University at Buffalo
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The UB Law Alumni Association presents a CLE program

Excellence in Action:

Views from the Trial Court and Appellate Benches

Tuesday, April 25, 2023
4 p.m. to 5 p.m.
The Buffalo Club
388 Delaware Avenue
Buffalo, N.Y.

Featuring:

Hon. Shirley Troutman
Associate Judge
New York State Court of Appeals

Hon. Lawrence J. Vilardo
United States District Judge
Western District of New York

Moderated by:

Hon. Amy C. Martoche '99
New York State Supreme Court Justice
Eighth Judicial District

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Biographies

Our Panelists

Hon. Shirley Troutman
Associate Judge, New York State Court of Appeals

Hon. Shirley Troutman, Associate Judge of the New York State Court of Appeals, was born in Fort Valley, Georgia. She was raised in Buffalo, New York where she attended public schools. In 1982 she received a Bachelor of Arts in Business Administration from the State University of New York at Buffalo. She received her law degree from Albany Law School in 1985 and was admitted to the New York State Bar in 1986.

She began her legal career as an Assistant District Attorney in Erie County, New York. Thereafter, she served as an Assistant Attorney General, and as an Assistant United States Attorney. In those positions, she represented the state of New York and the United States of America in civil litigation matters. She has also served as an adjunct professor at the University at Buffalo School of Law.

In 1994, Judge Troutman was appointed by Mayor Anthony Masiello to serve as a judge for the Buffalo City Court. In November of that year she was elected to a full ten-year term. In 2002, she was elected to the Erie County Court where she served until her election to New York State Supreme Court in 2009. In 2006, she was designated by Governor Andrew Cuomo to serve on the Supreme Court of the State of New York, Appellate Division Fourth Judicial Department.

In November of 2021, Judge Troutman was nominated by Governor Kathy Hochul to serve on the New York State Court of Appeals. She has served as co-chair of the Franklin H. Williams Judicial Commission, President of the New York Chapter of the National Association of Women Judges, a member of the Advisory Committee on Judicial Ethics, and a member of the Ethics Commission of the New York State Unified Court System. She has also been an active member of many bar associations.

Hon. Lawrence J. Vilardo
United States District Judge, Western District of New York

Hon. Lawrence J. Vilardo is a United States District Judge for the Western District of New York. On the recommendation of United States Senator Charles E. Schumer, President Barack Obama nominated him to the bench on February 4, 2015. On October 26, 2015, he was unanimously confirmed by the Senate, and he took office on October 30, 2015.

Judge Vilardo is a graduate of Canisius College*, summa cum laude*, and of Harvard Law School, *magna cum laude*. He was an editor and Officer-at-Large: Assistant to the President of the *Harvard Law Review*, and he is one of the authors of *Developments in the Law—Corporate Crime: Regulating Corporate Behavior Through Criminal Sanctions*, 92 HARV. L. REV. 1227 (1979). In 2019, he was awarded the degree of Doctor of Humane Letters, *honoris causa*, from Canisius College.

Prior to his appointment and confirmation, Judge Vilardo was a founding partner of Connors & Vilardo, now Connors LLP, a boutique litigation firm in Buffalo, New York. Before that, he was an associate at Damon, Morey, Sawyer & Moot, now Barclay Damon LLP.

Judge Vilardo began his legal career as clerk to the Honorable Irving L. Goldberg, United States Court of Appeals for the Fifth Circuit, in Dallas, Texas. Together with his co-clerk, Howard W. Gutman, he has written two articles about Judge Goldberg: *The Honorable Irving L. Goldberg: A Place in History*, 49 SMU L. REV. 1 (1995), and *With Justice From One: Interview with Hon. Irving L. Goldberg*, 17 LITIGATION, no. 3, 1991.

After a decade as an Associate Editor and two years as Executive Editor, Judge Vilardo served a two-year term as Editor-in-Chief of the American Bar Association's *Litigation* journal. He then served a three-year term as a member of the Council of the American Bar Association Section of Litigation and a one-year term as Co-Director of the Publication Division for the ABA Litigation Section. He has written or co-authored several articles, including: *Where Did the Zeal Go?*, 38 LITIGATION, no. 1, 2011; *Representing Lawyers*, 32 LITIGATION, no. 4, 2006; *Communicating With Clients*, 27 LITIGATION, no. 3, 2001; and *Taking Care of the Doctor*, 21 LITIGATION, no. 3, 1995. He also has written the Commentary for New York Civil Practice Law and Rules § 3101 (Discovery) for New York Consolidated Laws Service (CLS).

Judge Vilardo was the first lawyer practicing in Buffalo to be inducted into the invitation-only American Academy of Appellate Lawyers. He has been listed in Best Lawyers in America, New York Super Lawyers—Top 10 in Western New York, Who's Who in American Law, Who's Who in American Education, and Who's Who in Law—Western New York.

Judge Vilardo has taught Constitutional Law at Canisius College and Appellate Practice at the State University of New York at Buffalo School of Law. He has lectured on legal ethics, appellate practice, attorney-client privilege, civil procedure, and other topics before meetings of the New York State Bar Association, Erie County Bar Association, National Federation of Paralegal Associations, and Western New York Paralegal Association.

Our Moderator

Hon. Amy C. Martoche '99
New York State Supreme Court Justice, Eighth Judicial District

Hon. Amy C. Martoche is a New York State Supreme Court Justice who was elected in November of 2020. Currently, she presides over civil and criminal matters in Erie and Niagara Counties. Before she was elected to Supreme Court, she was a Buffalo City Court judge where she founded and presided over the Human Trafficking Intervention HUB Court from its inception in 2013 until she started in her new role in the Supreme Court. While she served in Buffalo City Court, she also presided over the Domestic Violence Part, where she adjudicated more than 8,000 cases.

Mayor Byron Brown appointed Justice Martoche to the bench in 2011 and she was subsequently elected to a ten-year term. Before she became a judge, she was a partner at the law firm of Connors & Vilardo, LLP, where she worked from 2001 to 2011; her practice there focused on civil litigation, professional defense, and white-collar criminal defense. Before

coming back to Buffalo for good, Justice Martoche worked at a large law firm in Washington, DC and before that served as a confidential law clerk to the Hon. Frederick J. Scullin, Jr. (N.D.N.Y.).

Justice Martoche received her B.S. from Cornell University's School of Industrial and Labor Relations. After completing her undergraduate degree, she spent three years in rural Louisiana as a teacher, corps member, and program director with the Teach for America program. She is a proud graduate of the University at Buffalo School of Law.

Materials Included

Back to Basics: Starting on the Right Foot: Effective Opening Statements written by Mark L.D. Wawro, published in Litigation Fall 1998, Volume 25, Number 1, pages 10-19

Closing Argument: A String of Pearls written by Patricia Lee Refo, published in Litigation Fall 1998, Volume 25, Number 1, pages 37-41, 69-70

Appeals: The Classic Guide written by William Pannill, published in Litigation Winter 1999, Volume 25, Number 2, pages 6-11, 61

Oral Argument: The Continuing Conversation written by Talbot D'Alemberte, published in Litigation Winter 1999, Volume 25, Number 2, pages 12-15, 67

Perspective: The Trial Lawyer written by David Berg, published in Litigation Spring 2000, Volume 26, Number 3, pages 6-15

An Interview with Judge Lawrence J. Vilardo written by Ashish Joshi, published in Litigation Journal Spring 2023, Volume 49, Number 4, pages 51-55

Back to Basics: Starting on the Right Foot: Effective Opening Statements written by Mark L.D. Wawro, published in Litigation Fall 1998, Volume 25, Number 1, pages 10-19.

Starting on the Right Foot: Effective Opening Statements

by Mark L.D. Wawro

My first big jury trial was a breach of contract case. We were seeking damages of more than half a billion dollars. The client agreed it was worthwhile to use a jury consultant to test how potential jurors would react to such a large damage claim, and we mock-tried the case several times. I delivered what I thought would be my opening statement to various panels of jurors. I left them stone cold.

We also showed the jurors videotapes of testimony from some of the witnesses. One of the videos included part of the deposition of my client. The snippet of tape that we showed had little to do with the substance of the breach of contract issues. Instead, the client described how, years earlier, he had started out in business running a chain of discount gasoline stations in Massachusetts.

His was a rags-to-riches-to-rags-to-riches-again story. He plainly enjoyed talking about the early part of his business life—especially the time he spent driving a tanker truck all night to supply each of his stations with gas for the following day. And the jurors plainly enjoyed listening.

My partner Steve Susman watched this happen and then took me aside. He told me: "Look, these jurors couldn't care less about what you're telling them. You're describing a dispute between two companies over a contract. You may be right about who should win the case, but these folks don't see any reason to get involved.

"Now look at the reaction they have to your witness. They love him. They love his story. It means something to them. You need to scrap your opening statement and start over. This time, tell them your guy's story first. Tell them how he got where he is. Then they will care about what is happening to him now."

So I did. And I discovered that telling the client's story first made the rest of the opening smoother and more coherent. I used that story not only to generate interest, but also to help determine what other facts to talk about. The client's life story became a unifying theme.

In the end, the jury awarded the damages we asked for, to the dollar. Did the opening win the case? Of course not. We were right on the substantive issues, and our client's own testimony was the high point of the proof. But if mock juries can be relied on—and I think they can—the result might have been very different had I given my opening statement as originally planned.

Some people say that jurors decide cases by the end of the opening statements. I doubt it. For it to be true, jurors would have to ignore the judge's instructions ("It is your duty to listen to and consider the evidence"). They would have to ignore the traditional plea of the lawyers ("I only ask that you keep an open mind until you have heard all of the evidence"). And they would have to believe that what a lawyer says on behalf of a client is likely to be the unvarnished truth. That proposition must strike even the least jaded among us as an unlikely hypothesis.

It is more likely that jurors think that opening statements are exactly what they are supposed to be: a road map of a party's case, a preview of what the lawyer expects to prove by evidence. Of course, when the case is over, jurors often tell the lawyers that they were convinced by the opening statements. But would the jurors have kept that view if the winning lawyer failed to present the promised evidence? Probably not.

In fact, promising evidence in an opening statement that you do not produce during trial is one of the most damaging mistakes a lawyer can make. When one lawyer does that, the other invariably pounces on it. In summation, she reminds the jury that her adversary "told you at the very start of the case that Mr. Jones would come here to tell you what happened. Did you see Mr. Jones? Where is he? Why was he afraid to come here to face you?" What may have been a strong opening turns into a loud backfire.

Surely, the best opening statements are given in cases in which the facts and the law are on your side. Unfortunately, you do not get to deliver those openings very often. Those cases settle. You are most often called on to address a jury when the evidence is contradictory, disputed, and circumstantial. And that is where you earn your money as an advocate.

An effective opening statement does three things. First, it tells a story about the case, the very best story the facts justify. Second, it emphasizes one or two or three important themes—or arguments—about the case. They are best when they are commonly understood and widely accepted principles about human conduct: A deal is a deal; your word is your bond. Third, it establishes you as a credible and reliable advocate for your client.

Start with storytelling.

Plot. Characters. Suspense. All good stories have them.

Mark L. D. Wawro is a partner in the Houston firm of Susman Godfrey L.L.P.

Opening statements should build the story from these bricks.

Plot is the what, where, when, and how of the story. Because time is short and the storytelling is oral, developing the plot requires more of the journalist's skill than the novelist's. Unlike the journalist, however, you are not presumed by anyone to be objective. On the contrary, you are an advocate. Everyone knows this. Everyone expects it. Do not even think about letting those expectations down. Tell the jury what happened. Put the events in context. But make sure it is the most favorable context possible.

Stories depend on characters; lawsuits even more so. Whether you represent the plaintiff or the defendant, you need the jury to see the actors on your side of the case as people. Your client will almost always have done something foolish, naive, tricky—maybe even wrong. You want the jury to forgive errors, to look beneath the surface, and to accept the essential correctness of your position. To do this, jurors need to connect with your client on a human level.

Suspense is what keeps jurors listening. This is not simply a matter of holding back some particularly important piece of information—not usually, anyway. Suspense is the skill of building the narrative about plot and character in a way that keeps the jury wanting to know *what happened next*? You do this by constructing a story that has flow. Each part of the story—each chapter, if you will—builds on what came before. Nothing depends on the jury knowing something you have not already told them.

Next, think about themes.

The function of opening statement is to describe what the evidence will be. You are not supposed to argue your case, right?

Wrong. Everything you say during trial should be designed to persuade the jury that your side of the case is the right one. This is especially true of opening statement, which is often your first extended opportunity for persuasion. The facts you select, the details you emphasize, the picture you draw of the people and events involved, should all be designed to persuade the jurors that your side should win.

What you should not do is make argumentative statements. Naked argument will frequently draw an objection that will be sustained. And jurors may be turned off by such argument because they think you are avoiding the facts.

If, for example, you try to tell the jury in opening that "you must send a message to corporate America that Big Business cannot tread heedlessly on the rights of consumers," your opponent will object and the judge will sustain the objection. But if you intend to make such an argument in closing, you can and should construct your opening statement to make it apparent that the evidence will be that the defendant has done exactly that.

A few years back, I tried a case with contract and fraud claims in it: we claimed the defendant had breached a contract to purchase our client's product, and the defendant claimed it had been tricked into signing the contract by misrepresentations about the safety of the product. The evidence was fairly debatable, but there was no dispute that under certain circumstances our client's product could be rendered dangerous. The defendant's position was that it did not know about the chemistry of the product and that our client was supposed to be an expert on whose judgment and candor the defendant had mistakenly relied.

Our position, on the other hand, was that the defendant knew precisely what it was getting and that its claim of having been deceived was an after-the-fact rationalization to avoid the contract. I could say that in so many words—and of course I did, several times. But I also thought it was important to tell the story of how the two parties came to do business together, and to tell it in such a way to make the jurors see that it would be extremely unusual if the defendant did not know at least as much as our client did about the chemistry and characteristics of the product.

In other words, I wanted to try to shift the burden of persuasion on that point to the defendant. So in my opening I described the size of the defendant's R&D department, the education and qualifications of its engineers, and the numerous other consumer products they marketed. I knew that one of the defendant's themes would be "Safety is our #1 concern," and I trumpeted that claim myself. I reasoned that jurors would naturally expect a company with that primary concern to spend substantial resources testing new products they were considering marketing. I told the story of the early meetings between my client and the defendant, and I focused on the scientists who participated and who asked questions

in those meetings. I emphasized that it was the defendant that devised the testing apparatus used to evaluate the safety of the product and that one of the defendant's engineers participated in all the testing, even on my client's premises. I described how the final formula was devised with input from the defendant, which had instructed our client to alter the formula during production.

By telling the story with this emphasis on the technical expertise of the defendant, I hoped to support the basic theme that the defendant was the real safety expert. I not only told the jury that fact, I also told the story in a way that emphasized it.

The themes of your opening should mirror the arguments of your closing. There should be just a few themes, and they should be central to your case. These are the issues you expect jurors to relate to on a fundamental level. The themes are often reflected in the substantive law, but their appeal is not their legal basis. Rather, it is that they make fundamental sense to most people.

The skill of identifying compelling themes is not inventiveness, but distillation. A theme that no one ever dreamed of before is not likely to have much appeal for jurors, precisely because it is new and different. It is probably not what anyone else thinks of as a fundamental truth. In fact, good themes may seem trite to you and your colleagues because you will have used them—or at least heard them—again and again.

Be relaxed and confident. Have a sense of humor. Be expressive. Move.

Obviously, your themes need to be consistent with your theory of the case. There is no point in arguing that "a contract is a contract" if your client's position is that the key contract provision is ambiguous. More than that, though, the themes are what give definition to the facts of the case. The themes are what you build your presentation of the facts around.

As you tell your story and present your themes in opening, you also need to sell yourself. Your credibility as an advocate is hugely important to your client. You want jurors to presume that you are correct when you say something. Your credibility throughout a trial is enhanced by coherence, preparedness, thoroughness, commitment, and personality. Opening statement is a place to establish these characteristics.

The object is not to win a popularity contest. Jurors may well regard the losing lawyer as the better lawyer. But every trial involves close calls, where the evidence and the force of the witnesses' testimony is closely matched. I am convinced that jurors' perceptions of the lawyers' reliability affects how they make those close calls.

It is therefore important to establish yourself as a credible advocate from the start. This means avoiding both surprise and disappointment. Avoid surprise by previewing unfavorable evidence in your opening. Avoid disappointment by not promising evidence you cannot deliver or pitching a theory that the facts do not justify.

Credibility means telling the story clearly. It means avoiding mistakes that will make it seem that your opponent knows the case better than you do. And it means keeping the jury interested in what you are telling them. Show the jurors your personality. Be relaxed and confident. Have a sense of humor. Be expressive. Move. These qualities and techniques will help to keep the jury focused on what you say.

A good way to begin thinking about the substance of your opening statement is to think about what you plan to say in summation. Pick out the two or three themes that you will emphasize during the case. Then think about how best to tell the story of the case to support those themes.

One important consideration in deciding what facts to include is how much time you have for opening. The court may set a limit, but remember that you do not have to use all of the time permitted. No matter how interesting you are, jurors will have difficulty staying focused on your presentation for more than about 45 minutes. As is true of most presentations: the shorter, the better.

Jurors want to hear about facts. But before they begin listening to what the evidence will be, they need an overall context for those facts. They need to know what the lawsuit is about. How extensive your explanation of the facts needs to be will depend on what the jurors have already heard in the voir dire process, or from the other side if you are the defendant. But you must always frame the issues for the jury by telling them what the case is about from your client's perspective. For example:

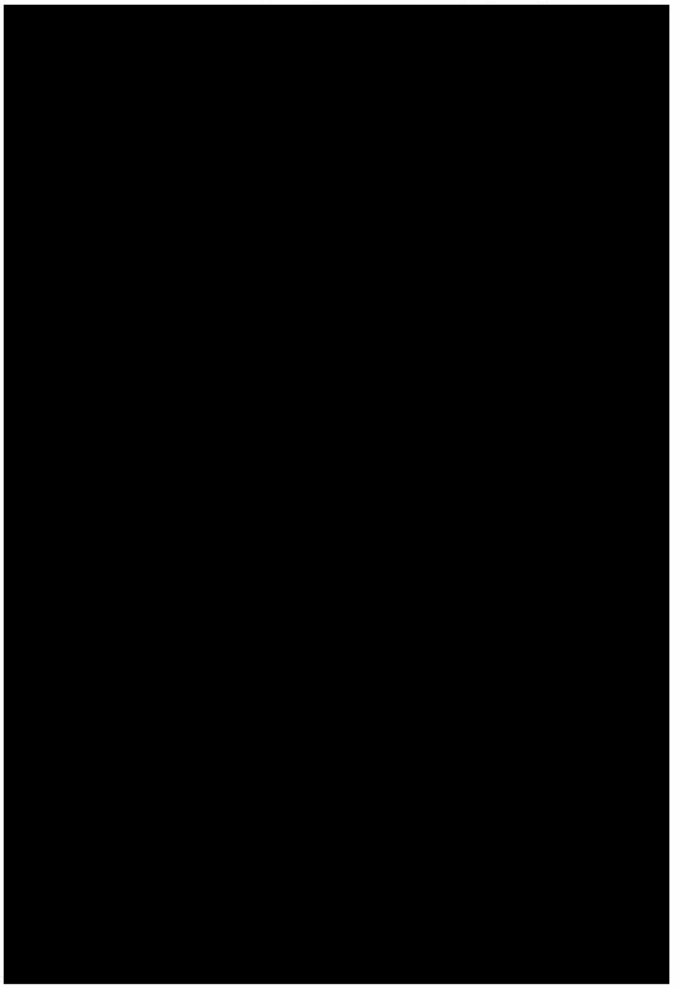
> I represent Fred Johnson and the company he founded in 1987, Arctic Industries. Both of them have been sued by David Maggs for fraud. Mr. Maggs claims that Fred Johnson lied to him in April 1995 when the two of them were negotiating an agreement to employ Mr. Maggs as the vice-president in charge of the widget division of Arctic Industries. Mr. Maggs's lawyer told you that Fred Johnson promised Mr. Maggs that he would get 10 percent of any profit if Arctic Industries sold its widget division while Mr. Maggs was in charge of it. Fred Johnson never said that. Fred Johnson agreed with Mr. Maggs that Mr. Maggs would be entitled to a 10 percent bonus on the operations of the widget division. He never agreed to pay him a bonus on the sales price if the division were sold. Mr. Maggs now wishes he had made a better deal, but the terms of the real agreement are in writing, and we will show it to you during this trial.

Obviously, one of the themes of this opening is that "a deal is a deal." This brief introduction tells the jurors that your position will be that Johnson never agreed to the compensation provision Maggs now claims. It also tells them that the compensation scheme Johnson did agree to is written down and will be a part of the evidence in the case.

Introducing the Client

Having set the stage by giving the jury the essence of your position about the central issue, you should then describe the important facts. For starters, tell the jury who your client is. In the case of Fred Johnson, you might describe how he started Arctic Industries and why; where he got the training or background to undertake the venture; what the business means to him. You might talk about his education or family background.

You need to be selective. The idea is to give the jury a sense of who the person is without boring them to death with the oral equivalent of snapshots of the family Labrador



retriever and without creating the impression that you are trying to take the focus off the real issues.

In the case of Arctic Industries—or when your only client is a business—talk about the business as if it were a person. It is a company that does things—makes them, sells them, fixes them. It is centered somewhere, and it has been in business for so many years. Someone from that client will be the "corporate representative" during trial, so introduce that person, but not as "the corporate representative." Instead, just introduce the person and say that he or she will be with you throughout the trial for Arctic Industries. Perhaps someone else from that business will be an important witness, so tell the jury about that person too and explain how he or she fits into the case.

In other words, when your client is a business, put a human face on its actions, thoughts, and discoveries. Avoid talking about what Arctic Industries did, or learned, or wanted; instead, put it in terms of what some specific person did, or learned, or wanted.

In introducing the primary actors of your adversary, different rules govern. You usually do not want the jury to see these people or entities as three-dimensional characters. They are the villains of the story, the people with the black hats. The corporate adversary is a faceless bureaucracy. The individuals are just names. You want to point them out or identify them for purposes of telling the story, but no more.

There are exceptions to every rule, and an exception to this one is that more information about your client's adversary is warranted when it is an important part of your story. Facts about the opposing party's background may supply motive, opportunity, or plan. In the breach of contract and fraud case I mentioned earlier, for example, I wanted the jury to know as much as possible about the adversary's technical expertise. I wanted them thinking of the opponent as a crackerjack research outfit that had the incentive and the ability to evaluate product safety completely.

Suppose that you represent Maggs in our example. You know that when Johnson was deposed he claimed to have no recollection of any negotiation with Maggs, any discussion of compensation terms, or even any agreement. In that event, Johnson's business sophistication and hands-on management style would be an important part of your story. You want the jury to understand some important facts about who Johnson is and what he has accomplished. Those facts will lead jurors to infer that Johnson is not being truthful when he claims to have no recollection of a negotiation he personally conducted with the man who was to head his company's widget division.

Once you have introduced the cast of characters, it is time to tell the jurors what happened.

The facts that led to your lawsuit often will cover a period of several years. You have been over those facts countless times before trial, in meetings with your client, during depositions, while reviewing documents, while interviewing witnesses, and in your head as you prepared for trial. There are facts your client thought were significant that you did not. There are facts that came as a surprise during discovery.

You have spent a lot of time with those facts, ordering them in your mind, assuring yourself that you know the whole story. Now you do. The problem is, you know too much.

You have to discriminate. Select. Cut. This is one of the hardest parts of preparing an effective opening statement. The easy route is to tell the whole story, but in most cases this requires an extended, time-consuming, and boring narrative. On the other hand, cutting the narrative to a manageable size presents dangers of oversimplification and misrepresentation.

The trick is to tell jurors enough of the facts so that they can see how the story unfolds without telling them more than they need to know. The facts you describe need to fit together logically and coherently, and to set the stage for the evidence that will follow. Keep in mind that the jury will learn many more facts from the evidence than the ones you describe in your opening. And remember that when the evidence begins to come in, the facts will be presented in piecemeal fashion. One witness knows only parts of the story. The next knows other parts, some of which came before anything described by the previous witnesses. Even if you try to tell the story smoothly, the evidence will be disjointed and disorganized. And if you are the defendant, you cannot control anything about the order of proof—and how the story unfolds.

Your job in opening is to give the jury a framework for the evidence that will permit them to recognize its significance as it comes in—including the evidence you have no time to discuss in your opening. Jurors can process information most effectively if they have a clear understanding of the overall path the evidence will follow.

Circumstantial evidence can pose a challenge in opening statement. Circumstantial evidence is founded on inference. Encouraging jurors to draw an inference is argument, and may provoke an objection. But simply describing the circumstantial facts will often be too subtle, especially in an opening statement.

If an important fact in your case will depend on circumstantial evidence, consider spending additional time on this part of the story:

> One of the central disputes in this case is what bonus provision Mr. Johnson and Mr. Maggs negotiated in April 1995. I am going to present two kinds of evidence during this trial to prove that Johnson and Maggs agreed that Mr. Maggs's bonus would include the profit from any sale of the widget division. The first kind is Mr. Maggs's own testimony about what happened. Mr. Maggs will tell you that he explained to Mr. Johnson that he was not interested in taking on the job of turning the widget operation of Arctic Industries around and making it profitable unless he was assured that the success of that work would be reflected in his compensation. Mr. Maggs will tell you that he and Mr. Johnson specifically discussed the possible sale of the widget division, and that they agreed that the profits from any sale would be included in the bonus calculation. Mr. Maggs was part of the discussion, he knows what he said and what Mr. Johnson said, and he will tell you that.
>
> In addition, I will present evidence that shows that Mr. Johnson knew he had promised Mr. Maggs 10 percent of the profit on any sale. Mr. Johnson made a calculation while he was negotiating the sale of the widget division in 1996 to Widgets-R-Us. In that calculation, in his own handwriting, Mr. Johnson deducted a 10 percent bonus owed to Mr. Maggs based on Arctic Industries' profit on that sale. Mr. Johnson knew exactly what he had promised Mr. Maggs, and he knew that the promise included a 10 percent bonus based on the profit from a sale of the widget division to a third party.

You need not always be this expansive. Often, it is enough to say that "I will show you that. . . ." or "Mr. Johnson knew . . . ." On critical issues, though, it is usually wise to say more, rather than less, about the nature of the proof to come.

Ordinarily, it is most effective to tell your client's story chronologically.

You want the jury to remember that two or three facts are important to the case (your good facts, of course), and one way to do this is to emphasize their importance by saying more about them in your opening.

A recent column in this magazine by James McElhaney ("Trial Notebook," Vol. 24, No. 2 LITIGATION at 59 (Winter 1998)) recommended developing a proof checklist before trial that ties each important fact to at least two independent sources. This is sound advice. But sometimes you have only a single source for a fact—and sometimes, your source is questionable. Documents and deposition testimony may come within an inch of establishing the critical admission, but only within an inch. Your own witness may be "positive" about a fact, but may describe the event a little differently every time he tells you about it. Or you may have solid evidence that a fact is true, but that evidence may be of questionable admissibility.

If the fact is an essential one for your case, McElhaney is right: do not bother spending your time thinking about how to describe the fact in your opening; spend your time instead developing a better way to prove the fact at trial. But if you have done everything you can and the proof remains shaky, you are left with a dilemma: should you incorporate the questionable fact into your opening, or leave it out?

If those are your only two choices, leave it out. If you promise evidence of a fact in your opening, it becomes significant—even when it is tangential. Your opponent will invariably canvas the transcript or her notes of voir dire and opening statements as she prepares for closing. She is looking for those unfulfilled promises. It might not even matter that you proved the fact a different way, if you failed to prove it the way you promised you would.

Fortunately, your choice is rarely limited to promising evidence of the shaky fact or ignoring it entirely. There is a middle ground—safely describing a group of facts in general terms without promising specific evidence.

The Safe Route

For example, in one case a former employee of my client had surreptitiously given an old friend some of the client's internal documents about a contract. Neither the former employee nor his friend were parties to the subsequent lawsuit—a declaratory judgment action brought by the company that had acquired the contract. The purloined documents were benign to the resolution of that lawsuit, but were important for cross-examination because the former employee had given deposition testimony about internal meetings that, if believed, would be damaging to our client.

In his deposition, the former employee testified that he had given his friend the documents innocently, not thinking there was anything particularly secret or valuable about them. Shortly before trial, however, we learned from another ex-employee that the former employee had told him about passing the documents to his friend in very secretive circumstances: the documents were placed in a plain brown wrapper, the two friends met in a dark nightclub, and the papers were literally passed under the table. These facts seemed to impeach the former employee's claim that he never thought there was anything wrong in giving these benign documents to his friend. But we could not be certain of proving the facts because our evidence was hearsay and there was no way to know whether the former employee or his friend would admit that the exchange happened the way we described.

Therefore, in describing this part of the case in the opening and voir dire, we told the jury that the evidence would include documents that had been taken from us secretly by a former employee. We told them that the documents had very little to do with any of the issues in the case, and that the more important fact was the way the documents had been taken. We left it at that. If we could do no more than have the former employee admit that he had taken the documents without permission—a fact he already admitted at his deposition—we would have delivered all that we promised. On the other hand, if the former employee acknowledged the details of the surreptitious delivery (and he did), the additional evidence was consistent with the promise made in opening.

Every story has a beginning, middle, and end. Ordinarily, it is most effective to tell your client's story chronologically. Peo-

ple process and recall information most effectively when they receive it in chronological order. Jurors will expect to hear the development of the story in the order in which the important events happened. Skipping around is likely to confuse them.

Sometimes, though, a different sequence may be more powerful. In a case involving a personal injury, it is often most effective to begin, and end, with a description of the immediate causes or circumstances of that injury. In a defamation case, for example, you might begin by telling the jury about the evening two summers ago when your client was watching the news with his 12-year-old son and learned, for the first time, that his employer had publicly accused him of embezzlement.

And sometimes significant events that occur early in the chronology are nearly incomprehensible until the jury knows the end of the story. In a fraud case I tried, we figured out late in the game that one of the key events had been a change in the corporate ownership of an entity that was acquired by one of the defendants. That entity had been a shell, with neither any assets nor any ongoing business. The change in the ownership structure—excluding our client without his knowledge—had therefore not caused him any injury, and so we had never paid much attention to the transaction. Once you knew the whole story, however, it became apparent that the purpose of excluding our client had been to make it easier to squeeze him out of the real deal later.

In the opening statement, I described the ultimate squeeze play first. Then I brought the jury back to the earlier time when the groundwork had been laid to accomplish it. The clearest proof that the defendants had never intended to keep the promises they had made, I pointed out, was the evidence showing that before the promises were made, the defendants had already constructed the means to leave my client out in the cold.

If you deviate from a chronological organization, bear in mind that jurors expect to hear the story from beginning to end. Be clear when you tell them the end of the story first. Be sure that you tie it all together before you sit down. And do not overdo it.

While organizing your opening, focus your attention on the facts that will be the building blocks of your story. There are certain key facts and circumstances in each case. If you represent Maggs in our example, these might include the following: (1) Maggs had been a successful business manager of Acme Widgets, a competing firm; (2) Arctic Industries' widget division was in decline, with several unprofitable recent years; (3) Johnson recruited Maggs personally; (4) Maggs was reluctant to leave his former employer.

You want to tell the jury about this evidence, but you want to do more. You want to make the jury empathize with Maggs. You need to provide the human dimension:

> Jack Maggs will tell you about the weeks he spent talking with family and friends about the offer Johnson made. On the weekend before Jack Maggs met with, Johnson to hammer out the details of Arctic Industries' offer, Jack and his wife spent several hours discussing whether this was a step they were comfortable taking. The next Monday, before meeting with Johnson, Jack met with Rodney Firestone, the chief executive of Acme, to tell him that he had been offered the Arctic Industries job and thought he would take it. Mr. Firestone asked Jack to reconsider, and offered him a raise if he would. Jack Maggs did not walk into the April 12 meeting with Johnson unprepared. He will tell you that he knew how significant a change he was about to make, and that he was not about to do so carelessly.

You will not have time to tell the whole story with this kind of depth. A few instances of this kind of storytelling, however, will imbue the entire narrative with a personal flavor.

Select the important facts that the jury needs to understand your case and the presentation of evidence. Among those facts, select a few that will draw the jurors into the story. Expand your discussion of those events with more detail about thoughts, feelings, hopes, or actions that bring the events to life.

Whether you represent the plaintiff or the defendant, your opening statement is an exercise in offense. You are there to tell your client's side of the story. You present it in the best light you can.

But do not be blind to good defense. There are always bad facts. Sometimes they are tangential, other times they are important. Either way, you need to defuse them early—as long as you are reasonably sure they will come into evidence.

Ordinarily, the best method of defusing a bad fact is to include the fact within the story in the best light possible. That is often more easily said than done. But if the fact is an important one, you must have an explanation for it. Otherwise, worrying about how to handle it in opening statement is like rearranging the deck chairs on the Titanic. The trick is to get that explanation into the story line without giving undue emphasis to the fact itself.

Suppose one of the bad facts for Maggs is that the operations of the Arctic widget division lost more money under his leadership than it had before. Perhaps the facts will permit you to handle that bad fact this way:

Do not abandon your own best case in an effort to meet the opposition.

> Jack Maggs knew he had his work cut out for him when he accepted Arctic's offer. He knew that before things got better, they would have to get worse. The widget division's problems were deeply rooted in years of poor and inconsistent management. Turning that kind of operation around required a complete break from the past, and sales would necessarily suffer in the interim while the widget operations were reduced in size and concentrated on the fundamentals.

The jury now knows that the business did worse after Maggs took over. Not only have you taken away the sting of surprise from this information, but you have also put it in its proper context. The poor results are a symptom of the cure, not evidence of Maggs's incompetence.

The way in which you alert the jury to the bad facts in your case is important. In telling the story during opening, you are speaking both for your client and yourself. Communicating candor and frankness in dealing with the difficult facts can increase the jurors' trust of both of you. Meeting bad issues head-on also conveys the sense that you are not afraid of the issue—the fact is not as bad as your opponent suggests. Most

important, discussing bad facts in opening robs them of the power they otherwise acquire from surprise or novelty when they appear in the evidence.

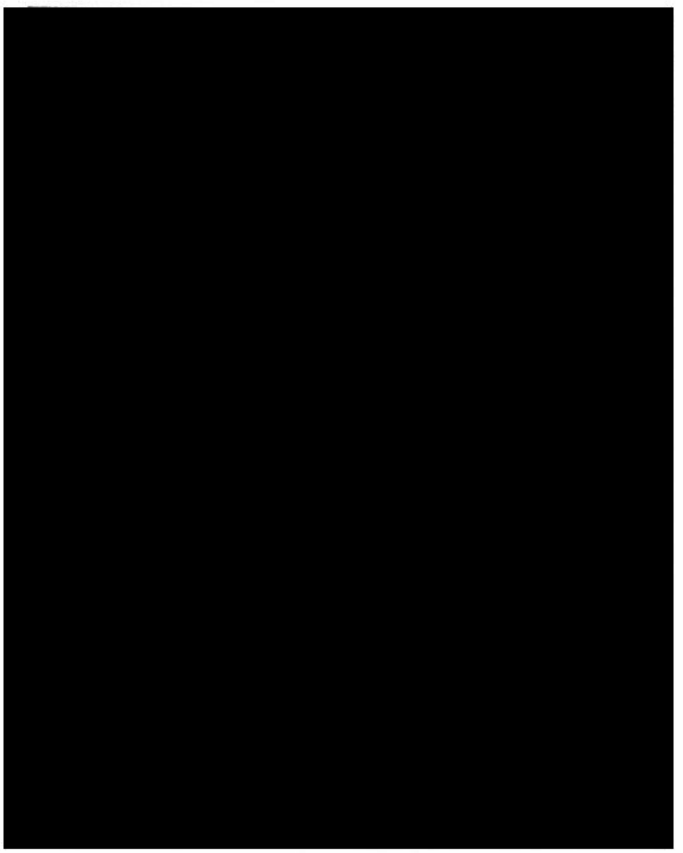
The same goes for handling your opponent's themes and issues. If you have analyzed your opponent's case well, you know what his strong points are. Dealing with them in opening may be good defense.

This is an area in which a mock trial can be extremely helpful. Mock trials help you understand what jurors are likely to find attractive and compelling about your opponent's case. As you listen to mock jurors deliberate, you will hear the points of view that you are likely to find represented on your real jury, and you will learn the concerns that your case fails to address. If you listen carefully, you will hear the themes that are likely to be most successful for your opponent.

Even without a mock trial, however, you can get to the same place by imagining how you would argue the other side of your case. Doing this will highlight those facts that require greater emphasis to neutralize your opponent's anticipated approach. Some facts may not be critical to understanding your case, but may be important to take the wind out of your opponent's thematic sails. Include these aspects of the case within the story you construct.

But do not abandon your own best case in an effort to meet the opposition, and be careful not to let defensive considerations shift the focus of the case away from your strongest points. One of the worst sins a trial lawyer can commit is to make his adversary's case better than his adversary does.

A couple of years ago I tried a case over a take-or-pay contract that my client—a pipeline—had signed. When the contract was signed in 1979, pipelines were anxious to secure natural gas and were willing to accept continuously escalating prices to get it. By the mid-1990s, the price under this contract had increased to something like $9 per thousand cubic feet, compared to a market price of only about $1.50. Needless to say, the supplier was enjoying quite a windfall.



The gas had to meet certain minimum specifications under the contract, however, including a specification about the heating value of the gas, or BTU content. For a time, the gas produced from the defendant-supplier's leases had dropped below that minimum requirement. To counteract that drop, the defendant began to inject propane—a gas with a relatively high BTU content—into the natural gas upstream of the point where the heating value was tested. This practice continued for about 11 months before the pipeline discovered it and demanded that it stop. In the meantime, however, my client had paid about $25 million for gas that it believed would not have met the required quality specifications without the propane injection.

We had two problems, and they were big ones. First, as a practical matter, injecting propane into natural gas does not harm the gas; it just makes it a better heating fuel. Second, there was no possible way to dispute that what we were really after was a reason to avoid paying $9/mcf for gas under the contract.

The defendant, however, had a bigger problem. It had made the mistake of being very secretive about the propane injection. It fact, it denied that it was occurring when we first began to suspect it.

We could not truthfully deny that we wanted to avoid the contract price. We could not claim that the propane made the gas worse. And we knew those points were to be the themes of the defendant's case. So we decided to make them part of our case, too.

I told the jury in opening that the case was about a 20-year-old contract to buy natural gas, that we could buy the same gas for a fraction of the price on the open market, and that we did not want to pay $9 for gas worth $1.50 if we did not absolutely have to. I told them that for the very same reason, the defendant wanted to force us to buy the gas for $9, and had secretly injected propane into the gas for 11 months to make it look like it met quality specifications when it did not. I told them that the propane injection did not do anything bad to the gas. The only complaint we had, I said, was that without the propane injection we would not have had to buy the gas at the inflated price.

The defendant did not expect this approach. They made the very same arguments, but our approach had stolen the wind from their sails. The focus of the trial quickly became the efforts the defendant had made to conceal the propane injection from us. That put the defendant in the worst possible light.

Two things were clear from our post-verdict discussions with the jurors. First, they found it entirely reasonable that someone would try to avoid paying $9 for $1.50 gas. One juror said: "Why would I buy a loaf of bread for $9 if I didn't absolutely have to?" Second, the evidence that the defendant concealed the propane injection convinced at least some of them that the gas would not have met the quality specification without the propane. That was key, because the expert evidence about whether the gas would have met the specification without the propane was conflicting.

The defendant disputed that it tried to conceal the propane injection. In retrospect, I think the defendant would have been better off admitting that it had concealed the propane system from us. Had it taken that approach and simply

explained that it had done so out of concern that we would use any excuse to wriggle out of the contract, I suspect that the jurors might have evaluated the case, and the damages, more favorably to the defendant.

As you preview the evidence, remember that the jurors have no earthly idea who most of the people they will be hearing from are. Introduce your witnesses into the narrative by name. If you can, tell the jurors when they will meet these witnesses. Sometimes, of course, strategic or practical problems make it unwise or impossible to be specific about the order of at least some witnesses. But it is rarely a real surprise to anyone who your first witnesses will be.

Tell jurors something about the witnesses: who they are, and how they fit into the story. And do not forget expert witnesses:

> Dr. Allison Algorithm is an economist and a certified public accountant. One of the disputes in this case is how much Mr. Maggs's 10 percent bonus on the sale of the widget division amounts to. We know that Mr. Johnson made this calculation himself shortly before the sale, but the defendants now claim that Mr. Johnson's number was wildly incorrect. We have asked Dr. Algorithm to make the proper calculation based on the sale documents and the financial statements of the widget division, and Dr. Algorithm will describe the work she did and the conclusion she reached. And you will find that Dr. Algorithm's conclusion is that Mr. Johnson's calculation was pretty much correct. Like Mr. Johnson, Dr. Algorithm has concluded that the correct bonus amount is approximately $3,225,000. Dr. Algorithm will describe precisely how she calculated the correct bonus number.

Notice that I never called Dr. Algorithm an "expert witness." Instead, I described her qualifications for giving opinion evidence. And I did not call her testimony "opinion." Instead, I described her "conclusions." That is because I am describing my own witness. My experts are not just witnesses—they are people who do things, study things, analyze things. Why they are expert is the important point. And, although my experts have lots of "opinions" about lots of things, the matters they testify to are "conclusions" and "calculations"—words that sound more like fact than conjecture.

Pictures, charts, and diagrams also help you communicate.

Running through this kind of explanation for every witness at a single point in the opening is counterproductive, however. The reason to introduce the witnesses in opening is to help the jury remember who they will be. If they hear about six witnesses at once, the effect may be the opposite. Therefore, introduce witnesses throughout the opening, as they become most important to the story. Then, when it is time to outline the order of proof, you will have to introduce only two or three witnesses who have not been mentioned before.

Defendants have a harder job than plaintiffs in this respect, because they often do not know which of their potential witnesses will really be needed. While the plaintiff had better have a pretty good idea of her case-in-chief, the defense lawyer frequently knows only that two or three witnesses will definitely be called. That presents a dilemma. Describing a witness who never shows at trial gives the plaintiff something to attack. Even without that attack, it may leave the impression that you could not, or for some reason would not, get the witness to trial. The safest course is to confine your specific description of witnesses to those you know you will call, and describe other evidence in narrative form without specific witness attribution.

A good way to introduce a witness to the jury in opening is to describe a portion of that person's testimony from her point of view:

> One of the witnesses you will hear from in the next several days is Catherine Calculus, the chief financial officer of Arctic Industries. Mrs. Calculus has worked for Arctic for almost 10 years. Before coming to work for Arctic, she was the controller for Widgets-R-Us, the company that eventually bought Arctic's widget division. Mrs. Calculus had nothing to do with running Arctic's widget division—that was supposed to be Mr. Maggs's job. But Mrs. Calculus was responsible for overseeing all of the accounting and financial functions of the entire Arctic company, and because of that she saw, month after month, that the widget division continued to lose money. She will tell you about the day in February 1995 when she finally went to Fred Johnson to tell him that something had to be done to stop the bleeding. That day, Catherine Calculus told Mr. Johnson that she knew her old company, Widgets-R-Us, was looking for acquisition candidates. "We need to sell the widget division," she told him, "and Widgets-R-Us will give us a decent price for it."

Most of your description of the evidence will be in narrative form, because it takes less time than the point-of-view approach. The point-of-view approach, however, emphasizes the evidence discussed—because you take more time describing it—and also brings it alive. Therefore, use it for critical points. When the two primary witnesses to an important conversation disagree, use the point-of-view technique to describe what happened in that conversation according to your witness.

Pictures, charts, and diagrams also help you communicate. Use them, but choose and design them carefully. If the physical layout or location of a place is important to the case, a photograph, map, or diagram can convey the information better than words. If the storyline involves numerous characters—people, businesses, or both—a chart displaying the cast of characters can help jurors remember, especially if pictures of the people listed are included. When the lawsuit involves a writing, an enlargement of the relevant text may be useful.

The problem with most demonstrative exhibits is that they are too small, contain too much information, or are placed where some jurors cannot easily see them. It is not enough to have an exhibit that contains important information; it must communicate the information. This is especially important during opening statement, because all of the information will be new to the jury.

You must ordinarily show demonstrative exhibits to your opponent in advance so that he or she has an opportunity to object. Objections that might preclude you from using such evidence include that it is an inaccurate depiction or is argu-

mentative. Some courts have a preference for hearing objections to and admitting exhibits in advance. When the court admits evidence before trial, of course, you are free to display it in your opening.

Be careful not to overload yourself with demonstrative evidence during opening, however. Placing exhibits before the jury and removing them from the jury's view takes time and is sometimes unwieldy. If a colleague is assisting you, there may be confusion about which demonstrative exhibit you want displayed. If you are handling the charts yourself, you might find yourself uncomfortably looking through a package of poster boards trying to locate the right one while the jury grows impatient. And the jury may get bewildered if you try to present too much visual information. Remember, while their eyes scan the demonstrative trying to figure it out, they will not be paying attention to you.

You have done the work. You have your themes. You have organized the story along those themes. Your story covers all the important points. It drips with pathos. Your dog weeps as he listens to you practice it. It is clear and concise. It builds to a seemingly inevitable conclusion. It is all there. It is perfect. Thank God you wrote it all down so you won't forget any of it.

Wrong.

Reading your opening statement to a jury robs it of all of the impact you worked so hard to put into it in the first place. It sounds forced. It looks forced. It comes across as a canned presentation that is no more sincere than the telemarketing pitches we all get at dinnertime. It is no longer the story of your case; it is a script.

Remember, one element of the opening statement you are giving is the suspense—not the surprise kind, but the way the story flows from one point to the next to an inevitable conclusion. The message in telling the story this way is: "It happened the way I say it did *because it had to happen that way.*" That sense of building to the inevitable—where the pieces all fit together one way, and only that way—is ruined if you cannot remember yourself that this is the way it happened.

Notes and Outlines

It is no better—or at least not noticeably better—to address the reading problem by memorizing your written text word-for-word. No matter how hard you try to write like you speak, you speak one way and write another.

Does this mean you need to wing it? If by wing it you mean walk into the courtroom without any plan, organization, or sense of where you are going and how you are going to get there, definitely not.

Some lawyers can present a carefully prepared opening statement without notes. They are to be admired. That kind of extemporaneous address conveys solid preparation, certainty about the facts, and sincere belief in the justice of the client's position.

Most of us do not have that special talent. Notes or an outline are essential tools for us. But the function of the tools is nothing more than to help us to remember where to go next when we need that help.

Use those tools as little as possible. You want to convey the same message as the extemporaneous speaker—preparation, certainty, sincerity. Too much dependence on notes, or any written aid, cuts against those impressions.

Reliance on any form of written text also requires you to lose eye-contact with the jury. Consulting your notes does not itself create a bad impression—people expect it. But it stops you from creating a better impression by talking directly to the people who will decide the case.

Too much reliance on your written aid also ties you down physically. Wherever your notes are, you must be, or must return to. In addition to limiting your freedom of movement, this also highlights your reliance on the notes when, for example, you have to return to the lectern or counsel table to consult your notes before continuing.

Movement adds interest to your presentation. Movement is a way to give emphasis—by moving closer to the jury as you discuss a particular point, for example, or by moving to your client when you introduce him.

Jurors do a pretty good job of reading you.

It is also more interesting to watch a lawyer who moves easily around the courtroom than to watch one who remains stationary. There is probably a theory that explains why this is so, but I just know from watching lots of speakers give lots of talks that a speaker in motion is more interesting to watch.

Movement also humanizes you. There is a theory that explains this, too—at least, that is what a jury consultant once told me. After watching me question a witness in preparation for an antitrust trial, the consultant scribbled out a little chart and said: "Watch how different it looks when you have the witness go over to this chart to explain that point." And it did look different. It looked better. It was much more persuasive. It had nothing to do with the content of the chart; it had everything to do with the different way the witness looked when he got out of the chair and stood by the chart. His body language was different—freer, more confident. Moving around the courtroom while you deliver an opening statement will do the same for you.

After all I have said about careful preparation it might seem odd, but improvisation is an important tool for opening statement. Always be on the lookout for your opponent's mistakes. These give you something potentially big to work with. Maybe the plaintiff's lawyer promised something in his opening that you know he cannot deliver. Maybe the defense lawyer slid over a bad fact in voir dire in a way that created a false impression.

Be prepared to capitalize on those errors. "One thing Mr. James just told you is not true, never was true, and won't ever be true no matter how much he wishes it was." This can be a great way to lead off—not only because it places your opponent on the defensive, but also because it brings a lively atmosphere to the proceedings. Right away, the jury is confronted with a factual dispute. They know they are here to decide the case, and now you have given them something to chew on.

As you deliver your opening statement, believe in your case. Really believe in it. This might strike you as the wrong place to discuss this important rule. After all, we have already covered thinking about and constructing opening statement. If you built your opening out of whole cloth, there is nothing you can do to fix that problem in presentation.

And that is the point. No matter how good the evidence is for your version of a disputed fact, if you do not believe it, the jury will know. And if they know that you do not believe it, they will not believe it either. This hurts your client in two ways. The jury will not accept your spin on that fact. And the jury will not believe much else that you say either.

Every case gives you the opportunity to violate this rule, and sometimes the opportunity is tempting. There is some fact or circumstance that might be innocuous or might be more than that. You think that it is innocuous. But if it is more than that, it is good for your case. Why not push the envelope?

Do not do it. Jurors do a pretty good job of reading you. They probably do a better job reading you than reading the witnesses. This stands to reason, because they see a lot more of you. You are there every day. They see you during breaks and when you leave for the evening. They see you when they arrive in the morning. They are intensely interested in you. They get to know you.

I had a partner who once observed that you know that a lawyer has a bad case if any sentence he uses begins with the words: "We could argue that . . . ." Jurors know when you are doing that. Don't.

A word about objections. Objections during opening statement perform two primary functions. First, they preserve error. Second, they interrupt the other lawyer. Jurors are only aware of the second effect, and they generally regard it as ill-mannered.

If a lawyer violates a motion in limine during opening, you do need to object (unless, as sometimes happens, the lawyer violated *his own* motion). And if a lawyer gets carried away with argumentative rhetoric, an objection might be warranted—though this is far from a general rule.

A judge who has granted a motion in limine is usually pretty sensitive to the issue during opening statements. Ordinarily, you have to wait until the other lawyer finishes a statement or a question before making an objection. When the complaint is about violating a motion in limine, though, judges are often lenient about this aspect of procedure, sensibly recognizing that forcing you to let the other lawyer get the whole matter out first elevates form over substance.

You therefore need to be alert and anticipate where the other lawyer is going so that you can object before he gets there.

All jurors know what an objection is—it is a plea not to let them hear something juicy. Your task in making an objection—in opening, as at any point in a trial—is to soften the inevitable "that's bad for me" impression an objection creates. For example, an objection that a lawyer has violated—or, better yet, is about to violate—a motion in limine might be made this way: "Your Honor, I hate to interrupt Mr. James's presentation, but he has begun to discuss matters that were the subject of the ruling you made this morning." The judge will probably then call both lawyers to the bench to discuss it further.

Jurors hate bench conferences. What they see is people who were talking with them a moment before now whispering to each other. Usually, the body language makes it clear that this is something they *really* do not want the jury to hear. Jurors feel excluded. Sometimes you have to ask for a bench conference in the jury's presence. But, it is better for you if the judge calls it.

Probably the most frequent objection voiced during opening statements is the complaint that the opposing lawyer is arguing the case. In many cases, the factual disputes are really about how to characterize admitted conduct: was it reasonable, good faith, or careful behavior? In such cases, both sides' opening statements will probably be heavily perfumed with argument, and neither lawyer is likely to object to the other's opening on that ground.

In any event, use this objection only in extreme circumstances. First, jurors usually have no idea what you are complaining about. "Arguing" is what lawyers are supposed to do; it is their job. This objection is likely to leave the impression that the other lawyer was scoring good points, whether or not that is so.

Second, the kind of argument that you can rein in with an objection is often ineffective in an opening statement. It is the kind of presentation that relies heavily on telling jurors what conclusions they ought to reach when what they want to hear is *what happened.* Forcing your opponent to get back on the track jurors want him on in the first place is a poor tactic.

Handling Objections

When you are on the receiving end of an opening statement objection, *stop*. In mid-sentence. Do not try to finish your thought. You do not know what the objection will be. You surely did not intend to violate a motion in limine, but sometimes your view of the scope of the motion is different from the court's view. You do not want to run the risk of a mistrial. You do not want the judge telling the jury to disregard something you have said or otherwise calling you down in front of them.

If you try to talk through an objection, you invite these serious problems. In addition, the jury will think that *you* are ill-mannered. They will also be distracted by the objection and the tension from listening to you finish your thought.

After the ruling, pick up where you left off. If, indeed, the judge thinks that you are headed into prohibited territory, improvise your way to safe ground as if that were where you had been going all along. Do not let the objection rattle you, and do not let it appear to have rattled you. It is usually a good idea to back up mentally a couple of sentences to a point shortly before the objection, because the jury may well have lost the thread of your explanation due to the objection.

I have left perhaps the most fundamental rule of all trial tactics to last: respect your audience. Never violate that rule in your opening. Do not talk down to jurors. Do not ask them to absorb too much information too quickly. Do not show them demonstrative exhibits that are hard to comprehend, read, or see. Be clear. Speak distinctly. Let them draw the appropriate conclusions from the facts.

Jurors work with obvious limitations. They have not had—and never will have—the time you have had to digest and comprehend the facts. Most have never been to graduate school; many never went to college; some did not even finish high school. They are about to devote a day, a week, a month, or more to listening to your case, and almost all of them want to do that job well.

To them, doing the job well means doing justice. Your opening should give jurors a framework within which doing justice and deciding for your client are the same thing. Your presentation of your opening statement should convey the sense that you trust them to arrive at the correct conclusion. And it should set the stage for them to process the evidence, hear the arguments, learn the law, and do just that. □

Closing Argument: A String of Pearls written by Patricia Lee Refo, published in Litigation Fall 1998, Volume 25, Number 1, pages 37-41, 69-70.

Closing Argument: A String of Pearls

by Patricia Lee Refo

You finished the last witness this afternoon. All of the evidence is closed, and the obligatory motions have all been made. The sun has long since said goodnight.

You sit at your desk, fretting over the closing argument you will deliver tomorrow morning. It is slow going, and you are plenty tired. When your mind wanders, you remember all the times you have heard that cases are won and lost by the end of opening statements. "Maybe that's true," you think. And, if the opening-statements-win-the-case folklore is true, maybe you can go home, put your feet up after a long trial, and watch *NYPD Blue*.

Think again. Closing argument, in addition to being enormous fun for those of us who thrive on standing in front of a jury, is among the most critical parts of any trial. Done well, it can complete the stage for jury deliberations and a verdict that is favorable to your client. Done poorly, it can be a fatal blunder—a missed opportunity to make at least some jurors feel compelled to argue and vote for your client's position.

Why is closing argument so important? Because it is your only chance to tell your client's story in your words, on your terms, drawing the inferences and conclusions that you want to draw. It is your chance to talk about the other side's story and explain why that story is not credible or logical. It is your chance to put all the evidence together in a seamless, sensible package that tells the jury why their verdict should be for your client. It is your chance to do what you are paid to do—persuade.

The distinguishing feature of closing argument is, well, argument. That means drawing inferences or conclusions from the facts; talking about witnesses' credibility, motivation, or demeanor while testifying; explaining the significance of the evidence; discussing why an event occurred the way it did. At trial, the facts came from the mouths of the witnesses, from the pages of exhibits, from the deeds and words of others. But closing argument is yours. Using your trial themes and putting on your spin, you create a complete, cohesive, persuasive story. You talk to the jury not only about what the evidence *is*, but also about what the evidence *means*.

I like to think of closing argument as stringing a necklace of pearls. Throughout the trial, during direct and cross-examination, you have been finding pearls of evidence and methodically gathering them. During closing argument, you take out your jeweler's string and, one by one, string the pearls together until you have created something entirely new out of them—a beautiful necklace.

Here is a simple example. Suppose you are cross-examining the sole eyewitness who places your client at the scene of the crime:

Q: It was dark that night?

A: Yes.

Q: And there are no street lights in your neighborhood?

A: That's true.

Q: And the moon that night was totally covered by clouds?

A: Yes.

Q: There was no moonlight at all?

A: That's right.

Q: And the incident you were trying to see from your window occurred at least 200 feet down the street?

A: Yes.

Q: And even though you wear glasses, you didn't have them on that night when you went to the window and looked out?

A: That's right.

That is gathering the pearls. Try to string them during your cross, and this is what can happen:

Q: And so you really couldn't see who was on that street corner, could you?

A: Sure I could. I saw it all quite clearly, and that's why there is absolutely no question in my mind that the person I saw robbing the defenseless little old lady was your client.

But wait until closing argument to string your pearls, and you have yourself a necklace:

The only witness who claims to have seen Mr. Jones at the scene that night was Mr. Smith. The State's case depends entirely on his so-called eyewitness testimony. We know he saw *someone* robbing Mrs. Victim that

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night. But can he really say who that someone was? He was peering out a window on a dark night, with no moonlight and no street light, straining to see what was happening more than 200 feet away. And he wasn't even wearing his glasses, ladies and gentlemen. He wasn't even wearing his glasses. Can he really say who that *someone* was?

While you are stringing your pearls, remember that you have at least two goals during closing argument. One is to persuade any juror who is still on the fence to jump off the fence on your side. The other is to arm "your" jurors—the ones who already have concluded that your client should win—with enough logical and persuasive arguments to convince those who are still undecided or are leaning the other way. Once they are in the jury room, your jurors have to do the work for you. Give them as much as you can to work with. They will not be able to come back to you for more if they are losing the fight inside the jury room.

Of course, preparation of your closing statement begins long before you string your pearls. If you represent the plaintiff, start thinking about and preparing for your closing argument as you draft the complaint. Include an introductory paragraph that sets forth in *LA Law*-style brevity the theory of the case you will present in your closing argument. Doing this will not only set the tone for your complaint, but it will also help you to focus your pleading on the themes you will want to develop during discovery and, ultimately, at trial.

If you represent the defendant, start analyzing what the plaintiff's themes are likely to be as you read the complaint and draft the answer. Begin thinking about the major deficiencies in the plaintiff's case and how you will use them to your client's advantage in your closing argument. Consider how you can use your own themes to counter the plaintiff's. Which affirmative defenses have the best jury appeal? How will you argue them? What evidence must you develop to support the arguments you want to make in closing?

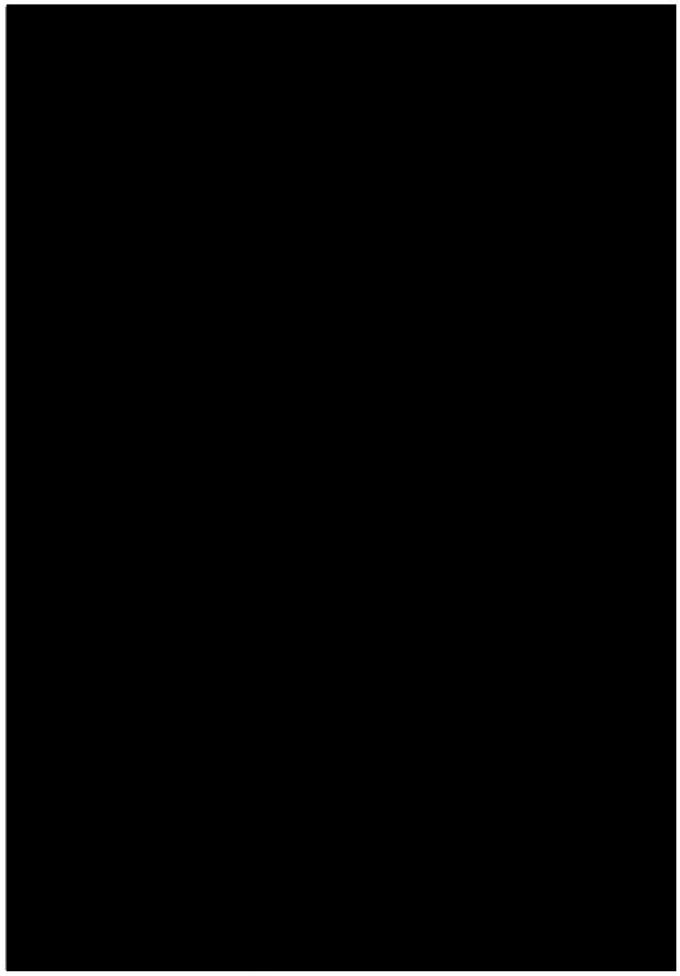
In your trial notebook—the one you start as soon as the retainer letter is signed—have a section labeled "Closing Argument" followed by blank sheets of paper. As ideas come to you during the months (or years) of discovery and preparing the case for trial, write them down. Include possible themes, analogies, stories, exhibits, ideas for visual or demonstrative aids—anything you think might be useful during your closing.

The key here is to write the idea down when it comes to you. Do not rely on your memory. Once you get into the throes of final trial preparation, you may not remember the great idea for a visual aid that popped into your head as you were driving to work last spring.

Case Notes

Go through these notes as you are preparing your opening statement, because the opening statement and closing argument should be of a piece. Some of the ideas you jotted down when the case began will no longer fit. Others of them, upon reflection, will not be nearly as brilliant or insightful as you thought they were when you wrote them down. But some will make the final cut and find their way into your opening and closing.

Add to your closing argument notes as you finalize your opening statement. By the time the trial starts, you should already have the skeleton of your closing argument.



But don't stop there. During the trial, keep notes of the things you will want to talk about or expand upon during your closing argument. Ask the other members of your trial team to make notes of snippets of testimony or portions of exhibits they think you will want to remember for closing. Writing things down when they happen is especially important if the trial lasts more than a few days. Your short-term memory will start to jettison details from the first week of trial to make room for details during week seven. But if you have been faithful about logging your ideas, much of your closing argument will be found in those notes.

I am convinced that there are as many ways to structure a good closing argument as there are good lawyers. What will work best depends upon your case, your style, your imagination, and your creativity.

There are lots of trial advocacy books on the market touting this, that, or the other model structure for the perfect closing. They are an interesting and worthwhile starting point, but that is all. Do not force your argument into a structure that is not right for your case.

You spent a great deal of time working on the themes you presented in your opening statement. You vetted them thoroughly and made sure that they would do the trick. You developed your witness examinations, both direct and cross, to elicit facts consistent with these themes and to attack inconsistencies. While you want your closing to sound fresh, closing argument is not the time to toss away the themes you started with and come up with something new. Sound the same themes that you used in opening, and show the jury

how the evidence supports your themes and your theory of the case. In other words, your themes in closing should be familiar—a sort of argumentative rehash of the major points with which you started the trial.

Remember that your opening statement is a promise to the jury of what you will prove through the evidence. Closing argument should show them that you kept your promise. Abandoning the themes you set out in opening is a full-page ad to the jury that you did not keep your promises, that you did not prove what you told them you would prove. In one of my recent trials, my opponent's opening statement characterized my client as "a scorned woman executive." In closing, however, he said that it did not matter whether or not she was "scorned." The jury noticed.

If you are representing the plaintiff, you generally will want your closing to be a complete "soup-to-nuts" explanation of why your client is entitled to win. It should be a cohesive, clear, and credible story and should address every element of every claim. As you tell the story, emphasize those undisputed facts that help you. Dwell on the other side's admissions and show how they bolster your case. Discuss the defense's major themes and refute them. They will seem less persuasive when your opponent starts to address them in his closing.

How much story narration you do as defense counsel depends on the specifics of your case. Sometimes the defense may hinge entirely on one element of the plaintiff's claim; if that is the case, you may decide to concentrate your closing on that element alone. If a big picture approach is more persuasive in your case, tell more of the story. But whatever your approach, prepare a focused attack on the vulnerabilities in the plaintiff's case. Narrate only as much of the story as is necessary to elucidate and highlight the points you want to make.

There are a few structures for closing argument that you should generally avoid. One is a witness-by-witness recitation of the evidence: dull, ineffective, and almost never persuasive enough. A good closing tells a story and weaves testimony into the story to make it flow.

You should also try not to structure your closing exactly like your opening statement because your closing is an argument rather than a prediction of what the evidence will show. And a fresh structure is more likely to keep your audience's attention.

But whatever structure you give your closing, there are a few topics that almost invariably must be addressed. One is credibility.

By definition, trials are about fact disputes. Most times, we resolve fact disputes by deciding who is more credible. Arguing credibility is more fun, and in many ways easier, than arguing arcane legal principles. Jurors make credibility judgments every day in their own lives. They know how to do it. Indeed, the standard instruction we give to jurors about witness credibility acknowledges their familiarity with making credibility determinations: "In evaluating testimony, you should use the tests for accuracy and truthfulness that people use in determining matters of importance in everyday life. . . ." Revised Arizona Jury Instructions (Civil) 3d-Preliminary 4.

Many things can affect credibility—positively and negatively. A third-party witness with no apparent ax to grind makes a very believable witness. Impeach that witness with a prior inconsistent statement, and he seems less believable. Demonstrate a relationship with one of the parties—friend, enemy, relative, ex-spouse, employee, and the like—and you suggest that the witness might be inclined to favor one side or the other.

Credibility can also be affected by the ability—or inability—to observe the events at issue or to relate what the witness saw. How well was the witness positioned to see what was happening? What were the lighting conditions? What did she say, or not say, about the event at the time? Was her testimony influenced by others who "helped" her to remember things in a particular way?

One of the most powerful ways to attack credibility in closing is to use something that happened in the courtroom right in front of the jury:

> Mr. Jones and his company are claiming, of course, that the trade association's rules are anti-competitive and violate the federal antitrust laws and that they had nothing to do with adopting these terrible rules. But we know that Mr. Jones was on the board of directors of the association the year the rules were adopted. And when Mr. Jones tried to say that he wasn't at the particular meeting when the members of the association approved the rules, we brought in the sign-in sheet with his signature on it. We proved he was at the meeting. And then what did he say to you? "Well, I must have left the room for the part of the meeting when the members approved the rules."

When making arguments about credibility, keep in mind that jurors are not predisposed to believe that a witness is telling a bald-faced lie. It is often more persuasive to argue that a witness's memory is colored by bias or that for some other reason the witness is not recalling events accurately or completely. If you choose to argue that a witness took an oath to tell the truth, looked the jury in the eye, and flat-out lied, you had better have the goods to prove it. Unless you are sure that the jurors will conclude for themselves that the witness intentionally lied to them, pull back on your throttle. If you accuse someone of lying and the jurors do not agree, they will hold it against you.

Credibility and Motive

Watch for opportunities to turn the other side's credibility arguments against them. In one of my trials, plaintiff's attorney challenged the credibility of a significant defense witness because the witness had a pending, unrelated lawsuit against the plaintiff. What were they suggesting with this attack, I asked in closing. *Surely* the plaintiff was not suggesting that persons who are plaintiffs in a lawsuit will give biased or untruthful testimony. *Surely* the plaintiff did not mean to argue that the jury should discount or disregard the testimony of a witness just because he was a plaintiff in a lawsuit.

Another theme that often recurs in summation is motive. In fact, motive can be the key element in convincing the jury to decide in favor of your client. We all accumulate information in story lines. That is how our minds help us to organize facts so that we can retrieve (remember) them when we need to. As the facts are unfolding during trial, each of the jurors is using the facts to write a story. And one of the essential elements of any good story is the "why"—why did things happen this way, why did people behave as they did, why did they write what they wrote or say what they said. If you do not fill in the why, your story has a hole in it. If you are lucky, the jury may fill in that hole for you, but they might instead decide that your story does not hold water because you have not shown them *why* people would have behaved as you say they did.

Sometimes the why is easy. The company defrauded consumers to sell more of its products. The manufacturer concealed the defect to hold down production costs. The plain-

tiff claims his injuries are worse than they really are because he is trying to inflate his claim.

In more complex cases, however, motive often becomes both more intricate and less obvious. Your job as the advocate in closing is to simplify the motive—that is, to explain it in terms that the jury will easily understand.

In my experience, it is crucial to explain why things happened the way they did even when motive is not legally significant. In a breach of contract case, for example, it may not legally—or "technically"—matter why the defendant breached the contract. But a good plaintiff's lawyer will deal with it in closing nonetheless:

> We know the bank wanted out of the construction loan it had committed to fund on the Bougainvillea Acres project. The head of the bank's Real Estate Department as much as told you that himself. Remember his testimony about how the bank had made a strategic decision not to make any new construction loans on real estate developments that were out of state? Out-of-state loans were too risky, they decided, because they couldn't monitor the construction well enough from so far away. They didn't want to be involved in new out-of-state loans any more. And Bougainvillea Acres was a construction loan. And it was out of state. And it was just like a new loan because the bank had not yet funded a penny on the project. They wanted out, and they manufactured a default under the loan documents so they didn't have to fund the new, out-of-state construction project.

Explaining the "why" is one way to get the jury to accept the "what" that you want them to.

Organizing your closing argument is every bit as important as deciding what themes and substance to include in it. Every jury consultant and teacher of advocacy will tell you that you have the jurors' attention most completely when you first stand up to begin your closing. They are interested. They are looking forward to what you have to say. You have their near-total concentration.

Showing the Jury

Warning: This will not last long. In a matter of moments, Juror Number 4 will be doing her mental grocery list, Juror Number 7 will be planning the starting line-up for the Little League team he coaches, and Juror Number 1 will be wondering why on earth you ever bought such an ugly tie. The attention span of the average juror is short. As more Generation X-ers join our juries, the average will sink further.

Use those precious first moments effectively. Do not squander them thanking the jury for fulfilling their civic duty, for their patience and attentiveness during the trial, blah, blah, blah. Instead, put together a short—two to five minutes, depending on your case—executive summary of the closing that is to follow. Use that summary to tell them why they should find for your client. Deliver that summary without notes, making as much eye contact with the jurors as possible. It will be a strong start—one that the jurors are likely to remember even if they lose their focus.

All of us think that the best ideas are the ones we thought of ourselves. That is simply part of the human psyche. We are much more personally committed to defending the correctness of a position we arrived at on our own than one that was told to us by someone else.

Jurors are the same. The views they will defend most vigorously when they begin deliberations, and the ones they are least likely to abandon, are not the ones you told them but the ones they believe they figured out for themselves. As an advocate, then, you would rather *show* the jury than *tell* the jury.

What does this mean? Here is an example. In a mock trial, Dominic Gianna of New Orleans was representing an insurance company that refused to pay a fire claim because it contended that the fire was caused by arson. The plaintiff—a dry cleaning establishment—claimed that the fire had started through spontaneous combustion caused by some cleaning rags piled in a warm spot near the hanging clothes. Dominic began his closing argument for the insurance company by holding up some dry cleaning and saying, "Ladies and gentlemen, if at any time during my closing argument this dry cleaning spontaneously combusts, I want you to stop me." The jury got the point.

Do not make the mistake of thinking that you can ignore difficult evidence.

A product liability case tried a few years back involved an automobile that caught on fire. The driver died within a minute, and the defense argued that the driver had not suffered because he died so quickly. In his closing, the plaintiff's counsel set the scene of the accident. He described the start of the fire and how the flames began to consume the interior. Then, he started his stopwatch and simply stood still in the silent courtroom for a full minute. He showed the jury that in a burning vehicle, a minute is an eternity.

Sometimes showing the jury can be entirely inadvertent. Some years ago, my partner Warren Platt defended a case against a plaintiff who had tripped over a power cord, fallen, and suffered severe brain damage. The plaintiff was drunk when the mishap occurred—too drunk to put his hands in front of his face, the defense claimed. During his closing argument, plaintiff's counsel tripped over a microphone cord in the courtroom, but because he was not drunk he broke his fall with his hands and was not injured. The jury returned a defense verdict in 15 minutes.

You can also show the jury through stories and analogies. Indeed, these can be some of the most effective tools in closing argument. Using common or shared experiences, or relying on a story that everyone knows or can readily appreciate, allows you to show the jury what you mean.

Two caveats about stories and analogies. First, keep them simple. If your story is too long or too complex, you will lose the jury and defeat your purpose. Second, look at your story from all possible angles to be sure that your opponent cannot turn it around and use it effectively against you during her closing.

In addition to developing your own themes and telling your own story during closing argument, you will also have to deal with the facts that cut against your case. There are bad facts in every trial. If there were not, you would have prevailed on your motion for summary judgment. If you have done your homework, you will know ahead of time what the bad facts are and

will develop a strategy about how best to deal with them. Still, your opponent has probably added at least a few bad facts to your list during trial. Your job is to neutralize them in closing.

Do not make the mistake of thinking that you can ignore difficult evidence and hope that the jury will not notice. They will, and—even worse—so will your opponent:

> Ms. Dance didn't say a word in her closing argument about Fred Patterson. Mr. Patterson said John Smith, the president of Giant Corp., told him they wanted out of the contract with Little Co. because the profit margins weren't high enough. Remember that? You heard that testimony from Mr. Patterson only because we subpoenaed him to come testify in front of you. It was devastating testimony for the defense, and Ms. Dance didn't even mention it when she stood up here and talked to you. She didn't want to talk about it because there is nothing she can say that will make it go away.

Where is the best place in your closing to deal with the bad facts and address the weaknesses in your case? Most times, you will decide to do it somewhere in the middle of your argument, reserving the start and the conclusion for more positive and helpful material. If you represent the plaintiff in a jurisdiction that allows rebuttal, you can consider not raising harmful points that you think your opponent might miss. If your guess is incorrect, you can then answer in rebuttal. But if the facts are really troublesome, your opponent will argue them and you risk looking defensive by not addressing them first.

You will almost certainly want to use exhibits and visual aids during your closing. The questions will be which ones, and how many is too many. And the answers may turn upon what technology you are using.

If you have never tried a paperless case—one in which all the exhibits are stored electronically, called up by running a light wand over a bar code, and displayed on TV monitors—check it out. The technology is becoming less expensive, and it allows you to bring up a page of an exhibit with literally a flick of your wrist. Then you can highlight or zoom in on the portion that is most important with a stroke of the wand. For purposes of closing argument, this technology substantially reduces the fumble factor of working with transparencies or blowup boards. It will undoubtedly make your presentation smoother.

But whether you are using the latest technology or the paper copy method, you will want to review key exhibits during your closing. Show the jury the exhibits and explain how they corroborate your witnesses or prove critical elements of your case. Do not be shy about showing the jury exactly what words you want them to focus on. And do not assume they will remember those words—or even those exhibits—from the trial. In any exhibit-heavy trial—and particularly where the jury is permitted to take notes—tell them specifically and by exhibit number which of the mountain of exhibits you want them to review when they retire to deliberate.

When you are using exhibits or other visual aids in the courtroom, be sure to consider the overall impact of what you are doing. Make sure that the jury can read the visual aid from where they are sitting. If you are vertically challenged (i.e., short, like I am), do not use huge foam board blowups on a big easel that tower over your head. And avoid positioning blowups, easels, and the like so that your opponent has an excuse—"I can't see the exhibit"—to stand next to the jury during your closing.

As you think about what themes to argue, what words to use, what exhibits to show, give some thought to the instructions that the jury will use to decide the issues. In Arizona, juries are now given preliminary instructions on the law at the beginning of the case and therefore have blueprints for reference as the evidence comes in. But whether the jury is instructed before or after closing, you will want to highlight key instructions in your argument.

You can do this in three ways.

First, highlight those instructions that are most important to your theory of the case. If your principal defense in a negligent misrepresentation case is that the plaintiff never relied on the allegedly false information, zero in on that element:

> The judge has instructed you about the elements of negligent misrepresentation. There are six separate elements to a negligent misrepresentation claim, and the plaintiff has the burden of proving every single one of those elements to you. The element I want to focus on right now is number 4: XYZ Corporation has to prove that it *relied* on the test data we provided to them. That means that they used it, they trusted it, they incorporated it somehow in the research project they were doing. But we know they didn't. We know they hired at least two independent expert scientists to perform the very same tests we did. And it was the test results from their own experts, not the test results we gave them, that they used in their research project. When they used the results from their own experts, they didn't rely on our test data.

Be careful not to be condescending, but better to be safe than sorry.

Second, spend some time talking about any important instruction that, because of the way it is written or because of its complexity, may be unclear or confusing. While many jurisdictions have made great strides in improving the comprehensibility of jury instructions by writing them in English instead of lawyer-speak, some instructions are still difficult to understand. In one of my trials not long ago, the jury was instructed on a quantum meruit claim to determine whether "it was not unfair for the defendant not to have paid" for the plaintiff's services. Any instruction with a triple negative deserves—probably requires—some explanation in your closing.

Third, address the verdict form. This is especially true if the verdict form includes any special interrogatories or has multiple questions or parts that the jury must work its way through. Show the jury the form, perhaps as a blowup or on a screen. Walk the jury through the form, item by item, and show them where and how to fill out the answers that you want. Be careful not to be condescending, but better to be safe than sorry. It is simply not worth risking a hung jury or an adverse result because the jury did not properly understand how to fill out a complicated verdict form.

As you craft your closing, you need to remember that there

(Please turn to page 69)

Closing Argument

(Continued from page 41)

are some things you cannot do or say. Most are obvious but are important enough to list anyway.

1. **Do not misstate the law.** If you lost the argument at the instruction conference, you lost. Until the judge is reversed on appeal, the law is exactly what he says it is. Period.

2. **Do not misstate the evidence.** It is unethical and it is usually ineffective. The jury will remember what the evidence was, or your opponent will remind them, and they will hold it against you for trying to hoodwink them.

And do not misuse evidence that was admitted only for a limited purpose. Say a condominium association is being sued by someone who fell on a broken portion of the sidewalk in front of the building. The association defends, in part, by saying that the sidewalk was controlled by the city rather than by the association. The fact that the association repaired the sidewalk after the accident may be admissible for the limited purpose of showing ownership or control. You may be tempted to argue that the fact that the sidewalk was repaired proves it was dangerous to begin with. Do not do it.

3. **Do not argue your personal beliefs.** You cannot do it, not ever. Read Rule 3.4(e) of the Model Rules of Professional Conduct.

4. **Do not argue that the verdict will affect the jurors.** It is not permissible to tell them that their phone bills will increase if they enter a verdict against your client, the phone company. You may not tell them the defendant will commit other crimes in the community unless they convict him this time. You may not argue that the jurors' automobile insurance premiums are so high because of frivolous claims like the plaintiff's.

Likewise, you may not ask the jurors to put themselves in the shoes of one of the parties. You are not allowed to argue, for example:

> Imagine what your life would be like if you could not walk any longer. Think about all of the things you would no longer be able to do, and all of the things your spouse or children would have to do for you. And ask yourself how much money you would want if you were the one who had been put into a wheelchair for the rest of your life.

5. **Do not attempt to appeal to racial, ethnic, religious, or other prejudices.** You may not argue, suggest, or even hint that the jury should consider such things in reaching its verdict.

6. **Do not violate any of the judge's prior rulings.** If the judge struck an answer and ordered the jury to disregard it, you may not bring up that answer in closing. If the court rules that you may not argue a particular measure of damages, do not argue it.

Delivery

Now that you have decided what—and what not—to say, you need to find the best way to say it. You could spend hours crafting the perfect closing argument, but if it is delivered in a monotone, with your face in your script and your feet bolted to one spot on the floor, all of your efforts will have been for nothing. To be persuasive you must be interesting, and to be interesting you must use all of the available tools.

Do not write out your closing, word for word, line for line. With a written script in front of you, the temptation to read it will be overwhelming. And reading will not work. Name the last person you saw reading a script who came across as natural, at ease, and sincere.

Instead of a script, use an outline. Prepare an organized list of the points you want to make and refer to it as often as necessary to make sure you do not omit anything. You will leave something out anyway—we always do—but the outline will ensure that you do not leave out something important.

Working from an outline will make your argument more lively and spontaneous, and will allow your sincerity and conviction to show through. It will also give you the freedom to move around as you deliver your closing.

With a script, your feet cannot do very much because they are essentially bolted to the floor behind the podium. With an outline, you do not need your notes every second, and you will be free to move away from the podium. You can get closer to the jury (but not too close—leave at least two feet between you and the railing in the front of the jury box), and you can *talk* to them instead of lecturing them from behind a podium.

Move out from the podium, plant yourself in a spot for a few moments, and make a few points. Then, when it feels comfortable or when you want to use your movement to underscore a point, move down the jury box a few steps. Try to avoid standing in front of any one juror the whole time. Include all of them.

Eye contact is another way to increase the persuasive power of your closing. It is also another good reason not to use a script: it is virtually impossible to maintain good eye contact when you are reading something. But be sure not to look at any one juror for too long—after about 20 seconds or so, your good eye contact can start to feel like rude staring.

You want your voice to be clear, loud enough to be heard at all times, and filled with inflection. Your voice will not be at its best if your lungs do not have enough air, so be sure to breathe properly with deep breaths that pull the air into your lungs. Practice a few good breaths while you are sitting down, waiting to start your closing. And concentrate on your breathing in the first moment or two of your argument. Good breathing will not only make your voice stronger, it will also help to allay the nervousness we all feel when we stand before the jury.

And be sure that your voice has good inflection. Variations in pitch—highs and lows—make you more interesting and can be used effectively to express incredulity, sarcasm, bewilderment, and a range of other feelings.

Use your volume knob as well. Turn it up or down from time to time to vary your presentation and to emphasize. Depending on your personal style, dramatically dropping your volume can punctuate a point just as well as speaking loudly.

Silence is one of the least used tools in a closing argument, but it can be one of the most effective. Jurors pay attention to silence. Like all of us, they are waiting for someone to fill it with sound. All too often we oblige them and start talking again because we, too, are a little uncomfortable with silence.

Concentrate on making silence work for you. When you have just finished making an especially important point, stop, be quiet, and stand still.

Let it hang there for a moment. Use silence to put an exclamation point after what you have said.

If you enjoy being a trial lawyer, giving a closing argument should be one of the most exciting and challenging things you can do. And perhaps one of the most important. After all is said and done, we trial lawyers are paid to argue on our client's behalf. Closing argument is our opportunity to do just that.

Appeals: The Classic Guide written by William Pannill, published in Litigation Winter 1999, Volume 25, Number 2, pages 6-11, 61.

Appeals: The Classic Guide

by William Pannill

When you want the best advice on handling an appeal, turn to the classics. The classic book about how to write a brief and argue an appeal is *Effective Appellate Advocacy*, by Colonel Frederick Bernays Wiener. It originally appeared in 1950. Although revised and reprinted with new cases and examples in the 1960s and 1970s under the title *Briefing and Arguing Federal Appeals*, Wiener's book is now out of print and largely forgotten. Yet Wiener's treatise is one of the finest books ever written about briefing and arguing an appeal. I have read it again and again.

I came across *Briefing and Arguing Federal Appeals* early in my career in a large law firm. Although I had a graduate degree in journalism and five years of writing for daily newspapers, my briefs kept running aground on the partner for whom I worked. One day, in the time when legal self-help books were rare, I saw this book on the shelf in the firm library. I read it straight through. That single reading turned me into an effective brief writer. My next brief made it past the partner in charge and into the court of appeals, where it won the case.

For years, I thought anyone writing a brief would have read this book. Yet for a quarter of a century I never encountered another lawyer—except for some of the editors of this magazine and the lawyers in my own law firm—who had read it. I have listened (as required) to dozens of speeches about appellate practice and read even more papers from courses of continuing legal education on the subject. Not once has an eminent speaker or author mentioned Wiener's book.

As a result, I have been able to keep to myself for 25 years this wonderful guide to the art of appeals. For an appellate lawyer, owning the book was like owning the formula to Coca-Cola. Colonel Wiener died in 1996 at the age of 90. Reluctantly, I have decided that now is the time to part with this great secret before the book and I both disappear.

Why is the book so good? In part, it is because Wiener was such an elegant legal writer. Wiener's style of writing aims at clarity above all else. It is far superior to most legal prose. Here is Wiener's statement of purpose for his work:

> Advocacy needs to be taught, and it needs to be learned. Too many, far too many, lawyers burden appellate courts with poorly prepared, poorly presented, and thoroughly unhelpful arguments—for which they receive, and clients pay, substantial and not infrequently handsome fees. Lawyers, like other professional men, can be divided into the classic threefold scale of evaluation as able, unable, and lamentable. Nonetheless, and after making due allowance for the frailties of mankind, it is really amazing how few good arguments are presented and heard, quite irrespective of the tribunal concerned. About a dozen years ago, I was told by a Justice of the Supreme Court of the United States that four out of every five arguments to which he is required to listen were "not good" . . .

Effective Appellate Advocacy at 6.

In my experience, you can expand Wiener's lament to include briefs. He concludes:

> The present book is a response to the conviction that there is nothing mysterious or esoteric about the business of making an effective written or oral presentation to an appellate court, that the governing principles of that process can be extracted and articulated and therefore taught, and that any competent lawyer has the ability, with study and proper application, to write a brief and make an argument that will likewise be competent—and that will further his client's cause.
>
> *Briefing and Arguing Federal Appeals* at 6-7.

Wiener—known as Fritz—graduated from Brown University in 1927 and Harvard Law School in 1930, where he was an editor of the *Harvard Law Review*. He developed his craft as a government lawyer in the 1930s, after Felix Frankfurter brought him out of private practice to join the New Deal in Washington. He worked in the Department of the Interior, served as a captain in the Judge Advocate General's Corps of the United States Army during World War II, and served for several years in the Office of the Solicitor General of the United States. He rose to become Assistant to the Solicitor

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General before he resumed private practice in 1948.

Perhaps Wiener's most famous exploit as a private lawyer was persuading the Supreme Court of the United States to reverse itself on rehearing—a feat as rare then as it is now. *Reid v. Covert*, 354 U.S. 1 (1957). An Army court martial had tried a military wife in Japan for killing her husband and sentenced her to life in prison. In a companion case, an Air Force court martial had tried a sergeant's wife who had killed her husband in England and sentenced her to life in prison. The Supreme Court first held in the 1956 Term that courts-martial could try civilians accompanying the armed forces overseas. But Wiener persuaded the Court to grant rehearing, and the Court changed its mind the next year by a vote of 4 to 3, holding that courts-martial had no power to try civilians in peacetime.

Writing the Brief

Wiener's principles of brief writing and argument render his book invaluable. If you follow his precepts, it is impossible to write a bad brief or give a poor argument. Here are the points on brief writing I consider the most important:

1. *Write the statement of facts so that the facts alone will make the court want to decide the case in your favor.*

Remember that the briefs will almost always decide your case. Not only are oral arguments disappearing in appellate courts under the drive for efficiency, but many judges read the briefs and make up their minds before they hear argument. So you cannot dash off a bad brief and cure that with oral argument. You should put the kind of effort and skill into writing a brief that a poet or novelist puts into his art, for when you write a brief you are a professional writer.

Wiener writes that, "In many respects, the Statement is the most important part of the brief." *Effective Appellate Advocacy* at 52. In my experience, the facts are *always* the most important part of the brief. The facts make each case stand out; the facts are what the judges strive to learn from the brief. If you can explain the facts of the case in your brief, clearly but completely, you have taken a giant step toward persuasion of the appellate court. As Wiener put it:

> Here the task is to present the facts, without the slightest sacrifice of accuracy, but yet in such a way as to squeeze from them the last drop of advantage to your case - and that is a task that in a very literal sense begins with the first sentence of your Statement of Facts and continues through the last one (in which you set forth the opinion or judgment below).

Briefing and Arguing Federal Appeals at 49.

Yet, most lawyers fail to use the facts to persuade. Only last year, I saw the appellees drop a five-page summary of the facts of an immensely complicated case into a 50-page brief. The statement of facts should not be an afterthought or a summary that you scribble out of the case file. Properly written, it is a complete story of the vital events and procedural history of your case. Your job as an advocate is to bring the case to life in the minds of the readers so that they incline to your side.

Wiener recommends writing the statement of facts before you take up any other part of the brief. That forces the briefwriter to lay out his entire case on the facts—to tell the story of the case—before he begins any of the argument. This leads to the second of Wiener's principles.

2. *Never argue or editorialize in your statement.*

The shrieking statement of facts has become more and more a part of brief writing as the "me generation" takes over the courts. Your goal is for the court to accept your brief as the most accurate and complete statement of the case. When you begin to argue or snipe at your opponent, the court's guard instantly goes up and you lose the value of the statement as a means of persuasion. Wiener makes the point this way: "[A] court reading a statement wants to feel that it is getting the facts, and not the advocate's opinions, comments, or contentions." *Effective Appellate Advocacy* at 64.

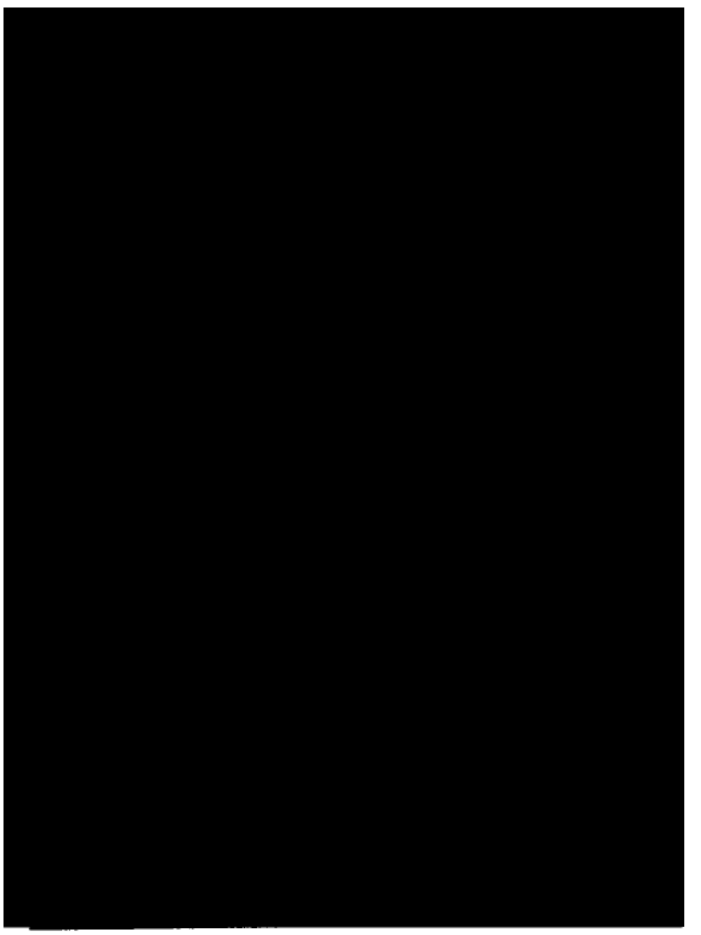
The way you write a statement of facts that persuades is to tell a complete story. Arrange the facts in logical order—usually chronological. But work at stating all the facts that are material to your case. Wiener puts it this way:

> In short, write your statement of facts from beginning to end, from the first paragraph to the last, with this one aim always before you: to write your Statement so that the court will want to decide the case in your favor after reading just that portion of your brief.

Id. at 54.

This is a much easier principle to state than to execute. I usually spend the majority of my writing time pulling the facts together. The statement requires constant trips to the record while you check facts and select testimony or exhibits to work into the statement.

The advantage of Wiener's way of writing the statement is that you will look at your case in a different way if you recite the facts fairly. Even if this is your first time with the



case, writing the facts forces you to understand and organize the evidence in your own mind in a way that reading alone will not. You will see connections between facts that you did not recognize before. I think of it as turning a diamond in the sunlight. The brilliance of the gem flashes in different ways as it revolves.

The effort to put the facts together so that they persuade without argument yields many dividends. Like a novelist, you have to arrange and compress facts to produce a readable narrative. With a thorough knowledge of the record, you will seek out and find evidence to paint a picture of the plaintiff and the defendant that illuminates the situation in the readers' minds. Wonderful material often lies overlooked in the record. You have a reason to search for it and use it.

Wiener gives several examples of an effective statement of facts. Here, for example, is a paragraph from an appeal by the United States to the Supreme Court. The government asked for review of a case in which a man called up by the draft on the last day of World War I, but not taken, had obtained a judgment 25 years later that awarded him an honorable discharge and veterans' benefits.

> Pursuant to the provisions of Section 2 of the Selective Draft Act of 1917 (c. 15, 40 Stat. 76, 77-78) and regulations promulgated thereunder, respondent James John Lamb was ordered by the local draft board at Davenport, Iowa, to report for military duty at 9:00 a.m. on November 11, 1918 [Armistice Day] (R. 2-3). The order recited that "From and after the day and hour just named you will be a soldier in the military service of the United States" (R. 13). He reported at the time and place fixed in the order and was appointed leader of a contingent of drafted men who were to travel to Camp Dodge (R. 3-4). Before actually entraining for camp, however, he was orally notified by the local board that he should not entrain because of cancellation of all calls for induction and mobilization (R. 4-5). The cancellation had been made by order of the Provost Marshal General under instructions of the President, the contents of the order being communicated to all State draft executives by telegram on November 11, 1918 (R. 16). On November 15, 1918, respondent was notified in writing by his local board of the cancellation order and advised that "such cancellation in cases of registrants who were inducted has the effect of an honorable discharge from the Army" (R. 5, 15). On January 26, 1919, respondent received a certificate entitled "Discharge from Draft" on Form 638-1, A.G.O., dated November 14, 1918 (R. 5-6, 17).

Id. at 243. The entire brief appears in *Effective Appellate Advocacy* at 242-51.

In writing the statement of facts, you are creating a mosaic using many different bits of the record. You may use testimony and other evidence, but you may also use the pleadings, documents from related cases, the lower court's own judgment and opinion, its findings and conclusions, the docket sheet—anything that fairly illuminates the case. You must bring the case alive for the appellate court.

3. *Always be accurate.*

"If the court finds that you are inaccurate," Wiener says, "either by way of omission or of affirmative misstatement, it will lose faith in you, and your remaining assertions may well fail to persuade." *Briefing and Arguing Federal Appeals* at 49. This is another way of saying that like all advocates, the most important quality you have is your credibility. When court or jury ceases to believe in you, they will also cease to believe in your case.

One way to make sure of accuracy is to insert a record reference for each sentence in the statement of facts. Although a tedious and time-consuming process, that will force you to test your statements of the facts against the record.

Citing to the record also allows you to review crucial testimony and other evidence you might overlook when you write from a digest. As different facts take on new significance, you will find yourself modifying your arguments—or thinking of entirely new ones (which, with any luck, you have preserved in the trial record). Write those ideas down (mine usually come in the middle of the night), because some of them will improve your brief.

Tell the court about the facts that hurt you.

Err on the side of understatement. Understatement forces you to build your case through successive record references. Do not risk losing your credibility by stating something as fact that the judges cannot find in the record.

I constantly encounter briefs that tell only part of the story. When you are answering, read not only your opponent's legal citations—some of which will probably turn out to help you—but also the record references. Misstatements of fact impeach a brief as much as a witness.

4. *"Grasp your nettles firmly."*

Tell the court about the facts that hurt you. Lawyers constantly violate this principle. Every case has some bad facts, or it would not have gone to trial in the first place. It is tempting to ignore facts that go against you, in the hope that the appeals court will not pick up on them. But an alert opponent will point out every one of your omissions to the court. As Wiener says, "No matter how unfavorable the facts are, they will hurt you more if the court first learns of them from your opponent." *Effective Appellate Advocacy* at 55.

There are several reasons behind Wiener's suggestion that you explain the problems in your case. If your client has done some questionable things, you should be the one to explain and mitigate his actions, if possible. Moreover, some of the facts that seem to hurt your cause may have a reasonable explanation that a court may well accept if the court hears about the problem from you.

5. *Index the record.*

Wiener offers several suggestions for writing the statement of facts. The most vital is to prepare an index of the entire record. That means that the briefwriter must also read the record. Wiener puts it bluntly: "The painful but inescapable preliminary to writing the Statement is reading the record; there just isn't any short cut or laborsaving gadget to spare the man who actually pushes the pen." *Effective Appellate Advocacy* at 102.

It takes time to read and digest any record. But you can hardly arrange the mosaic without sorting the tiles. Even if you are a senior partner who leaves it to the juniors to write the briefs, Wiener says you must still read the record:

> No lawyer, and I will say it dogmatically, here and now and many times again, should ever risk his reputation by arguing a case on a record he has not read. And since you should read it anyway, the time for that reading is when the process can still influence the brief.

Id. at 105.

Wiener recommends making handwritten notes—or better, dictating the notes. Here is one place where dictation has a place in the writing of briefs. For actual composition of the brief, you should write it yourself by hand or by typing. Dictation produces wordy writing.

Once you have written a clear statement of the facts, you can begin the remainder of the brief. Follow Wiener's advice about the argument.

6. *Phrase the "question presented" by the appeal so that the question will lead the reader to answer the question your way.*

The most memorable pages of Wiener's book are the ones in which he collects examples of how to state the question presented. The question presented is the first of your argument that a federal appellate court sees. Many state appellate courts follow the same practice. Even Texas, which long required the advocate to state points of error, now allows the use of a question. Tex. R. App. P. 38.1(a). The question presented is therefore your first opportunity to persuade the court.

Wiener offers two forms for presenting a question. The first form is to write a sentence that begins with "whether," e.g., "Whether postmortem declarations are admissible." The second—for use in complicated cases where you cannot cram the essential facts into a single sentence—consists of a statement of the most important facts followed by a statement of a simple question, *e.g.*, "The question presented is whether in these circumstances the later proceeding is barred by the earlier judgment." *Effective Appellate Advocacy* at 74. The challenge for the appellate lawyer is how best to write either kind of question.

Wiener says the "essential technique" for writing an effective question is "to load the question with the facts of the particular case or with the relevant quotations from the statute involved," fairly stated, so that "you can almost win the case on the mere statement of the question it presents." *Id.* at 74. Here, for example, is the question in the Armistice draft case quoted above:

> Whether a court may, by mandamus, order the Secretary of War to issue an "Honorable Discharge from the Army" to an individual who received a "Discharge from Draft" in 1918, over 25 years prior to the institution of suit, where such individual simply reported for induction on November 11, 1918, returned to his home on that day because of the cancellation of all draft calls by order of the President, never entrained for travel to a military camp, never wore the uniform, and never was accepted for military service by the Army.

Id. at 76, 243. The court of appeals had held in the draftee's favor. The Supreme Court unanimously reversed the court of appeals—"a mere thirteen days after oral argument." *Id.* at 76; *Patterson v. Lamb*, 329 U.S. 539 (1947).

Like drafting the statement of facts, drafting the question presented requires concentration and (in my case) many drafts. You must know the case so well that you can sum up the argument in a single sentence.

7. *"Think before you write the argument."*

This is the hardest of Wiener's admonitions for me to follow because I am always behind schedule and under deadline pressure after pulling together the statement of facts. But he is right: "Never start to write until you have thought the case through and completed your basic research." *Id.* at 106. If you write too soon, the final brief reflects it—just as the wall you build will not stand straight if you have not strung it out beforehand.

An equally good reason to plan your argument and read the cases is that "the basic authorities are always full of suggestive leads for further development." *Id.* But how do you know when you are through with the research? Wiener says, "The only answer is, you come to sense it." *Id.* Then, you start to write.

I have never been able to outline an argument on paper as Wiener suggests. Writing the statement of facts and doing the research sets up the argument in my mind. A formal outline would doubtless work better. Whatever your method, do not hesitate to move sections of the argument all around in later drafts. You must find the strongest point in your case and lead with that.

Remember, writing is thinking. Revisions trim and simplify your argument. Every changed word or crossed-out sentence helps you perfect the flow of your argument. Go through as many revisions as time permits. Your goal is to write an argument that your opponent cannot answer. No one produces arguments of that kind in the first draft.

Grab your opponent by the throat with the very first sentence of your argument.

8. *"Never let the other side write your brief."*

If you take away only one idea from Wiener's book, take this one. I have seen myriad briefs that begin by reciting the other side's argument. The purpose of your argument is to persuade the court that your position is the correct one. Restating the other side's contentions will not help you do that. Restatement can only persuade the court that your adversary's position is correct.

I knew an appellate lawyer who was such a fine writer that he restated the adversary's contentions before each section of his own argument far better than his adversary had stated the matter to begin with. I call this throat-clearing: The lawyer was writing the other side's argument to make sure he understood it. Start with your argument, not your opponent's.

Grab your opponent by the throat (figuratively, of course) with the very first sentence of your argument, and say something positive. "The lower court erred because . . .," or "The evidence proves that . . ." In the rest of your argument, refer to your opponent in passing as you knock down his contentions. Rebut your opponent's point as you state your own.

Wiener tells you not to write a responsive brief that merely

answers the other side's argument point by point: "Don't follow the appellant's outline of points, even when you must reply to all of them. Put your own strongest point first, because what may be strongest for him may not be so for you." *Id.* at 107. Wiener illustrates this point with an anecdote. A solicitor general asked one day when the government's brief in such-and-such a case would be ready. The reply came back that the lawyer had not started drafting the brief because he had not yet received the appellant's brief. "What's the matter?" asked the solicitor general. "Haven't we got a case?" *Id.*

Drop weak points. Weak arguments in your brief will dilute all your other arguments. If you think you must include every conceivable argument regardless of its strength, remember what Wiener says: "Indeed, critics of outstanding competence have emphasized that it is the ability to discern weak points, and the willingness to discard weak points, that constitute the mark of a really able lawyer." *Briefing and Arguing Federal Appeals* at 96.

9. *Always use argumentative headings.*

The most useless heading I encounter in a brief is: "*I. Introduction.*" It tells the reader nothing. It grabs nobody and goes nowhere. And yet I have seen it in dozens of briefs.

You write every word, every sentence, and every paragraph in the argument of a brief for only one reason: to advance the argument. It follows that headings, too, should advance the argument.

In many briefs I see headings like, "The defendant was negligent." That is better than "Introduction" or even "Negligence," but all it does is make an assertion. The statement proves nothing.

Each heading should sum up the argument of each section.

What you want to make is an argument, and you make an argument by telling the reader why: "The defendant was negligent because he saw the train approaching at a high rate of speed but did not wave his red flag at the plaintiff." That kind of heading boils down your argument on that point into a single sentence. If you work hard enough on the sentence, it will stick in the court's mind.

Wiener gives an example of "how not to do it," using what the newspapers call label heads, i.e., verb-less headings:

> II. The Rule of Jurisdiction Invoked by the Court Below Is Not Unconstitutional.
>
> A. The Intent of Congress.
>
> B. The Constitutional Considerations.
>
> C. The Application of the Constitutional Considerations to this Case.
>
> D. The Effect of Petitioners' Contentions.

Id. at 71-72

Go back to recent briefs you have received. Many will contain headings of this type. They tell you nothing of value to the argument. Wiener writes:

> Every one of the subheadings is blind, giving the reader no clue whatever to the substance of the argument; and the principal heading is only assertive. It falls short of being argumentative because it does not explain why the rule being appealed from is not unconstitutional—a matter of more than passing importance, since that was the vital issue in the case.

Effective Appellate Advocacy at 73.

Do not use argumentative headings in the statement of facts. Label heads work well in the statement of facts, where you wish to appear objective. But label heads do not argue. An argumentative heading grabs the reader and pulls him into the argument.

Repetition

There are other advantages to the argumentative heading. Repetition drives a point home, as advertising shows us. But you had better not repeat yourself in today's era of page limits and time constraints. As Judge McGarry said in these pages, "Say it once. Say it right—but say it once." *McGarry's Illustrated Forms of Jury Trial for Beginners*, 9 LITIGATION, No. 1, at 42 (1982). The argumentative heading allows you not only to repeat your main arguments **but to do it in boldfaced type**. Of course, you do not want to start your argument under each heading with the exact sentence you have just used for a heading. But each heading should sum up and encapsulate the argument of each section of the brief.

Wiener points out another advantage of the argumentative heading: A series of argumentative headings turns the table of contents into a powerful tool of persuasion. The reader can scan the table of contents and see not only the complete history of the case but also each point of the argument. *Effective Appellate Advocacy* at 70.

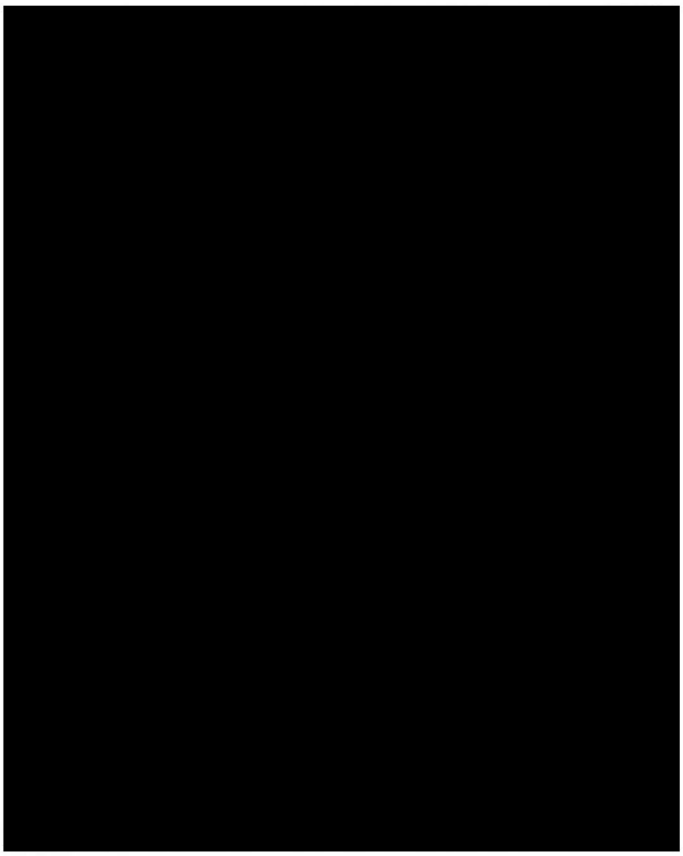
10. *Do not use footnotes.*

Wiener makes a persuasive case against footnotes in briefs. He says:

> Perhaps no single implement of all the vast apparatus of scholarship is so thoroughly misused in the law as the footnote. There may be some justification in the manifold sphere of the academic world for that formidable display of learning and industry, the thin stream of text meandering in a vale of footnotes, but that sort of thing is quite self-defeating in the law, because it makes the writer's thoughts more difficult to follow—and hence far less likely to persuade the judicial reader.
>
> The worst offenders on this score are undoubtedly the law reviews, whose student editors have at least the excuse of still being at the apprentice stage, and whose faculty editors may have had but insufficient opportunity to gain firsthand acquaintance with judicial psychology. Next in order are the attorneys at law who are not lawyers but who like to make a show of erudition.

Id. at 157–58.

Nevertheless, Wiener believes there are occasions on which you may use footnotes. Here I disagree with the master. I do not believe anything justifies a footnote in a brief. The purpose of a brief is to get read. Anything that interferes with reading jars comprehension. What greater interference can there be for a reader than to stop his eye at the top of the page and drop it down to the bottom to read small type single-spaced?



Your goal in a brief is to hook the reader with the first sentence and pull him inexorably from each sentence to the next until he has read the entire brief. You want to turn your product into a legal thriller. You may not attain that goal, but it is certainly your aim. A footnote allows the reader to pause and to put down your brief. When that happens, you have failed. Never use footnotes.

11. *Use "good, clear, forceful English."*

For some reason, Wiener did not have much more to say on the subject of legal writing-style than that. *Id.* at 66. He urged lawyers to use short sentences and to minimize legal formalisms such as "the said," "hereinbefore," "thereinafter," and so on. But in general, he concluded that "[s]tyle is of course an individual matter." *Id.* at 67.

Wiener was a natural writer. Most lawyers, sadly, are not. Therefore, let me add some writing suggestions that I make to new lawyers in my office.

Read and memorize the first five rules that George Orwell lays down to writers in his essay "Politics and the English Language," 4 *Collected Essays, Journalism & Letters of George Orwell* at 127, 139 (New York 1968):

- "Never use a metaphor, simile or other figure of speech which you are used to seeing in print."
- "Never use a long word where a short one will do"—not even if you wrote for the law review.
- "If it is possible to cut a word out, always cut it out." ("Always" is the important word in this sentence.)
- "Never use the passive where you can use the active." (This rule applies particularly to lawyers, who do not seem to know what the active voice is. *See* Strunk & White, *The Elements of Style* 18 (1979 ed.).)
- "Never use a foreign phrase, a scientific word or a jargon word if you can think of an everyday English equivalent." (Words such as "hereinafter," and "aforesaid," and "such," and "said" (as in "said case"), and "prong" (as in "the second prong of the rule") are jargon. There are many more, which you have spent years learning. Translate them into everyday English or leave them out.)

Forget the sixth rule, which allows you to "[b]reak any of these rules sooner than say anything outright barbarous." Lawyers in general write so barbarously that, like alcoholics, they cannot take any liberties with the rules.

I have three other suggestions for briefwriters:

- Never dictate a brief or any other kind of argumentative writing. Talk, especially formal lawyer-talk, becomes far too corpulent for easy reading.
- Do not file your first draft. As Kipling suggested, "Let it drain"—at least overnight.
- Then revise it, and revise it many times until some nonlawyer can explain to you what you are talking about. Try to imagine yourself as the reader. Move around to the other side of the desk. What seems powerful on Monday in the throes of composition will look weak and wordy on Tuesday or Wednesday.

Wiener suggests reading good legal opinions, such as those of Chief Justice Hughes, to improve your argumentative writing. *Effective Appellate Advocacy* at 68. But do not confine yourself to legal writing. Read widely. For example, read the essays of Sir Francis Bacon—the pithiest writing in English—and the prewar speeches of Sir Winston Churchill that urged the British nation to re-arm against Hitler.

Wiener also had some suggestions for oral argument. If you are lucky enough to get an oral argument in this day of maximized judicial efficiency, the most important is to study the record.

1. *Achieve complete knowledge of the record.*

Wiener insists that you read the record yourself, and reread the critical portions:

> If I were asked to name the advocate's secret weapon—a weapon, indeed, that still remains a secret to many—I should say that it is complete knowledge of the record . . . No lawyer, no matter how able he may be, can afford to argue any case in ignorance of the record. It is done, of course, but it is risky, on a par with passing a car on a curving hill; you may pull it off, but the chances are heavily weighted against you.

Briefing and Arguing Federal Appeals at 293–94.

2. *State the facts clearly.*

You must have the ability to explain a complicated set of facts to the court just as much as to the jury. Even the panel that tells you it is familiar with the facts will require explanation of some points. You must be able to tell the judges quickly and simply what the problem is all about. Wiener writes:

> "The great power at the bar is the power of clear statement." If that expression standing alone seems unduly sententious, just listen someday to a really able lawyer outlining a complicated fact situation to a court or jury, and compare his exposition with the efforts of some gar-

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Classic Guide

(Continued from page 11)

> rulous dowager at the bridge table to explain just what happened to the girls at the last big country club dance. The lawyer states the essentials first, then develops and unfolds the details; the dowager runs on endlessly and repetitiously, expounding whole masses of trivia.

Effective Appellate Advocacy at 186–87.

3. *Give an effective opening.*

You must catch and seize the court's interest in the opening minutes of your argument. This is particularly true for the appellee, who must "in his opening sentence seize upon the central feature of the case, and, by driving it home, dispel the impression left by his adversary." *Briefing and Arguing Federal Appeals* at 286.

Perhaps the most effective opening in the book is that of Wiener himself arguing for the United States Government in a denaturalization case in the Supreme Court: "The question in this case is whether a good Nazi can be a good American." *Id.* at 289. The case was *Knauer v. United States*, 328 U.S. 654 (1946).

Wiener could handle questions during oral argument with equal aplomb. In fact, when he was an assistant to the solicitor general, Wiener gave one of my favorite answers to a question asked during an oral argument. A former postal em-ployee sued the government in federal court in his home state of Oregon claiming unlawful termination. The government contended that Congress had changed long-existing law and required the ex-postman to bring his suit in the District of Columbia. Wiener had to defend the government's interpretation.

In preparing for argument, he struggled to come up with an answer to a question that he knew was coming—how could Congress have possibly thought that it was reasonable to make an ex-employee go 3,000 miles to have his routine case heard? The question did come, and Wiener gave his prepared answer: Congress knew that any court deciding these cases must have an intimate knowledge of complex government regulations. Because courts in the seat of government must be more familiar with these regulations than some court in the hinterlands, Congress had favored Washington, D.C.

Justice Frankfurter now joined the debate. He pointed out that he had been an Assistant United States Attorney in New York early in his career and that suits by postal workers were common. Those cases were so easy that the United States Attorney always assigned them to the most inexperienced lawyers in the office so they could get some trial time. With that in mind, Justice Frankfurter asked, would Wiener reconsider his previous answer.

Wiener's response:

"Your Honor, there were giants in those days."

* * *

These are only the highlights of a work containing dozens of suggestions about brief-writing, oral argument, and rehearings. Even the most experienced appellate lawyer will take something away from a reading of Wiener's book.

After several years of practice using Wiener's treatise, I discovered a division of opinion between those who preferred the original 1950 edition of the book and those who preferred the 1967 edition. I had never seen the 1950 version, so I began a search for the first edition. That ultimately led me to the author himself.

In the mid-1980s, someone scheduled a committee meeting of some kind for Phoenix, where Fritz Wiener—then nearing 80—lived in retirement with his wife, Doris, to whom he had dedicated the 1967 edition. I resolved to meet this eminent lawyer, both to tell him what a wonderful book he had written and to see if he himself had an extra copy of the first edition.

But for some reason, I had to drop out of the trip. So I telephoned him, explained that I was a devotee of his 1967 work, and said that I would like to own a copy of the first edition as well.

I asked if he had an extra copy of the first edition and offered to pay for it.

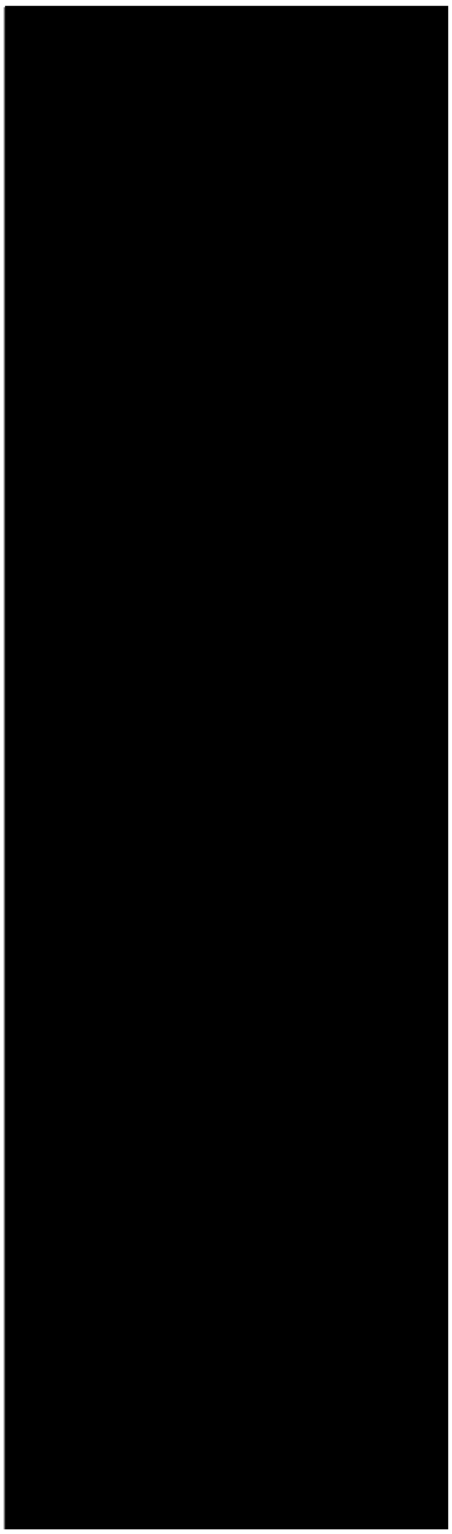
"Well, what do you think I should charge you?" Wiener asked.

"You set the price," I replied.

"How about a hundred dollars?" Wiener said.

I agreed, although I remember thinking that the price was high for an out-of-print book. But then the book arrived, and I began to read it. I realized that Fritz Wiener underestimated the true value of his masterpiece. Indeed, I had bought all this wisdom at a bargain price.

Grab any version you can find in the used bookstore. Wiener's book contains the finest advice you will find about how to win an appeal.



Oral Argument: The Continuing Conversation written by Talbot D'Alemberte, published in Litigation Winter 1999, Volume 25, Number 2, pages 12-15, 67.

Oral Argument: The Continuing Conversation

by Talbot D'Alemberte

The best advice I ever got about oral argument was from Justice Ben Overton of the Florida Supreme Court. "Oral argument is the time when all the judges have read the brief and the record and are prepared to decide the case," he said. "You should think of your argument as the beginning of the judicial conference, and you are privileged to be there."

Oral argument is a conversation you have with the court at the beginning of its deliberations on your case. More than that, it is part of a continuing conversation that the court has with lawyers about the development of the law.

As you begin to think about your approach to oral argument, imagine that the judges on the bench are, instead, seated around a table. You have been invited to their conference to talk about your case and to answer any questions they may have. Your input should be contained and conversational. You would not read your remarks at such a conference, and you should not deliver a prepared, formal speech in an oral argument. Seated at their conference table, you would simply talk to the others, maintaining good eye contact and watching for body language that furnishes clues as to how the others are reacting to your remarks. You would recognize that you have a limited amount of time to participate in the conference, and you would want to get to the questions that are on the minds of the judges. You would try to participate in the conversation in a way that leaves the judges thinking well of your client's case.

So should it be with oral argument. Elegant speeches and rhetorical flourishes should give way to direct, persuasive conversation. Convincing the others at your closed conference should be your sole focus; looking polished before a courtroom full of observers should not even cross your mind.

You can enhance your level of preparation—especially if you have not appeared before the court or if there is a new panel member whom you do not know—if you take time to go to court before your argument and listen to arguments in other cases. Come time for your argument, you must be comfortable and familiar enough with both the surroundings and the judges that you will feel natural in the conversation you will have with the bench.

Remember that appellate courts frequently hear from very good lawyers, and the expectations for lawyer performance are, therefore, very high. Good appellate lawyers do not attempt histrionic arguments. They do not berate their opponents. They do not yield to the temptation to attack the trial judge for the egregious errors inflicted on the client. The apocryphal opening—"Judge Cannon was the judge below, but there are other reasons for reversal"—may release some emotion, but it is not wise advocacy. Stated another way, there may be some trial courts where "Rambo" litigation tactics are effective, but I do not know of any appellate forums where those tactics are useful or appropriate. Instead, the effective appellate advocate approaches argument as a calm, civilized conversation among students of the law in search of answers and solutions.

Civility is a fundamental aspect of oral argument, and any departure from that rule should be very carefully considered. Seldom are appellate judges nasty or threatening to lawyers, and lawyers should remember that civility toward their opposing counsel is likewise expected. Experienced judges frequently say that more cases are lost at oral argument than are won, so bear in mind the ancient rule of the physician: *First, do no harm.* Certainly, there can be some exchange of differences, but appellate lawyers should learn to be unfailingly courteous—even in pointing out errors that the other side has made. And when opposing attorneys concede points, it is important to praise their candor.

The appellate lawyer is privileged to practice in a very civil setting. Indeed, there are certain traditions of civility in virtually all appellate courts: the opening of the court with all in attendance standing and the opening line "May it please the Court" are two good examples. And some courts take extra steps to create a climate of civility. One federal court leaves the bench to shake the hands of all lawyers at the conclusion of each argument. The Florida Supreme Court, like many others, has a lawyers' lounge where the justices come to speak to the lawyers about half an hour before oral argument.

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In keeping with the decorum of the appellate court, you should be particularly careful to observe its preferences. The United States Supreme Court is particularly sensitive on this issue. There, the practice is to refer to each member of the court as "Justice." A story is told about a time that the Chief Justice admonished a lawyer who had failed to follow this custom and who then became extremely flustered. But, even then, civility prevailed. Justice John Paul Stevens interrupted and said, "Counsel, we understand, and please do not be upset. Actually, the Constitution makes the same mistake that you made."

There is no reason for an appellate advocate to be unfamiliar with the rules and preferences in any appellate court. Know the practice of the court and follow it.

One way to get the appellate panel to understand the importance of the substance of your case is to develop a theme. That theme should become the overall topic of your conversation with the court—a refrain that you can repeatedly relate back to the facts and law of your client's case.

United States Supreme Court Justice Anthony Kennedy once observed that the best oral argument he ever heard involved the exclusion of a venireman on the basis of race. Rather than talking about harm to his client, the lawyer focused on the excluded African-American juror, a citizen who eagerly awaited this first opportunity to serve on a jury as one aspect of his full citizenship. The description of the frustration and disappointment of this citizen was a powerful policy argument, and the attorney used it as his theme. It captured the Court's attention.

In developing a theme, remember that the judges themselves face an incredible case load. Giving the judges a thematic context in which your case can be discussed can be a very valuable aid, and it can make your client's case stand out in the court's collective mind.

Of course, your theme needs to resonate with the principles and arguments developed in the appellate briefs, but oral argument will allow you more license to characterize your case. Therefore, you should develop the organizing theme in your brief, but you should emphasize it even more as the unifying thread in oral argument. In more mundane cases, it may be difficult to develop a theme for oral argument. But try to do so anyway.

To prepare for oral argument, most lawyers will read the judges' opinions in similar cases. When you do this, mark language in the precedents that is particularly helpful to your case. Have that language handy, so that when the judge asking you a question is in an area where he has previously written, you can quote his own words in your response.

I find it equally useful to research cases the judges handled as lawyers. Quite frequently, you will find that a member of the appellate court has had a case in at least a general area of the law that you are arguing. Some reference to the earlier case, where appropriate, will remind the judge of a principle of law or a circumstance that the judge knew intimately as an advocate. Placing your client's position in a context familiar to the judge enhances the chances for success.

Pre-Argument Homework

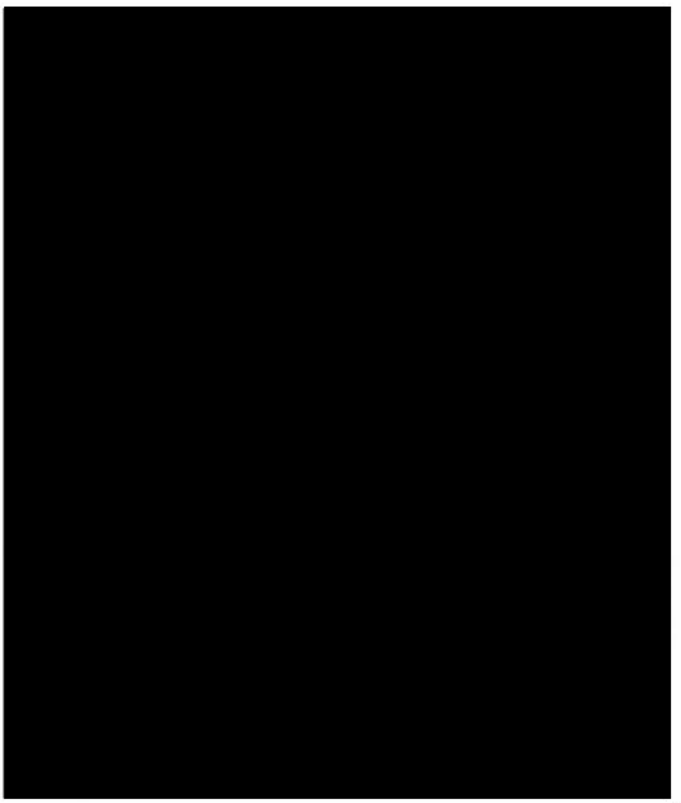
Of course, before you step to the podium, you should have read all the cases that address the issues in your case. But make sure that your efforts are complete: Check with the clerk of the court and look for any slipsheets that have been issued by the court in the day or two prior to your appearance. Quite often, the slipsheets will provide you with useful authority, of particular importance because the case will be clear in the memory of the judges. Indeed, with electronic research now available, recent relevant cases—no matter how recent—should never escape the advocate's notice.

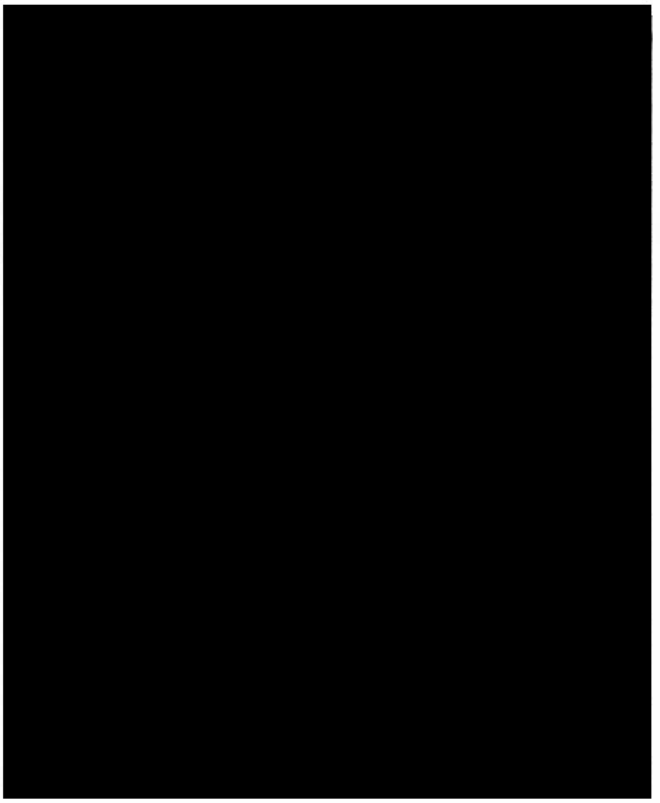
You should also be careful to check the court docket for the day and week of your oral argument, and you should look particularly for arguments in scheduled cases that touch your subject area. If a court is docketing similar cases close together, it is a signal that the court may be struggling for a resolution of principles of law that can impact your case. Learn the facts and arguments in those related cases. Indeed, you may be called on to distinguish one or more of them.

The transcripts or audio recordings many courts make of oral arguments can also help your preparation for oral argument. Some courts, such as the Florida Supreme Court, allow videotaped arguments. Where those records of previous oral arguments are available, it is extremely important to watch or listen to all the arguments that have any bearing on the issues you are arguing.

Since 1985, the Florida State University College of Law has been videotaping and archiving oral arguments before the Florida Supreme Court. When I argue in that court, I search the archives and frequently find several oral arguments that are quite pertinent to my case. Reviewing those videotapes has allowed me to anticipate questions that the court will ask.

Indeed, in watching the tapes, I have often been struck by the fact that oral argument is part of the continuing conversation of courts as they strive to develop public policy. Often, judges will ask questions in almost the same words as questions asked in earlier cases. But that should not be surprising. Judges are struggling to develop the law. Their struggle with an issue probably started when they first began to study the law and to think about its policy implications. Questions





from the bench, therefore, can reflect a judge's career-long search for the correct answer on an issue.

You can begin to appreciate the continuity of the bench's and bar's conversations about the law not only by reading and analyzing the case law, but also by learning, through any means available, the nature of the earlier dialogues the court has had with lawyers. If transcripts or recordings are not available, talk to lawyers who have handled similar cases. To be sure, you must be prepared on the facts and law of your case; but recognize also that your oral argument is part of an ongoing discussion that started long before and will continue long after your client's case is decided.

Another helpful development in judicial administration now adopted by most appellate courts is the "bench memo." Frequently, the judge to whom the case has been preliminarily assigned will be asked to prepare a memo for all other members of the court. This memo summarizes the basic facts and puts forth the issues—sometimes in only one or two paragraphs.

It is not always possible to get the bench memo, but there is a practice of modern courts that may allow you to see some part of it. Some courts release to members of the press a summary of the cases to be argued, and that summary is frequently taken from the bench memo. This summary may give you an idea about how the case is seen by at least one member of the court or her staff. Read any available press summaries. Needless to say, if you find that they are in error, address and clarify that error in your oral argument.

Moot courts, both formal and informal, can be extremely valuable tools in preparing for oral argument. I have sought multiple formal moot court experiences and have benefitted tremendously from them. Select people who are thoughtful and knowledgeable about the relevant area of the law as members of your moot court panel. Law professors are often extremely skilled in analysis and in developing hypotheticals. They can be of immense help in the preparation of your argument.

In scheduling these moot court exercises, go for the "full Monty"—stage it in a courtroom, if possible. At the very least, seat your panel and stand before them. It will feel silly at first, but this will help you overcome your nervousness when you stand before the real court.

Direct exchanges with opposing counsel are not appropriate during argument. I have found it very useful, however, to end an oral argument by posing a rhetorical question to my opponent. The question is not actually addressed to counsel but is made as a suggestion to the court. It highlights some flaw in the reasoning of your opponent, or some gap in the record, that you want to raise just before you sit down so that the court will have your point uppermost in its mind.

In his book on federal appeals, one of the great advocates of our day, Michael Tigar, offers this example of laying out a question for your opponent to answer at argument:

> The government claims that all it told the district judge during the secret hearing was information about the informer's identity—information that can properly be communicated ex parte. The problem is that they made the same claim in the court below and the district judge found that this is simply not the fact. Now they don't answer that finding in their brief. Maybe they have an answer today, and if so we look forward to hearing it.

Michael E. Tigar, *Federal Appeals: Jurisdiction and Practice* at 281 (Shepard's McGraw-Hill 1987).

This technique can work well whether you are appellant or appellee. Indeed, it can frequently be very powerful when, as appellee, you conclude your oral argument and put a very tough question to the appellant who must decide whether to address that question in rebuttal. Before making such a challenge, however, you need to think through all the possible responses your opponent may offer. A powerful response to your rhetorical question might well tip the balance against you.

You also must be prepared to field tough questions yourself. In preparing for oral argument, I have found it useful to develop what I call a "hard questions" list, which I begin compiling while reading the record and the legal authorities. I try to think of the weaknesses or perceived weaknesses in my case and the different ways that the court might ask questions to probe those weaknesses.

One of the best places to start is with the questions you had about the case when you first began to work on it. Judges who are facing these issues for the first time may have similar questions.

Questions about policy issues are frequently asked and difficult to answer. "Counselor, if we rule for you in this case, what will happen in a future case where . . . ?" Of course, lawyers begin to deal with such hypotheticals from the time that they enter law school. Indeed, I know of no other aspect of law school education that is so pertinent to the actual practice of law. When you begin to think about the hard questions—especially on policy issues—recall how your best law professor would take the facts and vary them slightly to question an applicable rule of law. Considering such hypotheticals will teach you a valuable lesson: You are better off submitting the case to the court on a very narrow rule that you can justify in all conceivable hypotheticals, rather than seeking some sweeping rule that might usher in a broad range of alternatives.

Knowing the law and anticipating questions about legal issues is only half of your preparation for oral argument; you must also be conversant about the essential facts of your client's case. For an appellate advocate, this means knowing every detail that might interest a judge. It also means having at your fingertips not only the significant case law, but also the vital portions of the record.

Judges will frequently introduce oral argument by telling all counsel that the court is familiar with the facts of the case, and there are times when judges will place particular emphasis on this point. Nonetheless, it is impossible to argue almost any case without some reference to the facts, and a mastery of the important facts is vital to every argument. So, do not take the presiding judge literally when he recites the standard introduction, "Counsel, the court has carefully read all briefs and is familiar with the facts and issues in the case, and we ask that you limit your oral argument to anything new or particularly important." Do not neglect to state the core facts.

This does not mean that you should recite the facts of your case by reading them from your brief. Indeed, that would be a bad mistake and would disrupt the conversational atmosphere you should strive to establish. Instead, introduce the statement of facts by saying something like, "As this court will remember, this case involves . . ." and then begin the conversation by summarizing the more important facts.

Sometimes, judges will be quite insistent that they do not want the facts stated. One such example was the famous argument in *Cohen v. California*, 403 U.S. 15 (1971). In that case, Mel Nimmer defended a Vietnam War-era protester who, in a California court, had worn a jacket emblazoned with the words "Fuck the Draft." In later describing that argument, Nimmer said that he thought it was very important that these words actually be said in the hallowed halls of the United States Supreme Court to demonstrate that the profanity would not crumble the walls of the reverent institution.

When Nimmer stood to argue the case, Chief Justice Warren Burger made it clear that he did not want to hear that phrase uttered in his presence. The Chief Justice admonished—with great emphasis—that the Court was fully familiar with the facts of the case and that it was absolutely not necessary to state them. Indeed, he insisted that Nimmer not recite the facts; the Court merely wanted to discuss the legal issues that these facts raised, the Chief Justice said. Nimmer then very graciously—and cleverly—began his argument by acknowledging and "honoring" the Chief Justice's wishes: "Mr. Chief Justice, members of the Court, may it please the Court. I will indeed adhere to your admonition. This case involves the simple issue of whether or not a citizen may be punished for wearing an article of clothing in a courtroom with the words 'Fuck the Draft.'" No lightning struck, no walls fell, no columns toppled. As every law student knows, the argument was successful.

Even if the question is not a friendly one, welcome it with relish.

Of course, you will not always be in total control of how you conduct your argument. There was a time when judges simply listened to speeches at oral argument, but for most courts that time has long passed. The modern norm is a "hot" bench—one where judges come to the oral argument armed with a great number of questions. The difficulty in preparing for an oral argument before a hot bench is that you do not know whether your case will be one that engages the judges and brings forth a number of questions, or whether you will be left to give your prepared presentation. You must be ready either way.

Delivery

Good appellate lawyers intentionally slow down the pace of their remarks. A pause is not a bad thing and can be used very effectively for emphasis. It can also invite questions—an important part of any conversation. During your pauses, scan the bench. Be alert to any body language that suggests that a judge wants to put a question to you. Every good conversationalist pays attention to the other participants, and you should be sensitive to the judges' interest in raising a point for discussion.

Even if the question is not a friendly one, welcome it with relish. It is far better to have this question raised in oral argument where you can respond to it, than left to the judge to answer on her own. When your argument ends and the court adjourns to its private conference room, you want the judges to take with them your answer to every question they might have.

Listen carefully to the court's questions and respond with candor. The most harmful thing you can do is to shade the facts, misinterpret the law, or deliver exaggerated rhetoric or hyperbole. Appellate courts expect candor. Indeed, more than any other tribunal, appellate courts emphasize the ideal of lawyers as "officers of the court."

But do not concede arguments that you need not concede, and do not fall victim to questions that lead logically to the slippery slope of defeat. Be especially careful in your answers if the question attempts to take you in the direction of some grand policy or sweeping principle. These are the most dangerous inquiries: Remember the wisdom of presenting your case on the narrowest principle that allows your client to prevail. If the court wants to use your case to announce some new broad rule of law, it does not need your argument to do so. Unless you must, never insist on a great change to justify a decision for your client.

Sometimes, you will face a judge who is hostile to your case and whose lengthy statements take up all your time. The judge who attempts to dominate a lawyer at oral argument in this fashion is not likely to be popular with the other members of the court. Where you sense clear hostility, and where the body language of other judges suggests impatience, there is some merit in dealing with it quite directly. It will take a great deal of courage, but you might turn to the judge and say, "Your honor, I do not think that I am going to convince you on these points, but I hope to convince your colleagues."

For me, the most difficult problem in oral argument is dealing with the judge who asks a question that is far afield from anything relating to the case. It is very difficult to answer such a question, and yet it must be answered. When faced with that type of question, restate the question: "I believe that you are asking me . . ." and then give the best answer possible. Sometimes, a candid "I do not know" is the

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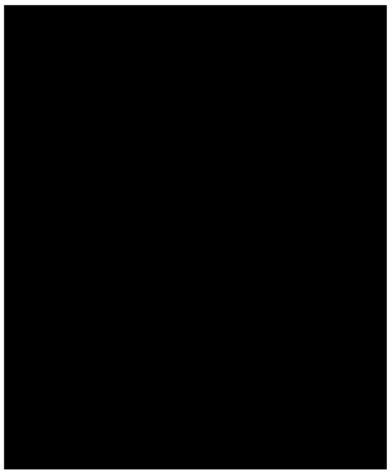


Oral Argument

(Continued from page 15)

best answer to such a question, followed by a segue back to the main issues in the case.

Another difficult problem is the very intense, rapid-fire questioning in which one judge interrupts your answer to another judge's question by asking a second, sometimes unrelated question. Responding requires considerable diplomacy. Try to fix both questions in your mind, and make sure that they are answered in sequence.

When the court asks questions, answer them immediately and directly. It is almost never good strategy to put off the answer in any way at all. When a lawyer is in the unpleasant position of sharing oral argument (a circumstance to be avoided if possible), this is particularly precarious. Nonetheless, some answer should be given when the question is asked, even if the lawyer must respond, "Your honor, my co-counsel will expand on this point, but our answer to your question is . . ."

By all means, stay away from absolute statements unless you know you are on solid ground. The argument that includes the words "always" and "never" will invite the judges or their law clerks to search for examples contradicting those absolutes. When asked about the scope of your argument, limit it to the narrowest possible point unless there is some special circumstance that requires a very broad submission. Questions about absolute values can be very difficult to answer and may substantially undermine a lawyer's argument.

Never be intimidated. Frequently, judges will ask "Of course, counselor you will concede, won't you, that . . .?" Be very careful about answering this kind of question. It is hardly ever a friendly one. It is far better to say bravely that you will not concede an issue than to find out later that your concession, hastily made at oral argument, was the reason you lost. On the other hand, where a concession must be made, make it clearly and forthrightly. If you have anticipated the question—as you should have—you will probably be able to argue that the concession is not determinative of the case and to explain why.

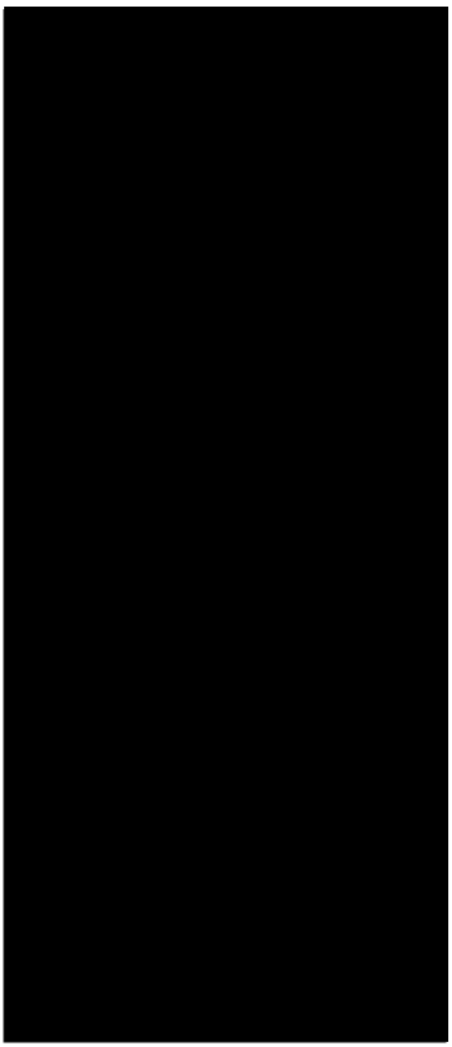
Use exhibits only if they are central to your case and will be useful to the court. Some lawyers, accustomed to working before juries, will use exhibits that are displayed so far from the bench that they simply cannot be seen by the judges. Not only is that ineffective and frustrating for the bench, it is distracting during your oral argument as well.

And using exhibits during oral argument can also be embarrassing. Once, while arguing for a rules change that would allow cameras in Florida courts (*In re Petition of Post-Newsweek Stations, Florida, Inc.*, 370 So.2d 764 (Fla. 1979)), I brought to the Florida Supreme Court, at its request, a videotape of certain trial court proceedings. I had carefully checked that the videotape machine worked and had verified that the picture could be seen from the bench. I failed to check, however, whether the copy of the videotape that I brought with me was a complete version. In the middle of my argument I learned, to my embarrassment, that some enterprising technician had copied a thirty-minute video onto a ten-minute tape. The lesson: If you are going to use exhibits, check them thoroughly.

Rebuttal argument—when available—is important. If you are the appellant in a court that permits rebuttal, make certain that you save time for it. I have found it very useful to go to the clerk, the marshall, or whoever is keeping time for the court, and to make a clear request for rebuttal time. That also gives me a chance to make certain that I understand what the lights on the podium or other signals indicate. If you do not plan accordingly, you may find that the red light that comes on during your principal argument has actually signaled the expiration of your entire time, and that you have lost your opportunity for rebuttal.

No other legal practice experience is quite as much like law school as an appellate oral argument. Indeed, you begin preparing for oral argument when you stand up to answer the first question asked of you in law school. But your role in the appellate courtroom is far different from what it was in the classroom. In the courtroom, it is up to you to "teach" your panel by answering their questions and engaging them in your conversation.

When you stand before the court, well-prepared and confident, you will probably feel intellectually challenged and energized. And you should. After all, that is what good conversation is all about. And oral argument is nothing more than that: lawyers and judges discussing the way legal principles are applied to the facts of your case—lawyers and judges having a conversation about the law.



Perspective: The Trial Lawyer written by David Berg, published in Litigation Spring 2000, Volume 26, Number 3, pages 6-15.

The Trial Lawyer

by David Berg

The Atlantic is calm today. The beach, rearranged by a tropical storm, is incredibly wide and white. Before I cast, I use pliers to clamp down the barbs on my hook. That makes it harder for me, but easier for the fish. It also forces me to be a better fisherman.

So it is with my practice. Over the years, I have learned to clamp down the barbs during trial. Early on, I cross-examined everyone like they were ax murderers, including old ladies and schoolteachers: "Exactly what do you mean, you were tending your roses? And quit fiddling with your oxygen tank."

Now, I try cases by using my opponent's strength and my own, more trial by aikido than by judo. The reason is simple: jurors don't like constant confrontation. They don't like it in their personal lives, and they tire of it quickly in a courtroom. Trial by aikido recognizes that. During voir dire, we encourage "bad" answers, using them to enlighten our strikes. During opening, we embrace undisputed facts, good *and* bad, arguing only about the rest. During direct, we all but disappear, trusting the client to tell the story. During cross, we welcome even unresponsive answers, turning them on the witness. During close, we tie it all together.

Let me be clear. We still have to command the courtroom. We still have to crush our opponents—especially if they are tall white men, the sum total of my personal moral code. We cannot do that with tender sensibilities. The object of the exercise is still a very large, very dead fish. But better to do it *sotto voce* than bellowing; better to do it by aikido than by judo.

During the past 30 years, I have tried cases from the austere courtrooms of South Texas to the marble-and-mahogany grandeur of the Eastern District of Virginia. I still cannot walk into any of them without feeling grateful for the opportunity; I have been that lucky. In the 1960s, I defended young people prosecuted for flag burning or marijuana possession. During the 1970s, I tried criminal cases, including defending a woman acquitted of using a chain saw to dismember her husband, who, I feel confident, had really irritated her. In the 1980s, I tried white-collar cases and once, with Morris Dees of the Southern Poverty Law Center, shut down the Ku Klux Klan's paramilitary training camp and enjoined them from harassing Vietnamese fishermen. During the 1990s, my practice primarily was personal injury and complex commercial cases, most recently the defense of a patent-infringement case involving a billion-dollar line of business.

This article includes much of what I have learned, the pure culture of what I know about trying lawsuits. It was written with the hope of making lawyers, especially younger ones, less reluctant to go to trial. It was also written out of the fear that the great war stories of the next generation of trial lawyers will sound something like, "And then, I looked that mediator in the eyes and said. . . ."

Everyone knows the vast majority of lawsuits get settled. Nonetheless, the only way to get better settlements than other lawyers is to have a track record of trying cases and getting good verdicts. That means preparing each case as if it were going to trial, never clenching a fist without being prepared to throw it. Besides, word gets out fairly quickly on lawyers who won't try a lawsuit. Inevitably, their clients pay more, get less, or go to jail for longer periods of time. This article is for them, too—litigators who aren't—with the intention of encouraging these otherwise talented attorneys to announce, "Ready for trial." The examples, sometimes blurred for confidentiality, come from real trials, focus groups, summary jury trials, and a lawyer's memories, excluding for reasons of modesty the juries that leapt from their seats, cheering and chanting his name. (You don't know—it could have happened.)

Pretrial

A trial is a continuum, beginning with the first meeting with the client and ending only after the final word is spoken in closing argument. From the start, experienced trial lawyers size up Exhibit A, the client, silently asking, "What will the jury think?" and "How can I help him become a believable witness?" and "Good Lord. Is that a pinkie ring?"

Like good doctors, the best lawyers take detailed histories about their clients' lives in addition to the facts of the case. Almost always, we can use that information during trial. Once, when I had been in practice less than a year, I listened from the back bench of a Harris County courtroom as Richard "Racehorse" Haynes, Houston's fabled criminal lawyer, conducted voir dire in an attempted murder case. He represented the heir to a Texas cattle empire accused of brutally assaulting a neighbor in a dispute over the borders separating their

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ranches and, more important, of saying ugly things about the defendant's momma. A panelist said she knew the defendant from church. Without hesitating, Haynes asked, "Would you then be incapable of fairness to the prosecution because you are aware of my client's involvement at First Baptist, teaching Bible class, taking the scout troop to Mexico, that sort of thing?" She actually said, "Well, sir, that's not the only reason I couldn't be fair. I also know how well he treats his momma, and I cannot believe a man that kind could hurt another soul—not without a reason." The trial was over. Haynes had disclosed the defendant's church life to a Bible Belt jury, and the panelist had gone one better. The defendant was acquitted in an hour, despite having stomped a mud hole through his neighbor's solar plexus.

I followed Haynes to trials frequently during those first years, until I could no longer afford the luxury of languid afternoons at the courthouse, his sonorous voice capturing the jury and my imagination. As I look back, what he did that day—humanizing his client—is essential to winning any case.

As plaintiffs, we tell a story. As defendants, we destroy that story and, if possible, tell a more plausible one of our own. That is true of any trial, including criminal cases where we don't even put on evidence. Our job is to persuade. Simplifying the story, telling it with absolute clarity of thought, is the key to convincing jurors of anything. Only the journeyman consoles himself that the jurors didn't understand his case. If they didn't get it, he didn't explain it.

Drafting a jury charge before the first deposition always helps. It forces us to ask questions in the very words and concepts jurors use to reach their verdict. My wife, Kathryn, once got a plant manager whose employee accidentally shot and killed our client's wife to admit that " . . . allowing our employee to carry a weapon was the proximate cause of the shooting and Mrs. Uribe's death." She had first taught him the meaning of "proximate cause," then helped him to make a ruinous admission using the language he'd just learned. That, and *60 Minutes* asking to put cameras in the courtroom, assured an extraordinary settlement.

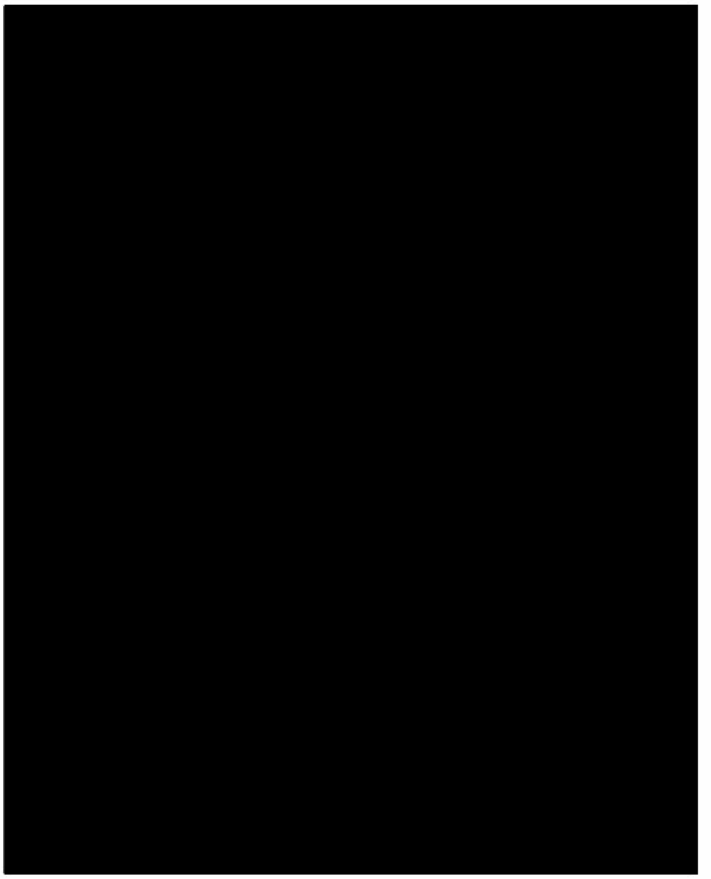
In the days before trial, streamline your case. Eliminate witnesses and documents you don't need. Create a lineup of the witnesses who remain and the evidence you will put on through each. Your case will only get better.

Voir Dire

Settlement talks have failed. The judge rejects defense counsel's sixth motion for continuance because America does not celebrate St. Swithin's day. Finally, the panel shuffles silently into the courtroom. It is an awkward moment as you rise to address them, like a mass blind date. In most large cities, you don't know them and they don't want to be there.

"Who is he to Hecuba or Hecuba to him?" asks Hamlet, in wonder, about an actor's ability to connect with a fictional character. Our job is even more difficult: we don't even get a dress rehearsal. We have to connect with a group of strangers on the first day of trial or, in all likelihood, lose. But what an incredible opportunity. We get to talk about the essential issues in the case with the people who will decide it.

If we are successful, they will be emotionally committed to our themes and open to our evidence. They will even rationalize our client's bad behavior. To accomplish that, jurors have to trust us. Mislead them about a single significant matter and that trust will be broken beyond repair. Try promising that a defendant will waive his Fifth Amendment right and take the stand and then, thinking you've got the case won, fail to put him on. Criminal lawyers call these clients "appellants."



The major purpose of voir dire is to determine juror attitudes about our themes, so that we can make informed strikes and challenges for cause. The most effective way to get the panel talking about things that matter is to ask open-ended questions, never attempting to drive them to our conclusions. Lawyers who ask, "Can you follow the law on fraud?" and follow up with "I take it by your silence you can" have learned nothing about the jurors, except that they are so bored by his voir dire they won't even answer. On the other hand, if you give them the chance, panelists will develop your themes, which you can immediately link to the facts of your case. That gives you a mini-closing argument before trial even begins.

If you want a big verdict, jurors' hearts have to race when you talk about your case. If they identify emotionally with your client, they will reward him and punish his enemies. I recently represented an investor who sued a developer for defrauding him out of millions of dollars in an office building syndication. Fraud may be a powerful concept to lawyers, but that's *all* it is to jurors—a concept so far removed from their everyday lives it will have no impact. At the heart of every fraud is a *betrayal*, however: something everyone has experienced. Early in my voir dire, I said just that:

> At some point, all of us have been betrayed. Someone we trusted has stabbed us in the back. Now, I don't want you to tell me the facts, but will someone tell me how you *felt* when that happened to you, or, to someone you know?

Hands shot up. Before it was over, a woman told me in tears how devastated she was when her brother borrowed $350 to pay some medical bills but gambled it away. That was our

case in microcosm, a perfect opportunity to link our facts to her betrayal. I acknowledged there was a world of difference in the amount of money involved but insisted they had been treated the same.

> Both were deceived by someone they trusted. In this case, the defendant promised to use the money in his office building business. Instead, he spent millions on jewelry and European trips and even bought a thoroughbred horse. He stole millions more paying back personal bank debt. He stole $2 million the day Ted's company funded the investment. Almost every penny was lost. You tell me the difference. Weren't they both betrayed?

The jury returned a verdict worth $52 million with interest, a handsome sum even for a Texas plaintiff.

What sinks many defendants is their predictable litany of "yeah, buts" and, sometimes, the arrogance of their attorneys. Being down to earth is a huge asset. Why do you think David Boies wears those polyester suits? Because he likes them? (Don't answer that. I was just trying to make a point.) In that fraud case, for example, talking to the venire about the plaintiff assuming the risks of the marketplace is a waste of time. Instead, defense counsel should strike an emotional chord: "Have any of you lost money in an investment?" "How did you *feel* when you lost that money?" "As disappointed as you were, did you hire a contingency fee lawyer to get it back?" "How do you *feel* about someone suing just because they lost some money?" If jurors decide the plaintiff and his lawyer are greedy whiners, you will win. Your client will walk out of the courtroom the same rich cheater he always was. (Sorry, I may be pro-plaintiff.)

A few years ago, I tried a case in Bay City, Texas, in which my client, Westinghouse, was accused of selling defective nuclear steam generators to the South Texas Nuclear Power Plant, leaving its citizens somewhat agitated over the prospect of a nuclear winter. The plant was the largest employer and taxpayer in Matagorda County. The county itself had been recognized in the *Wall Street Journal* as the home of the largest verdicts in the nation—scant comfort to my client. Prior to sending out jury notices, the sheriff removed anyone from the list who worked for the plant, leaving 250 of their closest friends and relatives to fill the cavernous courtroom.

So I told the panel I was worried. "The power plant has sued Westinghouse for $800 million. As you know, the plant is the largest employer here. It pays a lot of taxes and supports a lot of activities, like Little League teams." I turned to a pleasant looking man in the front row, one of the few who owned his own business. I asked if he ever worried about being sued, and he answered, "Yes, everyone does." I continued. "I want you to assume you had a business dispute with Westinghouse and they sued you for millions of dollars—in Pittsburgh, where the company is headquartered. They have thousands of employees there. And when it came time to select a jury, many of the people in the pool had relatives and friends working for Westinghouse. How would you feel?" The entire panel was listening. Westinghouse's general counsel leaned forward. Unmentionable things were being puckered throughout the courtroom. The juror smiled. "I'd be scared to death. I could lose my whole business." With the help of the venireman, I had used the plaintiff's greatest strength, the location of the trial, to increase my own. Men kissing men is generally frowned on in Texas, and, on occa-

sion, bailiffs have shot lawyers for less. I moved on.

It was critical to put a human face on my corporate client. I had several Westinghouse engineers and scientists sitting in the row just beyond the venire. Some of them were coatless, some of them sported pocket protectors, and most of them looked scared. Holding a hand mike, I walked through the swinging door of the bar that separated me from the jury, down the aisle to where they were now standing. Putting my hand on the shoulder of the one closest to me, I explained that not only were they there at the inception of nuclear power in our country, but they helped invent it. Then I had each man introduce himself and talk briefly about his family and field of expertise. "These are the men who designed and helped install much of the equipment in the power plants. They are very proud of what they have accomplished. The suit may be against their employer, but *they* are the ones accused of fraud."

Turning back to my friend on the panel, I asked, "How do you think these guys feel?" Without hesitating, he said, "They have to be scared." "Why?" "Because they don't know if they can get a fair trial here." "Is that fear justified?" He hesitated—these were his neighbors in the courtroom—but admitted finally, "I think it might be tough." We now had the next best thing to our failed motion for change of venue—potential jurors psychologically committed to proving that Matagorda County could be fair to defendants, a quaint if little-honored tradition in that jurisdiction.

Next, I walked up the aisle to question a lady in the middle of the second row. I was looking for a juror to establish that this lawsuit was at best premature, a theme that worked in our focus groups. I chose her because she had four school-age children and her husband was a working man. That meant a personal relationship with a washing machine. "Mrs. Graham," I guessed, "do you have a Maytag?" She said, "Yes, sir. Thirteen years and it's still working." I said, "Mrs. Graham, come on down," and she joined me in the aisle. "Well, surely there is *something* wrong with it by now. Why don't we get Maytag to give you a new one?" She replied, "No, sir. Don't want a new one." "Well, how about some new parts. Surely you can say some of them need replacing by now." She looked annoyed. "Yes, sir. Some did. But Maytag done brought me the parts. And installed them. Works just fine." "Now, wait. Don't you want to file a lawsuit? I'll get you some money." She looked offended. "*No, sir.*" "Mrs. Graham, is there another way of saying why you don't want to mess with that washing machine?" "Yes, sir. If it ain't broke, don't fix it." There it was, our basic theme, stated in a way that the jurors would remember every day as they looked at their own appliances.

I spoke to the entire panel. "What Mrs. Graham has said is *our* case. The power plant is performing so well that this county is now second in the world in producing electricity." They looked like I had just announced that Bay City had been selected to host the summer Olympics. I continued. "When the plant needed parts to be replaced, Westinghouse replaced them. Millions of dollars worth. The generators ain't broke and if they ever do, we'll fix them." Then, because the trial gods labor to prove you're an idiot, I added, "Westinghouse has been around more than a hundred years. The company's not going anywhere." Nine days later, Westinghouse bought CBS and promptly disappeared from the American scene.

Jury selection is also an exercise in other people's bigotry. My co-counsel (and fellow author in this issue), Jim Quinn, is from New York City. How would he play to this South Texas jury? Deep into voir dire, a man asked an esoteric question about nuclear waste. I, of course, had not the slightest clue what he was talking about. With no warning, I said, "Jim, why don't you answer that one?" Then I introduced him. "This is my co-counsel, Jim Quinn, who, despite being from New York, is a relatively decent human being. He's going to try this case, too, so I want you to get to meet him." I settled in with the panelists, curious to see if Quinn had Texas-sized anything.

Jim wriggled the hand mike free and walked around the lectern, leaning against the plaintiff's counsel table. After a long moment, he said, "Howdy, y'all. How ya dune?" Well, buckaroos, they say you could hear the "yee-haws" all the way

Try to figure out your opponent's strikes; visualize the likely jury.

to Mount Pleasant. "Do I sound like a Texan?" he asked, and they roared. Now, Quinn claims *I* fake sincerity better than anyone he has ever known, but folks, that day he was really on. He immediately told the heavily Hispanic, predominantly Catholic jury pool that he had gone to Notre Dame. When he got to a story about Sister Ignatius, his favorite high school teacher, even I felt shame for him because the man obviously had none of his own. The jury loved him. Of course, he never answered the man's question. And I never mentioned I also am a member of the New York Bar.

There are no bad answers during voir dire. Panels aren't poisoned, for example, because someone says she can't give punitive damages. While defense counsel thinks you are playing into his hands by discussing her opposition to punitives, you are actually doing the opposite. You are learning something that really matters about a potential juror. You also encourage others to speak more freely about their feelings. Without rancor, demonstrate how unreasonable her views are: "Are there *no* circumstances under which you could award punitives?" Ask if anyone disagrees with the answer. You are guaranteed a healthy debate and a lot of information about potential jurors. Once we start responding to extreme positions with aikido—letting people talk no matter what they say—our strikes really start to count.

Generally, answers like the one on punitive damages are followed up at the bench. This stage is critical: every successful challenge for cause equals an extra peremptory strike. Before you move to strike, commit the panelist unalterably to the disqualifying opinion. Ask questions that compel your conclusions, leaving no room for her to be rehabilitated. "Mrs. Jones, I see you are a schoolteacher. I take it from that you are a thoughtful person, that you didn't make up your views about punitive damages as you walked in the door, just to avoid jury duty. Is that a fair statement?" She is bound to agree. Provide a comfort level that allows her to admit she couldn't be fair—something difficult for almost anyone to do.

> Mrs. Jones, there are some cases where I should not serve as a juror, for example, where someone is accused of child-molesting. Most of us feel that way. In fairness to the defendant, to the system itself, I would have to dis-

qualify myself. Having said that, let me tell you we are going to be asking for millions of dollars in punitive damages. You said you did not believe you could give them. Let me tell you that all of us, especially my clients, are grateful for your candor. That makes this process work. But isn't it fair to say this is not a case you should serve on? That your deeply held convictions would affect your ability to deliberate fairly on punitive damages?

Nine times out of 10, you will have saved a peremptory strike.

Now comes the difficult, almost mystical process of striking jurors. Given the huge stakes involved, the judge tells you to take 15 minutes. You plead and get 20, grab an empty jury room, and begin talking with the trial team about each panelist. Because they took notes during voir dire—something you should never do—it is important to solicit their views. Nonetheless, this is still a "one riot, one ranger" exercise. *You* will be cross-examining, not your colleagues, and certainly not the forensic psychologist. If you don't want someone they like, strike him.

Try to figure out your opponent's strikes; visualize the likely jury. If you are convinced there are going to be double strikes, you might want to change your selections. In rare instances, you may even decide not to use all your strikes to avoid reaching higher-number panelists who appear troublesome. (I have done this once in 32 years.)

Once the jury is seated, you will have to move on and forget much of what you said during voir dire. But the jurors won't forget. The emotions you stirred will resonate within them throughout trial.

Opening

The best opening statements are simply great closing arguments in disguise, a thought you probably should not share with the judge. To get away with this, begin opening by repeating the judge's instruction that what you are about to say is not evidence. That buys you latitude from the court and credibility with the jury, especially if you add something like, "If I don't prove the case, it will be your obligation to pour us out." The first time opposing counsel objects that you are arguing, the judge will say, verbatim, "He said this was not evidence. Sit down. Shut up. He's a handsome devil and I'm enjoying this."

Done right, opening can have more impact than summation, when many jurors have already made up their minds. Moreover, it is surprisingly cathartic for your client to hear someone, finally, tell his side of the story—someone who is speaking *without notes*, who believes what she is saying so passionately that it comes from the heart and not a legal pad.

If you conducted voir dire, you ought to do opening, too. You are the one who made promises to the jury. They look to you to deliver, no one else. Besides, you have waited a long time for this opportunity, so take advantage of it. Argue your case in the words the jury will read in the charge. Tell them, without apology, how much you want and why. Do not hold back. If you don't care, they won't care.

As the journalists say, don't bury your lead. Come out smokin'. Don't explain how some esoteric patent claim was infringed. Tell the jury the defendants stole your client's invention and made a fortune with it.

In the early 1990s, I represented Robert Sakowitz, scion of a legendary Texas retailing family that had gone bankrupt during the oil bust. His nephew sued him for millions of dollars, alleging he converted family assets and drove the stores into bankruptcy. The allegations were apparently made with the blessing of the plaintiff's mother, who was Robert's sister and a famous socialite. Despite the calamity that befell the family business, the nephew was still rich, his father one of America's wealthiest men. I pointed to where they were sitting and said, "I don't know if they filed this suit for sport or for spite." Turning to the allegation that Robert secretly pocketed profitable side deals, I explained that his sister sat on the Sakowitz board, where each deal was disclosed and approved. Then I added, "But it's very difficult to explain anything to someone who won't come out from under a hair dryer." I repeated variations on these themes throughout trial. The jury unanimously poured the nephew out.

To minimize objections even further, reach an agreement with opposing counsel prior to trial on the admissibility of the evidence, and ask the judge to resolve any disputes. That way, you will be able to use key exhibits during opening. If the court allows, personally hand a couple of the exhibits to jurors during your presentation. Even that minimal physical contact establishes a bond. If there are bad documents, explain them and, if possible, embrace them—but pass those out, too. It tells jurors—the aikido of opening—that you want them to see even harmful evidence, an unmistakable sign your case is strong.

There are almost always bad facts that you need to address; it is best to do that before the other side does. For example, on the odd chance your client—say, a tobacco company—has actually done something wrong, it may actually have to apologize. Oh, I don't mean one of those apologies my wife makes ("I'm sorry you're a jerk"), which I figured out after a few years did not seem entirely sincere. I mean a real apology, made by the responsible parties during depositions and reiterated during opening. That very human act goes a long way toward defusing juror anger and minimizing damages, if not eliminating punitives altogether. I recognize that this is the tightrope thoughtful defense lawyers dance across all the time: how much can I say without admitting liability? But in a case where a liability finding seems certain, there is little to lose.

Last year, my son Gabe and I were involved in an invasion of privacy case, arguing for the plaintiff before a focus group. Gabe focused on the failure of a television producer to obtain

It was the client's brain that got him into the jam. It will be yours that gets him out.

consent from the plaintiff to televise a show shot at the scene of her automobile accident—while she laid pinned under a car. Paralyzed by the crash, she learned of the show by watching it in her hospital room when it aired months later. The producer could have called her but didn't. His indifference would turn any jury into a lynch mob, especially with a media defendant. When the jurors learned that consent was not legally required under these circumstances, they determined they would "make new law" by awarding substantial punitive damages.

In this situation, an apology not only soothes the savage juror, it provides cover for attacking the plaintiff's very sym-

pathetic case. In fact, she did have a problem. On the day the show aired, she wrote her niece, "Your aunt is a celebrity." Obviously, the letter undermined her mental-anguish claim. Arguing for the plaintiff in the focus group, I embraced the quote, saying she merely intended to shield her niece from her own pain at seeing the show. That defused the defense's strongest argument; the focus-group jurors never mentioned the letter during deliberations. The case settled before trial.

There is always common ground between some of the jurors and the client, something that allows them to identify with her case. Five of our jurors in that fraud case against the office developer were incredibly young. One of our remedies was to pierce the corporate veil of TALC Corporation, which the defendants owned and operated like a private candy store, ripping off my client's investment. Moreover, the plaintiffs already had a $35 million judgment against TALC. How to persuade five jurors between 18 and 24 to pierce something other than their tongues? I wrote: TALC "Я" US on butcher paper. That stuck and we won.

Remember, all this information, which you know so well, is new to the jury. Don't overload them. Help them follow you. Opening should be thematic, way above the trees. Time lines are essential but should be simple, covering only critical dates. Graphics should be like billboards, summarizing the case in a memorable way. Even crudely or inexpensively built models can be powerful tools, allowing witnesses to step down from the stand, act as teachers, and, if they do it right, captivate the jury.

Direct Examination

At the end of opening, you should be light years ahead, the case all but over. Except for one little fact. You no longer get to tell the story—now your client does. Direct examination is not one of those Kahlil Gibran "letting go" moments. Remember: it was the client's brain that got him into the jam. It will be yours that gets him out.

Even so, the lawyer should all but disappear during direct, guiding the witness with simple questions like "What happened next?" and "Why did you reach that conclusion?" That avoids the lethal conclusion that it is the lawyer, not the witness, testifying. It weakens the witness's credibility when the attorney suggests rather than questions. Asking "Didn't the doctor fail to warn you about the dangers of laparoscopic surgery?" is a mistake. Jurors will wonder why the plaintiff had to be reminded of the very reason she is in court.

Of course, this does not mean simply throwing the client on the stand to tell the story. All witnesses—especially clients—need some pretty serious advice about testifying. *See* Berg, "Preparing Witnesses," Vol. 13, No. 2 LITIGATION at 13 (Winter 1987). Find a deserted courtroom, and ask your client to sit on the stand. Talk him through direct but never so much that the spontaneity is gone. Tell him to turn to the jury to answer only when he wants to emphasize something, when it is truly important. Make him understand that when you pass him, his demeanor cannot change. If he suddenly becomes surly or evasive with opposing counsel, the jury will turn against him. He *has* to answer each question with a polite "yes," "no," or "I don't know" before explaining anything. That does not mean being passive. He can insist on the truth of his direct and point out serious errors in questions. He can occasionally ask to explain an answer, a tactic that is especially effective when counsel won't let him. Nonetheless, there is a delicate balance. The human mind needs to hear a direct answer first. Reverse the order, and he will sound like he's evasive or, worse, dishonest.

Aikido works wonders for witnesses, too. If your client stays under opposing counsel emotionally—playing bemused parent to the angry lawyer-child—jurors love it. But if he loses his temper, he probably will lose his case. Suggest which jurors he needs to reach, and how to shape answers that will appeal to their common ground. Remind him not to play to his wife and children in the gallery. It is the jury that will decide the case, not them. He has to be comfortable that you know the case cold, that if he gives a bad answer or gets cut off, you will fix it on redirect. This advice should keep him from prolonged argument with opposing counsel, a deadly game at best.

There are things we cannot teach, intangibles that touch jurors deeply.

The first witness the plaintiff puts on should be the one with the broadest knowledge of the case, often an expert. By the end of direct, the jury should know why the client is there, how he was hurt, by whom, how much money he's owed, and why. Conversely, defense lawyers have to destroy the first witness in most cases. By the time she steps down, the jury should believe that her claims are frivolous and/or the damages are wildly exaggerated. Failing that, kiss your application to the International Academy of Trial Lawyers goodbye.

One way to create a seamless transition from opening to the first witness is to listen carefully to your opponent's opening and seize on any serious mistakes. In 1996, I represented Samsung in a case against Texas Instruments, alleging that TI had breached a royalty-related agreement. TI's lawyer, fresh from back-to-back trials, was not ready. His opening statement, while well delivered, was riddled with mistakes. The most damaging claim he made was that Samsung, along with several Japanese manufacturers, had been sued by the Justice Department in 1986 for "dumping" memory chips on the U.S. market. I didn't know what "dumping" was, but it didn't sound very good. The next morning, Samsung's chief patent counsel took the stand. I went over each mistake, starting with the worst one. "Was Samsung ever sued for dumping, Mr. Donahoe?" I asked. "No, sir, we didn't begin manufacturing chips until a year after that suit was filed." I continued, "Now, why do you suspect that lawyer wanted to lump Samsung in with a bunch of Japanese companies?" Counsel objected vigorously that the question called for speculation about his motives, ending, of course, any speculation about his motives.

The first person who testifies is not always the most persuasive. The most powerful witness I ever put on the stand was Ann Sakowitz, Robert's mother, and she appeared last. Her testimony was so singular that Mike Tigar included a synopsis of it in his book *Examining Witnesses*. She demonstrated there are things we cannot teach, intangibles that touch jurors deeply if we just let witnesses be themselves.

It was in her kitchen, over meatloaf she made for us, that I learned about Ann's remarkable life. The lawsuit forced her to make a kind of *Sophie's Choice*. Ann loved both her children deeply, but her daughter made the lawsuit possible by transferring her heirship rights to her son (Ann's grandson), the plaintiff. The publicity and expense devastated Robert.

Ann sat next to her son and his wife until after opening argument, when the plaintiff's lawyer invoked the Rule, excusing her from the courtroom. When she finally walked back in to testify two weeks later, the silence was palpable. I slid a chair between Ann and the plaintiff's table and sat down, unconsciously protecting her from them.

Her testimony was riveting. Ann let the jurors into her world, where they discovered a very human being. She insisted that she and her late husband, Bernard, wanted Robert to invest outside their family business, that they encouraged the so-called side deals. "Bernard felt we had run a huge risk, putting all our eggs in one basket—the stores," she said and added with a sly grin, "I guess we were right about that." The jury was smiling, too; Sakowitz Bros. had been in bankruptcy for four years. "We wanted Bob to have more security than that. After all, our daughter was already fixed for life," a welcome reminder of the wealth of the plaintiff's family. Ann explained that she also served on the Sakowitz board and, along with her daughter and other members, approved each of Robert's "secret" deals. "She was just too distracted to pay attention," she said, adding sadly, "I love my daughter, but she has sold out for money and fame."

Cross was a disaster for my talented opponent, but one exchange resonates today—a valuable lesson about the natural-born witness. Opposing counsel wanted Ann to admit that she needed money to live—and that it was Robert's fault. He asked her first to acknowledge that her daughter and son-in-law gave her $10,000 apiece the previous year. "Yes," she replied. Then, before he could ask another question, she turned to the jury and added, confidentially, "I used it all for legal fees." The lawyer kept going. "You need money to live now, don't you?" She answered matter-of-factly, "Things are not like they once were." Next, he had her acknowledge that she owned a large ranch in East Texas. "Robert won't let you sell it, will he? He wants to inherit it." Ann looked stunned. The lawyer persisted, "Robert blocked you from selling it, didn't he?" She turned toward the jury again, tears streaming down her cheeks, answering almost inaudibly, "No. *I* won't sell it. It's all I have left of my husband." There was no reason for redirect. After the jury exonerated Robert, they spent an hour trying to figure out how to make the plaintiff, Ann's grandson, pay her living expenses. She was not even a party to the case.

Not all witnesses are naturals. In the Westinghouse case, I put on a distinguished physicist, a member of the National Academy of Sciences. He was intellectual and cranky; for added measure, he hated lawyers. But for a lucky break, his direct would have sounded like cross. When he told the jury he studied physics at Princeton in the early fifties, I remembered something. "Doctor, wasn't Albert Einstein there then?" His eyes lit up. "Yes. I met him once. A group of us, all physics students, went to his house one Sunday. His housekeeper let us in. We spent all morning around his kitchen table, eating bagels and talking about the theory of relativity." The jury saw the crusty old scientist as an engaging young man, awed by Einstein. When I asked him to step down to the model of the plant to testify, they were ready to listen.

Cross-Examination

Cross-examination is an anecdotal and inexact art, predicated as it is on discovering the truth from human beings. It is the hardest thing we do. Yet, mastering cross is essential to winning lawsuits consistently, including some we deserve to lose. One of the best ways to learn is by watching others.

Once, in the early 1980s, I sat down after cross-examining a witness in a RICO prosecution. Racehorse Haynes, who represented a co-defendant, followed me. His questions and the witness's answers quickly assumed a resonance one associates most often with great music. Haynes enticed him into a rhythm and, before you knew it, destroyed him. That night, I asked Haynes what I had done wrong. Generous as usual, he said that I had done fine. But I persisted. Finally, he drew on his pipe and said, "You weren't listening to the answers." (Of course, what I heard was, "What a loser. Get into welding while there's still time.") He told me the witness had admitted *under my questioning* that he disregarded certain Coast Guard rules—the case involved shipbuilders—yet he criticized our clients' failure to follow some of the same regulations. I had no idea the witness had said that.

As I thought about it that sleepless night, I realized that the deeper I got into cross, the less I listened, sometimes afraid of the answer. The next time up, I actually focused on what the witness said, not what I wanted to ask next. Each answer was a springboard to another question. I will never forget how powerful that felt.

There are rules common to all cross, yet none are set in stone. For ease of reference, I have numbered some below. They provide a broad framework within which to analyze and improve our skills. They teach us to control the witness—the goal of each cross-examination—so that the witness never controls us. *See* Berg, "Blind Cross-Examination," Vol. 17, No. 1 LITIGATION at 12 (Fall 1990); Berg, "Secrets of Cross-Examination," Vol. 20, No. 3 LITIGATION at 6 (Spring 1994). Once you master these—once they become a part of you—infuse the rules with your *self*. If you are funny, be funny. If you are smart, be smart. If you are neither, consider the judiciary.

(1) Keep a calm mind—and listen. Psychologists did a study of some of baseball's greatest hitters. DiMaggio, Mays, Mantle: all of them kept a "calm mind," reading the seams, waiting until the ball was on top of them to swing. So, too, we should keep a calm mind, reading the seams of the testimony, listening to each word the witness speaks. It is the ultimate rule of trial by aikido.

(2) Learn more about the subject than anyone in the courtroom. That includes the expert who testifies for your opponent. The more you know, the calmer your mind.

(3) Do not ask open-ended questions. Compel "yes," "no," or "I don't know" answers. Do not ask questions beginning with "why" or "how." That invites speeches.

(4) If the right situation presents itself, disregard the previous rule. Assume an expert doctor admits a certain blood test would have been helpful under the circumstances of your case. If the defendant doctor did not perform the test, ask, "*Why* would it have been helpful?" The answer can only help.

(5) Formulate follow-up questions. Sit at your computer. Write the questions you will ask if the response is "yes," "no," or "I don't know." That way, you will seldom be surprised on cross. Do this a few times, and you will even anticipate unresponsive answers; there is a limited universe of nonsense.

(6) Take advantage of confused, implausible, or unresponsive answers. Testimony volunteered or invented under the pressure of cross is often absurd or worse, allowing you to demonstrate on the spot that the witness is evasive or lying.

(7) Never laminate your cross. Set aside your computer notes. The questions are inside you.

(8) If you represent the plaintiff, call the defendants and most of their key witnesses to testify during your case. That forces the bad guys to tell their story while being cross-examined, not unlike giving a speech in a wind tunnel. (Defense lawyers know this is coming. Their witnesses should be spring-loaded to disrupt the plaintiff's story by telling their own.)

(9) Do not forget the jury. Ask questions that include them in your anger or dismay: "Mr. Witness, do you really mean to tell us . . . ?" Look at the jury as you ask, never turning away until you have your answer. It is a powerful way to deepen your bond. But do not overdo it. Remember, not everyone actually turns out to be an ax murderer. Watch the witness and watch the jury watching her. Bring them along. They have to know the reason for your emotions before you "get medieval."

(10) Don't just impeach the witness, gore him. If you use a deposition, first describe what it is: "You took an oath, just like in this courtroom?" "You were warned about perjury?" Always read the prior inconsistent statement yourself—never let the witness. His inflection and volume may destroy the moment. Make the contradiction clear to the jury. The last thing you want is for the judge to sustain an objection that what you did was not really impeachment.

(11) Be opportunistic. Pounce on new themes during cross. The plant manager was the first witness in the Westinghouse case. He testified there had been so many problems that "we no longer do steam generator business with Westinghouse." I could not believe it. Not only was there a written agreement between the parties excluding any evidence of business done between them since the filing of the suit, but the judge had granted *their* motion in limine enforcing the ban. They'd opened the door. "Mr. Johnson," I asked, "you didn't really mean to imply the power plant does not do *any* business with Westinghouse, did you?" Plaintiff's counsel objected, in front of the jury, "Wait a minute, Mr. Berg, we have a written agreement you won't go into that." The judge invoked the goose and gander rule. I handed the document to the witness. "Show me where that agreement allows you to mislead this jury." Then, I added, "In fact, the power plant has bought more than $100 million in goods and services from Westinghouse since the suit was filed, hasn't it?" The plaintiff scrambled to clean it up, but it only got worse. The testimony enabled us to build a compelling theme, one that works in any suit with a comparable situation. You do not continue to do business with someone you claim cheated you—at least, not if they really did. Incidentally, the case ended in a confidential settlement after five months of trial.

(12) Infuse your cross with argument. It is not enough to ask the engineer of the train to acknowledge he struck your client as she crossed the intersection. Make it vivid. "Isn't it a fact that as you came barreling out from behind that half-mile of illegally parked tank cars, when you were finally able to see Sharon Lemon, it was too late to avoid killing her?"

Blind cross demands that we be our most creative in the courtroom.

(13) Ask questions opposing counsel should have asked but didn't. This requires a certain testosterone level, regardless of gender. In the selfsame power plant trial (yes, I have at least two other clients if you include my sister's traffic tickets), the plaintiff called a former Westinghouse power-plant salesman. He had not been deposed. To my surprise, counsel never asked him a single question about their central allegation, that our salespeople misrepresented the useful life of the steam generators. Was it a trap? I asked the witness, who had worked at Westinghouse for years, to agree that he had never been told to misrepresent anything about power-plant products. He agreed. Resume pulmonary function.

(14) Cross-examine the whole person. It is one thing to impeach when we have hard evidence. It is quite another when we have nothing but the best of intentions and Ban Roll-On. Blind cross demands that we be our most creative in the courtroom—and a witness's personal history frequently provides a gold mine. In a recent racial discrimination case, the owner of a collection agency that does more than $1 billion a year in government contracts testified he had neither read his company's hiring policies nor been consulted by his employees about them. With $1 billion a year in government business, you'd think he'd know a little something about EEOC regulations, but he also claimed he'd never discussed minority hiring policies with government agencies. So, I began to develop the incongruity of it all, starting with the fact that he was the company's founder and sole shareholder. He admitted bringing in the government business. He told me that he and his executives devised a plan under which all U.S. agencies sent their collectibles, like student loans, to the Treasury Department, where his company peeled off a healthy percentage of the business. He admitted attending regular Monday morning planning meetings with his regional vice presidents, missing only

one in 10 years. Given that level of involvement, his answers made no sense. There was only one thing left to do.

(15) When testimony is incredible, go with lies. This guy was obviously over-coached, something I used to think was a bad thing. I asked if he ever discussed race during those meetings. Note, I did not say "racial policies," but "race." He answered, "Never." You'd think maybe Nelson Mandela or Rodney King or even Puff Daddy might have come up during the past 30 years, but I could be wrong. Once a witness weds himself to the party line, it gets easier and easier for him to lie. So I asked Mr. Detachment if he thought the EEOC considered African Americans minorities. He smiled benignly into the camera and said, "I have no idea." It was time for my final question. I would have bet money on the answer. "You have never had an African-American executive in your company. Your secretary makes more money than your highest paid black employee, some are college educated and have been there years longer than she." This seemed a fine time for an open-ended question. "Why?" He didn't hesitate. "We can't find any qualified blacks," he said. That was enough. It was not difficult to imagine 12 of his peers climbing out of a jury box to kill him. I closed my briefcase and left.

(16) Testify your ownself. In 1974, I represented Jim Bob, a two-time ex-con who faced a life sentence if convicted of the hand-to-hand sale of methamphetamine to an undercover agent. He was concerned the state's 20-year offer would impinge on certain of his social commitments, so we went to trial. The agent testified Jim Bob handed him a cigarette pack filled with meth. Given that there was no one on earth willing to testify for me, I swore my ownself in. "A regular cellophane-wrapped cigarette package?" I asked. He said, "Yes." "Where is it?" I demanded. The agent replied, "The lab threw it away when they tested the meth. But not until I initialed this envelope I poured it in. Of course, you know it tested positive." I knew that. Didn't he know I knew that? Nonetheless, my voice rose, shocked at the revelation, "The lab threw it away?" He responded again, wearily, "Of course they did. I've got the meth. I poured it into this envelope. I initialed it and dated it. It tested positive." I thought, "You're just doing victory laps," but instead asked, "Then I take it you never tested the cellophane or the pack for Jim Bob's fingerprints?" As if it really mattered. He responded again, wearily, "Of course not. I've got the meth. It tested positive." The jury hung 8 to 4 for acquittal, and the case was later dismissed. Around Christmastime, I answered the doorbell. It was Jim Bob, holding an oddly wrapped package. "It's a cashmere sweater," he explained, "I boosted it for you at Neiman's." Neiman's, indeed—exquisite taste at just the right price. "Jim Bob, I just couldn't," I demurred and closed my door on the undeniably touching moment. "Boosted," by the way, does not mean redeeming your Neiman Marcus Inner Circle points.

Closing Argument

In 1979, the chief justice of the Texas Supreme Court wrote an opinion affirming not only a verdict but our tradition of zealous advocacy as well. The issue was a particularly vitriolic closing argument in a personal injury case, including the assertion that the plaintiff drove by a "thousand [legitimate] doctors between the Astrodome and Spring Branch," clear across town, to get to the quack who testified. Justice Pope wrote, "Hyperbole has long been one of the figurative techniques of oral advocacy. Such arguments are part of our legal heritage and language. . . . In *The Tempest*, Shakespeare wrote 'Now would I give a thousand furlongs of sea for an acre of barren ground'; . . . in *Hamlet*, 'To be honest, as this world goes, is to be one man picked out of ten thousand.'"

All of which is to say, let fly. There is little you can do to create reversible error. There is much you can do to win.

The first words you utter should summarize your case, appealing to the broadest number of jurors in the most compelling way.

> I told you this case was about greed. About how the defendant cheated his partners. But as the case has gone on, I realized it is about much more. It affects each and every one of us who has a pension plan or an IRA or who invests at all. When we put our hard-earned money into an investment, we need to be able to trust that we have been told the whole story, that we are not being misled and lied to. Too many things, like our children's college and our retirement, can be destroyed. Just ask my clients, Fred and Janet.

Use language right out of the jury charge. If you talk in the same terms the judge will use when he reads the instructions, the jurors need make only a slight leap to fill in the blanks exactly as you want.

If there are seven liability questions and two on damages, write one through nine down the left side of some butcher paper, with a blank to the right of each. "In Question 1, you are asked if there was a breach of fiduciary duty. Let me give you a road map through the evidence. Just look at exhibits 9, 16, and 27 through 31. They prove. . . ." Remind them of the testimony that supports the claim. Then, fill in the blank with a "yes" and repeat the drill for each liability question.

When you come to damages, do the math step by step, so they can see how you arrived at the total.

When you come to damages, do the math step by step, so they can see how you arrived at the total. Fill in the blanks using a red marker so the number will stick in their minds. Suggest they take in hand-held calculators. I know I said jurors can understand your case. I never said they were good at math.

Arm your friends. Anticipate opposing counsel's strongest points, especially the ones that will come up during deliberations.

> It is natural for someone on this panel to say that the plaintiffs are all wealthy, that they can take a financial hit. I understand on a gut level why someone would say that, but that is not the law. If it comes up, someone among you must have the courage to respond immediately, to say, "That has nothing to do with this case. It has nothing to do with justice. The judge says right here, on the last page of the instructions, that we cannot decide this case on emotion or bias, only on the evidence." And I hope that will be the end of it.

Disarm your enemies. If the trial has lasted more than a few days, you probably have a good idea how the jurors are leaning. It is time to review the juror information sheet again, searching for common ground.

I once had a quality-control person on the jury in a medical malpractice case; her job required her to keep meticulous records of employee drug testing. At the close of evidence, she appeared to be against us. I pitched part of my argument to her, arguing that the defendant doctor purposely kept sloppy medical records.

> He wants you to think this is business as usual, to throw up your hands and say, "I can't read the records. I'll just have to take his word for it, that he diagnosed the tumor on time." Well, folks, that's not business as usual. You'd lose your job if you kept your records that way.

We won, but just barely. The quality-control woman became the foreperson, forging a compromise verdict that kept the jury from pouring us out. I never found out if closing argument changed her mind or if she was with us all along. In either event, it makes good sense to fashion arguments to fit critical jurors.

If possible, nominate your favorite juror to be foreperson. For example, you can comment that the jury has, collectively, "more than 500 years of experience, 27 children, and 12 different jobs. There is even a lay minister serving with you." Singling him out with a passing reference may be enough to get him elected. It really helps if you started this process during voir dire, asking a couple of your favorite potential jurors if they would serve as foreperson if nominated by their peers.

Jurors get much of their information from television, making videotaped deposition excerpts especially effective. Several years ago, Vinson Elkins managing partner Harry Reasoner tried an antitrust case against several railroads. Predictably, their executives had adopted a "me no Alamo" or "I don't remember nothin'" defense. Harry played a spliced tape of their offending answers, a 20-minute fugal chorus of "I don't know" and "I can't remember." It was painful to watch, like those tobacco executives denying before Congress that cigarettes are addictive. It achieved every plaintiff's goal: it sent the jurors out filled with anger. They returned a verdict of more than $300 million.

There have been many great ideas for unusual closing arguments over the years. Haynes always wanted to do one with musical accompaniment, so he argued a murder case in Oklahoma with co-counsel Pat Williams mournfully playing "Momma, Don't Let Your Babies Grow Up to Be Cowboys" on the harmonica. Jerry Spence urges that we become part of a psychodrama, that we become the object at issue. "I am an MRI. I am the most advanced, high-tech imaging equipment there is, so, Doc, read my scan. The tumor is right there, in the meninges. Wait a minute, Doc. Don't say that. Of course, there's a tumor. How can you miss it?" I'm not certain, but I think this practice is restricted to southern California.

Closing argument can also be about other people's bigotry. In *Sakowitz*, opposing counsel told the jury he was a frustrated Baptist minister, not a bad overture to a Bible Belt jury. Nonetheless, buckaroos, he seriously underestimated an Old Testament lawyer with a New Testament wife. "I'm obviously not a frustrated Baptist preacher," I responded, looking directly at the lay minister on our jury, "but I know what the Good Book says about people like the plaintiff. 'It is easier for a camel to go through the eye of a needle, than for a rich man to enter into the kingdom of God.'" The courtroom was silent, but I am certain I heard my late grandmother asking my late grandfather if I had actually quoted the Book of Matthew, threatening never to speak to me again, which, as you might guess, was a somewhat idle threat, given their current circumstance.

I'm not saying it is a bad thing to appeal to jurors' biases, only that if you do it, it better work. Pointing to Sakowitz's nephew, seated with his family, I concluded my argument, "Let me tell you about these people." I said, "They have entreé, they have power, they have money. No one ever says 'no' to them. At least not until now. You can do it. You can say 'no' to them for the first time." This invitation is irresistible to people who have been watching at the window all their lives.

Finally, it always pays to save something for closing, something you have seen that the rest of us may have missed. I recently second-chaired a two-day misdemeanor DWI trial. My oldest son, Geoff, was lead counsel. At the end of the first day, I told my wife that it was unwinnable. Just before closing argument, I challenged Geoff, asking him where the reasonable doubt was. He sniffed, "Where isn't it?" He argued that the client should never have been pulled over, much less charged. "Well, Geoff," I wondered, "should he have been given an Award of Merit for Driving Through the DWI Checkpoint?" He had an answer for that, too. "The officer admitted he signaled Donny with a flashlight to pull over through four lanes of busy traffic. You know that intersection on Saturday night. There is no way he could have seen a flashlight."

Geoff reminded the jury that Donny had not sped away, did not swerve between lanes, and pulled over four blocks away, as soon as he realized the officer wanted him to stop. Most important, he repeated the officer's testimony that he had turned off his flashing lights before he got out of his patrol car, something he said he never did until he made the decision to give a field sobriety test. It seems the flashing lights interfere with the results of the eye examination.

> When the lights go off, the field tests begin—a decision the officer made before he ever got out of his patrol car, without having said one word to Donny. In other words, with no evidence except that Donny drove away from the checkpoint, the officer was going to test him, and he was going to fail him. And that's exactly what happened.

The jury returned a not guilty verdict. They bought Geoff's close, especially the significance of turning off the lights. My pride was diminished only by the fear that he would ask for a raise.

Learning to Win

When the jury retires, you want your client to be able to say, "No matter how this comes out, I know you did everything you could for my case." More important, you want it to be true. Nonetheless, if you lose, there is little comfort in the compliment or consolation because you didn't make the facts. We write our history from our last verdict forward. The object of the exercise is to win.

Pablo Neruda, the Nobel Laureate, wrote that poetry came for him when he was eight, a touching way to describe when his craft began to consume him. So, too, trying lawsuits comes for us—invading our thoughts, teaching us our ancient craft—when we are not even aware we are learning. I think about that now when I watch the ocean, my top-water lure skimming across the waves, with the hook, barbs clamped down, hidden in the sea below.

An Interview with Judge Lawrence J. Vilardo by Ashish Joshi, in Litigation Journal, Spring 2023, Volume 49, Number 4, pages 51-55.

An Interview with Judge Lawrence J. Vilardo

ASHISH JOSHI

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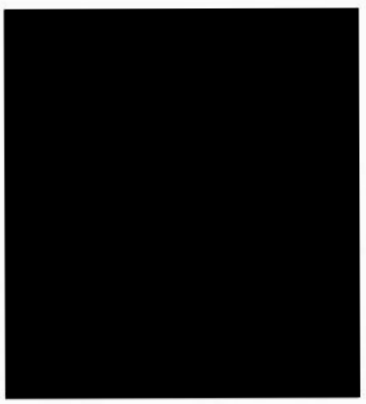

How does someone with aspirations to become a judge best present oneself to the world? In the case of Judge Lawrence J. Vilardo, it was a compelling combination of quiet brilliance and disarming humility.

Born and raised in Buffalo, New York, he received a bachelor of arts summa cum laude from Canisius College and graduated magna cum laude from Harvard Law School. He clerked for Judge Irving Goldberg of the Court of Appeals for the Fifth Circuit in Dallas, returned to Buffalo, was an associate at Damon Morey LLP, and then was a founding partner of Connors & Vilardo, LLP, where he conducted civil and criminal litigations in state and federal courts.

In 2015, President Barack Obama nominated him to serve as a U.S. district judge for the Western District of New York, on the recommendation of Senator Chuck Schumer, who said that when he turned his ear to western New York, what he heard from both sides of every political and litigation divide was the same: "Vilardo. Vilardo. Vilardo." The U.S. Senate confirmed his nomination by a vote of 88–0. He has served as a federal district judge since late October 2015.

Before becoming a judge, Vilardo served as an editor of LITIGATION for nearly 20 years, including two years as editor in chief; served a three-year term on the governing council of the ABA Litigation Section; and served a one-year term as codirector of the publications division of the Section.

Senator Schumer once referred to Judge Vilardo as "a true Buffalonian," by which Senator Schumer explained that he meant "salt of the earth; honest; grounded." Judge Vilardo embodies and personifies those values, which is how he has presented himself at each step of his professional career.

AJ: What is it like to be a federal judge?

LV: It's the best job in the world. Ever since I worked for [Fifth Circuit] Judge Irving Goldberg, it was my dream to be a federal judge. I saw the fun that he had doing what he did, the way he interacted with his clerks, and the significance of the job—just how important it is to have people who are committed to justice and willing to do the work necessary to do justice. For me, it's a joy to come to work every day. The decisions are very hard, and the job is difficult in ways that are different from the ways a lawyer's job is difficult. I work hard to try to do justice, to treat everybody who comes into my courtroom with respect. But it's the best job I've ever had. Well, the second-best job I ever had; the best job I ever had was clerking for Judge Goldberg.

Illustration by Daniel Hertzberg

AJ: What was it like to clerk for Judge Goldberg?

LV: He was an amazing man—a fabulous writer with incredible intellect, and the kindest and most generous and compassionate man I've ever dealt with. He had so many stories to share. He was Lyndon Johnson's personal lawyer. The first call that Johnson made after President Kennedy was assassinated was to Goldberg, to find out about the transition. It was a real blessing to clerk for him. Being a law clerk is like being a judge without any of the pressure. You get to help make the decision, but the buck doesn't stop with you—it's with the judge—so you don't feel the same pressures at all. That clerkship was just an amazing experience.

AJ: Tell us about your law clerks.

LV: I work closely with my clerks. My door is always open, never shut, and they come in and talk with me several times each day. We work collaboratively on everything. There's no competition among them; we're all trying to row the boat in the same direction. It's been remarkable. I've been very fortunate to have really fabulous young people apply. I've not had a single clunker yet; every person I've hired has been spectacular, both in terms of their legal abilities and in terms of their qualities as people. They get along with each other. Often, I'm sitting in my office, and I hear laughter coming from the clerks' offices. It's music to me.

AJ: Was there anything unusually interesting about the timing of your move from private practice to the bench?

LV: The stars aligned at a perfect time for me. I was approaching age 60—which is really about the oldest at which one gets appointed, at least to the federal bench—and the opening arose. I think I'm better as a judge because I had decades of experience practicing law first.

The other thing that was remarkable was the sheer good luck that I had. There are only two district judge slots in Buffalo, and there hadn't been an opening for more than 20 years. When the first one came up, Senator Schumer recommended someone else. I thought my chance was over. I was disappointed, but I was happy at my law firm, and it wasn't the end of the world. Then, a couple weeks later, I got a call from the senator's screening committee saying, "We'd like to interview you." And I thought to myself, "For what?" I called a friend who was wired into the political end of that situation and was told, "There's a rumor going around that the other judge is going to take senior status as well, and if he does, there's a decent chance that Senator Schumer will send your name to the White House for the second slot." So I interviewed with the committee and got a call less than a week later to meet Senator Schumer. About a month later, he sent my name to President Obama, who eventually nominated me for the position.

For whatever reason, the White House decided not to nominate Senator Schumer's first recommendation, so I was the only nominee for two slots, in a court that had an incredible backlog. My nomination was fast-tracked—I think mine was the only nomination first made in 2015 to be confirmed in 2015. Then, of course, the administration changed in 2016. Had I not been confirmed when I was, I probably wouldn't be sitting here today. Sometimes it helps to be lucky!

AJ: What was it like to go through the confirmation process?

LV: The interview with Senator Schumer was fascinating but intimidating. I had not expected it to be as substantive as it was. I expected it to be a get-to-know-you sort of thing. It was anything but, and a really intense interview. I was impressed with how much he cares about this process and how he wanted to be confident that, first of all, I was intellectually equipped to do the job and, second, that I had the temperament to do it.

While that part was intense, it paled in comparison to the intensity of what followed—because next, you're vetted by the ABA, you're vetted by the DOJ, you're vetted by the FBI.

It was an intense process that took several months. One day, my wife called me at the law firm and said, "Two cars just pulled up and guys in suits just left their cars and started walking around the neighborhood." I said, "Well, we knew this was going to happen." Later, I found out that—to a person, I think—all the neighbors said the same thing: "We don't know him. He leaves very early in the morning, and he comes home very late at night. But his wife is the nicest person in the entire world." So the FBI agents who did the door-to-door inquiry in my neighborhood told me that if there were an election between me and my wife in my neighborhood, my wife would win, and I'd finish a very distant second.

AJ: What was the transition from the bar to the bench like? Did it change your worldview?

LV: It did, but what prepared me for it was the transition from being a law clerk to being a lawyer. I remember some early briefs that I wrote for my former boss and later law partner, Terry Connors. He'd come into my office and say, "You know this is well written and well reasoned. It would be an A+ if you submitted it for an exam, but it's not what I want. I need advocacy. I need persuasion. You need to stop thinking like a law clerk and start thinking like an advocate."

That was a tough transition for me, but eventually I learned how to do it. When I became a judge, I knew that I had to reverse that process. I needed to stop thinking like an advocate and start thinking like a judge. I always thought I had a good sense of what's fair and just because of my parents, two of the most remarkable and fairest people you could ever meet. Neither one was much educated—each had just a high school diploma—but they both pushed all their kids to go to college and beyond.

The one rule in our house was that you had to go to college; that was not open for debate. Post-grad education, that was up to you,

but college was a must. Of their four sons, one became a dentist, one became a physician, I became a lawyer, and one is a charter fishing-boat captain. There's a state court judge around here who tells people, "This guy's got a brother who's a doctor, a brother who's a dentist, and he's a federal judge; and the fourth brother is the most successful of them all because he fishes for a living."

AJ: You went to Harvard Law School during the 1970s. How was your experience?

LV: It was a great place. It opened my eyes to lots of things that I didn't know about. And it was intimidating. During my first year in law school, I used to sit around and wonder how I was going to make it through the next three years with all those incredibly smart people, because there were so many of them who were so eloquent and obviously so brilliant. I thought to myself, "I can't compete with these folks. They're just way smarter than I am. What the heck was I thinking when I decided to come here, because I'm in way over my head."

I worked extremely hard. When I got my first semester grades, it had gone really well. I was just flabbergasted. And then, at the end of the first year, when I made the law review based on my grades, I was equally as flabbergasted. I just didn't think that I could compete in that league. The law school class was also diverse in terms of people from different socioeconomic backgrounds. I formed a lot of close friendships, including one with Howard Gutman, who became my co-clerk with Judge Goldberg and who got me involved with LITIGATION journal. And I became friends with Chief Justice John Roberts, who was my managing editor on the law review.

AJ: If you had an opportunity to talk to your younger self during your law school days or your law clerk days, what advice would you give yourself?

LV: Follow your heart and do exactly what you think you should do. I tell people I've been blessed. I've had to make a number of hard decisions about my career, but I would not change any of them. When I decided to come back to Buffalo rather than to go to Dallas or San Francisco, which were the two other cities I was thinking about, that was the right call for me. The dollars certainly would've been different in the bigger cities and perhaps the breadth of the litigation might've been different too, but it was the right decision for me. Then, becoming a judge, once that opportunity presented itself, was a no-brainer. Maybe not the smartest decision financially, but I've never pursued money as a goal, and I'm glad that I haven't.

AJ: As a judge, do you get trained to check your biases?

LV: I'm not sure we get trained, but the way I do it is by thinking about it and confronting it. I recognize that I have biases. We all do. The goal is not to let those biases infiltrate our decisions. So, when a 60-something Italian male appears as a defendant before me, I strive to treat him the same way I would treat anyone else, and vice versa. I also look to recognize that we all may have unconscious sympathies for people who are similar to us and perhaps different reactions to people who are not similar to us, but that cannot affect the decision-making process. At the same time, you can't bend over backwards just to appear "fair."

I once had to sentence someone who was similar to me in many ways. The question was do I put the person in jail. I didn't, but I agonized over it and confronted myself with the question "Am I doing this because of the similarities of how this person grew up and how I grew up?" My conclusion ultimately was no, and I hope that was right. These are hard decisions. I try hard not to let biases creep into them. I hope I'm successful.

> The pressure to do justice is a tremendous pressure; it's a positive pressure, to be sure, but it weighs on you.

AJ: Do you use anyone as a sounding board?

LV: Absolutely. My law clerks are my sounding boards, and they also watch for issues that I should know about but might not. Very early in my judicial career, I had one of my law clerks, a woman, ask, "Judge, do you realize that you are significantly easier on women than you are on men in criminal cases?" I said, "No. How can that be?" She presented me with some facts and said, "Look at it. This is what you've done in these cases." I looked hard at it and said, "You know what, you're right." So, I bounce things off my law clerks, and I ask them to look for things that I might not see.

My career clerk is very experienced and very talented, and I talk with her about my decisions all the time. On especially hard decisions, I'll sometimes call other judges and discuss with them what I'm thinking and why, just to see if they have any observations about my thought process.

No one makes the decisions for me. I make every single decision that comes out of these chambers. I read all the papers myself. I agonize over every single decision, even the seemingly unimportant ones. Every single decision is my decision, but I weigh what everyone says.

AJ: Your first day as a judge. What was it like to don that black robe and take the bench?

LV: I was petrified. You worry about whether you're going to say something embarrassing. You worry about whether you're going to make a decision that's going to be incorrect and hurt someone. The pressure to do justice is a tremendous pressure; it's a positive pressure, to be sure, but it weighs on you.

My first day was scary. The first lawyer who appeared in front of me, God rest his soul, was John Humann, who was an absolutely fearless public defender. He was a tough but wonderful person, and he would say exactly what he thought to any judge. He was about 10 years older than me, and he told my courtroom deputy that when I took the bench, he was going to moon me. Of course, he didn't, but afterwards, my deputy said to me, "I didn't know whether he was crazy enough to be serious; and I didn't know whether to tell the court security officers or warn you."

I took the bench and had no idea he had said that. In the end, of course, he turned out to be a perfect gentleman. I think he sensed that I was nervous. He treated me very respectfully and played it absolutely straight—no joking—and I was very grateful for that. He's gone now, and I miss him. But the first time on the bench was scary. Later, one of the magistrate judges here told me, "You couldn't have done any worse than I did. When I took the bench, I sat down, looked out at the gallery and said, 'Good morning, Your Honor.'"

AJ: We live in an age of disinformation and polarization. Do you see these trends play out in your courtroom with the juries?

LV: Because I'm not in the jury room, I don't know whether they play out with juries. I have had a couple jury verdicts I was absolutely floored by, as well as many I've agreed with, but I don't know whether these issues played any role in any of those verdicts. I do think that there is an anti-intellectual thread that's running through society today that is a little bit scary. People do not want to listen to experts. The pandemic—people's reactions to it and whether to get vaccines—is a good example of that. I tell folks that I asked my doctors, "What are you doing?" and then I did what they did.

In areas that I don't know about, I want to know what the experts are doing. But there is an anti-intellectual bent today. Some folks think that because they can click something on a computer that tells them everybody is wrong and we're getting the wool pulled over our eyes, they know better than the experts. It's scary to me.

AJ: What is it like to be reversed as a judge?

LV: Well, it's not a pleasant experience. But it is the way our system works. In fact, one of the things I pride myself on is helping the lawyers in my courtroom make a record. I recognize there are things you don't want to say in front of a jury, so every time we take a break, I ask the lawyers, after the jury leaves, "Is there anything you want to put on the record?" I try to allow them to make whatever record they wish, to preserve any errors that I might make. I also hope that I'm not afraid to get reversed. I think I've been reversed outright only once. I knew when I wrote that particular decision that I might be reversed, but I was convinced I was right. Although I knew the safer thing to do, for me and for my ego, might be to decide the case the other way, the right thing to do was to decide the case the way I decided it. Sometimes people think differently. All a reversal means is that other judges disagreed. It doesn't mean you're wrong.

AJ: Do you have a particular ritual or method that you follow when you sit down to write a judicial opinion?

LV: I try hard to write in a way that is accessible to the litigants. I think of my parents, who had just a high school education—would my mom and dad understand what I'm writing? And I ask my law clerks to help make it accessible and understandable. When I write and when I edit, I try to use short words, short sentences, and short paragraphs. I try to write in a way that makes it easy to understand why I did what I did. I know that half the litigants are going to read it and disagree with it. I'm not trying to get everybody to agree with what I'm saying. I just want them to understand. My goal, at the end of the case, is to have the losing litigant say, "He was wrong, but at least I understand why he decided what he decided."

AJ: Let's talk about courtroom craft. What tips would you offer to aspiring litigators?

LV: Make a good first impression on the court. The first thing the court should see from you should not be an unreasonable denial of a request for an extension. You just don't want that to be the judge's first introduction to you in the case. As far as the timing goes, pick your fights to make a good first impression in court.

Next, when you're in court, treat everyone, and I mean everyone, with respect. That doesn't mean that you can't make forceful arguments. It doesn't mean you can't ask hard questions. It doesn't mean you can't ask hard questions in a direct way. But don't ask them in an insulting way. Don't demean the other side. Don't do anything that shows disrespect for anyone in the courtroom. I've lost my temper in the courtroom only once, and it was as a result of a lawyer who was being very disrespectful to the court security officers and the marshals.

Finally, prepare, prepare, and prepare some more. There is nothing that is worse than a lawyer coming to a courtroom unprepared. When you come to the courtroom, you should know your case better than anybody else in the courtroom. You certainly should know it better than the judge, because the judge has had only a few minutes to spend with the brief or whatever the issue is in the case, and you've had days or weeks. You also

can and ought to outwork your opponent. That's one of the most important lessons for young lawyers.

AJ: What has impressed you the most in your time as a judge?

LV: Perhaps the difference in quality and commitment of the lawyers who appear in front of me. There are lawyers on both sides who just care so much about their clients—prosecutors and defense lawyers in criminal cases; plaintiff lawyers and defense lawyers in civil cases—and they work so hard to provide such stellar representation. Then there are others, sometimes very talented others, who don't display that same level of commitment and hard work. It's a shame.

There is a tremendous difference in the quality of practice in front of me. I'm not talking about talent as much as I'm talking about hard work and commitment. It breaks my heart to see litigants who are not well represented. Sometimes I see very talented lawyers who mail it in, and I say to myself, "You know, I never did that and I hope to God that I never would've done it, no matter how busy I got in my practice."

AJ: What's the most challenging thing about being a judge?

LV: Making decisions. When I was interviewed by Senator Schumer's committee, they asked, "What do you think the hardest part of this job is going to be?" I said, "Making decisions." They said, "Making decisions? You'll make decisions every day." And I said, "Yep; and every single one of them is going to be a tough decision." I had no idea how right I was when I said that. When I sign my name now, as a judge, it means something very different than when I signed my name 10 years ago as a lawyer. I recognize the importance and the power of that signature, and it makes me think.

It's also important to remember just how significant these decisions are to those who come before us. The other day in court, a lawyer said something about how so many criminal defendants think that they're just a number in the system and are not being considered as individuals. I said to the lawyer, "That breaks my heart." She said, "No, I don't mean that *you* do it, Judge." I said, "I understand. But it still breaks my heart that criminal defendants would think that." Every single person who comes into my courtroom is important to me, whether it's a court security officer, a criminal defendant, a prosecutor. I don't care who it is. Everybody in that courtroom is important, and every decision I make is important.

AJ: You've had a long association with the ABA and with LITIGATION journal in particular. How was your experience?

LV: Another blessing for me. When I became an associate editor of LITIGATION, I thought I knew how to write. But I learned so much more from that experience. Wordsmithing is so valued by the folks on the editorial board. So, in terms of my development as a writer, as an editor, it added to my abilities tremendously. Even more than that, the friendships that I developed through the ABA, and in particular through the journal, are just amazing. To this day, some of my closest friends are my fellow editors on LITIGATION. Just an absolute blessing. My wife passed away a couple of years ago. It was the most awful thing that has ever happened to me. The outpouring of love and support from folks on the journal was just remarkable. It got me through a very dark time. Those friendships are tremendous.

You can and ought to outwork your opponent. That's one of the most important lessons for young lawyers.

AJ: Judge, what gets you out of bed every morning?

LV: Three things—two are work-related, and the third is the most important of all. One is working with these folks in my office, who are all incredibly talented and committed and hungry to learn about the law. That's very important to me, to work with people who want to do what we're doing. Number two is doing justice in cases that are important to the folks whose cases they are. Every case that comes in front of me is a federal case. Every case is important. And when someone's freedom is on the line, that's hugely important. Every decision I make is an important decision. Making those decisions in a way that does justice, in a way that treats people with respect, and in a way that lets folks know that they're heard—that's what keeps me going, and I simply love it. But, as for what makes me happy to get out of bed every day, the third and most important thing is my family—my three kids, their fabulous spouses, and my four, going on five, grandkids. Their smiles and laughter are my greatest joy. I have been very blessed. ▪