed vote taking talked more, spent more time talking about the important issues in the case, and brought out more facts.
  - The criticism that juries don’t take their task seriously finds no support in this or any other research.
  - The deliberation process works well in correcting errors of fact but not in correcting errors of law. Errors are corrected, and irrelevant facts and implausible scenarios are generally weeded out.
  - However, discussion of the facts rarely produces a change in votes.
  - Discussion of the law tends to produce a change in the votes but jurors are much worse at understanding and applying the law.

**Devine, Clayton, Dunford, Seyeing, & Pryce, Jury decision making: 45 years of empirical research on deliberating groups (2001)**

Field work suggests that 1 in 10 juries come out with a different verdict then the one originally favored by the majority. (Kalven and Zeisel; Sandys & Dillehay)

**Smith, V. Prototypes in the Courtroom, Lay Representation of legal concepts**

Key Points:
- Jury instructions must do more than create legal concepts where none exist; to be effective they must revise jurors’ existing concepts.

**Connor, T.J., What you may not say to the jury**
Key Points:

- Things you can’t say to the jury (varies somewhat by jurisdiction):
  - Personal opinion as to the justness of a cause, credibility of a witness, or culpability of a civil litigant;
  - Personal knowledge of facts;
  - Blatant appeals to sympathy;
  - Relative size and wealth of the parties;
  - Insurance coverage;
  - Settlement discussions;
  - Personal attacks or unjustified comments about the other side;
  - Appeals to bias;
  - Urging the jury to ‘send a message’;
  - The golden rule argument. “How would you feel if…”

Study by James Zuehl. Juries all heard the same civil case.
- When the attorney asked for $10,000 the average verdict was $18,000.
- When the attorney asked for $75,000 the average verdict was $62,800.
- When the attorney asked for $150,000 the average verdict was $101,400.

Vidmar & Diamond, Juries and Expert Evidence
Key Points:
- Reports of jury incompetence and irresponsibility in assessing expert testimony is not supported by research findings
- There are some things that can be done to improve jurors’ comprehension of expert evidence:
  - Give the jury a written synopsis of the experts testimony before she testifies.
  - Have the experts testify back to back
  - Give the jury the chance to ask questions (through the judge)

Munsterman, Hanford & Whitehead, Jury Trial Innovations
- Reordering the Sequence of Expert Testimony
  - Have experts with contradicting evidence testify one after another and have the judge and attorneys simply present the information that the two witnesses agree on
- Appointing Court Experts
- Bifurcation, Trifurcation, or Polyfurcation of Trial Procedures

Race and Gender
Marder, N., Juries, justice and multiculturalism (2002)
Key Points:
- This study examined the effect of diversity on deliberations and concluded that:
  - Gender diversity had a positive effect on the tone of the deliberations, rendering them less hostile and more harmonious
  - Age and Gender diversity increased jurors satisfaction with their experience and deliberations
  - Gender had a significant effect on how thorough jurors thought their deliberations were.

S. Sommers, On racial diversity and group decision making

Studies and articles summarized by Ryan B. Parker (U. Mich. Law Sch., cum laude). 7
Key Points:

- Heterogeneous groups (4 whites and 2 blacks) deliberated longer and considered a wider range of information than did homogeneous groups for two reasons:
  - Minorities (Blacks) added a new perspectives
  - Whites participated more effectively by deliberating more thoroughly and being amenable to discussion of race related issues.
    - Hans and Vidmar – membership in a diverse group reminds whites of their motivation to avoid prejudice
    - Sommers and Ellsworth – a situational variable that activates whites’ concern about avoiding prejudice renders them more lenient toward a black defendant.

Judge Dann, “Learning lessons” and “speaking rights”: Creating educated and democratic juries (1993) (Author is a judge in Phoenix)

Key Points:

- Juries are like classes of students. Both are there to be educated. Juries and the rules governing them force passive learning. Classrooms foster active learning.
- Ways to permit greater juror participation in trial:
  - Case-specific juror orientation
  - Mini-Opening statements before voir dire.
  - Preliminary jury instructions, substantive and tailored to the case
  - Juror Notebooks – with lists of witness’s names, copies of the instructions, etc.
  - Note-taking by the jurors
  - Document control
  - Questioning of witnesses by jurors (through the judge)
  - Interim summaries
- Final Instructions
  - Simply and clearly crafted jury instructions
  - Jury instructions before closing arguments
  - Written copy of final instructions for each juror
  - Inviting questions by jurors (after final instructions)
  - Questions and requests from deliberating jurors
- Juror “Speaking Rights”
  - Jurors should be allowed to speak about the trial before deliberations.
- Interacting with Deliberating juror at or near impasse
  - Jurors should be able to present the issue they are having problems with to the judge and the attorneys and ask questions where appropriate.
  - Cases could be reopened to further evidence and instructions


Key Points:

- Majority View: Eliminate or drastically reduce the number of peremptory challenges
  - Inconsistent with the fundamental precepts of an impartial jury
  - Parties are not constitutionally entitled to peremptory strikes
  - Reasons for reduction rather than elimination:
    - Transfers a great deal of power from attorneys to the trial judge because she has the last say on challenges for cause and the appellate view standard (abuse of discretion) is very lenient.
Judge conducted *voir dire* keeps attorneys from getting the exposure to the jurors necessary to allow them to make challenges for cause.

- In the place of peremptory strikes, the DC jury project suggests that steps should be taken to allow attorneys to gain information about jurors by using:
  - using juror questionnaires and
  - individual *voir dire* of jurors

- The standard for challenges for cause should also be expanded.
  - Reasonable doubt as to impartiality
  - Presumption in favor of allowing strike

The combination of more information and a more lenient standard should be much more effective than the current system at eliminating biased jurors.
JUROR QUESTIONNAIRE

A juror questionnaire can gather large amounts of information far more quickly than voir dire. More importantly, a juror questionnaire can be designed by a social scientist to obtain critical information which gives the attorney a better perspective of the thinking processes of the juror. For example, in the O.J. Simpson case, prospective jurors were asked whether they read a newspaper and whether they watched P.M. talk shows like Jerry Springer. The jury consultant’s surveys showed that some 75 percent of persons who regularly read a newspaper believed O.J. Simpson was guilty. A like amount of persons who regularly watched P.M. talk shows believed that O.J. was innocent. That single subject - where a potential juror obtained their news and information - indicated a strong predisposition of jurors to find for or against O.J. By the time to the jury consultants had finished analyzing some 50 pages of questions answered by each juror they had a very good idea which jurors would favor the prosecution, and which jurors would favor the defendant. The actual panel favored the defendant, based on the polling and juror questionnaires.

Jurors can often give information more honestly in a questionnaire than in front of a court audience, and the questionnaire can save time since all potential jurors answer the questions simultaneously. A juror questionnaire is best used when specifically designed by a social scientist to obtain information to match previous polling. Needless to say, this is expensive. Most cases do not justify that cost, but you can still use a juror questionnaire to obtain a large amount of information quickly. Be aware that the downside of this process is that you have to have people and procedures prepared to analyze and coordinate that large amount of information quickly, and put it in a form which can be used in your jury selection process. This means at least overnight, and frequently the court will bring the panel in days or weeks before trial to fill out the questionnaire. Also be warned that if the other side uses polling, or has other sophisticated help or experience, they can obtain more assistance from the juror questionnaire than you do. The questionnaire then works to their advantage, and your disadvantage.

This is, at best, a general guideline. You MUST tailor the questionnaire to your specific case and trial tactics. The questions are often mixed up, and sometimes a similar question is asked more than once to see if the answer is the same. For example, questions about problems which might allow a juror to avoid service are often put near the end. The bracketed comments below are omitted from the actual questionnaire. Blank lines are usually inserted to indicate where answers should be supplied, with more lines supplied when answers are likely to be longer. The questions are numbered so they can be easily referred to and discussed. There is a lot of information here and the questionnaire should generally be condensed. Condensing also generally increases the probability the judge will allow a juror questionnaire. Some questions will not be suggested for inclusion on the questionnaire, or may change in tone, based upon which side of the case you are on. These questions are fairly neutral; generally both sides have to agree on the questions, with the judge ruling on a few disputes. These questions are mostly factual - often open ended and opinion questions are equally helpful. Voir dire to follow up answers to the questionnaire is normal.

Instructions about filling the questionnaire out should include identification of the parties, attorneys, witnesses etc., a brief summary of the facts, and using additional sheets of paper to write complete answers when the juror runs out of the room provided.

This sample juror questionnaire can also be used to construct subject areas and questions for voir dire.
SAMPLE JUROR QUESTIONNAIRE

[General Questions]

Juror number ____________

[Personal Information]

Name
Age
Gender
Race/ethnicity
Address
City

Marital status
married for _______ years
divorced (previously married _____ times for a total of _____ years)
separated for _____ months
single
other (please explain __________________________)

What is the last level of education you completed?
elementary school
some high school
high school graduate
attended vocational or technical school
some college
college graduate
attended graduate school
graduate degree in __________________________

Please list each school you attended after high school
School name    Subjects studied    Certificates or degrees received

Do you plan on attending school later? If so when, where and what areas of study
Please list significant informal learning (outside of school) including work, hobbies, and subjects of interest

[Insert questions about case specific training, education or experience]

Do you, your spouse or domestic partner, speak other languages in addition to English? Please explain

Please list prior residences
City Date moved in Date moved out

Please state the following regarding your current employment,
Job title
Description of your responsibilities
Description of the type of work you do
Number of years/months worked there
Other job titles/positions held and for what time
Number of other people you supervise at your job
Identify any responsibilities in hiring or firing others
Describe training courses, seminars attended with your employment

If you are not employed full-time please check those that most closely describe your current condition
full-time homemaker
student
retired
part-time employment outside the home
part-time employment inside the home
part-time employment, looking for full-time employment
unemployed, looking for work
unemployed not looking for work
disabled
other (please explain _______________________________________________

[Ability and Willingness to Serve as Juror]
It is anticipated that this trial will take about _____weeks/days. Will it work a hardship on you or your family to be in court that long?
[Some jurors try to get out of serving, and you may not want to ask this question, which suggests a juror may be able to avoid service by claiming hardship]

How is your hearing?
No difficulty hearing
Some difficulty hearing
Some difficulty, but corrected with hearing aid

How is your eyesight?
No difficulty seeing
Some difficulty seeing
Some difficulty, but corrected with contacts or glasses
Do you have any physical or mental condition that might affect your ability to serve as a juror? Please explain.

Are you on any medications or under a doctor’s care right now? Please explain.

Have you ever had any alcohol, drug or mental problems? Please explain.

Do you have any difficulty understanding the English language? Please explain.

Do you have any difficulty reading the English language? Please explain.

What was your reaction when you received your summons to serve as a juror in this case?

What kind of comments did you say to others about your possible jury service in this case?

Do you have any religious, social, political, philosophical, or other similar beliefs that may affect your service as a juror? Please explain.

Do you know any of the parties, attorneys, court personnel, witnesses or others involved in this case?

Are you familiar with any of the locations involved in this case?

Do you have any education or experience with any of the subject matters involved in this case?

Do you have any personal emergencies or problems that might make it difficult to focus on the testimony in this case?

Is there anything that would cause you to favor one side or the other in this case?

Is there any reason you would or would not like to serve as a juror on this case?

[Prior Jury Service]

Have you ever served on a jury before?

<table>
<thead>
<tr>
<th>Date</th>
<th>Criminal/Civil</th>
<th>Charges/Allegations</th>
<th>City/State</th>
<th>Verdict</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>(plaintiff/prosecution; defendant/defense; No verdict.)</td>
</tr>
</tbody>
</table>

Have you ever been a foreperson of a jury? If so, in which case?

Please describe your overall juror experience

- generally neutral
- generally positive
- generally negative
Please explain

Were you contacted by any of the parties or interviewed after your service on a jury? If so by whom

Is there anything about your prior jury experience that would make you want to serve, or discouraging from serving on another jury? Please explain

Have you had any dealings or other contact with police or the court system other than described above? Please explain

Have you, or anyone close to you, ever served in the military. If so in please state branch of service highest rank training received description off jobs responsibilities ever see combat number of years in the military ever involved in military police or Judge Advocate department

[Insert education or training that relates to your specific case. Some common ones include law enforcement, insurance, medicine or health care, news media, military etc.]

If you have had other employment in the past please state
Job title Description of your responsibilities Description of the type of work you did Number of years/months worked there Other job titles/positions held and for what time Number of other people you supervised Identify any responsibilities in hiring or firing others Describe training courses, seminars attended with your employment

[Family]
Regarding your spouse or domestic partner’s employment, please state
Job title Description of your responsibilities Description of the type of work done Number of years/months worked there Other job titles/positions held and for what time Number of other people supervised Identify any responsibilities in hiring or firing others Describe training courses, seminars attended with their employment

Please describe any prior employment of your spouse or domestic partner

For your spouse or domestic partner please list the last level of education completed
elementary school
some high school
high school graduate
attended vocational or technical school
some college
college graduate
attended graduate school
graduate degree in ________________________

Please list each school your spouse or domestic partner attended after high school
School name Subjects studied Certificates or degrees received

[Insert questions about case specific training, education or experience]

Please list your children, including stepchildren
Age Sex Occupation City of residence

Please list your grandchildren, including step-grandchildren
Age Sex Occupation City of residence

Please list your parents, sisters and brothers
Age Sex Relationship Level of education Occupation City of residence

[Background Information]
Please identify your most important sources of news and information. Please rank all the sources regularly used, with 1 being the most used and 10 being the least used
television
local newspaper
national newspaper
national tabloids
radio
magazines
Internet
family and friends
Please list all newspapers, magazines and tabloids that you regularly read

Name | How frequently read
| (each day, most days, occasionally, less than once a week, less than once a month)

How often do you listen to radio news or talk programs?

Which radio stations or programs do you most frequently listen to?

How many hours per day do you generally watch television?

What are your favorite TV news or talk shows?

What are your other favorite TV programs or types of programs?

Please rank the following types of shows you watch, with 1 being the most watched and 10 being the least watched

- morning news shows (such as today and Good Morning America)
- morning talk shows
- soap operas
- afternoon talk shows
- evening network news
- evening local news
- TV tabloids (such as Inside Edition or Hard Copy)
- PBS, Discovery, History channels
- TV magazine shows (60 Minutes, Dateline )
- reality shows
- primetime sitcoms
- political talk shows (such as Hardball)
- nightly news shows (such as Nightline, Larry King)
- nightly comedy (such as Leno and Letterman)
- primetime drama
- crime and law fiction/drama shows
- Court TV or other law related programs
- CSPAN

How frequently do you read books?

What kinds of books do you generally read? (If several, please rank from 1 being the most read to 10 being the least read)

- mystery
- legal fiction
- romance fiction
- science fiction
- historical novels
biography
history
true crime
politics
self-help
Other (please describe______________________________)

What is your favorite book?

Please name the last three books you read

How often do you watch a movie? (including videos, DVDs or movies played on television)?
  over 5 per week
  2-4 per week
  1 per week
  several per month
  fewer than 6 per year
  virtually never

What type of movies do you generally watch? (If several, please rank from 1 being the most frequently watched to 10 being the least frequently)
  Action/adventure
  romance
  historical
  comedy
  drama
  science fiction
  mystery
  animated
  crime

What is your favorite movie?

What are the last three movies you watched?

Do you have access to the Internet?

If so how frequently do you use the Internet?

Do you have been an e-mail address?

How frequently do you use e-mail?

For what subject matters do you use the Internet? (shopping, news, weather, hobby interests, research, chat groups, finance, etc.)
What are your three favorite or most visited Internet sites?

Do you have any Internet memberships or belong to any Internet sites or associations?

What recreational activities do you enjoy and how frequently do you do them?

What hobbies or other leisure activities do you enjoy and how frequently do you do them?

In what other ways do you spend your free time?

Please list all clubs, churches, social groups, political organizations, professional groups, or other similar organizations (for example PTA, Rotary, Junior League, Sierra Club, church choir, union, NRA etc.) which you have belonged to or attended. For each organization please state the following:

- Organization
- Description/purpose
- Dates belonged/attended

Please explain any leadership positions you have held in these clubs or organizations, and the dates held.

Have you attended, donated money to, or donated time to any organizations as explained above even though you have not been a formal member of such group?

Is there a bumper sticker on your car, or anyone’s in your family? If so, what does it say?

Describe a bumper sticker which you have liked or enjoyed.

Do you know any of the other jurors on this case?

Is there anything else you would like us know about you or you think important to any of the parties to know about you?

Is there anything else you believe might affect your ability to be fair and impartial as a juror in this case?

______________________________________        ________________________
Juror’s Signature                          Date signed

[Case Specific Questions]

[Every case needs voir dire questions tailored specifically to the facts of the case. Jurors who appear to have superior knowledge because of education, training or experience; or who have strong]
feelings on a subject; tend to have more influence on the outcome of the verdict, for better or worse. Any significant subject your case deals with should be reviewed and questions considered for the jury questionnaire or *voir dire*. The following are some examples of questions which can be included in a questionnaire or *voir dire* for subjects commonly encountered.]

[High Publicity Case]

How often do you-
- Read the local newspaper
- Listen to talk radio or radio news
- Watch local TV news
- Review Internet news sites

Have you read about this case in the newspapers? If so, please say what newspapers and describe what you recall of the coverage.

Have you heard about this case on television? If so, please say what channels and describe what you recall of the coverage.

Have you heard about this case on radio? If so, please say what stations and describe what you recall of the coverage.

From the news coverage you have seen, what most stands out in your mind?

Have you ever called into a talk show, or written to a newspaper or other media source about this case? If so, please describe.

Please describe your view of the amount of new coverage this case has received
- Very high
- Higher than normal
- Moderate
- Little
- Virtually none

Please describe your interest in the news coverage on this case
- High-I read or watched about it when ever I could
- Medium high-I read or watched most but ignored a few
- Average-I read or watched some but ignored others
- Low-I read or watched some, but avoided most
- None-I did not know the news had covered this case

Please describe your level of knowledge about this case
- I know a lot
- I know about average
- I know less than average
- I don’t know about the case
Please describe what you know about this case

Please describe your thoughts or opinions about the case

[Add questions on the specific media coverage]

**[Vehicle Accident Case]**
[Basic auto accident with reconstruction testimony, medical testimony]
[See Law Enforcement Also]

Have you or someone close to you had experience with accident reconstruction?

Do you have any training or experience in physics or math?

Have you or someone close to you worked in resolving claims after automobile accidents? [Judges and jurisdictions vary on how much can be asked about the insurance industry]

Have you, or any family members or close friends, ever been injured in an accident?
If so-
  - Who and what type of injury?
  - Was a claim made?
  - Was a lawyer involved?
  - Please tell us about the accident and injury.
  - Was a lawsuit filed?
  - How was the claim resolved?
  - Were you satisfied with the resolution?

Have you or someone close to you been seriously injured?

Have you or someone close to you had a similar injury as plaintiff?

Have you, or any family members or close friends, ever been involved in a lawsuit?
If so-
  - What kind of a lawsuit?
  - What was your involvement in the lawsuit?
  - Who represented you or them?
  - How was the lawsuit resolved?
  - Were you satisfied with the resolution?

Have you, or any family members or close friends, ever been a witness in a case or claim?
If so-
  - What kind of a case?
  - How was the claim resolved?
  - Were you satisfied with the resolution?
Have you or someone close to you worked in or had training in the medical arts and sciences?

[Review other issues significant to the outcome of the case:
  damages;
alcohol consumption;
drug use;
mistake/negligence;
distractions while driving;
repair of vehicle;
opinions about tort system;
poor condition or maintenance of vehicle;
past accident history;
past citations; etc]

[Case Involving Law Enforcement]

Have you or someone close to you ever been employed by any law enforcement agency (including police, sheriff, highway patrol, FBI, customs, National Parks etc.)?

If so, please state who, when, what agency, the job title and responsibilities

Have you or someone close to you ever been employed by an investigative or security agency (including private detective, IRS, OSHA, security company, armored car company, store or company security etc.)?

If so, please state who, when, what agency, the job title and responsibilities

Have you ever applied for work at, or volunteered at a law enforcement, investigative or security agency?

If so, please state who, when, what agency, the job title and responsibilities

Have you ever had close contact with someone from a law enforcement, investigative or security agency?

If so, please state who, when, what agency and the circumstances

[Also consider covering:
  prosecutor’s offices, defense attorneys (and the juror’s reaction to and opinions of);
law enforcement education to the extent not covered in the general education section;
prison, parole and pardon agencies;
the criminal justice system (whether the juror or those close to them have been a suspect, accused of, arrested for, convicted of a crime, been a victim of a crime, a witness to a crime, their opinions on the prevalence of crime and how effectively the system deals with it), whether they know someone who has been treated unfairly by the justice system, whether they have called police or reported a crime, known or suspected someone was involved in illegal activity (and if so, what action was taken) etc.;
general government positions (may include judges and court personnel, attorneys etc.);
and other case specific information as needed]
4. OPENING
Opening Statement Checklist
OPENING STATEMENT
CHECKLIST

Note: This checklist is targeted toward an opening to a jury in a medium civil case with discovery. Other cases may require more adaptation.

FIRST IMPRESSIONS LAST

The opening is THE trial. Approximately 80% of jurors reach a “preliminary” decision by the end of opening statements, and never change their minds. While jurors claim they are still open-minded, they begin to filter evidence and focus on that evidence that supports their initial reaction. Because it is the time when most persuasion occurs, the opening MUST be better PREPARED, and better REHEARSED than any part of the trial. It takes the same weeks of work as a short story would before publication.

If after openings, you have the lead jurors wanting to rule for you, you will likely win the case, as long as you produce the evidence promised, and don’t have any major mistakes that kill credibility and make the jurors reconsider.

HARD WORK

Jerry Spence was one of the most successful attorneys of the last century. He said he would sometimes take months preparing and writing his opening. If you prepare it well, and tie it to your examinations, documents and closing, your trial is pretty well prepared when it is finished.

I. RESERVE OPENING?

A. There are few times where reserving an opening statement makes sense (waiving the opening almost never does). The jury needs to hear your side of the story upfront. Also, see the section below re motions to dismiss for failing to state facts in opening that establish a prima facie case.

1. One instance is if there are several plaintiffs or defendants with similar interests. If one defendant reserves its opening statement until the beginning of the defense case, it can be an opportunity to sum up in the middle of trial.

2. Another instance is, particularly in a criminal case, where the prosecutor’s case is uncertain, and there may be witnesses who may not appear, or critical evidence that may not be admitted. You don’t want to address that evidence if excluded, yet you have to if it is admitted. After weighing the risks, you may decide it is better to reserve your opening.
3. If you dare not give a detailed opening, particularly in a criminal defense case, wait and see if plaintiff’s opening cures your concerns, and tells you exactly where they are going. If the concerns are still there, consider giving a less detailed opening. It must also be well prepared, and sound like a great opening even though some facts may have to be omitted.

B. In a judge trial sometimes the judge will decline to hear the opening statements.
   1. Encourage the judge to become familiar with the case through the opening.
   2. Find out before hand from the judge.
   3. Prepare the opening anyway, it’s helpful for you to understand the case, and the judge may change her mind.

C. If the judge hears the opening it must be aimed towards the judge. It will be somewhat different from a jury opening.
   1. Usually a bit shorter, more to the point, less emotion.
   2. Fewer legal definitions, but don’t presume the judge will quickly understand the facts and technical language. You’ve lived with the case for years and it’s become second nature.
   3. Find out about the judge’s background, how she decides cases, what similar cases or arguments she has heard. Then construct the opening to appeal to that particular judge.
   4. The judge can ask questions and counsel must be prepared to answer them.

II. PURPOSE OF OPENING STATEMENT.
   A. TECHNICALLY the object of the opening is to give the case facts and thereby EDUCATE the jurors – tell the facts you will prove and your case theory so the jury can see the “BIG PICTURE” and understand the evidence, which can rarely be presented in sequential order.

   B. IN PRACTICALITY, the object of the opening is also to PERSUADE jurors that your case is fair, your clients have correct motives, you are open and honest and your case should prevail.

   C. RAPPORT. The opening is often the first real introduction of both you and your client, particularly since judge conducted voir dire is becoming the norm. Develop a rapport with the jurors, make sure both you and your client are LIKABLE. Make introductions of your client, give information on her life and interests, show similarities with the jury.

   D. CREDIBILITY. You should also use the opening to create trustworthiness and credibility.

III. OPENING OUTLINE. Your opening should:
   A. Present your Trial Theme (A sound bite summary of the case - this case is about X, not a case
about Y. See the Trial Theme section of The Ultimate Trial Notebook);
B. Present specific evidence to support that theme (use actual evidence, not a bland representation of what ‘the evidence will show.’ By stipulation or court order show the jury actual exhibits, summaries of evidence, documents and testimony. Of course it is limited to highlights, the critical strengths of your case.
C. Take the sting out of the opposing trial theme. Deal with their trial theme, strengths now, not just their weaknesses. Again show actual evidence to undermine the opposing theme.
D. Focus narrowly on the case theme and supporting evidence. One of the most common errors in opening is to paint a broad, general picture of the case with conclusory language.
E. Generally, deal with the difficult issues, opposing counsel will and the jury needs your side of the story.

IV. PREPARING THE OPENING STATEMENT.
A. Preparation of the opening statement should begin as soon as the case arrives in your office.
B. Open a file and write down ideas about the opening, critical facts and observations, potential demonstrations and exhibits, critical documents etc.
C. Add to the file after depositions, motions, interviews.
D. Some of the ideas and observations you make early in the case, when it is new to you, will never come again.

V. SITTING DOWN TO WRITE THE OPENING (weeks, if not months before the trial).
A. BRAINSTORM. Without looking at your previously prepared notes, write down as quickly as you can different critical portions of the case:
   1. All the reasons why the jury should rule for you;
   2. All the reasons why the jury should rule against you;
   3. The most critical testimony on both sides;
   4. The most critical exhibits;
   5. The evidence on both sides that carries positive, or negative emotional impact;
   6. The personal characteristics of the parties that may appeal or repulse a jury;
   7. Ask other similar questions.
B. KNOW THE CASE! Gather information to refresh your recollection of the entire case. As you review the case, take notes and copy critical information into witness and opening files.
You must know all facets of the case intimately. If you give a tremendous opening which persuades all the jurors, but you were mistaken on some evidence, or forgot to explain a critical opposing document, you will likely lose your credibility, and the case.

1. Review witness statements, depositions etc. Decide on each witness’s testimony.
2. Review photographs, exhibits, hot doc file, deposition exhibits, etc.
3. Review case documents, medical records, the entire file. KNOW THE CASE!
4. Make sure you are correct on your facts. Uncertain information in the opening will be turned on you.

C. KNOW THE LAW. What instructions will likely be given? Tie the case theme to the instructions, tie the opening to the law.

1. The entire trial is aimed towards the closing, where the facts, the law, the arguments come together. Match your opening with your closing. Usually the two are at least outlined together.
   a) What are your best arguments in closing? How do you set them up in opening with facts; then prepare at the same time the witness examinations to be sure each fact you want in the closing and opening, is asked of the witness in trial; or that the document is entered into evidence.

D. OUTLINE THE OPENING around the trial theme you have previously worked out.

1. Take the brainstorming notes, the notes you have made during the case and the notes from your recent review and organize them into your outline.
2. Move duplicate and unimportant information to the end of the outline.
3. Reorganize the story, simplify it, so that each part supports the trial theme. Generally, start and end with the theme. Make sure that a sense of “injustice” is portrayed. “Justice” is not sufficient. Life is tough.
4. What will the opposing trial theme be, what evidence meets that theme, how can you best deal with it?

E. EVIDENCE, EVIDENCE, EVIDENCE.

1. The entire idea of the opening is to show your evidence.
   a) Identify the cause of action or defense.
   b) Clearly state the issues not in dispute; the issues in dispute or facts the jury must resolve, so they will know and pay particular attention to them – and spend more time on that evidence.
(1) Identify important evidence the jury should pay particular attention to.

c) Then marshal the facts, exhibits, depositions, statements, documents, testimony, the EVIDENCE that supports the issue; and relate it to the COA or defense.
d) Make it clear what your client wants – the verdict the evidence requires (but see the argument section below). Most judges will allow counsel to state that if he proves these facts, he will ask for a ‘not guilty’ verdict in closing argument.

F. DETAILS - What to leave in and what to leave out. The detail in the opening statement is critical. It should be as detailed as possible to show facts, truth, accuracy, reasons, motive, intent, credibility, lack of bias, etc. However, too much detail becomes boring. Don’t be diverted into battles that are not important to your trial theme, into detail that is not critical. Generally, put in as much detail as possible, then ask of each detail, “Does this move the case forward, is it necessary?” It takes many drafts to get the important detail in but keep the unimportant out.

VI. Address the OPPOSING CASE.

A. Your opening is on your case, your evidence, your theory. Don’t just give the opposing case then try to explain why it is incorrect.

B. But you must address the other side. Your opening is not given in a vacuum, you must anticipate the other side of the story and meet it.

C. Focus the jury on what’s happening. What are the real issues, is the opposing theme a diversion, based on emotion, a convoluted smoke screen?
   1. Consider admitting opposing evidence or argument to better focus or force the opposition to redo their theme.

D. Try to use the opposition’s diagrams, numbers, etc. Then point out that you disagree with their numbers, but even using their numbers, it still proves your case.

E. Attack the CREDIBILITY OF THE OPPOSING side:
   1. Find a few points of import in the opposing case that will cause the jurors to pause, to distrust it: A mistake, a contradiction; the plaintiff had been drinking, the defendant manufacturer had 23 similar accidents. Don’t “argue” but find facts that raise doubts by themselves.
   2. Point out consistencies with your witnesses and other independent witnesses.

F. INOCULATION, take the sting out, deal with skeletons, steal their thunder.
   1. Nearly every cases has its problems: a great witness who made a critical mistake on a
written statement; a defendant who didn’t commit the crime but has a long criminal record. Be candid about these problems, then explain why the facts support your side.

a) Review problem witnesses, conflicts in testimony, disputed documents, weak areas.

2. To “inoculate” deal with it ASAP – in voir dire if possible. Usually, deal with it in more detail in opening – but not so much to focus unduly on it.

3. Consider admitting bad facts that are bound to be proven anyway. It makes the proof irrelevant, and even if admitted it can make the opposition look petty.
   a) It makes you look honest and credible.
   b) If you don’t admit them, at least confess them, then explain them – rather than allow the opposition to pounce on them.

4. Generally, no matter how bad, it is better to come from your mouth than the oppositions’. You can explain, put it in the best light, and show how it’s not really relevant or critical. Tell the jury you will tell them all the facts, not just some of them. Your credibility is not weakened, and can be strengthened.

5. Identify any boring areas (laying foundations, getting a document in to evidence), explain why they are necessary and confirm you will handle it as expeditiously as possible.

6. Identify potential problems you have been unable to solve such as:
   a) the missing witness or document;
   b) the client unable to attend;
   c) the corporate client with different representatives each week;
   d) witnesses appearing by video, internet or deposition, etc.

VII. DIFFICULT ISSUES.

A. Damage amounts in opening? It is a sensitive topic and must be carefully considered.
   1. Sometimes the jury needs to know the number right up front, to be prepared for it.
   2. Other times they need the evidence first, become a little angry before confronted with a large number.
   3. Seeing how the trail goes can give a better idea of what the jury will award.
   4. Overreaching is a serious fault, and justifying large or small damages a valued art.

B. Expert witnesses. Consider covering the difference between lay and expert witnesses.
1. If you have important experts: introduce them; build their expertise and reputation; explain how they fit into the case; and what their testimony will be.

2. If the opposition has critical experts consider explaining they do not testify to facts, their opinions are for the jury’s consideration only and are not binding, or that certain assumptions have been made that don’t fit the facts.

C. Complex Matters.

1. Many complex matters are frankly beyond the detailed comprehension of an average jury. If you have technical issues they should be dealt with in opening.
   a) Simplify the matter. Rather than have your expert testify for eight days on direct (as with the DNA experts in the O.J. case) come up with some analogies: “Dr. Thomas is one of the world’s leading experts on DNA. He will tell you that DNA is just like a human fingerprint, only a lot more accurate.”
   b) Try to instill confidence that they can focus on and understand the testimony. Humanize it, confess your initial struggle to understand but that it made perfect sense once explained (may be objectionable).
   c) Go visual, it’s easier to see than hear.
   d) Create credibility in the expert and yourself. If not well understood, jurors ignore the evidence or go with trust.

D. Sensitive Matters.

1. Gory photos, frank sexual talk, scars in personal areas, intense situations, blowups with threats and profanity – anything that might shock some jurors should be dealt with. Explain what they will see or hear and why it is necessary – or why it is really irrelevant.

VIII. **REFINE THE THEME TO EXPLAIN ALL OF THE EVIDENCE.**

A. With the evidence now in firmly in mind, refine the theme to explain all important evidence.

B. Adjust the theme to meet probable opposing themes.

C. Confirm that the trial theme you have developed is the theme you will use for trial.

IX. **DEVELOP AND REFINE THE OPENING STATEMENT.**

A. Make the vocabulary vivid, word pictures, descriptive.

B. Incorporate memory principles (see *The Power to Persuade*).

1. **PRIMACY /RECENCY** - Start strong and end stronger.
2. STORY form.
3. SNAPSHOTS - Strong on visuals. Make it TV, not radio. Make sure most all the critical visuals of the trial are used in opening.
4. SIMPLIFY - Understandable, has meaning, eat the elephant a bite at a time. An 8th grader who has never heard the case before must understand it.
5. TRILOGIES - Three reasons why; beginning, middle, end.
6. CATCH PHRASES- Similar sounds, rhyme, play on words.
7. VARIED REPETITION. We remember what is repeated, but vary it, or it’s perceived as boring or useless.

C. Address CREDIBILITY of yourself, witnesses and case. Most judges do not allow you to directly argue the credibility of one witness over another, but your presentation can make a similar argument for you.
   1. Add detail that emphasizes credibility. Example - Read short passages from depositions. It shows you are prepared, the witness really said it. It adds credibility to quote the witness, it shows you are careful to be accurate.

D. Show your case MEETS THE LAW the judge has or will explain.
E. Show how COMMON SENSE supports your case.
F. Show how your case fits the BIG PICTURE. A vote for your case is a vote for safe products, freedom from bureaucratic red tape, some issue that the jurors have in common.
G. NO SURPRISES. Make sure all the critical facts are in the opening; all facts are accurate.
H. The IDENTITY OF THE PARTIES must be clear, their relationships, who you represent, etc. Your client may be “Bob” and the other client “the defendant,” but use consistent terms to refer to parties, places, equipment etc.
I. Make sure the case EMOTIONS are in your opening, but as an undercurrent.
J. The defense should usually remind the jury to keep an open mind, that the plaintiff’s witnesses will testify first, but there is another side to the story.

X. CONSTRUCT ARGUMENTS that your particular court will allow you to use in the opening.
   A. “Arguments” are your reasons, your persuasive appeals.
   B. Refer to the argument section of The Ultimate Trial Notebook - you need:
      I. Logos (evidence)
2. Pathos (appeals to human nature, how the mind decides, emotions); and
3. Ethos (credibility).

C. STORY. “Thought flows in terms stories-stories about events, stories about people, and stories about intentions and achievements. The best teachers are the best storytellers. We learn in the form of stories.” Frank Smith

1. A study by Pennington and Hastie (see the voir dire / jury study section of The Ultimate Trial Notebook for more detail) concluded juries decide a case based on a story model. Very briefly summarized, your story (in opening, direct or cross, and closing) needs to cover three principles:
   a) Coverage: The story accounts for the evidence presented at trial;
   b) Coherence –
      (1) Consistency - No internal contradictions in the story.
      (2) Plausibility - The story matches the decision maker’s view of how the world typically operates.
   c) Completeness - No major events or pieces of evidence unexplained.
   d) Uniqueness: If more than one story is coherent, the stories lack uniqueness and the decision maker will have less confidence.

2. A story does not argue unless it includes reasons. Include all of the REASONS - justifying liability and damages in the story line.

3. Consider adopting a well-known story line, David and Goliath (an individual against a giant corporation), Horatio Alger (humble beginnings, hard work, great success) etc.

4. While not always applicable, consider including the tried and true story line politicians use to subtly win votes:
   a) Humble beginnings, then accomplishments;
   b) Admiration of others (cheering, fawning crowds);
   c) One on one (one of us, personal, accessible)
      (1) Concerned about me;
      (2) Warm (with children);
   d) Common problems
      (1) I share your concerns;
      (2) I will fix them for you;
   e) Universal feelings of fairness, justice;
f) Patriotism
   (1) Our community, our heritage;
   (2) Flag, music.

5. Tell a GOOD STORY - with the following attributes (see The Best Story Wins for more detail on a good story).
   a) A CLEAR PREMISE (a brief statement that is later demonstrated by the story). Every part of the story contributes to the premise and moves the story forward.
   b) A SEQUENCE OF EVENTS with consequences, action and adventure. Action is the plot, filled with suspense. Show the decisions and difficulties the characters were confronted with, how they felt and thought, without letting the listeners know how they decided, how they dealt with the confrontation. Let the characters hang from the cliff for a moment, the audience not realizing whether they are going to fall or be rescued.
   c) The main character must ACT, not just be acted upon.
   d) CONCRETE, SPECIFIC INSTANCES from which the listener makes her own conclusion.
   e) Interesting PEOPLE- Stories are about people, “characters.” Create IDENTIFICATION between the story’s characters and listeners by showing: MOTIVATIONS; hopes and fears; troubles and triumphs; people’s dilemmas, conflicting values; larger than life heroics/tragedies.
      (1) We decide who is “good” and “bad” based on motives and intents. Show your client’s pure motives, justifiable intents, the opposing client’s corrupt motives, ruthless intents.
      (2) Be sure to show the reasons why you arrived at that motive or intent, not just the conclusion.
      (3) If you represent a corporation, show identification with the corporate representative who will sit through the entire trial, including testifying. Emphasize the corporate culture of caring, pride in their excellent product, emphasis on safety, research, etc. A company never does anything. People do.
   f) Facts that are accurate, understated, and consistent - not exaggerated conclusions. Make sure all facts are there. Follow Rudyard Kipling’s advice:
I keep six honest serving-men
(They taught me all I knew):
Their names are What and
Why and When
And How and Where and Who.

CONFLICT, particularly between people.

People STRUGGLE.

People CHANGE as a result of the conflict and events of the story.

CLIMAX (then sit down and shut up.)

Suggest a RESOLUTION to the story.

In telling the story use:

(1) FORESHADOWING (hints at what is to come (mentioning that the car had just been to the brake shop hints that something will go wrong with the brakes));

(2) CONTRAST (it was the best of times, it was the worst of times);

(3) WHO CARES? (what are the stakes, how does the outcome affect the participants, the jury?);

(4) SUSPENSE (leave the key until the last);

(5) MYSTERY (leave something (obvious) unspoken); and

(6) RELATION BACK (tie the end back to the beginning).

ANALOGIES. You can almost certainly use metaphors ("banished to a purgatory of pain"), most likely similes ("just like driving a car"), and often short analogies in opening. Carefully analogize to common situations that are well understood by the jurors. This is where you are most likely to convince the jury, so don’t ignore the opportunity to “argue” the case, however narrowly the judge defines it.

PRACTICAL ARGUMENTS can often be used in openings Particularly short examples.

Consider different ORGANIZATIONS of your opening.

STORY ORGANIZATION is critical to keep attention, increase understanding, and persuade.

See The Best Brief Wins outline on writing for a more organization templates and writing techniques.

1. Chronological, from beginning to end.
2. Show the ending then go back to the beginning (show the actual murder first, then the precipitating events).

3. Only on a rare occasion, such as a well-organized commercial case, can the opening be in order of witnesses.

B. CICERO’S ORGANIZATION OF A DISCOURSE.
   1. Introduction - get the jury’s attention.
   2. Case background - a brief, clear, believable statement of the facts.
   3. The division - areas of agreement; areas of disagreement; decisions to be made.
   4. Proof - show your supporting evidence on areas of disagreement.
   5. Refute - evidence and argument to “destroy” the opposing position.
   6. Conclusion - summary, remind jury of their responsibility (justice, fairness).

C. BEGINNING, MIDDLE, END.
   1. Beginning – Brief summary, then introduction of people, places, things (who, what, when, where).
   2. Middle – Evidence and info on the theme, issues, claims, defenses, conflicts, agreements, (why, how).
   3. End - Resolution of issues, request for action.

D. Traditional BEGINNINGS which are DISCOURAGED.
   1. Beginning with a formal introduction of all the parties. (This has usually already occurred. The beginning of the opening needs to be exciting and filled with important information. You will never get this much attention again. If you must introduce them, make it part of your story, or do it in the middle.)
   2. “What the lawyers’ say is not evidence in the case.” Some attorneys spend a paragraph to begin the opening basically explaining why the jury should not pay attention to them. Avoid explaining “what the lawyers say is not evidence,” or bury it in the middle of the opening if you feel compelled to state it because the opponent has made numerous misstatements, and you intend to emphasize the difference between what opposing counsel said and what the witnesses will say.
   3. “This is what we lawyers call an opening statement. An opening statement is one of only two chances I get to talk directly to you during the trial. The other time is the closing statement . . .” (A little understanding of case procedure can be helpful if the judge missed it,
but not to open.)

4. “This is the opening statement. It is much like a road map (or a jigsaw puzzle). It shows you where we are going . . . (The introduction needs to be your story, it incorporates your trial theme and the best several reasons the jury should rule for you. If you think it important to use this analogy, bury it somewhere in the middle.)

5. Beginning where the last party left off. You’ve carefully organized your opening for maximum clarity and persuasive effect. Don’t throw it away because the party before you ended on something that creates a spark in your mind.

6. “First we will call ‘A’ who will testify to the layout of the bank and the alarm system. Next we will call ‘B’ who will testify that . . .” (Tell a story, you can mention particular witnesses and their relationship to the facts if helpful, but the order of witnesses is rarely a good story.

XII. Adjust the opening to fit the JUROR’S PERSPECTIVE.

A. What are the jurors’ windows on the world, life experiences and how will they view the case?
B. What questions will the jurors be asking in their minds? For example, why witness X - whom jurors are likely to expect to testify, will not do so, why the murder weapon will not be introduced into evidence.
C. What are the jurors’ initial reactions, biases and emotions regarding the case?
D. What do these particular jurors want to hear, what will make them want to rule for you?
E. Pay particular attention to the jurors who are likely to be opinion leaders.

XIII. Check with the COURT, local rules and other attorneys to see what restrictions will be put on the opening.

A. Does the judge impose a time limit? Consider requesting a time limit if you tend to be short and opposing counsel tends to be long (but a long, boring opening of the opposition can be to your benefit).
B. Does the judge “let all evidence in,” or “keep it all out?” Consider motions in limine to assure your evidence is admissible and that the opposition will not discuss inadmissible evidence in opening. Some attorneys maintain that you may mention anything in the opening that you ‘reasonably believe’ will be admitted into evidence. However, once mentioned, you cannot “un-ring the bell.”
C. Does the judge restrict counsel to the podium?

D. Will the judge give pre-instructions, and what will they be? Will she deal with scheduling, order of witnesses, waiting, depositions, court procedure?

E. In multiple party cases, the judge has discretion on opening statements.
   1. The judge ultimately decides the order of openings. Try to negotiate with counsel first, but if unsuccessful, bring it up with the judge. The judge may give preference to the party with the most at stake; or may allow defendants to decide, or may go by the order of the names on the pleadings, or alphabetical order.
      a) Take care to match the timing of your opening with your theme. For example, if your theme is that you are a minor defendant, try to give the last opening, and a very short one. Generally try to give the first or last opening.
   2. The judge can consider related parties, same counsel, same interests, and other factors in limiting a party’s opening.
   3. The judge may also limit the time of openings, including dividing the time with multiple defendants to equal the time of the plaintiff.

F. Ask the judge to give basic jury instructions before the opening to assure that the jury understands critical legal issues. Assure you will be allowed to briefly discuss critical points of the law such as elements of a claim, burden of proof, etc.

G. You cannot “argue” facts, law or credibility in opening. But is the judge’s interpretation of “argument” conservative or liberal?
   1. In the liberal view you can state: facts, reasonable inferences (circumstantial evidence), reasonable deductions from the evidence; a summary of the law (especially if pre-trial instructions are given); address all the facts at issue including impeachment and rebuttal (if it will come into evidence); and a few conclusions (“This evidence shows he met/failed to meet the standard of care”), an occasional personal view (I didn’t understand the science until Dr. Thomas was deposed. He’ll testify that . . .”).
   2. Argument is, in the conservative view: facts only (to be safe, your witness must SAY it); no law; no inferences; no deductions; no conclusions of “negligence;” no credibility of witnesses; no anticipatory rebuttal evidence; no impeachment evidence the other side may produce; no personal opinions, feelings or stories; no thanking the jury, etc.; and only visuals that will be admitted into evidence.
   3. Small changes can avoid objections.
a) Avoid opinions, characterizations, attacks. Let the facts argue for you.
   (1) Don’t say “I will tell you” but “the evidence will show.”
   (2) Don’t say “you must see the world from the eyes of an eleven year old
        boy” but “we will show you the world through the eyes of an eleven year old
        boy.”

b) Sometimes prefacing marginal statements (that may be objectionable to some
    judges as not pure facts) with: “The evidence will show,” or “we will prove” can avoid
    objections.

c) Spread marginal statements out, don’t group them.

d) Start very clean, introduce gray areas slowly and see what opposing counsel
    will object to and what the judge will sustain.

4. “Argument” is often as much tone of voice, volume, etc. as words. Keeping a “living
   room” conversational tone will help avoid objections.

5. There is no substitute for knowing the judge. Most judges are somewhere in between
   the liberal and conservative views and you must know where.
   a) My brother began an opening: “In a civilized society -;” “Objection;”
       “Sustained.” His judge was of the conservative view – or perhaps she did not think
       proof existed our society was civilized. Opening is no time to be interrupted by
       objections, especially if they are sustained.
   b) Consider a motion in liminae to educate the judge on what is appropriate if
      opposing tends to take more leeway than you will.

H. What use of exhibits and visuals does the judge allow in opening? Must they be pre-admitted,
   stipulated to by counsel, approved by the court?

XIV. PERSONALIZE THE OPENING. You need the jury to identify with your client and you.

A. Disclose similar feelings. Show what is important to the jury is important to you and your
   client. Draw on common experiences.

B. Show you and your client are fair, friendly, competent. Show you are honest and trying to
   give the entire story, not hiding some facts.

C. Subtly point out similar backgrounds, points of view, feelings, values, beliefs. You may have
   to insert these items at the last moment, after learning them in voir dire.

D. Much of this can be non verbal - dress, habit, and speech patterns.
XV. Review the opening for ACCURACY.

A. COMPLETE FACTS. Get the jury instructions out and make sure everything the law requires for your success (a *prima facie* case on each cause of action, affirmative defense etc.) has been supported by a fact; or considered and excluded with good reason.

1. If you are the plaintiff, some jurisdictions allow a dismissal if the opening fails to state facts that would justify a verdict; also for affirmative defenses.
   a) Make sure even the ‘obvious’ is stated – the defendant, Mr. Jones, was at the wheel when the accident occurred.
   b) If appropriate, research and consider a motion to dismiss on opening statement, including affirmative defenses.
   c) If such a motion is made against you, request the court to reopen the opening statement and claim the facts necessary.

B. NO UNNECESSARY FACT. ‘Never claim what you need not; lest you must prove what you cannot.’

1. Stick to what you *must* prove, don’t be careless and claim as fact, anything not necessary to your success.

2. If it is not necessary to the verdict, at least leave some leeway:
   a) “in the range of 10 to 15 minutes;”
   b) “around 10:15 P.M.;”
   c) “approximately 45 miles per hour;”
   d) “to the best of Mr. Karl’s recollection.”

C. Make sure your FACTS ARE ACCURATE and the testimony and documents back each up.

D. TIE THE OPENING to your direct and cross examinations, and closing. Make sure your facts are accurate, and that you have the questions to bring that testimony out in your witness examination outlines.

E. JUDGMENT. Sometimes it is difficult to know exactly what a witness will say, or how a point will come out. Error on the side of accuracy.

F. HIDING SOME CARDS. You must educate the jury, but you are also educating opposing counsel.

1. If you have surprise evidence; a portion of a theme that is unexpected; impeachment or rebuttal evidence; it is often better to keep it out of the opening, or refer to it only
generally.

2. Part of every battle is to know where the real thrust will come from; what is feint and what is attack. You may want to keep quiet about critical information that can be more easily met if disclosed now.

3. Likewise, you may decide to include a few side issues that worry the opposition, as long as your not focusing on them will not hurt you.

4. Conduct a risk/reward analysis and use judgment.

G. UNDERSTATEMENT. Frequently understate the facts, never overstate the facts. It builds credibility.

XVI. BE UP FRONT. Generally tell the jury what you want and why you’re entitled to it. Don’t let your goal be a mystery until closing.

A. The first, dozen sentences should be the best written, most concise portion of the trial. Then virtually memorized. You might use it again with some alteration in closing.

   1. Grab the jurors’ attention immediately with some natural drama, an injustice, a vivid story, a contrast.

B. The conclusion is likewise carefully constructed and virtually memorized. Tell them the specific verdict the facts justify and again summarize why.

XVII. Address JUROR ISSUES when appropriate.

A. Commitments of the jury during voir dire.

B. Court procedure if the judge will not (be careful to not preempt or embarrass the judge) – order of cases, number of days, breaks, what to expect, order of witnesses . . .

C. Jury issues (appreciate time, energy, attention).

D. Road map, puzzle, contract analogies.

XVIII. Now that all the information is in your opening. SIMPLIFY, CONDENSE, tie everything back to the TRIAL THEME.

A. You know your case far too well, the jury is hearing it for the first time. You must simplify, make it clear, easy to understand on the first hearing.

B. Cut it back, make it brief, hit only the highlights.

   1. Be to the point, concise, don’t wander.
2. Repeat only critical facts and then in a varied way.
3. Keep the longer draft for a reference for closing.

C. You want to make the jury think the case is simple, easy, straightforward, and that anyone trying to complicate it is creating smoke. To do so, your opening must be simple.

D. Vocabulary list – define all important terms of law and art in the case.
   1. What is a deposition? The jurors may well have no clue.
   2. A tort is a fruit-filled pastry unless you tell them otherwise.
   3. Make sure the definitions are repeated, in a varied, non-offensive way, until even the slowest juror understands them.

E. Review opening for legalisms, and ANY unusual word. Make sure words are simple or defined.

F. It takes numerous drafts.

XIX. REVIEW OPENING FOR OBJECTIONS. Once the opening is finalized and you know what the judge will allow in opening, review your opening once again for objections.

   A. No misstatements of fact, misstatements of law, personal opinions, inadmissible evidence.
   B. Consider anything that could be considered argument, inference, deduction, conclusion, credibility of witnesses, anticipatory rebuttal evidence, impeachment evidence, law the jury is not yet instructed on.
   C. Review visual and documentary evidence you will use for potential objections.
   D. If unsure, research, check with the court, stipulate with counsel, make a motion in limine.
   E. Review for objectionable language – sex, race, religion, national origin.
   F. Make sure it does not ‘talk down’ to jurors; education level; demeaning of a profession or class of persons.

XX. POWERPOINT OR NOT?

   A. The opening needs to be visual, with exhibits, photos, diagrams, physical evidence. Visuals keep attention, create better understanding and persuade. Most judges will allow exhibits and summaries to be used in opening.
   B. PowerPoint by Microsoft is an easy way to accomplish a visual opening, and also serves as brief notes so you never have to look down at an outline. It is very easy to create a presentation and use the software. (Other trial software have similar visual help).
C. Proper use of PowerPoint can be very effective, poor use can be a disaster. Good use is to use PowerPoint as a visual aid. You talk about the testimony of a critical witness, the photo of the witness appears. You talk about the patent; a drawing of the patented machine appears.
   1. Poor use is to use it as a crutch, to read from it, to have slides that cannot be easily read, seen, or understood; to use items that distract rather than add to the message.
D. See the Evidence section of The Ultimate Trial Notebook for more on visual information.
E. Make sure you are familiar with the technology and comfortable with its use; that you test it beforehand; you have a techie on hand to solve any problems; that you have a backup immediately available; and that everyone can easily see and read the information.
F. Visual is important, don’t ignore it. But if one side has many computers, much technology and the other side uses blowup photos and graphs, it can appear as a David and Goliath situation.

XXI. PLAN THE DELIVERY.
A. “I’m preparing my impromptu remarks” Churchill said when found writing a speech. Your opening must look impromptu, but it never is.
B. Never read the opening. Use few notes or none. You MUST have eye contact. Using few notes also shows preparation, confidence, credibility.
C. Use a warm, conversational, living room tone. It should be rehearsed and polished, but appear “extemporaneous.” Develop your own style which matches your personality and case.
D. SLOW DOWN! Keep a slow, even pace. You know the case far too well. This is all new to the jurors.
   1. Even words like “plaintiff” and “defendant” can confuse them. Repeat that your client, Ms. Jones, was in the ‘red Mustang driving north’ a number of times so the jury will remember who you represent, the make and model of the car, and that it was headed north.
   2. Make sure it is well organized and simple so the jury can comfortably “eat it” a bite at a time rather than choke on too much information.
E. ATTITUDE. Plan the attitude you want to convey – confident / questioning; calm / a hint of anger; somber / cheery? The attitude changes during various parts; a consistent attitude, especially when extreme, becomes uncomfortable.
   1. Attitude is mostly communicated thought non-verbal channels, tone of voice, posture, gesture, facial expression.
2. Be courteous to all, polite and calm. Use a controlled show of irritation or anger only rarely, if clearly justified (someone has done something very wrong), and briefly.

3. See the Communication section of *The Power to Persuade.*

F. Don’t lecture, be condescending, cold, or distant. Talk as if with close friends, an occasional smile, a nod, raised eyebrows, gestures, be friendly. Develop your own style that fits your personality.

G. **APPLY ATTENTION TECHNIQUES.**
   1. Specifically plan how to **REFOCUS JURY ATTENTION** on critical evidence (put a photo on the overhead, pause, etc.; tell the jury this is important (tone of voice, gesture etc.); then show / tell the critical evidence.
   2. Keep the jury’s **MIND BUSY.** Make sure the opening is simple, understandable, has action, and keeps moving.
   4. Keep the jury’s **EYES BUSY** with visuals, charts, photos, diagrams, use markers on paper to outline your points, use gestures. Make your opening like **TV,** not radio.
   5. Watch the jury, if they wander, take action – pause, change the pace, volume, move – gesture / posture, etc.

H. Each juror expects **REPEATED EYE CONTACT.** Give more to the likely forepersons / leaders. Leave someone out at your peril. Those who tend not to give you eye contact are generally not paying as much attention or aren’t following or agreeing with what you are saying. You need to work on these people all the more. Eye contact establishes a personal relationship and lets people know you are interested in them and talking specifically to them.

I. **MOVE AROUND** - close to jury (not closer than about 5 feet), and between exhibits (move with purpose, don’t pace) – but be sure the judge allows moving from the podium.

J. **EXUDE CONFIDENCE,** **CREDIBILITY,** **FAIRNESS,** **HONESTY,** use appropriate body language.

K. **SHORT SENTENCES.**

L. **VARIED REPETITION.**

M. **READ THE JURY.** Are they with you, paying attention, understanding, agreeing? If not, make adjustments.
N. Make sure the IMAGE YOU PROJECT matches your opening and trial theme. Be aware of your clothes, grooming, posture, voice and tone, distance from jurors, gestures, etc. Everything you do communicates something.

O. This is your TIME ON STAGE - make it work - get them as involved in your case as you are.

XXII. TEST THE OPENING.

A. Do a MOCK TRIAL and jury research if feasible. Of course you find the opening understandable, persuasive, you have no questions – because you wrote it. Only testing it will tell you how the jury will perceive your opening.

B. At least TEST AN ABBREVIATED OPENING with persons of diverse backgrounds (age, education, race, gender, religion, politics, etc.) similar to those of the likely jury. This can be as simple as calling various people on the phone, giving the trial theme, critical portions of the opening, the opposing theme and opening, and asking questions such as:

1. What did you understand each side of the case to be about?
2. How would you vote?
3. Why would you vote that way?
4. What were the most important factors in your voting that way?
5. What information would you have liked to know that may have influenced your decision?
6. What was the point that, for you, the case turned on?
7. Which theory was most convincing and why?
8. Under what circumstances would you vote the other way?
9. Which arguments are most convincing and why?
9. Which portions did you not understand well? (Most will claim understanding, ask them to explain critical portions in their own words to see if they understood.)
10. Questions and comments.
11. Design questions to tell you what is happening in the communication of critical parts of the case.

C. CRITICIZE THE OPENING.

1. Does the presentation of the theme work as expected?
2. Is it understood?
3. How does it fit with the opposing opening(s)?
4. How do others react to it? Are any portions:
   a) Offensive;
   b) Unclear;
   c) Lack persuasive power;
   d) Lose attention;
   e) Not believable?
5. Is the theme believable, persuasive?
6. Does it keep attention?

D. Does it appeal to a wide variety of backgrounds, education levels, views?
E. ADJUST THE OPENING to meet the questions and comments of your mock jurors, then retest.
F. See the Mock Trial section of *The Ultimate Trial Notebook* for more information.

XXIII. REHEARSAL. Practice makes perfect. No one would ever put on a play without rehearsing it.
A. The 80/20 RULE. 80% of the persuasive power comes from the last 20% of preparation – the details, the nuance, the delivery, the practice.
B. VIDEO TAPE it - you watch it, show it to others. How is your voice, your body movement, your body language, your eye contact?
   1. Ask them the mock jury questions from above.
C. PREPARE AND POLISH, over and over. Small changes make big differences.
D. Become “THE GUIDE.” The jury is nervous, unsure, wanting to come to a right decision. They are looking for someone who is well prepared, honest, frank, smart, to guide them through the morass of contradicting facts and theories. A well prepared and presented opening will help them to choose you as their guide.
E. See the Delivery section for more information.

XXIV. THE OPPOSING OPENING
A. Cross-examine opposing counsel.
   1. During the opposition’s opening, TAKE CAREFUL NOTES and obtain a transcript if possible. Emphasize in trial testimony, and argue in closing, the variances between what opposing counsel represented in opening and the actual testimony. If the disparity is significant, opposing counsel loses credibility and cannot be trusted.
2. Know that the same will likely happen with your opening. Be sure your representations in opening are accurate and complete by knowing the case and evidence; and being well prepared to present it.

3. Careful notes of the opposing opening also allow you to anticipate and meet the opposing theme and facts.

B. Discover the Opposing Opening.

1. Find out about counsel and his style.
   a) Is he aggressive, includes non-admissible or argues evidence in opening?
      (1) If you go first and say nothing objectionable, then he stands and says: “I didn’t object in plaintiff’s opening and I ask he shows me the same respect and doesn’t object in mine.” Then gives a very objectionable opening, what will you do? Say “I said nothing objectionable, but this is pure argument and against the rules?” Again, know the judge, whether it will be sustained; know counsel and try to deal with potential problems before hand.
   b) Does he object, without basis, to your opening to disrupt the flow and distract the jury?
   c) How can you adjust your style to take advantage?
      (1) An attorney walked into court the morning of trial and saw the opposition brought four attorneys to trial. He immediately dismissed his junior and told even the paralegal who was arranging witnesses and exhibits to never be seen with him while the jury was present. He wanted to appear one - against the world.

C. Anticipate the opposing opening.

1. What is their theme likely to be?
2. How would you respond if they claimed this or that?
3. What are the critical points of evidence and issues and how can you respond?
4. If an alternative trial theme is used by opposing counsel, how will you react, how will you adjust your opening?
5. What missteps could they make, would you like them to make, and how can you respond?
6. What is the most difficult trial theme they could use, and how could you respond?
7. How will you deal with a claim of evidence of the opposition that is discretionary, and
the judge has not yet ruled?

8. Be prepared to deal with various opposing openings.

D. Objections during opening.

1. Research the law of your jurisdiction, local rules and practices, and particularly your judge. Have a trial brief for the judge - he may have much experience with common practice, but little experience with actual case law and rules.
   a) Be prepared to explain why it is wrong and how it damages your client and justice.

2. Try to deal with it before trial by stipulation, or bring a motion in liminae when the judge has time without the jury waiting.

3. Be prepared to live by the same standard, even if your opening was first. “She did it too” is a compelling argument.

4. Use discretion.
   a) If opposing counsel misrepresents a fact, it may be to your advantage – prove he was wrong later. And the judge will not likely know which fact is correct.
      (1) But it may also get stuck in the jury’s mind and be difficult to dislodge.
   b) You can look petty objecting on minor occasional items, especially if the judge, even if wrong, rules against you.

5. But some counsel abuse opening. One famous attorney said he put his client’s motivations in the opening because he was afraid the judge would not allow them in evidence. If your case is hurt and the law clear, object.

6. Plan out your objections, what you will allow and how often.
   a) Try to make the first objection on a clear, egregious item that is likely to be sustained.
   b) If objecting to a misrepresented fact, have the documents or depo readily available to show the judge the misrepresentation.
   c) Consider whether the discussion of the substance of the objection should be in front of the jury, or if you should ask for a sidebar conference.

7. Research your jurisdiction and consider the following objections:
   a) misstatements of fact;
      (1) including inaccurate summaries, graphs, timelines, videos, compilations;
b) misstatements of law;

c) inadmissible evidence;
   (1) including excluded by order, inadmissible documents and photos, irrelevant, prejudicial;

d) personal opinions, stories, feelings, promises, observations (these can be inadmissible evidence, argument, and/or personal opinions);
   (1) covenants or contracts to return a stated verdict if the evidence is such and such;
   (2) ingratiating oneself with the jury - “we are partners, a board of inquiry working together;”
   (3) self-aggrandizing - “I will never lie or intentionally mislead you;”
   (4) attacking counsel / self-aggrandizing - “what he said was just a bunch of lawyer talk, not evidence. I don’t like lawyer talk and will tell it to you straight, the good, the bad, and the ugly;”

e) Detailed instructions on the law not authorized by the judge;

f) argument (inference, deduction, conclusion, credibility of witnesses);

g) anticipatory rebuttal evidence;

h) impeachment evidence.
5. EVIDENCE

Five Minute Graphic Course
Witness Checklist
Daily Checklist
Exhibit List
Exhibit List - Continuation
Federal Rules of Evidence (Titles)
Entering Documents into Evidence
FIVE MINUTE GRAPHIC COURSE

More than 80 percent of the information we learn comes through our eyes. Your jury (and judge, and mediator) is accustomed to learning information through their eyes, not their ears. Most attorneys are tied to the radio generation. Years of law school lectures have dulled our senses. To communicate effectively, you must graduate to the television generation and present a wide array of visual information which compliments your oral presentation and explains your case.

Plan your visuals beforehand. Make a list of visuals, what issue they address, and what witness will use them. Then make sure you have them balanced on witnesses and case issues, rather than having many for one witness or issue, and very few for another. Next, on each visual, identify its purpose, outline it briefly then brainstorm different ways to meet that purpose. Try to tie visuals on the same issue together with a theme.

Good graphic design is a true art. Many small changes, which an attorney may consider irrelevant, make a large difference in the readability and the persuasiveness of the graphic. Consider hiring a good graphic artist, particularly if you did poorly in eighth-grade art. Here are some basic pointers to help you present visually.

1. **Bigger is Better.** A large chart is better than a small chart. Consider using an overhead or LCD/DLP projector to show photos on a 6 to 8 foot screen. Big text is better than small text. Try to make the print fill the page. If it does not, make the print larger. Make sure that each visual you use is large enough to be easily seen, read, and deciphered from anywhere in the courtroom.

2. **Color is Important.** Colors have meaning. Make sure you choose them appropriately. Our language is full of meanings associated with color: A person red with anger; green with envy; a bit blue today; This is a black day for all of us; He's just plain yellow. A plaintiff may well use red in a damage chart. A defendant would be unlikely to. Choose your colors carefully, yet use them sparingly. Generally, black print on white background using color (particularly red) for emphasis is well accepted. Some conventional wisdom:
   A. Use darker colors with more educated persons (add black, making reds burgundy, etc.);
   B. Greens hold attention longer, are more calming, and are associated with money;
   C. Browns are usually uninviting, but peach allegedly invites giving;
   D. Red arouses emotions;
   E. Blue denotes calm truth, experience, and is the most widely accepted color;
   F. Color is quite culture oriented, and even changes with sub-culture training and use;
   G. Amateurs use no color or too much color, and poor combinations.
3. **Fancy is Fallacy.** A variety of computer programs allow absolutely stunning and complex colors and graphics. Most of these are inappropriate for courtroom use. Even three-dimensional graphs and shadows tend to distract from the message. Fancy lettering, such as block letters, numerous colors and fancy design detract, and should be avoided.

4. **Words are Not Visuals.** Often times counsel simply take the written word and have it enlarged. This is entirely appropriate with critical documents and sometimes other evidence. However, the printed word is not a true visual. You need photographs, diagrams, charts, graphs, and drawings.

5. **Simplicity Sells.** Many novices try to put too much information into one visual. Separate your ideas out into two or three charts, rather than having a single, crowded, difficult to understand visual that will have little impact. If you cannot communicate your idea without some complexity, try using a single chart, with clear overlays that add additional information once the basic premise is understood.

6. **Be Creative.** Anything you can do to keep the jury's eyes busy will help keep attention, and help them understand. Particularly in a boring contract case, a little thought will help you develop graphs, charts, summaries of evidence so the jury can use their strongest sense - vision. An expert witness should always have visuals to help the jury understand the testimony. In-court drawings, and even a boring witness writing the major points on a black board, will help.

7. **Lay Review.** You know too much about your case. You will understand charts that will be indecipherable to the jury. Have a lay person, totally unfamiliar with your case, look at your graphics and explain to you the message they see. Listen carefully, you may be surprised.

8. **Back It Up.** Don't have your graphic simply represent a conclusion. Make sure there are numbers, data, or testimony on the graphic to support the conclusion.

9. **Variety is Spice.** Whatever your preferred media, try to break it up. If you use all overheads, all charts, all summaries, all photographs, all blow-ups, all black and white, or all reds, they lose their appeal. Use a variety of mediums and types of graphics, although a common theme is useful.

10. **Summaries Reign Supreme.** Remember Federal Rule of Evidence 1006 allows the use of summaries. One graph can represent fifteen years of confusing financial data. In a complex case, this may be the most important rule of evidence.

11. **Contrast Emphasizes.** A monotone voice is boring. And so is a visual without contrast. Pick out the important ideas and emphasize them with color, size, italics, bold, anything that gives contrast.
12. **Technology Fails.** Computers, LCD projectors, and animations are all great, but make sure you are very familiar with the equipment, and have actually used it. Make sure you know what to do if it goes haywire. And have a set of reserves: a second machine, a hard copy; an AV specialist on call. Also, make sure you pick the technology that fits the courtroom (so everyone, including the judge and counsel can see); and the case (cheap graphics in a big case communicates the wrong idea to the jury – and visa versa).

13. **Evidence Rules.** Make sure you understand how to get visuals into evidence. You must show they are relevant and accurate. *See Language of the Law* for more detail and examples.

**TECHNOLOGY AT TRIAL**

If you are using any technology to present exhibits at trial, including video depositions, or computer generated exhibits or presentations, review the following:

- Have the equipment purchased, rented, etc. months beforehand and become very familiar with using it.
- Have the wiring installed several days early - make sure the judge will allow you to tape the cords down so no one will trip on them. Some judges are highly sensitive about their courtrooms.
- Make sure you have an LCD projector or television that is bright enough so that courtroom lights can be left on. It is easy to put the jury to sleep in a dark room.
- Make sure there is no light on the screen, to wash out the color and detail.
- Make sure the screen or exhibits can be easily seen by all, including the judge, jury, and counsel.
- While there are many factors going into the decision, generally bigger is better.
- Some attorneys still worry that high tech equipment looks bad to the jury. However, juries tend to be used to the high tech equipment available, and appreciate and expect it.
- If using a videotape deposition, you must also give a transcribed duplicate for the judge’s use.
WITNESS CHECKLIST

Witness Name:__________________________________________________________________

Circle one: Plaintiff Wit.  Defendant Wit.  Indep.Wit.  Third Party Wit.______

Address________________________________________________________________________

Phone Numbers:  Work:_________________    Home:________________  Cell:______________

Employment:____________________________________________________________________

Other Information:

Date to Testify:_________________________   Time to testify:________________________

Subpoena date:_________________________   Return date:____________________________

Brief Summary of Testimony:

Importance to case:

Exhibits to enter into Evidence:
    Must enter (only witness to lay foundation):

    May enter:

Important testimony to be covered:

Potential areas of cross:
DAILY CHECKLIST

Date ______________________

Items to be discussed with counsel:

Motions/Items to be discussed with court:

***Exclusion of witnesses from the courtroom***

Exhibits to be entered into evidence
Exhibit no.: Description: Witness:

Witnesses to be called
Name: Phones: Subpoenaed: On witness list:

Today’s Schedule

Before jury is brought in:

Morning Session:
During lunch break:

Afternoon Session:

Evening:

**Daily Matters from Pretrial Order**
List of tomorrow’s witnesses to be exchanged with counsel:

**Miscellaneous:**

**TO DO**
Today:

Tomorrow:

Later:

Assigned to others:
## EXHIBIT LIST

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<th>Marked</th>
<th>Date Offered</th>
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**Documents**
1. Authentic (F.R.E. 901)
2. Relevant (F.R.E. 401-402)
3. Best evidence (F.R.E. 1001-8)
4. Not hearsay

**Business Records Exception to hearsay (F.R.E. 803(6))**
1. Made at or near time of event.
2. By person with knowledge (or from information from such person).
4. Regular practice of business to make the record.
5. All shown by custodian or other qualified witness.

6. Unless lack of trustworthiness.

**Procedure**
1. Identify document.
2. Mark as exhibit.
3. Show to counsel/witness.
4. Lay foundation that witness is familiar with.
5. Witness testifies it is authentic; or fair & accurate representation.
6. Offer into evidence.
7. Meet any objections (often relevancy, hearsay).
8. Question witness about exhibit once admitted.

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FEDERAL RULES OF EVIDENCE
(Headings)

Rule 101. Scope

Rule 102. Purpose and Construction

Rule 103. Rulings on Evidence

(a) Effect of erroneous ruling.
   (1) Objection.
   (2) Offer of proof.
(b) Record of offer and ruling.
(c) Hearing of jury.
(d) Plain error.

Rule 104. Preliminary Questions

(a) Questions of admissibility generally.
(b) Relevancy conditioned on fact.
(c) Hearing of jury.
(d) Testimony by accused.
(e) Weight and credibility.

Rule 105. Limited Admissibility

RULE 106. Remainder of or Related Writings or Recorded Statements

ARTICLE II. JUDICIAL NOTICE

Rule 201. Judicial Notice of Adjudicative Facts

(a) Scope of rule.
(b) Kinds of facts.
(c) When discretionary.
(d) When mandatory.
(e) Opportunity to be heard.
(f) Time of taking notice.
(g) Instructing jury.
ARTICLE III. PRESUMPTIONS IN CIVIL ACTIONS AND PROCEEDINGS

Rule 301. Presumptions in General in Civil Actions and Proceedings
Rule 302. Applicability of State Law in Civil Actions and Proceedings

ARTICLE IV. RELEVANCY AND ITS LIMITS

Rule 401. Definition of 'Relevant Evidence'

Rule 402. Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible

Rule 403. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion or Waste of Time

Rule 404. Character Evidence Not Admissible to Prove Conduct; Exceptions; Other Crimes

(a) Character evidence generally.
   (1) Character of accused
   (2) Character of victim.
   (3) Character of witness.
(b) Other crimes, wrongs, or acts.

Rule 405. Methods of Proving Character

(a) Reputation or opinion.
(b) Specific instances of conduct.

Rule 406. Habit; Routine Practice

Rule 407. Subsequent Remedial Measures

Rule 408. Compromise and Offers to Compromise
Rule 409. Payment of Medical and Similar Expenses

Rule 410. Inadmissibility of Pleas, Plea Discussions, and Related Statements

Rule 411. Liability Insurance

Rule 412. Sex Offense Cases; Relevance of Alleged Victim’s Past Sexual Behavior or Alleged Sexual Predisposition
   (a) Evidence generally inadmissible.
   (b) Exceptions.
   (c) Procedure to determine admissibility.

Rule 413. Evidence of Similar Crimes in Sexual Assault Cases

Rule 414. Evidence of Similar Crimes in Child Molestation Cases

Rule 415. Evidence of Similar Acts in Civil Cases Concerning Sexual Assault or Child Molestation

ARTICLE V. PRIVILEGES

Rule 501. General Rule

ARTICLE VI. WITNESSES

Rule 601. General Rule of Competency

Rule 602. Lack of Personal Knowledge

Rule 603. Oath or Affirmation

Rule 604. Interpreters

Rule 605. Competency of Judge as Witness

Rule 606. Competency of Juror as Witness
(a) At the trial.
(b) Inquiry into validity of verdict or indictment.

Rule 607. Who May Impeach

Rule 608. Evidence of Character and Conduct of Witness

(a) Opinion and reputation evidence of character.
(b) Specific instances of conduct.

Rule 609. Impeachment by Evidence of Conviction of Crime

(a) General rule.
(b) Time limit.
(c) Effect of pardon, annulment, or certificate of rehabilitation.
(d) Juvenile adjudications.
(e) Pendency of appeal.

Rule 610. Religious Beliefs or Opinions

Rule 611. Mode and Order of Interrogation and Presentation

(a) Control by court.
(b) Scope of cross-examination.
(c) Leading questions.

Rule 612. Writing Used to Refresh Memory

Rule 613. Prior Statements of Witnesses

(a) Examining witness concerning prior statement.
(b) Extrinsic evidence of prior inconsistent statement of witness.

Rule 614. Calling and Interrogation of Witnesses by Court

(a) Calling by court.
(b) Interrogation by court.
(c) Objections.

Rule 615. Exclusion of Witnesses
ARTICLE VII. OPINIONS AND EXPERT TESTIMONY

Rule 701. Opinion Testimony by Lay Witnesses

Rule 702. Testimony by Experts

Rule 703. Bases of Opinion Testimony by Experts

Rule 704. Opinion on Ultimate Issue

Rule 705. Disclosure of Facts or Data Underlying Expert Opinion

Rule 706. Court Appointed Experts

(a) Appointment.
(b) Compensation.
(c) Disclosure of appointment.
(d) Parties’ experts of own selection.

ARTICLE VIII. HEARSAY

Rule 801. Definitions

(a) Statement.
(b) Declarant.
(c) Hearsay.
(d) Statements which are not hearsay.
   (1) Prior statement by witness.
   (2) Admission by party-opponent.

Rule 802. Hearsay Rule

RULE 803. HEARSAY EXCEPTIONS; AVAILABILITY OF DECLARANT IMMATERIAL

(1) Present sense impression.
(2) Excited utterance.
(3) Then existing mental, emotional, or physical condition.
(4) Statements for purposes of medical diagnosis or treatment.
(5) Recorded recollection.
(6) Records of regularly conducted activity.
(7) Absence of entry in records kept in accordance with the provisions of paragraph (6).
(8) Public records and reports.
(9) Records of vital statistics.
(10) Absence of public record or entry.
(11) Records of religious organizations.
(12) Marriage, baptismal, a
(13) Family records. nd similar certificates.
(14) Records of documents affecting an interest in property.
(15) Statements in documents affecting an interest in property.
(16) Statements in ancient documents.
(17) Market reports, commercial publications.
(18) Learned treatises.
(19) Reputation concerning personal or family history.
(20) Reputation concerning boundaries or general history.
(21) Reputation as to character.
(22) Judgment of previous conviction.
(23) Judgment as to personal, family, or general history, or boundaries.
(24) Other exceptions.

Rule 804. Hearsay Exceptions; Declarant Unavailable

(a) Definition of unavailability.
(b) Hearsay exceptions.
   (1) Former testimony.
   (2) Statement under belief of impending death.
   (3) Statement against interest.
   (4) Statement of personal or family history.
   (5) Other exceptions.

Rule 805. Hearsay Within Hearsay

Rule 806. Attacking and Supporting Credibility of

ARTICLE IX. AUTHENTICATION AND IDENTIFICATION

Rule 901. Requirement of Authentication or Identification

(a) General provision.

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(b) Illustrations.
   (1) Testimony of witness with knowledge.
   (2) Nonexpert opinion on handwriting.
   (3) Comparison by trier or expert witness.
   (4) Distinctive characteristics and the like.
   (5) Voice identification.
   (6) Telephone conversations.
   (7) Public records or reports.
   (8) Ancient documents or data compilation.
   (9) Process or system.
   (10) Methods provided by statute or rule.

RULE 902. SELF-AUTHENTICATION

   (1) Domestic public documents under seal.
   (2) Domestic public documents not under seal.
   (3) Foreign public documents.
   (4) Certified copies of public records.
   (5) Official publications.
   (6) Newspapers and periodicals.
   (7) Trade inscriptions and the like.
   (8) Acknowledged documents.
   (9) Commercial paper and related documents.
   (10) Presumptions under Acts of Congress.

ARTICLE X. CONTENTS OF WRITINGS, RECORDINGS, AND PHOTOGRAPHS

RULE 1001. DEFINITIONS

TEXT OF RULE

   (1) Writings and recordings.
   (2) Photographs.
   (3) Original.
   (4) Duplicate.

RULE 1002. REQUIREMENT OF ORIGINAL

RULE 1003. ADMISSIBILITY OF DUPLICATES

RULE 1004. ADMISSIBILITY OF OTHER EVIDENCE OF CONTENTS
(1) Originals lost or destroyed.
(2) Original not obtainable.
(3) Original in possession of opponent.
(4) Collateral matters.

RULE 1005. PUBLIC RECORDS

RULE 1006. SUMMARIES

RULE 1007. TESTIMONY OR WRITTEN ADMISSION OF PARTY

RULE 1008. FUNCTIONS OF COURT AND JURY

ARTICLE XI. MISCELLANEOUS RULES

RULE 1101. APPLICABILITY OF RULES

(a) Courts and judges.
(b) Proceedings generally.
(c) Rule of privilege.
(d) Rules inapplicable.
   (1) Preliminary questions of fact.
   (2) Grand jury.
   (3) Miscellaneous proceedings.
(e) Rules applicable in part.

RULE 1102. AMENDMENTS

RULE 1103. TITLE
ENTERING A DOCUMENT INTO EVIDENCE

Show, thru testimony, the document is:

1. Authentic (F.R.E. 901) (It is what it purports to be).
2. Relevant to an issue in the case (F.R.E. 401-402).

Meet any objections such as:
   It is the "Best evidence" (F.R.E. 1001-8) (original document) or meets an exception.
   Not hearsay (F.R.E. 801) or meets hearsay exception (F.R.E. 803, 804)

Procedure
1. Mark the exhibit.
2. Show it to counsel/witness.
3. Identify it for the record.
4. Have the witness (or witnesses) show:
   - they have personal knowledge of the exhibit;
   - relevancy;
   - authenticity ((real or documentary evidence) (is what it purports to be)) including chain of custody if easily altered, OR accuracy ((illustrative evidence) (fair and accurate representation) (See F.R.E. 1006 for summaries)).
5. Move that the exhibit be received into evidence.
6. Meet any objections.
7. Once in evidence you can question the witness about the exhibit.

Business Records Exception to Hearsay (F.R.E. 803(6))
Made at or near time of event.
By person with knowledge (or from information from such person).
Kept in regular course of business (widely defined).
Regular practice of business to make the record.
All shown by custodian or other qualified witness.
Unless lack of trustworthiness.
6. **DIRECT**
   Direct Examination Checklist
   Ten Commandments of Testifying
DIRECT EXAMINATION
Checklist

Case _________________________________
Witness _______________________________

OVERVIEW

No list can be complete. Many lists are too complete to be useful. You must adapt this
checklist to your practice, the kind of case, your experience, the witness, and other factors. Any
of these guidelines can be ignored, but only based on thoughtful reasons. Generally, do not show
this checklist to a witness. It is for your use. Items shown witnesses in preparation to testify
may be discoverable.

This list must also be adjusted according to: the witness’ relationship to you (you can
spend more time and be more open with your client than with an independent witness); the
witness’ intelligence; and the witness’ natural testifying skills (if the witness is great, cover only
potential problems, you can over-prepare a witness and make the testimony “canned”).

Perhaps the most important quality of any witness is confidence while testifying. Your
preparation should increase that confidence, not decrease it. Be sure to compliment the witness
on strong points, reassure them. Be cautious about criticizing a witness. Pick the points you will
address with the witness carefully, you can seldom do a complete makeover, especially without
numerous sessions over many weeks. Indiscriminate preparation of a witness can do more harm
than good.

Practice actual questions and answers with the witness. Your explaining does little,
unless the witness is given the opportunity to practice while it is still fresh in his mind. Give the
witness feedback, and ask a similar question again.

PREPARING FOR TRIAL TESTIMONY

Note: If you are presenting deposition testimony by videotape at trial, see the exhibits portion
for tips on the use of exhibits and technology at trial.

ASSESS TESTIMONY

GATHER AND SUMMARIZE TESTIMONY. Review depositions, statements, exhibits, and
contradicting evidence. If the witness has not been deposed, thoroughly interview the witness so
you understand ‘the good, the bad, and the ugly.’
EVALUATE THE TESTIMONY

- What testimony needed to fulfill each element of each cause of action?
- What facts are most important to the case?
- What are the greatest strengths of the witness’ testimony?
- What are the greatest problems with the witness’ testimony?
- What are the internal contradictions in the testimony (contradictions of this witness with prior testimony, documents, inconsistencies, etc.)?
- What are the external consistencies in the testimony (contradictions of this witness with other witnesses, documents, etc.)?

EVALUATE DOCUMENTS ASSOCIATED WITH THE WITNESS

- What documents did the witness author, receive, review, or otherwise have knowledge regarding?
- What documents support or contradict the witness’s testimony or will otherwise be used in direct and cross of the witness?
- What documents must, and can, this witness authenticate for admission into evidence?

EVALUATE THE WITNESS

- Is the witness credible?
- Does the witness listen to and understand the question?
- Does the witness focus on the question and give a concise answer?
- Does the witness have appropriate body language?
- Will the witness establish eye contact with individual jurors?
- Does the witness convey an appropriate attitude?
- Does the witness use the appropriate vocabulary?
- Does the witness use a natural voice with good variety in tone, volume, etc.?
- Will the witness become unduly nervous while testifying?
- What are the witness’ biggest testifying problems?
- What are the biggest assets of the witness?

Based on the above assessment, particularly the credibility and testifying skills of the witness, ask: Overall, does this witness add SIGNIFICANTLY to the case? Unless the answer is a firm yes, do not call the witness (unless it will likely be misread by the jury, the witness will be called by the opposition and used to your disadvantage, etc.).

Trials are often decided on errors. Each additional witness you call creates more possibility for contradictions, surprises, misstatements - ERRORS that can lose the case. The more information given, the less the jury will recall. The more information given, the more confusion that is created. Resist the temptation to call witnesses who add a small dimension to the case.

PREPARE THE DIRECT EXAMINATION

- How does this witness fit into the trial theme?

- What information from this witness is critical? (Repeat critical theme in witness’ testimony.)

- What information gives this witness credibility? (Opportunity to observe, expertise, experience, education, remembers detail.)

- What information personalizes this witness? (Brings out warmth, shows similar attributes with jury.)

- What factual information is helpful, but not necessary? (Examine closely, make it short and sweet if you decide to include it.)

- What information is harmful, and will be the subject of cross-examination? (Prepare for it, take the sting out.)

- Possible/probable objections to testimony, exhibits introduced by this witness. (Map out a strategy to deal with each objection.)

EXHIBITS

- What necessary trial exhibits can only this witness put into evidence?

- What exhibits will keep interest, make testimony understandable, and help the jury visualize the testimony?

- What exhibits should this witness put into evidence?

- What exceptional exhibit will help this witness be remembered?

– Based on the above information, identify the objectives of this witness’ trial testimony.

– Identify the probable objectives of the cross-examination.

ORGANIZE THE TESTIMONY (sequence is critical to interest, understanding).

- What subject will give the testimony a strong start?

- What is the natural order of the story?
• Put the evidence supporting the main reason the witness is being called near the first.

• Start early with ‘credibility building testimony’ and continue throughout. Bring out similarities between the witness and jurors. Politely show status of witness.

• Know what specific information makes the story come alive. “What happened next?” may be the most frequently asked question on a poor direct examination. It leaves the entire scope and tone of the story up to the witness, or up to the order of time. While that may be acceptable with an occasional great story and great witness, it makes for a poor story with most witnesses. Ask specific questions to bring out the information critical to the story, in the order you want it.

• Note however, that most direct examinations are too much attorney, and not enough witness. A good witness needs to express herself to establish rapport with the jury.

• Make sure you ask specific questions that will bring out the witness’ motivations, feelings, trials, triumphs, etc. Ask the mother: Q: “How did you feel when your child was born?” A: “I felt horrible. Everyone was running around. They wouldn’t let me hold my own child. I knew something was horribly wrong, but no one would tell me what.” Motivations and feeling make the story interesting and makes the jury empathize.

• Make the testimony memorable with a story/stories. (People, Action, Vivid concrete language). See Anatomy of Persuasion, by this author.

• Snapshots/visuals. Spread exhibits throughout testimony. Use them to refocus attention, and clarify critical information.

• Weaknesses, admissions, taking out the sting - bury them in the middle. Support weak areas between strengths.

• Repeat the information critical to the theme throughout the testimony.

• What subject will give the testimony a strong conclusion?

• Now go back and simplify the organization - bite size pieces that make sense.

**OUTLINE PROBABLE REDIRECT** - emphasize theme - emphasize critical testimony - emphasize credibility - clear up any problems.

**FINE TUNE TESTIMONY**

Within the parameters of the truth, work with the witness to make the testimony a concise, vivid experience. Ask the witness not only what they saw, but what it looked like to them, what it reminded them of, how it made them feel. Use their descriptions to fine tune the
Example of fine tuning a testimony:

Original
The northbound car collided with the red one. I went over and the baby was crying and she was bleeding all over from the head.

Fine Tuned
I heard a horrible screeching, then a thunderclap of buckling metal. The red sports car plowed into the family minivan. Everything was silent for a second until the baby began to cry - "mommy." I ran over to help, but the metal pillar had burst the mother’s head open like a broken watermelon.

Note - You must work with each witness to best express, in their own words, what they observed, and not put your words into their testimony. It is unethical to change a witness’s testimony into your own words. The witness will also not come across well if they are trying to remember your characterization. However, most witnesses have faults you need to help them with – they use vague terms, a lot of pronouns (and “she” can refer to either the mother, the baby or the other passenger), their testimony lacks detail and you must question them to bring it out. Once you have gathered the important testimony from the deposition, interviews and statements, help the witness to give specific, detail testimony in the witness’s own words.

Carefully Review Vocabulary (vivid, descriptive, powerful language).

A. Create a Vocabulary List. Rather than one witness calling the plaintiff’s car the “red car,” another calling it the “sports car,” and a third calling it the “northbound car,” try to have witnesses use a common vocabulary both for the witness (the witness always says “sports car”) and the case (all witnesses call it the “sports car”). Be careful of too much similarity, which gives the appearance of your having put words in the witnesses’ mouths.

B. Use Vivid Vocabulary. How you say it is as important as what you say. Use vivid language, a substitute for a video picture. Make sure the words used evoke feelings and involve senses - hear, see, feel.

C. Delete Legalisms. If you did not use the word every day before law school, it is a legalism. Most jurors don’t even understand common legal terms such as “plaintiff,” “defendant,” and “deposition.”

D. Define ALL words that every juror may not know. All critical words must be defined, explained, repeated, and understood by all. Attorneys are too familiar with their cases and tend to speak over the heads of jurors.

Make Testimony Specific. Avoid pronouns, abstract terms and notions. Add appropriate
detail to show memory, credibility, build drama.

Add Analogies, Metaphors (takes a term out of normal association and uses it with a more emotional association—“His words created a firestorm of controversy”) from common experiences of the jurors.

Create trilogies (three points, three reasons, etc.).

Create Catch Phrases (rhyme, similar sounds, play on words, rhythm, etc.) to make the testimony memorable.

Personalize Testimony. Bring out information that develops rapport, work to develop the witness’ own style.

MEETING WITH THE WITNESS

The witness should read her deposition, review exhibits, read statements, and often refresh her recollection of the scene (or other physical evidence) before meeting with counsel. The witness should wear what she will wear at trial for this “dress rehearsal.” Practice so that the witness exudes confidence and conviction in her testimony.

ETHICAL CONSIDERATIONS

In preparing a witness to testify, counsel must be careful not to create false memory or put words into the witness’ mouth. The attorney has an obligation to see that a witness is prepared, knows his testimony (often years have passed since the witness last reviewed the documents, his statement, his deposition, etc.), understands how it fits with the case, and understands how opposing counsel is likely to cross-examine or attempt to mislead him.

However, counsel must be very careful not to change or embellish the testimony in preparing the witness. The attorney is looking for the best way to present the witness’ own testimony, in the witness’ words. Caution must be taken not to substitute counsel’s testimony for the witness’. Often witnesses will parrot the attorney’s words. Some specifically seek advice from counsel on WHAT they should say, rather that just how it can be said most accurately and interestingly.

FINISH THE INTERVIEW

• Usually in preparing the trial testimony, additional issues and questions arise. Review these areas and make sure you have all the facts of the case.
• Let the witness tell her story from beginning to end. Use this time to observe the witness’ natural testifying tendencies and skills.
REVIEW THE WITNESS’ TESTIMONY

- Review the general testimony with the witness.
- Review specific testimony with the witness. Make sure she has read her prior testimony, and is familiar with the exhibits and documents.

Practice the direct examination.

- Make sure critical portions are intimately understood.
- Notice discrepancies with prior testimony, and be sure they are understood.
- Review all distances, times, speeds and other numbers with the witness.
- Work with the witness to put her testimony, in her best phrasing. Phrasing is important. Whether you say the glass is half empty or half full, it’s the same truth, but leaves different impressions.
- Make sure your questions are eliciting the answers you wanted.
- Observe the witness’ manner in testifying.
  - Is eye contact maintained?
  - Is the body language appropriate?
  - Is the witness confident and believable?
  - Confident, clear calm, direct?
  - Objective, not argumentative?
  - Prepared, knows areas of direct and cross?
  - Low voice, good cadence?
  - Good body language?
  - Attitude carefully chosen. Always open, honest, never condescending, arrogant?

- Work with the witness on the above items until testimony is well told and believable.
- Does the witness obey the Ten Commandments of Testifying?
- Are your direct examination questions short, clear, devoid of legalisms and technical language?
- Review your direct to see if it has subjects which will open up new, difficult areas of cross-exam.

Prepare the witness for cross-examination. Review the cross-examination checklist. Be prepared to object to cross-examination questions including:

- Beyond the scope of direct (plus credibility). (The court has discretion to allow broader cross-examination.) Federal Rule of Evid. 611 (b).
- Improper impeachment including:
  - Impeachment on a collateral issue (see Federal Rule of Evid. 403 and 611 (a));
  - Improper purpose (trying to admit evidence which is otherwise inadmissible).
See McCormick, section 49.

The court has discretion over cross (and direct) in order to help:

- Ascertain the truth;
- Avoid needless consumption of time; and
- Protect witnesses from harassment or undue embarrassment. F.R.E. 611(a).

See Tip of the Tongue Trial Objections, by this author, for additional information on cross-examination objections and the rules of evidence.

Practice areas of cross-examination.

- Make it realistic.
- Include comments about the probable style of the attorney who will cross-examine them (Example: “He is invariably polite and soft spoken. You will tend to let your guard down and become very agreeable.”)
- If the answers do not go well, discuss them and ask similar questions again.

Note: Some attorneys do not like to cross-examine their own witnesses, particularly aggressively, since it can hurt their relationship. Instead, they have a partner practice the mock cross-examination.

During the session, remind the witness of THE TEN COMMANDMENTS OF TESTIFYING. (Generally, do not give any of this preparation material to the witness, or let them read it. A document the witness has used in preparing to testify might be discovered and become part of the cross-examination, particularly with unprepared counsel who have not taken the time to meet with the witnesses.) Make sure the witness understands and is obeying the commandments.

THE TEN COMMANDMENTS OF TESTIFYING

1. ALWAYS TELL THE TRUTH. Lying or exaggerating will hurt you and the case. But PHRASING IS IMPORTANT. If the question asked hedges on the truth, rephrase it in your own words.

2. LISTEN carefully to EACH question. If you don’t understand it, ask that it be repeated or rephrased.

3. ANSWER each question fairly, but as BRIEFLY as possible, then stop talking.

4. DO NOT VOLUNTEER. Don’t answer the question you think the attorney should have asked, or is trying to ask, or you want him to ask. Answer only the question actually asked.
5. **NEVER SPECULATE, GUESS,** or tell what “probably” happened. Often the truthful answer is: “I don’t remember;” “I don’t recall;” “I’m not sure, but I believe. . . ;” “To the best of my recollection. . . .” Use those phrases when they are the truth. You don’t look foolish if you don’t know all the answers. If you are willing to speculate, there is not much I can do to protect you.

6. **Only testify to what you KNOW.** Remember, the law wants you to testify only when you have PERSONAL KNOWLEDGE. If you didn’t see it or touch it, you don’t “know” it. Testify as to what others told you only if specifically asked “what you were told by ________”¹.

7. **Carefully REVIEW ALL DOCUMENTS,** evidence, and even your own deposition before answering a question about them.

8. **LOOK AT THE JURY** when you answer EACH question. Try to obtain eye contact with each juror. If you forget, I will remind you by saying, “Please tell the jury. . . .”, or I will move over by the jury. If you don’t look each juror in the eye while testifying, you will not be believed as much as if you were to look each juror in the eye.

9. **Let your natural EMOTIONS show.** No one expects you to be a robot. But don’t become

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¹ Example of educating about personal knowledge. Make sure the witness understands they must not speculate, but only testify about their **personal knowledge.** “When we ask a question in a trial or deposition, we are only looking for personal knowledge. In everyday conversation, when we are asked a question, we often take a little we observed, add to it some common sense, and something that we heard, and give our answer. In a trial, unless you saw it, felt it, or smelled it, you don’t “know” it.

Occasionally, you will be specifically asked if someone told you something. You can then respond with what you heard. But that is usually hearsay. Don’t speculate, don’t guess, unless you have personal knowledge, the truthful answer is “I don’t know”. Now let’s try a few questions:

Q: When were you born?

Q: You don’t have any personal knowledge of your birth. You don’t have any recollection or memory of your birth. You “know” your date of birth because of what your mother or others told you. Don’t answer unless you have personal knowledge of the subject. Now, if you are really asked your birth date, tell the jury. This is an extreme example. But beware that you only answer based on personal knowledge.
angry, defensive, or lose your temper.

10. BE YOURSELF. When you are on the stand testifying, forget these instructions. Be calm, natural, just like telling your story to friends in your own living room. You will do well.

OTHER ITEMS TO CONSIDER DISCUSSING WITH WITNESSES
(Depending upon each witness - don’t over-prepare)

Ask the witness what they plan on WEARING TO THE TRIAL.
Make sure that clothing, hair, grooming, jewelry etc. are appropriate to lifestyle (the janitor does not wear a $500 suit, the CEO does not wear overalls). Dress should generally be conservative, but dressed up. Similar to what jurors would wear under similar circumstances.

Be frank with the witnesses, even ones that are not your client. “Personally, it doesn’t matter to me how anyone wears their hair. I had long hair when I was in college. But this is a very conservative community. Some of the jurors may not give your testimony the credibility it deserves, because they may come from a different generation, and have a bias about very long hair on a man. You may want to consider cutting your hair for the trial. What do you think?”

Explain objections.
Don’t answer until the objection is finished and the judge has ruled. If you have started to answer, stop.

If I object, it is usually an area of quicksand. I usually don’t object unless it matters.

Keep your guard up regardless of how relaxed or pleasant the atmosphere.
The opposing attorney’s job is to attack you, even though it may be subtle and polite. Pay attention and follow the commandments.

Don't joke about or make light of people or situations.

Be careful when your testimony is characterized. Don’t let words be put into your mouth by the question. Feel free to rephrase your answer to use your own words.

Hold your ground. Don’t agree just to be agreeable. Stick to the truth.

Beware of absolute questions or answers like “always” or “never”. It is rare when there are no exceptions to a rule.

If you make a mistake, correct yourself. Even if some time passes, just state you have just remembered something you would like to clarify (or correct).

You may be asked to make a drawing. Be aware beforehand of the details of the scene (visit it together if possible). Make clear you are not drawing to scale.
Beware of numbers - time, distances, measurements, speeds, etc. Most of us are poor judges of exact numbers. Don’t be tied to a number, or a range, without having carefully considered it first.

You may be asked to give a range if you cannot remember exact numbers. The attorney will say, “Was it more than one? Was it less than one hundred?” and continue to narrow the range. Be aware beforehand of what the range is, and don’t allow yourself to be pushed beyond a reasonable range - you can simply say, “That is as close as I can estimate.”

You may be called by the other party to testify early. Be prepared.

Don’t argue with the opposing attorney.

Areas not to hold back - can volunteer:

- Criticizing the opposition;
- Justification for our action.

Attorney - Client communications. If a witness is also a client, make sure the witness is prepared to state that he or she is a client, and when and how the attorney client relationship was established. This is particularly important with employees, who may not have considered whether you represent them as an attorney. Make sure each client understands they should not divulge conversations and correspondence with you.

Work product. Make sure if work product is involved, the witness understands what it means, and what documents do not have to be disclosed because they were made in anticipation of litigation.

You are not being “paid” or “compensated” to testify. If a witness is being reimbursed for travel expenses, time off work and the statutory witness fee, make sure they understand they are not being “paid” for their testimony, but are only being “reimbursed” for their expenses.

What to do if you get tired. Long testimony and older or injured witnesses do not mix well. Tell them to explain the problem and ask for a break.

Don’t be defensive in your answers - be factual. Simply admit case weaknesses, errors, uncertainty on minor points. Don't get caught in the trap of feeling like you have to justify what happened, - just tell what happened.

Items never to mention. Insurance, settlement offers or negotiations, attorney client conversations or correspondence, work product, most four letter words.
You may be asked if you met with me and discussed your testimony. There is nothing wrong with our meeting. Of course we discussed it. We discussed the same subjects that you will be testifying about. I am telling you to tell the truth.

Explain the court procedure, from location, parking, waiting, exclusion of witnesses while others are testifying, swearing in, times, etc.

You will be asked questions we have not discussed. Just answer them truthfully, with the case theory in mind.

ADDRESS WITNESS’ STRENGTHS AND WEAKNESSES

Attention - What difficulties will this witness have in keeping attention (soft voice, complex testimony, no eye contact, few exhibits, etc.)? Plan to solve the weaknesses.

Perception problems (arrogant, timid, much richer/poorer than jury, etc.) - how to deal with them.

Witness testifying strengths (personality, story telling ability, artistic ability, etc.) - how to emphasize.

Witness testifying weaknesses (weak speech, rambling answers, does not answer question, attitude, inconsistency, contradictions with other witnesses, etc.) - how to minimize.

Emotional appeal (connects with jurors, body language, dress, grooming, voice, looking at jury, etc.) - work with it.

NOTES TO THE ATTORNEY

- Good direct is short plain answers, to short plain questions.
- Don’t let your body language confirm damaging testimony.
- Get out of your ‘peephole box’ and watch the witness and jury. Observe how the examination is going, and adjust.
- Ask questions to explain potential problems to jury -
  If witness is obviously nervous, explain (example, 17 year old who is nervous)
  Q: You’re a bit nervous about testifying here today?
  A: (Smiling) Yes!
  Q: You’ve never testified in court before?
  A: No.
  Q: Never been cross-examined by three attorneys before?
  A: No.
Q: Well, you’re understandably nervous, let’s just start out with where you go to school . . .

- Let the witness come through. Make sure there is not too much of you, the attorney in the direct.
THE TEN COMMANDMENTS OF TESTIFYING

1. ALWAYSTELL THE TRUTH. Lying or exaggerating will hurt you and the case. But PHRASING IS IMPORTANT. If the question asked hedges on the truth, rephrase it in your own words.

2. LISTEN carefully to EACH question. If you don’t understand it, ask that it be repeated or rephrased.

3. ANSWER each question fairly, but as BRIEFLY as possible, then stop talking.

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6. Only testify to what you KNOW. Remember, the law wants you to testify only when you have PERSONAL KNOWLEDGE. If you didn’t see it or touch it, you don’t “know” it. Testify as to what others told you only if specifically asked “what you were told by _______.

7. Carefully REVIEW ALL DOCUMENTS, evidence, and even your own deposition before answering a question about them.

8. LOOK AT THE JURY when you answer EACH question. Try to obtain eye contact with each juror. If you forget, I will remind you by saying, “Please tell the jury. . .”, or I will move over by the jury. If you don’t look each juror in the eye while testifying, you will not be believed as much as when you look each juror in the eye.

9. Let your natural EMOTIONS show. No one expects you to be a robot. But don’t become angry, defensive, or lose your temper.

10. BE YOURSELF. When you are on the stand testifying, forget these instructions. Be calm, natural, just like telling your story to friends in your own living room. You will do well.

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7.

CROSS
CROSS-EXAMINATION CHECKLIST

This checklist is designed to assist when you are actually preparing your cross-examination. If you merely read the principles now and file it away, you will forget most of them by the time you conduct an actual cross-examination.

Next time you prepare a cross-examination, review this as you prepare. Your cross-examination will be significantly better, because you will be reminded of many things you already know, and see them in the light of the case you are trying.

The checklist is most useful to remind you of previous knowledge. In order to be brief enough to be used as a checklist, details and examples are usually omitted.

I. CROSS-EXAMINATION - TRIAL’S MOST DIFFICULT SKILL.
   A. You can practice, even memorize an opening or closing. On direct, you can practice with most witnesses, and they are generally cooperative.
   B. Cross-examination is a battle of knowledge, skill, wits, brainpower, personalities. It is infrequently done well, and frequently done poorly.
   C. Because you can never totally prepare, it must be the most prepared segment of trial.
   D. That said, with preparation, it fairly easy do an adequate job, although great jobs are rare.

II. PURPOSE OF CROSS-EXAMINATION
   A. GENERAL PURPOSE. The purpose of cross-examination is to help your case, and hinder the opposing case. This can happen in a wide variety of ways. Often, you’re merely looking for a few admissions, point out the witness’s memory is lacking in a few ways, and set a few limits on the length and breadth of the testimony. What you’re trying to do is de-emphasize the importance of the witness. Another time your purpose may be to point out the witness’s testimony is not critical to the core issues in the case. Another witness will be aggressively attacked on a single issue.
      1. Cross-examination goes far beyond the facts elicited. You may elicit some damaging facts, but create sympathy by doing so. Carefully define the purpose of your cross-examination of each witness, as outlined in the different cross-examination types below.
   B. SPECIFIC PURPOSES OF CROSS
      1. Support your case theme.
         a) Facts that support your theme and arguments.
         b) Information that increases the credibility of your witnesses, corroborating testimony and documents.
            (1) Good opportunity to observe, ability to recall, reasonable, careful
            (2) Honest, independent (not biased, not prejudiced, no ax to grind).
            (3) Consistent.
            (4) – But only where it supports you.
         c) Increase the perceived character and image of your witnesses and counsel.
            (1) Likeable, just like the decision maker(s).
      2. Undermine the opposing case theme.
         a) Facts that discredit the opposing theme and arguments.
         b) Discredit their witnesses.
II. THREE BASIC APPROACHES TO CROSS-EXAMINATION. There are three basic approaches to a cross-examination. Most examinations involve two or three of the approaches, on different subjects. The sub-factors under each approach are the factors most usually used in that approach. However, all of the sub-factors can be used under any of the approaches.

A. Discrediting the witness’s testimony. (The witness is honest, but mistaken.) While this may seem to be a fine distinction, it is not. The witness who believes they're telling the truth, but are mistaken, are likely to be helpful in finding the truth if you're able to show it to them in a kind, non-embarrassing way. The jury may dis-believe them without disliking them.

1. Some witnesses however, will stick to their guns even when very mistaken. The entire attitude of the cross-examination and the structure of the kinds of questions asked will change based on whether you impeach the witness or the witness’s testimony.

2. Lack of memory.

3. No opportunity to observe.

4. Lack of intelligence, lack of common sense.

5. Detail. Many witnesses arrive at a conclusion, but do not have the details to support that conclusion.

6. Partial Picture. Many witnesses have not viewed the whole picture. When they view information which contradicts their conclusion they may reevaluate it.

7. Foundation. Many witnesses reach a conclusion based on their understanding of the underlying facts, only some of which they observed. Shown that their facts do not sit on a firm foundation they may reconsider.

8. Light bias, including cooperation/contacts with the opposing party, friendship, similarity with the opposing party.

9. You may want to limit the boundaries of the testimony, because a witness who is mistaken is less likely to exaggerate their understanding of the facts.

B. Discrediting the witness. (The witness is intentionally exaggerating or lying.)

1. Consistency.

   a. Most witnesses have a desire to be consistent with their original statements and with other witnesses whom they believe are credible.

   b. When they understand a contradiction, they will often try to reconcile it.

   c. Jurors also understand these principles and if the witness will not acknowledge their testimony is only partial, lacks a foundation, they do not understand the details, etc., the jury will discredit their
testimony.

2. Character and reputation for honesty.

3. Heavy bias, including relationship, close friendship, observable bias.

4. Motive to lie. Motive is huge.
   a. If there is a motive to lie, the jury will usually believe the witness is lying.
   b. Motives are often very influential in the outcome of cases.
   c. Be sure you understand the motives on both sides of your case.
   d. Bring them out on cross.

5. Confrontation.
   a. Some witnesses will naturally defend the indefensible if confronted.
   b. Others will run from safe territory into danger at the first sight of confrontation.
   c. Try to get the confrontational witness to defend so staunchly they become unreasonable by defending the extremes.
   d. Get the non-confrontational witness to acknowledge favorable precepts.
   e. Note there are ethical issues getting a witness to say something neither you nor the witness believes is accurate.

6. Emotion. Emotions cloud our ability to think. An angry witness says things he regrets. Some witnesses are frustrated, scared, nervous, etc. All these emotions can affect their ability and desire to understand and respond reasonably to questions.

C. Limiting the witness/ testimony. Sometimes you may ignore the witness and the testimony, and show both are irrelevant to the case.

III. THE LAW OF CROSS EXAMINATION.
The law of cross examination is guided by Federal Rule of Evid. 611. The following is a summary.

A. The court has discretion over the mode and order of examination.

B. The court’s goals are:
   1. ascertain the truth;
   2. avoid needless consumption of time; and
   3. protect witnesses from harassment or undue embarrassment. F.R.E. 611(a).

C. Cross-exam is limited to the subject matter of direct exam, plus the witness’s credibility. The court may allow additional inquiry. F.R.E. 611(b).

D. Leading questions are not generally allowed against a “... hostile witness, an adverse party, or a witness identified with an adverse party.” Leading questions are also allowed on direct “as may be necessary to develop the witness’ testimony.” F.R.E. 611(c). This can cover a wide variety of circumstances including leading children, non-controversial areas, transitions to new subjects etc.

E. Attacking a Witness’ Credibility. Note that Federal Rule of Evid. 607 allows the credibility of a witness to be attacked by any party, including the party calling the witness.

G. Character of a Witness. Federal Rule of Evid. 608 governs the use of evidence showing the character of a witness, or specific instances of conduct of a witness.


I. All parties may cross-examine a witness called by the court. Federal Rule of Evid.
J. The use of prior statements at trial is governed by Federal Rule of Evid. 613.

K. Witnesses may be excluded during the testimony of another witness. Federal Rule of Evid. 610.

L. Religious Beliefs are not allowed to show credibility is impaired or enhanced. Federal Rule of Evid. 610.

When character is an element of the case, specific conduct is admissible. See Federal Rule of Evidence 405 (b).

A. Character or a trait is generally not admissible to show an action is in conformity with the character. See Federal Rule of Evidence 404. But note the exceptions in F.R.E. 404 (a) (1).

B. If character is admissible, proof is by reputation, or opinion based on experience. On cross, inquiry into relevant specific conduct is allowed. See Federal Rule of Evidence 405 (a).

C. Use of prior statements is governed by federal rule of Evid. 613. The old tradition of having to show the witness the statement, before confronting them with its substance is generally abolished. However, if the witness denies the statement is his, the witness must be given an opportunity to explain or deny the statement before extrinsic evidence proving the statement is that of the witness is admissible. See rule 613.

D. Objections to cross-examination include:
   1. Beyond the scope of direct (plus credibility). The court has discretion to allow broader cross-examination. Federal Rule of Evid. 611 (b).
   2. Improper impeachment including:
      a. Impeachment on a collateral issue (see Federal Rule of Evid. 403 and 611 (a));
      b. Improper purpose (trying to admit evidence which is otherwise inadmissible). See McCormick, section 49.

E. See Tip of the Tongue Trial Objections by this author for additional information on cross-examination and the rules of evidence.

I. BRAINSTORMING YOUR CROSS. Before reviewing case material think about and write out:

A. What is the critical testimony this witness will give?

B. What areas of testimony hurt your case theme worst?

C. In what areas can the witness help your case?

D. Where is the witness lying and where telling the truth? Is it an intentional lie, or just mistaken observation, memory or misunderstanding?

E. How honest and biased is the witness? If explained or confronted with truth, will the witness likely admit, deny, equivocate, rationalize? How can your questions push the witness towards what you want the witness to do?

F. What are the witness’s strengths in testifying (personable, credible, consistent, great memory, keen observation, consistent with great documentation, great credentials, etc.)?

G. What are the witness’s weaknesses in testifying? (clearly lacks any of the above, or becomes angry, easily confused, over-prepared, anxious to please, overly nervous, etc.)?

H. Overall, how badly does the witness hurt your case?

I. Will certain types of cross-examination create sympathy for the witness in the jury’s
eyes (demeaning the loss of an innocent widow, an aggressive cross-examination of
grandma or a young child, politically correct issues of age, gender, or race; will
opinion leaders on the jury identify with this witness and resent a frontal attack, etc)?

J. On the issues you want to cross-examine, how well will opposing counsel prepare the
witness?

K. What would be the ideal cross-examination for the witness, and how might you
obtain the ideal?

L. Etc.

II. REVIEWING CASE MATERIAL. There is no substitute for knowing all the detail, the
contradictions in documents, the opinions without foundation. Review the case material in
detail, taking notes.

A. Indexing. You must also index material during this review, so that you can quickly
find it during the cross-examination. Right now you do not know what new
contradictions the witness will make in direct, or cross. Only if you have the
deposition and documents well indexed, can you quickly find the contradiction and
point it out to the jury. A contradiction that is not well documented (and quickly
shown), is no contradiction at all.

1. Summarize the depositions, and critical portions of documents.
2. Use different colored Post-it Notes, or colored tabs, to identify different
issues. Index your Post-it Notes in the front of the deposition.
3. Make overheads, blow-ups etc. of the critical contradictions.

B. While reviewing, look for the following.
1. Information which supports your case theory.
2. Information which supports your witnesses, or adds to their credibility.
3. Where is the truth? Where is the witness vulnerable? What are the areas
most likely to yield benefits?
4. Prior depositions (particularly with experts make sure you have all prior
pertinent depositions from other cases).
5. Documents authored by the witness.
6. Interrogatory responses authored by or pertinent to the witness.
7. Prior written statements.
8. Depositions of other witnesses on the same subject, or otherwise dealing with
this witness’s credibility, opportunity to observe, etc.
9. Other case documents copied to, received by, addressed to, treating the same
subject matter etc.
10. Review your file, including notes during the deposition, discovery responses,
correspondence, etc.
11. Try to obtain, from outside sources, additional information on the witness.
Prior depositions from other cases, prior statements regarding the case,
reputation for veracity in the community. This is the material the witness is
unlikely to be prepared to respond to or even rationalize.

III. PLANNING YOUR SPECIFIC PURPOSE OF CROSS

A. Considering your case theme, the opposing case theme, and the material available to
cross-examine this witness, outline the possible purposes of your cross-examination.
Most likely, you will have several purposes, in different areas of testimony.

1. Elicit favorable testimony to support your case.
   a) Facts, which support your case theme.
   b) Facts which support your witness’ testimony or their credibility.
c) Facts which discredit opposing witnesses or damage their credibility.

d) Most witnesses will acknowledge some helpful information. Even a witness who is lying, if smart, will make some concessions. Attorneys often attack, offending the witness, and do not obtain those helpful admissions.

2. Impeach the witness (the witness is lying).
   a) Identify contradictions in testimony (in any type of prior statement, document etc.)
   b) Identify motives to lie.
   c) Identify heavy bias.
   d) Character and reputation for honesty.
   e) Influence and contacts with the opposing party.

3. Impeach the witness’ testimony. (The witness is not lying, but mistaken.)
   While this may seem to be a fine distinction, it is not. Though some witnesses will stick their guns even when shown they are mistaken, most witnesses who believe they’re telling the truth, but are simply mistaken, are likely to cooperate with you in finding the truth, if you’re able to show it to them in a kind way. The entire attitude of the cross examination, the organization, and the kinds of questions asked will change based on whether you decide to impeach the witness or the witness’ testimony. Look for:
   a) Opportunity to observe;
   b) Light bias;
   c) Memory. Ability to recall details testified to and other details normally observed, lack of intelligence, common sense;
   d) You may want to put some boundaries on the testimony. A witness who was merely mistaken is less likely to exaggerate their understanding of the facts.

B. Decide on the method most likely to achieve your purpose. These may be used either to impeach the witness, or their testimony.
   1. Favorable testimony. Favorable testimony from the opposition carries far more weight than the same testimony from your own witnesses.
   2. The rest of the story. Bring out information which the opposing side omitted.
   3. Foundation. Many witnesses arrive at a conclusion, but do not have all the underlying facts to support the conclusion.
   4. Detail. Some witnesses are missing details, without which, their conclusion is suspect.
   5. Contradictions. Many witnesses have not viewed the whole picture, and when they view information which contradicts their conclusion, they (or the jury) may reevaluate it.
   6. The whole picture. Many witnesses have only a partial view of what happened and arrive at a conclusion from that. When shown the whole picture they may reconsider their facts fit in.
   7. Consistency. Most witnesses have a desire to be consistent with their original statements and with other witnesses whom they believe are credible. When they are inconsistent, they lose credibility, unless they have a good explanation.
   8. Confrontation. Some witnesses will naturally defend the indefensible when confronted. Others will run from safe territory into danger at the first sight of confrontation. Get the confrontational witness to defend so staunchly that they become unreasonable by defending the extremes. It is better to get the
non-confrontational witness to acknowledge favorable items first. Note that there are ethical issues in your getting a witness to say something neither you nor the witness believes is accurate.

9. Softening the testimony. Getting the witness to agree to weaknesses, shortcomings, parameters, limitations, only estimates.

10. Emotion. Emotions cloud our ability to think. If you get a witness angry, he will likely say things he later regrets. If you have a witness who is frustrated, scared, nervous, etc. it can affect their ability and desire to respond reasonably to questions. You can use all these emotions to your advantage, sometimes just by making the jury aware of them.

11. Bias / prejudice. The witness is blinded from the truth - including relationship, friendship, motive, cultural upbringing or association, cooperation with the opposing party, meeting with opposing counsel, matches the testimony of other witnesses "too well," similarity with the opposing party etc.

12. Your Story. Occasionally, you may want to tell your story through cross-examination. You make a factual statement which supports your case. The witness denies it. You go on making the factual statements, explaining the story of your case, even though the witness continues answering "no."

13. Obfuscation. Occasionally, your goal in cross-examination may be to obfuscate the issues with misdirection, marginally relevant material etc. This may call for a longer cross-examination on areas not critical to the case, to get the jury’s minds diverted from the direct examination. There are ethical restraints to this type of cross.

14. Causation. Look at more than just the facts. Humans make quantum leaps between facts, and causation. If you have a causation issue, see the closing argument section for types of causation.

15. De-emphasize the witness. The witness and/or to testimony is not important to the case, it does not materially affect the outcome. This may call for a short cross, or none at all.

16. Jurors also understand these principles. If the witness will not acknowledge their testimony is only partial, lacks a foundation, they do not understand the details, etc., the jury will discredit their testimony.

17. Most often, you will use several different types of cross-examination, starting off friendly to obtain some favorable admissions, then becoming confrontational on another issue. Oft times however, you must chose between two techniques of cross, because the two types are incompatible.

C. Your credibility is also at stake in cross-examination. While you may intimidate or embarrass a witness into giving more favorable testimony, you may create more sympathy for the witness, or anger against you. Mad dog cross is rarely successful. Always emphasis your fairness, you are only after "the truth," wherever it may lie.

IV. PRELIMINARY OUTLINE OF CROSS. Compare the potential cross-examination areas, the case theme, and witnesses’ weaknesses and make a preliminary decision as to the specific areas of your cross-exam.
A. Which areas of cross will best help your case theme?
B. Which areas, if the witness falters, are most detrimental to the opposing case them?
C. Are there any areas, which, unless attacked, will likely mean an opposing victory?
D. Where is the witness most vulnerable?
E. Evaluate the witness. Be sure to tailor the cross to the witness’ personality, strengths
and weakness. During depositions, you should have taken notes about how the witnesses comports herself, what her tendencies are. Use those notes now. A technique that works wonderfully with an arrogant witness will not work at all with a shy one. Look at personality, tendencies, emotional makeup, etc.

F. A Perry Mason cross-examination, where the witness breaks down and admits to the opposing case, is rare. Most good cross-exams are a careful combination of several types of cross that get the jury doubting the witness, or disliking him.

V. WINNING THE BATTLE CAN LOSE THE WAR - DO A GENERAL RISK/REWARD ANALYSIS.

A. When is it wise to reduce uncertainty and when is it wise to be daring?
   1. “In [cross], all action is aimed at probable, rather than at certain success. The degree of certainty that is lacking must in every case be left to fate, chance, or whatever you like to call it. [Preparation] can make uncertainty as small as possible in that individual case. Yet we should not habitually prefer the course that involves the least uncertainty. That would be an enormous mistake. There are times when the utmost daring is the height of wisdom.” Carl von Clausewitz, On War.
   2. So the attorney must generally analyze whether each case and cross, and then specifically analyze whether each subject, and each question: should minimize uncertainty and risk; or be daring.
   3. It is important in accessing risk that the attorney know her own personality and compensate for it. Some personalities do not access danger well and consistently take foolish risks. Other personalities see risk at every corner, even when opportunity shows its face.

B. The Case. Access how well is the case going, and how much does this witness hurt you? If the case is going poorly, and this witness kills you, you have to take more risk, do things which may work well, but could damage your own case.

C. Risk factors.
   1. Part of the risk is the strength of the evidence that confirms or contradicts the witness’s testimony.
   2. Part of the risk is the skill of the witness, and your skill in cross-examining.
   3. Part of the risk is your preparation and the preparation of the witness – does each have all the facts on the tip of their tongue; do they understand the documents and how the conflicts best resolve; do they have prior testimony in mind, word-for-word?

D. The Potential Risk. If the case is going well and the witness does not affect the case much, you would be foolish do undertake a risky attack on the witness. The witness will most frequently fight back, and each attack that fails, will only bolster the witness’s testimony, credibility, and image in the sight of the jury. You attack the witness as biased, and if it fails, the witness has more credibility. You show a contradictory prior statement, and the witness gives a reasonable explanation of it, the credibility grows again. You attack the witness’ veracity, and create sympathy, since the jury now believes the witness. For every potential reward in cross, there is a real risk.

E. The Potential Reward. Balance this with the potential reward. Do you have “the goods?” Irrefutable evidence of a lie? How good is the witness, how well prepared? Include in the evaluation the testifying skills of the witness, and the level of your own cross examination skills - they are important. Think through the risk / reward, evaluate your position in the case, and use good judgment. Be aware of how solid your evidence is, and what the probable, or possible responses of the witness will be.
F. Reducing Risk. Solid evidence reduces risk and so does your preparation and skill. By assuring you close all doors first, by being well prepared, by carefully ordering the cross and controlling the witness, you can make escape much more difficult, thereby reducing your risk.

G. Difficult Decisions. Most often the risk / reward decision is unclear, and difficult to make. The statement you want to confront the witness with contains some great contradictory information but also information very helpful to the opposing case. And use of the statement may disclose the existence of insurance. It calls for careful thinking, and good judgment.

VI. FOCUS YOUR CROSS-EXAM.

A. Simplify. Having identified the critical areas of cross, narrow the cross down to the few best subjects. Avoid the temptation to dabble in the remaining good areas. Good cross-examinations are usually a short, pointed, surgical procedure.

B. Choose your battles. Choose your battles carefully, but win every battle. Your choice of subject matter in the cross examination is critical. Attack the weaknesses of the witness not the strengths. If you show the witness cannot be believed, by attacking the weaknesses, the jury is unlikely to believe the witness’ strong testimony. If you attack the witness’s strengths, and lose, it bolsters the entire testimony of the witness. It is very difficult to conduct a great cross-examination on the strength of a witness.

C. The Minefield. By definition, cross-examination is a walk through a mine field. You have a hostile witness who is looking for opportunities to damage your case. The more you meander around, the more likely you are to be blown out of the water. Know what you want, what the evidence and risks are, and take only those risks that are appropriate to the case. Attorneys tend to risk too much, or not enough, depending on their aggressive or conservative personality.

VII. CRAFTING THE CROSS-EXAMINATION.

A. The Order of Subjects. Place the subjects during the cross examination for maximum impact.

1. Generally, organize your cross examination to start strong and end stronger. Rarely go in chronological order.

2. However, some witnesses are better addressed by opening with some minor admissions and obtaining the cooperation of the witness before attacking difficult points.

B. “The Goods.” Be sure you have your backup material instantly available in a form the jury can easily understand. Put together exhibits to illustrate each contradiction, opposing fact etc.

C. Craft the cross so that all doors are closed before a trap is sprung, and outline and decide on which techniques will be used, as contained in the next section.

VIII. THE GREAT GUIDELINES OF CROSS-EXAMINATION.

A. Conducting the Cross-examination. The following are principles of cross-examination which are used in nearly every cross-examination. However, while most of the principles work most of the time, none work all of the time. Some contradict each other. The only inviolable rule of trial is: to think, think and think again. Think about the possible, and likely responses of the witness and counsel. Think about how the jury or judge will view the cross. Think carefully through your case, and determine which Great Guidelines are appropriate for your style, for this
1. **Conduct a risk/reward analysis** to understand the purpose of this particular witness' cross-exam.

   a) Before any cross-examination, conduct a risk/reward analysis.
      (1) How does this witness’ testimony hurt *my trial theme*?
      (2) How does this witness’ testimony help the *opposing trial theme*?
      (3) Is the witness lying or merely mistaken?
         (a) If she is merely mistaken, she may cooperate if you show her the truth.
         (b) If the entire truth has not been told, *WHY*?
            (i) Not asked the right question? (Ask it!)
            (ii) Poor memory? (How can your cross illustrate that?)
            (iii) Motive to lie? (How can your cross show the motive?)
            (iv) Jumps to conclusions without facts? (How can your cross demonstrate the witness’ tendency?)
            (v) Influenced by others?
            (vi) Did not observed the facts claimed? Etc.
      (4) On what points will I win/lose with the jury? (Even though you may be factually correct, the biases of the jury may compel them to disagree.)
      (5) What emotional factors exist? (Will an aggressive cross of the widow create great sympathy, even if it shows she’s exaggerating?)

2. **Prepare Early, Prepare Well.**
   a) Winston Churchill was once writing at his desk and was asked what he was doing. He responded: “I’m preparing my impromptu remarks.”
   b) While cross-examination may look spontaneous, even off the cuff, it is invariably well prepared.
   c) You must always be preparing your cross. As soon as a case is opened, open a file called “cross.” As the case expands, have a “cross” file for every witness. Every time you have an idea; you notice a strength or weakness; you find a contradiction; you run across a damning document; put it in the witness’s cross file.
   d) If you’re always preparing, your cross will write itself: Do it **now**, you’ve **won**!

3. **Make a plan of cross-examination.**
   a) Before any cross-examination, make a PLAN including:
      (1) What critical points will be the focus of the cross?
      (2) What subjects will be avoided in the cross?
      (3) What order will likely obtain the best results?
      (4) What cross-examination techniques will likely obtain the best results?
      (5) Example.
         (a) The purpose of one witness’ cross-exam may be to combatively devastate the witness by pointing out consistent lying through contradictions with earlier documents.
(b) The purpose of the cross-examination of the next witness may be to de-emphasize the importance of the witness by asking only a few questions, and pointing out the testimony is really irrelevant.

4. **Create a Goal Oriented Cross**
   a) You can’t write your questions out and read them, you must adjust each question to the last answer (exceptions: matching the question asked to another witness, quoting the language from a document, asking a complex hypothetical to an expert, etc.).
   b) Instead, have a theme, goals, and steps.
      (1) Theme – A series of related goals that prove a point, support an argument you’ll make in closing.
      (2) Goals – Facts, admissions, to support the theme.
      (3) Steps – logical steps toward a goal.
   c) Sample theme and goals in a red light / green light case.
      (1) Theme: This “independent” witness really supported us, but after meeting three times with opposing counsel, became neutral.
         (a) GOAL 1. Acknowledge helpful information – Light was not green.
            (i) Steps:
               (a) Light was not green when entered;
               (b) At least yellow;
            (b) Yellow for at least a few seconds.
      (2) GOAL 2. Changed testimony re light.
         (a) Statement - At accident scene: said “light was very yellow when I last looked up a couple of seconds before the accident.”
      (3) GOAL 3. Changed after meeting with opposing counsel.
         (a) Steps
            (i) Met with opposing attorney 3 times
               (a) Once before deposition – 3 hours
               (b) Once last week in preparation for trial
               (c) Once this morning
            (ii) Changed testimony after meeting with opposing attorney

5. **Carefully select the topics for the cross.**
   a) The topics that are directly relevant to your trial theme or the opposing trial theme.
   b) The topics for which the witness has no good answer or explanation.

6. **Carefully plan the correct attitude** for your cross-examination.
   a) An experienced attorney observed a surprising defense loss, of millions of dollars. He attributed the surprise to the young defense witnesses “high fiving” each other as one left the stand, and another took the stand. The strength of the facts and law supporting the defense was irrelevant to the attitude of arrogance with a paraplegic plaintiff.
   b) Your attitude, and the attitude of the witness your cross brings out, is subtle, and often non-verbal, but critically important.
   c) The attitude in one cross-examination may be nonchalant, inferring that the testimony is irrelevant to the case.
   d) Only rarely will the attitude be aggressive, showing anger that the
witness is lying. When used, strong emotions should be justified, and natural.
e) Don’t aggressively go for the jugular. Instead, calmly give the witness the rope needed to hang themselves.
f) The attorney should not “fight” the witness. Attorneys often want to show their superior knowledge, fight on minor points to demonstrate their superior position as the one who asks questions. Don’t.
g) Usually, the attitude will change as the cross-exam progresses, attuned to the testimony.
h) For more on communication, see *The Power to Persuade*, by this author.

7. Organize the cross.
   a) The same question, asked in a different order, can make the cross devastating, or incomprehensible. Organize your cross to have impact, to take the jury step-by-step to a conclusion, keep from showing your cards, to get cooperative information before attacking the witness.
   b) Some principles of organization.
      (1) Logical organization. - a progression of points leading to a conclusion.
      (2) Chronological order. Begin with the earliest point and progress time wise. A clear chronology makes the points easier to remember.
      (3) Organize according to theme. Lead with the points most important to your trial theme, or which most blatantly contradict the opposing trial theme. Put similar points together.
      (4) Sometimes you will want to obtain a few admissions first, while the witness is still fairly cooperative. Only after the admissions are made do you go on the attack.
      (5) On rare occasions your organization will be intentionally random and disorganized to confuse the witness and keep the witness from seeing where you are going.
         (a) If the witness cannot anticipate where you’re going, they are more likely to make an error.
         (b) Be very careful however. Intentional disorganization also confuses the jury, and often you.
      (6) On rare occasions you will want to pick up where the direct examination left off. Do this if only if you can make a strong point and clearly refute what is fresh in the jury’s mind.
      (7) Have anchors, or themes, that relate the points together so they are remembered. Generally treat one theme at a time. Sometimes you can number your points, they are better remembered and related to each other.
   c) Organize not only the overall cross, but also each section.
      (1) Sandwich weak points between strong points. Hide an ‘unknown’ with several ‘knowns.’
      (2) Ask a question for which you have “the goods” to prove the witness is wrong, and obtain an admission. Try to get the witness to deny it, so you can embarrass the witness with the truth.
      (3) Repeat it again and by about the third time, the witness will be hesitant to confront you, knowing you are well prepared and they will look foolish.
(4) Next, slip in a question which you believe is accurate, but for which you don’t have a direct contradiction.

(5) The witness will often acknowledge the truth of your statement – presuming you again have “the goods” that proves the witness wrong.

(6) Continue to “sandwich” questions for which you can prove a contradiction, with areas you cannot.

(7) A similar technique of internal organization is to plan your cross to get the witness in the “yes mode.” Ask a number of questions, even innocuous ones, to which the answer is “yes.” Get the witness used to agreeing with you by answer each questions with “yes.” Once you have established the pattern, then slip in a critical question to which you’re quite sure the answer is also yes, but which you can’t prove. Often the witness will automatically answer “yes.”

(8) Organize your cross so it is easily understood. For example, use transitions when you change subjects, so it is clear to the witness and jury. Simply state: “Now let’s talk about what you did immediately following the accident, do you understand?”

(9) Part of organizing for clarity is re-establish a lie by having the witness confirm prior testimony, then reveal the truth or the contradictions with documents or prior statements.

   a) Be careful however, to not give the witness a chance to explain away or back out of the prior testimony. Once the witness sees where you’re going, and sees you are well prepared to prove their testimony is wrong, the witnesses tends to back out before you can show the lie, and it loses its impact.

(10) Last, end your cross on another strong point. The last point you make is also better remembered by the jury. Leave the jurors with a bad taste in their mouths for the witness.

   a) Sometimes you can sum up near the end by conglomerating the points of the cross or drawing a conclusion. But be careful. Going back on the same subject often allows the witness a chance to back off an answer once they see they’re cooked.

8. **Always focus on your plan of cross-examination,** absent compelling new information.

   a) Cross-examination is a walk through a minefield.

      1) The witness is usually trying to hurt you.

      2) Make the few points you need, and get out.

      3) Wandering needlessly around is dangerous!

   b) Focus on the purpose of the cross.

      1) While it sounds obvious, there is a "bulldog" that lives deep within every trial lawyer.

      2) Despite our best planning in our calm hours of preparation, we can be sorely tempted to take a bite at stray issues which accidentally arrive, and like the bulldog, once we have our teeth into the stray issue, we are loath to let go.

      3) Note however, that a great cross-examination will make expert judgments about these stray issues, and follow a few of them to spectacular results.

9. **Start the cross on a strong point.**
a) Impress the jury with a strong point or two right up front.
   (1) You have all the jury’s attention.
   (2) Jurors create impressions on people in the first 90 seconds, and they are hard to change later.
   (3) It damages the witness’ credibility, and makes other points look stronger.
b) Occasionally, you can obtain a few admissions first, while the witness is still cooperative.

10. Know the probable answer to each question asked.
a) Thorough preparation will allow you to focus the cross on the subjects which emphasize the witness’ weaknesses.
b) If you don’t know the probable answer, you’re either not prepared, or you shouldn’t ask.

11. Ask only leading questions.
a) Avoid open-ended and general questions. They give control to the witness to change the subject, divert attention, and give long answers.
b) Particularly in critical areas, only leading questions should be used.

12. Control the witness.
a) Control is:
   (1) a clear response to your question -
      (a) Specific, clear answers;
      (b) Short answers;
      (c) The answer only (don’t volunteer or change the subject).
   (2) Losing control usually occurs when the witness volunteers, by not responding to the question, or by adding non-responsive material from their own agenda to hide your answer deep in a long response.
   (3) Witnesses, particularly experts, can hone this skill to an art.
   (4) Ask good questions. A poor question immediately loses control. You try to gain it back, and the judge tells you: “The witness is just answering the question you asked.”
      (1) Ask short questions. Long questions invite long answers.
         (a) Add only one fact at a time to your story.
         (b) Generally, the shorter, the better.
            (i) “You saw the stop light as you approached.”
            (ii) “The light was initially green.”
            (iii) “It turned yellow.”
            (iv) “Before you were in the intersection.”
            (v) “You did not stop.”
            (vi) “You did not try to stop.”
      (2) Ask specific questions. Vague or broad questions invite vague, broad, answers - you lose control.
      (3) Ask factual questions. Theoretical questions invite debate.
      (4) Ask tough questions, on subjects on which the witness does not have good answers, by sticking to your carefully selected agenda.
      (5) Make sure all words have clear definitions.
      (6) Avoid open-ended and general questions which invite the witness to explain, give lengthy answers etc.
         (a) These questions come in many forms, but frequently
include such questions as “what happened next?”;
“Don’t you think you should have re-read the contract?”

e) Require short, specific, factual answers.
(1) Keep the witness on your agenda, which has been carefully
picked as the subjects for which there are no good
explanations. Don’t allow the witness to repeat the strong side
of their story.
(2) Don’t allow the witness to avoid answering your questions.
Often times, particularly experienced experts, will give a
beautiful answer to a related question which they wish you
would have asked.
(a) If the witness rambles, let them continue for a short while,
then ask: “Do you remember what the question was?” The
witness will often say “no,” you repeat the question, they will
answer it, and be more careful to answer future questions.
(3) Don’t allow the witness to give lengthy answers to your short
questions, trying to hide the point of your cross examination.
(4) Don’t allow the witness to give vague answers to your specific
questions.

f) Establish control early. The witness is almost always nervous about
cross examination. If you start out soft, let the witness volunteer, let
the witness answer the questions they want to, rather than the when
you are asking, it is difficult to gain control back.

g) Maintain control. Once in control, it is much easier to maintain. But
don’t hesitate and let the witness think they can do what they want.

h) You essentially have three choices when a witness starts challenging
you for control of the cross-examination.
(1) You can challenge the witness for control.
(2) You can appeal to the court for help.
(3) You can ignore it.
(4) The best choice is nearly always to challenge, then appeal to
the court. However, all three are appropriate remedies at
times.

i) Challenging the witness for control. If a witness volunteers, try to
stop it early on. However this must be balanced with choosing a clear
example of volunteering. Don’t get caught up in arguing minor points
which you will lose with the judge, or seem petty with the jury.

j) Methods of controlling the witness:
(1) Demand a specific action (please, give a short answer, don’t
volunteer etc.);
(2) Give a reason for your action (in order to save the court’s time,
you answered your attorney’s questions briefly, won’t you
please do the same for me? etc);
(3) Graciously persist. (An aggressive witness will battle you
constantly for control, using slight deviations at first, and
increasing the battle until you fight back. Persist, but always
graciously.)
(4) Sometimes, when the witness has been cooperating, but starts
to fight for control, if you go back to some obvious questions,
and get the witness in the "mode" of giving short, direct answers again, you can then go back to the more difficult questions, and the witness will cooperate.

k) Examples.
   (1) The witness avoids the question - Simply repeat the same question, even if it takes several times, until the witness responds with the relevant answer. Both the witness, and the jury, will quickly catch on as to how the game is played.
   (2) State what you want, the reason it is fair, and proceed.
      (a) “I need a brief, accurate, response to my questions. If you have other questions you would like to answer, your attorney will have another chance to ask you additional questions. You answered her questions, you’ll be fair enough to answer mine also, won’t you?”
   (3) As you begin to lose control, revert back to shorter questions, even a more simple subject matter, in order to re-establish control.
   (4) Ask the court reporter to read the question back, and request that the witness answer the question asked. Be careful it does not take too long, and be sure the delay will be blamed on the witness, not you.
   (5) “Please answer the question “yes” or ‘no.”” While this may be appropriate at times, such as when hearsay might come in, it can play like a Gestapo tactic.

l) Requesting assistance from the court.
   (1) Inadmissible evidence. If the witness volunteers information which is inadmissible, you can ask the judge to strike the inadmissible response, and to warn the witness to answer only the question asked. However, this frequently focuses the jury’s attention on the inadmissible evidence.
   (2) Ask the judge to instruct the witness to restrict their answers to the question asked. This tends to work well with a judge who is tight on evidence, tight on time, and a witness who is long on both.

13. **Demand detail.** You lose with generalities.
   a) A good cross seeks specifics. Generalities give the witness "wiggle room" to later change testimony and claim no contradiction; to later claim your arguments are not soundly based on the witness’ testimony.
      (1) Make sure you demand specific times, dates, details, definitions - who, when, where, what, why and how.
      (2) Make the implied explicit, the presumed apparent.
      (3) This can be difficult, and definition can be split in two.
         Remember President Clinton: ‘It depends on what the definition of the word “is” is.’
   b) Demand Detail. Most witnesses cannot remember detail.
      (1) Time has eroded their memory.
      (2) If they make up detail, they get caught in a lie, and witnesses contradict each other.
      (3) Witnesses tend to estimate, and you can usually show the
estimates are wrong.

(4) Look particularly for any numbers, times, distances.
(5) Take the witness “step by step” through a particular time period or procedure.
(6) Cross-examine on non-essentials such as weather, lighting etc. The non-essentials are forgotten more easily.

c) Detail also works to discredit a witness’ testimony. Showing the witness’ inability to remember many details discredits those details the witness does remember.

14. **Tie the Answer Down.** Witnesses will give vague answers, often intentionally. They will avoid the question asked, change the subject, and give half an answer. It is your job to follow up and tie the answer down.

15. **Don’t Give the Witness a Chance to Change a Bad Answer.**
   a) Covering the same ground twice, or trying to reiterate a bad answer to the jury, allows the witness to:
      (1) Change, or explain, an answer they now realize was poor;
      (2) Don’t give them that second chance.
   b) Judgment.
      (1) Your need to tie the answer down, yet not give the witness a second chance to change a bad answer are competing principles.
      (2) By trying to make a good answer better, you give the witness a chance to make it worse. The good witness will come back and or otherwise try to take great admission away.
      (3) Only good judgment will tell you when you have gone as far as the particular witness will go, and it is time to quit.

16. **Don’t ask “why” or “how,” or allow the witness to explain.**
   a) Don’t ask: “Why did you do that?”
   b) It gives the witness the opportunity to explain themselves at length, and look reasonable.
   c) Of course, if there is a very reasonable explanation, that will be brought out on redirect anyway, you should probably not be cross-examining on the subject.

17. **Close all escape doors.** Make sure you close all doors of escape, before attacking the witness or testimony.
   a) Exhaust the witness’s memory on the subject.
      (1) If you are cross-examining on what a witness did for fifteen minutes, because he cannot account for the entire time, you close the door by asking: "Did you do anything else in those fifteen minutes that you have not yet described to us?” A “no” answer closes the door.
   b) Look at the cross chart and the Five Faults of Facts to assure your “fact” is a fact, and has no faults.

18. **Observe the witness.**
   a) A senior attorney saw his junior hurriedly taking notes during the opposition’s direct examination. The junior was reprimanded: “You’re missing the testimony!”
   b) Be sure to evaluate the witness during deposition, direct, and cross. Know the witness’ strengths and weaknesses, and play to them.
   c) How good is the witness, how well prepared, how skilled?
      (1) ‘The one with the best story is the pathological liar.’
(2) Some times a great witness, even if lying, will get away with it.
(3) A poor witness, even if telling the truth, can often be made to look foolish by a good cross-examiner.

d) How credible is the witness? Most of the factors on which the jury will determine who is “truthful” are non-verbal - credibility is determined not by the words, but eye contact, the tone of voice, confidence, non-verbal behavior.

e) See The Power to Persuade, by this author, for more information on the art of communication, indications of lying, and understanding courtroom body language.

f) What are the strengths and weakness of the witness, the tendencies to exaggerate, how smart is the witness, how well prepared, how well does she communicate, how much rapport exists with the jury?

g) How do the witness’ strengths and weakness play into your plan for cross-examination?

h) You have to compare your skills, the witness’ skills, the case facts, and the “goods” you have against the witness. If it is a battle you are likely to lose, you may be better off expending your credibility elsewhere.

19. Read the Witness

a) The witness:
   (1) Hesitates, stammers;
   (2) Asks you to repeat the question;
   (3) Avoids the question;
   (4) Has nervous hands, face, shifting body;
   (5) Lowers the voice, scrunches the nose, a slight shrug of the shoulders;
   (6) Dissonance between emotions and words
   (7) Has micro-expressions of distastes, anger, distress, a smirk.
   (8) Be aware of the indications of discomfort and lying (See Trials of the Century II).

b) Read the witness and you will often know when to dig deeper, when to leave a subject alone.

20. Have the "goods" to prove the witness wrong.

a) If you are going to cross on the witness drinking alcoholic beverages (to argue their memory /judgment was affected), make sure you have "the goods" - COMPELLING EVIDENCE - receipts, documents, contrary testimony, photos, etc.) to show the witness is wrong, or at least cast serious doubt.

b) The witness will rarely admit to bad conduct, you must have the goods to show the witness is wrong, or show they have exaggerated, are unreasonable, or otherwise not credible.

21. Don’t argue with the witness.

a) Make your points and leave the argument for closing.

b) Argument includes:
   (1) comparing the testimony of one witness with another;
   (2) trying to get the witness to say another witness is lying or mistaken;
   (3) trying to get the witness to agree with your conclusion, rather than asking questions to elicit facts.
c) If you argue, you will get an objection, which is likely to be sustained,
d) It is a rare witness who will agree with your argument.
e) A commonly used argumentative question is to ask the witness to
conclude that any testimony contrary to their own testimony, means
the other witness is lying or mistaken.
(1) Q. "So if witness Thurgood testified the contract was not
signed on the day indicated, he would be lying or mistaken?"
(2) The question is argumentative, and objectionable.

22. **Choose your battles carefully - Win each battle.**
a) Control the bulldog in you. Don’t try to fight every battle, contest
every issue. Choose those issues critical to the case, and concentrate
your energies.
b) Control the subject matter of the cross-examination.
(1) If the witness is allowed to choose the subject matter of the
cross, they will win big points by picking easy subjects for
which they have great answers.
(2) You will select the subject matters for which there are no good
answers.
c) Make sure the witness is not allowed to change the subject, either by
leading you astray or by volunteering additional information not
requested by the question.

23. **Condense your cross to a few critical points.**
a) Attorneys are tempted to try to score on each possible point.
(1) If you have ten "good" points, raising all ten loses the three
"best" points in a long cross.
(2) Occasionally, numerous points, of near equal value, add up to
a large score against the witness’ credibility.
b) One area you should usually expand, rather than condense, is a clear lie.
If the witness lies, break the lie down into many small, specific lies, rather
than one big, general lie: you lied when I interviewed you; you lied in your
deposition; you could have changed the lie when you signed the deposition,
but did not; you lied on direct; you lied again when I asked you on cross.
c) How do you decide which points are the most critical?
(1) The most important points are usually determined by:
   (a) the trial themes of each side;
   (b) the critical portions of the witnesses testimony;
   (c) by the relative strengths and weakness you are attacking;
   and
   (d) how strong your evidence is against the witness on a
       particular point.

24. **Ask short, clear, specific, factual questions that call for a “yes” answer.**
a) Avoid negatives, they tend to confuse.
(1) Q: “The light wasn’t red, was it?” (What does a “yes” answer
    mean, that it was red, or that it wasn’t?
(2) “You don’t disagree that Mr. Alverez was correct? (If you
don’t disagree, you must agree! Do two negatives make a
positive?)
(3) Isn’t it true that you never saw the red car?”
b) Avoid using “crutches,” the prefaces and tags we add to our questions:
(1) “It is true, isn’t it, that you signed this contract?”
(2) “You signed this contract, didn’t you?”
(3) Instead use the simple statement of fact: “You signed this contract.”

c) **Short**, simple, factual statements that call for a “yes” answer are usually the best questions:
(1) NOT: Q: “You saw the light change to yellow and had time to stop, but sped up instead.” BUT:
(2) Q: “You saw the light change to yellow.” A: “Yes.”
(3) Q: “You had time to stop.” A: “Yes.”
(4) Q: “You sped up.” A: “Yes.”
(5) Q: “To try to make the light.” A: “Yes.”
(7) Q: “You still had not reached the crosswalk.” A: “Yes.”

25. **Demand short, clear, specific answers.**
a) You’re entitled to them. See the section on controlling the witness.

26. **Avoid repeating the witness’ harmful testimony.**
a) Enough said.

27. **Show the jury you scored.**
a) There is no scoreboard mounted in the courtroom. You must subtly advise the jury each time you score. This is where the actor in you comes out.
(1) A surprised look, a furrowed brow, much of it is non-verbal communication.
(2) Emphasize admissions, sometimes repeat them in your questioning.
   (a) This can contradict the Great Guideline of not giving the witness a chance to change the answer. Good judgment is again required, make sure you have the admission well tied down.
(3) Through your tone of voice, gestures, facial expressions, writing on the backboard, etc. make sure the jury understands the important admissions you obtain.
(4) Realize that you may be showing the witness also, and end cooperation, or elicit a quick retraction.

28. **Show Contrast.**
a) Contrast makes the problem stand out, gives it impact, makes it appear more serious.
b) If you cross on an error made in a report, don’t merely go to the error and point it out.
   (1) First establish that reports are important; care was taken in creating the report; others rely on the report; the information was fresh in the witness’s mind when the report was made; all the reasons, that the witness will usually want to agree with, of why it is important that their report is so good and accurate.
   (2) Then point out the important error, or series of sloppy errors. The contrast between what should have been done, what the witness was trying to do; and what was actually done; gives the error impact.
c) Contrast and conflict are one of the most important factors in good writing, and in good cross.

29. **Pounce on opportunities!**
a) A cross-examination nearly always turns up some unexpected information or opportunity. Great cross-examiners immediately “pounce” on it. It requires “ad libbing,” although great preparation will usually give you help to know which direction to go.
b) This contradicts the Great Guideline that you should stick to your plan.
   (1) Use good judgment.
   (2) Novices generally deviate from the plan too easily.
c) The ability to score on the run requires:
   (1) Wide preparation and good indexing;
   (2) Experience and good judgment;
   (3) Careful attention to the witness and testimony.
   (4) Skill in executing the Great Guideline.
d) Your ability to exploit these opportunities is often what changes a good cross into a great one - or a poor one.

30. Linger Longer.
   a) If the witness is having a hard time with your questions, he has no good answers, he looks foolish in his rationalizations, “linger longer” on the subject.
      (1) Re-ask essentially the same question with a slight variation.
      (2) Ask related questions.
   b) You want to bring the discomfort, the poor answers out.
   c) But be careful that you don’t give the witness a chance to change a poor answer.

31. Don’t go a “bridge too far” and ask one question too many.
   a) There is a temptation to go from facts to conclusions; Having led the witness fact by fact to the obvious conclusion, to ask the witness to admit the conclusion.
   b) The adverse witness will rarely agree with your ultimate conclusion. Bring out the facts, and stop – leave the conclusion for closing argument.
   c) Most often, the witness makes the opposing argument, justifies the admission, or otherwise weakens the cross.
   d) Cross is trying to get facts to support your later arguments. Get the salient facts, don’t try to get the witness to agree with the conclusion (i.e. argument) counsel wants to make.
   e) But – read the witness, a good cross can be great if the witness will admit it; but a good cross can be poor if you ask one question too many, and the witness explains it away.
   f) It is difficult to describe when you have gone as far as you can go – but the answer that smacks you in the face immediately tells you, you asked “the one question too many.”
   g) So don’t ask “the one question too many” that allows the witness to claim some credibility back.

32. Victory is in the documents!
   a) Most witnesses are willing to at least put a good spin on bad facts. Some are willing to fabricate.
   b) Look for documents.
      (1) Documents are a good indication of what the people were saying and thinking at the time.

33. End the cross on a strong point.
a) See the organization section above.

IX. USE CROSS-EXAMINATION TECHNIQUES to increase the likelihood of obtaining the answers you want. The Great Guidelines (above), are generally applicable to nearly all cross-examinations. With the following techniques, you must pick and choose with good judgment. Most all can be either homicidal or suicidal.

1. Asking a series of simple agreeable questions, to which the witness must answer “yes” can make the witness more likely to answer more neutral questions with a “yes.”

2. Skipping around from subject to subject can keep the witness off guard, and prevent her from planning how to answer your line of questions. However, it can confuse not only the witness, but the jury, and you (jumping around you forget to ask some questions).

3. Confronting the witness with answers from his deposition, can convince the witness that all of your questions are similarly backed up with a deposition quote, and he should simply agree with you to avoid being confronted with his own deposition testimony again. Once the witness is agreeing, slip in the question that is fair, but is not backed up by the deposition.

4. If the witness becomes hostile, and begins disagreeing with every question, begin asking some neutral, and then helpful questions. The witness will often continue to disagree with you even when it is in his best interest to agree. You may get admissions, or the jury may conclude the witness is unreasonable.

5. Make your final argument through the witness. Make a statement, then raise your tone at the end to make it sound like a question, or for agreement from the witness. You basically ignore the witness’ answer, it is your question that is important. This works best on a witness whose credibility has been previously destroyed. “That is the same exact wording that Ms. Jones used?” “You didn’t talk to her recently, did you?”

6. Ask the reporter to mark portions of the testimony by politely asking: “mark that,” or with a prearranged signal (a nod of your head) so you do not interrupt. Later have the crucial testimony transcribed and quote it in the cross of another witness, or in closing. This is an excellent way of showing a contradiction, rather than allowing the witness to argue that he never stated what you claim. It also piques the jury’s interest, although the judge and jury may not like it frequently.

7. Socratic Method. Kindly, carefully ask questions of the honest witness who is mistaken, to lead them to their own folly - a unwitting presumption, a lack of critical facts upon which to base a conclusion.

8. Identify how the witness perceives herself, and appeal to the witness’ natural pride (they perceive themselves as smart, honest, thorough, etc.)

   a) Example. At Nuremberg, Göring’s intelligence was appealed to after Göring would not acknowledge Germany had lost the war:

      (1) Q: “You want history to reflect that you were not aware the war was lost in January of 1945?”

      (2) The appeal worked, and Göring modified his answer.

9. Push the witness where they tend to exaggerate.

   a) Tend to agree? Get them to agree to the absurd.

   b) Tend to disagree and fight you? Get them to fight you on a reasonable
premise.

10. Remind of the solemn oath taken to tell the truth.
   a) This may have one of several effects.
      (1) Some witnesses, when they realize you don’t believe their testimony, will “rethink” the testimony.
      (2) Sometimes these questions are used to emphasize to the jury the incredulity of the witness’ testimony.
      (3) (To the professional expert): “You maintain, under oath, that you do not recall, within a hundred thousand dollars, what your income was last year?”

11. Have you ever been mistaken before?
   a) Most will acknowledge they have been.
   b) Most jurors will be skeptical of a person who claims they have never been mistaken.
   c) It opens the door to argument, especially in a ‘reasonable doubt’ case, a ‘he said, she said’ case, or another case where credibility is critical.

12. The unanswerable question - damned if you do or don’t.
   a) Illustrate the dichotomy of the witness’ testimony. These are usually carefully planned and executed.\(^1\)

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1 Example. Honorable Joseph H. Choate was one of the great cross-examiners of the late 1800's. He had a case overturned when the opposition successfully argued his cross-examination was abusive (it showed the defendant’s wealth and associations, claiming to test his memory).

The cross-examination below involved a husband who claimed he took securities from his wife, unknown to her, and pledged them as collateral in a stock margin account, losing his wife’s securities. The suit was for the return of the securities. Choate cross-examined the husband:

Choate: “When you ventured into the realm of speculations in Wall Street, I presume you contemplated the possibility of the market going against you, did you not?”

Husband: “Well, no, Mr. Choate, I went into Wall Street to make money, not to lose it.” (Laughter).

Choate: [Patiently persisting] “Quite so sir, but you will admit, will you not, that sometimes the stock market goes contrary to expectations?”

Husband: “Oh yes, I suppose it does.”

Choate: “You say the bonds were not your own property, but your wife’s?”

Husband: “Yes, sir.”

Choate: “And you say that she did not lend them to you for purposes of speculation, or even know you had possession of them?”

Husband: “Yes, sir.”

Choate: “You even admit that when you deposited the bonds with your broker as collateral against...
X. **The Three Sub-channels of Communication.** Far more important than the words spoken, are how the three sub-channels of communication are used. Some 80 percent of meaning comes from the words, but from the three sub-channels of communication. Think carefully about them, and focus on real communication, not just words.

A. **Credibility.** It doesn’t so much matter what the witness says, it matters if the witness is believed. Keep constantly in mind your credibility, and that of the witness. Credibility is built with consistency, fairness, consideration of all the facts, identification by the jury with you or the witness, good body language (including eye contact, no appearance of nervousness, calm voice, appropriate gestures).

B. **Attitude.** Decide on the attitude of the cross examination. Are you angry this witness is lying?; Are you sorry the widow is suffering from the loss of her beloved husband?; Are you skeptical of the witness’ story? Your attitude will communicate to the jury what their attitude would be. Your tone of voice, volume, gestures, facial expressions all communicate an attitude. Frequently be several different attitudes expressed. A cross examination may begin with a friendly attitude in order to obtain a few admissions which the witness is likely to give. The attitude of the cross may then change to skepticism and disbelief as the witnesses credibility is attacked. The attitude may build to anger as the high points of the cross examination are reached, accusing the witness of pure fabrication of portions of the testimony.

C. **Image.** How you dress, comb your hair, whether you wear one suit or six, drive a ‘76 Maverick or current Porsche convertible all give an image to the jury of who you are, and whether you can be relied up as their guide though the maze of a trial. Remember, the jury probably already has an image of you. You can play with the image to your advantage. If the jury already has the image of your being superbly well prepared, knowing every fact and document, you may play dumb, pretend to let the witness lead you astray, then confront the witness with contradictory documents, to the delight of the jury.

XI. **APPEAL TO THE DECISION LEADERS.**

A. Not all jurors are created equal. There will generally be two to four jurors who will be leaders, the others will follow along with what they have to say. Consider the background of the likely opinion leaders on the jury, what additional information will they want to know, what areas of cross-examination are more most likely to find persuasive, what attitudes are they likely to have towards the witness, and what attitudes they expect to see from you. If one of the jury’s likely opinion leaders is a blue-collar laborer, you may have to adjust your cross-examination of the blue-collar foreman.

B. Look at the cross-examination through the eyes of the jury, not your own.

C. Review and adjust your cross-examination for sensitive issues such as sympathy, race, sex, insider/outside, juror bias etc. Even though the widow may be exaggerating, your attacking her may create more sympathy than the point is worth.

your stock speculations, you did not acquaint him with the fact that they were not your own property?”

Husband: “I did not mention whose property they were, sir.”

Choate: “Well, sir, in the event of the market going against you and your collateral being sold to meet your losses, whom did you intend to cheat, your broker or your wife?”

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XII. **FINE-TUNE THE CROSS-EXAMINATION.** Review your outline of cross-examination to insure:

A. That you do not "open the door" to any evidence which the judge has ruled inadmissible, unless you bring it up.

B. Review from the opposition's point of view - are there any likely traps?

C. That you have covered all critical points necessary to prove your case, to argue your theory in closing, to cover a possible appeal etc.

D. There are no questions likely to lead to potential traps set by opposing counsel.

E. Evidence admissibility objections and issues are prepared to be addressed if raised at trial.

F. Any unusual vocabulary, legalisms, technical words etc. are well defined and explained (several times) to the jury.

G. K. I. S. S. Take the time to go through and condense your outline. Do you really need each subject area? Does it really advance your case or destroy the opposing case? Most cross-examinations are too long. The more minor subjects you treat, the less impact each is likely to have. Simplify, simplify, simplify.

H. Outline each area of cross-examination with a reference to contradictory statements and depositions, contradictory documents or exhibits etc. so if the witness testifies differently, they can be immediately confronted with opposing evidence.

I. Oftentimes, it is worthwhile to write a few specific cross-examination questions down, and commit them to memory. This works particularly well on a critical answer. For example, if during the deposition testimony was given which you now think the witness will contradict, make sure you ask the exact same question at trial, as was asked in the deposition. By repeating the same question, you don’t give the witness wiggle room to equivocate on the two answers.

J. Create at least several high impact exhibits, demonstrations, charts etc. for the jury to visually understand the cross-examination. Jurors learn most information to their eyes. Give them what they want to see.

K. Review of both your exhibits and the opposition's exhibits to make sure those you’ll need for the cross examination are already in evidence, or that an adequate foundation can be laid through the person being cross examined.

XIII. **PRACTICE THE CROSS-EXAMINATION.**

A. Particularly practice critical areas of the cross examination with a partner.

1. What is the witness’ likely response;

2. What other potential responses to could the witness give;

3. If you were preparing the witness for cross-examination, what would you recommend;

4. As to each of the responses above, how will you treat each potential answer.

5. Knowing the potential answers, re-evaluate your risk/reward quota.

XIV. **CONDUCTING THE CROSS-EXAMINATION.**

A. Good cross-examination is frequently a chase through uncharted territory.

1. Don’t read from or be beholden to your outline. The main areas should be committed memory. You may occasionally peek at the outline for a specific reference to a forgotten exhibit, cite, or review a complicated area.

2. Much of raising a good cross-examination to great cross-examination is reading the witness, and developing good judgment on when to deviate from the prepared cross, and when uncharted territory will wreak disaster.
3. If you’re not comfortable doing a cross-examination without your outline, the best exercise is to have an attorney, paralegal, spouse etc. read the deposition and let you practice the cross-examination without your outline. You should soon be able to follow the general course of the outline without looking, make necessary deviations from the outline depending upon witness’s answers, and come back to the outline without any noticeable seams in the cross-examination.

XV. CROSS-EXAMINATION CHART (FACTUAL WITNESSES - For experts see The Greatest Trials Ever Held).

A. Review this section before each cross to remind you what subjects to cross on.
   1. 80% of cross is on these subjects.

B. First, check relevancy – picking your subjects of cross.
   1. There are four different subjects you can cross on.
   2. Of course, pick the subjects carefully; you cross on subjects for which the witness has no good answers.
      a) Facts relevant to the case – your trial theme and their trial theme.
         (1) “Admissions” (can have wider use than plain facts, see FRE 801, 803, 807, 1007).
         (2) Attack relevancy of opposing facts, show they are not necessary to the law, argument or claimed conclusion.
      b) Credibility.
         (1) Character.
      c) Arguments.
         (1) Outline your closing argument and cross to get the facts to support each argument.
         (2) An argument is anything that makes a fact more or less likely.
         (3) Witnesses make only “observations,” the attorney makes them into facts or mistakes for the jury or judge to believe or disbelieve.
         (4) Look for analogies, stories, practical arguments, human nature. See the argument section of The Ultimate Trial Notebook.
         (5) It is the largest part of lawyering.
      d) Opportunity.
         (1) It may have happened that way, but it ‘coulda’, woulda, shoulda’ happened differently.
            (a) Deviation from normal practice.
            (b) Procedures.
            (c) Precedent.
            (d) Remedial measures. Remedial measures were taken, that could/should/would have been done before, and prevented this.
         (2) You had the opportunity to anticipate, change foreseeable events.
         (3) Monday morning quarterbacking- other options, courses of actions Go through, with hindsight, options of what could have been done.
            (a) Shoulda: Who had responsibilities?
               (i) Where they fulfilled?
               (ii) Manuals followed?
               (iii) Policies and Procedures?
                  (a) Not in place?
                  (b) Not followed?
                  (c) Not trained?
(d) Not current?
(iv) Consider consequences before acting?
(v) Coulda: Could there been a different outcome? If there had been:
   (a) better procedures;
   (b) more thoughtful review of problems;
   (c) policies and procedures were not followed, were not in place, were not updated, were not well thought out.
   (d) discussions of changing the procedures.
   (e) Were there post accident changes in procedures?
         (i) If not, why not?
         (ii) If so, why not earlier?
   (f) Habit
         (i) Was the habit thoughtful?
         (ii) Deviation careless?
(vi) Woulda:
   (a) Possibilities to have prevented it.
   (b) If X occurred, would that have changed anything?
   (c) If you had done Y, would that have changed anything?
   (d) Get acknowledgement that
         (i) It could have been done differently;
         (ii) Then, that it should have been done differently.

3. Relevancy can be argued on virtually all issues.
   a) Does a shoplifting conviction 15 years ago as a teenager really taint the witness’s honesty?

C. Second, get HELPFUL INFORMATION – Consider getting helpful information first, because the witness tends to stop cooperating once attacked.
   1. This is frequently overlooked in a rush to “destroy” the witness.
   2. An admission from an adverse witness carries much more weight than the same testimony from your own witness.
   3. Elicit this helpful information to focus your case - define what is disputed and what is not.
   4. The most common areas are:
      a) Admissions, any information that establishes case elements or helps your trial theme;
      b) Confirms your witness’s testimony or corroborates it to improve their credibility;
      c) Builds your witness’ credibility (knows your witness, likes and trusts them);
      d) Facts that contradict the opposing trial theme;
      e) Put boundaries on the witness’ testimony, what they did not do, did not see;
      f) Define where the dispute is by showing agreement with your witnesses.

D. Third, consider the skill of the examiner and the witness.
   1. Skill makes a difference, honestly consider your skill as a cross-examiner and the
skill of the witness.

(1) An attack on cross can backfire, and hurt, rather than help your case.

b) The skill of Being Believable.

(1) For detail on communication, see *The Power to Persuade*, by this author.

(2) A likeable witness is generally more believable. You have to consider that in how you examine and attack a witness.

(3) A believable witness, with a reassuring manner, confidence, a clam voice, convincing body language, has to be evaluated more carefully for your cross.

(4) A savvy witness is not so much smart, but knows how to appeal to other people, is personable, understands motives, including those of the cross-examiner.

(5) The smart witness is more likely to be a better witness, a better liar, less likely to become confused or fall into your trap and blurt out the truth.

E. Fourth, review and attack The Five Faults of Facts. A “fact” can be testified to, but be wrong, in one of five ways. Cross is finding the weak links. One weak link can break the chain.

1. Notice that you must have each of the five items on the chart, to have accurate testimony. A fault in any one, and the testimony fails, or is at least suspect.

2. Review the chart from the perspective of both sides of the story/case.

<table>
<thead>
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### XVI. DETAIL ON CHART SUBJECTS

A. Most of cross-examination is on theses five subjects, with the skill of the witness and examiner deeply affecting each. On most witnesses, most of your time is likely to be spent on four and five - the witness’ memory and truthfulness.

B. Many are interrelated. For example, a mistake may show there was no foundation, and/or the witness misperceived, and/or the witness has a poor memory, and/or was dishonest.

C. A cross will likely focus on two or three items on the chart. While you might address all the subjects in a deposition or interview, you MUST know the information beforehand, and cross-examine only on the weaknesses.

1. **Meaning.**
   a) What is the definition of the word “is?”
   b) Clinton denied having “sex” with Monica Lewinski based on meaning.

   To Clinton:
   
   (1) “is” means the present, she had sex with him in the past;
   (2) “causes” means to force, and he never forced Monica, she was a willing participant;
   (3) “the deponent” was the one being deposed (which was Clinton) so Monica had sex with him, but he didn’t have it with her.

   c) Usually the meaning is not intentionally bent, but the attorney does not question in precise enough terms or tie it down.

   (1) The witness says “she was near” and means ten feet, the attorney presumes it means fifteen inches.

     a) Press yourself to be specific, avoid vague words.
     b) Avoid pronouns: he, she, it, that – they are unclear at best, and the witness often means something different than the attorney.
(2) Meaning is difficult because language is inherently vague and subject to interpretation.
(3) Make sure you and the witness have a meeting of the minds on meaning, and that it goes into the record in terms that can’t be later disputed.

d) Press for detailed meaning if the witness is too careful, tends to be technical.
e) Make the vague specific.
f) Make in implied explicit.
g) There are no true synonyms, pick your words carefully.
h) Ask for, or give precise definitions.
(1) Ask for, or give examples of what the meaning covers.

2. **Foundation** – Uncover, attack the foundation, the basis for the claimed fact - did the witness observe what she claims to know?

a) Ability to observe includes:
   (1) Ability to see well, eye glasses worn, sufficient light;
   (2) Ability to hear well;
   (3) Use of drugs, medications, alcohol;
   (4) Lack of sleep.

b) Opportunity to observe includes:
   (1) Present at correct time and place;
   (2) Vantage point not blocked;

c) Mistakes.
(1) Omission. Missed something that was, or could have been important.
(2) Commission. Did something that should not have been done, included fact or step that was unnecessary, tainted the rest.

3. **Perception.** Part of “seeing” involves perception. An attorney at a college basketball game jumped out of the stands and attacked the referee. Had the referee made such a serious mistake? Or was the attorney’s perception coloring the “facts” he was witnessing? Our minds interpret the “facts.” It is not that we don’t tell the “truth” as we see it, but we perceive the truth differently.

a) Focused. You may be at the scene of an accident, with your head facing it. If your attention is focused on your daughter spilling milk in the front seat, you may never notice the accident until it is over.
(1) Paying attention, mentally there (personal problems, day dreaming).
(2) Distractions - Talking on the cell phone, listening to radio, talking with a friend; distractions are endless.

b) A natural bias or prejudice - the fan disagrees with what the referee saw.

c) Ability to understand.
(1) When something is new or unusual we fail to comprehend the matter, and often arrive at the wrong conclusion.
(2) We see “magic” tricks with our own eyes, but do not understand why our eyes see what they apparently see.
(3) Another magician, who understands, can tell you exactly what really happened.
(4) An honest witness may see, but if they don’t understand, their testimony is suspect.
4. **Memory quality.**
   a) Includes:
      (1) Accuracy of memory;
      (2) Detail of memory;
      (3) Prior inconsistent statements (could also be an intentional distortion).
   b) Passage of time dims memory, the more time, the less memory.
   c) When one witness talks with another, counsel talks to witness, we read articles in the newspaper, even talk to friends, their views influence our “memory.”
   d) Similar incidents become confused in memory.
      (1) A police officer who investigates 600 accidents a year is likely to have a poor memory of any one of them, and may well confuse several while testifying.
      (2) If you have been in only one accident in your life, you probably recall it well.
   e) Unusual events aid memory.
      (1) “I remember it occurred on the 29th of April, because it was my birthday.”
      (2) “I remember she said “Call my boss for me” because it struck me as such an odd request for a dying person.”
   f) Trauma often destroys memory, but can sometimes heighten it. Many involved in a traumatic incident describe it as a “blur” or have no memory at all.
   g) For more information on memory, see *The Power to Persuade*, by this author.

5. **Truthfulness.**
   a) Inconsistencies show lack of truthfulness.
      (1) Internal – witness contradicts self with prior statements.
         (a) Sworn statements.
         (b) Unsworn statements.
            (i) Written, formal to police, investigators.
            (ii) Oral to others.
         (c) Testimony conflicts with acts
         (d) Acts conflict with motive, intent
         (e) Motive, intent conflicts with knowledge, interest
      (2) External – witness contradicts other witnesses.
      (3) Documents, things, other physical evidence are contradicted by the witness’s testimony.
   b) Most people have a desire to “look good” or “win.”
      (1) This creates a motive to exaggerate or even lie.
   c) Bias and prejudice not only affect our perception, but give a motive to exaggerate and lie.
   d) Motives to lie are numerous: Benefit from the verdict; relationship to person; identified with a party; sympathetic toward party; pride; shame; save face; be consistent; publicity; drama . . .
   e) Contact between the opposition and the party
      (1) Extensive preparation by the opposition.
      (2) All affect the witness’ neutrality and credibility.
   f) Much of truthfulness is challenged by showing inconsistencies:
(1) With prior statements or actions;
(2) With other witnesses’ testimony (who often have no motive to lie);
(3) With other facts and evidence

6. Reality check.
a) Facts which don’t match reality are not believed.
   (1) The whore expert who claims not to recall, within a hundred thousand dollars, how much he made off attorneys last year.
   (2) Reasonable? Anytime a witness is unreasonable it creates doubt.
   (3) Common sense.
   (4) Knowledgeable, used reasonable foresight, considered consequences before acting.
   (5) A reality check can also be testimony that contradicts an act which speaks for itself.
      (a) That is your signature on the contract.
      (b) That is your car found at the scene of the hit and run.

b) Human nature.
   (1) Ted Bundy ran from a cop that was following him, and ran a stop sign. Human nature is to go more carefully if a policeman is following – if we have done nothing wrong.
   (2) Human nature indicated Bundy ran because he felt guilty, he had something to run from.

c) Probabilities.
   (1) Coincidences occur, but add up the probabilities.
      (a) Bundy had handcuffs, a crowbar, rope, gags, two masks, a false mustache.
      (b) He was driving 500 miles a week to “nowhere in particular.”
      (c) Gas receipts showed Bundy was in the areas many murders occurred, near the time of the murders, and he had no reason why he was in those areas.
      (d) Bundy claimed to never had been in Aspen, but he had a map of Aspen in his apartment with the Wildwood Inn circled – that’s where the murdered Carin Campbell was staying.
      (e) Bundy lied to the police officer and lied to others.
   (2) What are the probabilities? Guilty!

XVII. Cross in the Weak Case.

A. Sometimes you have most all the facts against you, yet still have to go to trial. How do you cross?
   1. Beware of ethical issue that arise.
   2. Also be aware that these can backfire, and show you have a weak case.
   3. If these techniques are used against you when the other side had a weak case, point out that the cross had nothing to do with the direct.

B. Consider not crossing. If you have no good points on cross, this witness is tangential, you can acknowledge the facts and still win, don’t cross.

C. Try the witness.
1. Max Steuer was considered New York’s finest trial lawyer in the early 1900’s. His culpable defendants were nearly always found not guilty.
   a) Time Magazine wrote: Steuer is the profession’s ablest exponent of the old legal saw for a weak case: “Try the judge, try your opponent, try the police, but don’t try your client.”

2. To try the witness:
   a) Don’t stand still merely defending, go on the offense.
   b) Put the accusers on trial – attack, demonize (Mark Fuhrman was compared to Hitler – certainly overkill) Three basic lines of attack
      (1) Mistakes.
        a) In the OJ case a blanket from Nicole Brown’s home was used to cover her body, potentially contaminating it with hair and fiber.
        b) The police carried O.J.’s blood around for three hours.
        c) Trainee collected evidence then Fung lied about it.
      (d) Motives.
      (e) The OJ defense alleged racism and abuse of government power.
      (2) Policy and procedure violations.
        a) In OJ, the police failed to timely notify corners.
        b) They did not obtain search warrant for O.J.’s estate.
        c) They did not count or document the blood samples until three days later.

3. Give at least a general theory the jury can use as a plausible excuse.
   a) In OJ, a well-qualified Dr. Henry Lee said regarding the damning DNA evidence: “Something’s wrong.”
      (1) He didn’t say what was wrong (nothing was).
      (2) He gave no evidence or details.
      (3) But his high credentials and vague allegation gave the defense an emotional argument, however weak, against overwhelming evidence.

D. Pseudo Cross
1. Show all the minor items the witness cannot recall, and suddenly the few major items the witness claims to recall become suspect.
   a) What clothes were people wearing?
   b) What was the weather like?
   c) Where else had they been that day?
2. This is better developed in a deposition, because witnesses tend to recall some things, but not others – at trial show only those the witness did not recall.
   a) A clothing designer may remember exactly what clothes people were wearing.
   b) The auto mechanic may remember the make, model and year of every car in the accident.
3. But you can usually develop a long list of minor items a witness cannot remember, and cast at least a doubt on those items he claims to remember.

E. Taint the witness.
1. Not a strong cross, but often better than no cross at all.
2. Works best when a number of witnesses have been tainted, or this witness tainted in a number of ways.
3. Point out some bias, prejudice, animosity, or cooperation with the other side.
a) In the Triangle Shirtwaist Fire trial, Max Steuer pointed out witness after witness:
   (1) Had met with the prosecutor, numerous times;
   (2) Had sued his defendants on other grounds;
   (3) Had shown some preference or cooperation with the other side.

F. Tell your own story on cross.
   1. Tell your story, and essentially ignore the witness’s denial of the truth of your story.

G. Read the Witness.
   1. Reading the witness is necessary in a good cross, but is dangerous if you have no plan of attack, and reading the witness is your only intent. Yet on rare occasions, you must try it.
   2. Max Steuer commented on a damning witness, for whom he had no cross:
      “When the jury is crying, you must cross.”
      a) He also noted: “You may attack the story in any way, but to attack the witness will likely prove disastrous.”
   3. Steuer read the witness, or as he said “toyed with the story.”
      a) He was looking for a weakness, a mistake, an opportunity.
      b) He found it (Kate Alterman had memorized her story, likely given her by the prosecutor).
      c) Steur said after his cross: “The jury was no longer in tears. Kate had not hurt the case.”

XVIII. FOLLOW THESE GREAT GUIDELINES and you can do an adequate cross-examination your first time, and a good cross nearly every time.

A. To improve:
   1. Read book and great cross-examinations – Three of my favorites are:
      a) Cross-examination, Science and Techniques, Posner and Dodd
      b) Trying Cases to Win-Cross-examination, Herbert Stern (one of a four volume set;
      c) The Art of Cross-examination, Wellman. Nearly a hundred years old. It still has wisdom and some great examples.
   2. Take the afternoon off and watch some good attorneys in court.
   3. In your next deposition, practice cross-examination for the last ten minutes.
8. **CLOSING**
Closing Argument Checklist
Quotes for Closing
ARGUMENT CHECKLIST

Note: Much of the information on types of arguments is a summary of the argument section in *Anatomy of Persuasion*, by Todd Winegar. This is designed as a checklist, see *Anatomy of Persuasion* for more detail.

I. ARGUMENT IS:

A. A list of reasons supporting a conclusion:
   1. “The evidence shows that the defendant was the cause of this accident” may be argumentative, but it is not an argument. It does not give the reasons for the conclusion.
   2. Conclusions alone are a fallback to two children claiming, “It is so!” “It is not!” “Yes it is!” “No, it isn’t!”
   3. Stating conclusions does not help a judge or jury decide.
   4. Rather than just stating a conclusion, share the reasons that led you to arrive at that conclusion.
   5. Arguments are best when they give reasons, which clearly explain and justify a conclusion.

B. Clear thinking;

C. A process of reasoning that leads to your conclusion;

D. Detailed observation and explanation;

E. Making the obscure clear;

F. Meshing fact, law and argument into a compelling explanation of what occurred, who’s to blame;

G. Taking facts and showing they mean something other than the obvious;

H. Taking a weakness in your case and neutralizing it or turning it into a positive;

I. A justification, clarification, simplification, education, a series of facts that lead to the truth;

J. An argument can also be the opposite. It can obfuscate, misdirect, mislead, confuse, and lead to error. There are ethical considerations in using arguments that mislead.

K. Arguments sometimes must change the way a jury or judge thinks. Often, there is no one "truth," but merely competing values and beliefs. However, each of us usually perceives that our own values and beliefs are “true” and we tend to be quite closed-minded, unwilling to even consider the
opposing viewpoint. Values and beliefs are rarely changed in trial. In the end, authority decides what values and beliefs are "true." In our legal system the judge and jury have the authority.

II. IMPLICIT ARGUMENTS. You have been “arguing” your case since the moment the jury first saw you.

A. Whenever you “help” opposing counsel by telling him which exhibit number he is looking for, you argue to the jury that you are prepared, fair, you have nothing to hide, and you can be trusted.
B. A photograph of the plaintiff in pain is an implicit argument for greater damages.
C. The soiled clothes of the witness may implicitly argue to some that he is hard-working, to others that he is socially inept.
D. Your organized table argues you are well prepared and orderly, and can be relied on.
E. When you quote from the deposition or trial transcript it argues you are careful to be accurate.
F. When counsel arrived and saw three attorneys at opposing counsel’s table, he refused to allow even a runner or paralegal to be seen with him. The implicit argument was that he was David battling Goliath.
G. The sarcastic demeanor of counsel in examining or describing a witness is an implicit argument that the witness is not to be believed.
H. We quickly identify explicit arguments. However, implicit arguments during the entire trial can be difficult to identify, and deal with.

1. Mistrials have been granted because counsel shook her head from side to side, made other gestures of disbelief during a witness’s testimony, and did not stop when the court ordered. The judge granting the mistrial recognized the strength of the implicit argument: that the testimony of the witness was not to be believed.
2. Be aware of implicit arguments made by the opposition. They can be objectionable.

I. Both sides "argue" from the very beginning of trial in all that they do and say. Be sure your implicit arguments complement rather than contradict your explicit arguments.

III. BE AWARE OF YOUR PURPOSE in closing. Jury research shows that by closing, most of the jurors have their minds pretty well made up. Only a few will change their minds from the end of opening statement until the end of the trial. If you waited until now to finally persuade the jurors of the validity of your case, it is probably too late. By now you should have the couple of opinion leaders on you jury leaning
heavily in your favor. Your purpose in closing argument is to

A. Give arguments (reasons) to the opinion leaders on the jury who favor your side, for their use in persuading the followers on the jury to come with them, and the opposed jurors to switch sides. Give them the reasons to confirm and justify the decision they have tentatively made.

B. Tell your story. The story ties all the information together that came in piecemeal.
   1. Your story personalizes your client, your cause.
   2. It shows what evidence is most important and why.
   3. It highlights and makes sense of small facts, and highlights (or resolves) contradictions that couldn’t be explained earlier.
   4. It ties the facts to the law and shows how they relate.
   5. The facts in your story are reasons for the verdict.

C. Charge your jury with emotion to excite and motivate them, possibly even anger them. Emotion empowers the individual jurors to fight to right an injustice.
   1. The jurors are about to be involved in perhaps one of the most trying, demanding arguments of their lives.
      a) Jurors become animated (“sure”) they are doing the right thing mostly because of the emotion you convey.
      b) Other jurors are likely to disagree, perhaps in an angry and personal way, with the jurors who favor you. Emotion charges your jurors up with vision, courage and resolve to fight for your case.
      c) Some jurors strongly support you, but don’t have the personality to speak out. Emotion gives them courage to stand up.
   2. Use emotion carefully. Too little, or too much emotion will kill your case. The best emotions arise naturally from the facts and are felt sincerely by you.

D. Make sure your favorable jurors understand what they have to do. Show them how to fill out the special verdict form correctly, and assure they know how to give you the verdict you ask for.

E. Educate, simplify, clarify, create new associations and change the thinking of those who are open-minded.

F. Rebut the arguments of the other side. Cases in trial are usually close. Except in an unusual lopsided case, the jurors are split as you address them in your closing. You must address the
arguments of the opposition and identify their weaknesses and faults.

1. Inoculate your jurors against the opposing arguments so they won’t be persuaded by the counter arguments in the jury room.

2. Create grave doubt in those jurors who have decided against you to begin the process for them to reassess their thinking.
   
   a) A change of mind usually begins by undermining facts and arguments they think are accurate.

3. Make opposing arguments appear weak or biased so opposing jurors will be embarrassed to express their view.

G. Create the basis for later arguments to the appellate court, a very different audience.

H. Justify damages. Often, jurors have decided who should win, but any damages have been left uncertain until near the end of trial. Moreover, if jurors have not discussed damages, they tend to have quite different perceptions of how much is “fair.” The amount of damages can often be changed in closing argument, particularly when they are not fixed sums which have been discussed throughout trial.

I. There are different goals of arguments in closing. Choose arguments which meet your goals.

IV. YOUR DELIVERY IS CRITICAL. Demosthenes was asked the three most important factors in persuasion. His response: “Delivery, delivery and delivery.” Cicero said ‘the most dominant aspect in oratory is delivery.’ A great delivery can make up for a mediocre case.

A. More than other times in the trial, the closing calls for emotion, drama, a bit of theater. This is your plea to avoid a great injustice in the world. See the Communication section of The Power to Persuade, by this author. The three sub-channels of communication (credibility, attitude and image) speak more than the words you say. Let the jury feel your commitment.

B. Style. Attorneys seem to prefer the pulpit pounding style, demanding justice be done for this client. Many jurors prefer a “Jimmy Stewart” style - down home, open and honest, let’s work this out together. There are a wide variety of styles that work. Don’t feel you have to adopt one that does not fit you.

V. WRITING YOUR ARGUMENT.

A. Plan For Your Arguments. When you open a new case, also open a specific file for arguments. As arguments occur to you, write them down. These will become invaluable notes for negotiations, opening arguments, and closing arguments. Make notes of analogies, details for the story, reasons and justifications for your side, rebuttals to opposing arguments, etc. Some ideas never come again. You tend to get good ideas when the case facts are new to you. Use your notes to write your closing arguments well before trial. From the opening and closing arguments, make a checklist to be sure that all the evidence necessary for each argument is elicited from the witnesses.

B. Get the detailed facts and the law.

1. Facts are at the basis of nearly every argument. Make sure you look at all the facts and that your argument accounts for them. Arguments tend to emphasize the best and worst facts.
2. Good arguments are tied to the law. Use the jury instructions as the foundation for many arguments.

C. Brainstorm before you actually write the argument. Quickly write down:

1. Every reason you can think of why the judge/jury should grant your motion or give you the verdict;
2. If you lose, what are the likely reasons or the basis of the losing decision? (Spend more time here, we tend to underestimate the opposing arguments and over estimate our own.);
3. If you win, what are the likely reasons or the basis of the winning decision?
4. What are the critical facts that will likely prove decisive?
5. What facts are weak and might be turned by one of the parties?
6. Press yourself to find more reasons, more critical facts.

D. In a closing argument, use your opening as a basic outline. It was well prepared, and covers all the important points.

1. Add the new information, the quotes, contradictions, and mistakes that came out during trial.
2. Refine it to match the emphasis that was given in trial.
3. Make any adjustments for how the trial themes were actually used in trial.
4. **Emphasize the evidence.** The great advantage of closing argument is you can use the actual evidence in the case. Actual evidence is your best argument. Use it repeatedly. Refer to the exhibits, show them to the jury, explain their significance. Quote from the trial transcript, or accurate notes if there is no transcript.

5. **Emphasize the jury instructions.** Make the jury familiar with the critical instructions. Make sure they are explained, and tied to the evidence. Studies show juries do not understand jury instructions well – fill that void. Show the jury the special verdict form. Go through, step by step, how it needs to be filled out, and argue for the answers you want inserted.

6. **Merge your closing with the trial.** Refer to *voir dire* promises, and from your trial notes make comments about the highlights of witnesses, their demeanor and testimony. Tie the closing in with your opening, and show how your promises were fulfilled. Quote from the opposition’s opening, and then quote the transcript showing how the opposition’s promises were not fulfilled.

7. **However small, make your case a big “FEDERAL” case.** Adopt social issues, argue for the future, for society, for the disadvantaged, for freedom and justice.

E. **ADD ARGUMENTS** to drive your points home.
   1. Once you have the subject of the argument you must choose the type of argument that best makes your point.
   2. Many arguments are meshed together or use several types of arguments to make the same point.

F. **TYPES OF ARGUMENTS.**
   1. Use this as a checklist to assure you have considered all the different types of arguments (see more detail on types of arguments later).
   2. Logos (facts, evidence, logic, reason).
   3. Pathos (appeals to our human nature of emotion, passion, prejudice).
   4. Ethos (credibility, expertise). Credibility arguments are part of nearly every trial and time should be spent on what facts and witnesses are believable and why.
   5. The law.
      a) Burden of proof.
b) Instructions.

c) Reasonable doubt.

6. The story.

7. Analogies.

8. Practical arguments.
   a) Quotes.


10. Common sense (history, proverbs, fables, maxims).

G. TRIAL THEME – AN ANCHOR

1. You must have a trial theme of about one to three basic claims that summarize your position.

2. These themes act as an anchor – all other arguments should be related to them as sub-arguments.

3. Without the anchor of these themes a jury (or judge) is unlikely to understand and recall your arguments well.

H. COUNTER ARGUMENTS.

1. Consider the arguments likely to be used against your case and construct your arguments with them in mind.

2. Take the sting out of opposing arguments by anticipating them, making them yourself, and then showing why that argument fails.

3. Setup the opposition by tempting them to make an argument that for which you have a strong rebuttal.

I. SHARPEN YOUR ARGUMENTS.

1. Once you have a decent argument, you make it good or even great by sharpening it. Sharpening take an argument and makes it vivid, memorable, personalized, clearly applicable.

   a) Argument example: You shouldn’t speak with the agent if the principle is there.

   b) Sharpened: Winston Churchill said: “Never hold discussions with the monkey when the organ grinder is in the room.”
2. Sharpening includes:
   a) Phrasing;
   b) Catch phrase (“If it doesn’t fit you must acquit”);
   c) Metaphor;
   d) Personalization, how it will affect the listener;
   e) Drama, illustration;
   f) Concrete examples;

3. Sharpening includes use of rhetorical principles in organizing and delivering the arguments such as trilogies.

4. Sharpening means you must condense your argument to a brief, powerful thought rather than a wandering diatribe that eventually makes the same point.

J. REVIEW DANGEROUS ARGUMENTS.

1. Some arguments are dangerous because they may offend or undermine your cause to some listeners, or under some circumstances. Others are dangerous because opposing counsel may be able to turn them against you or effectively attack them.

2. Dangerous arguments include those that are true and compelling, but which make you or your cause seem cold and unsympathetic.

3. Dangerous arguments can be very powerful but can backfire. Review and use them carefully.

4. Examples of dangerous arguments:
   a) Overstatement;
   b) “Liar;”
   c) Sarcasm, Humor, Anger;
   d) Weak arguments (easily defeated, weaken strong arguments);
   e) An uncaring attitude against a sympathetic figure;
   f) Bias, prejudice, anything that offends;
   g) Two faced / duplicitous (he wasn’t negligent, and if he was there are no damages, and if there are, the damages are small);
   h) Admitting the opposition’s facts or contentions.

K. SOFTEN ARGUMENTS.
1. Sometime you can take a harsh or dangerous argument and soften it so its use won’t diminish your credibility or offend. Softening also assures you don’t overstate your argument and lose credibility.
   a) Use a rhetorical question. Rather than: “He ran the red light;” ask “Did he run the red light? Some evidence suggests it.”
   b) Acknowledge. “I don’t want to sound cold or uncaring, but there are a few things we must note about the widow’s testimony.”
   c) Qualify, use possibilities, probabilities. “A possible explanation is . . .” “It could be that . . .”
   d) Make a strong argument then couple a weak argument with it.
   e) Surrogate arguments. Let your expert or another witness introduce a touchy subject then you repeat or adopt it.
   f) Phantom arguments. “Someone once said . . .” or “Others have claimed . . .”
   g) Use a loose analogy.

L. ORGANIZE THE ARGUMENTS for presentation to build on each other and have the most impact.
   1. The same arguments, organized differently, can have vastly different impact.
   2. Organize your arguments first, then look at the organization templates to refine your organization.

M. TEST AND REFINE.
   1. It is difficult to predict the exact effect your arguments will have. You need to test them by delivering them to persons much like your listener and having them critique which arguments they found most and least compelling.
   2. Refine your arguments based on the input of others.

N. Be aware of the LAW AND ETHICS of arguments and make sure you comply.

O. PRACTICE YOUR DELIVERY.

VI. GENERAL OBSERVATIONS ON ARGUMENTS
   A. An argument must be natural. Not every argument works for every attorney. Choose arguments which match your style.
   B. An argument must be case appropriate and match your trial theory.
C. Different audience values require different arguments.

D. An argument can be written or oral, but can also be visual, implied, or unspoken. Written arguments tend to force the writer to be more precise. Oral arguments tend to convey more emotion than written arguments. Written arguments can also be dissected more easily, because they can be re-read, compared, and contrasted.

E. Be aware of the types of disputes involved in your case. They call for different types of arguments. Most cases involve several types of disputes.

1. Factual disputes - who is telling the “truth.” (Credibility and evidence arguments are important.)

2. Opinions, inferences, and assumptions - (true facts require little interpretation, opinions, inferences; and assumptions require much interpretation).
   a) Emphasize education, evidence, and credibility (particularly if the subject is beyond the comprehension of the judge/jury).

3. Causation - did the act in question cause this result? (See causation section below.)

4. Values, biases and beliefs - what kinds of actions, laws, and behaviors are acceptable and desirable in our society? (These can be the most difficult to overcome, see the bias section below.)

5. Definitions - Does this act meet the definition of the statute? (Examples and analogies are important, see definitions below.)

F. Tough issues. Don’t avoid the tough issues in the case. We sometimes fear – “the more I talk about it, the more the jury will. If I ignore it, so will the jury.” The jury will talk about the tough issue, be sure you do. Address what the jury is thinking, and then show them a way out, even if it is somewhat of a rationalization.

G. Your argument must anticipate, meet, and counter the opposing argument. Be sure to address the implicit, unspoken arguments of the opposition. Decide how you would argue the case from the other side. What are their best arguments? Ask others, particularly lay persons like those on your jury, the same questions, and then develop arguments to address the opposition. You will never be “right on” what the other side will argue, but you will be much better prepared.

H. Selecting The Most Convincing Arguments. Once you put together a list of good arguments, you need to select those which will best persuade those making the decision.
1. Ask yourself -
   a) What are the attitudes, values, and beliefs of the decision-makers?
   b) What are the decision-makers’ likely objections, questions, and concerns?
   c) What facts, data, evidence, and other information are needed to address the likely concerns?
   d) What arguments appeal to the jury’s/judge’s beliefs and values?

2. Use a focus group or mock jury. You can identify the most convincing arguments for people just like you. But persons just like your jurors are necessary to find the most persuasive arguments for your jurors. Even asking lay persons questions will help you identify which arguments appeal to what kinds of people.
   a) How would you vote?
   b) Why would you vote that way?
   c) What were the most important factors in your voting that way?
   d) What information would you have liked to know that may have influenced your decision?
   e) What was the point that, for you, the case turned on?
   f) Which theory was most convincing and why?
   g) Under what circumstances would you vote the other way?
   h) What other comments do you have on the case?

VII. DISSECTING ARGUMENTS.

A. ANALYZING ARGUMENTS. Arguments can be complex, and there are a number of methods to analyze and break down arguments into their component parts. You must do this, formally or informally, in order to argue well. See the argument section of Anatomy of Persuasion and the section on Toulmin’s system for analyzing legal arguments in The Science of Persuasion for more detail.

B. THE LANGUAGE OF ARGUMENTS. To be effective, arguments must be stated in clear, concise, and simple language.

   1. COMMON PROBLEMS.
   2. Ambiguity
   3. Vagueness.
4. Plain English.

5. Avoid legalisms (see legalisms dictionary in Language of the Law section)

6. Definitions. Make sure the vocabulary used is well defined.

7. Repetition of key words.

8. Subtle distinctions are missed by jurors. The expert said it was "not uncommon."
   Counsel later argues the experts said that arthritis will be a problem.

9. Picturesque language. Good arguments are told in vivid, colorful language. Coining a
   phrase that is memorable and descriptive goes far in persuading.

VIII. CLASSIFICATION OF ARGUMENTS. There are many ways to classify arguments. Here are
several major ones. Your closing argument should cover most of each category.

A. PATHOS, LOGOS, AND ETHOS. The Greeks classified arguments according to their appeal.

1. PATHOS APPEALS TO THE "LISTENER." These arguments generally deal with
   human nature, beliefs, values, attitudes, sympathy, bias, and identification with the speaker
   or subject. These arguments are often subtle, can be unstated, and may frequently not even
   be identified by the listener. They are, however, extremely powerful.

2. LOGOS APPEALS TO "LOGIC." This is the message itself, the reasons, facts, and
   evidence.

3. ETHOS IS THE CREDIBILITY OF THE "SPEAKER". This includes the speaker's
   reputation, credibility, communication skills, and lack of mistakes.

B. A diverse audience, such as a jury, will usually require diverse arguments. One argument
   persuades one juror, a second argument convinces three more, etc. The majority decides in favor of
   your case, but for different reasons.

C. A good final argument must be carefully planned to balance pathos, logos, and ethos. It mixes
   appeals to the listener’s attitudes, with demonstrations of the speaker’s accuracy and credibility,
   with demonstrations of evidence and logic. Leave one of the trios short, and your closing is lacking.

IX. MAIN CATEGORIES OF ARGUMENTS USED IN LEGAL SETTINGS.

A. THE STORY. A story is an exceptional form of argument when it contains reasons for a
   conclusion. A good story keeps attention, gives meaning, and is easy to remember. Argue through
   a story by putting the reasons for your conclusion in story form.
1. **OUTLINE OF A STORY.**
   a) **MAIN THESIS.** One sentence that the juror will tell her spouse the evening of the first day of trial when asked what was the trial about. "It's about a boy whose perfect mind is trapped in a body that can't walk or talk because a doctor didn't follow procedures."
   b) Put the **REASONS IN STORY FORM.** For example, if talking about damages, list the specific, concrete facts showing the reasons the damages are justified.
   c) After listing the reasons, state the **CONCLUSION** they support. “Although you cannot make Thomas walk or talk, you can assure there is always someone there to feed him, and stretch his muscles so his spine is not painfully bent.”

2. **A GOOD STORY INVOLVES THE FOLLOWING ATTRIBUTES**
   a) A good story has a **CLEAR PREMISE** (a brief statement that is later demonstrated by the story). *Every* part of the story contributes to the premise and moves the story forward.
   b) A good story is a **SEQUENCE OF EVENTS**, particularly *action* and adventure.
   c) Events must have some **CONSEQUENCE**.
   d) The main character must *ACT*, not just be acted upon. TAKE NOTE defendants!
   e) A good story contains **CONCRETE, SPECIFIC INSTANCES** from which the listener makes her own conclusion.
   f) A good story deals with **PEOPLE** - the “characters” of the story.
      (1) Particularly people whose actions create *EMOTIONAL FEELINGS*. Most instances which generate emotion also generate *IDENTIFICATION* between the story’s characters and listeners. Listeners become personally involved in the story - and its outcome.
      (2) Particularly people’s *MOTIVATIONS*.
      (3) We want to hear about interesting characters –
         (a) People’s hopes and fears, troubles and triumphs.
         (b) *People’s dilemmas, conflicting values*.
         (c) Larger than life heroics/tragedies befall them. “The thrill of victory, the agony of defeat.”
(4) Clarence Darrow said “The main job of a trial attorney is to make the jury like his client.” Personalize your story, make your client warm, likeable, properly motivated.

g) A good story is told with understatement. Any story must be condensed. If you overstate, you lose credibility.

h) A good story contains CONFLICT, particularly between people.

i) A good story is believable - because it matches the listener’s view of the world. Also- accuracy, understatement, consistency.

j) People STRUGGLE in a good story. We identify with other individuals’ struggles

k) People CHANGE as a result of the conflict and events of the story.

l) A good story has a CLIMAX.

m) A good story has a RESOLUTION. (In law the resolution is usually left to the judge or jury.)

3. Story Telling Techniques

a) IDENTIFICATION - Experience it! We identify with a character in a story when we see what the character saw, feel what he felt, understand the motivations which explain his actions, see the color, the detail.

b) SYMBOLS AND IMAGERY in stories can be powerful, but be careful. These are often inappropriate in factual settings. (The catching of the fish in "Old Man of the Sea" is a symbol of manhood.

c) IRONY (saying one thing but meaning another).

d) CONTRASTS. The best story opening ever by someone trained in the law (albeit not in court): “It was the best of times, it was the worst of times, it was the age of wisdom, it was the age of foolishness, . . . it was the spring of hope, it was the winter of despair . . .” Charles Dickens, a clerk at Grays Inn Law Firm at the age of 15.

4. STORY ORGANIZATION

a) PROLOGUE. Begin before the beginning. Begin the story with a “status quo” to set the scene just before your real story begins. (The prologue helps the story to
show change.)

b) Begin at the BEGINNING.

c) Begin at the ENDING. (You see John Brown here in a wheel chair unable to walk, or even stand.) It can be dramatic and keep attention and suspense. The listeners want to know "how did this happen?"

5. VIEWPOINT

a) OMNISCIENT. The attorney knows all, gives information from all viewpoints.

b) OBJECTIVE viewpoint, usually your client.

c) PERSONALIZED. “Had YOU been at the corner of 4th and Vine at 3:00 p.m. on September 18, 1992, YOU would have seen. . .”

B. ANALOGY - Analogies make comparisons. Some claim that analogies are the basis of most thought and learning. Juries use analogies frequently, comparing your case to driving a car, sports, anything familiar to them. If you construct an analogy the jury adopts (This case is just like driving a car, you have to pay attention all the time) that analogy can go a long ways to determine the outcome of the case.

1. Similar to analogy, and not treated separately, are simile (an explicit comparison of two unlike things, usually using “like” or “as”) “Frank is as loyal as a snake,” or “An angry Jim is like a keg of dynamite”; and metaphor (a word or phrase that makes an IMPLICIT comparison) “The court room is just another stage for the plaintiff.” “This case cries out for punishment.”

2. There are two categories of analogies

a) Literal. Comparing items from the same classification. Examples: Two competing products compared for safety features; a reported legal case compared to the current case.

b) Figurative. Comparing items from different classifications. Example: “Ignoring the printed warning is like an ostrich sticking its head in the sand.” There are three sub types of figurative analogies. (There is considerable overlap between the types.)

(1) DESCRIPTIVE ANALOGY. Goal - create a vivid picture. A good analogy creates understanding. Descriptive analogies compare abstract notions with something that is concrete and familiar in order to illustrate the
abstract. Example: “Selling this machine without an instruction manual makes me think of giving a gun to a child. We know that ignorance will eventually create tragedy.”

(2) EXPLANATORY ANALOGY. Goal - *clarity* and *understating.*
Example: Einstein, in speaking of the four-dimensional time-space continuum said, "Think of space that curves and has bumps. Or better yet, think of the surface of a potato."

(3) ARGUMENTATIVE ANALOGY. Goal: justify a conclusion.
Argumentative analogies are used to prove something or make a prediction. They take past experience and facts and draw a prediction for the future.
Example: “ACE never recalled this product when they knew it had killed three customers. Unless you impose punitive damages, how many more will die by ACE’s arrogance?”

3. CONSTRUCTING ANALOGIES
   a) Think of something with which to **COMPARE** the issue. Find something that:
      (1) Is familiar to the judge/jury;
      (2) Has clear issues, impact;
      (3) Is simple.
   b) SIMILARITIES. Identify all of the relevant similarities between the different items being compared.
   c) AN ANALOGY IS STRENGTHENED BY:
      (1) RELEVANCE of similarities;
      (2) A high *NUMBER* of similarities;
      (3) A high *DEGREE* of similarity;
      (4) A LACK OF DISSIMILARITIES.
   d) THINK THE ANALOGY THROUGH. Many poor analogies can be turned on you.
      (1) What will the opposition respond with?
      (2) Can the analogy be changed slightly to injure the case?
      (3) Can the same analogy be used against another issue in the case?
e) TO ATTACK AN ANALOGY

(1) Point out the same factors, but emphasize the differences, the lack of similarity, etc.;

(2) Try to turn the analogy, find a different part of the case where it does not hold true, or a slightly changed analogy that shows the opposite.

f) RELEVANCE. Relevance is the most common area of error. Many similarities appear to be relevant, but upon close examination, are only tangentially relevant.

C. PRACTICAL ARGUMENTS.

1. Judgments in legal settings are often based on values. There is a continuum of choices, rather than one mathematically correct choice and many wrong choices. Practical arguments are particularly helpful here. Pure logic and formal arguments are usually impossible in dealing with value judgments.

2. Review the following and select those which best fit your case. Note that many practical arguments, while powerful, appeal to human nature rather than careful thinking.

3. Be aware of practical arguments used against you. When they are, identify them for what they are - “That argument of opposing counsel is called a ‘straw man argument,’ where counsel takes a weak argument that I did not make, then tears it down, claiming all my arguments are weak. You will remember that I never made that argument. Opposing counsel made it himself. Don’t allow that ploy to distract you from the real issues I have discussed with you.”

4. DEFINITION ARGUMENTS. “It all depends on what the meaning of the word “is” is.” Any definition can be cut in half. There are few black and white definitions, because of the inherent vagueness of language. In arguing definitions consider the following:

   a) What is the definition? Is there a statute, a jury instruction, agreement among experts, a treatise, a dictionary, common sense factors, etc.?

   b) Compare the actions in the case (or the quality involved in the case) to the definition. What are the similarities and the dissimilarities?

   c) What are the critical qualities necessary to meet the definition, and what are the only tangential qualities?

   d) Redefining. What are the reasons or the basis for the definition? Show that
those reasons are not applicable in the present case. Use examples, tending towards the extremes of the definition.

e) Address the fairness of the application of the definition in the present case. Look for arbitrary lines drawn in shades of gray, and inequitable outcomes.

f) Look for applications in other cases or similar circumstances as precedent or unfairness in the application of the definition.

5. VISUAL ARGUMENTS can be very persuasive. Testimony about distances has little impact upon a jury. However, an animated accident re-creation, or markers in a photograph showing the distances, can impress upon the jury that there was more than sufficient time to take evasive action.

6. DEFINING THE ISSUES. Is the case about race, prejudice, or murder? Once we accept what the case is about, we can see the end quite clearly.

7. JUSTICE, FAIRNESS. Most all arguments should include a claim that between these parties, in this situation, this is the fair, the just result. Arguing precedents is included here, since we believe in equality of justice.

8. RELEVANCE. Review the relevance of the reasons supporting the conclusion. Direct relevance is a major error in practical arguments. Aristotle claimed the use of irrelevant arguments caused more injustice than any other reason. Appeal to the judge to limit opposing, irrelevant arguments.

9. EXAMPLES. Many legal theories are abstract. Specific, concrete examples are often necessary to give meaning. Examples are one of the most powerful arguments in creating understanding.

10. PERSONALIZATION - putting the jury in the shoes of your client. We are motivated by results, which affect us personally. Arguments which show how the case theme could touch our lives are very powerful. That’s why the prosecutor argues “make the streets safe” to the jury. In Sweet, Darrow argued “Imagine yourselves back in the Sweet house on that fatal night.”

11. UNDERSTATEMENT. Exaggeration destroys credibility. Understatement breeds credibility. And when you come to a weak point and need to exaggerate a little, the jury believes you because of your consistent understatement.
12. **PROBABLE CONSEQUENCES.** Follow the consequences of the decision to their logical and probable end. Show that the probable consequences are undesirable.

13. **ABSURDITY.** Find other situations in which the opposing rule, if applied, would lead to absurd results.

14. **AUTHORITY.** Refer to authority, which usually gives opinion or agreement. Important to authority is experience and direct relevance (expertise in the specific area). Authority includes quotations. An apropos quote of Lincoln associates your case with his stature and authority.

15. **CREDIBILITY.** Attack the credibility of a witness or statement.
   a) Inconsistencies.
   b) Contradicts common sense.
   c) Actions contradict words.
   d) Bias, opportunity to observe, memory, perception, and consistency.
   e) You lose credibility by claiming too much.
   f) See *The Power to Persuade*, by this author, for how credibility is judged.

16. **APPARENT NEUTRALITY.** We judge an argument by its source. Showing you are fair and neutral greatly increases the believability of your arguments. Emphasize opposing admissions; acknowledge your case's weaknesses, the opposing strengths, your own errors; be accurate and fair; and praise opposing counsel as skilled.

17. **BIAS** and Prejudice. A preconceived inclination that makes one’s judgment partial to a certain outcome. Bias can come from many sources - relation, friendship, similar philosophy or upbringing giving a sense of right or wrong (including religion, adherence to a set of ideas (pro or anti abortion etc.)). See below on step in overcoming bias and prejudice.

18. **EMOTION** - Passion, Pandering and Pity, Anger, Fear. When aroused, emotions tend to override the rational mind.

19. **THREAT OF FORCE OR HARM.** Coercion begins to take place when the threat of harm is used. Fear is a great motivator, but usually uncalled for. Arguments about making the city safe for the jurors and their families, or making products safe for jurors, fall in this category.

20. **ARGUMENT CHAINS OR STACKING ARGMENTS.** An effective technique,
particularly where there is little evidence to support your claim, is to stack numerous, short, arguments together. The number of arguments, rather than the strength of the argument, is important to jurors using superficial thinking (heuristics) in their decisions (see *The Science of Persuasion*, by this author).

21. **NON SEQUITUR** ("it does not follow"). Using a gross generalization, or unsupported logic.

22. **THE FALSE DILEMMA.** Over-simplification of a complex problem to present only two possible solutions. You must choose either one or the other. It ignores the frequent middle ground.

23. **CIRCULAR REASONING** *(BEING THE QUESTION).* Assuming, in part of your argument, the issue that is really in question.

24. **STRAW MAN ARGUMENT.** Usually taking an argument you wish the opponent made (but they were too smart to have bitten), and then destroying it, or grossly simplifying an opponent's argument into something that is easy to refute.

25. **ATTACKING THE MESSENGER** *(AD HOMINUM)*
   a) A personal attack on opposing counsel, a witness, the police, often related to bias, prejudice, or guilt by association.
   b) **Attacking counsel** - Counsel's character or actions are rarely relevant to the underlying case itself. They are frequently unethical.

26. **APPEALING TO AUTHORITY.** Just because someone has authority (an expert witness, a police officer, etc.) does not necessarily mean they are accurate. Appeals to the authority of an expert witness, particularly in areas outside their area of expertise fall under this category.

27. **TRUST ME.** Believe me because I say it is true, without divulging the evidence itself.

28. **MOTIVE.** The expert is testifying for money, the plaintiff wants revenge. Motive is very powerful, we decide outcomes based on people’s motives.

29. **BANDWAGON ARGUMENT.** "Everyone else is doing it." Bandwagon arguments can beg the question as to which decision is correct or just.

30. **NEW TECHNOLOGY.** Some arguments claim adoption for the sake of the “latest and greatest” - bigger, faster, stronger. By itself, it is not a valid reason.
31. **TRADITION** *(APPEAL TO THE FAMILIAR).* “It has always been done that way;” “It’s tried and true;” “If it ain’t broke, don’t fix it”; “Better safe than sorry.” Without specific reasons, appeal to the past (even legal precedent) is not usually justified.

32. **APPEALING TO SYMBOLS:** The flag, support your local police, American pie.

33. **US AGAINST THEM.** We tend to be tribal in nature. We want the locals to win, our companies, our neighbors, things we identify with. An appeal to *our* traditional values, beliefs, feelings, biases, and prejudices is powerful. We all belong to a number of groups. Try to push the identification of the group most similar to your client or case.

34. **THE RED HERRING** or DIVERSION. Ignoring the real issue, and instead emphasizing peripheral or non-relevant issues, such as putting the police investigation on trial. Often used with emotional issues.

35. **TESTIMONIAL.** It happened to me, it must be true. Producing a few specific, personal, examples, which are not representative of the whole. It can be powerful. The Benedictine cases paraded mother after mother before the jury saying: “I took Bendictin and look at my deformed child.” Juries responded with large verdicts. *Daubert* held there was no scientific basis to the claims.

36. **THE PLACEBO EFFECT.** We believe what we want to believe. A medical study found that thirty percent of patients in serious pain were relieved when told they were being given a powerful new painkiller, and then really given a sugar pill. Appeals to human nature, common beliefs, stereotypes fall here.

37. **OBFUSCATION.** Through the use of vague vocabulary, technical language, often mixed with red herring’s and personal attacks, the real issues can become difficult to identify and deal with.

38. **STATISTICS,** numbers, and data can be powerful arguments, particularly when expressed in charts and graphs.

39. **HUMOR** can be a very forceful and devastating argument. If we can laugh about it, it is not that bad. A failed attempt at humor can devastate the party using it. If you're good at humor, it is powerful, however, always use it with great caution.

40. **SARCASM** can be powerful, but must be used with care. In *Scopes,* Darrow analogized to the witch trials and argued ‘the only difference is we have not provided that they shall be...
burned at the stake. But there is time for that your honor, we have to approach these things gradually.’

41. UNFORESEEN but likely (or very negative) CONSEQUENCES. While the act itself may not be bad, a seemingly innocuous act can produce bad consequences, which must be considered before doing the act.

42. HASTY GENERALIZATION. Many minds accept broad platitudes, common wisdom, without a detailed examination of the underlying facts, exceptions, etc.

43. FIRST STEP, SLIPPERY SLOPE, THE CAMEL’S NOSE IN THE TENT. Some arguments acknowledge that the act complained of is not bad in itself, but claim (correctly or erroneously) that it is merely a first step down a slippery slope, which will inevitably lead to bad consequences.

44. FLATTERY, PANDERING. We all love to be complimented, looked up to, and even sweet-talked. Just don’t over do it.

45. RHETORICAL QUESTION. Ask the jury a question with an obvious answer, and don’t give the answer, or do so only later. Rhetorical questions begin ‘self talk,’ the process by which we all persuade ourselves. We are all attached more to the answers we reach ourselves.

46. STUPIDITY. “No one could be so stupid to have done this.” Although we do stupid things, it is hard to believe in hindsight.

47. WHITE HATS/BLACK HATS. Good people don’t do bad things; or if they do, it is justified. Bad people don’t do good things. We presume consistency. This is powerful, one of Darrow’s favorite arguments. We always want the good guys to win, even if they slipped up this time.

48. FUZZY THINKING. Much legal analysis requires careful, clear thinking which is difficult to accomplish. A seemingly “logical” analysis that cuts corners can be appealing. Related to gross generalization.

49. UNETHICAL. Note that many of these arguments, for example attacking counsel, are usually unethical.

X. REBUTTAL OF ARGUMENTS. You must not only argue your case, but rebut the arguments of opposing counsel.
A. **Understand the argument.** What kind is it, does it go to pathos (the listener’s sympathies, etc.), logos (logic and reason), or ethos (the speaker’s credibility)? What are the implicit arguments it relates to, what are the biases and prejudices it appeals to, why is counsel making the argument? See Toulmin’s system for analyzing legal arguments in *The Science of Persuasion*, by this author.

B. **Dissect** the opposing arguments and point out its fallacies, lack of logic, non-sequiturs, and lack of evidence. Address the unstated arguments, inferences to bias, visuals, etc.

C. **Point out misstatements**, errors, exaggeration of facts, evidence, claims.

D. **Define the issues.** In Clinton’s impeachment the defense argued ‘this is a case about an unfaithful relationship, not a case about an impeachable offense.’

E. **Address relevance.** “The opposing evidence is irrelevant to the real issues of the case. It was brought forth by opposing counsel to arouse sympathy, prejudice or passion.”

F. **Admit** the argument. Carefully admitting an opposing argument can be a powerful defense. “I acknowledge that is true, but”:

1. “It’s totally irrelevant”; or
2. “It makes absolutely no difference to the case”; or
3. “It’s not applicable here because . . .”; or
4. “The present circumstances are different because . . .”
5. Or otherwise explain why it doesn’t affect the outcome of the case.
6. Admissions build your credibility, and also can take sting out of opposing arguments.
7. A variant of admitting the argument is to say “**even if it were true**” and then make the above distinctions.

G. **Deny.** Emphasize opposing testimony, contradicting facts, and then address your side’s credibility.

H. **Question, while not denying.** If the opposing facts cannot be outright denied without losing credibility, question them. Show they are suspect, cannot be relied upon, have unreliable sources, conflicting data, etc.

I. **Address the credibility** of your witnesses, and the opposing witnesses.

1. Some attorneys often **deflect** arguments with obfuscation, using vague language, using technical legal language, diverting attention to the emotional or sympathetic red herrings, and otherwise distracting the jury from the opposition’s clear argument.
J. **Point out what counsel is doing.** “Counsel is using an ‘old attorney’s trick,’ of appealing to passion and prejudice, which the judge specifically instructed you to avoid.” Or specifically identify the argument. “This is an old argument called the ‘bandwagon argument.’ It appeals to us because we all like to jump on the bandwagon, and go along with the crowd. But let’s look and see where that bandwagon is really going . . .”

K. **Distract.** Focus on the weak arguments, the weak evidence, re-categorize the case as being about something else.

L. **Spin facts into gold.**
   1. Argue the opposite conclusion from the same facts.
      a) In *Leopold and Loeb*, Darrow was faced with the “Million Dollar Defense” argument. It was claimed he was being paid a million dollars by the boy’s multimillionaire parents to save the lives of the two boys. He denied it (it was not true) but then “turned the conclusion” arguing that ‘money is the most serious handicap we have faced. There are times when poverty is fortunate’ - Pointing out that but for the wealth of the parents, the prosecutor would have accepted a plea of guilty in return for a life sentence.
   2. Show the **same acts or motives** on the other side.
      a) In *Leopold and Loeb*, Darrow also was faced with “The Most Cold-blooded Murder Ever.” The boys had planned the murder for months and showed no remorse. The prosecution claimed that if ninety men had been hanged for murders, less cold-blooded than this one, certainly these boys should hang. Darrow argued, “let the state, who has been planning and scheming for months to take these boys lives, show an example of kindheartedness before they call my clients cold-blooded.”

M. **Develop your own arguments.** For every argument, there is an equal and opposite argument.

XI. The most common problem with arguments (yours and theirs).

   A. **Relevance** to the conclusion drawn is weak. Aristotle said this was the number one problem with arguments.

   B. **Conclusory.** It’s not a word, but it should be. Lawyers give the conclusion, but leave out the factual support for the conclusion. In the end, conclusory arguments are based on: “trust me.”

   C. **Generalization.** While some support is offered, it is generalized, not based on specific data, or
only on narrow circumstances or a few instances.

D. **Begs the question.** Assumes, without proof, part of what is at issue.

E. **Improper causation.** Humans generally have a difficult time determining cause and effect.

We tend to jump to simple but unwarranted conclusions about causation between two events. See causation section below.

F. **Non sequiturs.** Proving one fact but claiming, without justification, that another will always follow.

G. **Over simplification.** Many arguments, to be effective, are simple - too simple. They omit the troubling details and contradictions. They make a solution look easy when it is in fact fraught with difficulty. Point out the problems.

H. **Emotion.** Most effective arguments carry some emotion, since most of us react more to emotion than pure reason. Aristotle pointed out that “Our judgments when we are pleased and friendly are not the same as when we are pained and hostile.” Many appeals to emotion, however, are not justified by the evidence, but are used for the purpose of clouding judgment.

XII. **CAUSATION.**

A. Coincidence, Correlation, Contribution, and Cause in Fact.

1. We humans are very *poor in determining causation*. We find causes when none exist.

In one test, humans scored lower than rats because humans consistently searched for relationships where none existed.

2. Our culture is full of home remedies, myths, and biases which explain actions, all giving great comfort to the human mind. Many of these are without any foundation.

3. The jury, and even judges, are naturally susceptible to the human tendency to find “the cause.” Frequently, there are several causes, and only gross estimates can be made of how they combined to create the result. Yet the law usually demands a precise percentage be assigned to each party. Consider the following in arguing causation.

B. **Coincidence.** The evidence looks good, but coincidences occur in real life every day

1. For 14 years (1969 to 1982) the Super Bowl was won by a quarterback with a two-syllable name. Eliason broke the string.

   a) Common sense dictates that the number of syllables in a quarterback’s last name is not the cause of a Super Bowl victory. However, most statistics have similar,
unusual, coincidences

b) It can be difficult to detect situations which have valid correlations to cause, and those, which do not. Many testimonials fall in this category.

C. **Correlation through probability.** Correlation uses statistics to establish probabilities, even though the actual cause can *never* be established.

1. For example, the specific cause of a cancer in a certain individual.
   a) We can only state, that exposure to certain chemicals (like smoking) increases the *probability* of a person contracting lung cancer.
   b) That is, there is a statistically significant correlation between smoking, and increased incidents of lung cancer.
   c) Many other persons, who never smoke, also contract lung cancer, but their probability of contracting it is significantly less.
   d) Some people who smoke never get lung cancer.

2. Correlation can be weak or strong, depending upon the amount of correlation and the increased risk (1% to 99%).

3. Statistics need to be current, pertinent, and casually related.
   a) The study needs to be valid, including sample size and reproducible results.

D. **Contribution.** Most results have a number of causes. There is not the causal factor but a causal factor, several times over.

E. **Cause in fact.** A scientific cause that can be reproduced.

1. **Inductive reasoning** - Why did the event take place?
2. Identify possible explanations.
3. Follow through with consequences of possible explanations.
4. Assume the opposite of the explanation and trace out its consequences.
5. The more facts that the hypothesis is able to explain, the stronger the hypothesis (Important)

F. **But/for causation** - Blame it all on the “big bang.”

1. But/for causation tends to be weak.
2. Many factors can enter into a but/for argument.
   a) “But for” your leaving for work late, the accident would not have occurred;
b) “but for” the interesting news program which kept you up last night, you would not have been late to work;
c) therefore, ABC’s program is a cause of the accident.

G. “Common” sense, common experience, observation, and examples are often used as good arguments in convincing a jury of causation that cannot be established scientifically - but sometimes common sense is wrong.

XIII. CONSTRUCTING ARGUMENTS TO OVERCOME BIAS

A. OVERCOMING THE BIAS ALL JURORS/JUDGES/ATTORNEYS HAVE.
   1. Light bias.
      a) **RECOGNIZE THE BIAS.** Without recognition of a bias, and what it is based on, you’re helpless to overcome it.
         (1) Obtaining varied points of view will help you identify bias. When someone disagrees with your case, they are not “wrong,” explore their point of view.
         (2) A judge’s prior decisions and questions can reveal his bias.
         (3) Jury research (even talking with the secretaries, the runners, and the cab driver) can reveal general biases.
      b) **ADDRESS THE BIAS.** We often find it difficult to deal with bias, and want to shove it under the rug, or at least into the corner. Biases in a case must nearly always be addressed.
         (1) Look at the case (or portion of case that the bias is affecting) from the biased **PERSON’S POINT OF VIEW.**
            (a) What does the biased person “want” and how can you give it to them within the context of your case?
         (2) **GIVE THE BIASED PERSON WHAT THEY “WANT.”** You are unlikely to change a person’s bias in the course of a trial, tell them what they want to hear - their religion, their creed is great, or at least acceptable.
         (3) **MAKE THE BIASED PERSON WANT TO VOTE FOR YOU** by meeting the person’s wants and needs.
(4) At least **GIVE THE BIASED PERSON A WAY TO FIND FOR YOU** while still keeping what they want. This is done by distinguishing your case from where their bias wants to pigeonhole it.

2. Heavy Bias. HUMANS are basically a Bundle of Prejudices - Race, Religion, Sex, Rich/Poor. Sometimes, particularly with a deep seated prejudice, you cannot give the prejudiced person what they want. You have to change the prejudice in the course of the trial. That is a very difficult task, usually not accomplished even by good attorneys.

   a) The following are steps to try to change a prejudice in a person.

      (1) Identify what the prejudice is.
      (2) Address the issue head on. If you sweep it under the carpet where it is not seen, that doesn’t mean that it is gone away. It will do its dirty work against you.
      (3) State what the jury is thinking. It hurts, but it rings home. “I don’t want them living next to me.”
      (4) Identify the reason for the feeling - “You, the jury, are PREJUDICED!”
         (a) It’s tough to say. Offensive. DANGEROUS!
         (b) You’d better back it up. You’d better prove you’re right in a very *kind, politically correct* way.
      (5) Give specific examples. Show you’re right, they are prejudiced. Most will want to deny it. GIVE SPECIFIC, CONCRETE examples, NOT just CONCLUSIONS.
      (6) Show the Prejudice is Wrong. Give the real facts to show we judged too quickly.
      (7) Shift Responsibility: “It’s not your fault, we were brought up that way.”
      (8) Appeal to Fairness. Show the persons against whom the prejudice is held are unfairly judged and treated.
      (9) Personalize It. If the shoe were on the other foot, and you were the one who was being prejudged, how would you feel?
      (10) Show Them the Way. What can YOU do about this: A verdict of
“Not Guilty.”

(11) Express Confidence in the jury that they will overcome the prejudice.
Challenge them to show the world they are not prejudiced.

XIV. ORDERING YOUR ARGUMENTS. The order of arguments is important to persuasion.
A. Cicero’s organization of a speech is one of my favorites because it divides and conquers. Early on, define areas where there is agreement, then focus on the real issues.
   1. Introduction. Get attention with something fascinating and compelling.
   2. Factual background. A brief, clear, believable statement of the facts.
   3. The division. Areas of agreement; areas of disagreement; decisions to be made.
   4. The proof. Show your supporting evidence on areas of disagreement.
   5. Refute the opposition. Evidence and argument to “destroy” the opposing position
   6. Conclusion. A summary, remind jury of their responsibility (justice, fairness).
B. Aristotle recommended addressing ethos, your credibility, first. He believed you should show the audience you understand the listener's side of the argument, and the opposing side, even trying to accommodate the opposing view into yours.
C. Darrow’s closings tended to start with ‘what is this case really about, why are we really here, what are the motives of the parties?’ He would then move on to the witnesses, the evidence, and the exhibits. He would close with human nature, justice, and argue for the future, along with motive again.
D. Addressing a supportive audience, the strongest arguments (even somewhat conclusory to a very supportive audience) tend to be made first, with a detailed explanation afterwards.
E. With a hostile audience, changing their way of thinking is a slow process and generally begins with a solid foundation of facts, figures, and analogies. Strong specific requests and arguments are made only later. Sometimes you may not even let the listener know what you are requesting until you have laid a careful foundation to make it acceptable.
F. A general template is to begin with those arguments or facts with which your audience will agree with, which have a strong appeal to your audience. Then add opinions and inferences. Next, rebut the opponent’s arguments and point out contradictory and conflicting arguments. Finish with strong arguments and a summary.
XV. MOST ARGUMENTS DOVETAIL WITH EVIDENCE. Arguments go hand in hand with evidence and compliment each other.

A. Look for evidence that the listener will be familiar with, is likely to trust, and feels comfortable with.
B. The best evidence is specific, directly relevant, and recent.
C. We tend to trust numbers, measurements, statistics and data. It has the feel of math-like certainty.
D. “Evidence” during closing can also include personal experiences familiar to you and the judge/jury, common sense, examples, which are familiar to the jury, and hypothetical future examples.

XVI. THE DEATH OF AN OTHERWISE GOOD ARGUMENT. Beware of the following problems which can be the death of an otherwise good argument. Good arguments can change our way of thinking, and turn a case around. They do not always result in a just verdict, however. Here are some of the reasons arguments don’t work:

A. INFORMATION OVERLOAD. The lawyers are familiar with the case, the facts, the names, the terms, and intricate inter-relationships. They tend to argue information too fast, and the jury, while they could understand it, are overloaded and give up.
B. THE LISTENER’S LACK OF ABILITY. Most jurors, and some judges, depending upon the particular case, do not have sufficient educational backgrounds to logically understand and grasp complex issues. For example, a patent case on wave particles tried to a jury with a high school education has little chance of producing a well thought-out result.
C. The listener's INABILITY (OR LACK OF DESIRE) TO OVERCOME PREJUDICE, BIAS, SYMPATHY, BELIEFS, OR IDENTIFICATION. In 1962 Byron de la Beckwith was tried for the murder of civil rights worker Medgar Evers, in Mississippi. At that time, a white person had never been convicted in Mississippi for the murder of a black person. Not surprisingly, de la Beckwith was not convicted despite compelling evidence. Thirty years later, when attitudes had changed, he was convicted on less compelling evidence, much of which had been lost or grown stale.
D. The JUDGE who ALLOWS IRRELEVANT EVIDENCE, misleading arguments, obfuscation,
jury nullification, appeals to prejudice and bias, etc. creates great risk that good arguments will fail. Some judges want to ‘let it all in and let the jury sort it out.’ The jury seldom can.

E. The SPEAKER WHO DOES NOT SIMPLIFY THE ISSUES, address the issues from the audience’s point of view, communicate well, understand clearly, prepare well, etc.

F. MIS-FOCUS. Mistakes can be particularly devastating (persuasive) because they draw the focus of the jury off the real issues. The human mind can deal with only a couple of ideas at a time. We tend to focus on the problems, the negatives, the aberrations.

XVII. SEE OPENING ARGUMENT SECTION FOR MORE INFORMATION.
Quotes for Closing

**ANALOGY**  (Use analogies in your closing arguments.)
Apt analogies are among the most formidable weapons of the rhetorician.
-Winston Churchill

**ARGUMENT**
The most savage controversies are those about matters as to which there is no good evidence either way.
-Bertrand Russell

When the eagles are silent, the parrots begin to jabber.
-Winston Churchill

Discussion is an exchange of knowledge; Argument an exchange of ignorance.
-Robert Quillen

It is not necessary to understand things in order to argue about them.
-Pierre Agustin de Beaumarchais (1732-1799)

The worst quarrels only arise when both sides are equally in the right and in the wrong.
-Winston Churchill

If you can’t answer a man’s argument, all is not lost. You can still call him vile names.
-Elbert Hubbard.

If you have no basis for an argument, abuse the plaintiff.
-Marcus Tillius Cicero (106-43 B.C.)

**APPEASEMENT**

If you will not fight for the right when you can easily win without bloodshed, if you will not fight when your victory will be sure, you may come to the moment when you will have to fight with all the odds against you and only a precarious chance of survival.
-Winston Churchill

An appeaser is one who feeds the crocodile hoping it will eat him last.
-Winston Churchill

**BIGOTRY**

How can any man help how he is born?
-Winston Churchill
**BURDEN OF PROOF**

The Governor of Narbonesis was on trial before Caesar. Delphidius, the prosecutor, had a weak case. The defendant refused to put on evidence, but simply denied the accusations. The prosecutor became frustrated and cried out to Caesar: “Oh illustrious Caesar, if it is sufficient to simply deny, what hereafter will become of the guilty?” Caesar responded: “If it is sufficient to simply accuse, what hereafter will become of the innocent?”

**CAPITOL PUNISHMENT**

I wonder whether in shrinking from the horror of inflicting a death sentence, honorable Members who are conscientiously in favor of abolition do not underrate the agony of a life sentence.

- Winston Churchill

**CHANGE**

The more the change, the more it is the same thing.

- Alphonse Karr

**CONSISTENCY**

He that never changes his opinions, never corrects his mistakes, and will never be wiser on the morrow than he is today.

- Tyron Edage.

A foolish consistency is the hobgoblin of little minds.

- Emerson

The foolish and the dead alone never change their opinions.

- James Lowell (1819-1891)

The only completely consistent people are dead.

- Aldous Huxley

Consistency requires you to be as ignorant today as you were a year ago.

- Bernard Berenson

The only man who can change his mind is a man that’s got one.

- Edward Westcott (1846-1898)
**CREDIBILITY**

Little strokes
Fell big oaks.
   - Benjamin, Franklin

Who are you going to believe? Me, or your lying eyes?
   - Richard Pryor

**EXPERIENCE**

Experience is the worst teacher; it gives the test before presenting the lesson.
   - Vernon Law

There’s only one thing more painful than learning from experience, and that is not learning from experience.
   - Miguel de Cervantes (1547-1616)

Experience is the comb that Nature gives us when we are bald.
   - Belgian Proverb

**ERROR**

An old error is always more popular than a new truth.
   - German Proverb

If error is corrected whenever it is recognized as such, the path of error is the path of truth.
   - Hans Reichenbach

The world always makes the assumption that the exposure of an error is identical with the discovery of the truth - that error and truth are simply opposite. They are nothing of the sort. What the world turns to, when it has been cured of one error, is usually simply another error and may be one worse than the first one.
   - H. L. Mencken

An error is the more dangerous in proportion to the degree of truth which it contains.
   - Henri Frederic Amiel (1821-1881)

I shall try to correct errors where shown to be errors, and I shall adopt new views as fast as they shall appear to be true views.
   - Abraham Lincoln.

**ETHICS**
France fell because there was corruption without indignation.  
-Romain Rolland

Ethics stays in the preface of the average business science book.  
-Peter Drucker

**FACTS**

Facts do not cease to exist because they are ignored.  
-Aldous Huxley

The degree of one’s emotion varies inversely with one’s knowledge of the facts - the less you know the hotter you get.  
-Bertrand Russell

Every man has a right to his opinion, but no man has a right to be wrong in his facts.  
-Bernard M. Baruch

To treat your facts with imagination is one thing, but to imagine your facts is another.  
-John Burroughs

**FAILURE**

Only those who dare to fail greatly can ever achieve greatly.  
-Robert F. Kennedy.

I can accept failure, everybody fails at something, but I can’t accept not trying.  
-Michael Jordan.

There are two kinds of failures; those who thought and never did, and those who did and never thought.  
-William Feather

**FAULTS**

If we had no faults we should not take so much pleasure in noting those of others.  
-Duc de La Rochefoucauld (1613-1680)

**FORCE**

The inclination to aggression . . . constitutes the greatest impediment to civilization.  
-Sigmund Freud

**FREEDOM**
The price of freedom of religion or of speech or of the press is that we must put up with, and even pay for, a good deal of rubbish.  

-Chief Justice Charles Evans Hughes

A free society is one where it is safe to be unpopular.

-Adlai Stevenson

People who are not prepared to do unpopular things and defy the clamor of the multitude are not fit to be ministers in times of difficulty.

-Winston Churchill

**HATE**

We must learn the lessons of the past. We must not remember today the hatreds of yesterday.

-Winston Churchill

**HISTORY**

A page of history is worth a volume of logic.

-Oliver Wendell Holmes

Those who cannot remember the past are condemned to repeat it.

-George Santayana

**HONESTY**  (See Lying and Truth)

**HONOR**

What is honored in a country will be cultivated there.

-Plato

**IDEAS**

The ultimate good is better reached by free trade in ideas. The best test of truth is the power of the thought to get itself accepted in the competition of the market.

-Oliver Wendell Holmes, Jr.

**IGNORANCE**

Ignorance is the primary source of all misery and vice.

-Victor Cousin

‘Tain’t what a man don’t know that hurts him; it’s what he knows that just ain’t so.

-Frank McKinney Hubbard (“Kin Hubbard”)
A man doesn’t know what he knows until he knows what he doesn’t know.  
-Thomas Carlyle (1795-1881)

Genuine ignorance is . . . profitable because it is likely to be accompanied by humility, curiosity, and open-mindedness; whereas ability to repeat catch-phrases, cant terms, familiar propositions, gives the conceit of learning and coats the mind with varnish, waterproof to new ideas.  
-John Dewey

I have never met a man so ignorant that I couldn’t learn something from him.  
-Galileo Galilei (1564-1642)

**JUDGEMENT**

Our duty is to believe that for which we have sufficient evidence, and to suspend our judgment when we have not.  
-John Lubbock (1803-1865)

What most people call bad judgment, is judgment which is different from theirs.  
-Winston Churchill

**JURY**

Jury service honorably performed is as important in defense of our country, its Constitution and laws, and the ideals and standards for which they stand, as the service rendered by the soldier on the field of battle in time of war.  
-Judge George H. Boldt

Trial by jury, the right of every man to be judged by his equals, is among the most precious gifts that England has bequeathed to America.  
-Winston Churchill

**JUSTICE**

Fairness is what justice really is.  
-Justice Potter Stewart

Justice cannot be a hit-or-miss system. We cannot be content with an arrangement where our system of . . . laws applies only to those who are willing to keep them.  
-Winston Churchill

The sword of the law should never fall but on those whose guilt is so apparent as to be pronounced by their friends as well as foes.  
-Thomas Jefferson (1743-1826)
One ought to be just before he is generous.  
-Winston Churchill

Unless justice be done to others it will not be done to us.  
-Woodrow Wilson

This is a court of law, young man, not a court of justice.  
-Oliver Wendell Holmes, Jr.

Since when do you have to agree with people to defend them from injustice?  
-Lillian Hellman

Justice, though due to the accused, is due to the accuser too.  
-Justice Benjamin N. Cardozo

I think the first duty of society is justice.  
-Alexander Hamilton (1757-1804)

**KNOWLEDGE**

Knowledge without conscience is the ruination of the soul.  
-Francois Rabelais (1495?-1553)

The world is governed more by appearance than by realities, so that it is fully as necessary to seem to know something as it is to know it.  
-Daniel Webster

The more knowledge we possess of the opposite point of view, the less puzzling it is to know what to do.  
-Winston Churchill

**LAW**

Lawyers spend a great deal of their time shoveling smoke.  
-Oliver Wendell Holmes, Jr.

Useless laws weaken the necessary laws.  
-Montesquies

Humanity, not legality, must be our guide.  
-Winston Churchill (re the Nuremberg trials)

The law is reason free from passion.  
-Aristotle (384-322 B.C.)
Laws are like cobwebs, for any trifling or powerless thing falls into them, they hold it fast; but if a thing of any size falls into them, it breaks the mesh and escapes.
   -Anacharsis (c. 600 B.C.)

**LYING** (See truth also)

I never encourage deceit; and falsehood, especially if you have got a bad memory, is the worst enemy a fellow can have. The fact is, truth is your truest friend, no matter what the circumstances are.
   -Abraham Lincoln.

He who permits himself to tell a lie once finds it much easier to do it a second and a third time till at length it becomes habitual.
   -Thomas Jefferson (1743-1826)

It is a fine thing to be honest, but it is also very important to be right.
   -Winston Churchill

In the size of the lie is always contained a certain factor of credulity, since the great masses of the people . . . will more easily fall victims to a great lie than to a small one.
   -Adolf Hitler

Truth is so precious she must often be attended by a body guard of lies.
   -Winston Churchill

A half truth is a whole lie.
   -Yiddish Proverb

The louder he talked of his honor, the faster we counted our spoons.
   -Ralph Waldo Emerson (1803-1882)

The Lord Chief Justice of England recently said that the greater part of his judicial time was spent investigating collisions between propelled vehicles, each on its own side of the road, each sounding its horn and each stationary.
   -Phillip Guedella

A lie told often enough becomes the truth.
   -Lenin

People are a more easy prey to a big lie than a small one.
   -Adolf Hitler

**MAJORITY**
Any man more right than his neighbor constitutes a majority of one.
   -Henry David Thoreau (1817-1862)

Sometimes a majority simply means that all of the fools are on the same side.
   -Proverb.

**MAN**

Man, biologically considered . . . is the most formidable of all the beasts of prey, and, indeed, the only one that preys systematically on its own species.
   -William James

**MONEY**

Money is a terrible master but an excellent servant.
   -P. T. Barnum (1803-1882)

The process of the creation of new wealth is beneficial to the whole community.
   -Winston Churchill

**MOTIVES**

Lord, grant that I may always desire more than I can accomplish.
   -Michelangelo (1475-1564)

Why should we be in such desperate haste to succeed, and in such desperate enterprises? If a man does not keep pace with his companions, perhaps it is because he hears a different drummer.
   -Henry David Thoreau (1817-1862)

Are you not ashamed of heaping up the greatest amount of money and honor and reputation, and caring so little about wisdom and truth and the greatest improvement of the soul?
   -Socrates (470?-399 B.C.)

My belief is that to have no wants is divine.
   -Socrates

**ORATORY**

I should be glad if I could flatter myself that I came as near to the central idea of the occasion in two hours as you did in two minutes.
   -Edward Everett (1794-1865), to Abraham Lincoln at Gettysburg

**PERSEVERANCE**
I know of no more encouraging fact than the unquestionable ability of man to elevate his life by a conscious endeavor.  

-Henry David Thoreau (1817-1862)

POLICE

Who shall guard the guardians themselves?  

-Juvenal

POTENTIAL

Treat people as if they were what they ought to be and you help them to become what they are capable of being.  

-Johann W. von Goethe (1749-1832)

Genius without education is like silver in the mine.  

-Benjamin Franklin.

POWER

Power may justly be compared to a great river; while kept within its bounds it is both beautiful and useful, but when it overflows its banks, it is then too impetuous to be stemmed; it bears down all before it, and brings destruction and desolation whenever it comes.  

-Andrew Hamilton

Power tends to corrupt and absolute power corrupts absolutely.  

-Lord Acton

PRIDE

Though pride is not a virtue, it is the parent of many virtues.  

-M. C. Collins

PRINCIPLES

It is easier to fight for one’s principles than to live up to them.  

-Alfred Adler

PROBLEMS

A problem well stated is a problem half solved.  

-Charles F. Kettering
A good problem statement often includes: (a) what is known, (b) what is unknown, and (c) what is sought.  

-Edward Hodnett

To solve a problem it is necessary to think. It is necessary to think even to decide what facts to collect.  

-Robert Maynard Hutchins

**QUESTIONS**

I keep six honest serving men;  
They taught me all I knew.  
Their names are: What and Why and When,  
And How and Where and Who.  

-Rudyard Kipling

**REASON/LOGIC**

Most of our so-called reasoning consists in finding arguments for going on believing as we already do.  

-James Harvey Robinson

True genius resides in the capacity for evaluation of uncertain, hazardous, and conflicting information.  

-Winston Churchill

I do not feel obliged to believe that that same God who has endowed us with sense, reason, and intellect had intended us to forego their use.  

-Galileo Galilei (1564-1642)

There’s a mighty big difference between good, sound reasons and reasons that sound good.  

-Burton Hillis

Logic is the art of going wrong with confidence.  

-Joseph Krutch.

In formal logic, a contradiction is the signal of defeat. But in the evolution of real knowledge it marks the first step in progress toward a victory.  

-Alfred Whitehead

Against logic, there is no armor like ignorance.  

-Laurence J. Peter

Our difficulties and our dangers will not be removed by closing our eyes to them.  

-Winston Churchill
Doubt is not a pleasant mental state, but certainty is a ridiculous one.
- Voltaire

**STATISTICS**

Statistics are like a bikini. What they reveal is suggestive, but what they conceal is vital.
- Aaron Levenstein

There are three kinds of lies. Lies, damned lies, and statistics.
- Benjamin Disraeli.

Then there was the man who drowned crossing a stream with an average depth of six inches.
- W. I. Gates

You can not ask us to take sides against arithmetic.
- Winston Churchill

**TEACHING**

I hear and I forget. I see and I remember. I do and I understand.
- Chinese Proverb

Education is that which remains when one has forgotten everything learned in school.
- Albert Einstein

**THOUGHT**

There is nothing expedient to which a man will not go to avoid the real labor of thinking.
- Thomas Alva Edison

Where all men think alike, no one thinks very much.
- Walter Lippmann

Anyone who has begun to think places some portion of the world in jeopardy.
- John Dewey

A great many people think they are thinking when they are merely rearranging their prejudices.
- William James

**TRUTH** (See Lying also)

The truth is rarely pure and never simple.
- Oscar Wilde
The truth that makes men free is for the most part the truth that men prefer not to hear.  
- Herbert Agar

Men occasionally stumble over the truth, but most of them pick themselves up and hurry off as though nothing ever happened. 
- Winston Churchill

The history of our race, and each individual’s experience, are sown thick with evidence that a truth is not hard to kill and a lie told well is immortal. 
- Mark Twain

VICE

He who hates vices hates mankind. 
- Thrasea

WORDS

I wish he would explain his explanation. 
- Lord Byron (1788-1824)

Official jargon can be used to destroy any kind of human contact, or even thought itself. 
- Winston Churchill

Words are, of course, the most powerful drug used by mankind. 
- Rudyard Kipling

We have too many high sounding words, and too few actions that correspond with them. 
- Abigail Adams (1744-1818)

He speaks an infinite deal of nothing more than any man of all Venice . . his reasons are as two grains of wheat hid in two bushels of chaff; you shall seek all day ere you find them, and when you have them, they are not worth the search. 
- Shakespeare, The Merchant of Venice

UNDERSTANDING

Nothing in life is to be feared. It is only to be understood. 
- Marie Curie

It is not necessary to understand things in order to argue about them. 
- Pierre Agustin de Beaumarchais (1732-1799)
If you want to truly understand something, try to change it.

-Kurt Lewin.

For more quotations:

Peter’s Quotations, Ideas For Our Time

Bartletts Quotations

The Wit and Wisdom of Winston Churchill
9.

LANGUAGE OF THE LAW
A QUICK REFERENCE TO LANGUAGE AND RULES COMMONLY USED IN TRIALS.

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IX. RECORDED RECOLLECTION

I. INTRODUCTION
   Much of legal work is choosing the "right words." Over the centuries lawyers have developed their own language. Some of it is virtually meaningless, but traditionally used nonetheless. Particularly for a new practitioner, finding the traditional language to use at the appropriate time can be difficult. One learns by sitting through many trials. Even for the experienced litigator, many trial situations are infrequently encountered, and this section can be a quick reference.

   These are generally accepted uses of language, but be aware of local rules, local customs and practices, and your particular judge. Not only can traditions and judges vary in requirements and expectations, but styles may differ. The style presented here tends to be less formal than many. I prefer a more simple, direct approach, believing it is more easily understood by the jury. The basic examples can be easily adapted to your own style and local customs.

   Some of the more frequent variations between courts and judges include:
1. Some judges insist that the attorney never leave the podium without permission from the judge. You must specifically ask to approach the witness, to show the exhibit to the witness, etc.

2. Some judges are much more informal, and you have relative freedom to move around the courtroom.

3. Some judges have all exhibits pre-marked, and parties must raise all objections before trial, except as to relevancy. Counsel and court usually have copies of exhibits, and it is not necessary to show an exhibit to the court or counsel.

4. Other judges have exhibits marked one time, as they’re ready to be presented. They usually want to see the exhibit itself, and also have it shown to counsel, before proceeding to question the witness about the exhibit.

5. Some judges are very technical on what evidence is admitted, and want every rule carefully followed. Others are much more liberal, and unless it there is a serious question about the exhibit’s authenticity or relevancy, do not desire an extensive foundation.

6. You should also adjust these examples for opposing counsel. If opposing counsel continually objects to evidence, you will want to lay the foundation more carefully, and assure you adhere to each rule. If opposing counsel has not raised objections to your evidence, you need not take so much time.

7. Most judges allow the use of leading questions on foundation matters. It saves time, and usually isn’t prejudicial to the other side, unless there is a real question about the document’s authenticity or relevance.

II. ENTERING A DOCUMENT INTO EVIDENCE

RULES: F.R.E 901(a): “General provision. The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what is proponent claims.” See F.R.E. 901(b) 1-10 for specific examples. Also see F.R.E. 902 for self-authenticating documents (newspapers, public documents, commercial paper.) Chain of custody is part of F.R.E. 901 if evidence could have been tampered with.

F.R.E. 402. “All relevant evidence is admissible, except as otherwise provided . . . Evidence which is not relevant is not admissible.” See also F.R.E. 401 (defines relevance) and 403 (exclusion of relevant evidence on grounds of prejudice, confusion or waste of time).

Basic Requirements:
Show through testimony the document is:
1. Authentic (F.R.E. 901) (It is what it purports to be).
2. Relevant to an issue in the case (F.R.E. 401-402).
3. Meet any objections such as:
"Best evidence" (F.R.E. 1001-8) (original document) or meets an exception. Hearsay (F.R.E. 801) or meets hearsay exception (F.R.E. 803, 804)

See Tip of the Tongue Trial Objections for additional objections and rules.

Procedure:
1. Mark the exhibit.
2. Show it to counsel.
3. Identify it for the record.
4. Give the exhibit to the witness, and have the witness (or witnesses) show: they have personal knowledge of the exhibit; it is relevant to the issues in the lawsuit; the document is authentic ((real or documentary evidence)( is what it purports to be))
including chain of custody if easily altered OR accuracy ((illustrative evidence) (fair and accurate representation)).

5. Move that the exhibit be received into evidence.
6. Meet any objections.
7. Once in evidence you can question the witness about the exhibit, and with the court’s permission, show it to the jury.

Note: Nearly all documents are hearsay. Many business documents overcome the hearsay objection under the:

Business Records Exception to Hearsay (F.R.E. 806(6))
1. Made at or near time of event.
2. By person with knowledge (or from information from such person).
4. Regular practice of business to make the record.
5. All shown by records custodian or other qualified witness.
6. Unless lack of trustworthiness.

While The Business Records Exception to Hearsay overcomes the general hearsay objection to a document, many documents also contain hearsay in their content. Each such ‘content’ must also overcome the hearsay objection for that portion of the document to be entered into evidence.

III. ENTERING A PHOTOGRAPH INTO EVIDENCE

RULES: (Same as other documents.) F.R.E 901(a): “General provision. The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what is proponent claims.” See F.R.E. 901(b) 1-10 for specific examples. Also see F.R.E. 902 for self-authenticating documents (newspapers, public documents, commercial paper.) Chain of custody is part of F.R.E. 901 if evidence could have been tampered with.

F.R.E. 402. “All relevant evidence is admissible, except as otherwise provided . . . Evidence which is not relevant is not admissible.” See also F.R.E. 401 (defines relevance) and 403 (exclusion of relevant evidence on grounds of prejudice, confusion or waste of time).

Entering a photograph into evidence can run the gamut from simple to complex. Particularly, when computer re-creations of accidents or operations are involved, a careful foundation needs to be laid. Also, there can be concerns about digital alteration of photographs. However, for your average photograph, the requirements are simple. As with other documentary evidence, you need show:

1. The witness is familiar with the scene shown in the exhibit;
2. The photograph is in a fair representation of what it purports to be; and
3. What ever is shown in the photograph is relevant to the case.

Of course, if there are any objections to the witness’ familiarity with the scene in the photograph, its authenticity, or its relevancy, those objections must be met.

Procedure: (Same as other documents.)
1. Mark the exhibit.
2. Show it to counsel.
3. Identify it for the record.
4. Give the exhibit to the witness, and have the witness (or witnesses) show:
   they have personal knowledge of the exhibit;
it is **relevant** to the issues in the lawsuit;
the document is **authentic** ((real or documentary evidence)( is what it purports to be)) including chain of custody if easily altered OR **accuracy** ((illustrative evidence) (fair and accurate representation)).
5. Move that the exhibit be received into evidence.
6. Meet any objections.
7. Once in evidence you can question the witness about the exhibit, and with the court’s permission, show it to the jury.

**Example 1.** Photograph of an accident scene. Basic foundation.
Attorney: “Let me show you exhibit 23. Do you recognize what this photograph shows?”
Witness: “Yes, I recognize it.” [Sometimes the witness should be cautioned to answer “yes” or “no” at this point, and not to describe the details of the photograph.]
Attorney: “What does exhibit 23 show?”
Witness: “It shows the intersection at Park Street and Second Avenue.”
Attorney: “Is exhibit 23 a fair representation of the intersection at Park Street and Second Avenue at the time of this accident?”
Witness: “Yes, it is.”
Attorney: “Your honor, I move that exhibit 23 be admitted into evidence.”

**Example 2.** Photograph of accident scene which has changed. Additional foundation as to knowledge of the scene.
[The more changes between the photograph, and the original scene itself, the less likely the photograph will be admitted into evidence. Also, it is potentially misleading to the jury, and may show a lack of foresight and preparation on your part.]
Attorney: “Let me show you exhibit 23. Do you recognize what this photograph shows?”
Witness: “Yes, I recognize it.”
Attorney: “What does exhibit 23 show?”
Witness: “It shows the intersection at Park Street and Second Avenue.”
Attorney: “How familiar are you with that intersection?”
Witness: “Very familiar. That is my house in the upper right hand corner of the photo.”
Attorney: “How long have you lived there?”
Witness: “About nine years now.”
Attorney: “Are there any differences between exhibit 23, and the intersection as you saw it on the night of this accident?”
Witness: “Yes, there are a number of differences.”
Attorney: “What are those differences?”
Witness: “The first difference is, that the accident happened at night, and this photograph was taken during the day. Additionally, it was snowing that night and the road was snow packed. Next, this photograph was taken in summer and the trees are blocking part of the view.”
Attorney: “Is that all of the differences?”
Witness: “Yes, that’s all I notice.”
Attorney: “With the exception of those three differences, is exhibit 23 a fair representation of the Park Street and Second Avenue intersection as it appeared on the night of this accident?”
Witness: “Yes.”
Attorney: “Your honor, I move for the admission of exhibit 23 into evidence.”

**Notes.**
Normally, it is not necessary to have the photographer present to lay a foundation for the
introduction of the photograph into evidence. However, it can become necessary. Particularly where:
  artificial lighting (or other lighting different from the time in question) is involved;
  a wide-angle or telephoto lens was used;
  filters change the photo;
  the timing of when the photograph was taken is important; or
  the photograph has been “touched-up.”

Last, today's technology allows a photograph to be digitally altered. Usually there is little indication
of the alteration. If there is any question about how the photograph was taken, or when it was taken, the
photographer should be available to clear up any underlying questions.

IV. OFFER OF PROOF

RULES: F.R.E. 103 governs offers of proof.

F.R.E. 103 (a)(2): “Offer of proof. In case the ruling is one excluding evidence, the substance of the
   evidence [must be] made known to the court by offer or [be] apparent from the context within which
   questions were asked.” [In order to be the basis of error on appeal.]

F.R.E. 103 (b) allows the court to add additional information regarding the evidence and ruling.

F.R.E. 103 (c) requires that questions and proceedings be conducted “. . . so as to prevent inadmissible
evidence from being suggested to the jury be any means. . .”

Summary.

In order to preserve an argument of error for excluding evidence, counsel must make an offer of proof
when an objection to your evidence sustained. Suggesting inadmissible evidence to the jury, whether
by question, argument or offer of proof, violates Rule 103(2)(c). Make sure your offer of proof is made
outside the hearing of the jury.

Examples.

1. The preferred method of making an offer of proof is to put the actual evidence into the record. This example is of an objection sustained to calling a witness, Ms. Camille Brown. Ms. Brown is able to testify of a similar accident which occurred prior to the accident in question. The court has just excluded the evidence based on the accident not being sufficiently similar. You are still at the bench, outside the hearing of the jury.

   Attorney: "Your Honor, with the court’s permission we would like to make an offer of proof this afternoon."

   The Court: "Yes. Please remind me of it during the noon break."

   Counsel: [Back before the jury.]“We will call as our next witness, Jonathon Buckner.”

At the lunch break

   Attorney: “Your honor, now that the jury is gone I would like to make an offer of proof by calling Ms. Brown immediately after the lunch break. I suggest we give the jury an additional 15 minutes for lunch.”
   
   Court: “Can the evidence be put in 15 minutes, counsel?"

   Attorney: “Yes, your Honor, I believe the basic proof can be put on in 10 to 15 minutes.”

   The Court: “Fine. We’ll begin with Ms. Brown now, and have the jury come back at 1:15.”

   Attorney: “Thank you your honor. If the bailiff will please call Ms. Camille Brown.”

   The Court: “Come forward Ms. Brown and take the oath please.”

   [The clerk administers the oath]

   Attorney: Would you please give us your name and address for the record Ms. Brown?

   A: My name is Camille Brown. I live at 1275 South Park Street”.
Q: Camille, did you work for the defendant, Mega Industries in July two years ago?
A: “Yes I did.”
Q: “What was your position? “
A: “I was the human resources director.”
Q: “Were part of your duties as human resources director to investigate accidents?”
A: “Yes.”
Q: “And you investigated another accident in the same building which occurred three weeks before Mr. Lee’s accident.”
A: “Yes.”
Q: “Would you please describe that accident.”

[Proceed with all the details which are necessary to preserve the evidence for appeal. Sometimes, if you do a good job of showing the evidence is relevant, the court will change its mind, and admit the evidence. Consider renewing your motion to admit the evidence. The court will want you to put the evidence on quickly, but be sure that all of the details necessary for the appeal are part of the record. At the end of your direct examination, opposing counsel may cross-examine and point out the dissimilarities between the accidents, and that the prior accident was irrelevant and did not give notice of a dangerous condition. Opposing counsel may also put other evidence before the court to show the testimony was properly excluded.]

2. Sometimes the court will not take time to hear the actual testimony. In this instance, counsel should request, for example, during the noon hour, that a record be made in the judge’s absence, with counsel present, before the court reporter. That way, the appellate court has a complete record of the information available.

3. If the court declines the above two options make a brief summary of the evidence, [again outside the hearing of the jury]:
Attorney: "Your Honor, we make the following offer of proof. Ms. Brown, if called, would testify that she was employed by Mega Corporation as the human resources director at the time of Mr. Lee’s accident. She would testify that three weeks prior to Mr. Lee’s accident another accident occurred in the same building. While on a different floor and during a different shift, the accident was similar because it occurred when the same janitorial firm failed to properly inspect the premises. The prior accident shows the defendant had notice of the slippery condition of the floor.

V. USE OF WRITINGS CONTEMPORANEOUSLY.
RULES: F. R. E. 106: “When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.”
NOTE: Regarding the use of additional portions of a deposition contemporaneously, see F.R.C.P. 32(a)(4), which is similar.

Summary: If part of writing is introduced, the adverse party may introduce at the same time, another part of the writing or, another writing, that should in fairness be considered contemporaneously.

Example.
Attorney: "Your honor, in fairness, under Rule 106 the next paragraph of this document, which opposing counsel did not read, deals with the same subject matter, and should be read now for the jury to consider that paragraph in context. The subject matter is the same because __________.”
Opposing Counsel: "Your Honor, I object. Those responses are not on the same subject and do not fall
under Rule 106. Counsel can offer that information later as part of his examination, if he desires. The subject matter is distinct because __________________.

Attorney: "If I may respond your Honor. Rule 106 does apply, because in fairness the jury is entitled to know that the witness made an exception to the general rule and wrote it on page ____. They are part of the same sum and substance because _______.”

Court: "The objection is overruled, you may read the next paragraph to the jury."

VI. USE OF DEPOSITIONS AT TRIAL.

A. EDUCATING THE JURY ON THE DEPOSITION PROCESS.

Whenever using a deposition, be sure to explain to the jury what a deposition is. The following is an excerpt from jury deliberations of a mock jury in an actual case.

1st juror: "I wonder if it has already gone to part of a trial?"
2nd juror: "No they said it was coming up for trial."
3rd juror: "But they had already cross-examined some of the witnesses."
4th juror: "No, you see, there are different levels, and when they go to the jury, it’s because they didn’t like what the judge had to say. There are different levels and all that, its really interesting."

Of course, it had not already gone to “part of a trial.” But the attorneys quoted from depositions, and never explained the deposition process. The jurors wrongly concluded that a prior trial had occurred. Before using a deposition, ask the judge to explain the deposition process, usually as part of pre-trial instructions. If no pre-trial instructions are given, ask the judge to allow you to explain the deposition process. If the judge declines that also, the judge will usually allow some questions to the witness in order to explain the deposition process. This may be shortened or lengthened depending upon the situation.

Example 1.

Attorney: "Your honor, may I may a brief explanation to the jury of what a deposition is?"
The court: "Yes, briefly."
Attorney: "The rules of court procedure allow both sides in a law suit to meet with witnesses and ask them questions so all of the parties have the facts of the case. Two years ago this September 14, the plaintiff and Mr. Horton, her counsel, came to my office. We sat around our conference room table. A court reporter was there. The court reporter had two roles. First, as a notary public, she is authorized by law to swear the witness in, just as though the witness were testifying here in court. The plaintiff swore to tell the truth, the whole truth, and nothing but the truth.

"The second role of the court reporter is to take down, word for word, everything that is said during the deposition. All of the questions I asked, and all of the plaintiff’s answers, were compiled in this booklet. The plaintiff was then given an opportunity to read this deposition booklet and make any changes to her deposition testimony. You will note here in the back, she made a couple of changes and then signed the deposition. If the testimony today in court differs from the sworn testimony given in the deposition, we are allowed to point that out to you."

OR:

Example 2.

Q: "Your deposition was taken on the 4th of June of last year?"
A: "Yes."
Q: "And in that deposition you came to my law office to answer a series of questions?"
A: “Yes.”
Q: "Mr. Horton, your attorney, was present representing you?"
A: "Yes."
Q: "And a court reporter was present?"
A: "Yes."
Q: "You were sworn to tell the truth, the whole truth, and nothing but the truth, just as though you were in court."
A: "Yes."
Q: "And the court reporter recorded all of my questions and all of your answers?"
A: "Yes."
Q: "The court reporter has put all of those questions and answers in this booklet."
A: "Yes."
Q: "And you had an opportunity to review your answers shortly after the deposition and make changes?"
A: "Yes."
Q: "And you, in fact, made a couple of changes."
A: "Yes."
Q: "Let’s read from page 34, line 14 of the deposition, and see what you said in response to that same question two years ago."

B.  USE OF DEPOSITIONS AT TRIAL.

RULES: F.R.C.P. 32 governs the use of depositions at trial.

1.  CALLING A WITNESS THROUGH DEPOSITION TESTIMONY.

RULES:  F.R.C.P. 32(a)(3) governs the use of depositions when a party is not present to testify (dead, more than 100 miles, ill, prison, unable to subpoena, interests of justice (upon notice) etc.). However, note that F.R.C.P. 32(a)(2) allows the deposition of an adverse party (including officers, directors, managing agents, 30(b)6 designees) to be used for any purpose.

Example 1.
Stipulation of unavailability.
Attorney: Your Honor, we call Janine Redding as our next witness. Counsel has stipulated that Ms. Redding is unavailable to testify in person, as she lives out of state. [Turning toward counsel.]
Opposing Counsel: We have stipulated Your Honor.
Attorney: Your Honor, a paralegal from our office, Jennifer Gardiner, willing take the stand to read the part of Ms. Redding.
Attorney: [to the witness] I will read the question from the deposition transcript and you read the answer Ms. Redding gave, under oath.

NOTES: A deposition is a dry cold object. If you can’t get the witness live, try a video deposition. If it must be read, find a lively, compelling person to read the deposition, but one who is believable. You generally would not want a young paralegal to read an experienced doctor’s deposition. Occasionally, you will want the deposition read, because the witness comes across so poorly. However, you cannot suggest or help a witness to become "unavailable."

2. PROVING UNAVAILABILITY.

Occasionally the opposing parties will not stipulate, and you will have to prove the witness is unavailable. You probably want to ask the court to decide the question of availability outside the presence of the jury.
Attorney: “Your Honor, we call Gloria Redding, the mother of Shannon Redding to show that Shannon Redding is out of the state and unavailable to testify.”
Witness: “Gloria Redding.”
Attorney: “Where do you live?”
Witness: “546 Cambridge Drive, here in the city.”
Attorney: “You are the mother of Victoria Redding?”
Witness: “Yes.”
Attorney: “Does your daughter live with you?”
Witness: “She does off-and-on during the summers, but attends Brown University during the school year.”
Attorney: “On the 4th of January, were you present when a subpoena was left with your daughter at your home?”
Witness: “Yes.”
Attorney: “Was your daughter living with you at your home about five weeks ago on the 4th of January?”
Witness: “Yes, but she left for winter semester at the University a few days later.”

Attorney: “When do you expect her back in town again.”
Witness: “Not until the first week of May.”
Attorney: “Let me show you what has been marked as Exhibit 70. Is this a copy of the subpoena that was left at your house by Sheriff Magelby last January 4th?”
Witness: “Yes it is.”
Attorney: “I have no further questions Your Honor. Unless counsel has questions, I ask the court to declare that Shannon Redding is unavailable as a witness, and allow her deposition to be read.”

NOTES:
Opposing counsel may ask questions. Opposing counsel may also offer other evidence if desired. The most common argument against a witness not being available, is that you failed to subpoena the witness sufficiently in advance of trial, and the witness is merely out of town for a short period of time.

3. IMPEACHMENT OF A WITNESS WITH HER DEPOSITION.
RULES: F.R.C.P. 32(a)(1) states that “any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of deponent as a witness.” Review the rules if a party was not present at the deposition or if there were objections.

VII. JUDICIAL NOTICE
RULE: F.R.E 201. 210(b): A fact “... not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.”
Example.
Attorney: “You honor, I have here the section D of the local Tribune, on December 18, the day after this accident. It shows that the weather the day of the accident, and I ask that the court take judicial notice of that weather report.”
Judge: “What specifically do you want the court to take judicial notice of?”
Attorney: “That it snowed continuously at the downtown weather station from 9:30 AM until midnight, and that the temperature on the hour before and after the accident was 24 degrees.”
Judge: “Is there any objection?”
Opposing counsel: “Yes your honor. They must call someone from the weather bureau in order to establish that it was snowing at the time of this accident. My client denies that, and the newspaper is too general, and may not account for differences in localities, or short breaks in the storm.”

Judge: “Do you have any documentation that contradicts the weather information printed in the newspaper that day?”

Opposing counsel: “Not documentation, but I do have the testimony of my client.”

Judge: “Unless you have some documentation which indicates the weather report is not trustworthy, I will take judicial notice of the weather report. Your arguments regarding location go to the weight of the evidence.”

VIII. RECOLLECTION REFRESHED

Rule: F.R.E. 612.

Sometimes a witness, often because of the mere passage of time, will be unable to recall many details important to your case. If they made an earlier writing, it can be used to refresh their recollection.

Example.

Attorney: “Can you describe the hit and run car to us?”
Witness: “I could have last year, but I had a minor stroke, and I just don’t remember that anymore.”
Attorney: “Shortly after the accident, were you asked by the police officer to write a statement of what you observed that night?”
Witness: “Yes, I was.”
Attorney: “Do you think that reading that statement now would help to refresh your recollection of what you saw that night?”
Witness: “Yes, I think it would.”
Attorney: “Your honor, may I show the witness a copy of his statement to the police?”
The court: “Has counsel seen the statement?”
Attorney: “Yes your honor”.
The court: “You may show the statement to the witness.”
Attorney: “Here is a copy of exhibit 43. Do you recognize this statement?”
Witness: “Yes, this is the statement I wrote for the police officer, about an hour after the accident happened.”
Attorney: “Does your signature appear at the end of the statement?”
Witness: “Yes, that is my signature.”
Attorney: “Would you please take a moment to read the statement.”
Witness: “I have read it now.”
Attorney: “Has reading your statement refreshed your recollection about what type of car hit the Ford Probe and then left the scene of the accident? Please answer yes or no.”
Witness: “Yes, it has.”
Attorney: “Is your memory refreshed enough that you are now able to recall the type of vehicle that hit and ran, independent from the statement itself?”
Witness: “Yes, I remember quite well now.”
Attorney: “Please give me exhibit 43 [the witness hands the exhibit back ]. Would you please tell us what type of car hit the Ford Probe in the intersection on the night of December 31st, two years ago.”
Witness: “Yes, it was a blue Dodge Viper hardtop, probably a 1998 model.”.
IX. RECORDED RECOLLECTION

RULE: F.R.E. 803 (5) (Exceptions to hearsay, availability of declarant immaterial.)

If you are unable to refresh a witness’ recollection, by showing them a copy of a prior statement, you may be able to have the witness' recorded recollection read into evidence [the document itself can only be entered into evidence by the adverse party]. At any time when you are trying to refresh a witness' recollection, it appears obvious that you will not succeed, you can move to the recorded recollection series of questions.

Procedure.
1. Memorandum or record.
2. Witness once had knowledge.
3. Current recollection is not full or accurate.
4. Memo made or adopted by witness when memory was fresh.
5. Reflects knowledge correctly.

Example.
Attorney: “Can you describe the hit and run car to the jury?”
Witness: “I could have last year, but I had a minor stroke, and I just don’t remember that anymore.”
Attorney: “Mr. Buckner, near the time of the accident, did you know what kind of a car hit the Ford Probe and then left the scene of the accident?”
Witness: “Yes, I knew back then.”
Attorney: “Let me show you what has been marked as exhibit 43.” [If the exhibits have not been pre-marked, you should have the exhibit marked, and assure that the court and counsel have a copy or are aware of what the document is.]
Attorney: “Do you recognize this exhibit? Please answer yes or no.”
Witness: “Yes, I recognize it.”
Attorney: “Would you briefly described what the document is.”
Witness: “This is a statement which the police officer asked that I write.”
Attorney: “When did you write this statement?”
Witness: “About an hour after the accident happened.”
Attorney: “Is the exhibit in your handwriting?”
Witness: “Yes, it is.”
Attorney: “At the time you wrote this statement, did you know the description of the car involved in the accident that night, which left the scene of the accident?”
Witness: “Yes, I did.”
Attorney: “Was your memory fresh as to the description of the hit-and-run car, at the time you wrote this statement?”
Witness: “Yes, it was very fresh.”
Attorney: “When you wrote this statement, did you include the description of the hit-and-run car?”
Witness: “Yes, it’s in there.”
Attorney: “At the time you wrote this statement, did it correctly reflect your description of the car which ran from the accident scene?”
Witness: “Yes, of course it did.”
Attorney: “How did you know what kind of car the hit and run automobile was?”
Witness: “Well, I saw it.”
Attorney: “Were you familiar with the type of car you saw leave the scene of the accident?”
Witness: “Yes, of course.”
Attorney: “How were you familiar with that type of car?”
Witness: “I have been a mechanic all of my life, and this was a real unusual car.”
Attorney: “Your honor, I move that exhibit 43 be read to the jury as recorded recollection.”
Judge: “Exhibit 43 may be read to the jury.”
Attorney: “Would you please read your description of the vehicle from exhibit 43?”
Witness: “Yes, it says ‘a blue hard top Dodge Viper, most likely a 1998 model, hit the Ford Probe, rested for a second or two, and then took off.’”
DICTIONARY OF LEGALISMS

Clarence Darrow prided himself on being able to speak the “common man’s English” that was understood by jurors. Your vocabulary, as one of the most educated persons in the world (a graduate degree) will not be well understood by most jurors. You must simplify your language. This is a brief dictionary of terms to assist lawyers in speaking “plain English.”

The following terms should not be used, unless you have carefully thought it out, and decided to the contrary. If you decide to use them, make sure the term is well defined, numerous times, so the jury becomes familiar, and comfortable with it.

1. ‘MANGLED PIECES OF LATIN’ (Daniel Webster)
   With few exceptions (for example, the phrase is used in a jury instruction and the case may turn on it).

   *Ipsa dixit, res ipsa, de minimis, et cetera.*

2. LEGAL WORDS
   Plaintiff, defendant, deposition, pleading, interrogatory, tort, discovery, panel (jury), chambers, citations and authorities . . . and the list goes on nearly without end. Most of the vocabulary that you use today, you did not understand before law school, and the jury will not understand now. This is particularly difficult with such legally common words such as plaintiff and defendant. It takes a conscious effort to speak plain English.

3. OLDE ENGLISH
   The ‘said’ accident or ‘said’ anything else.
   Aforesaid, hereinafter, afore mentioned, comes now . . .

4. DUPLICATION - DOUBLES AND TRIPLES.
   All right, title and interest
   Did take, steal and convert
   Signed and executed

5. VERBOSE
   A sufficient number of times enough to . . .
   For the reason that because . . .
   At the point in time in which . . .

6. PASSIVE VOICE
   The plaintiff *did* say . . . (The plaintiff said . . .)

7. HYPER-TECHNICAL
   Although occasionally called for, these are usually hyper technical
Policeman in question, vehicle in question (anything else in question)
At that place and time
When you were going to the store, with your husband, on the morning of July 7, 1999, in you’re your car that you were driving, about ten o’clock, did anything happen?

8. IMPERSONAL TERMS
Pronouns can create confusion - use them sparingly - he, she, it . . .
My client, the plaintiff, the defendant, the witness, the expert (although sometimes you may want to personalize your client, and de-personalize the opposing side).

9. VAGUE TERMS
Beware of vagueness, it is common in everyday use. The car - which, most accident have at least two.

10. JURY INSTRUCTION LANGUAGE
Jury instruction language can be very technical, difficult to understand, but difficult to avoid. You will most often want to use the exact language of the jury instruction. Just make sure it is well defined, referenced back to the instruction, and used consistently. Try to define these critical terms to your advantage, but be sure you don’t overstate and lose credibility.

Proximate cause
Reasonable doubt
Burden of proof
10.

TRIAL ALMANAC

Perpetual Calendar
Mathematical Formulas
Fractions and Decimals
Roman Numerals
Chemicals
Temperatures
Linear Measurements (Incl. Metric Conversions)
Volume Measures (Incl. Metric Conversions)
Weight
Areas and Surfaces
Medical Abbreviations
## PERPETUAL CALENDAR - 1901-2064

### 1. Years

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### 3. Week Days

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**INSTRUCTIONS**
1. Find the year in #1.
2. Follow the line to the right, horizontally, and find the month in #2
   (a) Add the number found in the month column to the date you are looking for (“sum”).
3. Look up the “sum” (the date plus number found under month in #2) under #3 to find the day of the week.
Mathematical Formulas

VOLUME

Cone — Take the radius of the base; Square it; Multiply it by Pie (3.1416); Multiply it by the height; Divide it by 3.

Cube (equal sides) — Take the length of one side; Multiply it by 3.

Cylinder — Take the radius of the base; Square it; Multiply it by Pie (3.1416); Multiply it by the height.

Pyramid (square base, four sides) — Take the length of one side of the base; Square it; Multiply it by the height; divide it by 3.

Sphere — Take the radius; Multiply it by 3; Multiply it by Pie (3.1416); Multiply it by 4; divide it by 3.

Note: The “radius” of a circle is the distance from the center of the circle to the edge of the circle.

AREA

Circle — Take the diameter; Square it; Multiply it by .785398.

Rectangle — Take the length of one side; Multiply it by the length of the other side.

Surface of a Sphere — Take the radius; Square it; Multiply it by Pie (3.1416); Multiply it by 4.

Square — Take the length of one side; Square it.

Trapezoid — Take the length of the two parallel sides; Add them together; Multiply it by the height; Divide it by 2.

Right Triangle (One 90 degree angle (corner)) — Take the two legs which join in the 90 degree corner; Multiply them together; Divide it by 2.

Equilateral Triangle (3 equal sides) — Take the length of one side; Square it; Divide it by 4; Multiply it by the square root of 3 (1.73205).

General Triangle (Anything that is not a right triangle or an equilateral triangle) — Find the square root of “s (s-a) (s-b) (s-c)” where a, b, and c are the lengths of the three sides of the triangle, and “s=1/2 (a+b+c)”.

Hypotenuse of a right triangle (one 90 degree angle)
If you know the length of two of the sides of a right triangle, you can determine the third side with the Pythagorean Therom. The length of the two sides joining at the right angle are a and b. The side opposite the right angle is c. c squared = a squared plus b squared.
Fractions and Decimals

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Multiples of thousands are written using the same letters, but with a line drawn over the letter, signifying it is 1,000 times the number. The following Roman Numerals **WOULD** represent the corresponding numbers, **IF** the computer could draw a line over the Roman Numeral.
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Sodium  Na  11  22.9898  solid
Strontium  Sr  38  87.62   solid
Sulfur   S  16  32.064   solid
Tantalum  Ta  73  180.948  solid
Technetium  Tc  43  98** synthetically prepared
Tellurium  Te  52  127.60   solid
Terbium   Tb  65  158.924  solid
Thallium  Tl  81  204.37   solid
Thorium   Th  90  232.038  solid
Thulium   Tm  69  168.934  solid
Tin      Sn  50  118.69   solid
Titanium  Ti  22  47.90   solid
Tungsten (Wolfram)  W  74  183.85   solid
Uranium   U  92  238.03   solid
Vanadium  V  23  50.942   solid
Xenon     Xe  54  131.30   gas
Ytterbium  Yb  70  173.04   solid
Yttrium   Y  39  88.905   solid
Zinc      Zn  30  65.37   solid
Zirconium Zr  40  91.22   solid

Atomic weights are based on the exact number 12 as the assigned atomic mass of the principal isotope of carbon, carbon 12.

(*) the mass number of the isotope of longest half-life.
(**) the mass number of the better known isotope.
The names for elements 104-106 have been proposed, but not formally accepted by the IUPAC.

TEMPERATURES

FAHRENHEIT
Water boils at 212° Fahrenheit at sea level (boiling point decreases by about 1 degree for every 550 foot rise in altitude).
Pure water freezes at 32° Fahrenheit.

CELSIUS (“centigrade” is considered antiquated)
Water boils at 100 degrees Celsius
Pure water freezes at 0 degrees Celsius.

Conversion from Fahrenheit to Celsius
Take the temperature in Fahrenheit; minus 32; times 5; divided by 9.

Conversion from Celsius to Fahrenheit.
Take the temperature in Celsius; times 9; divided by 5; plus 32.
SAMPLE CONVERSIONS

Equivalents

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<th>Celsius</th>
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LINEAR MEASUREMENTS

US

1 mil  0.001 inch  = 0.025 4 millimeter
12 inches (in)  = 1 foot (ft)
3 feet  = 1 yard (yd)
5 ½ yards  = 1 rod (rd), pole, or perch (16 ½ feet)
40 rods  = 1 furlong (fur)=220 yards=660 feet
8 furlongs  = 1 statute mile (mi) = 1,760 yards = 5,280 feet
3 miles  = 1 league = 5,280 yards = 15,840 feet
6076.11549 feet  = 1 International Nautical Mile=1.852 kilometers

METRIC LINEAR MEASURES

10 millimeters (mm)  = 1 centimeter (cm)
10 centimeters  = 1 decimeter (dm) = 100 millimeters
10 decimeters = 1 meter (m) = 1,000 millimeters
10 meters = 1 dekameter (dam)
10 dekameters = 1 hectometer (hm) = 100 meters
10 hectometers = 1 kilometer (km) = 1,000 meters

**US / METRIC CONVERSIONS**

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<th>Conversion</th>
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<td>0.03937 inch</td>
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<tr>
<td>1 centimeter (cm)</td>
<td>0.3937 inch</td>
</tr>
<tr>
<td>1 decimeter</td>
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<tr>
<td>1 meter (m)</td>
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<tr>
<td>1 dekameter</td>
<td>1.9884 rods</td>
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<tr>
<td>1 kilometer (km)</td>
<td>0.62137 mile</td>
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<table>
<thead>
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<th>English Unit</th>
<th>Conversion</th>
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<tr>
<td>1 inch</td>
<td>2.54 centimeters</td>
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<tr>
<td>1 foot</td>
<td>3.048 decimeters</td>
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<tr>
<td>1 yard</td>
<td>0.9144 meter</td>
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<tr>
<td>1 rod</td>
<td>0.5029 dekameter</td>
</tr>
<tr>
<td>1 mile</td>
<td>1.6093 kilometers</td>
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**OTHER LENGTHS**

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<td>0.000 000 001 meter</td>
</tr>
<tr>
<td>1 micrometer</td>
<td>0.000 001 meter</td>
</tr>
<tr>
<td>1 angstrom (Å)</td>
<td>0.000 000 1 millimeter</td>
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<tr>
<td>1 cable's length</td>
<td>720 feet</td>
</tr>
<tr>
<td>1 chain (ch) (Gunter's or surveyors)</td>
<td>66 feet</td>
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<tr>
<td>1 chain (engineers)</td>
<td>100 feet</td>
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<table>
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<th>Conversion</th>
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<td>-of latitude</td>
<td>68.708 miles at equator</td>
</tr>
<tr>
<td>-of longitude</td>
<td>69.171 miles at equator</td>
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**GUNTER'S OR SURVEYORS' CHAIN MEASURE**
7.92 inches (in) = 1 link
100 links = 1 chain (ch) = 4 rods = 66 feet
80 chains = 1 survey mile (mi) = 320 rods = 5,280 feet

VOLUME MEASURES

FLUID VOLUME MEASURE (Metric)

10 milliliters (mL) = 1 centiliter (cL)
10 centiliters          = 1 deciliter (dL) = 100 milliliters
10 deciliters         = 1 liter (L) = 1,000 milliliters
10 liters               = 1 dekaliter (daL)
10 dekaliters          = 1 hectoliter (hL) = 100 liters
10 hectoliters          = 1 kiloliter (kL) = 1,000 liters

METRIC CUBIC MEASURE

1,000 cubic millimeters (mm³) = 1 cubic centimeter (cm³)
1,000 cubic centimeters = 1 cubic decimeter (dm³) = 1,000,000 cubic millimeters
1,000 cubic decimeters = 1 cubic meter (m³) = 1 stere = 1,000,000 cubic centimeters

CUBIC MEASURE (US)

1 cubic foot (ft³) = 1,728 cubic inches (in³)
27 cubic feet = 1 cubic yard (yd³)

LIQUID MEASURE

4 gills = 1 pint (pt) = 28.875 cubic inches
2 pints = 1 quart (qt) = 57.75 cubic inches
4 quarts = 1 gallon (gal) = 231 cubic inches = 8 pints = 32 gills
### DRY MEASURE

The word “dry” should be used in combination with the name or abbreviation of the dry unit.

- 2 pints (pt) = 1 quart (qt) = 67.2006 cubic inches
- 8 quarts = 1 peck (pk) = 537.605 cubic inches = 16 pints
- 4 pecks = 1 bushel (bu) = 2,150.42 cubic inches = 32 quarts

### METRIC / US CONVERSION

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<th>US Unit</th>
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<tr>
<td>1 cubic inch (in³)</td>
<td>0.554 fluid ounce</td>
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<tr>
<td>1 cubic foot (ft³)</td>
<td>7.481 gallons</td>
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<tr>
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<td>1.308 cubic yards</td>
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<tr>
<td>1 cubic yard (yd³)</td>
<td>0.765 cubic meter</td>
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<td>1 British Imperial gallon (gal)</td>
<td>277.42 cubic inches</td>
</tr>
<tr>
<td>1 gill (gi)</td>
<td>7.219 cubic inches</td>
</tr>
<tr>
<td>4 fluid ounces</td>
<td>0.118 liter</td>
</tr>
<tr>
<td>1 hectoliter (hL)</td>
<td>26.418 gallons</td>
</tr>
<tr>
<td>2.838 bushels</td>
<td></td>
</tr>
<tr>
<td>1 liter (L)</td>
<td>1.057 liquid quarts (1 cubic decimeter)</td>
</tr>
<tr>
<td>0.908 dry quart</td>
<td></td>
</tr>
<tr>
<td>61.025 cubic inches</td>
<td></td>
</tr>
<tr>
<td>1 milliliter (mL)</td>
<td>0.271 fluid dram (1 cu cm)</td>
</tr>
<tr>
<td>16.231 minims</td>
<td></td>
</tr>
</tbody>
</table>
0.061 cubic inch

1 ounce, (U.S.) liquid 1.805 cubic inches 29.573 milliliters 1.041 British fluid ounces

1 ounce, fluid (British) 0.961 U.S. fluid ounce 1.734 cubic inches 28.412 milliliters

1 peck (pk) 8.810 liters

1 pint (pt), dry 33.600 cubic inches 0.551 liter

1 pint (pt), liquid 28.875 cubic inches 0.473 liter

1 quart (qt) dry (U.S.) 67.201 cubic inches 1.101 liters 0.969 British quart

1 quart (qt) liquid (U.S.) 57.75 cubic in (exactly) 0.946 liter 0.833 British quart

1 quart (qt) (British) 69.354 cubic inches 1.032 U.S. dry quarts 1.201 U.S. liquid quarts

1 tablespoon 3 teaspoons 4 fluid drams ½ fluid ounce

1 teaspoon 1/3 tablespoon 1 1/3 fluid drams

WOOD

1 board foot (lumber measure) a foot-square board 1 inch thick

1 cord (cd) firewood 128 cubic feet

BUSHEL

1 bushel (bu) (U.S.) 2,150.42 cubic inches (exactly) (struck measure) 35.239 liters

VOLUME EQUIVALENTS

<table>
<thead>
<tr>
<th>Units</th>
<th>Cubic inches</th>
<th>Cubic feet</th>
<th>Cubic yards</th>
</tr>
</thead>
<tbody>
<tr>
<td>1 cubic inch</td>
<td>1</td>
<td>0.000578704</td>
<td>0.000021433</td>
</tr>
</tbody>
</table>
WEIGHTS

METRIC WEIGHTS

10 milligrams (mg) = 1 centigram (cg)
10 centigrams = 1 decigram (dg) = 100 milligrams
10 decigrams = 1 gram (g) = 1,000 milligrams
10 grams = 1 dekagram (dag)
10 dekagrams = 1 hectogram (hg) = 100 grams
10 hectograms = 1 kilogram (kg) = 1,000 grams
1,000 kilograms = 1 metric ton (t)

US WEIGHTS

16 drams = 1 ounce
16 ounces = 1 pound
2000 pounds = 1 ton (short ton)

CONVERSION US /METRIC
1 gram (g) = .03527 ounce (oz)
1 kilogram (kg) = 2.2046 pounds (lb)
1 ounce (oz) = 28.35 grams (g)
1 pound (lb) = .4536 kilogram (kg)

WEIGHT OF WATER

1 cubic inch = .0360 pound
1 cubic foot = 62.4 pounds
1 cubic foot = 7.48052 U.S. gal
1 U.S. gallon = 8.33 pounds
AREAS OR SURFACES

**US**

144 square inches = 1 square foot (ft²)
9 square feet = 1 square yard (yd²) = 1,296 square inches
30 ¼ square yards = 1 square rod (rd²) = 272 ¼ square feet
160 square rods = 1 acre = 4,840 square yards = 43,560 square feet
640 acres = 1 square mile (mi²)
1 mile square = 1 section (of land)
6 miles square = 1 township = 36 sections = 36 square miles

1 acre  43,560 square feet
1 acre  4,840 square yards  0.405 hectare

1 hectare (ha)  2.471 acres
1 square  100 square feet

**METRIC**

100 square millimeters (mm²) = 1 square centimeter (cm²)
10,000 square centimeters = 1 square meter (m²) = 1,000,000 square millimeters
100 square meters = 1 are (a)
100 hectares = 1 square kilometer (km²) = 1,000,000 square meters

**US / METRIC CONVERSION**

1 square millimeter (mm²) = 0.002 square inch
1 square centimeter (cm²) = 0.155 square inch
1 square decimeter (dm²) = 15.500 square inches
1 square foot (ft²) = 929.030 square centimeters
1 square inch (in²) = 6.4516 square centimeters
1 square kilometer (km²) = 247.104 acres  0.386 square mile
1 square meter (m²) = 1.196 square yards  10.764 square feet
1 square mile (mi²) = 258.999 hectares

1 square rod (rd²) sq. pole, or sq. perch  25.293 square meters
1 square yard (yd²) = 0.836 square meter
# ABBREVIATIONS OF MEDICAL TERMS COMMONLY FOUND IN RECORDS

The following are common abbreviations found in medical records. CARE MUST BE TAKEN as abbreviations vary between specialties, medical schools, hospitals and even offices. Some abbreviations also have several meanings, and the “correct” meaning must be taken from the context (RE is “right eye” to an ophthalmologist and “right ear” to an ear, nose and throat specialist), or obtained from the person writing the abbreviation.

For example:
- os is Latin for bone;
- O.S. is the abbreviation of the Latin “oculus sinister”, meaning left eye;
- Os is the chemical symbol for osmium;
- os is an abbreviation for mouth; and
- os is a suffix used on medical nouns meaning the noun is singular.

Use of capitals and periods is inconsistent. Also be sure your word processing program and printer correctly display the symbols.

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Definition</th>
</tr>
</thead>
<tbody>
<tr>
<td>~</td>
<td>before (Latin “ante”)</td>
</tr>
<tr>
<td>aa</td>
<td>of each</td>
</tr>
<tr>
<td>ac</td>
<td>before meals (ante cibum)</td>
</tr>
<tr>
<td>AD</td>
<td>right ear (auris dextra)</td>
</tr>
<tr>
<td>ADA-3</td>
<td>1800 calories per day</td>
</tr>
<tr>
<td>ADL</td>
<td>activities of daily living</td>
</tr>
<tr>
<td>ad lib</td>
<td>as much as desired (at liberty)</td>
</tr>
<tr>
<td>adm</td>
<td>admit. admission, admitted</td>
</tr>
<tr>
<td>AE</td>
<td>above the elbow</td>
</tr>
<tr>
<td>AFB</td>
<td>acid fast bacilli</td>
</tr>
<tr>
<td>AGA</td>
<td>appropriate for gestational age</td>
</tr>
<tr>
<td>AgNO3</td>
<td>silver nitrate</td>
</tr>
<tr>
<td>AJ</td>
<td>ankle jerk</td>
</tr>
<tr>
<td>AK</td>
<td>above the knee</td>
</tr>
<tr>
<td>a.m.</td>
<td>before noon (ante meridiem)</td>
</tr>
<tr>
<td>AMA</td>
<td>against medical advice</td>
</tr>
<tr>
<td>amb</td>
<td>ambulate, ambulant</td>
</tr>
<tr>
<td>amp</td>
<td>amputation</td>
</tr>
<tr>
<td>anes</td>
<td>anesthesia</td>
</tr>
<tr>
<td>ant</td>
<td>anterior</td>
</tr>
<tr>
<td>AP</td>
<td>anteroposterior</td>
</tr>
<tr>
<td>A&amp;P</td>
<td>auscultation and percussion</td>
</tr>
<tr>
<td>A&amp;P repair</td>
<td>anterior-posterior repair</td>
</tr>
<tr>
<td>approx</td>
<td>approximate</td>
</tr>
<tr>
<td>AROM</td>
<td>active range of motion</td>
</tr>
<tr>
<td>AS</td>
<td>left ear (auris sinistra)</td>
</tr>
<tr>
<td>ASA</td>
<td>aspirin (acetylsalicylic acid)</td>
</tr>
<tr>
<td>asap</td>
<td>as soon as possible</td>
</tr>
<tr>
<td>ASD</td>
<td>atrial septal defect</td>
</tr>
</tbody>
</table>
ASHD arteriosclerotic heart disease
ASO antistreptolysin “O” titer
AV arteriovenous or atrioventricular
A&W alive and well
ax axillary
A-Z Aschheim-Zondek

B
ba. enema barium enema
barb. level barbiturate level
B&B bowel & bladder
BBB bundle branch block
BCG bacillus Calmette Guerin
BE below the elbow
bf black female
b.i.d twice a day
bil slc bilateral short leg cast
BK below the knee
bl blood
bla bland
BM bowel movement
bm black male
BMR basal metabolic rate
BOA born out of asepsis (absence of or protection from germs)
BOW bag of waters
BP blood pressure
BPH benign prostatic hypertrophy
BR bathroom
BRP bathroom privileges
BS bowel sounds
BSO bilateral salpingo-oophorectomy (surgery removing ovary and fallopian tube)
BSP bromsulphalein test (seldom used liver test)
BUN blood urea nitrogen
Bx biopsy

C

c with (Latin *cum*), also w/
C centigrade
C1, C2 . . C7 cervical vertebrae (neck) 1 through 7
Ca calcium
CA carcinoma
caps capsules
cath catheter
CBC complete blood count
cc cubic centimeter
CC chief complaint
CCU cardiac (or coronary) care unit
CDE common duct exploration
CHF congestive heart failure
Cl chloride
Cl. liq clear liquid
cm centimeter
CNS  central nervous system
c/o   complains of
C02  carbon dioxide
COLD chronic obstructive lung disease
comp  compound
cont  continue
COPD chronic obstructive pulmonary disease
CPD cephalopelvic disproportion (baby’s head too large or mother’s canal too small to permit normal birth)
CPR cardiopulmonary resuscitation
CRP cardiac rehabilitation program
C&S culture & sensitivity
C-section Cesarean section
CSF cerebrospinal fluid
CVA cerebrovascular accident
C.V.A costovertebral angle
CVP central venous pressure (blood pressure in large veins of body)
CX cervix
cysto cystoscopy

D  
DC  discontinue
DC discharge from hospital
D&C dilatation and curettage
decub decubitus
derm dermatology
dil  dilatation
disch discharge
DLE disseminated lupus erythematosus
DNR do not resuscitate
DNS did not show
DOA dead on arrival
DOE dyspnea on exertion
Dr  doctor
dresg dressing
D/S dextrose and sugar
DTR deep tendon reflexes
DT’s delirium tremens
DUB dysfunctional uterine bleeding
D/W dextrose in water
Dx diagnosis

E  
EBL estimated blood loss
ECG electrocardiogram
EDC expected date of confinement
EEG electroencephalography
effa effacement
EKG electrocardiogram
ENT ear(s), nose, and throat
EOM extraocular movement
eos eosinophils
epis  episiotomy
ER   emergency room
exp  expired

F
F   Fahrenheit
FA  flourescent antibody test
FB  foreign body
FBS  fasting blood sugar
Fe  iron

Fetal position and presentation:
LFA(RFA)  left frontoanterior (right)
LFP (RFP)  left frontoposterior (left)
LFT(RFT)  left frontotransverse (right)
LMP (RMP)  left mentoposterior (right)
LMT (RMT)  left mentotransverse (right)
LOA (ROA)  left occiput anterior (right)
LOP (ROP)  left occiput posterior (right)
LOT (ROT)  left occiput transverse (right)
LSA (RSA)  left sacrum anterior (right)
LSP (RSP)  left sacrum posterior (right)
LST (RST)  left sacrum transverse (right)

FF  fat free
FH  family history
FHS  fetal heart sounds
FHT  fetal heart tones
FMG  foreign medical graduate
FNP  family nurse practitioner
ft  feet
FUO  fever of unknown origin
FX  fracture

G
gal  gallon
GB  gallbladder
GC  gonorrhea
gen  general liquids
GI  gastrointestinal
gm  gram
gr  grain
grav. I, II, etc.  gravida, number of pregnancies (no matter how short)
gtt  drops
GU  genitourinary
GYN  gynecology

H
h  hour (also hr, N)
H2O  water
Hct  hematocrit (measure of red blood cells as percent of total volume)
HCVD  hypertensive cardiovascular disease
HD  heart disease
HEENT  head, eyes, ears, nose, throat
Hg  mercury
Hgb  hemoglobin
hpf  high power field
HR  heart rate
hr  hour (also hr, H)
hs  at bedtime (hora somni) hour of sleep
ht  height
htn  hypertension
hypo  hypodermic injection
Hx  history

I
ICCE  Intracapsular cataract extraction
ICS  intercostal space
ICU  intensive care unit
I&D  incision and drainage
IHSS  idiopathic hypertrophic subaortic stenosis
IM  intramuscular injection
imp  impression
in  inches
inc  incomplete
ing  inguinal
I&O  intake and output
IOL  Intraocular Lenses (implant)
IPPB  intermittent positive pressure breathing
IQ  intelligence quotient
irreg  irregular
iss  one and one half
IT  inhalation therapy
IU  international units
IUD  intrauterine device
IV  intravenous device
IVP  Intravenous pyelogram

L
L  liter
L  left
L1, L2, . . . L5  lumbar spine, one through 5
L&A  light and accommodation
l. abd  left abdomen
lab  laboratory
LAC  left ante-cubital
lap  laparotomy
lat  lateral
LAT  left anterior thigh
lb  pound
LBE  laryngoscopy, bronchoscopy, esophagoscopy
L. Chol  low cholesterol
LDH  lactic dehydrogenase
LE  lupus erythematosus
LE  Left ear
LF  low fat
LFA  left frontoanterior
LFP  left frontoposterior
LFT  left frontotransverse
LMP  left mentoposterior
LMT  left mentotransverse
LOA  left occiput anterior
LOP  left occiput posterior
LOT  left occiput transverse
LSA  left sacrum anterior
LSP  left sacrum posterior
LST  left sacrum transverse
LGA  large for gestational age
liq  liquid
LLE  left lower lobe (lung)
LLQ  left lower quadrant
LML  left middle lobe
LML  left medial lateral episiotomy
LMP  last menstrual period
LOA  left occipitoanterior
LP  lumbar puncture
LPF  low power field
LS  low salt
LT  left thigh
LTP  last term pregnancy
 LUA  left upper arm
LUB  left upper buttock
LUE  left upper extremity
LUL  left upper lobe
LUQ  left upper quadrant
LVH  left ventricular hypertrophy
L&W  living and well
lymphs  lymphocytes

M
m  murmur
mcg  microgram
Med  medicine
meds  medicines or medications
memb  membranes
mEq  milliequivalent
mg  milligram
Mg  magnesium
ml  milliliter
mm  millimeter
MOM  milk of magnesia
mono  monocytes
MTD  right ear drum (membrana tympani dexter)
MTS  left ear drum (membrana tympani sinister)
<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>Na</td>
<td>sodium</td>
</tr>
<tr>
<td>NaCl</td>
<td>sodium chloride</td>
</tr>
<tr>
<td>N.A.D.</td>
<td>no abnormalities detected</td>
</tr>
<tr>
<td>NAD</td>
<td>no acute distress</td>
</tr>
<tr>
<td>NB</td>
<td>newborn</td>
</tr>
<tr>
<td>neg</td>
<td>negative</td>
</tr>
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<td>Neuro</td>
<td>neurology</td>
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<tr>
<td>NG</td>
<td>nasogastric</td>
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<td>NH</td>
<td>nursing home</td>
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<tr>
<td>NH4</td>
<td>ammonia</td>
</tr>
<tr>
<td>NLP</td>
<td>no light perception</td>
</tr>
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<td>noc</td>
<td>nocturnal</td>
</tr>
<tr>
<td>NPH insulin</td>
<td>neutral protamine hagedorn insulin</td>
</tr>
<tr>
<td>NPN</td>
<td>nonprotein nitrogen</td>
</tr>
<tr>
<td>NPO</td>
<td>nothing by mouth</td>
</tr>
<tr>
<td>NS</td>
<td>normal saline</td>
</tr>
<tr>
<td>NSD</td>
<td>normal spontaneous delivery</td>
</tr>
<tr>
<td>NSR</td>
<td>normal sinus rhythm</td>
</tr>
<tr>
<td>nsy</td>
<td>nursery</td>
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<td>O</td>
<td>oral</td>
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<td>O2</td>
<td>oxygen</td>
</tr>
<tr>
<td>OB</td>
<td>obstetrics</td>
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<tr>
<td>OBS</td>
<td>organic brain syndrome</td>
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<tr>
<td>O.D.</td>
<td>Right eye (<em>oculus dexter</em>)</td>
</tr>
<tr>
<td>OD</td>
<td>overdose</td>
</tr>
<tr>
<td>OHD</td>
<td>organix heart disease</td>
</tr>
<tr>
<td>op</td>
<td>operation</td>
</tr>
<tr>
<td>OP</td>
<td>outpatient</td>
</tr>
<tr>
<td>OPD</td>
<td>outpatient department</td>
</tr>
<tr>
<td>OR</td>
<td>operating room</td>
</tr>
<tr>
<td>ORIF</td>
<td>open reduction with internal fixation</td>
</tr>
<tr>
<td>Ortho</td>
<td>orthopedics</td>
</tr>
<tr>
<td>os</td>
<td>bone</td>
</tr>
<tr>
<td>os</td>
<td>mouth</td>
</tr>
<tr>
<td>Os</td>
<td>the chemical symbol for osmium</td>
</tr>
<tr>
<td>O.S.</td>
<td>left eye (<em>oculus sinister</em>)</td>
</tr>
<tr>
<td>OT</td>
<td>occupational therapy</td>
</tr>
<tr>
<td>O.U.</td>
<td>both eyes (<em>oculus unitas (both) or uterque (each)</em>)</td>
</tr>
<tr>
<td>oz</td>
<td>ounce</td>
</tr>
<tr>
<td>P</td>
<td>after (<em>post</em>)</td>
</tr>
<tr>
<td>P</td>
<td>pulse</td>
</tr>
<tr>
<td>P</td>
<td>phosphorus</td>
</tr>
<tr>
<td>PA</td>
<td>posteroanterior</td>
</tr>
<tr>
<td>P&amp;A</td>
<td>percussion and auscultation</td>
</tr>
<tr>
<td>PAR</td>
<td>postanesthesia recovery room</td>
</tr>
<tr>
<td>Para I, II, etc.</td>
<td>number of pregnancies to 20 weeks or more</td>
</tr>
</tbody>
</table>
qdrnt   quadrant
q.h. every hour (quaque hora)
q2h. every 2 hours
q3h. every 3 hours
qid 4 times per day (quater in die)
ql as much as pleases (quantum libet)
qli quality of life index
qm every morning (quaque mane)
q.m.s. quantity not sufficient
qn every night (quaque nocte)
q.o.d. every other day
q.s. quantity required (quantum sufficit)
qt quart

R
Rrectal
Rrepiration
Rright
r.abd. Right abdomen
RBC red blood count or cells
RD retinal detachment
RDS respiratory distress syndrome
RE right ear
RE right eye
reg regular
Rehab rehabilitation
resp respirations
retic reticulocytes
RFA right frontoanterior
RFP right frontoposterior
RFT right frontotransverse
RMP right mentoposterior
RMT right mentotransverse
ROA right occiput anterior
ROP right occiput posterior
ROT right occiput transverse
RSA right sacrum anterior
RSP right sacrum posterior
RST right sacrum transverse
Rh blood factor of Rh+ or Rh-
RHD rheumatic heart disease
RLE right lower extremity
DLL right lower lobe
RLQ right lower quadrant
RMLepis. Right medial lateral episiotomy
R/O rule out
ROM range of motion
R.O.M. Rupture of membranes
ROS review of systems
RT right thigh
RTC6m return to clinic (6 months)
RUA right upper arm
RUB right upper buttock
RUE  right upper extremity  
RUL  right upper lobe  
RUQ  right upper quadrant  
Rx  treatment, take, prescription  

S  
s  without (sine) also w/o  
SA  sinoatrial  
Sc  scapula  
sc  subcutaneously injected into fat under skin  
sed. rate  sedimentation rate  
serol  serology  
SF  salt free  
SGA  small for gestational age  
SGOT  transaminase (ozaloacetic)  
SGPT  transaminase (pyruvic)  
SH  social history  
SLB  short leg brace  
SLE  systemic lupus erythematosus  
SLWC  short leg walking cast  
SMR  submucous resection of nasal septum  
SNF  skilled nursing facility  
SOB  Short of breath  
sol  solution  
sos  if necessary (si opus sit)  
S/P  status post  
spec  specimen  
sp. Grav  specific gravity  
spon  spontaneous  
sq  subcutaneous  
SS  soap suds (enema)  
ss  half (semis)  
ST  speech therapy  
staph  staphylococcus  
stat  immediately (statim)  
strep  streptococcus  
subcu  subcutaneous  
subq  subcutaneous  
Surg  surgery  
Sx  symptoms  

T  
T  temperature  
T1, T2 . . . T12  thoracic vertebrae 1 through 12  
T3 uptake  screening test for thyroid status  
T&A  tonsillectomy and adenoidectomy  
tab  tablet  
TAH  total abdominal hysterectomy  
TB  tuberculosis  
tbsp  tablespoon  
TC&DB  turn cough and deep breathe  
TCH  turn, cough, hyper attack
temp  temperature
tid  Three times a day (*ter in die*)
tinct  tincture
TP  total protein
TPI  treponema pallidum immobilization
TPN  total parenteral nutrition
TPR  temperature, pulse and respirations
trach  tracheal
trans  transverse
TSH  thyroid stimulating hormone
tsp  teaspoon
TUR  transurethral resection
TWE  tap water enema
tx  traction

U
u  unit
u/a  urinalysis
ULQ  upper left quadrant
ung  ointment (*unguentum*)
URI  upper respiratory infection
URQ  upper right quadrant
Urol  urology
ut  uterus
UTI  urinary tract infection
umb  umbilicus (belly button)

V
v  vein
VA  visual acuity
vacc  vaccination
vag  vagina or vaginal
VD  venereal disease
VDRL  Venereal Disease Research Laboratories
VMA  vanilmandelic acid
VNA  Visiting Nurses’ Association
VO  vocal order
VP  venous pressure
VS  vital signs
VSD  ventricular septal defect

W
w/  with (also *cum*)
WBC  white blood count / cells
wc  wheelchair
wf  white female
w.n.  wheelchair nourished
wk  week
wm  white male
WNL  within normal limits
w/o  without (also *s*)
wt  weight
X
X times, power

Y
yo years old

Z
Z, Z', Z'' increasing intensity of contraction
ZIG zoster immune globulin
Zn zinc

Other symbols
= Equals
S Negative
+ Positive
* Birth
\(\perp\) Death
# Pounds or number
> Greater than
< Less than
8 Increase
9 Decrease
& Female
♂ male

**US / METRIC CONVERSIONS**

**LENGTH**
- 1 millimeter (mm)  0.03937 inch
- 1 centimeter   0.3937 inch
- 1 decimeter   0.328 foot   3.937 inches
- 1 meter   39.37 inches   1.0936 yards
- 1 inch  2.54 centimeters
- 1 foot  3.048 decimeters
- 1 yard  0.9144 meter

**WEIGHT**
- 1 gram  0.03527 ounce
- 1 ounce  28.35 grams
- 1 kilogram  2.2046 pounds
- 1 pound  0.4536 kilogram
Appendix
GEORGIA MANDATORY CLE FACT SHEET

Every “active” attorney in Georgia must attend 12 “approved” CLE hours of instruction annually, with one of the CLE hours being in the area of legal ethics and one of the CLE hours being in the area of professionalism. Furthermore, any attorney who appears as sole or lead counsel in the Superior or State Courts of Georgia in any contested civil case or in the trial of a criminal case in 1990 or in any subsequent calendar year, must complete for such year a minimum of three hours of continuing legal education activity in the area of trial practice. These trial practice hours are included in, and not in addition to, the 12 hour requirement. ICLE is an “accredited” provider of “approved” CLE instruction.

Excess creditable CLE hours (i.e., over 12) earned in one CY may be carried over into the next succeeding CY. Excess ethics and professionalism credits may be carried over for two years. Excess trial practice hours may be carried over for one year.

A portion of your ICLE name tag is your ATTENDANCE CONFIRMATION which indicates the program name, date, amount paid, CLE hours (including ethics, professionalism and trial practice, if any) and should be retained for your personal CLE and tax records. DO NOT SEND THIS CARD TO THE COMMISSION!

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Should you need CLE credit in a state other than Georgia, please inquire as to the procedure at the registration desk. ICLE does not guarantee credit in any state other than Georgia.

If you have any questions concerning attendance credit at ICLE seminars, please call:

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Dear ICLE Seminar Attendee,

Many thanks to you for attending this seminar. We hope that these program materials will provide a great initial resource and reference for you in the particular subject matter area.

In an effort to make our seminar materials as correct as possible, should you discover any significantly substantial errors within this volume, please do not hesitate to inform us.

Should you have a different legal interpretation/opinion from the author’s, the appropriate way to address this is by contacting them directly, which, by the very nature of our seminars, is always welcome.

Thank you for your assistance. It is truly appreciated.

Sincerely,

Your ICLE Staff

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