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State Bar of Texas
SUING AND DEFENDING GOVERNMENTAL ENTITIES
BOOT CAMP
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CHAPTER 10
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Judge Eric M. Shepperd took office on January 1, 2007 for Travis County Court at Law No. 2. He was formerly the Director of Civil Litigation for the Travis County Attorney’s office. Prior to joining the County Attorney’s office, Eric was an Assistant Attorney General in what is now called the Law Enforcement Defense Division. Judge Shepperd’s law degree is from The University of Texas School. Eric has always been active in service to the legal profession and the Austin Community. He is a lecturer for The University of Texas Law School’s Trial Advocacy Program. He sits on the Board of Directors for Austin Habitat for Humanity. He is also the President of the Austin Black Lawyers Association and President Elect of Leadership Austin. He is also a past President of Texas Organized Professionals, a community services organization with emphasis on youth development. He is also the past Board Secretary for Central Texas Red Cross Board of Directors.
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Overview

• Trial lawyers are story tellers.
• Before there was T.V., a trial was the town's entertainment.
• The person with the best story wins.

Story Telling Techniques

• Arouse the listener’s curiosity
• Use the active voice
• Tell the story in the present tense
• Use lay terminology
• Present compelling characters
• Employ evocative language which transforms the actions into memorable images
• Appeal to all of the senses
The Picture Theory

- Selecting the right words to create a picture at trial will frame the story to the way you want the jury to see it.
- Create a picture in the courtroom without the use of demonstrative evidence, but instead with words.
- Using the right words can mean the difference of the jury remembering your story better than the opposing counsel.

Opening Statements

A statement of first impressions

TRCP Rule 265(a) & (c)

(a) The party upon whom rests the burden of proof on the whole case shall state to the jury briefly the nature of his claim or defense and what said party expects to prove and the relief sought. Immediately thereafter, the adverse party may make a similar statement, and intervenors and other parties will be accorded similar rights in the order determined by the court.

(c) The adverse party shall briefly state the nature of his claim or defense and what said party expects to prove and the relief sought...
Prepare!

- Prepare your opening statement in advance.
- Know your case—every detail of it.
- Deliver your opening without notes.

This is the time the jury hears the story so make a good first impression.

Jury’s Perspective

- This is the first time the jury get to hear about the case—it’s critical to establish a good first impression of the case, but also of the client and lawyer.
- They just got done with a long voir dire process and for many of them the only trials they have seen are on movies and T.V. shows.
- If you have technical/scientific stuff that an expert will testify to, chances are the jury knows nothing about it.

Convey your Theme and Labels

- Theme and labels are simple ways for the jury to remember things during the trial... but more importantly remember things in the way you want them to see it.
- The theme you decide on at opening should be used throughout the trial.
- Your first paragraph in your opening statement should develop your theme and disclose your overall position in a simple form.
Organizing your Opening

- The opening should be simple, clear, and organized.
- Aim for a simple narrative. This would make your opening:
  - Have a beginning, middle, and end.
  - Short and not burdened by the minutia of small details that the jury will hear for themselves during trial.
  - Be in plain English (so that the jury understands what you are saying).

Establishing Credibility

- Never say anything you can’t prove.
  - 15% of juries change their mind after opening statements.
- Admit the problems in your case to the jury.
  - It will sting less coming from you than from opposing counsel.
  - It will also look like you are not hiding anything from the jury.

Direct Examination

It’s about the answers
TRCP Rule 265(b) & (d)

(b) The party upon whom rests the burden of proof on the whole case shall then introduce his evidence.

(d) [The adverse party] then introduce[s] his evidence.

Prepare Yourself

• The most effective way to prepare for direct examination is to draft a list of all significant facts you need to establish for each witness.

• Having only the facts you need to establish will ensure that your questioning is:
  - Coherent
  - Spontaneous
  - Compelling

• Be sure to go over the facts you intend to elicit with each witness before trial.

Prepare your Witness

• Make sure your witnesses know what they are going to be asked.

• Educate your witnesses on dress, demeanor, courtroom procedures.

• Make sure your witness knows what questions you will ask.

• Make sure your witness knows what questions are likely to be asked on cross examination and is well prepared for them.

• If she has been deposed, review the witness’s deposition with her to reacquaint her with her testimony and to work over any anticipated problems.

• Make sure the witness knows the general overview of the case so she can keep your questions and cross examination in perspective.

• Practice your direct and anticipated cross examination with your witness.
The Jury’s Perspective

- It is important in preparing for direct to appreciate the jury's perspective on the trial:
  - The jury does not interact with the witnesses;
  - Witnesses' stories do not come across whole, but are revealed in piecemeal, interrupted by objections, other questions, breaks, and recesses; and
  - Much of the testimony is in unfamiliar legal language and legal terminology.
- Direct examination thus requires counsel's constant attention to the jury's perspective.
- The likelihood of having your message stored in jurors' long term memory is enhanced by presenting information in a novel way or by varying the presentation through visual aids or demonstrative evidence. Jury memory is enhanced most effectively by:
  - A unique, memorable message at the beginning of the examination;
  - Repeating the most important part of the message throughout the direct examination; and
  - Summarizing the testimony at the end of the examination.

Jury Motivation

- In addition to being able to remember what a witness says, jurors must be motivated to remember the testimony.
- The credibility, weight, and persuasiveness of witnesses is often related to the perceived similarity between the witness and the jurors (e.g. the scene).
- One technique to help a jury learn to like your witness is through personalization.

Organizing Direct Examination

- Just as well written essays are clearly organized and memorable, an effective direct examination comprises clear and well defined "blocks" of information introduced by “headlines.”
- Blocking or storyboarding allows jurors the chance to take in the testimony in smaller pieces that are more easily retained.
- Each block should contain:
  - A headline (“So now that we know you were a crossing guard on duty at the time of the accident, let’s turn to your vantage point just before the accident.”);
  - A detailed description of the events;
  - A summary; and
  - A clear transition to the next block.
Redirect Examination

- Avoid trying to get in the last word through redirect. Redirect implies to the jury that you’ve either incompetently left out something on direct or that your position has been badly damaged on cross. Save redirect:
  - To rehabilitate a witness who has been impeached;
  - To correct wrong or misleading cross examination testimony;
  - To develop new matters brought out on cross examination
- You want the jury to come away thinking opposing counsel didn’t lay a glove on you.

Cross Examination

It’s about the questions

TRCP Rule 265(f) & (g)

(f) The parties shall then be confined to rebutting testimony on each side.
(g) But one counsel on each side shall examine and cross-examine the same witness, except on leave granted
Should you cross examine?

• The decision to cross examine cannot be intelligently made unless you have prepared the cross-examination in advance and have a realistic understanding of what you can expect to achieve during the cross examination of any witness.
• As always, the key is to prepare before trial.

Ask Yourself the Following Questions Before your Cross Examination

• Has the witness hurt your case?
• Is the witness important?
• Was the witnesses' testimony credible?
  e.g. Did the witness give less than expected on direct?
  • If so, conducting a cross may give opposing counsel another chance to attempt to repair it on redirect.

Ask Yourself the Following Questions Before your Cross Examination (cont.)

• What are your realistic expectations on cross?
  • Remember that during cross, where a witness has made a reasonable impression on direct, the jury will side with the witness.
• What risks do you need to take?
  • If your case is solid and you can reasonably expect to win, keep your risks to a minimum.
  • If your facts are bad, conducting “risky” cross is something you can consider.
Purpose and Order of Cross Examination

• Eliciting favorable testimony:
  • This involves getting the witness to admit those facts that support your case and are consistent with your theory, themes, and labels.

• Conducting a destructive cross:
  • This involves asking questions that will discredit the witness or his testimony so that the jury will minimize or even disregard them.
  • Warning: Don't conduct a destructive cross, just because you can. Think about what this witness does for your case.

Elements of Cross Examination

• Structure
  • Make your strongest points at the beginning and the end of your cross.
  • Open with a flourish and end with a bang.
  • Vary the order of your topics.
    • Successful cross examinations are sometimes based on indirection
    • Don't repeat the direct examination

Younger's Rules for Cross Examination

• Your chances of conducting successful cross-examinations improve when you follow certain rules that have withstood the test of time.
  • Start and end crisply
  • Get the witness to agree with you a lot
  • Know the probable answer to your questions before you ask the question
  • Play it safe
  • Its sole purpose is to elicit favorable facts or minimize the impact of the direct testimony
  • Listen to the witness' answers
  • Don't argue with the witness
Younger’s Rules for Cross Examination (cont.)

• Don't ask the witness to explain.
• Don't ask the “one question too many.”
  • You've made your point. Don't ask the last obvious question.
  • “So you didn't really see the car before the crash occurred, did you?”
• Ask yourself this question:
  • What’s the final point about this witness that I’ll want to make during closing arguments?
  • Once you decide that point, don’t ask that question during your cross.
• Hazel's Addition: Ask a lot of picky fact questions.

Questioning Style

• Make your questions leading.
• Make a statement of fact and have the witness agree to it.
• Use short, clear questions, bit by bit.
• Keep control over the witness.
  • Example:
  • Q: You recognized the driver of the car, didn't you?
  • A: Yes.
  • Q: It was Frank Jones, wasn’t it?
  • A: Yes. He was weaving and looked drunk.
  • Q: Objection, your Honor, we ask that the answer after “yes” be struck as non-responsive, and the jury be instructed to disregard it.
  • Court: The answer will be stricken. The jury with disregard it.

Questioning Style (cont.)

• Project a confident, take charge attitude.
• Be a good actor.
• Use a natural style.
• Remember, cross is about the questions, not the answers.
What impeachment can I use?

Types of Impeachment:
- Can I show bias, interest, and motive?
- Can I use prior convictions?
- Can I use prior bad acts?
- Can I use prior inconsistent statements?
- Can I show contradictory facts?
- Can I show bad character for truthfulness?
- Can I use treatises?

How will I prove up the impeachment if necessary?

Closing Arguments

Argue!

TRCP Rule 269(a), (b), & (e)

(a) After the evidence is concluded and the charge is read, the parties may argue the case to the jury. . .

(b) In all arguments, and especially in arguments on the trial of the case, the counsel opening shall present his whole case as he relies on it, both of law and facts, and shall be heard in the concluding argument only in reply to the counsel on the other side.

(e) Arguments on the facts should be addressed to the jury. . . Counsel shall be required to confine the argument strictly to the evidence and to the arguments of opposing counsel. . .
Closing Arguments from the Jury’s Perspective

- They are tired. Sitting, listening, and watching a trial is tiring, physically and emotionally.
- The jurors are informed. They have watched and listened and know the evidence that the two sides have presented.
- They are opinionated.
- They know the time for them to decide is near, and they are anxious and worried about deciding the case correctly.

Understand that a good closing not only persuades the undecided and uncertain jurors, but also provides ammunition to the favorable jurors so that they become advocates on their behalf during deliberation.

Be Organized

- Have your argument outlined, but do not use your notes; maintain eye contact with the jury.
- Have all exhibits and other materials you will use arranged so you do not fumble around looking for them.
- Organize your argument around the questions, definitions, and instructions in the Charge.
  - Show the jury how the evidence relates to the Charge and supports a verdict for your side.
  - Parts of the Charge which are most helpful should be enlarged and shown to the jury as you talk about them.

The First Minute

- The first minute or two of your closing should communicate three things to the jurors:
  - Your theme
  - Why the jury should find in your favor; and
  - Your enthusiasm about your side of the case.

The traditional approach was to begin gradually thanking the jury for its service to our system of justice and their attention to the case, and build from there.
Argue Efficiently

• Closing argument is not a summation. No one (certainly not the jury) wants to hear a flat recitation of what the witnesses said during the trial.

• Jurors have limited attention spans.
  ◦ Therefore, your argument cannot overload the jury. Instead, it should focus on the themes, the key evidence, and the law.

Arguing

• Argue your strengths, not just your opponent’s weaknesses. Successful arguments are those that have been a positive approach and concentrate on the evidence produced at trial that affirmatively demonstrates your party should prevail.

• Deal candidly with your weaknesses:
  ◦ Closing is the time to solve problems, not to ignore them.

• Force your opponent to argue his weaknesses:
  ◦ A common method is to ask rhetorical questions during your argument that challenge your opponent to explain his weaknesses.

How do you deliver your closing argument?

• The jurors are looking for conviction. They are looking at which lawyer firmly believes in his case and which one is merely making a closing because it’s expected.

• Don’t use the lectern unless required, because it places a barrier between you and the jury.

• Maintain periodic eye contact with each juror and be aware of your body language.

• A closing must be forceful. View a closing argument as a discussion with the jury, in the same manner you would present your views on an important issue to a gathering of neighbors at someone’s house.

• Do not try to copy or imitate another lawyer’s style. That style will only work for him. Learning from others is important, but always adapt what you learn to your own individual style.
Conclusion

Remember, the person with the best story wins