What I Learned From Teaching Trial Advocacy:
Opening Statements and Storytelling

Part One of a five-part series.

TAKEAWAYS >>

- Trial persuasion requires making events come to life by mastering the intricately connected answers to who, when, what, where, how, and why.
- Total storytelling activates jurors' senses, conveys unforgettable realism, and builds a narrative world confirmed by witness testimony and evidence.
- Defense attorneys who prefer not to reveal too much about their trial strategy during opening statements may still use storytelling when their case is particularly strong. Defense attorneys with a weak story to tell should at least consider whether a negotiated resolution is in order when the other side's story is notably compelling.

BY GINO L. DiVITO

I LEARNED MUCH FROM TEACHING. AN EARLY REALIZATION WAS THAT EFFECTIVE teaching requires subject-matter knowledge coupled with relevant, entertaining, and compelling information.

I learned, too, that one earns subject-matter knowledge through study and experience. I have had a full dose of both. I've studied ample amounts of trial advocacy information from books, lectures, articles, and the Web. And I've learned from more than three decades of teaching trial advocacy: in Chicago and other far-flung locations; in collaboration with extraordinarily talented judges and lawyers; in adapting to teaching's inherent demands; in serving as the lead attorney in well more than a hundred jury trials; in serving for 12 years as a trial judge; and from eight years on the Illinois Appellate Court in reviewing trial-related briefs, trial transcripts, and oral arguments.

Boldly risking the possibility of censure for flawed opinions, I nevertheless dare to share this series on trial advocacy based on those experiences, but mostly from lessons learned from teaching law students and attorneys how best to navigate through the four stages of a trial: 1) opening statements, which will be covered in two parts; 2) direct examination; 3) cross-examination; and 4) closing arguments.

As in news reporting and teaching, trials require answers to the standard six questions that begin with "who," "what," "when," "where," "why," and "how." This applies to opening statements, and continues with testimony about *who* the witness is, and *when* and *where* the witness acquired information; and they continue with testimony about the witness's knowledge of *what* and *how* and *why* events happened.

But in this series, answers to those questions are not about witness sequence or the need to present witness testimony, but about how trial attorneys apply answers for persuasion in the various stages of a trial.

Thus, my answer to the "who" question is not merely to identify witnesses, but to ensure that your witnesses are viewed as trustworthy and reasonable—and that you are viewed similarly.

Likewise, the three important questions about what to do and how and why to do it—answers that frequently overlap, and sometimes are indistinguishable—must be based on the need to recreate past events by also answering where and when they occurred. The combined answers to those six questions are essential for making events come to life. Indeed, answers in the courtroom—about the advocate and about the facts that create past events—are the bedrock for trial persuasion.

This five-part series shares my personal experiences based primarily on trying cases and teaching the four stages of trial advocacy. All five parts in this series published by the Illinois Bar Journal incorporate the numerous examples, lectures, and anecdotes I've used to enlighten and entertain law students and attorneys on the art of persuasion in trials—primarily in jury trials. I take full responsibility for any failure to offer guidance on subjects I should not have overlooked.

My opinions are my own. You, however, are entitled to your own opinions based on your personal experience. If you disagree—if what you do works for you, if your methods have produced persistent success—my conflicting opinions should be rejected. My sole goal, after all, is to offer a contribution to trial advocacy excellence for our legal system, one that already has deservedly earned the world's gold standard for obtaining truth and justice.

ISBA RESOURCES >>

- Benjamin R. Lawson, *Trial Lessons From Comedians*, 111 Ill. B.J. 36 (Aug. 2023), law.isba.org/3PaewVE.
- Bruno R. Marasso, *Trying Your First Case: A Primer on Getting to Opening Statements*, YLDNews (June 2019), law.isba.org/33yOrGs.
- Maureen B. Collins, *Lawyer as Storyteller*, 88 Ill. B.J. 289 (May 2000), law.isba.org/3YQT2QY.

From October 2023 through February 2024, the Illinois Bar Journal will be publishing a special five-part series on trial advocacy by **GINO DiVITO**, *who cofounded and is a partner in the Chicago law firm of Tabet DiVito & Rothstein LLC. He has served as a trial judge and as a justice of the First District of the Illinois Appellate Court. He is the author of the ISBA publication, "The Illinois Rules of Evidence: A Color-Coded Guide," which is updated annually.*

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PERSUASIVE OPENING STATEMENTS RESULT IN THE FUSION OF WHAT JURORS FIRST LEARN AND WHAT THEY HEAR AND EXPERIENCE FROM WITNESS TESTIMONY, THUS AUGMENTING EVEN TESTIMONY OTHERWISE LACKING PERSUASION.

Opening statements

What to do. On the first day of every trial advocacy class—the orientation session—I invariably assured law students, usually assembled in a Daley Center courtroom in Chicago's Loop, that, before they embark on any of their assigned trial exercises, I would do my best to fully prepare them on what to do. Then, on the scheduled day for opening statements—before they were to assemble in groups of eight led by fellow instructors—I reminded the students of my promise.

Immediately after making that announcement, though, I pointed out that they might have noticed that I appeared somewhat disoriented. Agreeing, I explained that I was still traumatized by the terrible accident I had seen while walking to class—an accident they also may have seen. And then, prompted by bewildered looks, shoulder shrugs, and heads shaking left and right, I realized the accident had occurred on the south side of the Daley Center, the direction from which I had come; but the students could not have seen the accident, since they had come from their law school, located north of the Daley Center building.

I then began telling them about the accident I had seen:

> You no doubt have seen the outrageous behavior of bicycle messengers in Chicago's Loop. You've seen how they often ride recklessly at great speed while sometimes going the wrong way in one-way traffic, and how they habitually ignore traffic lights.
>
> And you're probably familiar with the Chicago Temple Building, which abuts the sidewalk on the southeast corner of Washington and Clark streets, across from the Daley Center. You probably know that Washington and Clark are one-way intersecting streets in the Loop, with Washington accommodating only east-bound traffic and Clark only south-bound traffic.
>
> While I waited for the light to turn green to cross Washington, an eastbound car on that street—one that had the green light—drove through the intersection and struck a messenger-service bicyclist, who was cycling northbound the wrong way through the solid red light on Clark.
>
> When the car crashed into the bicycle, both it and the messenger flew about 10 feet in the air. I hesitate to tell you this … but the cyclist was beheaded.
>
> Then, after hitting the cyclist, the car swerved to the right, narrowly missing others and me, but it hit a man and a woman on the sidewalk, pinning them against the Chicago Temple Building. As parts of the car were enveloped in flames, I saw a young child strapped into the backseat of the car. I instinctively opened the back door of the car, managed to unbuckle the child from the seatbelt, and calmed the screaming child, who was unhurt. Others bravely pulled the unconscious driver from the car, but he was badly burned. Still others moved the car from the pinned and bloodied pedestrians and began attending to them.

What I told the students was accompanied by demonstrations of traffic flows, the collisions of car and cyclist and pedestrians, and my own avoidance of the out-of-control car—demonstrations enhanced by appropriate emotion and by animated body movements in order to: indicate car and bicycle directions on the courtroom floor; recreate directions and collisions; act out how I avoided being struck by the car; and demonstrate my actions in saving the child and the actions of others in removing the driver from the car and in caring for the injured pedestrians.

The students had been gasping and were audibly responding in horror from the instant they learned of the beheaded cyclist. I then paused, and loudly proclaimed: "Now that's an opening statement!"

After I made it clear that no cyclist had been beheaded, no one was struck by a car, and no child or anyone else needed to be rescued, relief and laughter filled the courtroom. I then announced: "That's how you make an opening statement! Now, let's discuss how it affected you and why you believed it—why it worked."

Storytelling

First of all, I told and demonstrated a **story**. A false one to be sure, and one that would never be allowed in a trial based on an attorney's personal perceptions—but a teaching demonstration that first previewed buildings and streets and the actions of a cyclist, all possibly familiar to at least some jurors. Such familiarity may play an important role in opening statements—where some jurors may have experienced similar behavior of a key person in the action, as well as places where the action occurred. Such information may conform with jurors' knowledge or experience and may thus enhance credibility.

Telling a story—either through total opening statements or as essential parts of one—presents an important start for persuasion. But successful opening statements require more than talk. You must **show** truth. You do that through the use of admissible physical evidence when available, and by creating word-pictures by speech, emotion, and body movements that establish images evoking reality.

The reality evoked through opening statements sets the table for all the testimony to follow. Where witness testimony is effective, it confirms and bolsters what opening statements provided. And, in instances where witness testimony lacks effectiveness, opening statements may provide welcome support, because of the inexorable intertwining of opening statements with witness testimony. The two become one, *even though opening statements are not evidence.* Persuasive opening statements result in the fusion of what jurors first learn and what they hear and experience from witness testimony, thus augmenting even testimony otherwise lacking persuasion.

Everyone, from childhood on, enjoys a good story. Especially one that expands knowledge and is consistent with experience and beliefs, and even

one that willingly suspends reality for the semblance of truth. Stories achieve that by providing images even for the unreal. For effective opening statements, you must shape jurors' beliefs through images that command jurors' **five senses**. If jurors can see it, hear it, smell it, taste it, and touch it, it's real. What's real is true. And everyone has a natural affinity for truth.

Conveying reality is particularly important in this very first stage of trial. Memories of jurors (which, throughout this essay, include trial judges when they are the finders of fact) are likely to forever be embedded in the first impressions they receive. The important requirement of **primacy** is thus served, because every juror begins with a clean slate—an absence of preconceived knowledge—so that what they first learn often endures as their final belief.

Unlike closing arguments, this stage of a trial invites you to etch new information on each juror's previously clean slate. To best provide fresh information, you must be a **reporter**—one who relates what has been learned. The analogy is appropriate. When a reporter—in contrast to one who provides opinions, such as an editor or a columnist or a commentator—tells us of unfamiliar places and events, we are unable to reject what is conveyed because we have no or limited knowledge relevant to the location and imparted information. That absence of knowledge applies also to the first things jurors learn in a trial's opening statements.

To take advantage of that first opportunity, you must give the jurors reality shaped by the word-pictures that create true images. If jurors' five senses are induced by what you describe, they cannot reject those images. They may even place themselves in the action through the images you provide—and not by your improper invitation—as the victim of the rape, or the shooting, or the robbery; as the person who was injured because of someone's negligence or indifference; as the person who was defrauded, and whose trust was violated; as the person whose reputation is in shambles; as the person who is near bankruptcy because of a breached contract.

Where jurors are presented only random facts and data, experiencing reality is unlikely. Using facts and data to create a story—one that jurors capture and etch with their five senses—offers the pathway to truth.

To secure jurors' interest in previewing what is to come, you need to hit the ground running. That's particularly true in *total* storytelling, where, as the first to speak as a prosecutor or for the plaintiff, you should not waste time telling jurors that your opening statements give you an opportunity to provide an overview of what the evidence will show, and to guide them through future trial procedures. In some instances, especially when you don't engage in total storytelling, that may be a perfectly fine way to garner juror appreciation.

In total storytelling, however, leave those informative statements to the judge or opposing counsel. Telling a persuasive story requires opposing counsel, who may have nothing of substance to offer, to try to reduce the impact of your statements by informing jurors that what you said is not evidence, but merely your opinion of what the evidence will show. But, where opposing attorneys do have something to say, they are likely to challenge your version of the story, and even offer their own version.

If only one side delivers persuasive opening statements, that side starts with an advantage that may never be overcome. But don't be concerned if both sides offer persuasive statements. In that case, the jury will note the differences and pay special attention to the forthcoming evidence that supports each party's statements. This applies also in bench trials, where judges appreciate opening statements for providing an understanding of the case and the parties' differences, thus allowing focus on what really matters during evidence presentation.

In starting strong, some believe that every story should begin with something like, "It was a dark and stormy night."

IF ONLY ONE SIDE DELIVERS PERSUASIVE OPENING STATEMENTS, THAT SIDE STARTS WITH AN ADVANTAGE THAT MAY NEVER BE OVERCOME. BUT DON'T BE CONCERNED IF BOTH SIDES OFFER PERSUASIVE STATEMENTS. IN THAT CASE, THE JURY WILL NOTE THE DIFFERENCES AND PAY SPECIAL ATTENTION TO THE FORTHCOMING EVIDENCE THAT SUPPORTS EACH PARTY'S STATEMENTS.

Although we may pay homage to that cliché, it's merely an example for starting with words that draw interest. Try to summarize what the case is about in your very first sentence.

A good start for a plaintiff's attorney may begin with, "This is a case about a boy who will never walk again."

A good start for a prosecutor may begin with appropriate gestures and words such as: "'Put all your paper money in this bag or you're a dead man,' this armed defendant shouted seconds before he clutched the treasured bag of money he demanded and needlessly pulled the trigger of the gun that killed John Doe."

Then, having succinctly stated what the case is about and having drawn the emotion and attention of the jury, you must keep the momentum going by painting the images that capture the reality of what happened and the identity of the person responsible.

Of course, where defense attorneys have a good theory supported by persuasive evidence, they should begin with a compelling statement, and follow up by pointing out the inadequacy of the other side's evidence, while sharing their version of the reality underlying the case.

To provide students the rules I've already stressed, and to set examples for even more, I invariably have given

students another example of a total story in opening statements:

> It was a perfect spring day—May 15 of last year.
>
> After a good-night's sleep, Jimmy Jones was awakened by his radio alarm clock. He brushed his teeth, showered, dressed, and—as was his custom—read a few more pages of the book he had been reading. He then joined his father, mother, and sister at the breakfast table, sharing with them interesting information he had just learned.
>
> Jimmy's 14th birthday was a week away. He was an A student in his eighth-grade class. He loved sports. He played golf with his father, and tennis with friends and members of his family. He played shortstop on his Little League team. He was the captain of his school's basketball team, where he played point guard and led his team in scoring.
>
> Jimmy was the first to leave the breakfast table that day. He hugged and kissed each member of his family, and he told his sister that, this afternoon, he would give her another chance to win her first basketball contest of HORSE. As he left to walk the two blocks to school, his mother watched as he went down the front stairs, with his books in his backpack, and turned left to head toward Main Street. It was the last time she was to see him walking.
>
> When Jimmy arrived at Main Street, he waited for the light to turn green. When the light changed, he stepped off the curb and started to cross the street ….

It's likely Jimmy was struck by a car that drove through the red light. But for the anticipated civil lawsuit, it's unknown whether he suffered death or injuries. But that's irrelevant for this exercise.

What's relevant is the story. By drawing images through word-pictures, I described a special boy with a loving family and a promising future, one that set the stage for a terrible outcome not possibly marked by challenging weather or misconduct by Jimmy. And in this *total* storytelling, I never used lawyer-talk. I didn't once refer to words like "I submit …," what a witness would say, or what the evidence will show. I just told a story—without saying such things as his principal will tell you (or testify) that Jimmy was an A student, and his coaches will tell you he was skilled in basketball and baseball, and his father will tell you how he enjoyed the game of golf. And after Jimmy stepped off the curb when the light turned green, I wouldn't say that Mr. Doe and Ms. Smith will testify that they saw the light was green for Jimmy and red for the defendant.

In total storytelling, I wouldn't tell the jurors those things because telling the factfinders a realistic story through facts that create vibrant images is superior to telling the jurors about witness testimony or what the evidence will show. I wouldn't say those things because they soften the narrative and they invite jurors' doubts. Jurors may think: "That may be what the witness will say (or what the evidence will show), but what really happened?" Or, "I want to see and hear these people—especially on cross-examination—to determine whether they experienced what they claimed to have experienced and to judge if they are trustworthy." Conveying images without needless attribution avoids the possibility of such doubts.

Storytelling when not telling an entire story

Thus far, I have given two examples of telling a persuasive *total* story in opening statements. But storytelling applies also to opening statements that contain partial storytelling. In most criminal cases and in some civil cases such as those involving death or great bodily harm, total storytelling may work well because they evoke emotion and provide tangible images that evoke reality.

In many cases, however, telling a total story may not be effective. But even in those situations where storytelling does not represent the entirety of the opening statements, some storytelling and some show-and-tell are essential.

I acknowledge that, in almost all instances, *total* storytelling is not the norm. And I also acknowledge that most attorneys successfully apply the techniques I previously criticized when total storytelling is used. I recognize that, in partial storytelling, the statements I criticized may create a positive bond between attorney and jurors. You must determine how and when to use storytelling. My dwelling on their importance in opening statements has been to provide relevant examples and to demonstrate that even nontotal storytelling in opening statements must be accompanied by producing the essence of prior occurrences through the storytelling portions that create reality.

As in all aspects of a trial, never do anything that might appear artificial to the jury. Such manifestations guarantee failure. You must determine before trial what approach works best for you and your case, and how the jury will respond to your presentation. Though I've focused on statements of prosecutors and plaintiff's attorneys, defense attorneys also need to determine the best tact for their opening statements.

In criminal cases, defense attorneys rarely disclose their trial strategy. Whether they offer defense information or not, they certainly will stress the defendant's presumption of innocence and that the defendant has no burden of proof because the entire burden of proof is solely on the prosecutor, who must meet the high burden of proving guilt beyond a reasonable doubt. Where defense attorneys do not provide information, they will no doubt stress that the prosecutor's statements are only what the prosecutor thinks the evidence will show, that it is not evidence, and that jurors should pay special attention to cross-examination-based answers from the prosecutor's witnesses. And they might focus on portions of what the prosecutor told the jury if they feel those portions are vulnerable to counterevidence. But when defense counsel feel their position is strong, they might disclose it and even provide a persuasive story of their own.

In civil cases, where the burden of proof for plaintiff's attorneys is not as high as that of a prosecutor in a criminal case, there is a usual tendency for defense counsel to offer the defendant's version of the facts—perhaps through counter-storytelling or simply through highlighting differences. This is particularly true where the defendant has

a strong and plausible version of events and the law. Of course, where a defendant in a civil case does not have a persuasive version to counter the plaintiff's lesser burden of proof, defense counsel should consider whether a negotiated resolution is in order. IBJ

Part Two of this series, concerning opening statements and the elements of persuasion, will appear in the November Illinois Bar Journal.

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Part Two of a five-part series.

What I Learned From Teaching Trial Advocacy

The essential elements of persuasion: What to do and how and why to do it.

TAKEAWAYS >>

- The three "c" words—character, competency, and conviction—summarize successful persuasion based on Aristotle's teachings regarding the need for trustworthiness (ethos), logic (logos), and emotional appeal (pathos).
- Attorneys must master how to personalize their case, and also when and how to introduce, combat, or reframe negative information. Tactics for doing so are not always compatible for both plaintiff and defense counsel.
- Small details during opening statements matter, including positioning, use of notes, and eye contact.

BY GINO L. DiVITO

ISBA RESOURCES >>

- Amanda Hamilton, *Oral Arguments: More and Less Remote*, 108 Ill. B.J. 30 (Nov. 2020), law.isba.org/46rkHue.
- Timothy S. Midura & Colleen L. Sahlas, *Case Management Lessons From 'The Art of War'—Part 1: Introduction*, Trusts & Estates (Jan. 2020), law.isba.org/3rts1XA.
- Judge Debra B. Walker & Niharika Reddy, *Perspectives, Preferences, and Pet Peeves From the Bench*, Family Law (Sept. 2019), law.isba.org/2oybkJt.

TRIALS ARE ALL ABOUT PERSUASION. And no one has explained the elements of persuasion better than Aristotle. What that storied Greek philosopher taught about persuasion, so many centuries ago, persists to this day. And they apply in every aspect of trial advocacy.

Aristotle's "Rhetoric" examines the art of persuasion through appropriate language in speaking and writing, the latter of which is essential but not relevant for our purposes here. It should not be confused with its frequent alternative meaning, which describes a false argument such as: "What he said is just plain rhetoric." In his "Rhetoric," Aristotle taught that there are three modes of persuasion for every argument: ethos, logos, and pathos. He stressed that persuasive arguments require the speaker to be familiar with all three modes and to use them effectively.

His three modes of persuasion apply in opening statements, and they also apply throughout trial. They answer the "who" question addressed in Part One of this series, available at law.isba.org/3LPmiCe, and which is so important for the jury's perception of the speaker. They are presented here as essential for opening statements, but it is important to understand their significance for every aspect of a trial, for they will be referred to frequently below and throughout the remaining parts of this series.

Aristotle's primary focus on the three modes of persuasion was on the speaker (for ethos), the argument (for logos), and the audience (for pathos). In this discussion of the three modes, however, my emphasis is on the primary speaker (as should be expected in an essay such as this), so the focus is on the lawyer's role. But it should be obvious that lawyers must ask their witnesses questions that aid them in displaying the three modes as well, while asking adverse witnesses questions that may expose, if possible, their failure to have one or more of those qualities.

Ethos relates to a speaker's "credibility" and "authority"—necessary traits that result in trustworthiness. Where a speaker is deemed to be untrustworthy, persuasion is not possible. No one trusts a person believed to give misinformation or disinformation. For example, would you buy a used car from a seller whom you catch in a lie or whom you simply don't trust? Using a first "c" letter for each of the three modes of persuasion, my word for what best describes ethos is "**character**"—shorthand for good character. Though my emphasis on trustworthiness in this series is on the attorney, it obviously applies to your witnesses as well.

Logos describes arguments that are "reasonable" or "logical"—traits that recognize a speaker's knowledge and application of plausible facts. Without that perception, persuasion is impossible. For example, would you buy a used car from a seller who is unable to address relevant concerns about the car? My "c" word for logos is "**competence**"—shorthand for the combination of the lawyer's demonstration of competence in the courtroom and for asking appropriate questions leading to trustworthy and logical witness-answers so essential for persuasion.

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IN ANY EVENT, IN ALL CRIMINAL CASES AND IN MOST CIVIL CASES, YOU DON'T WANT THE JURY TO CONSIDER OPPOSING COUNSEL'S THEORY ON YOUR TIME. YOU MAY BE WRONG ABOUT THE TACT YOUR OPPONENT WILL TAKE, THUS GIVING THE JURY AN ADDITIONAL (AND PERHAPS PREFERABLE) ADVERSE THEORY TO CONSIDER.

Pathos is an appeal to emotions—a persuasive motivating consideration for the listener. Aristotle meant it as a speaker's incitement for action by the listener, based on an array of emotions, such as fear, pride, hatred, hope, betrayal, joy, and love. But, consistent with my goal of focusing on what enables the lawyer's ability to persuade, my "c" word for pathos is "**conviction**"—shorthand for evoking jurors' emotions through lawyers' personal display of belief in the rightness of their cause. For example, would you buy a used car from a seller who did not convey personal conviction for the car's worthiness?

In sum, and for ease of recollection, my proposed three "c" modes for successful persuasion—based on Aristotle's teachings regarding the need for trustworthiness, for logic, and for appeal to emotions through the speaker's personal display of conviction—can be summarized as **character**, **competency**, and **conviction**. When you possess those qualities and your opponent lacks one or more, success may overcome your opponent's otherwise weightier evidence.

It's common knowledge that some persons who lack ethos, logos, and pathos are nonetheless able to fake those qualities. All types of charlatans thrive on such fakery. And, sadly, so do some lawyers. But the best way to ensure obvious ownership of those attributes is to possess them. How wonderful the world would be if everyone had those traits. Surely, the preeminence of our justice system would be enhanced even more if every participant—especially every lawyer—possessed those virtues. Developing skill in trial advocacy must never be used as a tool to deceive or for self-enrichment.

A few random considerations for opening statements

Well before a trial begins, you must know everything there is to know about the case: the parties; prospective witnesses; all relevant documents about the case, including oral and written statements, reports, and prior testimony; and any other relevant information. Your quest for knowledge applies even to the judge and to opposing counsel. Preparation for every aspect of your case and your opponent's case is essential.

Also, well before beginning a trial, you must have a **theory** that supports the basis for winning the case. This requirement is essential and deserves significant attention. It's not discussed here because, despite its absolute relevance to the beginning of trial in opening statements, theory will be discussed in Part Five of this series, under the topic of closing arguments, where it shares the same important requirement. Likewise, a good **theme**, one likely to resonate with jurors, will help to support a basis for winning. That too is discussed under the topic of closing arguments in Part Five.

Opening statements and closing arguments are customarily prefaced by acknowledging the judge, opposing counsel, cocounsel, and then the jury. They are nice gestures and should be followed, because they demonstrate mutual respect for all the trial participants. The proper acknowledgement for the judge is, "May it please the court" (which is usually followed by the judge's return acknowledgement by stating your name), followed by simply looking at and stating the names of opposing and cooperating attorneys, and turning to the jury and starting with, "Members of the jury." In today's climate of gender identification, the acknowledgment to the jury in that form might be safer than "ladies and gentlemen of the jury."

Your opening statements should conclude by informing the jury what you seek, such as a conviction, a not-guilty verdict, money damages, a finding of no liability, or some other form of relief.

Focus on your case

As a plaintiff or a prosecutor, generally talk only about your case; let your opponents present their case. Though you should anticipate what your opponent will do during trial, don't disclose it to the jury. That's certainly true in criminal cases, where a prosecutor may not comment on the defendant's anticipated defense, because defendants have no burden of proof and may offer no information during opening statements and no evidence during their case-in-chief. Even if before trial criminal defense attorneys have signaled a possible defense theory, they're not bound by it.

In any event, in all criminal cases and in most civil cases, you don't want the jury to consider opposing counsel's theory on your time. You may be wrong about the tact your opponent will take, thus giving the jury an additional (and perhaps preferable) adverse theory to consider. None of that applies to defense counsel, who has heard the plaintiff's theories and is free to comment. Always, as noted in Part One, have faith that jurors will compare opening statements and will focus on evidence presentation to determine whose version is correct.

Avoid disclosing negative information *when you are in total control of its admission*. For example, some criminal defense attorneys mistakenly disclose negative information about a defendant's prior conviction, based on their belief that the jury will respect them for being forthright. But evidence of a defendant's conviction is totally under the defendant's control. It is admissible for the purpose of impeachment, but it cannot be raised by the prosecutor unless and until the defendant testifies, where it can be addressed during the defendant's testimony in a manner

consistent with considerations of primacy (not at the beginning of defendant's testimony, which should start with favorable persuasive evidence; and, with considerations of recency, not at the end of defendant's testimony, where it would be the last words the jury hears). In opening statements, revealing that defendants have served their sentence and have been upright citizens ever since their conviction does not justify counsel's inviting the jury to view them in an unfavorable light at the very beginning of trial, and to view all the evidence through the lens of their prior conviction(s).

Where negative information is intrinsic to a case, however, you may not be able to avoid it. Plaintiffs, who speak first, can expect opposing counsel to discuss a plaintiff's negative information during opening statements. Defendants, on the other hand, have the advantage of knowing whether plaintiff's counsel addressed defendant's negative information and, if not, it need not be revealed at this stage of trial. In any case, consider softening—and even enhancing—the effect of negative information. For example, where the defendant's car collided with the plaintiff who was riding a bicycle on the wrong side of the road, plaintiff's counsel might point out the plaintiff was cycling on that side of the road to better see oncoming traffic.

Personalize your side as best you can (and dehumanize your opponent) by starting with opening statements and throughout the trial. State prosecutors refer to themselves as "the People." They talk about "the defendant," usually not by name. Criminal defense attorneys personalize their clients by name, and refer to "the state" or "the government" or "the prosecutor" or "the prosecution." Plaintiff's attorneys don't talk about "the plaintiff," but about the person (by name) who has been injured in some fashion. And when plaintiffs' attorneys represent persons, they talk about "the corporation" or other business entity on the defense side, while defense attorneys personalize the entity they represent by talking about the people involved in the action. No one should refer to "my client" because it conveys an entity or a person who is paying the attorney to win, perhaps at any cost.

Position, notes, and eye contact are important considerations for opening statements. You must be aware of where to stand, how to use notes, and how to make eye contact with the jurors. Center position is ideal. Don't stand far away from the jury or so close that jurors' space might be invaded. Avoid pacing unless you use it minimally as a way to reach out to every juror. Don't hold notes. Don't read notes to the jury. Notes should be limited to topics for discussion and to remind you, if necessary, of relevant occurrences, names, dates, and places. Determine where to place notes for easy access, such as a podium, but don't let a podium imprison you or portray you as a lecturer. By the time trial begins, you should know every aspect of the case and have confidence in not having to rely on notes at all. Eye contact with jurors is essential. Speak to each one in a manner that projects genuine interest in each of them, as opposed to merely fleeting glances or lingering too long on a single juror or a group of jurors. Failure to speak to any juror may create hostility with disastrous consequences. Rehearsing opening statements with colleagues, friends, and relatives is encouraged. Use them to ascertain whether they understood your case, and to invite critiques. IBJ

WELL BEFORE A TRIAL BEGINS, YOU MUST KNOW EVERYTHING THERE IS TO KNOW ABOUT THE CASE: THE PARTIES; PROSPECTIVE WITNESSES; ALL RELEVANT DOCUMENTS ABOUT THE CASE, INCLUDING ORAL AND WRITTEN STATEMENTS, REPORTS, AND PRIOR TESTIMONY; AND ANY OTHER RELEVANT INFORMATION. YOUR QUEST FOR KNOWLEDGE APPLIES EVEN TO THE JUDGE AND TO OPPOSING COUNSEL.

Part Three of this series, concerning direct examination and evidence, will appear in the December Illinois Bar Journal.

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What I Learned From Teaching Trial Advocacy: The Direct Examination

Part Three of a five-part series.

TAKEAWAYS >>

- Proper direct examinations require relevant questions resulting in answers that create reality.
- Selecting the right expert witnesses is paramount. Your experts should be knowledgeable; able to connect with the jury using classic elements of persuasion (ethos, logos, and pathos); and an excellent teacher.
- When admitting exhibits: *Mark* the exhibit, *show* it to opposing counsel, *show* it to the witness, *ask* the witness questions to authenticate it, *ask* the judge to admit it, and *use* it.

BY GINO L. DiVITO

ISBA RESOURCES >>

- Gino DiVito, *The Illinois Rules of Evidence: A Color-Coded Guide—2024 Edition* (To be released in January 2024).
- ISBA Free On-Demand CLE, *Eight Things Every Trial Lawyer Should Know* (recorded Apr. 2020), law.isba.org/46DTKnV.
- Keith L. Davidson, *Cross-Examination of Experts: Saving the Best for Trial*, 97 Ill. B.J. 94 (Feb. 2009), law.isba.org/3s9rSbZ.

BECAUSE THEY CARRY THE BURDEN OF PROOF IN BOTH CRIMINAL AND CIVIL CASES, prosecutors and plaintiffs' attorneys are the first to present opening statements and direct examinations. They thus have the initial opportunity to create favorable first impressions.

Direct examinations provide the first opportunity to confirm the truth of everything you told the jury during opening statements—another opportunity to establish ethos. And consistent with logos, you are given another opportunity to establish competence by your actions, and by posing questions to answers that create concrete images leading to reality. Finally, consistent with pathos, you are given another opportunity to display your personal conviction in your case and to elicit answers that provide the emotional responses that lead to desired results.

Of course, defense counsel, even without the advantage of initial opportunity, must also embrace all of Aristotle's admonitions. (For more on ethos, logos, pathos, and other elements of persuasion, see Part Two of this series in the November 2023 Illinois Bar Journal, law.isba.org/3LPmiCe.)

What to do and how and why to do it

Except possibly for adverse-witness testimony, direct examination should simulate a friendly conversation. After introductory information based on "who" the witness is and "when" and "where" events occurred, witness questioning shifts to an open-ended question such as "what happened?" After the witness answers with a general explanation of an event, a series of questions designed to paint detailed images about the event follow. When the answers have exhausted the images that create the intended reality, the same procedure follows: an answer to an open-ended question on a related action or on another topic, followed by questions directed to elicit reality concerning the event. This procedure is followed until the witness's testimony is completed.

As an example for my students, and with an adequate display of sorrow, I used the sad story involving Humpty Dumpty:

Humpty Dumpty sat on a wall.
Humpty Dumpty had a great fall.
All the king's horses and all the king's men
couldn't put Humpty together again.

That nursery rhyme is what the witness says in response to your question about what happened. Your task is to make that answer come alive by asking a series of questions directed at painting the images that create reality.

After the witness answers the "who" question to establish identity, the "when" question about date and time, and the "where" question about the location of the event, the witness responds to your open-ended question of what happened by reciting the nursery rhyme. You then ask the witness to describe Humpty before his fall. The witness's answer may provide an entire description. But if parts of Humpty's appearance are not described, you ask about them. From the answers, the jury learns that Humpty was egg shaped; much larger than a chicken egg; very pale; hairless, with big blue eyes and little ears and large nose and lips; and had short, spindly arms and hands and legs.

After answers to questions about the witness's knowledge of how Humpty got to the top of the wall, questions about the wall provide concrete images about the height and width and length and color and

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YOU SHOULD MAKE THE EXHIBIT(S) AVAILABLE TO THE JURY AS SOON AS THE JUDGE ALLOWS ADMISSION. SOME ATTORNEYS' HABIT OF SHOWING EXHIBITS TO THE JURY AT THE END OF THEIR CASE-IN-CHIEF DEPRIVES JURORS OF JOINING WITH YOU ON THE ROAD TOWARD VICTORY.

the material of the wall's construction, and perhaps the wall's purpose. Questions and answers follow as to how Humpty fell off the wall, about the sight and sound of Humpty's hitting the rocks at the bottom of the wall, and how Humpty looked (and perhaps smelled) after he fell—the terrible cracks in his shell and the oozing of a yolk-like variety of liquid colors. And then the king's horses and the king's men: how many of them; describe them; what sounds did they make; where did they come from; what prompted their arrival; how much time passed from Humpty's fall and the arrival of the horses and men; what did the horses and men do to put Humpty together? Did he survive?

Humpty's nursery rhyme alone provided no images, except for a possible few perceived by some jurors whose abstract images would surely differ from and have little effect on themselves and their fellow jurors. But Humpty's story, derived through questions and answers, exemplifies the creation of reality that occurs through proper direct examinations in real trials. In sum, proper direct examinations require relevant questions resulting in answers that create reality.

In another example I used for my students, after answering introductory questions, the witness answered the question about what happened by testifying: "A man ran into the room, fired two shots at Joe, and ran away." That testimony took a few seconds.

Significantly more time must be taken just to describe the man, the room, the gun, and the victim. We'll address just three sets of questions and answers that provide examples for creating images focusing on the defendant, the gun, and the victim.

The defendant. In response to the question about describing the man with a gun, the witness describes his features, stressing any that are unique. If the witness fails to mention relevant features, questions elicit them. As the man's image is created, the jurors focus on the defendant to determine whether he has the listed features. But far better, if the witness knew the defendant or previously identified him as the shooter, no description is necessary. The witness then identifies the defendant as the shooter as early and as often as possible. All the evidence, from the beginning to the end of trial, is about the defendant and not an amorphous "man" or "the shooter."

The gun. In response to a question, the witness is asked to describe the gun. The answer may be as simple as "a black gun." Or it might be as thorough as "a black .38-caliber revolver with a pearl handle." In response to a question about a gun shown to him, the witness says it looks like the gun, perhaps identifying any unusual features. A question about the sounds made by the gun evokes a loud "bam, bam." A question about what the witness saw when the gun was fired evokes "flashes." Perhaps a question about smell evokes "gunpowder." Those are the concrete images jurors experience concerning the gun.

The victim. In response to questions about Joe and his actions, responses include information about Joe, when he arrived in the room, who was there, and where he was and what he was doing when he was shot. When asked what Joe did after he was shot, the answer may be something like, "He clutched his chest and said, 'Bill has killed me. Tell Mary I love her.'" A question regarding what the witness did when Joe fell to the floor may include that the witness saw a vast amount of blood and felt Joe's pulse and knew he had died. Those are the concrete images jurors experience.

The answers about the shooter, the gun, and the victim achieve the goal of bringing to life some of what took place on that fateful day. Those are the images that jurors experience through their five senses. They illustrate the methods for developing the word-pictures that recreate prior action in direct examination: an open question followed by a series of closed questions.

Handling expert witness testimony

Consistent with common law and codified rules of evidence, a witness "is qualified as an expert by knowledge, skill, experience, training, or education." (See, *e.g.*, Federal Rule of Evidence 702.) An expert witness is allowed to testify on scientific, technical, or other specialized knowledge as an aid for the trier of fact to understand the evidence or to determine a fact in issue. (See again Rule 702.) Cases are often won or lost based on the testimony of an expert witness.

Except for an expert directly involved in the action, selecting the right expert witness is goal number one. This is a rare opportunity to select a witness of your own choosing. You need to select an expert who is both knowledgeable and able to connect with the jury. One committed to Aristotle's modes of persuasion is ideal.

Before experts are retained, they should be interviewed to determine whether they are appropriate for your case. During those and subsequent interviews, you must learn whether the experts have a firm grasp on the issues in the case, and whether they can teach you about their area of expertise and how you should frame questions for answers that teach jurors about their opinions and the conflicting opinions of any relevant opposing counsel's experts. In addition to your independent research, experts, who have deservedly earned their title, must be your teacher for everything about their and the opposing expert's opinions,

their experiences and results in providing testimony, and where the soft underbelly may exist for your experts' own testimony and that of the opposing experts.

Given the expansive discovery available before trial—especially discovery related to expert witness testimony—there are hardly any trial surprises related to testimony. Interrogatories and the deposition of an opposing expert witness and preparation for your own expert are essential. Discovery of an expert witness's opinions describe the parameters of the witness's opinion testimony at trial, and are also sources for impeachment. To ensure you're not surprised, you must exercise your right to discovery and be aware of every bit of furnished and independently obtained discovery, including the discovery you provided opposing counsel.

The greatest differences between an expert witness and any other witness are: 1) the expert's ability to provide expert opinion testimony to the jury; and 2) the attorney's need to learn, pretrial, as much as possible about unfamiliar and complex matters from the expert. In addition to those differences, another major difference includes the likelihood of the expert openly adopting the role of teacher for the jury—for example, by being invited to stand before the jury to graphically discuss and explain photographs, drawings, computer-projected images, and other visual aids, and even to self-create relevant images and to use and manipulate models.

When embarking on examining and cross-examining expert witnesses, you should have confidence in using the same tools you apply to other witnesses. It's true that the testimony of expert witnesses differs from the testimony of most other witnesses, for they possess the right to give opinion testimony and have greater knowledge of difficult subjects than average persons, including typical attorneys. But once experts have shared with you their knowledge on relevant subjects, and once you have prepared for battle—with significant pretrial aid from your own experts—it will be clear that you may address expert witness testimony in the same fashion you handle any other witness testimony. But, when cross-examining an expert witness, always be mindful that you're dealing with an expert.

Handling admission of exhibits

The proper handling of exhibits is important because, as is true for everything you do in court, the handling of exhibits should be flawlessly consistent with Aristotle's modes (ethos, logos, pathos) of persuasion.

The proliferation of email and text messages, police body cameras, surveillance cameras, audio recordings, use of computer technology in courtrooms, and all types of real and demonstrative exhibits results in significant increases in exhibit evidence in trials. Determining the admissibility of exhibits before the start of trial is now commonplace. Parties often stipulate to the admission of exhibits pretrial, thus setting aside foundational requirements. Motions *in limine* are used pretrial to determine whether exhibits are admissible. Hearings on such motions require briefings on the application of various evidence rules and may be similar to a mini bench trial. The good news is that the parties know rulings in advance of trial and even whether typical methods for admission of exhibits may be set aside.

However, where there has been no previous ruling or stipulation on the admission of exhibits, knowing the requirements for their admission is paramount.

What follows is a simplified, abbreviated process for admitting exhibits: *Mark* the exhibit, *show* it to opposing counsel, *show* it to the witness, *ask* the witness questions to authenticate it, *ask* the judge to admit it, and *use* it.

Mark it. The first step is to mark the exhibit. Depending on local custom or the judge's procedure, you personally mark it, or you give it to the court reporter or clerk or anyone else authorized to mark it. The marking should be something like: "Plaintiff's Exhibit No. 1 for Identification."

The first showing. The next step is to

THE PURPOSE OF YOUR ARGUMENTS FOR SEEKING OR OPPOSING A MOTION OR ARGUING AGAINST A JUDGE'S RULING IS TO WIN THE ARGUMENT THROUGH EVERY APPROPRIATE METHOD. IN SO DOING, YOU MAY WIN THE ARGUMENT; BUT IF YOU FAIL, YOU WILL HAVE MADE AN APPROPRIATE RECORD FOR APPEAL.

bring the marked exhibit to opposing counsel for counsel's review. This step provides an opportunity for opposing counsel to object. If there's an objection (*e.g.*, on the basis of hearsay or relevance or authenticity), the judge should conduct the argument and ruling outside the jurors' hearing. If there's no objection or an objection is overruled, the exhibit is brought to the witness.

The second showing. The witness is shown the exhibit, after which you ask if they know what it is. When the witness responds in the affirmative, you proceed to the next step, also involving the witness.

The first ask is to pose questions to the witness in order to authenticate the exhibit. This step is necessary to lay a proper foundation for admitting the exhibit by explaining the source of the witness's knowledge concerning it and answering questions that establish its authenticity. When the exhibit has been authenticated, you proceed to the next step.

The second ask is to request the judge's admission of the exhibit into evidence. A valid objection may be overcome by additional questions for clarification purposes. When the judge rules that the exhibit will be admitted, the "for Identification" marking on the exhibit is deleted, so the exhibit's marking reads, and will be referred to, as "Plaintiff's Exhibit No. 1" or "Exhibit No. 1 in Evidence." The exhibit is now available to be published.

Using the exhibit. You've taken all

the preceding steps to make the exhibit available to the jury. Having heard all the lead-up questions and answers, the jury should not be left in the dark. You should make the exhibit(s) available to the jury as soon as the judge allows admission. Some attorneys' habit of showing exhibits to the jury at the end of their case-in-chief deprives jurors of joining with you on the road toward victory. Let the jurors see the writings, the photographs, and all the other exhibits for which you obtained admissibility. You do that by asking the witness to read the exhibit or to show it to the jury; or by asking leave of court for you to read it or show it; or asking leave to allow the jurors to individually review the exhibit and pass it to each of the other jurors (or to review it together in the jury room); or asking leave to project it on a screen.

Note that the above procedure does not address a situation where a witness cannot identify an exhibit because of the need for relevancy based on the fulfillment of a condition of fact or the need to satisfy a chain of evidence. An example of the former is where the witness testifies to having received an exhibit of a relevant handwritten note, but cannot identify the author of the note. A handwriting expert, however, will testify that the handwriting on the note is the defendant's. Under an evidence rule such as Federal Rule of Evidence 104(b), given assurance that the handwriting expert will testify, the judge should allow admission of the note contingent on the expert's later testimony. The same applies to a chain-of-evidence situation, where multiple witnesses may need to testify on such matters as the receipt, storage, and analysis of blood or other material for DNA analysis or of drugs for chemical testing. IBJ

Part Four of this series, concerning cross-examination, will appear in the January 2024 Illinois Bar Journal.

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Part Four of a five-part series.

What I Learned From Teaching Trial Advocacy:

The Cross-Examination

TAKEAWAYS >>

- The cross-examining attorney's role is to teach the jury while never giving it an opportunity to learn from an opposing witness.
- To avoid turning the jury against you, carefully set up the witness during cross-examination with leading and closed questions, and questions for which you know the answers. Never provide a witness you are cross-examining with an open-ended question.
- Impeaching a witness requires establishing a strong foundation with such elements as proof of a prior inconsistent statement or proof by omission.

BY GINO DiVITO

ISBA RESOURCES >>

- Arlo Walsman, *The Incomplete Impeachment Conundrum*, 109 Ill. B.J. 28 (Sept. 2021), law.isba.org/46CCSge.
- ISBA Free On-Demand CLE, *Eight Things Every Trial Lawyer Should Know* (recorded Apr. 2020), law.isba.org/46DTKnV.
- Hon. James M. Varga, *A Short Guide to Using Cross-Examination to Impeach Experts*, 100 Ill. B.J. 492 (Sept. 2012), law.isba.org/3RicLqy.

CROSS-EXAMINATION ENABLES QUESTIONING IN BOTH CONSTRUCTIVE AND DESTRUCTIVE WAYS. For your opponent's witness, who assuredly will supply helpful evidence for your case (or be impeached), you should question in a pleasant, constructive manner. In rare cases, obtaining helpful information may be the sole basis for your questions. In most cases, however, you'll no doubt begin or follow up in destructive mode, challenging the credibility of your opponent's witness.

Unlike direct examination, where the witness occupies center-stage as the provider of information, a witness under cross-examination and subjected to the destructive mode should be neither the focus of the jury nor the source of information. The cross-examiner must fulfill both roles. The object of cross-examination in destructive mode is not to ask questions that provide answers for the enlightenment of the jury, as in direct examination. Asking open-ended questions of an opposing party's witness invariably invites narrative answers leading to dire consequences.

To fulfill the goal of providing information, the cross-examiner takes a central position in the courtroom: center-stage, in a position central to the jury. That position draws the focus of the jury on both the questioner and the controlled information contained within the questions.

Destructive cross-examination, in sum, must never be an opportunity for the jury to learn from the witness. It must always present an opportunity for the cross-examiner to teach the jury. A proper cross-examination is one that asks only control questions. So, let's move on to how to do it.

How to control the witness

In beginning my lecture on cross-examination, I told students they may have noted that everyone insists that a successful cross-examination requires control of the witness. That certainly is true, but no one ever tells you how to do it. I disclosed, however, that I had the secret for controlling the witness on cross-examination and was willing to share it with them if they promised not to share it with anyone else. I asked if they would make that promise. Hearing a few almost inaudible responses and no unanimity, I shouted, "Will you make that promise!?" I received a loud chorus of "yeses," but, because I was uncertain that everyone had promised not to share the secret, I shouted even louder, "Will everyone make that promise!!?" This time I was almost certain that the students made the promise. But to be sure, I said, "If any of you have not made the promise not to share the secret, please leave the room now." No one left, so I began to share the secret.

I first pointed out that the ultimate way to control a witness on cross-examination is to garner the judge's support, through an objection based on the witness not properly answering the question, an objection possessed only by a questioning attorney: "Objection, your honor, the witness is not responding to my question. I ask your honor to instruct the witness to answer my question." I follow that advice by asking if everyone understood that method for controlling the witness. When I received some nods and weak responses from students, I shout, "Do you understand!?" I receive a chorus of "yesses."

I then will say, "OK. You understand how to use that allowable method. But set it aside,

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… NEVER ASK AN OPEN-ENDED QUESTION ON CROSS-EXAMINATION. IF YOU ASK SUCH A QUESTION, YOU WILL INVITE A NARRATIVE ANSWER, YOU WILL HAVE LOST CONTROL OF THE WITNESS, AND THE ANSWER IS LIKELY TO BE HARMFUL AND PERHAPS DEVASTATING.

for you'll never, ever use that method to control a witness! You won't use it, for you don't need the judge's help because, for reasons you'll soon learn, you want the witness not to respond properly."

I then stressed that there are other things you don't do to control witnesses:

You don't control witnesses by talking over them. You don't control witnesses by questioning more rapidly than they answer. You don't control by out-shouting witnesses. And you don't control witnesses by approaching them so closely that you're able to reach for their jugular vein. You don't do those things because jurors will feel you're being unfair. And, if you do all or any of them, they will hate you!

Having provided the students what not to do, I proceeded to tell them what to do to control the witness:

1) You ask the right question.
2) If the witness does not respond correctly (*e.g.*, by answering with a question, by answering with an answer unrelated to the question, by responding with a narrative, by answering the question but following with an explanation) you politely interrupt the witness and repeat the question. If that doesn't work, you've asked the wrong question.

I then requested and obtained a volunteer for my two-step approach. I told the volunteer that I am going to ask a single question: "What color is your car?" I instructed the volunteer not to answer. A response could include the make of the car, its model, its age, its condition, its horsepower, its speed, how many doors it has, how well it travelled on the road, how many miles per gallon of gas it requires, any other attributes of the car, or anything about any subject. But under no circumstance was the volunteer to answer the question about the color of the car.

We then proceeded with my question about the color of the car and the volunteer's various nonresponsive answers, followed by my politely interrupting the answers and repeating the question. Over many decades, few students heeded my instructions. Almost every student relented after a handful of questions by responding with a color.

Why did so many volunteers reject my firm instructions not to provide the color? The answer is obvious. Unlike the few who tenaciously followed my demands, the many others ultimately sensed that avoiding the answer was silly and embarrassingly indicative of a lack of trustworthiness. In a trial, jurors perceive the same things. And so do witnesses. The result is witness-control. So, if you do it right—if you ask the right questions—the witness who has experienced control will remain under control. And careful questions designed to control answers will follow.

But if the witness doesn't get it—if the witness dances around proper questions or persists in expanding answers—you should rejoice internally. (I would demonstrate by leaping in the air while clicking my heels.) That is so because the witness will have lost credibility, while yours is enhanced. The two-step approach, a process that, as in the example of the color of the car, will have jurors internally screaming the equivalent of, "Color, damn it, give us the color!" When that occurs, when the witness self-destructs, you will understand why I've told you not to invoke the judge's help in dealing with witnesses' answers. To win the battle for credibility, you need to persist in the so-called "struggle" to get answers to proper questions without the aid of the judge.

If the witness gives an improper but *harmless* testimony, ignore it by continuing the two-step process, but include the improper answer in your next question, such as, "Okay, you've said your car is a dream car; but what color is your car?" By doing that, you enhance the jurors' reaction to the witness's improper response to your question.

You should invoke the help of the judge only if the witness provides improper *prejudicial* testimony in response to your question: "Your honor, I object to that statement as not responsive to my question." After the judge sustains the objection, your next request is, "I ask the court to strike the statement." After that's granted, your next request is, "I ask that the jury be instructed to ignore that statement." Perhaps, depending on the seriousness of the prejudice, you might ask for a mistrial or that the witness be taken out and shot—the latter, a tongue-in-cheek exaggeration, is to suggest asking for whatever relief is necessary—but with the added feature of ensuring jurors recognize the witness's wrongdoing. Parenthetically, the one objection you should never make in the presence of the jury—at any phase of trial—is that the question or answer is prejudicial. That objection only highlights the prejudice. Make such arguments outside the jury's presence.

Proper control

At this point, we've discussed only the consequences for witnesses not properly answering questions rather than fulfilling my promise to share the secret for controlling the witness on cross-examination. So, we now turn to the specific questions for asking the right cross-examination questions to control the witness. They are:

1) Ask leading questions.
2) Ask closed questions that require only single or limited answers.
3) Ask questions to which you know what the answers should be, and that provide an opportunity for impeachment if you receive a

different answer.

Let's unpack those three questions.

Leading questions. A leading question is one that suggests the answer and invites only a "yes" or "no" answer, or "I don't know" or "I don't remember." For example: "Is your car blue?" or "The color of your car is blue, isn't it?" or "Was that when you crossed the street?" or "Do you enjoy listening to music?" or "Did you cross the street when the light turned green?" Accept nothing other than a yes or no answer or an answer claiming lack of knowledge. In the latter response, in some instances you'll impeach the witness by using techniques we'll soon discuss. For now, note that, as in the preceding examples, the form of the verbs "to be" (*e.g.*, "is," "are," "were," "was," "could," "would") and "to do" usually result in framing leading questions.

Closed questions. A closed question invites a limited single or near-single answer. For example, "What color is your car?" should elicit only a single or multicolor response. Examples of closed questions that should elicit single or near-single responses include questions calling for color, speed, height, weight, size, and distance.

Known answers. A question with a known answer is somewhat misleading because no one knows what witnesses may say. We know only that the question is safe, for we know what the witnesses should say because they said it previously. So, if they don't give the same answer, they will be impeached—a result even more desirable than getting the expected answer because of the negative effect on witness credibility.

Evasive answers to the listed control questions are what allow you to politely interrupt the witness's answer and to repeat the question. And if the witness gives a correct answer to the control question, but continues to speak, it allows you to interrupt the witness by saying, "Excuse me, Mr. Jones, but you've answered my question." As previously explained, the witness's consequence for evading questions is either loss of credibility or awareness of being under control. Either way, you prevail.

When posing control questions, *never help witnesses to answer* by telling them they can or should answer questions with a "yes" or "no" or a single answer. Some lawyers use that as a way to control the witness. But if you do that, jurors will conclude that you're treating the witness unfairly. And they will begin focusing on whether you're asking only "yes" or "no" or single-answer questions. When that happens, jurors' focus might be misplaced, and you will have revealed the secret—the secret that you have promised to keep. You must not reveal the secret by exposing to the jury your methods for cross-examination.

For that reason, in addition to not directing the witness how to answer the question, I encourage a combination of the three forms of questions provided above. Vary your questions with leading questions, closed questions, and questions that require the expected answer.

From the foregoing discussion, you know that you should never ask an open-ended question on cross-examination. If you ask such a question, you will invite a narrative answer, you will have lost control of the witness, and the answer is likely to be harmful and perhaps devastating. The same applies to a question that requests an opinion of a nonexpert witness.

To illustrate the danger of an opinion question, especially one based on a witness's personal knowledge, I have shared with my students the following real-life cross-examination of witnesses during one of my jury trials as a prosecutor.

A female university student shared an apartment with three male students. Their apartment was invaded one night by a group of armed intruders, who initially placed pillowcases over the heads of all the males and took their money and other property. The female was taken to a bedroom, where she was raped by three of the intruders.

The female victim, whose head was not covered with a pillowcase, viewed a photo array, and identified a photo of a man as one of her rapists. He was arrested and charged with rape, armed robbery, and home invasion. At trial, she identified the defendant as one of her rapists.

IMPEACHMENT REQUIRES SET UP: ASKING ALL THREE SETS OF QUESTIONS—IN THE ORDER PROVIDED—ARE STRONGLY RECOMMENDED, FOR THEY PROVIDE MULTIPLE OPPORTUNITIES FOR ESTABLISHING THE JURY'S AWARENESS OF THE WITNESS'S FABRICATIONS.

After her testimony, to provide evidence for the offenses of armed robbery and home invasion, one of the males testified about the intrusion and property taken from him. He testified that he could not identify the intruders. On cross-examination, he was specifically asked if he knew whether the defendant had raped the female victim. He gave a negative response.

A lunch recess was then declared. During that time, I talked to the next male scheduled to testify. I asked him if he knew who raped the female roommate, whom we'll call Jane Doe. He said no. I responded by telling him that there were a lot of things I knew that I had not personally witnessed. For example, I knew there was a place called China even though I never experienced or visited it. I knew it existed because I have seen photos purporting to be of China and many claimed maps of that country, and I've read many trusted historical reports and information about it. So, I know China exists.

I then asked him what he thought of Jane Doe, starting with how well he knew her and asking questions about her specific traits: whether she was intelligent; whether she was trustworthy or prone to fabricate; whether she was impulsive; whether she made rash judgments; whether she was prudent; whether anyone

could convince her to identify someone if she was unable to do so; whether she would identify the defendant as one of her rapists if she was not sure of that fact; whether she firmly believed the defendant had raped her. He answered as I had anticipated. I then asked him if he knew who raped Jane Doe even though he had not personally seen him.

After he answered yes to that final question, I told him to honestly answer all the defense attorney's questions, especially if he was asked whether he knew that the defendant raped Jane Doe, and how he knew.

When trial resumed, the defense attorney asked the second male witness questions similar to those he had asked the first male witness. When the attorney asked the witness if he knew whether the defendant had raped Jane Doe, he answered with a firm "Yes." When the attorney figuratively picked himself off the floor, he looked at me and was smart enough not to ask how the witness knew the defendant was one of the offenders. He asked instead, "You never saw any of the men who raped Jane Doe, did you?" If he had asked the witness how he knew that the defendant had raped Jane Doe, he would have received a version of the China story, as it applied to Jane Doe's credibility and certainty in identifying the defendant.

Impeachment

Impeachment, which refers to the effort to remove governmental officials, is also a legal term for challenging a witness's credibility. You impeach witnesses by challenging their credibility in many different ways. Some of the most common forms of impeachment include proof of interest in the trial's outcome, any motive to fabricate, relationships with a party or a relative or a friend of a party, being under the influence of alcohol or drugs during the event or at trial, and acting under duress.

A frequently used way to challenge a witness's credibility—especially by a defense attorney in a criminal case where the witness is giving testimony against a friend or a fellow gang member of the defendant on trial—is to do so without rancor. In such a case, the theory of the cross-examination is that the witness, charged with the same offense or a different one, has turned on his friend or fellow gang member to save himself. The questions reflect that motive: "You were caught red-handed, right?"; "You had been in prison before, right?"; "You knew you were on your way to prison again, correct?"; "You didn't want to go to prison again, did you?"; "You knew that telling the police and the prosecutor that Bill was guilty would result in your not going to prison, isn't that so?"; or "As a matter of fact, didn't the prosecutor promise to reduce your crime to a misdemeanor?"

But the two most effective ways to challenge witness credibility are through proof of a prior inconsistent statement or through proof by omission. That is so because these methods of impeachment constitute direct assaults on the witness's credibility—as opposed to the other methods that suggest the possibility of lack of credibility—because everyone knows that a person who changes stories or fails to relay something important is untrustworthy.

Both impeachment methods require substantial preliminary questions. You must lay a proper foundation for the desired impeachment effect.

Proof of a prior inconsistent statement. Some lawyers immediately and wrongly jump to the bottom-line question without suitable preliminary questions. But for appropriate impact, there must be proper lead-up. The line of questioning should result in answers that establish:

1) commitment to testimony given by the witness on direct examination;
2) confrontation based on reality (*i.e.*, based on the subject matter the witness testified about in direct examination); and
3) confrontation based on the witness's prior inconsistent statement.

The answers to these three sets of questions ultimately reveal a witness's mendacity.

Examples of questions for the commitment phase should proceed in the following fashion:

1) You've told the jury the black car drove through the red light and struck the blue car, right?
2) And did you testify before the jury that you saw the black car drive through the red light?
3) Did you have an unobstructed view of the black car driving through the red light?
4) Are you sure the black car drove through the red light?
5) There's no doubt in your mind that the black car drove through the red light?
6) And you told the jury the black car collided with the blue car, right?
7) Are you sure the black car crashed into the blue car?
8) Did you talk to a police officer after you saw the collision?
9) Did you tell the police officer, as you've told the jury, that the black car went through the red light?

With the (exhaustive) "yes" answers to these questions, even with a denial that the witness talked to a police officer, the witness has committed to his prior direct testimony. The next round of questions about reality follows:

1) Isn't it true that the blue car went through the red light?
2) Didn't the blue car actually crash into the black car?
3) Isn't it true that the black car had the green light?
4) Did you talk to a police officer about the accident?
5) You didn't lie to the police officer, did you?
6) Did you tell the police officer the truth about the accident?

With the answers to these questions, the witness has been confronted, not with what he told the officer, but about the event concerning his testimony—about what really happened. The ultimate questions about what the witness told the officer are now posed:

1) As a matter of fact, isn't it true that

you told the police officer that the blue car went through the red light?

2) Didn't you tell the police officer that the blue car crashed into the black car?

With the "no" answers to those questions, the foundation has been set for the police officer's rebuttal testimony that the witness told him the blue car was responsible for the collision. And the entire series of questions and answers have set the table for the jurors' awareness of the differences between you as the questioner and the witness's answers—an awareness resulting favorably when the police officer testifies.

As noted, some lawyers improperly ask the ultimate question without prefacing the other sets of questions, thus eliminating all the witness's prior fabrications. The result is a major reduction of the effect on the jury. Other lawyers tend to ask only the commitment question, skipping the second phase of questioning, before asking the ultimate question. Asking all three sets of questions—in the order provided—are strongly recommended, for they provide multiple opportunities for establishing the jury's awareness of the witness's fabrications.

When setting up a witness for impeachment by prior inconsistent statements, you want jurors to feel they are the direct targets of the witness's falsehoods. You do that by including jurors in your setup questions. Rather than lead-up questions, always beginning with, "Are you saying that …?" or "Did you testify that …?" or "Did you say that …?" You should occasionally ask, "Are you telling the jury that …?" or "Didn't you tell the jury that …?" or "Did you swear under oath before this jury that …?" When jurors feel a witness has personally misled them, they're likely to react with justified outrage.

Here's how to create a little drama in handling the final impeachment-by-prior-inconsistent statement. Impeachable statements are usually in what we'll refer to as a "document," simply a writing containing information about a prior inconsistent statement from any source. When you have such a "document," keep it on the table. Don't hold it. Act as though it doesn't exist. You, of course, have full knowledge of the information it contains.

Without resorting to the document, you ask a series of questions identical in nature to the questions for impeaching a witness by proof of a prior inconsistent statement. If, at some point in response to your lead-up questions or your ultimate questions, the witness concedes the difference between his prior inconsistent statement and his current testimony, he will have self-impeached. So, fortified by the jurors' standing ovation based solely on your deft questioning, you will have no need to pick up the document.

If, however, the witness adamantly

Some Random Thoughts on Cross-Examinations

Being in tune with the jury. A rule to abide by in all phases of trial advocacy, especially during cross-examination, is to do what jurors would do if they were in your shoes. If you're laughing when jurors are outraged by some occurrence or you display sadness when jurors are laughing, jurors are likely to conclude you're not in tune with reality. On the other hand, if you have established that a witness has testified falsely, it's OK to pummel him if you believe jurors would act similarly. Being in tune with the jury is clearly positive, but don't overdo it. Being out of step with the jury is likely to lead to disaster.

Going "Bananas." At the end of my lecture on cross-examination, I invariably told the students about the impact that Woody Allen's movie "Bananas" had on me.

In "Bananas," Woody Allen plays a character named Fielding Mellish, a dual citizen of the U.S. and the president of a country named San Marcos. In a U.S. courtroom, he has been charged with fraud, inciting to riot, conspiracy to overthrow the government, and using the word "thighs" in mixed company. He is representing himself. As a penalty for disrupting the court, he is gagged and tied to a chair. After a witness testifies that she overheard his treasonous remarks about this country, he is allowed to cross-examine her. So, seated and bound to the chair and gagged, he hobbles close to the witness. Through his gagged mouth, he asks a series of muffled questions, no part of which is understandable. But after each muffled question, the witness answers his "questions" in the following sequence:

"Yes, I did."
"No, I don't remember."
"No."
"Don't put words in my mouth!"
"Yes."
"Yes, it's true. I lied!"

I told the students that if they are able to perform as well as Fielding Mellish, with or without the obstacles he endured, they'll surely experience the pinnacle of success—similar to those they would experience when, in Perry Mason fashion, any witness confesses during cross-examination.

Keeping a defendant from testifying. In criminal trials, defendants frequently do not testify. That is so because experienced defense attorneys understand the perils of a defendant's testimony under cross-examination. They rely, instead, on the rule that the defendant's failure to testify cannot be asserted or questioned by the prosecutor and may not be considered by the jury. They also rightly emphasize jury instructions that the defendant bears no burden of proof and that the sole burden is on prosecutor to prove guilt beyond a reasonable doubt. Indeed, those jury instructions often provide a criminal defense attorney's primary argument for acquittal.

But there are two other important reasons for a criminal defendant not testifying. Both are related to the defendant's probable lack of credibility: 1) the need to keep from the jury evidence of the defendant's admissible prior criminal conviction(s); and 2) an effective cross-examination that results in the jury's focus on the defendant's mendacity, thus enhancing the prosecutor's burden of proof and fostering the likelihood of conviction.

Defense attorneys must be aware of those dangers, share them with those they represent, and counsel them on the possible negative consequences of their testimony.

stands by his previous trial testimony in answering your questions, he will have created tension about whether you or the witness is truthful. This tension is welcome, for it ends favorably when it's established that the cause of tension is due to the witness's inconsistency, not questions dreamt up by you. So, after you've concluded the lead-up questions we've discussed, you take the document from the counsel table and ask the ultimate questions about the witness's prior inconsistent statement based on what is in the document. Using the document in that fashion might give jurors greater credence in your framing of the ultimate question—a credence that will be fortified when another witness provides testimony concerning the witness's prior inconsistent statement.

This use of a document is particularly effective where it includes verbatim, prior inconsistent statements of the witness's own writing, electronic recording, or prior transcribed testimony. For maximum effect, when you're asking questions before holding the document during the earlier stages of questioning, your questions should perfectly align with the verbatim, prior inconsistent statements of the witness in the document—especially in using, when available, identical important words. Here also, if the witness persists in adhering to his prior direct testimony, the witness who provided the document's inconsistent statement will give appropriate rebuttal testimony.

As a follow-up to instances where the impeaching evidence is the witness's own verbatim statement, such as those just discussed, it's essential that the questioner focus on the appropriate issue. Some attorneys muddle the ultimate cross-examination question, which is designed to prove the prior inconsistent testimony, by not focusing on the correct issue.

An attorney does this by initially correctly marking as an exhibit and showing the witness under cross-examination the witness's verbatim statement. The attorney then correctly invites the witness to read along with him the verbatim statement, while the attorney reads it aloud for the jury. When the reading is concluded, the attorney then asks the witness if the attorney read it correctly. When the witness answers affirmatively, the attorney wrongly ends the questioning on the topic.

The mistake made by the attorney is that the questioning terminated prematurely. The attorney's focus was wrong. The issue is not whether the attorney read the writing correctly. The issue must be focused on whether the witness previously said what the writing contains. That is the basis for proof by prior inconsistent statement.

Asking the witness if the attorney read the writing correctly is proper and even desirable. But the final question must be, "Is what I read aloud for the jury, as you read it along with me, what you said?" If the witness says "Yes," he has been impeached. If he says, "No, the writing is not accurate," you will cross-examine him about the inaccuracy if you have one or more witnesses who will provide rebuttal testimony that the writing is correct. If the witness testifies that the writing is accurate, but he misspoke, you have a choice. You may pursue him on the basis of his alleged error, if you feel his explanation lacks merit based on the context of the statement or that it's inherently improbable. Or you may choose not to allow him to explain why he spoke erroneously, leaving that responsibility to his attorney, thus possibly providing you another opportunity to reveal his untrustworthiness through rebuttal cross-examination.

Impeachment by omission. Impeachment by omission includes impeachment by prior inconsistent statements, but unfolds differently. The "blue car, black car" example given above provides an appropriate example. Assume that in this case the police officer testified in rebuttal that the witness told him that the blue car went through the red light and caused the collision. His police report, however, includes nothing about that conversation.

On cross-examination, the lawyer's first requirement is to highlight the importance and, where applicable, the necessity of the omitted statement in the police report:

> Officer, you told the jury that the witness told you the blue car went through the red light and caused the collision with the black car, correct?
>
> And you've told the jury that you remember the witness telling you that, right?
>
> Is one of your duties as a police officer to prepare a report about an incident such as the one that occurred in this case?
>
> You prepare a report for many reasons, right?
>
> Do you prepare a report because you're required to do so?
>
> Is a report required to make a record of your investigation?
>
> Is it required to inform others, such as a prosecutor or the secretary of state, of what happened and who was responsible?
>
> Do they need that information to prosecute a person or to take other appropriate action?
>
> Is a report designed to make a record of the evidence you obtained for anyone who needs it?
>
> Do you provide your report to one or more of your supervisors?
>
> Is a report a way to inform your supervisors of your activities?
>
> Is it a way for your supervisors to evaluate your activities?
>
> And to have you or another officer do further investigation?
>
> Because of the passage of time and the number of cases you investigate, is it also a way to refresh your memory?
>
> Do you try to be as comprehensive as possible in making a report?
>
> You wouldn't withhold information in a report, would you?
>
> Do you take care to be as accurate as

possible and not write false information in making a report?

So, for all of those reasons, do you agree that an accurate police report is extremely important?

"No" answers to any of these questions invite additional impeachment opportunities. "Yes" answers establish the necessity and importance of a police report and set the stage for impeachment by omission.

Some lawyers begin questioning, without establishing the importance of the report, by prematurely asking the officer if he wrote in his report that the witness told him the blue car ran the red light and caused the collision. Others will ask the same question after merely establishing the importance of the report. When you start with that question—at the very outset or immediately after establishing the importance of the report—the officer, who is likely to have read his report before testifying and knows that the report says nothing about the witness saying the blue car caused the collision, is likely to say "no," thus terminating any follow-up questioning.

The preferred method for proving impeachment by omission establishes the importance of the report, followed not by questioning the officer about whether he put the witness's statement in his report, but by beginning with the officer's report. This focus on the report avoids a prompt admission by the officer that he did not include the witness's statement in his report, thus circumventing all questions about its importance. The benefits of the lead-up questions are thus lost.

Instead, after establishing the importance of the report through questions as indicated above, you mark it as an exhibit for identification, show it to opposing counsel, and then show it to the officer. At this stage, you first ask the officer whether he recognizes it. After he answers, your target is to ask the officer to read where he put the statement of the witness in his report. But before you go down that path, there are other questions to be answered:

Officer, I show you this document.

Do you recognize it?

Is it your report about the accident you testified about on direct examination?

For all the reasons we discussed, you try to be as accurate as possible in writing your report, do you not?

You try to be comprehensive and truthful, correct?

You wouldn't write something false in your report, would you?

Or withhold information in a report?

Considering all the answers you gave to my previous questions, do you agree that a police report such as this one is important for many reasons?

So, you certainly agree that any important information a witness gives you would need to be put in your report, do you not?

Officer, read aloud for the jury where you wrote in your report that the witness said anything about the black car running the red light and being responsible for the collision.

Because you first laid the foundation for the importance of the report, the jury would reject any effort on the part of the officer to deny the importance of any of your questions. And, of course, the officer is unable to find or read aloud what the witness said about the black car's responsibility for the collision.

As in proof of a prior inconsistent statement, by following the methods provided for proof by omission, you will have given the jury the basis for rejecting, or at least questioning, what the officer claimed the witness had told him. IBJ

Part Five of this series, concerning closing arguments, will appear in the February 2024 Illinois Bar Journal. All parts are available online at www.isba.org/ibj.

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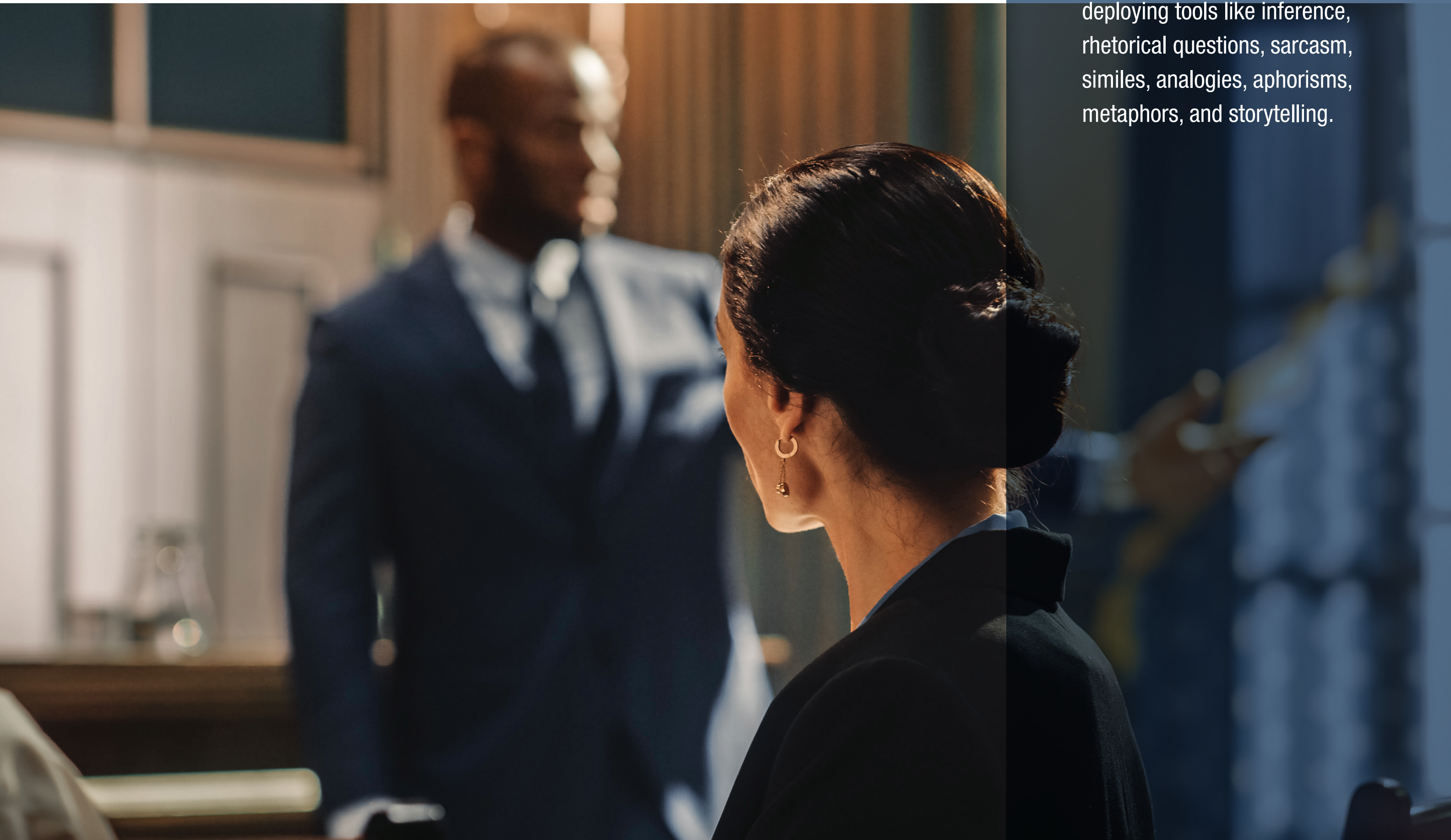
Part Five of a five-part series.

What I Learned From Teaching Trial Advocacy:

The Closing Argument

TAKEAWAYS >>

- The goal of a closing argument is to help members of the jury determine: 1) the meaning and significance of the facts and evidence they have heard; and 2) who is right and who is wrong.
- The persuasiveness of an attorney's closing argument often is built upon a refined theory of the case, a carefully constructed theme, and a thoughtful framing of issues.
- When drafting your closing argument, consider deploying tools like inference, rhetorical questions, sarcasm, similes, analogies, aphorisms, metaphors, and storytelling.



BY GINO DiVITO

ISBA RESOURCES >>

- Benjamin R. Lawson, *Trial Lessons From Comedians*, 111 Ill. B.J. 36 (Aug. 2023), law.isba.org/3PaewVE.
- ISBA Free On-Demand CLE, *Eight Things Every Trial Lawyer Should Know* (recorded Apr. 2020), law.isba.org/46DTKnV.
- Kimberly A. Davis, *How to Give an Effective Closing Argument*, ISBA Quick Takes for Your Practice (recorded May 2016), law.isba.org/48mU8r9.

CLOSING ARGUMENTS POSSESS A UNIQUE STATUS WITHIN TRIAL ADVOCACY. They occupy the climactic arguments in books, plays, movies, stories, and real trials. But persuasion does not magically occur based on the power of closing arguments. If you haven't done the job of persuasion from the opening gun—if, during the other parts of trial, jurors haven't accompanied you on the road toward victory—persuasion is unlikely to result from your closing arguments.

Nonetheless, closing arguments deservedly earn the mystique they generate. Unlike the other phases of trial, they present your first and only opportunity to openly argue your case. Until then, arguments have not been permitted to accompany all the previous facts (pro and con), storytelling, imagery, and questions and answers. Everything previously furnished to the jurors has led to this final opportunity to explicitly tell them why you should win.

Your premise in every trial should be that every juror strives to do justice. When jurors feel they have achieved that goal, they are likely to share their experience with relatives and friends, eager to tell them about the case and how they came to the correct decision. Your task in closing arguments is to facilitate their making the right decision and to enable them to be proud of the correctness of their verdict(s).

To make that happen, let's discuss what you're able to do in closing arguments—the specific arguments that are not permitted during the other phases of trial.

Overview

In closing arguments, you should not merely regurgitate the facts. Jurors have already heard the facts and, if you did it well, they have experienced them. Your goal is to help the jury to determine the meaning and significance of the facts—of the testimonial evidence they heard and the real, documentary, and demonstrative exhibits they reviewed.

Being a reporter of the facts was your role in opening statements. But in closing arguments, your role is more akin to that of editors and commentators—those who persuade without providing the universe of underlying facts but by emphasizing the meaning of significant facts and their logical consequences. At this stage, jurors who surely know the facts may be inclined to vote a certain way. Your task is to secure or to alter their decision through compelling arguments. It's to give them reasons for taking pride in reaching the right result—your result.

You need to tell jurors why your version is more credible than your opponent's; why to believe your witnesses and to disbelieve your opponent's. You need to tell them about the logic of your positions and the absurdity of your opponent's positions; about the proper conclusions to be drawn from the evidence from your side and the unsound positions of your opponent's side. Unlike the other stages of a trial, closing arguments are designed for explicit arguments concerning who is right and who is wrong, who should win and who should lose—and why jurors should reach those conclusions.

Applying the modes of persuasion

If you've succeeded in applying Aristotle's admonitions from opening statements through witness examination, you laid the groundwork leading to persuasion (see parts Two and Three of this series). Closing arguments

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WHERE ATTORNEYS WITH GOOD CHARACTER, COMPETENCE, AND CONVICTION ARGUED MATTERS ABOUT WHICH I HAD A CONTRARY INCLINATION, I WOULD WONDER WHAT THEY HAD SEEN THAT I MAY HAVE MISSED. I WOULD THEREFORE PAUSE TO CAREFULLY RECONSIDER MY LEANINGS.

now allow you to put those traits on full display through arguments not permitted previously. That difference presents a final application of Aristotle's modes of persuasion. Your trustworthiness based on your good character (ethos); your competence in displaying professionalism, knowledge, reasonableness, and logic (logos); and your personal conviction concerning the rightness of your cause and the invocation of appropriate emotions (pathos) together present a final and greater manifestation of Aristotle's modes of persuasion.

From my experience as a trial judge, I know the effect those traits had on me in arguments on motions, rulings, and bench-trial findings. Where attorneys with good character, competence, and conviction argued matters about which I had a contrary inclination, I would wonder what they had seen that I may have missed. I would therefore pause to carefully reconsider my leanings. On the other hand, when attorneys lacked one or more of those traits—particularly when they seemed to lack conviction by just going through the motions—previous inclinations did not require reconsideration.

Regarding the power of pathos, I invariably discussed with my students the Pygmalion effect. In ancient Greece, Pygmalion was the king of Cyprus who falls in love with an ivory sculpture he made of a beautiful woman. Overcome with love for his sculpture, he begs the goddess Aphrodite to breathe life into her. She grants his wish, and he marries her. The Pygmalion effect is a metaphor for your need to express such conviction in your case that, if the jury does not grant your request, you will die. If the jurors trust you and like you, they will not want you to die.

Pathos is so important in arguments because, even if you display ethos and logos, no one will believe you if you don't convey personal conviction about the rightness of your cause. To convey again the importance of pathos, I would encourage my students to think about what turned them on and how they expressed it. For me, what really turned me on was the "s" word. It was truly one of the things I enjoyed most. No, not the "s" word you may be thinking of. I was referring to skiing.

Skiing is a great analogy for life. The goal is not to get to the top or the bottom of the mountain. The goal is to ski, to magically navigate in snow—especially in deep powder—with two boards clamped to your boots, and to enjoy and share the challenges of the black diamond and the double-black diamond runs and the runs through the trees, the majesty of the mountain, and all the joyful experiences with those you love.

I learned much from skiing. One lesson was that absolutely perfect conditions can suddenly become very harsh. Sleet and snow create unacceptable conditions, including freezing cold, inability to see beyond a few feet, and general disorientation. When those conditions unexpectantly occurred, my family and I had an understanding: We would stop for lunch. It was always amazing how resting and being replenished by food with people you love resulted in our ability to venture out again—sometimes in the same harsh conditions we had left—and how skiing was again endurable and enjoyable.

I share my passion for skiing to illustrate how you express pathos, but also as a model for how to embrace life. Relatives and friends and the need to stop

Random Thoughts on Closing Arguments

• **Using visual and electronic aids** is always a plus in a trial and is especially so in closing arguments, as you combine your explanation about various matters with their significance. Using and explaining real and demonstrative exhibits, diagrams, photos, videos, and recordings are enhanced by explanations of their significance. Using a chalkboard or some other version of a writing tool can help the jury to understand matters. For example, using a chalkboard may aid the jury in understanding the various bases for money demands by visually providing the reason for each cause of action and for calculating the total amount of damages. Such a visual will remain before the jury while opposing counsel argues—unless counsel takes the deliberate step of putting it out of view. But be cautious about using such a demonstration; opposing counsel may use it to ridicule your conclusions and even use it to delete or alter portions of what you wrote.

• **Never make *ad hominem* attacks on opposing counsel.** Such attacks may be deemed unfair by jurors and are likely to draw objections that are certain to be sustained. Opposing counsel is not your enemy and should not draw your enmity. Your focus, if you're attacking a party opponent or an adverse witness, should always be on why that person or entity is deserving of scorn.

• **Read the notes** you've taken before giving closing arguments. I was always amazed to find forgotten information in notes—information that was helpful in discussing with the jury what a witness or opposing counsel had said.

• **You should not read notes to the jury.** Have notes available to discuss areas of discussion and to recall relevant occurrences, names, dates, and places. Use common words and phrases in closing arguments, rather than fancy words that require you to rely on your notes. Speaking from the heart is more effective than having to rely on notes to convey your message.

for lunch are key to successful lawyering and all of life, especially in tolerating inevitable losses and other difficulties.

As stressed previously, never do anything that might appear artificial, especially regarding pathos. An example involving a defense attorney in a criminal case occurred in my courtroom. The attorney was passionately giving his closing arguments, but when he started discussing the testimony of various prosecution witnesses, especially police officers, his anger was evident. It kept growing, until his anger reached such a crescendo of rage that he took his reading glasses—which he plainly needed to periodically review notes—and threw them against the jury box. An awesome display of conviction! But after he concluded his arguments, the prosecutor, who was to give rebuttal arguments, approached the broken glasses, picked them up, placed them on defense counsel's table, turned to the jury and said, "Don't worry about the glasses. It was probably the fourth pair of Walgreens reading glasses he broke this year." I don't recall the charges against the defendant, nor the sentence he received.

Theory of the case

In every trial, each side must have at least one plausible theory of the case. But an ultimate theory is frequently replaced by focus on some aspect of that theory. For an obvious example, the prosecutor alleges the defendant is a murderer; the defense attorney contends the defendant is not guilty. The focus of each may be considered each party's theory of the case. But there are invariable offshoots for these basic theories. And an offshoot soon becomes the major focus of the theory of the case. For example, the ultimate theory for each side in the murder case may concern: whether, for any reason, a witness could or could not correctly identify the defendant as the offender; or whether the prosecution or defense witnesses had reason to lie; or whether the defendant had a credible alibi; or whether the defendant acted in self-defense; or whether the defendant acted properly but excessively, such as in applying a choke-hold; or whether the defendant was insane or otherwise not responsible for committing the crime.

The ultimate theory, though not specifically articulated early on, should be evident from opening statements right through closing arguments. When closing arguments occur, that theory will be the primary focus of the case for both sides.

In any argument, expressing the issue in simple and credible terms sets the stage for each side to have their arguments clearly conveyed and understood while simultaneously attacking the other side's arguments. But before explicit arguments are allowed in closing arguments, each side, being aware of its own and the opposing side's theory, must endeavor to focus on the facts—pro and con—that should ultimately lead to persuasion.

To illustrate, a multitude of examples apply to the current debate over abortion:

> Is abortion about a woman's right to choose to control her own body or killing a fetus or a human being? Or is it about the right to choose abortion for any reason or that no right exists for any reason? Or is it about choosing abortion for any reason or the right solely based on the health of the mother, rape, or incest? Or is it about abortion for a specific period of time versus for a lesser period of time? Or is it about an abortion at any time, including up to childbirth versus only for a designated period of time?

Perhaps you will note that the current national debate on abortion is generally about the first issue provided above: the broad right for and against abortion. But at the state level, where citizens and lawmakers are currently voting, most debates are focused on one of the other issues—a stance designed to garner votes by staking an appropriate middle ground. The takeaway for trials, and for any argument, is that your statement of the issue should be one that is fair, more reasonable, and has greater appeal than your opponent's position.

Another example of relying on conflicting theories of the case is the true story of the 1999 custody dispute involving Elián González. That case involved the gut-wrenching, international dispute involving a father's right to have his six-year-old son reside with him in Cuba versus the right of custody for Cuban-American relatives of the surviving son of a mother who drowned while trying to get herself and her son out of Cuba and to the USA, before their small boat was swamped at sea, with Elián, who was in an inner tube, having been rescued a few miles off the Florida coast. (Spoiler alert: In March 2023, 29-year-old Elián González was elected to communist Cuba's National Assembly in a slate of 470 unopposed candidates.)

UNLIKE THE OTHER STAGES OF A TRIAL, CLOSING ARGUMENTS ARE DESIGNED FOR EXPLICIT ARGUMENTS CONCERNING WHO IS RIGHT AND WHO IS WRONG, WHO SHOULD WIN AND WHO SHOULD LOSE—AND WHY JURORS SHOULD REACH THOSE CONCLUSIONS.

A few other examples:

- Is the death penalty about killing a person or the ultimate demonstration of the sanctity of life?
- Is incarceration about every prisoner having the opportunity for freedom or some prisoners never being released because of the nature of their crimes?
- Is the overriding consideration in a defamation case about First Amendment rights or a tarnished reputation?
- Should public-sector union employees have the right to strike or should they be denied such a right?

As the above examples illustrate, winning the case is highly dependent on the theory of the case (or at least the way the theories are expressed); theories that lawmakers and jurors regularly confront; and the outcome of which may be dependent on political leanings, religious beliefs, or other considerations. The examples may also suggest the possibility of slipping into framing an issue to win the argument, as discussed below, where political leanings

or other considerations may determine a desired outcome.

Importance of a theme

Though not as essential as a good theory, a theme that resonates with everyone can be vital, for it provides universal truth that supports why your theory of facts and law is correct and why you should win.

For example, if the driver of a car was intoxicated, the plaintiff will surely emphasize the universal agreement that drunk drivers cannot choose to drive a car and must be responsible for their actions and for the damages they cause. In a bicycle-messenger case, the plaintiff(s) will likely focus on the corporate employer of the bicycle messenger stressing speed over care, and not requiring strict adherence to traffic laws.

In discussing Russia's invasion of Ukraine, the relevant current theme is: "Putin's unjustified random killings of innocent and defenseless people and the total destruction of an entire sovereign nation cannot be tolerated." Examples of other current themes include:

- "Inmates should not run the asylum."
- "Government officials elected as representatives of the people must act transparently."
- "We must narrow the unacceptable gaps that separate officials elected to serve us."
- "Can we tolerate leading candidates of our nation's two major political parties lacking credibility, competence, and meaningful conviction about their goals?"

Note that themes may be stated as an expression of fact or as a rhetorical question.

Framing the issue

A close relative of the theory of the case, but more powerful, is winning by simply framing the issue in the case. This argument prevails for countless reasons, especially for what is widely meaningful for most of us. Examples include: the general appeal to universal values, such as those based on our Constitution; what is considered right and just; and what is considered logical and reasonable. They include what may have positive or negative effects on people, on the economy, on jobs, on our boarders, on homelessness, on our freedoms, on our democratic republic, on government power. Ultimately, winning by framing the issue works where there is general agreement on universal values.

I offer as an example of this argument the two following paragraphs of my 10-page opposition for the Illinois Prisoner Parole Board's consideration of the parole effort of George Clifford Knights, one of the murderers of the two Chicago "walk and talk" police officers at Cabrini Green in 1970:

> There is an old and reliable adage that "proper framing of an issue wins the argument." Knights' statement of the issue in pursuit of parole freedom can be framed—based either on his individual reasons or in combination with all his justifications—as follows: "Knights should be granted parole because: he is innocent, the evidence shows he is innocent, he is old, he has served more than 50 years in prison, and he is a role model and guide for fellow prisoners."
>
> The correct framing of the issue, however, is: "Knights should not be granted parole because: he is guilty of randomly killing two uniformed police officers just because of their status as police officers; the evidence at trial undeniably proves his guilt and the appellate court agreed; his persistent insistence that he is not guilty establishes that he is not repentant and cannot be trusted, so he should not be paroled because of his age or the time he has been imprisoned; and he cannot be a role model and guide for others because of the inconsistencies between his current sworn petition to attain parole and his sworn testimony during his trial—both of which are false and even conflicting—and because of his more-than-half-a-century of mendacity concerning the very reason he is imprisoned."

In "1984," George Orwell pointed out the power of words and language to control thoughts and to control or empower people. We are now regularly confronted by various interest groups trying to eliminate or alter words to achieve certain goals.

In trials, it's important to appreciate the power of words in order to use them appropriately and to be aware of their use by opposing counsel. You need to appreciate the power of how words and language are used to win an argument—for use either in your favor or to counter their use by opposing counsel. The following examples describe various ways words are used in trials.

Using jury instructions. The admonition to prepare jury instructions before beginning trial has absolute validity, because they require both parties to focus on the elements necessary to prove the cause(s) of action and the rules generally applicable. Using jury instructions during closing arguments, however, serves two additional purposes: 1) helping the jury to understand and apply difficult instructions; and 2) receiving the judge's imprimatur when the instructions are read aloud by the judge in the courtroom and provided for the jury's review during deliberations. In a criminal case, for example, a prosecutor's explanation to the jurors of the meaning and application of instructions for accountability or the felony-murder rule results in the judge later quoting the prosecutor and thereby giving the stamp of approval on the prosecutor's explanation.

Rhetorical devices

Rhetorical devices provide arguments that aid in demonstrating truth or falsehood. There are numerous examples of such devices. They are permissible and useful for clarifying arguments. A few are offered as representative examples.

Inferences. If X happened, then Y logically followed. For example:

- When you slept, the ground outdoors was dry. When you awoke, there were four inches of snow on the ground. You know it snowed even though you didn't see one drop of snowfall.
- After midnight, you see a man carrying items that were later identified as from a nearby store. He is running a short distance from the store, where there's a broken window and the sound of a burglar alarm. You know he was running because he broke the window and took items from the store, even though no one saw him do those things.

Note that inferences often are the bases for *circumstantial evidence*, which is

frequently more reliable than eyewitness testimony. You should argue that fact while arguing the significance of the inferences in your case.

Rhetorical questions. A friend once told me that one day he was standing in his sixth-grade gym class when a classmate came up behind him and pulled down his shorts, revealing to the whole class—boys and girls—parts of his body that should not have been displayed. He said, from the moment he turned to look at the boy responsible, he would never forget his face. "Members of the jury, do you think Jane Doe will ever forget the face of the man who raped her?"

Sarcasm. Abraham Lincoln is said to have asked the question, "If you call a calf's tail a leg, how many legs does a calf have?" When the response was five, Lincoln said, "No, a calf has four legs. Calling a calf's tail a leg doesn't make it one." "Members of the jury, just because Mr. Doe testified that it was so doesn't make it so, just as calling a calf's tail a leg doesn't mean a calf has five legs."

Similes. The truth is like a torch: The more you shake it, the brighter it glows. And when I cross-examined this witness, you saw how his torch quickly turned into embers. Or calling this thief a bad business man is like calling a pirate a bad sailor.

Analogies. Crypto currency is the equivalent of the Wild West. Another example:

> One day, while roughhousing in the living room with my brothers and sister, our mother's favorite vase fell to the floor and cracked in a number of places. As the oldest sibling and the person most responsible for the damage, I carefully glued and taped the pieces together so that it looked perfectly fine to everyone, including our mother. That lasted until the day mom put flowers in the vase and poured water into it. Needless to say, the vase couldn't hold water. And, members of the jury, if you look carefully at the witness's testimony, you'll find all the cracks that won't hold together, just like the vase that couldn't hold water. Let's consider each of those cracks.

Aphorisms. "It ain't over 'till it's over." "We made too many wrong mistakes." "You can observe a lot just by watching," and a treasure trove of so many others from Yogi Berra. And other treasures from Will Rogers:

- "We will never have true civilization until we have learned to recognize the rights of others."
- "The only difference between death and taxes is that death doesn't get worse every time Congress meets."
- "I don't make jokes. I just watch the government and report the facts."
- "You've got to go out on a limb sometimes because that's where the fruit is."

Metaphors. In life as in sports, victories are celebrated and losses are tolerated only by those who love and respect the game. So, enjoy the game. (A great metaphor for trial lawyers.)

Storytelling in closing arguments

If a picture is worth a thousand words, a story is worth a whole book. Telling stories that lead to a relevant point are permissible in closing arguments. They frequently provide interest and entertainment with an effective punchline. R. Eugene Pincham's sugar story is a prime example. Pincham was a criminal defense attorney for many years. He then served as a trial judge and later as an Illinois appellate court justice. When he retired from the judiciary, he again defended those charged with crime and, until his death, he also had a significant civil practice.

In criminal cases, Pincham included substantially the same story to a jury in virtually every closing argument. He would begin by saying he had grown up poor in Alabama, on a small farm that didn't produce much. Because there was no refrigeration to preserve food, his family bought ice and immersed wrapped or bucketed food in a cold creek. To preserve what grew on their meager farm for longer periods, they purchased sugar, an expensive necessity for preserving certain types of food. They would buy a single barrel of sugar and keep it in the farm's small meat house.

Because of its expense, their mother had a strict rule for her two sons: They were not to take sugar from the barrel without her approval. But Pincham and his brother loved sugar. They used it in drinks and to sweeten food. Their mother's rule didn't matter; they wanted sugar so much they couldn't help themselves. But whenever they took sugar from the barrel, their mother knew it. And she would tell them to search the farm for a switch so she could give them a good whipping. If they brought her a switch that was too small, she would send them to look for another. But she never caused real injury or wounds or bruising, and she never drew blood.

Pincham and his brother couldn't figure out how their mother always knew they had been in the sugar barrel. They would approach the barrel and look closely at the sugar. They would carefully study and remember how the sugar looked in that barrel. Then, after satisfying their sugar needs, they would very carefully ensure that the sugar looked the same as they had found it. But, somehow, their mother always knew when they had been in the sugar, and she punished them every time. Amazingly, she never punished them when they didn't touch the sugar.

Many years later, Pincham learned his mother's secret. On a Christmas day, with his family at his mother's home, while she was enjoying her rocking chair with one of his young children on each leg, he asked her how she became clairvoyant. She seemed puzzled, and asked what he meant. He reminded her of her ability to know when he and his brother were in the sugar barrel and when they were not. He was sure she had a sixth sense. She burst into laughter, and denied she was clairvoyant. He asked how, then, did she know he and his brother were in the sugar. Through her laughter, she explained that, when they were in the sugar barrel, no matter how careful they were, no matter what precautions they took, they always left a few tiny granules of sugar on the floor. So, when she approached the barrel, she could feel the granules under her feet. And, when she checked, she could see those very tiny granules. That's how she knew they were in the sugar.

Pincham then said, "Folks, you heard what the state's witnesses told you. If you consider carefully what they said, you'll know they've been in the sugar. If all their granules of sugar were here in this courtroom, there would be a huge pile of

sugar right here before you on the floor. Let me tell you about the granules of sugar those witnesses left on the floor—the inconsistencies, the lies, the inadequate evidence. Let's together consider those sugar granules."

On the surface, Pincham's story was about witness lies and inadequate evidence. He skillfully used metaphor to compare forbidden sugar with misbehavior and lies. But his story was much more than that connection. He perfectly satisfied Aristotle's modes of persuasion. Consistent with ethos, logos, and pathos, he spoke directly to every juror. He used understandable words and language. He created real images. He told jurors an interesting story, had them wondering where he was going, and presented a satisfying and relevant climax. He created compelling images of his early poverty, of the bond with his brother, of the wisdom and the many attributes and the love of his mother, and a hint of his own family that included at least two children. And he presented the reality of an unprivileged boy who became a lawyer who could transfix a jury.

His story is a model for every trial lawyer. But his story presents other lessons. One is the need to learn as much as possible about opposing counsel, especially concerning the attorney's tendencies, with special focus on closing arguments. That's so because attorneys tend to be fond of stories and other devices that have worked successfully in the past. When you discover such a tendency, especially a powerful one, you must consider how to deal with it.

That's what I did in preparing for the prosecution involving Pincham's defense of one of the two defendants on trial for killing two walk-and-talk Cabrini-Green police officers, referred to previously. I had much earlier endured Pincham's sugar story in a jury trial—fortunately, one that ended satisfactorily. In his closing arguments in that trial, his mother's big reveal occurred on a train to Springfield, after he had graduated from Northwestern Law School. They were on the train for his swearing-in admission to practice law. Anticipating the pending trial with Pincham, I attended his closing arguments in another case. It featured his sugar story, altered with the later reveal on what occurred on a Christmas Day, and which led to a winning result.

When the Cabrini-Green closing arguments began after six weeks of trial (including Saturdays), I had the initial opportunity to address the jury. During my arguments, I said to the jury:

> Have you experienced that when you use sugar for coffee or tea, or to sweeten cereal, no matter how careful you are, some tiny granules of sugar spill from your spoon onto the kitchen table? Have you noticed that, though you may not be aware of it, you know the sugar is on the table, because you can feel it under your fingers?
>
> Members of the jury, you might not have been aware of the lies of the defense witnesses, but let me tell you how you know those witnesses were in the sugar bowl. Let me tell you how you can feel those granules of sugar that the defense witnesses have tried to hide.
>
> When I glanced at Pincham, it was obvious he was not happy. Nonetheless, he told a different story that included the meager farm and his mother and brother. I can't recall the story he told, except that it involved his brother and him sucking on some sort of weed on the farm. It was very confusing and didn't have anything close to Aristotle's three modes of persuasion and the punch of the original story. And his closing arguments were much shorter than usual.

Epilogue

On their last day of class, the students were to demonstrate all they had learned in conducting a total moot court jury trial—one with classmates and friends and relatives as jurors, and with real volunteer judges who would grade their performances. These were my final remarks to the students in the class before their trials:

> My youngest daughter—the one I thought would be a lawyer, but who is now a physician—and I went to Popeye's Chicken for lunch one Saturday afternoon when she was a high school freshman, before she became a vegetarian. As we ate, she said, "You know, Dad, I really blew it when I was young." Puzzled, I asked what she meant. She told me how she and her best friend would compete on who had the best drawings and the best crayons. She always won the battle for best crayons, but she valued them so much that she would never press hard on them. The result was that all her crayons were in like-new condition, and her drawings and colorings were dull and lifeless.
>
> She said, "I now know that crayons are made for coloring, and that you have to press hard on them." When I regained composure from near-fainting, I recognized she had confirmed what I already knew: not only that she was very special, but that she could separate the important from the trivial.

Inspired by her revelation, my final message to my students was:

> My hope for all of you is that, whether you go on to try cases, or do any other type of lawyering, or do anything far removed from lawyering, you use all your crayons and press so hard on them that there's nothing left but stubs. So that, wherever you go and whatever you do, you'll leave a legacy of vibrant colors, and a lifetime of joy for yourself and everyone you touch.

For everyone who endured this series, that is my fervent hope for each of you. IBJ

This is the final part of a five-part series that has appeared in the Illinois Journal from October 2023 to February 2024. For all five parts, visit law.isba.org/3TxtJD2.

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