Chapter 2

REASONING AND THE COMMON-LAW TRADITION

What is the common law, the basis of the Anglo-American system of justice? Popularly, it is known for its case law, its jurisprudence, for a system of legal precepts that emerge from court decisions. In the common-law countries today it is an important source of the substantive law that governs society. Law emanates primarily from statutes enacted by legislatures and from clauses in written constitutions in those countries that have them, as does the United States and its constituent states; but equally important, law takes the form of rules of law distilled from judicial decisions in cases and controversies in courts of record.

This judge-made law is what is familiarly referred to as the common law. It materializes as the by-product of a judicial opinion and has an experience traceable to either the Battle of Hastings in 1066 or the signing of the Magna Carta by King John at the Runnymede in 1215. Aside from its longevity, its universal acceptance derives from two characteristics of our tradition: first, the judicial opinion is published, eventually bound in permanent books and given a caption containing both a volume and page number and a name (indicating the parties) so that it may be readily retrieved and cited as authority; second, the rule of law emerging from the opinion is the conclusion reached by a publicly expressed reasoning process. It is the reasoning process—the fealty to the rules of logic—that gives legitimacy to judge-made law.

Even when the original source of the law is statute or constitution text, the method of interpreting these legislatively-enacted precepts follows the same methodology. The interpretations appear in publicly recorded volumes of court decisions containing a rational process supporting the conclusion reached in the decision.

At work then are two concepts: judge-made law which we know as "the common law" and a method of deciding cases which is known as "the common law tradition." In our discussion of legal reasoning, we shall address common law in the sense of the common-law tradition.

Common-law countries differ from the civil-law countries of Europe and Latin America where, in theory, the source of law is limited to Codes and written constitutions. In theory, on the Continent and in those jurisdictions that follow the civil-law tradition, the judge does not refer to a previous decision of a court, but uses the text of the Code as the starting point for legal analysis. The body of court decisions that we common-law countries know as precedents does not exist in the

civil-law tradition, because the authoritative source for each decision (in theory) is the Code enacted by the legislative branch. Unlike the common-law tradition, inferior courts are not bound by decisions of courts superior in the judicial hierarchy. And it is only in recent years that some of the courts on the Continent are beginning to publish computerized abstracts and some bound volumes of their opinions. The civil-law tradition is traced to the experience of France. Forged in the French Revolution that overthrew an absolute monarchy and subsequently copied by other jurisdictions on the Continent and in Latin America, the civil-law model reflects an antipathy to a strong court system. It is an historical French reaction to the abuses of the royal courts that they overthrew. The civil-law countries have not vested in their courts the power conferred in common-law courts. These countries do not accord to their judges the profound respect of our tradition. "Your honor" is an expression foreign to the civil-law jurisdictions.

The heart of the common-law tradition is adjudication of specific cases.[1] Case-by-case development allows experimentation because each rule is reevaluated in subsequent cases to determine if the rule did or does produce a fair result. If the rule operates unfairly, it can be modified. The modification does not occur at once, "for the attempt to do absolute justice in every single case would make the development and maintenance of general rules impossible; but if a rule continues to work injustice, it will eventually be reformulated."[2] The genius of the common law is that it proceeds empirically and gradually, testing the ground at every step, and refusing, or at any rate evincing an extreme reluctance, to embrace broad theoretical principles.

The common-law method has been described as one of "Byzantine beauty," a method of "reaching what instinctively seem[s] the right result in a series of cases, and only later (if at all) enunciating the principle that explains the patterns—a sort of connect-the-dots exercise."[3] Adherence to the rules of formal logic and legal reasoning are absolutes in this exercise. "Connecting the dots" is but a shorthand way of describing inductive reasoning. The "dots" represent holdings of individual cases, each announcing a specific consequence for a specific set of facts. They are "connected" by techniques of induction for the purpose of fashioning broader precepts. Those techniques, which we will study in depth, include the use of enumeration of specific instances of like situations, and

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1. For a discussion of the role of rationality in adjudication, see Lon Fuller, The Forms and Limits of Adjudication, 92 Harv. L. Rev. 353, 365-72 (1978). Fuller explains that adjudication is a device that gives formal and institutional expression to reasoned argument in human affairs. It assumes a burden of rationality not borne by other social processes. A decision that is the product of reasoned argument must be prepared to meet the test of reason.

2. Munroe Smith, Jurisprudence 21 (1909).

3. John Hart Ely, The Supreme Court, 1977 Term—Foreword: On Discovering Fundamental Values, 92 Harv. L. Rev. 5, 32 (1978) (citing Amsterdam, Perspectives of the Fourth Amendment, 58 Minn. L. Rev. 349, 351-52 (1974)); see also Holmes, Codes and the Arrangement of the Law, 5 Am. L. Rev. 1 (1870), reprinted in Early Writings of O.W. Holmes, Jr., 44 Harv. L. Rev. 725, 725 (1931).

the use of analogy, where resemblances and differences in the cases are meticulously compared.

Precepts that are broader than narrow rules are called legal principles. These principles—precepts covering more generalized factual scenarios—are assembled from publicly stated reasons justifying rules formulated in previously decided cases. Formulation of a principle is a gradual process, shaped from actual incidents in social, economic and political experience. It is a process in which countervailing rights are challenged, evaluated, synthesized and adjudicated on a case-by-case basis, in the context of an adversary proceeding before a fact-finder in a court of law. For every rule at common-law there is a publicly stated reason, the *ratio decidendi*. And for each principle that slowly emerges, there is a solid base of individual rules from particular cases and from the reasons given to support the conclusions in those cases. The formation of a principle in case law emerges in that process of legal reasoning known as inductive generalization.

Logical reasoning lies at the heart of the common-law tradition. For the common-law methodology to have been accepted in the first instance and later developed into the most respected legal system in the world, there had to be consent and endorsement by the people and institutions affected by judicial decisions. Without this acceptance, the tradition would not have endured. And without a logical explanation for its decisions, there would never have been the initial and continuing acceptance of our tradition. Without a reasoning process adhering to rules of logic to support conclusions, judicial decisions would have been nothing more than decrees, orders and judicial fiat. This would have been anathematic to the spirit of our democracy. With the reasoning process driving the engine, the common-law tradition was able to develop unity of law throughout a jurisdiction and yet a flexibility to incorporate developing legal precepts. But our tradition is more than unity and the capacity to assimilate. Also at work is gradualness. Holmes noted that the great growth of the common law came about incrementally.[4] The common law, like progress, "creeps from point to point, testing each step,"[5] and is, most characteristically, a system built by gradual accretion from the resolution of specific problems. The sources of decision are *rules* of law in the narrow sense—rules of specific cases, "precepts attaching a definite detailed legal consequence to a definite, detailed state of facts."[6] These precepts provide "fairly concrete guides for decision geared to narrow categories of behavior and prescribing narrow patterns of conduct."[7] The courts fashion *principles* from a number of rules of decision, in a process characterized by experimentation. At common law rules of case law are treated not as final truths, "but as working hypotheses, continually retested in those great laboratories of the law, the courts of justice."[8]

4. Oliver Wendell Holmes, The Path of the Law, 10 Harv. L. Rev. 457, 468 (1897).
5. Alfred North Whitehead, Adventures of Ideas 24 (1956).
6. Roscoe Pound, Hierarchy of Sources and Forms in Different Systems of Law, 7 Tul. L. Rev. 475, 482 (1933).
7. Graham Hughes, Rules, Policy, and Decision Making, 77 Yale L. J. 411, 419 (1968).

Common-law reasoning should not be characterized as merely inductive. It is more than a congeries of fact patterns converging to compel an induced conclusion either by analogy or inductive generalization. Rather, the reasoning process is both inductive and deductive. It resembles the ebb and flow of the tide. A principle is induced from a line of specific, reasoned decisions and, once identified, becomes the major premise from which a conclusion may be deduced in the cause at hand. The problem of common-law adjudication, in John Dewey's formulation, is that of finding "statements of general principle and of particular fact that are worthy to serve as premises."[9] By means of a value judgment, the common-law judge makes a choice from competing legal precepts or interprets or applies them, and then structures the premises that lead to conclusions in the case at hand. To do this, he uses "a logic relative to consequences rather than to antecedents."[10] Use of this logic in the common-law tradition facilitates the gradual development of legal principles.

Another important characteristic of the common-law tradition is that it is fashioned by lawyers and judges from actual events that have raised issues for decision. It emerges as a by-product of the major function of the courts—dispute settling, the adjustment of a specific conflict among the parties. Harlan Fiske Stone emphasized that a "[d]ecision [draws] its inspiration and its strength from the very facts which frame the issues for decision."[11] By contrast, legislative lawmaking is not a subordinate effort. To a legislator, the law is not a by-product; it is the primary endeavor. Statutes are enacted as general rules to control future conduct, not to settle a specific dispute from past experience.

The common-law decisional process starts with the finding of facts in a dispute by a fact-finder, be it a jury or a judge in a bench trial or an administrative agency. Once the facts are ascertained, the court compares them with fact patterns from previous cases and decides whether there is sufficient similarity to warrant applying the rule of an earlier case to the facts of the present one. The judicial process culminates in a narrow decision confined to the facts before the court. Any portion of a judicial opinion that concerns an issue beyond the precise facts of the case is *obiter dictum*.

Although the common law is judge-made, we are reminded by Harlan Fiske Stone that it is "the law of the practitioner rather than the philosopher."[12] The judge deciding the individual case is the centerpiece of the common-law tradition. As Stone emphasizes, the judge, "not the legislator or the scholar, creates the common law."[13]

8. Munroe Smith, Jurisprudence 21 (1909).
9. John Dewey, Logical Method and Law, 10 Cornell L. Q. 17 (1924).
10. }{\plain \i\f1 Id.}{\plain \f1
11. Harlan Fiske Stone, The Common Law in the United States, 50 Harv. L. Rev. 4, 6 (1936).
12. }{\plain \i\f1 Id.}{\plain \f1
13. }{\plain \i\f1 Id}{\plain \f1 .

The difference between the common-law tradition and the civil-law tradition of the European continent and Latin America must be repeated for emphasis. We must be aware of the distinctive methodology and hierarchical disciplines of the two systems. In the civil-law countries, the legislative Codes (and written constitutions) are the sole sources of decision; theoretically, in every case, recourse must be made to the language of the Code. And in every civil-law jurisdiction the relevant provision of the Code becomes the major premise in the categorical deductive syllogism. In common-law countries, however, the concept of *stare decisis* governs. *Stare decisis* commands that lower courts follow decisions of higher courts in the same judicial hierarchy. The tradition also demands that the most recent higher court decision be followed, whether the original precept stems from statutory or case law. In the United States, unity of judicial action within a given jurisdiction is ensured by the rule that a court may not deviate from precedents established by its hierarchical superior.

Cardozo's 1921 observations in The Nature of the Judicial Process[14] described the fundamental characteristics of the common-law tradition. They remain true today and provide an excellent summary of what we have been discussing. First, the tradition seeks and generally produces uniformity of law throughout the jurisdiction. Second, it produces decisions announcing a narrow rule of law covering a detailed and real fact situation. Third, principles develop gradually as the courts reconcile a series of narrow rules emanating from prior decisions. Fourth, the common-law tradition produces judge-made law for the practitioner, not for the philosopher or academician. Fifth, lower courts operating in the tradition are bound by decisions of hierarchically superior courts.

Common law is case law of the specific instance. It is law created by a process of both inductive and deductive reasoning. It is an exercise that combines legal philosophy, a constantly expanding body of case law, statutes comprising the jurisprudence of a given state or the federal government and a profound respect for logical form and critical analysis.

PRECEDENT

Precedent is the basic ingredient of the common-law tradition. It is a narrow rule that emerges from a specific fact situation. One court has defined a precedent as follows:

> The essence of the common-law doctrine of precedent or *stare decisis* is that the rule of the case creates a binding legal precept. The doctrine is so central to Anglo- American jurisprudence that it scarcely need be mentioned let alone discussed at length. A judicial precedent attaches a specific legal consequence to a detailed set of facts in an adjudged case or judicial decision,

14. Benjamin N. Cardozo, The Nature of the Judicial Process (1921).

> which is then considered as furnishing the rule for the determination of a subsequent case involving identical or similar material facts and arising in the same court or a lower court in the judicial hierarchy.[15]

A legal rule forms the basis of a precedent. Precedent, therefore, is a normative legal precept containing both specific facts and a specific result. In contrast, a principle emerges from a line of legal rules as a broad statement of reasons for those decisions. It is important to understand that a single court decision cannot give birth to an all- inclusive principle.

Formulation of a broad principle from a single case decision exemplifies the material fallacy of hasty generalization, as we will discuss later in detail. Dean Pound warned of the danger of hasty generalization:

> You cannot frame a principle with any assurance on the basis of a single case. It takes a long process of what Mr. Justice Miller used to call judicial inclusion and exclusion to justify you in being certain that you have hold of something so general, so universal, so capable of dealing with questions of that type that you can say here is an authoritative starting point for legal reasoning in all analogous cases.
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> A single decision as an analogy, as a starting point to develop a principle, is a very different thing from the decision on a particular state of facts which announces a rule. When the court has that same state of facts before it, unless there is some very controlling reason, it is expected to adhere to the former decision. But when it [goes] further and endeavors to formulate a principle, *stare decisis* does not mean that the first tentative gropings for the principle . . . by this process of judicial inclusion and exclusion, are of binding authority.[16]

Much difficulty results from a confusion between "principled decision-making" and decision-making that purports to prescribe law for circumstances far beyond the facts before the court. When a specific holding of a case is suddenly anointed with the chrism of "principle," it has a very real effect on the doctrine of *stare decisis*. There is always the danger that a commentator or a subsequent opinion writer, either in the same court or another, will elevate the decision's naked holding to the dignity of a legal "principle," and attribute to that single decision a precedential breadth never intended. Such an act may confuse the court's dispute-settling role with its responsibility for institutionalizing the law. The common-law tradition, as stated before, is preeminently a system built up by the gradual accretion of special instances. The accretion is not gradual if an improper dimension is given to a specific instance.

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15. Allegheny Gen. Hosp. v. NLRB, 608 F.2d 965, 969-70 (3d Cir. 1979).
16. Roscoe Pound, Survey of Conference Problems, 14 U. Cin. L. Rev. 324, 330-31 (1940).

Every holding of every decision does not deserve the black-letter law treatment that some judges or commentators wish to give it. If case law is to develop properly in the common-law tradition, the effect of specific instances, the rules of law in the narrow, Poundian sense, must be given proper weight—but only proper weight. Describing a rule of law as a principle or a doctrine interferes with that proper weight. It puts a jural butcher's thumb on the scale. Thus, the expression, "It is settled that," in a treatise, brief or court opinion, should indicate a line of decisions supporting the statement, not simply a single decision from a favorite jurist.

THE ROLE OF LOGIC

It is essential to understand the sophisticated nuances of logic in the law employed in this tradition. Rules of logic are only a means to the end in the law. They are implements. They are techniques to encourage, if not guarantee, acceptable supporting reasons for the final conclusion in a case, a decision that constitutes a legal rule. Putting aside constitutional law, in our tradition legal precepts spring from two sources: legislative statutes and court decisions. These precepts are currency of equal value, but there is an important distinction. The legislature may promulgate a statute without offering one word of explanation or reason for it, and the statute will be respected until it is repealed. The same is not true of case law. Case law stands or falls solely on the reasons articulated to justify it. There can be legislative fiat, but not judicial fiat. Reason justifies the legal rule emanating from a court decision. Where stops the reason, there stops the rule.

Certainly, Holmes was correct when he told us that "The life of law has not been logic; it has been experience."[17] Although formal logic is one of the important means to the ends of law, formal logic is not the end itself. Professor Harry W. Jones has observed: "[T]he durability of a legal principle, its reliability as a source of guidance for the future, is determined far more by the principle's social utility, or lack of it, than by its verbal elegance or formal consistence with other legal precepts."[18] But the statements of Holmes and Jones must not be taken out of context. They were stated as appeals that the law adjust to changing social conditions—that we should not be bound by rigid legal precepts that were once justified by good reasons but are no longer viable in a changing society. The appeals did not go unheeded. From what was once a rigid jurisprudence of conceptions fixed in a kind of jural cement has emerged a relatively new phenomenon in the American legal tradition.

As the last century came to a close, Roscoe Pound decried excessive rigidity in American decision-making processes. He described our system at the time as one of conceptual jurisprudence, a slavish adherence to *elegantia juris*, the symmetry of law, and suggested that it too closely resembled the rigid German

17. Oliver Wendell Holmes, The Common Law 1 (1881).
18. Harry W. Jones, An Invitation to Jurisprudence, 74 Colum. L. Rev. 1023, 1025 (1974).

Begriffsjurisprudenz, which Rudolph Von Jhering styled as a jurisprudence of concepts.[19] In his classic lecture, "The Causes of Popular Dissatisfaction with the Administration of Justice,"[20] Pound sounded a call for the end of mechanical jurisprudence: "The most important and most constant cause of dissatisfaction with all law at all times is to be found in the necessarily mechanical operation of legal rules."[21] He attacked blind adherence to precedents—and to the rules and principles derived therefrom—as "mechanical jurisprudence" and "slot machine justice." Pound advocated "pragmatism as a philosophy of law."[22] He vigorously stated: "The nadir of mechanical jurisprudence is reached when conceptions are used, not as premises from which to reason, but as ultimate solutions. So used, they cease to be conceptions and become empty words."[23]

Pound was trumpeting a theme more softly played by Oliver Wendell Holmes a decade earlier—that the social consequences of a court's decision are legitimate considerations in decision-making.[24] This is precisely what Professor Jones meant in 1974.[25]

If Roscoe Pound's 1908 warning against mechanical jurisprudence did not create a new American school of jurisprudence, at least it spawned widespread respectability for social utilitarianism. It added a new dimension to law's traditional objectives of consistency, certainty and predictability—namely, a concern for society's welfare. A few years after Pound's warning, Cardozo delivered his classic 1921 Storrs lectures at Yale. He stated his theme: "The final cause of law is the welfare of society. The rule that misses its aim cannot permanently justify its existence."[26] A half century later, in many legal disciplines, the once desired objective of *elegantia juris* in legal precepts, institutions and procedures had become subordinated to the objective of social utility.

In 1974, Professor Jones eloquently stated the new spirit of legal purpose: "A legal rule or a legal institution is a *good* rule or institution when—that is, to the extent that—it contributes to the establishment and preservation of a social environment in which the quality of human life can be spirited, improving and unimpaired."[27]

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19. Rudolf Von Jhering, Der Geist Des Rominischen Rechts (1877).
20. Address by Roscoe Pound to the American Bar Association, Aug. 29, 1906,}{\plain \i\f1 printed in}{\plain \f1 40 Am. L. Rev. 729 (1906),}{\plain \i\f1 reprinted in}{\plain \f1 8 Baylor L. Rev. 1 (1956).
21. }{\plain \i\f1 Id.}{\plain \f1 at 731; }{\plain \i\f1 see}{\plain \f1 8 Baylor L. Rev. at 8.
22. }{\plain \i\f1 See generally}{\plain \f1 Roscoe Pound, Mechanical Jurisprudence, 8 Colum. L. Rev. 605, 609 (1908).
23. }{\plain \i\f1 Id.}{\plain \f1 at 608, 620-21.
24. Oliver Wendell Holmes, The Common Law 468-474 (1881).
25. Harry W. Jones, An Invitation to Jurisprudence, 74 Colum. L. Rev. 1023, 1025 (1974).
26. Benjamin N. Cardozo, The Nature of the Judicial Process 66 (1921).
27. Harry W. Jones, An Invitation to Jurisprudence, 74 Colum. L. Rev. 1023, 1025 (1974).

Typical of judicial utterances that had disturbed Holmes, Pound and Cardozo was one by the Maryland Court of Appeals in 1895: "Obviously a principle, if sound, ought to be applied wherever it logically leads, without reference to ulterior results."[28] In contrast, in the same year he delivered the Storrs Lecture at Yale, Cardozo seized the opportunity to put his theory into practice by publicly rejecting blind conceptual jurisprudence in Hynes v. New York Central Railway Co.[29] A sixteen-year-old boy had been injured while using a crude springboard to dive into the Harlem River. The trial court had stated that if the youth had climbed on the springboard from the river before beginning his dive, the defendant landowner would have been held to the test of ordinary care, but because the boy had mounted the board from land owned by the defendant railroad company, the court held the defendant to the lower standard of care owed to a trespasser. Cardozo rejected this analysis, describing it as an "extension of a maxim or a definition with relentless disregard of consequences to 'a dryly logical extreme.' The approximate and relative become the definite and absolute."[30]

Cardozo's opinion in *Hynes* is a prototype, and his classic lecture, "The Nature of the Judicial Process," an apologia, for decision-making based on sociologically-oriented judicial concepts of public policy. The philosophical underpinnings of what Cardozo described as the sociological method of jurisprudence ran counter to the widely held notion that public policy should be formulated and promulgated only by the legislative branch of government. When judges utilize this organon, laymen and lawyers label them "activists," "liberals," "loose constructionists" and a host of other epithets, gentle and otherwise. The debate continues today and will probably continue well into the future.

But to recognize that formal logic is not an end in itself does not mean that logical form and logical reasoning have ever been subordinated in the judicial process. Certainly, in all but a few areas of static law, mechanical jurisprudence is more historical than operational. Yet the common-law tradition demands, indeed requires, respect for logical form in our reasoning. Without it we are denied justification for our court decisions. Adhering to logical form and avoiding fallacies, we repeat for emphasis, is only a means to the ends of justice, but logical form and avoiding fallacies are nonetheless critical tools of argument. They are the implements of persuasion. They form the imprimatur that gives legitimacy and respect to judicial decisions. They are the acid that washes away obfuscation and obscurity.

Professor Edward H. Levi has offered a thoughtful analysis of our subject. He has outlined a basic pattern of legal reasoning and suggested the following characteristics:

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28. Gluck v. Baltimore, 81 Md. 315, 325, 32 A. 515, 517 (1895).
29. 231 N.Y. 229, 131 N.E. 898 (1921).
30. }{\plain \i\f1 Id.}{\plain \f1 at 231, 131 N.E. at 900. }{\plain \i\f1 See}{\plain \f1 discussion of this case in Rupert Cross, Precedent in English Law 187-88 (1968).

- The basic pattern is reasoning by example.
- It is reasoning from case to case.
- The process involves the doctrine of precedent in which a proposition descriptive of the first case is made into a rule of law and applied to a similar situation.
- The process involves three steps:
  - Similarity is seen between cases.
  - A rule of law is announced in the first case.
  - This rule of law is then made applicable to the second case.[31]

These three steps describe only one phase of legal reasoning—the process of analogy, which we will study in depth later.

But there is more to logic in the law than analogy. Logic in the law involves the processes of both induction and deduction. To be sure, legal reasoning has some resemblance to the logic of mathematics, but in the common-law tradition, major premises are constantly undergoing change, or are susceptible to change, sometimes in minor detail and at other times as dramatic as a sea change. This is because judge-made law, in the sense of either creating precepts or interpreting statutes and regulations, is affected by the facts of particular cases, as well as by social and philosophical considerations. Professor Levi says that "this change in the rules is the indispensable dynamic quality of law. It occurs because the scope of a rule of law, and therefore its meaning, depends upon a determination of what facts will be considered similar to those present when the rule was first announced. The finding of similarity or difference is the key step in the legal process."[32]

Although the applicability of a rule of law to a given case may often depend on the degree of analogy that can be drawn, the "dynamic quality" of law is affected by more than the presence of novel facts in new cases. Often more than one rule suggests itself as precedent; more than one principle arguably applies. Here, value judgments play a major part in the development of the common law.

CRITICAL IMPORTANCE OF VALUE JUDGMENTS

To understand the role of value judgments, we must first identify the types of conflicts facing the courts. Cardozo taught that there are three:

- Where the rule of law is clear and its application to the facts is equally plain.
- Where the rule of law is clear and the sole question is its application to the facts at bar.

31. Edward H. Levi, An Introduction to Legal Reasoning, 15 U. Chi. L. Rev. 501, (1948).
32. }{\plain \i\f1 Id}{\plain \f1 . at 502.

- Where neither the rule is clear, nor, *a fortiori*, is its application clear.

Cardozo described the third category as the "serious business" of judges, "where a decision one way or another, will count for the future, will advance and retard, sometimes much, sometimes little, the development of the law."[33] If the controversy is in the third category, it is imperative to recognize with specificity where lies the conflict between the litigants. Here, too, three categories, or flash points of conflict, are at work in the judicial process:

- Choice of the controlling legal precept. This involves choosing among competing precepts or fashioning one inductively. The choice becomes the major premise of the deductive reasoning syllogism.
- Interpretation of the legal precept. Here there are no competing precepts. The parties agree on the controlling major premise. They differ only as to what it means. Statutory interpretation is the classic example.
- Application of the chosen legal precept, as interpreted, to the facts found or to be found by the fact-finder. The facts comprise the minor premise; here is where many sparks fly in the pleading or trial stages.

Early recognition of the specific conflict can immediately sharpen the issues. If it is a category-one case, the lawyer and the judge must also proceed into a consideration of categories two and three; in a category- two case, it is necessary to consider category three as well.

We emphasize this aspect of the judicial process here because formal rules of logic do not inform the choice for the judge at this stage. Judges constantly strive to seek an accommodation between competing sets of principles. There are times, however, when the scales seem evenly balanced, and it is difficult to determine exactly where the weight does lie. It is here when the judge makes a value judgment. At these times, the jural philosophy of the individual judge comes into play, consciously or otherwise, by means of a value judgment that places a greater weight on one competing principle than another. "Indeed, the most important attributes of a judge are his value system and his capacity for evaluative judgment," writes Professor Robert S. Summers. "Only through the mediating phenomena of reasons, especially substantive reasons, can a judge articulately bring his values to bear."[34]

Consider the observations of Professor Paul Freund:

> Much of law is designed to avoid the necessity for the judge to reach what Holmes called his "can't helps," his ultimate convictions or values. The force of precedent, the close applicability of statute law, the separation of powers, legal preemptions, statutes of limitations, rules of pleading and

33. Benjamin N. Cardozo, The Nature of the Judicial Process 168-170 (1921).
34. Robert S. Summers, Two Types of Substantive Reasons: The Core of a Theory of Common-Law Justification, 63 Cornell L. Rev. 707, 710 (1978).

> evidence, and above all the pragmatic assessments of fact that point to one result whichever ultimate values be assumed, all enable the judge in most cases to stop short of a resort to his personal standards. When these prove unavailing, as is more likely in the case of courts of last resort at the frontiers of the law, and most likely in a supreme constitutional court, the judge necessarily resorts to his own scheme of values. It may therefore be said that the most important thing about a judge is his philosophy; and if it be dangerous for him to have one, it is at all events less dangerous than the self-deception of having none.[35]

United States v. Standefer
610 F.2d 1072, 1105 (3d. Cir. 1979)
(Aldisert, J., dissenting)

The issue before us constitutes a classic example of how one's jural philosophy may predetermine a decision. When confronted by a close case in criminal law, necessitating the expression of a value judgment, I cast my lot in favor of the individual and not the society that seeks to regulate his conduct. To me this is an *a priori* proposition distilled not only from the Constitution but from the philosophical foundation of Anglo-American common law. "Administration of a technical and often semantical criminal justice system is the price we pay for the balance struck in the Constitution between the federal government and the individual defendant." . . . The balance is struck because, in Dean Rostow's words, "[t]he root idea of the Constitution is that man can be free because the state is not."

The expression of this value judgment is not confined to the fashioning of a rule for a particular case. It begins with the choice of a controlling legal precept, continues through the interpretation of that choice and persists finally in the application of the precept as interpreted to the facts at hand. Value judgments inhere throughout; it is not a mechanical process. Values do not form in a vacuum; their range depends always on factual limitations. Thus, judges' decisions are governed by their beliefs about facts as well as abstract rules; the act of deciding involves both the determination of material facts and the determination of what rules are to be applied to the facts. Jerome Frank observed, cynically perhaps, that a judge "unconsciously selects those facts which, in combination with the rules of law which he considers to be pertinent, will make 'logical' his decision."

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35. Paul Freund, Social Justice and the Law, }{\plain \i\f1 printed in}{\plain \f1 Social Justice 93, 110 (R. Brandt, Ed. 1962).

From counsel's trial memorandum or brief, or from experience and independent research, the judge recognizes that a weighing process or assigning of priorities precedes his or her embarkation on a journey of legal reasoning. The judge thus begins by choosing from among competing legal precepts or competing analogies. Often there is no choice. Often the judge must formulate a rule of law because no rule or principle appears visible for the choosing. In either event, this formulation must be fortified by persuasive reasoning.

Two guidelines aid both the choice or formulation and its ultimate acceptance: first, the judge should avoid arbitrary or aleatory choices; second, the judge has a duty of "reasoned elaboration in law-finding." Julius Stone says this is necessary so that the choice seems, to the entire legal profession, "if not right, then as right as possible. The *duty* of elaboration indicates that reasons cannot be *merely* ritualistic formulae or diversionary sleight of hand."[36]

Max Weber, the important European social theorist, suggested that the term "value judgment" refers "to practical evaluation of a phenomenon which is capable of being . . . worthy of either condemnation or approval." He distinguished between "logically determinable or empirically observable facts" and "the value judgments which are derived from practical standards, ethical standards or . . . views."[37] We draw the same distinction here. Judges each have their own preferences among a sea of legal standards, any one in principle respectable, and they make selections. Sometimes judges must resort to extralegal standards, making a choice from ethical, moral, social, political or economic concepts offered by diverse teachers or philosophers. Because a value judgment figures in the choice of competing precepts, interpretations and applications, how can a judge arrive at this decision without being arbitrary?

Roger J. Traynor suggested an answer. The great California judge reminded us that "one entrusted with decision, traditionally above base prejudices, must also rise above the vanity of stubborn preconceptions, sometimes euphemistically called the courage of one's convictions. He knows well enough that he must severely discount his own predilections, of however high grade he regards them, which is to say he must bring to his intellectual labors a cleansing doubt of his omniscience, indeed even of his perception."[38]

In the law, as well as in life itself, judging is the act of selecting and weighing facts and suggestions as they present themselves, as well as of deciding whether the alleged facts are really facts and whether an idea suggested is a sound idea or merely a fancy. A good judge, dealing with relative values, can estimate, appraise

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36. Julius Stone, Man and Machine in the Search for Justice, 16 Stan. L. Rev. 515, 530, 536-537 (1964).

37. Max Weber, Value Judgments in Social Science, }{\plain \i\f1 printed in}{\plain \f1 Weber Selections 69 (W. Runciman, Ed. 1987).

38. Roger J. Traynor, Reasoning in a Circle of Law, 56 Va. L. Rev. 739, 751 (1970).

and evaluate with discernment. No hard-and-fast rules can be given for this operation of selecting and rejecting, or fixing upon significant evidentiary facts. It all comes down to the good judgment, and the good sense, of the one judging. To be a good judge is to perceive the relative or significant values of the various features of a perplexing situation. It is to know what to eliminate as irrelevant and what to retain as relevant. In ordinary matters, we call this power knack, tact or cleverness. In the law, as in other important affairs, we call it insight or discernment.

What we should expect from our judges, at a minimum, is a willingness to consider alternative solutions to a problem. A "result- oriented" judge, in the sense condemned, is one who consistently resists considering arguments contrary to an initial impression or preexisting inclination. We cannot expect judicial minds to be untainted by their first impressions of a case. What we can expect is that the initial impression will be fluid enough to yield to later impressions. We can also expect that judges will be intellectually interested in an outcome based on sound reason. What we can demand is that judges employ logically sound techniques of intellectual inquiry and reflection when making value judgments, and then explain both their premises and their conclusions to us in clear language evidencing impeccable logical form.

A PAUSE TO RECAPITULATE: AN INTERMEZZO

Let us now attempt to synthesize what has gone before.

We have explained the distinction between rules and principles. We have described the role of value judgments and precedents. We have briefly introduced concepts of formal logic. These seemingly diverse subjects are critically interrelated. Now we can put that relationship into proper perspective. A rule of law (1) is viewed in combination with other rules by a process of inductive reasoning, (2) to form the major premise for a process of deductive reasoning in the next case, (3) leading to the conclusion of the deductive syllogism which forms the decision in the case, (4) which in turn takes the form of a new legal rule. Such is the common-law tradition of adjudication.

We have also warned that although reasoned exposition traditionally takes the form of a logical syllogism, there is much more to the common-law process than dry logical progression. We have recognized that judges do not always use formal logic to choose or formulate legal premises, interpret them and apply the rule as chosen to the facts found by the fact-finder. In this aspect of the judicial process, courts do not necessarily appeal to any rational or objective criteria; essentially they exercise a value judgment and should be recognized outright as doing so.

Moreover, because courts have the power to alter the content of rules, no immutability attaches to their major premises. The desirability of *elegantia juris*, with its concomitants of stability and reckonability, is often subordinate to the

desirability of rule revision in the light of claims, demands or expectations asserted in the public interest. Once a controlling rule or principle has been selected or modified, however, it must be applied in a manner that follows the canons of logic, with respect for formal correctness. The process requires fealty to logical order, to the formal consistency of concepts with one another. At this stage, our concern is with the relations between propositions rather than the content of the propositions themselves. Thus, the reasoning process dictates formal correctness, rather than material desirability. It is to the concept of formal correctness that we now turn.

NITA

Appendix C

"Your Audience: Jury Voir Dire"

"The Awkwardness of Voir Dire"

"Conducting Voir Dire"

"Peremptory and Cause Challenges: Making Choices"

David Ball
Theater Tips and Strategies for Jury Trials*, *Second Edition

CHAPTER 3

Your Audience: Jury Voir Dire

Brief History of Jury Selection. You will conduct better voir dires if you understand the historical forces that made voir dire necessary for obtaining a balanced cross-section of jurors. When the ancient Greeks invented juries 2,500 years ago, cross-sectional balance was assured by size—500 jurors per case. Statistics minimized the influence of jurors who could not be fair because of particular biases. With so many jurors, biases on either side of any issue were outweighed by the enormous number of unbiased jurors in the middle, and jury size assured that biases would be present on *both* sides of any issue and thus cancel each other out.

For example, in a self-defense case, 50 arms-control activists who disapproved of keeping spears in the home might have been prejudicially hostile to the spear-owning homeowner who had skewed an intruder. But their bias was outweighed by the 400 other jurors who were neutral on that issue.

Moreover, if a large jury contained strong proponents of spear control, they were almost certainly balanced by members of the NSA (National Spear Association) who strongly favored the right to bear spears. Extremes were offset and consequently neutralized by their corresponding opposite extremes.

Over the centuries as juries grew smaller and majority rule gave way to unanimous or near-unanimous requirements, the statistical dynamics changed. With fewer jurors, the chances decreased that any extreme would be balanced by its opposite counterpart on the jury. And whereas 50 jurors could barely influence a majority-seeking jury of 500, two or three jurors can hang or sway a unanimity-seeking jury of twelve or six. Even a single juror can do so.

Since we no longer seat hundreds of jurors on a single case, we use adversarial peremptory and cause challenges instead of relying on statistics to create a balanced jury. Each side removes those jurors who are potentially most hostile to its cause. Political pressures to decrease the number of peremptory challenges ignore the statistical fact that, without adversarial peremptories, the uncontrollable tyranny of random chance makes it nearly impossible to obtain a balanced jury. Thus, attorneys on both sides, judges concerned with fairness instead of saving time, and citizens who understand the value of balanced juries must fight efforts to reduce the number of peremptory strikes. Any

argument against adequate peremptory challenges must rest on some agenda other than fairness.

Difficulty of Jury Selection. When counsel is provided with an adequate number of peremptory challenges, squandering them is among the most common causes of losing cases. Jury de-selection must be done skillfully and with an understanding of jury psychology and group decision-making dynamics.

The difficulty of skillfully conducting voir dire lies not in how hard it is, but in how different it is from everything else you do. Voir dire requires skills, preparation, mindset, and processes that you use at no other time in a case. But if you are intelligent enough to have mastered enough law and procedure to engage in anything as monstrously complex as a trial, you can master the methods of voir dire.

ATTITUDES

A juror coming into court brings attitudes that do not change during trial. Some of these attitudes will affect how the juror perceives and eventually decides the case.

A juror's particular attitudes are the result of a combination of life experiences (they do not change during trial) and inherent personality traits (they never change). You cannot always discover inherent personality traits during voir dire, but you can easily find out about a juror's life experiences. Just ask.

Because life experiences shape attitudes that govern juror responses, you can examine life experiences to determine what attitudes they might have created. For example, if you ask, "Have you ever been blamed for something you did not do?" and learn that Mrs. Jones was fired from a job after being wrongfully accused, you can infer that she is probably suspicious of accusations and thus will probably demand a higher burden of proof than other jurors. Her *life experience* (being fired) gave rise to an *attitude* (suspicion of accusations) that controls how she responds to something in the case (the burden of proof). Because nothing during trial is going to alter her life experience of having been fired, her attitude about accusations and the burden of proof will not be changed by anything she hears in court.

Some judges may not allow you to ask how a juror feels about burden of proof, but few judges bar questions concerning jurors' case-relevant life experiences (though you may have to show the judge the relevance). So you can find out that Mrs. Jones was fired without proof of wrongdoing. Even if you cannot ask her how she feels about what happened, you can safely assume that it left scars.

If you had started by asking her directly about the burden of proof, her answer would have been less informative and less reliable than what you could infer from the fact that she was unjustly fired. ("Mrs. Jones, tell me what you

think about the burden of proof," or worse yet, "Mrs. Jones, will you be able to obey the judge when she instructs you about the burden of proof?")

Nothing in trial can outweigh this juror's life experience. Its scars will continue to control her attitudes about accusations and burdens of proof long after the trial ends—and probably for the rest of her life.[1] This does not mean you can be certain how any juror will vote in deliberations, but you can predict which way a juror will *probably lean* when it comes to case issues related to her particular attitudes.

Voir dire's most important goal is to gather information about life experiences because life experiences provide clues to the attitudes that can affect jurors' responses.

SOFTER BIASES

There are softer biases which, unlike attitudes, can change—some more easily than others. Soft biases present themselves in such forms as opinions, proclivities, or even temporary moods. Because they vary in strength, the possibility and difficulty of changing soft biases vary correspondingly.

You can discover soft biases by using the same techniques you use to discover immutable attitudes. For example, demographics (see next section) can provide clues for follow-up questioning. And because life experiences create soft biases and attitudes, identifying life experiences can reveal both.

Because a soft bias can be changed during trial, whereas an attitude will remain constant, you must differentiate between them. For example, if a juror seems uncomfortable discussing his perceptions of the crime rate among black males, you must determine whether he is a racist (which is an attitude) or simply nervous about recent local unrest in his neighborhood (which is a soft bias). Mistaking one for the other can result in a wasted peremptory or in a juror you cannot afford to have.[2]

Evaluating soft bias. Once you identify a harmful soft bias, determine whether your case contains the kinds of facts and arguments that can change it. If not, you must treat the soft bias as an immutable attitude. For example, you may discover that a juror has the soft bias of believing that policemen always tell the truth. You can change that bias if you have, say, a convincing way to impeach the police witness in question. If not, then for all practical purposes that soft bias is an attitude.

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1. To deal with immutable attitudes that are bad for your case, see Chapter 4, p. 69, "Bad Attitudes."
2. Like so much else in voir dire, the distinction between attitude and soft bias is best pursued via open-ended questioning as described below, p. 47, and self-confession, pp. 49-50.

Step one: Ferret out the soft biases and differentiate them from attitudes. *Step two*: Determine whether you have the ammunition to change the soft biases.

Caveat: It is risky to try to change soft biases during voir dire. You don't yet have the standing to disagree with jurors, and doing so can harden soft biases into a real problem for you later. Some jurors will resent you for trying to impose your point of view, and you may alienate yourself even from jurors who don't share that soft bias but are listening to the interchange.

The purpose of discovering soft biases in voir dire is not to argue against them right then but to decide whether you have the ammunition to change them later, once you have sufficient standing with the jurors to attempt to do so.

DEMOGRAPHICS AND PHYSICAL CHARACTERISTICS

Because demographic groupings (such as "middle-aged white mothers") and physical characteristics (such as "expensive-looking haircuts") are easier to spot than attitudes or even life experiences, it is tempting to rely on them (as in, "strike anyone with an expensive-looking haircut"). But demographic groupings and physical characteristics can rarely do more than alert you to possibilities. They show you where to probe for particular life experiences that can reveal relevant attitudes. This makes it worthwhile to examine each juror's demographic and physical characteristics, but only for clues to *possible* attitudes.[3]

For example, a plaintiff's personal injury attorney should avoid jurors who believe that bad things happen solely because God wills them. Such a belief is an attitude that will not likely change during trial. The demographics-driven solution is to strike every born-again Christian. But some born-again Christians also believe that when a person does something wrong, it is up to *other people* to right the wrong, even though God willed the wrong in the first place. Such folks can be excellent plaintiff's jurors. The moral: Demographics provide inadequate information to intelligently strike, but they can usefully guide your voir dire questioning.[4]

Here are some common demographic assumptions:

—Blacks are soft on criminals.

—Orientals value education.

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3. Relying too much on demographic groupings can also entangle you in Batson and its progeny—the U.S. Supreme Court and other decisions that forbid the use of peremptory challenges based on race or other cognizable groups.

4. Exceptions are obvious: Med mal plaintiffs don't want }{\plain \i\f1 any}{\plain \f1 doctor—no matter her expressed attitudes—on the jury, and criminal defendants should almost always avoid having policemen on the jury. Just be careful to maintain a high threshold for "obvious."

—Bankers and businessmen banish emotion from their decision-making.

—Artists are emotional and liberal.

—Social workers care about people.

Here are some common assumptions based on physical characteristics:

—People in ties are bad plaintiff jurors.

—Obese folks are people-friendly.

—Jurors who lean forward and smile when you question them must like you.

—People who lean back while you question them and fold their arms over their chests don't like you.

All such assumptions can lead you astray, so if you have a black prospective juror, question her about her attitudes toward crime. Maybe she believes that most victims of crime are black, and thus she is harder on black criminals than a white juror might be. If you have Oriental jurors, ask about their educational achievements and their family's. Question thoroughly enough to determine whether the businessman incorporates emotion into his decision-making process and whether the artist fits the stereotype (emotional and liberal) or stands outside it.[5] Find out if the social worker still respects and likes the people she was trained to help. The man may be wearing a tie because he is going to his office later if he does not get stuck on a jury. The woman leaning forward and smiling while you question her may hate you so much that she feels obliged to cover her hostility.

Often, your demographics-based or visual-based expectations will be borne out, but not always. Moral: Demographics and physical characteristics can guide follow-up questioning, but they are a dangerous shortcut.

As a guide, *occupation* is among the most revealing of demographic groupings because it so heavily determines life experiences, including day-to-day lifestyles. But even with so revealing a demographic as occupation, don't jump to conclusions. For example, it is tempting to make the demographics-based assumption that teachers value education. But some don't. A weary, embittered veteran of the classroom who no longer values education can carry enormous weight on that topic during deliberations. She can thus profoundly influence other jurors' reactions to, say, an injured plaintiff's proposal for special education or to a defendant's mitigation argument (lack of education) in a capital case.

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5. Question }{\plain \i\f1 every}{\plain \f1 juror on such demographics-based topics. If you question, say, only the black juror about her attitudes on crime, you will seem to be offensively operating out of a stereotypical framework.

IMPROVING VOIR DIRE CONDITIONS

Before looking at how to shape questions to uncover attitudes and ways of seeing, first consider the limitations under which you conduct voir dire. Problem areas may include the allowable topics and form of questions, the time allotted to voir dire, who asks the questions, and the order of strikes. These and several auxiliary matters vary from jurisdiction to jurisdiction. Improvement is often possible.

Many judges are surprisingly open to intelligently supported motions for better conditions. For example, if your jurisdiction does not usually allow attorney questioning, or requires you to exercise peremptories before having questioned the whole panel (a system that belongs in a casino, not court), or severely limits the form or topics of questions, it is worth moving for improvements.

If your judge customarily introduces voir dire by announcing, "This is a search for fair jurors," you can probably get her also (or instead) to encourage jurors to be forthcoming and tell the truth.[6]

If some of your questions might be uncomfortable for jurors to answer in open-court voir dire, you may be allowed sequestered questioning of individual jurors, or supplementary pre-voir dire written questionnaires.[7] Judges are more likely to grant either if you:

—Show case-specific need for the information and explain how a questionnaire or sequestered voir dire questioning is necessary to reveal that information.

—Specify the precise questions to be asked.

—Indicate other courts in which it has been done.

—Show how it will save time.

Some jurisdictions do not routinely provide a venire list in advance, even when there is no issue of juror security. However, many judges, if asked, would be willing to override such an inane withholding of information, as long as you can show that there is no real or perceived potential threat to juror safety.

Improvements are often granted even in highly limiting jurisdictions. For example, many judges who typically do all voir dire questioning themselves don't really care who does it. They have merely been following custom, not statute or even local rules. They may even prefer that you do the questioning. But you have to make the request. The worst a judge can say is no, and there is every chance she will say yes.

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6. To understand the harm done when the judge says she is seeking fair jurors, see pp. 46-47 below, "Fairness questions."
7. See below, p. 52, "Use a pre-voir dire questionnaire."

Judges are more likely to grant improvements when counsel argues in terms of the court's own concerns and priorities:

—Saving time.

—Helping both sides intelligently exercise peremptories.

—Understanding your proposal in relationship to existing law, rules, and custom.

—Being fairer to both sides.

—Removing the least fair jurors.

—Producing a fairer jury.

—Easy logistics (for example, propose a simple system for questionnaires to be xeroxed and distributed to all parties and the court).

—Indication of other courts that have used your proposed improvements.

Few judges will resent intelligently supported requests for voir dire improvements. Even if your requests are all turned down, sane judges will not get angry or vengefully rule against you later on other matters. In fact, the passive listening that makes up most of a judge's day can be so boring that you help it go faster by giving the judge something challenging to think about. So don't hesitate to make motions for improvements. The judge knows that you know your case better than she does, so she relies on you to make the motions you need and to support them well enough for her to gauge their necessity and rationale.

When to ask: Don't wait until the day of trial. Begin the process during pretrial conferences. You are asking the judge to alter customary procedure. While many judges will seriously consider an intelligent request to do so, it is difficult for them to grant a last-minute request. In limine is too late.

Written briefs bolster your request by providing something palpable to help the judge consider your request. In these matters, an oral motion is not worth the paper on which it is written.

For further guidance: For detailed guidance in identifying voir dire improvements and petitioning for them, several readily available books are helpful. The clearest and most useful is Chapter 2 of the National Jury Project's *Jurywork* (published by Clark Boardman Callaghan). Also see Chapters 3 and 5 of Starr & McCormick's *Jury Selection* (Little, Brown), and Chapter 7 of Bennett & Hirschhorn's *Bennett's Guide to Jury Selection and Trial Dynamics* (West Publishing). These books also provide comprehensive guidance for planning, wording, presenting, and evaluating the responses to the kind of voir dire questioning suggested in this chapter.

Statutes and Case Law. Have all statutes and case law applicable to voir dire outlined and at your fingertips. This will make it more possible to ask the questions you want, and to prevail in your objections to your opponent's questions.

Judges have broad discretion in voir dire and are more likely to respond your way when you can quickly cite supporting statutes or precedents.

DE-SELECTION (How to tell who to get rid of)[8]

You do not select jurors. You only de-select the worst and try to avoid revealing the best.

In some jurisdictions, you are in the preposterous position of having to strike before you know anything about the replacements.[9] And in every jurisdiction, you must rely mainly on what prospective jurors *choose* to tell you. Even under the best conditions, the uncertainties of voir dire are a messy business. Messy jobs are best accomplished with methodical tools. You can't stir goulash with a sponge rubber spoon.

Preparatory lists. Five methodical preparation steps will get you started.

(1) List the *key evidence and pivotal issues* of your case. (For example: a theory of negligence that centers on the installation of a shoddy front door lock.)

(2) List *attitudes and ways of seeing* that might affect how jurors respond to your key evidence and pivotal issues. (Continuing the example: jurors' attitudes about personal safety may affect how they respond to the issue of a shoddy lock.)

(3) List *life experiences* that can give rise to and help you spot the attitudes listed in 2. (A victim of violence, such as someone who was mugged, probably has strong attitudes about personal safety.)

(4) List *demographic and other factors* that can help you spot jurors who might have had the kinds of life experiences in 3 or who might have the attitudes in 2. (*Elderly people living alone* are likely to worry about issues of personal safety.)[10]

(5) List *questions* that will uncover the attitudes listed in 2. "How many of you wear seat belts all the time?" immediately followed by, "Mr. Jones, why do—or why don't—you?" can reveal attitudes regarding personal safety.[11]

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8. Suggestions in this and following sections assume a voir dire system in which the attorneys do the questioning. For judge-conducted voir dire, many of the same principles can be adapted.
9. See previous section on improving voir dire conditions.
10. Other examples: Parents of school-age children are more likely than others to expect schools to provide absolutely safe facilities. Relatives of physicians are more likely than others to believe there is a litigation crisis.
11. Another example: If list 2 includes attitudes toward authority, you might ask, "Mr. Smith, when do you think it's okay to disobey your boss?"

These five lists will help you ask the right questions of the right people and effectively evaluate the responses. You will be able to distinguish between jurors who are likely to take seriously the installation of a shoddy lock and those who will probably think it is not so serious. The lists will keep you from frittering away time and juror patience with useless questions such as, "Is there anyone here who cannot be fair?" Such a question cannot come from your lists.

Fairness questions. Generalized "fairness" questions are pointless and often harmful.

Q Can you be fair even though my client is African American?

A Yes.

All you have learned is that the respondent is more comfortable answering "yes" than "no." The answer does not help you tell a Martin Luther King from a Mark Furman.[12] The only possible answers are "yes," "maybe," or "no." You almost always get "yes" followed by silence, and learn nothing. Juror after juror answers "yes!" An eavesdropping Martian would conclude that racism has vanished from America.

Fairness questions yield unreliable answers because people rarely confess to their bigotry or anything else that might be socially frowned upon in that particular situation, especially in the intimidating environs of the courtroom. Moreover, people are often blind to their own biases.[13]

When you tell prospective jurors that you are seeking *fair* jurors, it is easy for them to think you are lying. Although you are indeed seeking fair jurors, it might appear otherwise when jurors who don't yet understand the case see whom you select and whom you drop.

Moreover, when you (or the judge) say that the goal is to find fair jurors, some jurors will shade their answers to meet with approval. Other jurors will shade their answers to avoid having to serve.

Instead of saying "fair," some attorneys explain that they are seeking jurors who can best judge the case strictly according to the evidence and the law. Others prefer the option of simply not explaining what they are seeking.

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12. Furman was the racist cop in the O.J. Simpson criminal case.

13. A further problem with fairness questions: When counsel or the court accepts a juror's implausible answer, every juror immediately learns that honesty is neither expected nor valued here—because jurors are knowingly allowed to give whatever impressions they wish to give, rather than the truth. Judges particularly should be aware of this because it undermines the entire process of voir dire and does not help much with the rest of trial either. It even erodes public confidence in the justice system.

\~\~\~\~\~\~When you accept obviously false answers to fairness questions, jurors can conclude that you are gullible, and, therefore, untrustworthy. "After all," they reason, "if you accept deceptive answers from prospective jurors, who knows what deception you might have accepted from your client or witnesses?"

Whichever your choice, don't say you are looking for fair jurors if your selections are liable to make jurors think that you did not mean what you said.

Exception: The National Jury Project's Susan Macpherson wisely points out one use for saying that you need fair jurors. Sometimes a juror's bias is so strong and you so short of peremptory challenges that all you can do is ask him to be aware of his bias and to try to keep it out of his decision-making. This might motivate the juror to at least try to be fair. For example, "Mr. White, though you feel like young black males are committing all the crimes these days, can I count on you not to convict Joe Defendant for what others have done, but instead to do your best to be fair to Joe by considering only the evidence in this case?" If you have developed some rapport with that juror during voir dire and place that question squarely in his lap, he may feel a responsibility to not only answer honestly but (if he answers "yes") to later try to abide by his answer. Of course, if he answers "no," challenge him for cause.

You can go further and ask jurors if they are willing to monitor each other in deliberations so that a particular bias or topic (such as worry over the litigation crisis or sympathy for the victim) does not get factored into the decision-making process. For example, "Mrs. White, during deliberations, if you hear others talking about how much crime is committed these days by young black men, will you be willing to remind everyone that that opinion has no fair place in your decision-making? Will you be able do that?" (But be cautious when eliciting promises from jurors during voir dire. See p. 64 below, "Getting Assurances from Jurors.")

Indirect questions. Because direct fairness questions do not work, you must instead ask questions that address the issue indirectly. To uncover potential racist attitudes, ask, for example, about the juror's children. What grade are they in? Public or private school? What do you like about the school? Any problems in that school? Any recent changes? Have you ever considered changing schools? What would you look for in a new school?

Or ask about the juror's neighborhood. Strengths? Problems? Changes over recent years?

The goal of such questioning is to gain sufficient information so that it is you and not the juror who decides whether the juror can be fair to your client.

Open-ended vs. close-ended questions. The above questions are not only indirect but most are open-ended. Questions are open-ended when they suggest no particular answer and cannot be answered in only a word or phrase. Because "What's your job?" is close-ended, it shuts people up after a word or two. "Tell us about your workday" is open-ended and gets people talking.

Close-ended questions have some limited use in voir dire: They can nail down a challenge for cause, launch a new topic, or introduce the weaknesses of your case.

To prepare the way for a challenge for cause: "*So it's hard for you to trust doctors?*" "Yes." "*You've mistrusted them since your operation?*" "Yes." "*Eleven years?*" "Yes." "*Do you think you'll start trusting them again in the next few days?*" "Not likely." Etc.

To launch a new topic: "*Do you believe policemen always tell the truth?*" "Sure." "*Do you think there are ever pressures on policemen to shade the truth one way or the other?*" "I guess." Now start open-ended questioning: "*What do you think some of those pressures might be?*" This sets the stage for this juror and others to give opinions.

To use close-ended questions for introducing case weaknesses in voir dire, see page 62 below, "Introducing Weaknesses During Voir Dire."

For most other purposes, a close-ended question such as "Has the publicity about this case caused you to form an opinion?" is inferior to an open-ended question like, "What opinions have you formed about this case?" "Do you believe a person is innocent until proven guilty?" is inferior to "When someone is accused of a crime, why is it so easy to believe the person is guilty?"

Even when looking for biographical information, use open-ended questions to get jurors talking. No matter what jurors say, the more they talk, the more you learn.

Q What kind of work do you do?

A Dogcatcher.

@BODYCPYNOIND = Not much there. Ask it a different way:

Q Tell us what your work day's like.

A I'm a dogcatcher.

Q I've never known a dogcatcher. What's involved?

A Well, you know, I drive a truck around the city all day and pick up people's stray or dangerous dogs.

That can lead to:

Q I'll bet you run into lots of problems with a job like that.

A Yeah, sometimes.

Q Like what, for example?

A Well, I get bit all the time, one time a lady even bit me because I got her poodle.

If you get twenty seconds of conversation going, you will learn something, even if no relevant attitudes or characteristics are mentioned. How people sound is revealing no matter what they are saying.

Avoid questions that start with the following:

—"Do you agree that . . . ?"

—"Does anyone here . . . ?"

—"Do you . . . ?"

—"Is . . . ?"

Never say, "I take it by your silence that [for example] none of you has ever been in a dangerous situation." Instead, when faced with that awful silence after you ask a group question, ask, "Mr. Jones, what about you, what experiences have you had that put you in dangerous situations?"

Ask questions that start with:

—"What . . . ?"

—"Why . . . ?"

—"How . . . ?"

—"Tell us about . . ."

—"Please explain . . ."

If you have trouble asking open-ended questions, practice by sitting down with a friend and trying to ask a dozen open-ended questions in a row. Practice twice a week until you can do it easily and automatically every time.

The most useless voir dires are those in which counsel asks close-ended questions to which everyone knows the answers before any of the jurors open their mouths. "Is there anyone here who does not agree that Sally Smith deserves a fair trial? . . . I take it by your silence that you all agree." All you can ever take by a jury's silence is that they don't want to talk to you.

The best voir dires are those in which you use open-ended questions to such an extent that you do only ten percent of the talking. The jurors do the rest.[14]

OTHER VOIR DIRE STRATEGIES. In addition to well planned open-ended questioning, consider the following strategies when appropriate:

Getting jurors to talk: counsel's confession. The attitudes and softer biases you need to discover are often the very ones jurors are most reluctant to reveal. As Raleigh attorney Joseph Blount Chesire V points out, one way to overcome that reluctance is to confess to having some of the same kind of bias yourself.

For example, you might say, "Mrs. Smith, sometimes I find myself thinking that when someone gets hurt these days, maybe they complain too much, and maybe they just ought to learn to play the hand they've been dealt instead of trying to find someone to blame it on. Do you ever feel that way? Tell me about it." If she answers "yes" to such a question, ask open-ended follow-ups such as, "Why?" If she answers "no," ask her if she knows people who think that way, and why.[15]

Or, "We all like to think we judge everybody the same, but I remember when I first went to a doctor who had a foreign accent. It crossed my mind to

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14. See Application F, p. 205, "Conducting Voir Dire.}{\plain \i\f1 "}{\plain \f1

wonder if she was any good. Mr. Johnson, did that ever happen to you? That you maybe realized you had some feelings like that about foreigners or some other group of people?"

This kind of questioning allows jurors to reveal their biases because you have just done so yourself. In other words, you are asking how a juror might be like you, not different from you. This is a powerful information-gathering tool that opens the way for more information in voir dire, enhances your credibility, and lays the groundwork for better rapport.

Caveat: Be sure that your self-confession cannot anger anyone on the venire panel. For example, some jurors will understandably take offense if you say, "Going to a black doctor makes me nervous," or "I admit I've made some assumptions about Jews and money." To avoid this, ask yourself how a member of the group might feel hearing you confess to such feelings. If you don't like the answer, try it another way.

Voir dire deliberations. Raleigh attorney John R. Edwards describes a superb voir dire technique that gets jurors to deliberate with each other in voir dire. This is the most productive information-gathering method you can employ. To use it, wait for a juror's statement that seems open to debate, such as, "People who keep guns in the home are asking for trouble and deserve whatever they get." Then simply ask another juror, "Mr. Jones, what's your opinion about that?" And keep asking until you find a juror who disagrees with Mr. Jones.

This method has many benefits. First, disagreement among jurors reveals a range of juror attitudes. Second, you will see how strongly the jurors hold their particular views, as well as their general malleability and willingness to compromise. Third, as these jurors interact with each other you will see how they will probably interact with each other in deliberations. (Be on the lookout for jurors who are likely to despise each other. If they are both on the jury, they decrease the chance of a unanimous verdict.) Fourth, you will see who the leaders are (see p. 55 below, "Identifying leaders").

To get jurors to debate with each other, use open-ended follow-up questions. When a juror expresses an opinion (such as, "I don't like using money to compensate for pain and suffering"), don't merely ask another juror, "Do you agree?" Ask her what she thinks. Don't accept, "I think the same thing." Fol-

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15. If the judge does not want you to ask about the opinions of people the juror knows, argue that such opinions can unfairly influence how she might want the case to come out. When she deliberates, she may fear that her friends will be angry at her for having been on a jury that decided in a way they disapprove of.

\~\~\~\~For example, a juror may have no bias of her own concerning lawsuits against physicians, but she might worry that her physician acquaintances and maybe even her own doctor will harbor ill feelings toward her if she has helped decide a multi-million-dollar medical-negligence verdict. That juror knows she will have to associate with her physician acquaintances long after this trial ends.

low that up with, "Could you tell me exactly what you agreed with?" or, "I'd like to hear your opinion in your own words, if that's okay with you."

When a juror disagrees with another juror, leapfrog your follow-up questions to involve even more jurors. For example, "Mrs. Johnson, do you agree with Mr. Jones and Mr. Green, or do you agree with Mrs. Brown and Mr. Black?" followed by "Why is that?" You should be doing almost none of the talking. *And by no means should you get pulled into the debate*.

Because the jurors do all the talking, this is the easiest kind of voir dire to conduct. And because they talk and even argue with each other, it is also the most useful.

Once you get jurors debating in voir dire, ask how their life experiences relate to the subject of the debate. For example, "Mr. Jones, you seem sure that people should not keep guns in the home. Have you been in homes where there were guns?" and "Who do you know who was hurt by a hand gun?" Eliciting the jurors' own life experiences helps you gauge how strongly each juror believes what he is saying. (See p. 39, "Attitudes.")

Co-counsel should participate in voir dire so that you both build rapport with jurors. Moreover, sharing voir dire makes jurors see you as equals—and, thus, later they will pay as much attention to the evidence co-counsel presents as to the evidence you present.

To share voir dire with co-counsel, you may need to request permission. Offer case-specific reasons why sharing will result in a more efficient voir dire, more complete information from jurors, and a saving of court time. For example, point out that co-counsel has focused heavily on a particular aspect of the case, so that she can question the jurors more efficiently in that regard and thus more quickly frame follow-up questions that cannot be planned in advance.[16]

Among the many fine suggestions made by Robert B. Hirschhorn (president of one of the nation's premier trial consulting firms, Cathy E. Bennett & Associates, Inc., in Galveston), one of the most intriguing is to *consider having your client ask one or two questions in jury voir dire*. A brief interchange between your client and each prospective juror helps reveal which jurors are uncomfortable with your client and where there is rapport. In fact, the interchange can build rapport.

Not every client can be put in such a position, and no client should be put in this position without careful preparation. The pressure of participating in voir dire is more than some clients can handle. Not everyone has the necessary communication abilities and personality traits. The enormous nervous tension of participating in voir dire can make your client seem like anything but a person who is in the right.

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16. See also Application A, p. 187, "Working with Co-Counsel."

For clients with the appropriate personality and skills to come across reasonably well in the unnerving process of participating in voir dire, provide ample role-playing sessions with strangers acting as jurors. This will give you an indication of how your client will do in a real voir dire, and the advance practice will produce better results in court.

Look at your prospective jurors—and don't wait until they are in the courtroom. Send assistants out to watch jurors arriving at the courthouse (to see what kinds of cars they drive), coming up the elevator, and going into the waiting room. Note clothing, jewelry, shoes, reading materials, demeanor, etc. How do the jurors socialize with each other? Who are the talkers and leaders? (See below, p. 55, "Identifying leaders.") What are the jurors' apparent feelings about having to be here?

This advance look provides information to help you decide what questions to ask and which jurors will be more influential than others. If local rules force you to exercise strikes before questioning the entire panel (see p. 43 above, "Improving Voir Dire Conditions"), this advance look helps you gauge your chances for improvement when considering who to eliminate.

Collect jury clerk information. The clerk's venire list sometimes includes such useful information as address, race, occupation, marital status, age, education level, etc. Such things provide attitude clues that help you decide which questions to ask of which jurors. Jury lists also give you an advance overview of the jury panel, which can somewhat mitigate the gamble when you are forced to exercise strikes before having questioned everyone.

Other government information. Once you have the jury clerk's list, you can seek further information from tax records (such as real estate valuation), election records (such as party affiliation and in which elections each juror voted), and civil actions (to learn which jurors have been involved in lawsuits). Prosecutors can obtain criminal histories, and defense should seek to see those materials.

Use a pre-voir dire supplemental questionnaire. The court often allows questionnaires because they save courtroom time and can spare jurors the discomfort of answering sensitive questions (such as medical history inquiries or questions about alcohol use) in open court. Questionnaires also provide demographic and other data on which to base oral voir dire questions. Even a one-page questionnaire can cover extensive personal and occupational information, names of witnesses and parties jurors might know, and juror experiences that might relate to the case ("Have you ever been a patient at the Central Union Hospital?").

Jury studies. Anything that helps you understand juries is helpful, both for voir dire and for the remainder of trial. There are published jury studies about language perception and usage, community values and attitudes, juror psychology, how jurors listen and make decisions, and so forth.

But beware! Juries operate in secret, so most studies are based either upon what jurors choose to say afterward or upon the results of surrogate juries. The former is unreliable because there are many reasons jurors may not be accurate or forthcoming. And though surrogate juries can provide a wealth of useful information, in inept hands the results can be misleading.

For example, one study was based on surrogate juries composed of faculty and students at one of America's most expensive, prestigious, upscale, racially unmixed universities. The only time you could rely on the results of such a study would be if you had an all-white jury of highly educated, upper-middle-class jurors watching a case they believe is pretend, who don't have to put up with the inconvenience of time or circumstance that a real trial entails, who have none of the sense of moral or civic duty that a real trial arouses, and who are all either twenty years old or the professors of those twenty-year-olds. Because the study's "juries" so little resembled real juries, the results must not be taken seriously.

Before accepting the conclusions of any jury study, examine its methods. The internal mysteries of the jury are not easily revealed.

Be especially careful to question secondhand reports. When someone tells you what a study says, look for yourself. It may not say what you were told it says. For example, you have probably been told about a study which showed that 80 percent of jurors make up their minds by the end of opening. The study referred to is *The American Jury* (Harry Kalven, Jr., and Hans Zeisel). But that study says no such thing. It does not even discuss the topic. Dr. Zeisel himself vigorously repudiated the grapevine misreporting of his work ("A Jury Hoax: The Superpower of the Opening Statement," *Litigation*, Summer, 1988). But customarily reliable and well-meaning teachers and lawyers continue to misreport it even though no research indicates that jurors decide by the end of opening, and even though the Kalven/Zeisel study does not say they do.

Gender and Race. Whichever your sex, try to use an assistant or colleague in voir dire (and if possible throughout trial) who is the opposite sex. Men and women judge people differently. In voir dire, you want every perspective you can get.

It is equally important to apply the same considerations to race when the venire includes different races.

Fighting for rapport. If you have trouble establishing rapport in voir dire with a particular juror, don't stop questioning that juror. Keep trying to break the ice. If you cannot get through, you want to know it now, not halfway through testimony or after the verdict. Bad rapport during voir dire's two-way interchange rarely improves during the one-way communication of the rest of the trial.

In voir dire, compare your rapport with each juror to your opponent's rapport with the same jurors.[18] A prospective juror who is closed off to you and open to your opponent may stay that way throughout trial. A strike may be appropriate.

On the other hand, if a particular juror is obviously good for your side, your opponent will probably get rid of her. Before that happens, you can still use her to educate other jurors and help glean information about them. Once you know you are going to lose her, elicit her points of view, such as "Big industries don't care about public safety." While she is answering, you or a colleague should watch other prospective jurors for clues as to who agrees and who disagrees. Then ask those jurors how they feel about what she said. (See p. 50, "Voir dire deliberations.")

Influence of leaders. In deliberations, a single leader can carry the decision-making weight of several—sometimes of many—followers. Leaders often control the verdict. They are hard to persuade (either by you in trial or by other jurors in deliberations), but they are adept at persuading others. They have more power in deliberations than you ever have in trial, because, unlike you, they are present in deliberations, perceived by other jurors as having no stake in the outcome, able to participate in individual dialogue with every juror, and can enlist other jurors to help persuade those who disagree.

Even when most of the jurors start deliberations on your side, they often defer to leaders' opinions. You can start nine to three in your favor and lose; it happens more often than you think. Here is one way that it happens: The leader lets everyone have their say and then adds her authoritative weight until one or two of your jurors switch sides. A third, seeing others changing, is likely to follow. Now it is a balanced fight in terms of numbers, but because the leader is against you, it is not balanced in terms of weight. One by one, the followers slide over to the leader and her accumulated supporters. Each shift increases the pressure on the remaining holdouts. What should have been an easy decision turns into a tight race which you may well lose.

That is why keeping a harmful leader on the jury is lethal.

One common but harmful voir dire strategy is to strike jurors who have terrible qualities but are weak in terms of group impact—and to simultaneously keep a leader who has only moderately bad qualities, in hopes that your "better" jurors will adequately contend with those moderately bad qualities. But leaders are not easily overridden. So don't waste precious peremptories on bad jurors who will have minimal group impact, unless their negative qualities fall into the "absolute" category (as a plaintiff must consider a doctor's son in a med mal case). The evaluation of every juror requires a balanced consideration

18. If you are forced to decide on jurors before your opponent questions them, petition for both sides to question before either side strikes. See p. 43, "Improving Voir Dire Conditions."

of leadership strength and good-or-bad qualities. You must weigh each within the context of the other.

Another common error is to retain a harmful leader in the hope that your favorable leader will balance her. But leaders do not cancel each other out. At best, a battle of leaders is utterly unpredictable. Moreover, even if you don't lose your leader to an opposition strike, you may lose him to illness during trial. That leaves you with a leader against you and none for you. You will lose.

When it comes to hostile leaders, take no chances. Seating an opposition leader on the jury is not as bad as seating your opponent's mother. But it is close.

Identifying leaders. There are many ways to identify leaders. One of the easiest is by occupation. A leader in the workplace is often a leader on the jury. Managers, teachers, supervisors, administrators, bosses, and organizers are among those likely to be jury leaders. As you learn each juror's occupation, consider what human relationships are involved. Is leadership part of the job? How many people are under him? How often is he in decision-making situations? What is his level of responsibility and decision making? How much coordinating does he do? How much is he involved in leading groups that are charged with making decisions? How much do other people listen to him?

Even if leadership is not part of the job, familiarity with a work-connected activity can unexpectedly make a juror a "single-topic leader," if that work-connected activity is related to the case. For example, a taxi driver could be regarded as a reliable authority on matters such as dangerous nighttime neighborhoods or hospital emergency rooms. An office clerk might be regarded as authoritative when it comes to business machines. Such authority elevates an otherwise non-leader to a person with a leader's weight and status on that particular topic. (Particular life experiences can also make a juror a single-topic leader; see below.)

Articulate people, especially those who talk easily and a lot, are usually leaders because deliberations are mainly a speaking event. To identify articulate and expressive people, ask open-ended voir dire questions. Leaders are those who answer most fully and confidently.

People with charisma are often jury leaders because other jurors voluntarily gravitate to their way of thinking.

People who are popular are often jury leaders even when they do not try to be. They are popular because they are well liked, so other jurors try to please them.

Celebrities, including local celebrities, tend to be leaders.

People who easily offer opinions tend to be jury leaders, *if they listen as readily as they speak*. Jurors allow themselves to be led by democratic coordinators who are good listeners. Jurors want to follow a respectful person who has

the self-confidence not to bully and who will prevent others from bullying. Such a democratic leader holds great power in deliberations because other jurors allow themselves to be coordinated by her, and many will eventually gravitate toward her opinions.

Problem solvers become jury leaders, as do take-charge people, as long as they seem to be able to do so without stifling open discussion. Organizers are leaders but not necessarily opinion leaders. Because they are interested primarily in leading the progress of a group's activity (such as making a difficult decision), they are likely to be consensus makers and as such are often responsible for compromise verdicts.

If you need unanimity, be wary of jurors who take stands in voir dire that seem intentionally different from those expressed by other jurors. This can indicate a common personality type that seeks stature by trying to lead people away from a popular side to his or her own side.

As with occupation, life experiences can create single-topic leaders. With or without other leadership qualities, some jurors are disproportionately influential on topics relating to their own life experiences. This is true even if they do not seek to influence others; it is a matter of how other jurors regard them. A juror who has had extensive or recent surgery can become influential on the medical issues in your case. A juror who cares for an invalid at home will be considered an authority on home care. Even a juror who was bonked in the head by a baseball 30 years ago might be regarded as an "expert" on post-concussion behavior ("*I got slammed and walked away just fine*").

It is important to ask jurors about their spare-time activities because volunteers and people with special training can also be single-topic leaders. For example, a library volunteer knows not only about books but about working with the public. In case-related matters concerning working with the public, jurors may defer to that library volunteer's opinions. Even someone who has merely taken a Red Cross CPR course can be a strong influence on the jury's choice of which expert cardiologist to believe.

A juror with prior jury experience often carries more weight than first-timers. She is also likely choice for foreperson. While the position of foreperson is not always influential, a foreperson with prior jury service usually is.

Ask them. Come right out and ask prospective jurors to tell you the situations in which they are regarded as leaders, and which as followers. Their responses are not completely reliable, but will provide clues to be followed up.

Some leadership signs are subtle. When jurors are returning to the box after a recess, followers tend to sit down and look straight ahead. Leaders may check around to see if everyone is back in their seats. During voir dire recesses, observe how jurors behave with each other. Those who talk most are potential leaders. Also be on the lookout for people who take the initiative in such sim-

ple matters as seating arrangements, holding doors, and even pushing the elevator button. Have an associate hang around the hallway to observe who seems to be leading such decision-making processes as where to go for lunch. (Of course, make sure your associate does not interact with any prospective jurors.)

Caveat: Do not eliminate someone as a potential leader simply because she does not seem likely to lead a person like you. A juror who is deferential to you might exert considerable control over other sorts of people. Leadership is a comparative quality. In a room of lieutenants, the general is boss—but a roomful of sergeants heeds the lieutenant.

For the same reason, consider the makeup of the jury as a whole before concluding whether or not someone is a leader. Also consider gender and race. For example, can the woman who is a potential leader on your behalf hold sway over the particular men who are also going to be on the jury?

Even after voir dire, observe which jurors emerge as leaders over the course of trial. It is usually those you expected, but not always. Whoever they turn out to be, monitor them during trial to be sure they are paying attention during your important points. Without ignoring other jurors, focus the delivery of your important points on the leaders. Develop and maintain good rapport with the leaders. In opening and closing, talk to them. When prudent and appropriate, coach your key witnesses to make contact with them during key points in testimony. And make sure your visual exhibits are aimed at them.

Jury consultants. Jury and trial consultants are a readily available voir dire resource.[19] Your case needn't be big for a consultant to be affordable. In a few hours, a consultant can help you identify what to look for in voir dire, provide questions to help you find it, and make suggestions for getting prospective jurors to talk.

19. The American Society of Trial Consultants provides an annotated directory of members, their locations, and the services they provide. Call (410) 830-2448.

Depending on your needs and resources, consultants can also provide pretrial jury research that includes focus groups and surrogate juries, community analyses and surveys, and other voir dire and trial services.[20]

Jury and trial consultants also help identify and test pivotal issues of a case, guide case presentation, prepare witnesses, create and test visuals, and provide a wide range of other services. If you have never worked with a trial consultant, a good way to begin is to enlist their services for voir dire.

GET TO KNOW YOUR AUDIENCE

Information learned about jurors in voir dire tells you more than whom to eliminate. What you learn in voir dire also helps you tailor your case presentation to the jurors who are seated.

Playwrights and screenwriters write best when they know who they are writing for. Shakespeare, Moliere, Sophocles, and most other major dramatists tailored their plays to audiences they knew well. Few great plays have been written for anonymous, generic crowds.

Because audiences vary, the ways to affect them vary. Material that brings down the house in one place can empty the house in another. The world has different colors of paint because there is no generic favorite color.

In real life, you choose your tactics, tone, arguments, and evidence according to whom you are addressing: your law partner, your spouse, your teenager, your auto mechanic, your great-grandma, your dad, or your dog. You deal differently with each because people (and dogs) vary. Jurors vary, too. Find out in voir dire what they are like and then tailor your case to them.

Suppose, for example, that your client is an attorney suing for defamation. Among the seated jurors are several skilled manual laborers. Instead of saying in opening statement, "An attorney without a good name is like a doctor without medicine," change your comparison to, "Ruining an attorney's name is like chopping off a steelworker's arms. No one will employ him again." Every juror will understand your image, but it will have personal and, therefore, extra impact on your manual laborers because they understand the comparison person-

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20. Not every pretrial jury research tool is equally useful. Surveys are expensive and often yield little useful information; they are best used for such purposes as deciding whether to seek change-of-venue and supporting the motion to do so. They consume resources that can almost always be put to better use—such as focus groups. "Drive-bys" are popular but overrated. They are popular because they are easy, but they are neither cost-efficient nor time-efficient. They entail a visual look at the homes of prospective jurors. Inferences are based on neighborhood, vehicles, condition of yard and house, and whatever other clues can be gathered by driving by and looking. Much of what can be predicted about juror behavior on the basis of what a home looks like can be better predicted by pretrial questionnaires and good voir dire observation and questioning. By far, the best research tool is the focus group or mock trial. (See Application D, p. 196, "Focus Groups, Mock Trials.")

ally. It also shows them—perhaps unexpectedly—that they have something in common with your client.

Warning: Don't pretend to *be* like your jurors. Mimicry is insulting. Simply choose terms they have reason to respond to.

Tailoring is not merely a matter of how you talk. What you learn in voir dire can help you modify and shape your themes and arguments, decide which evidence to emphasize, and choose which witnesses to call.

The particular kind of tailoring explained below in Chapter 4 (dealing with harmful juror attitudes) is a case-pivotal use of this technique and requires special emphasis on finding out all you can in voir dire. But every bit of tailoring you do, case-pivotal or not, will help your case presentation fit your jury.

During voir dire, have an assistant take thorough notes. Don't throw away the notes when voir dire ends. Use them to guide your thinking for the rest of the trial. (Also see Chapter 4, p. 74, "Tape Recording Voir Dire.")

Remember: there is no one-size-fits-all audience. Voir dire is where to get the precise measure of each particular juror.

EDUCATING JURORS: TWO TEACHING TOOLS

It is ethical to educate jurors in voir dire only if the "education" is an unavoidable by-product of a legitimate bias-seeking question. Based on this, you can employ two objection-resistant teaching tools.

The first teaching tool is low impact. It can be used to introduce information and themes but not to persuade. The second tool is high impact and can persuade.

The low-impact teaching tool consists of *voir dire questions that seek bias and simultaneously—as an unavoidable consequence of seeking bias—communicate*. For example, you might ask:

> Q Mrs. Jones, have you ever been accused of anything you did not do?

This question seeks bias, but at the same time (and unavoidably) it announces your major theme. The bias is one that you need to know about because people who have never been unjustly accused of anything tend to demand a lower burden of proof than others.

Note that this first method merely announces information and themes. It is informative but does not by itself persuade. It informs jurors of your theme (unjust accusations) but does little to persuade jurors of its validity.

Whereas the first method embeds *within the question* the matter you want the jury to hear, the high-impact teaching tool—the persuasive one—relies on matter embedded within the jurors' responses. Therefore, this method is called "response teaching." It uses questions that, as an unavoidable conse-

quence of seeking bias, elicit responses you want the jury to hear—responses that get jurors thinking the way you want them to think.

Q Mr. Smith, why were you so quick to believe your son had stolen your wallet?

Your question genuinely seeks bias: does Mr. Smith jump to conclusions based on insufficient evidence? But his answer will do more than reveal the presence or absence of that bias. It will also initiate juror discussion of how easily and why people jump to conclusions about guilt. By means of that discussion, the jurors will educate each other.

You can encourage such a discussion by appropriate follow-up questions such as, "Mrs. Jones, what kinds of conclusions have you ever jumped to?" or "Mr. Green, what kinds of unfair conclusions have others jumped to about you?" Ask about such possibilities in both their personal and work lives. Because such questioning elicits discussion of life experiences, the jurors relate themselves to the consequences of jumping to conclusions. This is both revealing and persuasive.

It is persuasive because *everything that is said comes from jurors, not from you*. You have a stake in the case, but jurors do not. Therefore, what they say to each other is more credible than what you say.

Another benefit is that jurors will provide their own vocabulary and terms, which you can pick up and use throughout trial. Jurors' language often communicates to jurors better than yours does.

Another example of response teaching: "Mr. Black, do you encourage your little girl to squeal on her friends when they do something wrong?" followed by "Why?" or "Why not?" You can use Mr. Black's (or some other juror's) answer to lead jurors into a discussion and possibly debate about why children hate squealers. You can easily shift from children to adults, and then (either directly or by implication) to the unwillingness of physicians to testify against colleagues in the same locale. You never need to make an affirmative statement; just ask questions: "Mrs. Green, we've been hearing why children don't like to squeal. Do you think any of those reasons explain why adults don't like to either? Which ones? Why?"

Origin. This kind of response teaching is a group application of the Socratic method of individual questioning. Socrates invented his method at the same time that his countrymen were inventing jury trials and theater in ancient Greece. The Socratic method is so powerful a persuader that throughout history it has been regarded as dangerous. Socrates himself was put to death, not merely for what he thought, but because his method of response teaching was so convincingly and memorably persuasive.

Good-faith bias seeking. Note that both kinds of teaching tools—questions that educate and Socratic group-response questions eliciting answers that edu-

cate—must be good-faith attempts on your part to uncover bias. This is an ethical imperative. It is also a jury matter. If you sneak information in via questions that are merely transparent pretenses at seeking bias, the judge will have reason to stop you and jurors will conclude that you are a sneak. Worse, they will assume that a sneak in voir dire will be a sneak throughout trial. So to protect your credibility (not to mention your ethical standing), ask questions that are genuinely bias-seeking. Along the way, you can educate.

To educate or not to educate? Experts disagree over the advisability of educating jurors during voir dire. Some argue that voir dire should be used solely for gathering information on which to base de-selection. Others say that key points should be established as early as possible, which means during voir dire.

It is undeniable that you need to gain as much information as possible for strike decisions. It is also undeniable that educating jurors can hinder the information-gathering process. But Socratic response questioning eliminates the need to choose between the two because it allows juror education to enhance information gathering, and vice versa.

Undesirable educating. There are some topics you may not want jurors to hear each other discuss. If you are a prosecutor, you may not want a juror discussing the reasons he distrusts the local cops. He might enlighten and persuade other jurors. The solution: a pre-voir dire supplemental written questionnaire. (See p. 52.)

Caveat: For reasons covered in the next section, unless you use the second teaching tool (Socratic response), *voir dire is a low-impact time to convey information.* Anything you say in voir dire that you want to stand out in jurors' minds later on must be emphatically reinforced during opening and testimony. This is because information conveyed in voir dire by any means other than Socratic response questions is muted. Such information can form an effective backdrop for certain issues[21] or serve as a low-key introduction to negative information that you must bring out but wish to downplay (such as your case's liabilities). Unless you use Socratic questioning, nothing you bring out in voir dire will have as strong an impact as initially presenting it later in trial.

On the other hand, Socratic response questions elicit answers that educate and persuade, and thereby provide high impact—so high that in some circumstances what the jurors talk about may not need to be mentioned again. For example, if you ask questions that get jurors to talk about why they think it is hard for children and adults to be squealers or whistle-blowers, it may suffice later merely to ask a hostile expert, "Doctor, you don't like to squeal on other doctors, do you?" The jurors will make the conclusion you want because in voir

21. Creating backdrop (or context) helps jurors notice and remember information coming up later, but the backdrop itself has no impact and is not memorable. It merely provides a framework (context) for upcoming material.

dire you had them (not you) talking about why folks are reluctant to tattle on acquaintances or co-workers.

INTRODUCING WEAKNESSES DURING VOIR DIRE

Breaking the "law of primacy." The "law of primacy" is a highly touted communications principle, and, as such, is frequently taught to trial attorneys. But it is often taught incorrectly, and the result is hogwash. Those who incorrectly teach primacy claim that placing an assertion first creates impact and memorableness. In fact, the opposite is often true.

Accurately expressed, the law of primacy holds that whatever listeners first *believe* is what they tend to continue believing. But primacy does not make them believe it. In actuality, placing an assertion first—before facts—radically diminishes and can altogether destroy the assertion's credibility.

The misconception that primacy creates emphasis, memorability, or credibility is based on a profound misunderstanding of audience perception. Without powerful methods for creating impact and memorableness, primacy—especially during voir dire—has the opposite effect from what many teachers claim. It subordinates material. As a result, primacy is a good way to introduce and subordinate your case weaknesses.

To prove to yourself that primacy is ineffective, think back to your last few CLE courses. Is your strongest memory the material that was presented first? Do you even remember the material that was presented first?

When experienced playwrights or screenwriters want to subordinate instead of emphasize something, they place it in the script's first ten or fifteen minutes. They know better than to put anything crucial at or near the beginning unless it is intrinsically spectacular or made memorable by the use of other attention-grabbing techniques. During the early moments of a play or movie, audience members are concerned with themselves and their own lives. They are not yet fully involved with what is on stage or screen.

Prospective jurors are the same. During voir dire, they are concerned with themselves and not yet involved with the case. They don't yet have any emotional investment in the case. This is why you can subordinate your case liabilities by introducing them in voir dire. To do so, use the first teaching tool (never the second) described in the preceding section: bias-seeking Socratic questions with your message embedded in the question, *not in the answer.*

To introduce but downplay your case weaknesses in voir dire, NEVER use Socratic response questions. If your client has used illegal drugs, you don't want jurors educating each other about the harmful effects of such drugs, or you highlight rather than downplay that case weakness.

Downplay further by using close-ended bias-seeking questions. Open-ended questions get jurors talking, which is exactly what you don't want them to do with respect to the liabilities of your case. Ask a close-ended ques-

tion such as, "Mr. Jones, if you knew that Mr. Client once used illegal drugs, would that make it hard for you to be a juror in this case?" Such a question is a terrible information-gathering device, but it efficiently conveys your case weakness. In fact, in group voir dire you need ask it of only one juror (as long as all the other jurors—including those waiting in the gallery to be called into the box—have heard it).

There are many reasons to reveal your case's liabilities in voir dire:

—You can choose a low-impact manner of presentation. If you leave your opponent the opportunity to introduce your weaknesses, she will do it in the most harmful way possible, such as by hurling it in your client's face on cross. That is a powerful tactic only if the weakness is news to the jury. If it is old news (because you introduced it in voir dire), the tactic is limp.

—You gain juror trust because jurors see that you are hiding nothing, not even information that hurts your case. When you leave negative information for your opponent to bring up, jurors can conclude that you were either unaware of it or trying to hide it. Either conclusion undermines your credibility.

—In voir dire, prospective jurors have no context for harmful information, so it carries less significance than it would if it were to come up for the first time later. (See Chapter 7, p. 115, "Context.")

Prospective jurors have no involvement yet with the case. They don't even know if they will be a part of it. Thus, nothing they hear now will have as much impact as if they first hear about it later.

Mentioning your weaknesses as far ahead as possible from jury deliberations relegates your liabilities to the long-distant past. As "given circumstances" from the start, they tend to fade into the background.

By introducing the weaknesses yourself, you establish the language that will be used during trial to describe them. If you say "driving under the influence," your opponent may seem to be exaggerating when she later calls it "drunk driving." But if she mentions drunk driving first, then "driving under the influence" may seem artificial.

In summary, early mention dilutes harmful information into the stew of everything else jurors have on their minds during voir dire. They are inundated and intimidated by a barrage of questions and unfamiliar expectations. They are worried about how long they will be stuck here, whether they are being well regarded by others in the courtroom, and whether they will be accepted. They are hoping they don't have to sit next to the weird-looking person. They are thinking about how to coordinate their outside lives with court. During this period of preoccupation, jurors pay the least attention to new information. Thus, weaknesses revealed in voir dire (unless via Socratic

questioning) have little impact and will be old news by the time jurors are ready to focus on them later.

GETTING ASSURANCES FROM JURORS

Conventional wisdom would have you obtain assurances from jurors in voir dire. But except in particular circumstances (see p. 46 above, "Fairness questions"), it can be a dangerous practice. Jurors resent being asked to guarantee what they will do later or how they will think in deliberations. This is because in voir dire they don't yet know much about the case, and they know you are aware of that.

It is even more dangerous to call in promises in closing, because jurors leaning against you will feel that you tricked them. Those are the very jurors you can least afford to alienate.

Some attorneys report success in asking jurors for assurances in voir dire, but it requires skill and well-established rapport. Otherwise, this sophisticated strategy can blow up in your face. For example, you might ask, "Mr. Jones, if I show you that Doctor Smith was at fault, can you assure me that you will have no trouble finding against him?" Mr. Jones looks you in the eye and swears, "Yes." That seems like an innocent enough exchange. But if Mr. Jones either happens to have a bias in favor of doctors or starts to lean in favor of Doctor Smith as the case goes on, then your question propels him into taking pains to view every piece of evidence in the best possible light for the doctor. Having aggressively viewed all the accumulated evidence in that light, it is likely that by the end of the case, Mr. Jones will never agree that you showed the doctor to be at fault.

If you had not asked Mr. Jones for that assurance, he would have had less motive to view the evidence in a light favorable to the doctor.

HOW TO CONDUCT YOURSELF DURING VOIR DIRE

Make yourself the host-in-chief of the courtroom. Welcome prospective jurors by making them feel that you—you *personally* and not the system in general—consider them the most important part of the process. Show real and individual respect, not just rote politeness.

As host, take upon yourself the duty of introducing to the jurors everyone who has not yet been introduced: you, your client, your opponents, the court reporter, the bailiff, the clerks, the eagle glaring down from the flagpole, and even the judge.[22] This makes the jurors feel that you are cordially in charge and at their service.

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22. You can introduce everyone via legitimate voir dire questions to check for conflicts of interest resulting from a juror's knowing someone. "This is Ms. Felicity Wright, the court reporter. Do any of you know her?"

During voir dire, prospective jurors are intimidated. Treating them warmly and well relaxes them, thus creating appreciation for and rapport with you and making it easier for them to talk freely.

Starting in voir dire and continuing until the last syllable of your closing, let jurors see that you acknowledge and appreciate that they are the whole point of the process. You have to treat the judge deferentially, but she is less important to the outcome of your case than are the jurors. From a jury perspective, the reason to treat the judge well is that jurors gauge you partly on your behavior toward the judge.

Think of prospective jurors as no less than your equals. With some jurors that can be difficult, but if you let yourself believe that you are superior, some jurors will spot and resent it.

It is particularly easy for you to feel (and thus inadvertently display) superiority. Court is your home ground whereas jurors are neophytes—court freshmen. But if you want to win jurors to your side, give them real respect, not freshman beanies. If you cannot get over feeling that most of your prospective jurors are inferior, single out one or two you *can* respect and generalize that feeling to the others.

Encourage answers. When questioning prospective jurors, don't act as if you expect (or want) a particular kind of answer. If you get an answer you don't like, *encourage the juror to say more*. Answers you don't like are exactly what you need to hear. As the juror speaks, nod slowly to get more (a quick nod will cut her off). Without being dishonest, exhibit approval of whatever you can about the answer: its frankness, for example, or its articulateness. Behave as if the answer is reasonable and important, and you want to hear more.

Don't argue. Don't disagree with anything a juror says in voir dire. It is an argument you cannot win. You will lose even more seriously if you seem to win, because the juror will want to see you proven wrong during trial. You don't have to falsely agree with anything, but never get drawn into disagreeing. You can rarely change a juror's mind in voir dire.

Exception: When pursuing challenge for cause, it may be necessary to confront a juror who is denying evidence of bias. For example, you are arguing when you point out a contradiction in his statements: "Mr. Johnson, you say you're able to follow the law, but you also say that money compensation for pain and suffering is wrong. So if the law says you're supposed to consider money for pain and suffering, you cannot follow that law, can you?"

Under such limited circumstances, you may have to argue with jurors. But most often, arguing with jurors is a futile and potentially damaging pursuit.

Talk loud. If there are prospective jurors behind you in the gallery while you are questioning the current group in the jury box, talk loudly and clearly enough to be heard by those behind you. Turn around from time to time to in-

clude them. Jury voir dire is the first step of your persuasive process, so take care that no prospective juror misses any of it. They will appreciate the attention. Bonus: in a strike-before-everyone-is-questioned system, talking to the remaining prospectives lets you turn and see them, thus giving you some idea of your chances of improving the jury if you strike.

Dangerous questions. Watch out for inadvertently impertinent or prying questions. This is often a matter of wording. For example, if someone has adolescent or adult children, don't ask, "What do they do?" If they are in jail, you have caused embarrassment. Word the question in a way that allows the juror to dodge: "Are your sons employed?" The juror will answer, "No, they are all in jail except for little Billy who's on the lam" only if he wants to. He can also just say, "No." In that case, don't reflexively ask, "Well then, what do they do?"

Prying. Attorneys often start voir dire by saying, "I'm not trying to pry," and then they go right ahead and pry. Don't deny in advance what you know you're going to do.

Be careful when excusing jurors. The remaining jurors are watching and this is their first impression of you in a difficult situation. Handle it well. Be truly considerate about the feelings of those you challenge peremptorily or for cause. Even if the excused juror does not want to be on the jury, being rejected is insulting. Don't use a boilerplate apology, and don't speak as if it is routine. Look at those you excuse. Make honest eye contact. Thank them face-to-face for their time and trouble and for their frankness in answering your questions. The remaining jurors will like you better for it. But they will lose trust in you if they see you trying to slink out of an awkward moment by avoiding eye contact with your victim and taking refuge in legalese formality.

Keep 'em on their toes. Most of voir dire is boring for jurors because they have no reason to listen. Their minds wander, making it less likely that they will have visible reactions and harder for you to get them talking when you finally get around to them.

To keep jurors alert, question them in random order instead of predictably across the back row and then the front. Jump around. Don't ask every juror the same question; use different wording to get at the same information. And don't sequence your questions in the same order to every juror.

By randomly sequencing what you ask and whom you question, and by varying the wording of your questions, you keep jurors alert and provide them less chance to formulate answers in advance. Their answers will be more spontaneous and therefore more revealing.

Caveat: Keep track of jurors when questioning in random order. Jurors are insulted when you miss them. Be especially careful to keep track of what you have covered with each juror and what you have yet to cover. Otherwise, you will have to base your peremptory challenges on guesswork instead of analysis.

Group questions. For purposes of gathering information, most group questions are useless. In fact they are harmful because they efficiently mask the very information you seek. Yet judges prefer group questions because they save time. In fact, it takes longer to ask group questions to get everything you need than it does to ask individual questions of each juror.

Many judges do not realize how much their insistence on group questions damages the information-gathering process and, consequently, counsel's ability to exercise intelligent challenges. Try to explain to your judge that jurors are neither frank nor forthcoming in response to group questions. Thus, group questions yield less information. And because you have to ask so many of them, they can take more time than individual questioning, not less.

Watch jurors carefully so that you miss no responses to your group queries. For example, "We're calling an expert witness named Dr. Jekyll. How many of you know him?" Two or three hands may shoot up, distracting you from shy Juror Stevenson back in the corner who raises his hand just a little. Mr. Stevenson raises his hand just a little because he is uncomfortable saying he knows Dr. Jekyll, who botched a diagnosis on his daughter last year. But you don't see shy Mr. Stevenson's hand, so you ask him no follow-up questions and he ends up on your jury—the last person in town to trust your Dr. Jekyll on the stand or anyplace else.

Not only can missing a juror response deprive you of learning something you need to know, but it can make a juror think you find him insignificant.

There is another reason to monitor the whole jury. When questioning one juror, others sometimes visually reveal reactions to the question or its answer. If possible, have an associate watch jurors so that both questioning and scanning get full attention. When a juror reacts to something another juror says, use the reaction to launch questions such as, "Mrs. Shelley, you look like you agreed with Mr. Stevenson. What did he say that you agreed with most?"

Don't stop reacting. Be careful how you visibly react while your opponent is questioning jurors. You lose credibility when you display, for example, sympathy when a juror mentions her accident injury if minutes later, when your opponent is questioning her, you have no reaction to her revelation that her mother just died.

Your visible responses are obvious and important all through the trial, not just during an answer to one of your own questions. You don't disappear from sight just by sitting down and not talking.

The ultimate question: Do you like each other? When you don't like a juror, or when you think a juror does not like you, heed your instincts. If you would not want to spend time together, then why would you want to have a trial together? Carefully consider the wisdom of keeping a juror when one of you seems to dislike the other.

And beware jurors who make a great show of liking you. People who try hard to show that they like you sometimes have hidden reasons for doing so. Carefully question such jurors. Observe them at every opportunity to see if their demeanor is equally exaggerated with everyone. If you are the only target, be suspicious.

Part Two: Applications

A, B, C, and E are adapted from articles published in 1995 and 1996 in *Around the State*, a publication of the North Carolina Academy of Trial Lawyers.

D, F, G, H, I, J, K, and L are adapted from monthly columns that appeared in *North Carolina Lawyers Weekly*, 1995 and 1996.

M is adapted from an article in *Trial Briefs* (Spring 1996), the journal of the North Carolina Academy of Trial Lawyers.

A: WORKING WITH CO-COUNSEL (Juror interpretation that hurts.)

There are few limits on how jurors interpret what they observe, so when working with co-counsel(s), be careful.

Equal importance: To begin with, arrange the division of labor (including voir dire) between you and your co-counsel in such a way that neither of you seems to be the lesser member of the team. If jurors think one of you is senior or dominant, they will assume that anything the other does is relatively unimportant. They will listen less closely to "lesser" counsel and assign lighter weight to testimony he or she elicits.

You can offset this by assigning important tasks early in trial to the junior member, such as a share of voir dire, or questioning an important witness.

Voir dire and rapport: Not every judge automatically allows voir dire to be shared with co-counsel (indeed, some will never have heard of such a practice), so prepare a motion to do so. Argue that it will save time, since you are each more familiar with different areas of the case and can thus more quickly pursue what you need to know in those separate areas.

Don't share by alternating questions. Change questioners only once or twice, and make the division by topic.

Though sharing voir dire is rarely done, it helps make co-counsel a fully effective member of the trial team. The kind of rapport that results from voir dire develops at no other time, because only in voir dire do jurors talk with you. This kind of rapport helps credibility—and you want your co-counsel to be as credible as you.

Allowing rapport to develop between the jury and only one member of the trial team marginalizes and thus diminishes the importance, credibility, and persuasive weight of the non-participating counsel and everything he or she does.

Respect: Treat your co-counsel not merely civilly, but with respect. Jurors who are or have been rudely treated as subservients in their own jobs can resent lawyers who treat junior colleagues as inferior. *The senior-junior behavior that may be appropriate in your office can sit badly with jurors in court.*

Each member of the trial team should treat every other member as his or her boss. Treat no one like an underling.

Paralegals and assistants: In the presence of the jury, be careful how you and your co-counsel treat your paralegals and assistants. Make requests of your staff as politely and deferentially as you would of your superiors.

Again, jurors who may have been badly treated as underlings at work can turn resentful if you behave like their offending bosses.

Moreover, make sure that both you and co-counsel treat staff *equally* well. When your co-counsel is deferential with the assistants that you order around

like serving maids, you create a harmfully visible power-differential between you and co-counsel.

Bench conferences: Both you and your co-counsel should go to the bench for every conference so that jurors will see that you have equal stake and equal input. In jurors' minds, what goes on at the bench is mysterious and important. When co-counsel does not join you there, jurors conclude that he or she is not smart or important enough to deal with the mystery and importance of the judge.

Attentiveness: One common courtroom error is for senior counsel to fail to pay close attention when junior counsel is talking to jurors or questioning a witness. If one counsel studies the next witness's deposition while co-counsel questions the current witness, jurors conclude that neither the current witness nor her questioner is important.

Every member of the trial team should pay the same level of attention to your co-counsel's work as to your work. If your paralegal files papers or stares into space while your junior colleague questions a witness, and then turns raptly attentive when you take testimony, jurors infer that not even the paralegal respects junior counsel.

Monitoring: There are many ways you or your trial team might inadvertently undermine the position of your co-counsel in the jurors' eyes. Alert your trial team to the problem's potentially serious consequences. And stay alert to the problem yourself.

E: THE AWKWARDNESS OF VOIR DIRE

The beginning of voir dire can be the most awkward-feeling time for you in trial. This is because you have to shift almost instantly from being a lawyer battling over motions, to a people-person trying to make human contact with normal folks.

The transition is hard to make under the best of conditions, and even harder if your motions have fared badly.

> JUDGE: You cannot have either of your proposed experts. The pre-existing conditions can come in. So can the drug and spouse abuse charges. Now let's call in the jury panel.
>
> YOU: *Now?!?* Wait a minute, I'm in shock!

Anyone would have trouble getting into the right frame of mind to meet a jury. But you have no choice.

Compounding the problem: the jurors have been waiting around all day doing nothing. They were called at, say, 9:00 a.m. They showed up promptly, but without explanation were made to sit there like pre-Miranda prisoners. Maybe it is now 11:30 a.m. or even 3:30 p.m. Here is how they feel: They are no more eager to meet you than you are mentally set to deal with them. They are not eager to answer your questions.

To make matters worse, during motions you probably felt pressure to get quickly through whatever you had to say. This may have caused you to speak more quickly and tensely, which temporarily made you a poor listener. So when the jury panel files in, you talk to them as if you are a lawyer in a bad mood, in a hurry, uninterested in anything these folks might have to say, and unconcerned with their humanity and feelings.

Great start, eh? No wonder voir dire feels awkward and sometimes embarrassing. Your frame of mind after motions arguments is dead wrong for the upcoming task of voir dire because you are lugging motions baggage into voir dire. This triples the thickness of the ice you have to break.

What you need here is a MOMENT. Just before the jurors come in, or as soon after their arrival as possible, *sit down, shut out of your mind all that has gone before, and turn your thoughts and feelings around.*

One attorney I know takes an important-looking file from his briefcase, opens it, and peruses the contents. He is the only one who can see that it is a photo of his young daughter, and it is inscribed with crayon, "TO DADDY, WAY COOL!" He smiles every time. Such a courtroom aid makes it worth having kids, and it gets counsel ready for the human-centered task of voir dire.

Another attorney I know shuts her eyes and mentally sips a glass of wine (cold beer works, too). Another gets a mental shoulder massage. Some attorneys sing (mentally) a favorite mood-changing song. Simply find something that

makes you feel warm and sociable, and that helps you replace your arguing-motions self with your people-oriented self. Let it take you over as the jurors file in for voir dire. You will feel more comfortable and the jurors will be more open both to your questioning and to you.

You should do this even when you go second in voir dire. You will listen better to the human content of the answers your opponent elicits, and you will be more prepared when it is your turn to question.

Actors use transitional moments when they go from the paraphernalia and technician-laden bustle of backstage into the very different world in front of the lights. Doctors often use such a moment as they go from the dark concentration of an operating room to the socially-demanding interchange of talking with anxious relatives in the waiting room. Presidents of nations use such a moment to go from spatting with spouses to international TV press conferences.

The uniqueness of voir dire. Even without the distraction of in limine matters, voir dire can feel awkward to you because it is a unique trial activity. It demands skills and a manner of behavior that you use nowhere else in trial and hardly anywhere else in your practice.

An easy solution: *practice*. A night or two before trial, gather seven or eight people you don't know, pay them $10 or $15, and voir dire them for two hours. Use the same questions you will use in court. Do this a day before your real voir dire in court because such last-minute rehearsal gets you primed for the real task. It will have you up and running—and comfortable as well as effective—right at the start of your real voir dire the next day.

Caveat: Jurors are more forthcoming in practice voir dires than in court. Because the trappings of the courtroom tend to intimidate jurors into silence, you will need to make more persistent use of open-ended questions and follow-ups (see next section, "Conducting Voir Dire") in court than in the practice session.

A final trick to help make voir dire a more comfortable and successful experience: Watch other attorneys' voir dires. Chances are you will think you do voir dire just as well, and that will give you a comforting confidence next time out. And when the attorneys you watch are better than you, you will learn from them.

F: CONDUCTING VOIR DIRE

If you walk into any courtroom during juror voir dire, you can quickly determine whether or not counsel is doing a good job. Just listen to who is doing most of the talking. Badly run voir dires consist of ninety percent counsel talking and ten percent jurors talking. A well run voir dire is the opposite: counsel says little and jurors do most of the talking. Counsel merely asks and listens.

It is almost an absolute principle: The more talking you do, the worse your voir dire. You may wish to educate or indoctrinate, but if you don't get prospective jurors talking before you tell them what to think, they will not reveal the biases and attitudes you need to uncover in order to exercise worthwhile strikes and successful challenges.

Lecturing jurors does little good. Insofar as you can educate or indoctrinate in voir dire, it is best done by asking questions that will lead jurors to say the things you want the rest of the jurors to hear. (See also Chapter 3, p. 59, "Educating Jurors.") Jurors believe each other more readily than they believe you. So don't indoctrinate by asking, for example, "Do all of you agree that home repairmen should be held responsible for the quality of their work?" Such a question persuades no one, and the answers (or lack of them) reveal little, if anything, about any juror.

Instead, ask a bias-seeking question that also educates: "Mr. Smith, when you hire someone to repair something in your home, what do you think you have a right to expect?" Either Mr. Smith or some other juror will respond with what you want the jury to hear: honest pricing, a repair job that stays fixed, decent materials, etc. Keep going until you get what you want. Then ask other jurors if they agree—and why. And be sure to ask what experiences they have had that might have led to their opinions.

This kind of questioning allows jurors to feel that the standards by which they will judge this case come from their own sense of right and wrong, not a lawyer's.

Lecturing jurors in voir dire or asking thinly-disguised indoctrination questions is not only improper, but almost never persuades. Whatever you want the jury to know, if you cannot get it onto the floor via a bias-seeking question or through the answers such a question can elicit, then save it for opening when you can support it by reference to evidence.

Lecturing during voir dire also diminishes the jurors' only opportunity to talk with you. When jurors talk with you, they are bonding with you. Bonding creates rapport and makes jurors want to do what you want them to do.

In brief:

—Get jurors talking so that you know whom to strike, how to challenge for cause, and who your audience is.

—Educate by having jurors teach themselves as they respond to your bias-seeking questions.

—Remember that when jurors talk, they are building rapport with you.

—Don't cross-examine jurors. Listen to them.

—Encourage jurors to debate with each other. (See Chapter 3, p. 50, "Voir Dire Deliberations.")

Test yourself. Tape record your next voir dire and count the words. Is it ninety percent juror talk and ten percent you? Or is it the other way around? If you are talking more than ten percent of the time, here are three ways to improve:

TECHNIQUE #1: ASK OPEN-ENDED QUESTIONS.

Open-ended questions are *non*-leading questions. They suggest no particular answer and cannot be answered in a word or two or even in a phrase or two. (See Chapter 3, p. 47, "Open-ended vs. Close-ended Questions.")

Begin voir dire with open-ended questions that jurors can answer easily and confidently. Ask the jurors about themselves: the things they do, their families, their neighborhoods, and their jobs. "Tell me about your children," "Would you please describe your neighborhood?" or "What do you do on weekends?" starts the conversational ball rolling. Once that happens, you can go on to ask open-ended questions on other topics, and the jurors will continue talking to you.

Close-ended questions are useful only for introducing new topics ("Has anyone ever signed a contract?") or when pursuing a challenge for cause ("You've been afraid of doctors ever since they cut off your leg instead of your arm, haven't you?") Otherwise, avoid them.

Close-ended questions are particularly harmful at the start of your voir dire when they will teach jurors that you expect and want single-word answers. But when your initial questions are open-ended, jurors comprehend and more readily accept that their role is to talk a lot.

TECHNIQUE #2: WATCH and LISTEN.

Watching and actively listening to juror responses not only helps you pick up every possible clue-providing nuance. It also means that you are behaving in a way that encourages fuller responses. *Nod* as a juror answers your question. People continue talking when you nod because they feel you approve of the fact that they are talking and of what they are saying.

Encouraging juror response by how you watch and listen is particularly important when a juror is saying something you don't want to hear. If a juror thinks you don't want to hear something she has to say, she shuts up. But if it is something that seems counter to your case, you need to hear it. When a prospective juror starts revealing an attitude that could hurt you, don't argue,

scowl, or shut her off. Listen intently, watch closely, nod, and encourage her to keep talking. Encourage the fact that she is talking, even if you cannot encourage the content.

Don't worry that she will poison the other jurors. If she is expressing a harmful opinion now, she will express it in deliberations, too—so you want to know about it while you can still do something about it, and while you can see which other jurors might agree with or be affected by her. And if she or others who agree with her end up on the jury, you want to know about their harmful opinions so you can deal with them over the course of trial. (See Chapter 4, p. 69, "Bad Attitudes.")

Whatever you do, *don't* turn off a responding juror by exhibiting disapproval or scorn for an answer.

For example, juror Winston might say, "Anyone who drinks even half a beer and then drives a car should be whipped and jailed!" Now, just because you are on defense in this DWI case, don't fight that answer. Don't say, "But Mr. Winston, you'll be able to put aside how you feel and decide this case according to the law, won't you?" That is a pointless close-ended question that shows Winston that you find his answer "wrong," thus stopping him from further revealing how he feels. It usually gets you only the answer that Winston thinks you want to hear ("Sure"), not the answer that might be true. It shuts Winston up and ends any possibility of a challenge for cause.

Instead of resisting what he is saying, encourage Winston to continue talking. Don't make him defensive. Respond as if he is expressing an interesting, intelligent, and legitimate attitude. This will help you get him to explain why he believes what he believes (often by revealing an influential life experience that has created an immutable attitude), how long he has believed it, and *whether he is likely to change his mind in the next few days*.

By pursuing such questioning, you learn about the juror and you increase your odds of a successful challenge for cause—because you have gotten Winston to state, restate, and reinforce his strong feelings, possibly to relate them to his life experiences, and to insist he is not about to have different feelings during the upcoming trial.

TECHNIQUE #3: ASK FOLLOW-UP QUESTIONS.

The point of Technique #2, *watching and listening*, is not only to gather information. Careful, active watching and listening also helps you know what to ask next. For example: "And what about you, Mr. Mason? You looked like you were disagreeing with Mrs. Smith. Tell me about that." Now encourage Mr. Mason as he answers—all the while keeping an eye out for other jurors who might be exhibiting visible signs of having thoughts or feelings about this topic.

If a juror exhibits no sign that he has anything to say, try, "Mr. Jones, I can see you have something to say about this, don't you?" Half the time, he will say no. But the other half of the time, he will indeed have been thinking something—and now you get him talking about it.

As a prospective juror answers a question, find something in his response on which to base a new question that will keep him (or someone else on the panel) talking. If the answer to an occupation question is "I'm a plumber," follow up with, "How did you learn your trade?" If he again answers briefly ("In trade school"), ask him what his favorite or most valuable courses were and why he liked them. Then ask how he found that learning valuable in his life outside of work. Keep trying to get him talking, and he will soon understand that you are not going to be satisfied with short answers. That will usually get him talking more than briefly.

Then ask another juror, "Mr. Turner, Mr. Jones learned to be a computer programmer by going to technical school. How did you learn to be a truck driver?"

(If you are stopped because your question is not relevant, find an area that you can justify by reference to the issues of the case. If an issue is safety, don't just ask about how Mr. Turner learned his job; ask about the kinds of safety measures involved in the job and how he learned them.)

Careful watching and listening for clues to help you formulate follow-up questions is a crucial interviewing skill, yet it is really nothing more than being a decent conversationalist. But it requires you to formulate questions on the spur of the moment—questions that you can justify as bias-seeking. For example, you have to be able to quickly formulate a question such as, "How did you learn to be a software designer?" and be able to explain (if necessary) how it is bias-seeking. (Perhaps the issues in your case make it necessary for you to be wary of jurors who believe that it is easy to learn how to do new things.)

Because you cannot plan follow-up questions in advance, you must spontaneously create questions that both seek bias and do whatever else you want the question to do: educate, create rapport, get a juror talking, etc. To develop this skill, *practice outside of court*. As you are driving to work, think of open-ended questions you might ask jurors. Then justify these questions as bias-seeking. Practice daily on ten or fifteen questions, and soon you will be able to do it instantly and automatically.

(If you have trouble asking open-ended questions, start with "Why," "How," "What," "Tell me about . . . " or "Please explain . . . . " For further guidance, see Chapter 3, p. 47.)

The result of your practice will be a valuable courtroom arsenal: you will be capable of extemporaneously creating questions that seek bias while at the same time designing them to condition, educate, inoculate, create rapport, un-

dermine your opponent's case, test peripheral juror attitudes, etc. And there will be almost no question you cannot figure out a way to ask.

For example: "Mr. Dillon, some people think it's wrong to keep a loaded gun in the house. How do you feel about that—and why?" Your "educational" intention may be to get jurors discussing necessary gun-safety precautions because your case rests on the fact that the defendant observed none. But the question to Mr. Dillon also seeks bias: some people believe there should be no gun rules at all, whereas others believe that no one should keep guns, with or without precautions. You need to know if Mr. Dillon has any such bias and how it might affect his thinking with respect to the issues and people in this case.

USING THE JUDGE.

In addition to the three basic techniques to get jurors talking (asking open-ended questions, watching and listening, and asking follow-up questions), you can also enlist the judge to help. Urge the judge to introduce voir dire by telling prospective jurors that a) there are no wrong answers, and b) the court needs and expects jurors to be forthcoming and to express themselves fully and freely.

CLOTHING.

A final hint: *Dress down* for voir dire. Wear lighter colors, jackets, and slacks rather than suits. Wear looser-flowing skirts and blouses rather than severe fits and lines. Wear clothing that does not distance you from or intimidate jurors. Unbutton your jacket, relax, and talk to these people. Don't make speeches, don't try to impress them, and don't hide your own nervousness behind courtroom formality.

PRACTICE.

If you have not tried this approach to voir dire before, your next step is to practice before you actually go to court. (See Application E, p. 203, on voir dire rehearsal.) Arrange such a practice session the night before every case; it provides a dress rehearsal that allows you to start your case in court much more sure of yourself.

If you know someone who already knows how to do voir dire using the methods described above, have her watch and critique your practice voir dire.

Many trial lawyers have little love for voir dire because voir dire is hard to predict and prepare. But the difficulty diminishes if you think of voir dire as a group conversation. Open-ended questions, good watching and listening, and follow-up questions are the central skills of conducting a group conversation. Develop these techniques through practice and by observing how others apply them. If you learn to run voir dire as a group conversation, jurors will converse.

Bonus: In the future, when one of those jurors needs a lawyer or has to recommend one, she will not choose your opponent who in voir dire talked *at* them and barked cross-examination questions. She will choose you because

you came across as a good listener, an intelligent questioner, and—the inevitable conclusion when such qualities are evident—a personable, effective, and honest attorney.

G: PEREMPTORY & CAUSE CHALLENGES: MAKING CHOICES

There is a methodical way to determine what information to seek in voir dire and how to use that information to decide whom to strike. Even your best-run voir dires are useless if you have not carefully planned what to look for or what to do with it when you find it.

The method suggested below derives from social science research, observation of jurors, post-trial juror interviews, and extensive courtroom experience. In every kind of case, it helps you achieve intelligent and productive voir dires that are comfortable for both you and the jurors.

And because voir dire interlocks with everything else, this method leaves you with a juror-based perspective of your case that will be invaluable from pretrial motions through closing.

I. General technique.

This method is a systematic way of 1) identifying important factors in your case that will elicit differing responses from different jurors, and then 2) identifying those jurors who respond the most unfavorably to those factors.

The method is based on the fact that jurors rarely start out by being for or against your case as a whole. Instead, they are for or against particular parts of your case. The way they feel about those particular parts dramatically influences how they perceive everything else in the case.

For example, many jurors believe that anyone arrested is probably guilty. Such a juror does not decide guilt at the outset but honestly thinks she has an open mind. Yet her belief (that anyone arrested is probably guilty) tends to influence her to see every piece of evidence in the best possible light for the prosecution. As a result, she eventually arrives at an "honest" guilty verdict.

You can rarely discover in voir dire how a juror feels about your whole case, but you can find out how jurors respond to individual key matters.

Applying this method diligently enough to rely on the results requires painstaking preparation. But once you have used this method a few times, it will be second nature to you and help you in so many other areas of trial that it will ultimately save you time.

In addition, because this method immerses you in every important individual factor that connects the jurors to your case, it maximizes the sensitivity and accuracy of your jury-selecting instincts. Brilliance is one percent instinct and inspiration, and ninety-nine percent perspiration. This method is mostly perspiration—but it helps you get the most out of your instincts.

II. Selection profile.

The goal of voir dire preparation is to develop a selection profile. A selection profile lists potential juror characteristics (such as opinions, beliefs, atti-

tudes, fears, likes and dislikes, biases, life situations, and life experiences) that can influence how a juror will think and feel about (and thus react to) the laws, principles, people, evidence, and arguments in your case.

Example: a juror who has the characteristic of fearing that the courts are soft on crime will settle for a lower burden of proof than will a prospective juror who has been unjustly fired from her job. Thus, the juror's opinion that the courts are soft on crime influences how the juror interacts with an important factor in the case (burden of proof). A juror with a different characteristic (having been unjustly fired) will have a higher burden-of-proof expectation.

The unequal expectations of each of these two jurors do not only attach to burden of proof but also determine how each juror will interpret and assign weight to every piece of evidence throughout trial. The juror who believes the courts are soft on crime will tend to assign greater weight to every piece of prosecution evidence and less weight to defense evidence, and may even turn some defense-supporting evidence into prosecution-supporting evidence. The unjustly-fired worker will do the opposite.

In other words, *the factors that direct the decision-making process are primarily the juror's characteristics, not the content of the case*.

Juror characteristics determine how jurors will think and feel about every separate thing in the case. By using voir dire to discover those characteristics—the characteristics on your selection profile—you can anticipate how each juror is likely to regard your case.

III. Creating a selection profile.

Creating a selection profile requires a careful analysis of your case, as follows:

LIST 1: LAWS AND PRINCIPLES

First, list the important elements of every law, principle, policy, doctrine, and guideline that will be involved in the case. "Self-defense," for example, is too general unless you list its separate elements: "reasonable or necessary force," "no other escape," etc.

Include every element of such applicable laws as negligence, damages, respondeat superior, burden of proof, arson, assault, etc., and such principles as "reasonable person," "standard of care," "good faith," *and whatever else the jury must understand in order to render a verdict*.

Thoroughness is important; carelessly leaving out an element can cost you the case.

LIST 2: CHARACTERS

List every party and important witness (both sides), and indicate the salient characteristics of each. Salient characteristics include but are not limited to race, profession, education, status and social class, age, gender, background, personality type, demeanor, physical appearance, and similarity to the jurors.

LIST 3: FACTS AND TESTIMONY

Make a witness-by-witness list (both sides) of the important points each witness will make and of other important evidence such as documents and texts.

LIST 4: ARGUMENT

List every important contention and argument likely to be made by each side.

LIST 5: VARIABLES

From the items on the first four lists, create a fifth list of *everything that can elicit differing responses from different jurors*.

Items that will elicit *identical* responses from every prospective juror will not help you select. They need not (and should not) be dealt with in voir dire, so they don't belong on your list of variables.

The hard part is to distinguish variables from nonvariables. This requires careful analysis and can also benefit from such means as focus groups, post-trial juror interviews from similar cases, speaking with other attorneys who have conducted similar cases, and drawing on the research skills and experience of jury consultants.

Here are examples of the kinds of variables you will be looking for:

SAMPLE VARIABLES from LIST 1 (Laws and Principles)

Respondeat superior will elicit differing responses from different jurors. Not every juror considers the doctrine fair. Thus, it belongs on your list of variables.

On the other hand, most elements of, say, larceny laws elicit identical responses from all jurors, so those elements don't belong on your list of variables. But do include any elements that might elicit differing responses—such as intent or dollar value.

Another example: By talking to jurors in voir dire or post-trial interviews, you may have discovered that the seriousness with which various jurors regard "standard of care" often depends upon each juror's own particular background. Some jurors believe that standards of care are sacred and should be absolutely obeyed. Others regard standards of care as mere guidelines of varying importance depending on particular circumstances. Thus, "standard of care" belongs on your list of variables.

SAMPLE VARIABLES from LIST 2 (Characters)

Policemen and firemen: Various jurors have differing responses to policemen, so police witnesses on list two should be on your list of variables. On the other hand, firemen rarely belong on your list of variables because everyone regards firemen in the same way. (Except in Los Angeles after the riots when different people regarded firemen in different ways. When such differences exist, firemen should be on your list of variables.)

Physicians: A prospective juror whose close friends include doctors will not want to be on a jury that might award millions of dollars against a doctor. So if such a juror is seated, he is likely to make sure that the jury does not, in fact, become one that awards millions against a doctor. This is not because the juror necessarily favors doctors, but rather because he knows he will have to face his doctor acquaintances long after this trial is history. He will not necessarily vote dishonestly, but he will subconsciously tend to see each piece of evidence in the best light for the doctor. No plaintiff's med mal case can withstand such a viewing of the evidence. Thus, because some jurors have doctors as friends and other jurors do not, include on your list of variables the fact that the defendant is a doctor.

Occupation is not the only character consideration. A witness who is 87 years old will be accorded differing levels of credibility by different jurors. A witness with a foreign accent will be given widely differing levels of respect by different jurors. A witness who stutters will be regarded by some jurors—but not all—as foolish.

SAMPLE VARIABLES from LIST 3 (Facts and Testimony)

Guns: Different jurors will have differing responses to the fact that the defendant kept a loaded rifle in his closet. Some jurors will disapprove; others will think it is a good idea. Since it is capable of eliciting disparate responses, the rifle on list three should be placed on your variables list.

Locked doors: On the other hand, every juror will have similar responses to the fact that the defendant locked his front door before going to sleep. It should not be on your variables list.

Weather: The fact that the weather was bad at the time of the auto wreck elicits juror responses that differ in accordance with each juror's own bad-weather driving experiences, so it goes on your variables list. But evidence that the sun was shining does not go on the variables list, because every juror will respond to that information in the same way.

Money: Arguments concerning the different elements of damages will elicit differing responses from different jurors. For example, different jurors will respond differently to your lost-wages argument if you are seeking money for your client's widow. Jurors who are heavily dependent on a spouse's income might think she should be awarded the full total of the wages your client would have earned if he had lived. But other jurors may decide that because some of those wages would have supported your deceased client, the widow is not entitled to the full amount. Others will decide that since the widow can remarry, she is entitled to little or none of the lost future wages. Since there may be such differences about replacing future lost wages, "lost wages" should be on your variables list. But there will probably be no differences about medical and burial expenses, so those expenses do not belong on your variables list.

SAMPLE VARIABLES from LIST 4 (Arguments)

Complex arguments that persuade some jurors (the smart ones) will merely confuse others (the less-smart ones). Thus, complex arguments from list four should be placed on your variables list.

Arguments that rely on ethical considerations can also elicit differing responses from different jurors; the variable is each juror's own sense of morality. ("If she valued life, she would not have had an abortion.") Thus, ethical arguments, like complex arguments, should be on your list of variables.

On the other hand, jurors will all respond the same way to your argument that a person who volunteered for work at the soup kitchen must care about people. It does not belong on the variables list.

(The items you have left off of the variables list are not necessarily unimportant. You are not eliminating them from the case. You are merely eliminating them as matters to be considered during voir dire, because they will not help you sort favorable jurors from unfavorable.)

ASSEMBLING THE SELECTION PROFILE

Your selection profile is a listing of every likely juror characteristic (including opinions, beliefs, attitudes, fears, likes and dislikes, biases, life situations, and life experiences) that might affect how a juror will think and feel about the items on your variables list.

You can determine these juror characteristics by analysis, common sense, brainstorming with colleagues, interviews with jurors who have been on similar trials, jury research tools including focus groups and jury simulations, and the advice of experienced jury experts. Some attorneys rely heavily on statistical surveys, but experience and research evidence shows this to be a frequently ineffective and always expensive tool. Analysis, discussion, and advice, as well as good focus groups and a common-sense understanding of human behavior, provide better results.

When creating your selection profile, it is essential for you to give the lawyer part of you a day off. Enlist the part of you that is not a lawyer to create your selection profile. Shed your legal mindset and apply instead your best knowledge of real-life human behavior and reactions. If this seems like an utterly alien assignment to you, find a colleague to do it with you. It is often the most important single task in the whole case.

Separating the Good from the Bad.

Selection profile items fall into one of two categories. The first category includes juror characteristics that are likely to interact with items on your variables list in ways that are *good for your case*. For example, the characteristic that a juror is close to doctors will interact positively with the variables list item that your med mal defendant client is a physician.

The second category includes characteristics that are likely to interact with variables-list items in ways that are *bad for your case*. For example, the

characteristic that a young juror has four elderly grandparents who are in advanced states of senility may interact negatively with the variables list item that your key witness is 87 years old.

Weighting the profile.

As voir dire progresses, your task is to seek the characteristics that are on your selection profile. With each such characteristic you find in any juror, give it one of four possible weights: *absolute*, *high*, *medium*, or *low*. A characteristic's weight indicates how heavily the characteristic can influence that juror's decision. A characteristic that cannot affect a juror's decision has zero weight and, as such, does not belong on your list of juror characteristics.

With each individual juror, a characteristic's weight is determined by gauging two things. First, consider how important the characteristic is to the case (hating alcohol use is usually more important to a DWI case than is believing some cops to be dishonest). Second, consider how strongly the juror holds the characteristic (having a father and two brothers who are doctors is a more strongly held "knows doctors" characteristic than is merely having a friend who is a doctor).

By noting the weight of each of a juror's characteristics, you can quickly rate that juror. An "absolute" (such as a physician on a med mal jury) against you means *get rid of that juror*. Any scattering of lower weights (for such characteristics as, say, sharing particular background traits with your client, not trusting foreign accents, or disapproving of guns in the home) makes you consider dropping that juror and gives you a quantitative way to compare him with other jurors.

This method also helps you to avoid dangerous temptation: If a juror you like has, say, three "highs" against you, she can doom your case despite the dozen "mediums" about her that are in your favor and that make you like her.

Some attorneys and consultants assign a number value to each weight—4 for absolute, 3 for high, 2 for medium, and 1 for low—so that a juror's relative worth can be mathematically computed and compared to other jurors. This is useful as long as you do not let apparent mathematical "certainty" overwhelm your judgment and instincts. Nothing is certain.

Example of using a selection profile: If you are counsel for a med mal permanently damaged juvenile plaintiff seeking a sufficient verdict to pay for home care, you may be tempted to retain a juror who is generous (medium weight in your favor), loves children (medium weight in your favor), is absolutely certain that money is a fair compensation for pain and suffering (high weight in your favor), believes that children belong in their own home (high) and is pretty sure that there is no litigation crisis (medium or low).

You may really want that juror. But your selection profile will spotlight her potentially harmful characteristics: She and her family rely for their health care solely on the agency hospital (high weight against you), she is grateful to

doctors for having saved her son's life (medium weight against you), thinks that maybe high medical verdicts—even though deserved—cause health care costs to rise (medium weight against you), and has a handicapped child of her own (medium to high weight against you because she has never received compensation to help her child).

This is a comparative process. Unless there is an "absolute" weighting (for example, if the woman in the preceding example is a nurse), it does not tell you outright to strike any particular juror. Rather, it helps you place that juror on a comparative hierarchy from good to bad.

Caveat: The fewer challenges you are allotted and the less time the judge allows for voir dire, the higher in importance (and thus the fewer) must be your selection profile items.

Other advantages: Your selection profile has the added advantage of being a check list. You can easily keep track of whether you have asked each juror about every item that you have determined in advance to be of importance.

Your selection profile also saves voir dire time because it helps you determine which areas to cover with each particular juror. You needn't ask every juror every possible question. Just select those particular items that are potentially relevant to each juror.

Is that all there is to it?

No. There are two other considerations: *leaders* and *instinct*.

LEADERS

You need to identify which jurors have leadership qualities. A leader carries more than one juror's worth of influence in deliberations. A single leader can—and often does—turn a jury around.

For this reason, you cannot afford to have a leader whose selection profile characteristics are high negatives or even medium negatives. But you need at least one leader with high or medium positives.

Identifying leaders.

You can identify leaders partly by the way they talk in voir dire: do they talk a lot or do they hang back and wait for others to take the lead? Do they offer their own opinions or just agree with others? Do they express themselves clearly, articulately, and persuasively? Do others seem to agree with them, to like them, and to defer to them?

You can spot leaders by such factors as background and occupation. (For example, doctors and teachers are accustomed to telling other people what to do, and people are accustomed to being told what to do by doctors and teachers.) You can also ask jurors to tell you the circumstances in their lives in which they are regarded as leaders. (For guidance in identifying leaders and understanding their influence, see Chapter 3, pp. 54-55.)

Leaders you don't want.

Leaders with negative selection profile characteristics should be put at the top of your list of jurors to challenge. Get them talking as much as possible because, sooner or later, they may become extreme enough in expressing their negative characteristics to give you grounds for a challenge for cause. For this reason (among others), it is always a mistake to cut off discussion with negative jurors.

Moreover, the more negative their remarks, the more likely it is that other jurors will begin to disagree. The ensuing juror remarks can turn into a kind of inter-juror argument, revealing how these jurors think and interact with each other and which of them might be leaders.

Keeping leaders you want.

Though you cannot control whom your opponent challenges, there are some techniques that may help you "hide" leaders you like from your opponent's challenges.

One way to protect a favorable leader is to question non-leaders (or leaders with mixed positive and negative characteristics) in such a way as to elicit so great a flood of positive attributes for your side that your opponent gets nervous enough to challenge. This leaves your opponent with fewer challenges, reducing the chances that he will challenge your leader.

This method of protecting a favorable leader depends on how the numbers work out. It also forces you to risk losing followers who might be good for your side. But you must weigh that cost against the benefit of having the leader you need to bring the jury to the verdict you want.

Don't try to "hide" a positive leader by curtailing your questioning once you discover her strong positive characteristics. Only by thorough questioning can you be sure that this leader does not also have strong negative characteristics. It is safer to risk losing a possibly favorable leader than it is to gamble on accepting a leader who may not be on your side after all.

INSTINCT

Another tool with which to decide who to challenge is *instinct*. You probably already use instinct. Raleigh attorney John R. Edwards simply asks himself whether he wants to spend time with the juror in question. By asking himself that question, he finds he can put together the whole conglomeration of information he has found out about that juror during voir dire. Raleigh attorney Joseph B. Cheshire V thinks about whether he would want to sit down for dinner with that juror and whether he and the juror would like each other.

Some attorneys just ask themselves if they want to walk into the courtroom every day and see that juror.

To make best use of your instincts, consider how well you and the juror seem to get along with each other. Are you comfortable talking with each other? Is there awkwardness or discomfort between you? Are the channels of communication and trust open or shut?

Such methods of bringing your instincts into play will combine the benefits of your instincts with the value of your selection profile and the information you gather in voir dire. This combination can turn weak instincts strong and make strong instincts extraordinarily reliable.

FINAL CAVEAT:

NEVER DO VOIR DIRE ALONE! No matter how small the case, you need someone *other than you* to take notes. If you have no paralegal or secretary who can take notes, hire an office temp.

You cannot learn about jurors if you don't look at them, and you cannot look at them if you are busy taking notes. Every instant your eyes are not on the jury, you are missing an opportunity to gather valuable information. Your momentary glance at what you are writing is often the very moment that a juror does something revealing.

Moreover, you cannot generate good rapport if you keep looking down to write notes. Note-taking interrupts and can even reverse the rapport-building process. Moreover, jurors are less candid when you sit there like some sort of high inquisitor, writing down everything they say.

So bring someone to voir dire to take notes.

In addition to using a note taker, it is also valuable to use another attorney or a consultant to help monitor jurors and participate in your decisions. If you are a one-person firm and the case is too small for a consultant, call in a favor from an attorney friend and bring him along. Return the favor in kind some other time. When questioning a juror, you need someone to monitor the other jurors as they listen. Their visible reactions can be as revealing as anything they say or do when you are questioning them.

It is important for the jury to see you consult your client about selection decisions. But clients are rarely objective or knowledgeable. They may know if a juror dislikes them, or if they instinctively dislike a juror. But clients rarely have your comprehensive overview of the case and you are the one who has to deal with the jurors—so consult with your client but don't lose control of selection.

These voir dire techniques constitute a methodical way of examining how the important matters in your case might relate to individual prospective jurors. You will eventually want to adapt and tailor these techniques to your own style, but first, master them as given. Before you start altering them, see by experience why each step is important.

Appendix D

"The Artful Lawyer: More Show, Less Tell in Opening Statement"

William Bailey

***TRIAL*, October 1993**

Association of Trial Lawyers of America

Trial Techniques

The Artful Lawyer: More Show, Less Tell in Opening Statement

William S. Bailey

Had Abraham Lincoln been transported by time machine from an 1850s courtroom to its circa 1993 counterpart, he would find little has changed. The basic elements of trial and the formalities surrounding Anglo-American jurisprudence have remained relatively the same for generations. Judges preside in black robes. Courthouse architecture, for the most part, draws inspiration from the past. And—most important—some trial lawyers rely on words alone in arguing their cases. Too many trials are ritualistic and ceremonial—anachronisms in an electronic age.

Isn't it time to use new-age developments in communications and information processing to make a trial come alive for jurors? Jurors, highly motivated though they may be, are outsiders to the court process. Yet they are charged with making difficult decisions, including matters of life and death. Lawyers can help them reach a fair and rational decision by presenting key facts of the case visually. Today, *show* is more effective than *tell*, especially during the opening statement.

Though trial practice gurus differ in their opinions on many things, most of them agree that the opening statement is one of the most important parts of a trial. Thomas Mauet's observations in this regard are representative:

> The opening statement will be your first opportunity to tell the jury what the case on trial is all about. As such, it is a critical part of the trial . . . opening statements often make the difference in the outcome of the case. Studies have shown that jury verdicts are, in the substantial majority of cases, consistent with the initial impressions made [on] the jury during opening statements. As in life generally, the psychological phenomenon of primacy applies, and initial impressions become lasting impressions.[1]

Conventional wisdom about the critical importance of an effective opening statement is backed by impressive statistics. Some studies show that up to 80 percent of jurors make up their minds during opening and do not change them during trial.[2] And, generally, once people form opinions, contradictory information presented later may affect strength of conviction but will not change minds.

The usual opening statement in a case is a throwback to pre-20th-century means of communication. It is mainly dry *talk* about what the evidence will show—with little, if any, visual evidence to pep it up and make a point. Trial practice textbooks frequently describe opening as exclusively an appeal to jurors' ears:

- Painting a picture in the mind's eye through the use of words.[3]
- *Tell* the jury. . . . It is a *statement* . . . . If [the jury] *heard* nothing more . . . .[4]

Any reference to what the jury *sees* or is *shown* in opening statement is an afterthought in many trial practice textbooks and at best usually receives a lukewarm endorsement:

> Exhibits in opening statements are a mixed blessing. On the one hand, they can be an effective tool to make key facts clear for the jury. On the other hand, exhibits can also distract the jurors' attention from you and, once seen, will no longer be new evidence when reused during the trial.[5]

According to a media-based analysis, the opening statement as described above is a throwback to the early days of radio—all talk, with nothing for the eye to see. This is not likely to impress an audience; jurors no longer—if they ever did—spend their evenings listening to the thundering hoofbeats of the Lone Ranger. Lawyers who use radio techniques in opening are wasting their most significant opportunity to persuade jurors who grew up with TV and videos.

Don't Tell Me, Show Me

Twenty-five years ago, Marshall McLuhan offered an analysis of why visual information is more persuasive than verbal. His thoughts still hold true today:

> Most people find it difficult to understand purely verbal concepts. They *suspect* the ear; they don't trust it. In general, we feel more secure when things are *visible*, when we can "see for ourselves." We admonish children, for instance, to "believe only *half* of what they *see*, and nothing of what they *hear*." . . . We employ visual and spatial metaphors for a great many

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everyday expressions. . . . We are so visually biased that we call our wisest men *visionaries* or *seers*.[6]

There is a good reason for most jurors' psychological and cultural bias in favor of visual evidence. It is a much more efficient means of communication than verbal communication, enhancing jurors' ability to follow what is being said. Alan Morrill recognized this nearly 20 years ago:

> With anything more than a simple set of facts involving an intersection collision, it is probably safe to say that following opening statements through words alone, not one juror has a clear picture in his mind as to how the accident occurred. It is a good bet that about half the jury is completely lost, perhaps some of them have a completely erroneous picture created in the mind's eye.[7]

The time is long overdue for fundamental change in the traditional approach to opening statement, one that makes it more visual than verbal. Accomplishing this means that trial lawyers should work with a creative consultant or art director to visualize key points for opening in ways that will inform as well as persuade. The few attorneys who have already taken this approach have experienced dramatic success.[8]

The kinds and format of visual evidence will vary with the proof problems unique to each case. Computer animation may be the key to success in one case and a waste of money in another. A simple storyboard may be more effective in one and a filmed accident reconstruction in another. There are no fixed rules other than that a lawyer should focus on ways to put the case across visually from the moment it comes into the office and should make sure that all visuals are available in time for use in opening statement.

Court Acceptance

Basic instinct tells any trial lawyer that "a picture is worth a thousand words," that an effective visual display can convert a jury to a particular point of view. Conversely, the opposing side sees visual evidence as a potential threat, and correctly so. As a young public defender, I noticed quickly that my opponents had a great interest in even my fairly primitive, homespun trial visuals. Whenever I came into court with an artist's portfolio in addition to a briefcase, I got at least a second look from the prosecutor.

An advocate who intends to use effective visual evidence during opening statement can count on determined opposition from the other side. There will be ***no*** agreement stipulating to the use of visual evidence. A typical response from the opposition comes from a relatively recent case:

> I think we should back up and look at this for a second. This is flat-out bizarre. . . . That is utter off-the-wall stuff. . . . I have never seen anybody in court trying to proceed in such a fashion. . . . This is not part of that framework within the court system . . . . I want it clear that I take literally violent exception to this. . . . He shouldn't be allowed to do [this] in opening statement. . . . That is way beyond the realm of acquainting the jury with what the evidence and issues are. . . . To allow him in opening to bandy these props around as representative of what is out there, I object to.[9]

The earlier discussion about traditional trial ritual does not presuppose that judges oppose the use of innovative and creative visual evidence in opening, or anywhere else in trial. Far from it.

One of the occupational hazards of being a judge is lawyers who start a statement with "Just briefly, Your Honor . . . ." and drone on and on. An intelligent trial judge knows that bored, inattentive jurors do not render quality decisions. Judge Warren Wolfson of Chicago is one of many judges who sees visual evidence as a way to assist jurors:

> I'm a big believer in blow-ups. I think everything ought to be blown up, especially photographs. . . . [Often] [t]he jury hasn't the slightest idea what the lawyer is talking about. Important documents ought to be blown up, or put on slides and projected. Models of the body, when injuries have to be shown, ought to be brought in. Lawyers can't rely on words only. Words don't have the impact of "show and tell." Juries will retain best, and believe best, what they can see and hear at the same time. Most lawyers just don't know how to do that.[10]

In fact, some trial practice textbooks state that judges will be reasonably sympathetic to the use of visual evidence in opening statement: "[E]very effort should be made to employ visual aids during opening statements. Most judges in exercising judicial discretion will permit the use of visual aids if it can be demonstrated in advance that these aids can properly be used and it is counsel's intention to use them during the taking of evidence."[11]

Laying the Foundation

Generally, identifying and authenticating visual evidence for use in any part of the trial, including opening, is straightforward and simple. In both state and federal courts, all that is needed is the testimony of a witness who saw the event or can describe what the visual evidence shows, concluding that it is a reasonable representation of the subject matter.[12] Anyone with firsthand knowledge of the subject of the visual evidence can provide the necessary foundation.[13]

Echoing the sentiments of Judge Wolfson, the higher courts of many states have enthusiastically favored the use of demonstrative evidence at trial. For example, in *Norris v. State of Washington*,[14] the Washington Court of Appeals approved a series of drawings of an accident scene when no photographs were available. Each drawing was identified and authenticated at trial by witnesses who described the accident to the artist. The court approved this use of demonstrative evidence (at trial, including in opening statement) in sweeping terms: "The State's objection seems largely motivated by the novelty of the evidence. Novelty in an exhibit, however, does not make it inadmissible."[15]

The lack of use of visual evidence in opening is not the result of a reluctant judiciary, but rather the lack of imagination on the part of the trial bar.

It is well established that any party in a lawsuit may, in opening, refer to admissible evidence to be presented at trial.[16] The party seeking to admit relevant and properly identified visual evidence has a right to introduce it.[17]

Federal Rule of Evidence 611(a) and its state court counterparts give the trial court broad authority over the mode and order of presenting evidence. The rule requires only that the court's control be "reasonable" and that it serve the general objectives of ascertaining the truth, avoiding needless consumption of time, and protecting witnesses from harassment and embarrassment.[18]

A trial court's discretion to determine the presentation of evidence in specific instances is not limited by Rule 611(a), the purpose of which is only to define general guidelines for the exercise of judicial discretion at trial: "Rule 611 deals with matters that are known virtually by instinct by every experienced trial lawyer and judge."[19]

In addition to the broad grant of discretion to the trial court on the admission of demonstrative evidence generally, appellate decisions are of limited precedental value in this area: "The court's decision invariably turns on the particular facts and circumstances of the individual case, and the trial court is affirmed with little or no discussion in the vast majority of cases."[20]

The trial court's inherent discretion makes careful planning and laying the foundation for all demonstrative evidence essential, particularly when it is sought for use in opening statement. A formal pre-trial admission hearing to allow demonstrative evidence in opening is invaluable.

Invariably, some lawyers will take a casual approach to laying the necessary foundation for visual evidence. There is a pervasive tradition of sloppiness in this regard. Lawyers commonly bring up admissibility questions at trial on an ad hoc basis, often just before the court is ready to bring the jury back from a recess. This approach virtually guarantees a hostile or inattentive reception from the judge.

Also, as discussed previously, if the visual is effective, the opposition will commit anything short of mayhem in urging the judge to keep it out of evidence. Lawyers who get off on the wrong foot with the trial judge for lack of adequate planning may make their opponents' job easy.

By tradition, lawyers are accustomed to filing pre-trial motions in limine to keep out evidence perceived as unfairly prejudicial. A formal motion in this regard is appropriately heard before the jury is impaneled, along with an accompanying brief. The court can then sort out these admissibility questions in a more structured and attentive manner before the pressure of a waiting jury is an issue.

Yet the same lawyer who dutifully files a motion in limine to ***keep out*** evidence rarely thinks to prepare an equivalent pre-trial motion to ***get in*** evidence before opening statement. This is unfortunate, because what lawyers get in before trial is every bit as important as what they keep out, especially where effective opening statement is concerned.

The usual consequence of not setting up a formal pre-trial hearing to lay the foundation for visual evidence is that the court will not permit this evidence to be used in opening, deferring a decision on it until later in the trial. By that point, later may be ***too late*** to persuade the jury, particularly if the opponent has taken the steps necessary to have the visual evidence used in his or her opening statement admitted.

Like the third little pig who built his house of brick, lawyers have to lay the foundation for using visual evidence, brick by brick. Otherwise, a very effective and expensive piece of evidence may remain locked in a briefcase at a time when it could do the lawyer and the client the most good.

Case Study

Holman v. Mullan[21] is instructive on both the procedure for and the possibility of using effective visuals in opening statement. Todd Holman, my client, a 21-year-old college student and gifted athlete, was seriously injured while a passenger in an Audi Fox that was preparing to turn left. An oncoming Honda Acura "T-boned" the Audi, splitting the vehicle in two.

In the ensuing lawsuit, the Acura driver's insurance company made a reasonable settlement based on evidence that the Acura was exceeding the posted speed limit, going 60 mph in a 30 mph zone. However, the Audi driver's insurance company refused to admit fault under the deception doctrine, claiming that the configuration of the road and the lighting on the night of the accident deceived the Audi driver into thinking that the Acura was traveling at a lower speed than it actually was and that a left turn could be made safely.

When boiled down to the most critical element, the liability in *Holman* hinged entirely on what the Audi driver could see as he began his left turn. As he was the disfavored driver under the rules of the road, the jury would be most interested in the question of whether he should have seen the Acura and should have known to yield the right-of-way.

A competent accident reconstructionist and an experienced filmmaker were retained to create a filmed visibility study under conditions similar to those on the night of the accident, using exemplar cars. The resulting 15-second film was extremely damaging to the deception-doctrine defense of the Audi driver. It ***showed*** that he could have seen the Acura clearly from at least three blocks away and never should have attempted the turn.

Once the study re-created the view available to the defendant driver, the decision was made to use this evidence in the opening statement. The traditional view, of course, is that evidence like this "simply isn't allowed" in opening statement. Yet there is nothing in reported cases forbidding it.

A formal pre-trial motion was filed before the trial judge to pre-admit the filmed visibility study as evidence for all purposes, including its use in opening statement. Both the accident reconstruction expert and the filmmaker were scheduled to appear at the pre-trial hearing for foundation purposes, even though they would testify during trial. Although this increased the expert witness budget, the additional money would be well spent if this evidence could be used in opening statement where it would do my client the most good.

The defendant's experts did not challenge the accident reconstruction expert's calculations. The figures were presented in affidavit form to support the findings and conclusions for foundation purposes. This affidavit and the accident reconstructionist's deposition were submitted to the trial judge and relied on by the filmmaker in his testimony at the pre-trial hearing.

The foundation for the visibility study was laid in some detail with a thorough discussion of filming procedures, including the type of camera equipment and type and speed of film, equivalency of weather and lighting conditions, and special circumstances of filming at night.

The defense attorney cross-examined the filmmaker extensively about the technical limits of night photography. He also brought his own witnesses to the pre-trial hearing to challenge the accuracy of the final product.

The pre-trial hearing on admission of this evidence took nearly a day. The court determined that the visibility study was accurate and permitted it to be shown in opening statement. From that point on, the case was over and the defendant knew it.

Jurors saw the video in opening statement and learned through their own eyes that the defendant should not have attempted the left turn in question. They saw the video on two other occasions during the trial, once during the testimony of the accident reconstruction expert and again when the filmmaker appeared before the jury to describe the process of making the visibility studies.

The court also made the video and a TV monitor available to the jury for use

Appendix E

"Objections"

Steven Lubet
Modern Trial Advocacy: Analysis and Practice, Second Edition

— CHAPTER NINE —
Objections

I. MAKING THE RECORD

There is a technical, as well as an artistic, side to trial advocacy. The laws of evidence and procedure govern the manner in which a trial proceeds. It is not sufficient for information to be persuasive and elegant, or even true; it must also be admissible under the law of evidence and presented properly under the rules of trial procedure. The process of bringing and contesting information before the court and jury is called making the record.

Making the record involves a series of steps. Attorneys offer evidence in the form of testimony and exhibits. Some of this evidence may become the subject of objections, in which case the trial judge is called upon to make rulings on admissibility. The admissible evidence is presented before the fact finder. If properly preserved, both the evidence and the objections may eventually be reviewed by an appellate court.

In order to make a record, it is necessary to internalize the rules of evidence and procedure. It is not enough to understand the theory of the hearsay rule; one must also be able to recognize hearsay on an almost instinctual level and to articulate a persuasive objection at virtually any given moment. It is not enough to comprehend the foundation for the admission of a past recollection; it is also necessary to be able to elicit the foundation in a manner that will be persuasive to the trier of fact. In other words, making the record calls for knowledge, judgment, decisiveness, adaptability, and reflexes.

This chapter will discuss the use of objections. The next chapter will cover two related aspects of making a trial record: exhibits and foundations.

Objections are the means by which evidentiary disputes are raised and resolved. Objections may be made to an attorney's questions, to a witness's testimony, to the introduction or use of exhibits,

to a lawyer's demeanor or behavior, and even to the conduct of the judge.

Most of a trial advocate's energy is understandably devoted to the content of her case. What do the witnesses have to say? What facts are available to prove the case? How can the opposition be undermined? Which events are central to the proof? Is it possible for several different stories to be harmonized? A persuasive story rests upon the manner in which facts can be developed, arranged, and presented to the trier of fact. It is equally and sometimes more important however, that the advocate also be well-versed in the technical side of trial advocacy. A well-conceived and tightly constructed story cannot persuade a jury if its crucial elements are not admitted into the record, or if the opposition has had the benefit of using substantial amounts of inadmissible evidence.

II. OBJECTIONS

A. Purpose and Function

1. Use of Objections at Trial

An objection is a request that the court rule on the admissibility of certain testimony or evidence. The purpose of objecting is to prevent the introduction or consideration of inadmissible information. Although the process of objecting has become associated in the popular mind with contentiousness and even hostility, that need not be the case. Our adversary system relies upon opposing attorneys to present evidence and the judge to decide upon its admissibility. An objection, then, is nothing more than a signal to the judge that there is a disagreement between counsel concerning the rules of evidence or procedure. When there are no objections, which is the overwhelming majority of the time, the judge can allow evidence to come into the record without the need for a specific ruling. If we had no process of objecting, the trial judge would have to rule upon every separate answer and item of evidence. Unless the process is abused or misused, trials are actually expedited by the judge's ability to rely upon counsel to object to questionable evidence.

Objections can be made to questions, answers, exhibits, and virtually anything else that occurs during a trial.

An attorney's question may be objectionable because of its form or because it calls for inadmissible evidence. A question is objectionable as to form when it seeks to obtain information in an impermissible way. For example, a leading question on direct examination is

improper because it tells the witness what answer is expected.[1] Even if the answer itself would be admissible, the question is disallowed because of its suggestiveness. Compound questions, vague questions, and argumentative questions, to name a few, are also objectionable as to form.

Conversely, a question phrased in proper form may nonetheless call for inadmissible evidence. The information sought may be irrelevant, privileged, or hearsay. An objection may be made when it is apparent from the question itself that the answer should not be admitted. The question, "What is your religious belief?" is in proper form. Any answer, however, would be inadmissible under most circumstances by virtue of the Federal Rules of Evidence.[2] The question is therefore objectionable.

Even in the absence of an objectionable question, a witness may respond with an inadmissible answer. The answer might volunteer irrelevant information, it might contain unanticipated hearsay, or it might consist entirely of speculation. For example, a direct examiner could ask the perfectly allowable question, "How do you know that the traffic light was red?" only to receive the hearsay reply, "Because someone told me just last week." Opposing counsel would no doubt object to the answer and move that it be stricken from the record.

Finally, objections may be made to anything else that might have an impermissible impact on the trier of fact. A lawyer can object if opposing counsel raises her voice to a witness or approaches the witness in an intimidating manner. Objections can be made to the manner in which exhibits are displayed or to the position of chairs and tables in the courtroom. Even the judge's words and actions are not immune to objection, although it is admittedly awkward to ask the court to rule on the permissibility of its own conduct.

2. Use of Objections Before Trial

It is not always necessary to wait until trial to move for the exclusion of evidence. Motions in limine are available to obtain pretrial rulings on evidence that is potentially so harmful that even mention of it may prejudice the jury. A motion in limine asks the judge to rule that the offending evidence be found inadmissible and that it not be offered or introduced at trial.[3]

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1. Leading questions are discussed in greater detail in Section IV A(1), *infra* at p. 299.

2. Evidence of the beliefs or opinions of a witness on matters of religion is not admissible for the purpose of showing that by reason of their nature his credibility is impaired or enhanced. Rule 610, Federal Rules of Evidence.

A motion in limine can be based on any of the substantive rules of evidence. Note, however, that the motion usually will not be granted merely because the subject evidence is objectionable. An additional showing is usually required that the evidence is so damaging that once it is mentioned a sustained objection at trial will not be sufficient to undo its prejudicial impact.

a. Effect of granting a motion in limine

Once granted, a motion in limine excludes all references to the subject evidence. Not only is the evidence itself disallowed, but counsel may not offer it or refer to it in a question. Evidence excluded in this manner also may not be mentioned during jury selection, opening statements, or closing arguments. In the appropriate situation witnesses may be instructed not to volunteer testimony concerning the excluded evidence.

For example, assume that the plaintiff in a contract action had been convicted of disorderly conduct while participating in a peace demonstration during the 1960s. The conviction is clearly not admissible under the Federal Rules of Evidence.[4] An order granting plaintiff's motion in limine would prevent defense counsel from inquiring about the conviction during the cross examination of the plaintiff. It would also bar mention of the conviction during jury selection, opening statement, and closing argument. Finally, the defense attorney could be required to instruct all of her witnesses to refrain from mentioning the plaintiff's past conviction.

Alternatively, the court might grant only some portion of a motion in limine. The court may exclude some, although not all, of the subject evidence, or could enter an order limiting its use. In the above example, it is conceivable that the judge might rule that the conviction is admissible for impeachment, but only if the plaintiff first offers evidence of his own good character.[5] In that case, the conviction could still not be mentioned during jury selection or opening statement, but it might become admissible once the plaintiff took the stand.

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3. A motion in limine may also be used to obtain an advance ruling that evidence is admissible. With such a ruling in hand counsel can better frame her trial theory, and can also plan witness examinations so as to avoid the possibility of reversible error. Nonetheless, this "reverse" use of the motion in limine is fairly unusual.

4. Rule 609, Federal Rules of Evidence.

5. *See* Rule 404(a)(1), Federal Rules of Evidence.

b. Effect of reserving ruling on a motion in limine

Judges may reserve ruling on motions in limine, as it is often difficult or impossible to determine whether evidence should be excluded until the trial is under way. The admissibility of some evidence may depend upon the foundational testimony that precedes it. In such circumstances the judge might want to delay ruling until the trial evidence is more fully developed.

To prevent prejudice to the moving party, many judges will instruct counsel to refrain from mentioning the subject evidence until the reserved motion can be ruled upon. This will generally require the offering attorney to wait until she believes the foundation has been established, and then to approach the bench for a decision on the motion in limine.

c. Effect of denying a motion in limine

The denial of a motion in limine does not necessarily mean that the subject evidence is absolutely admissible. It may mean only that there are insufficient grounds to take the step of excluding it before the trial begins. Thus, even where a pretrial motion has been denied, an objection to the same evidence at trial might be sustained.

If possible, the court should be asked to clarify the meaning of an order denying a motion in limine. Has the evidence been found admissible, or is it simply too soon to decide?

3. Preservation of the Record on Appeal

Appellate courts typically will not consider issues that were not originally raised in the trial court. The admission of evidence generally cannot be reviewed unless it was the subject of a motion in limine or a timely objection was made at trial.[6] Thus, objections serve not only to alert the trial judge to the need for a ruling, they also define the scope of the evidentiary issues that can be considered on appeal.

B. The Decision to Object

1. The Process of Decision Making

In the heat of trial the decision on whether to object to some item of evidence must usually be made literally on a split-second basis. A question on either direct or cross examination typically lasts less than ten seconds; a long question will go on for no more than twenty

6. *See* Rule 103(a)(1), Federal Rules of Evidence. The only exception is in the case of "plain error," in which case the appellate court can take notice of egregious errors affecting substantive rights, even if they were not brought to the attention of the trial judge. *See* Rule 103(d), Federal Rules of Evidence.

seconds. Yet within that time counsel must recognize, formulate, and evaluate all possible objections. The concentration required is enormous, and there is no opportunity for letup; counsel must pay exquisite attention to every question and every answer, lest some devastating bit of inadmissible evidence sneak its way into the record. There is no room for even the slightest lapse.

The decision-making process consists of three distinct phases. Counsel must first recognize the objectionability of the particular question, answer, or exhibit. This is often the easiest step since many questions simply "sound wrong." In addition, it is often possible to rely upon certain key words and phrases to jog the objection reflex. Questions that use words such as "could," "might," or "possible" commonly call for speculation. Questions that ask about out-of-court statements or conversations must clear the hearsay hurdle.

Following recognition, the next task is to formulate a valid objection. Does the question truly call for speculation, or is it an acceptable lay opinion? Is the out-of-court statement inadmissible hearsay, or does it fall within one of the many exceptions? Even if there is a potentially applicable exception, is it possible to present a counterargument in favor of excluding the evidence? This is the sort of analysis that can fill pages in an appellate opinion or an evidence casebook, but trial counsel must undertake it within the five or ten seconds during which a viable objection can be made.

Finally, counsel must evaluate the tactical situation in order to determine whether the objection is worth making. It is well worth noting that not every valid objection needs to be made. There is little point to objecting if opposing counsel will be able to rectify the problem simply by rephrasing the question or if the information is not ultimately harmful to your case. Moreover, there are often good reasons to refrain from objecting.

2. Reasons Not to Object

a. Jurors' reactions

Objections are tiresome. They interrupt the flow of the evidence, they distract attention from the real issues at hand, and they have an awful tendency to degenerate into posturing and/or whining. It is always possible that the objecting lawyer will lose points with the judge or jury by constantly interrupting the opposition.

It was once widely believed that jurors hate objections and that this alone was reason enough to avoid objecting in all but the most pressing circumstances. More recent thinking on the subject is that

jurors understand the need for lawyers to object and see it as part of counsel's job, so long as it is not overdone. Juror reaction, then, becomes a reason to utilize objections wisely and sparingly, but not to stand in fear of making them at all.

b. Judge's reaction

Fear of losing, however, remains a substantial reason to refrain from objecting. No lawyer can predict with certainty that a judge will agree with his or her objections. A judge may overrule an objection because she misunderstood it, because her knowledge of the law of evidence is inadequate, or because she just wants to move the trial along without interruption. A judge might also overrule an objection because it was meritless, foolish, or contemptuous. Whatever the reason, it hardly enhances counsel's stock to be overruled regularly when making objections. It is therefore necessary to evaluate the risk of losing when deciding whether to object.

Bear in mind, however, that an unmade objection cannot preserve the record for appeal. Only an objection that is presented and overruled can later be considered by the appellate court. Reticence in objecting can therefore result in the waiver of important issues. Fear of losing should never be the sole determining factor in deciding whether to object. It can even be tactically advantageous to make and lose an objection, since this may lay the groundwork for a successful appeal.

c. Opponent's reaction

What goes around comes around. Counsel who objects at every turn will eventually find her own examinations punctuated by the intercessions of the opposing lawyer. This sort of interchange serves no good end and can only detract from the dignity and value of the adversary system.

In a well-prepared trial involving experienced counsel it would not be surprising for hours, even days, to go by without a single objection. When objections are made they are directed at important items of evidence whose admissibility is seriously in doubt. While this standard cannot be achieved in every case, it is one to which we all might aspire.

3. Deciding to Object

The decision to object must be made in reference to your theory of the case. Concerning every potential objection, always ask: Will the exclusion of the evidence contribute to my theory of the case? Unless

the exclusion of the evidence actually advances your theory, there is probably no need to raise an objection.

The principal contribution that an objection can make to your theory of the case is to prevent the admission of truly damaging evidence. Hence the maxim, "Do not object to anything that doesn't hurt you." You can refine the decision even further by asking these two additional questions: Even if the information is harmful, can it be accommodated by other means? Even if the objection is sustained, will the information eventually be admitted after another question or through another witness?

a. Accommodating harmful evidence

Harmful information can often be accommodated through explanation or argument. Indeed, the function of the theory of the case is precisely to anticipate the use of harmful information and to develop a story that both accounts for and devalues it. Consider the case of a plaintiff in a personal injury case being cross examined on the issue of damages. She testified on direct that the injuries to her hand prevented her from engaging in many activities that she previously had enjoyed, including oil painting. The cross examiner, armed with information gained in discovery, has determined to show that plaintiff's inability to paint is of no great value:

QUESTION: You used to engage in oil painting, and now you can't? Correct?

QUESTION: You even considered becoming a professional artist?

QUESTION: You tried to sell your paintings in a local gallery?

QUESTION: But not a single person ever bought one, right?

QUESTION: You even gave up painting several times out of frustration, didn't you?

QUESTION: In fact, just before the accident the gallery owner told you that your paintings could not even be displayed there any longer, isn't that right?

QUESTION: The fact is, you were never any good at all at painting, were you?

Should the plaintiff's counsel have objected to these questions? Her inability to sell her paintings seems irrelevant to her current injuries, since she did not claim loss of income. The gallery owner's statement appears to be hearsay. The parting shot was surely

argumentative. And the purpose of the examination was to damage the plaintiff.

On the other hand, the information can be accommodated. Imagine the plaintiff's own explanation, either during cross examination or on redirect:

ANSWER: I never painted for money. It was just my way of relaxing and enjoying myself.

ANSWER: Being in the gallery was nice, but the real joy came from holding the brush and creating the images.

ANSWER: I suppose I wasn't that good in some people's eyes, but just standing at the easel and creating was enough for me. Now I can never do that again.

Or imagine the final argument of plaintiff's lawyer:

> Maybe my client wasn't the best painter in the world, but it was a hobby that brought her inner peace. It was a way for her to lose the troubles of the day. Even if the paintings were bad, that harmed no one. She seeks damages not from the loss of a profession or job, but from the loss of her enjoyment of life. So what if she was a poor painter? Does that give the defendant the right to crush her hand so that she can no longer even hold a brush? And who knows, perhaps she would have improved. Perhaps she would have been discovered. Now she will never know.

In other words, the plaintiff's theory of damages can accommodate, perhaps even benefit from, the nasty cross examination. Counsel therefore must choose. Is it better to object in the hope of terminating the line of questioning, or is there more to be gained by weaving the cross examination into the plaintiff's own case? There is no definite answer to this question, other than to note that reflexive objection is not always the optimum solution.

b. Eventual admissibility

A further consideration is the eventual admissibility of the information. When a question is improper solely as a matter of form, it can generally be cured simply with rephrasing. An objection, therefore, is quite unlikely to result in the actual exclusion of any evidence. This is particularly true of leading questions on direct examination:

QUESTION: Isn't it true that you had the green light as you approached the intersection?

OBJECTION: Counsel is leading his own witness.

THE COURT: The objection is sustained.

QUESTION: What color was the traffic light as you approached the intersection?

ANSWER: It was green.

In this example the objection to the leading question accomplished nothing in the way of excluding evidence and may actually have emphasized the witness's testimony that the light was green. Counsel would have been just as well off not making it. Of course, the persistent use of leading questions to feed answers to a witness is quite another matter. In those circumstances an objection should almost always be made. The use of an occasional leading question, however, is so easily cured that experienced counsel seldom object.

A variation on this theme occurs when information is objectionable coming from one witness but conceivably admissible if elicited from another. Hearsay provides a good example, as in this direct examination of the defendant driver in an intersection case:

QUESTION: Did you speak to anyone following the accident?

ANSWER: Yes, I spoke to a crossing guard who was standing on the corner.

QUESTION: Did the crossing guard tell you what he saw?

ANSWER: Yes.

QUESTION: What did the crossing guard tell you that he saw?

OBJECTION: Hearsay.[7]

THE COURT: Sustained.

Here, the objecting lawyer has succeeded in keeping the crossing guard's observations out of evidence, but only for the time being. What will happen when the crossing guard testifies?

QUESTION: What is your occupation?

ANSWER: I am a crossing guard.

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7. Note that no objection was made to the earlier question, "Did the crossing guard tell you what he saw?" An objection at that point would have been premature since only the content of the statement will be hearsay. Regarding the timing of objections, see Section II C(1)(c), *infra* at p. 275.

QUESTION: Did you see the accident?

ANSWER: Yes I did.

QUESTION: What did you see?

No objection is possible since the crossing guard will be testifying as to his own direct observations.

Most situations are hardly so clear-cut. The crossing guard may not be available to testify, or he might give testimony that is much less favorable to the defendant. The guard might be subject to impeachment or might suffer a memory lapse. There is no hard and fast rule that counsel should refrain from objecting simply because another witness is available to give unobjectionable testimony. On the other hand, the ultimate admissibility of the information is definitely a factor to be considered in deciding whether to object.

If the harmful information cannot be accommodated and if it is unlikely to be admitted later, then objecting is a no-risk proposition. All other situations call for the exercise of judgment.

4. Planning

We have just cataloged a long list of factors to be considered in deciding whether or not to raise any particular objection. Even in the computer age it is difficult to imagine anyone actually running through all of these factors in the five or so seconds available between question and response. How, then, can full consideration be given to the objection decision?

The answer, as in so much of trial advocacy, lies in planning. Given the scope of modern pretrial discovery, there is no reason to postpone the objection decision until the very moment when the answer is falling from the witness's lips. The general content, if not the precise words, of most important testimony is known to all counsel before the witness ever takes the stand. Most documents and tangible exhibits must be tendered to opposing counsel in advance of trial.

Objection strategy should therefore be planned in the same manner as is direct or cross examination. For each opposition witness, counsel's preparation should include consideration of all possible objections to every reasonably anticipated area of testimony. The potential objections should be weighed against the standards discussed in the above sections, and counsel should come to at least a tentative conclusion as to whether an objection is worth making. The same process should be applied to every expected exhibit and document. It is also necessary to consider the likely content of the opposition's

cross examination of your own witnesses and to determine the value of any possible objections.

The best of planning, of course, will not free counsel from the need to make split-second decisions. The evidence will rarely come in exactly as was expected, and the context of the trial may require last-minute adjustments to strategy and approach. Nonetheless, a good deal of the evidentiary background work can and should be done prior to trial.

C. Making and Meeting Objections

The format for making and meeting objections differs somewhat from state to state and even from courtroom to courtroom, so you will need to tailor your approach to objections to local practice. If in doubt about the requirements in a particular jurisdiction, one should always inquire. What follows here is a generalized description of the majority approach.

1. Making an Objection

The standard method of raising an objection is to stand and state the grounds for the objection:

"Objection, Your Honor, relevance."

"Objection, counsel is leading the witness."

"Your Honor, we object on the ground of hearsay."

"Objection, no foundation."

In a jury trial it may also be advisable to add a descriptive tag line so that the jury will understand the basis of the objection:

"Objection, hearsay, Your Honor. The witness cannot testify to what somebody else said."

"We object to the leading questions; counsel is testifying instead of the witness."

In any event, it is necessary to give the precise basis for the objection in order to preserve the issue for appeal. In most jurisdictions, simply stating "objection" is understood only to raise the ground of relevance. If such a "general objection" is made and overruled, all other possible grounds are waived for appeal.[8] It is also necessary actually to state that you are making an objection. For some reason many attorneys are inclined only to comment on the inadequacy of the evidence, most commonly something like, "Your Honor, I fail to

8. Note, however, that a "general objection" that is sustained may be affirmed on appeal if there is any valid basis for the objection.

see the relevance of counsel's last question." A rebuke from the judge often follows. "It doesn't matter whether or not you see it. Just make an objection if you have one, counsel."

a. Speaking objections

A speaking objection goes beyond the simple state-the-grounds formula described above. Some attorneys find it necessary or fulfilling to launch into an extended discourse on the bases for their objections before allowing the judge to rule or opposing counsel to speak:

> "Objection, Your Honor, that question calls for hearsay. The witness's personal notes constitute an out-of-court statement, even though the witness is present on the stand. They do not qualify either as business records or as past recollection recorded, and in any event there has been no foundation."

While there is no absolute rule against speaking objections, most judges do not like them. Since the judge is often ready to rule as soon as the initial objection is made, speaking objections are seen as time-wasting and laborious. Judges generally consider it their prerogative to request argument and may resent it when counsel fails to wait for the invitation.

b. Repeated objections

It is often necessary to raise the same objection to a number of questions in a row. Perhaps your initial objection was sustained, but your opponent is persistent in attempting to introduce the inadmissible evidence through other means. Perhaps your initial objection was overruled, and you feel bound to protect your record for appeal as opposing counsel asks a series of questions in elaboration. In any event, an awkward feeling inevitably arises when it is necessary to object repeatedly, on the same ground, to question after question.

The least obtrusive way to raise a repeated objection is to say "same objection" at the end of each of opposing counsel's questions. The judge can then repeat her ruling and the trial can proceed in a relatively uninterrupted fashion. If your objections are being sustained, the judge will no doubt tire of reiterating her ruling and will eventually instruct opposing counsel to move on to another line of questioning.

If your "same objections" are being consistently overruled, the judge is likely to tire of them even sooner. At some point she will probably inform you that "I have ruled on that issue, counsel. There is no

need for you to continue to object." Now you will risk the judge's ire if you continue to object, but you also risk waiving an issue on appeal if some future question expands on the theme in a way that was not quite covered by your earlier objections.

The solution to this conundrum, which will often be suggested by the trial judge, is the "standing objection." The theory of the standing objection is that a single objection will be considered to "stand" or apply to an entire line of questioning, without the need for repeated interruptions. The problem with standing objections is that it may be difficult in the future to determine exactly which questions and answers were covered. Although the meaning of the standing objection may be apparent to everyone present in the courtroom, the cold transcript presented to the appellate court may seem to tell an entirely different story. It is for this reason that standing objections are to be avoided if possible.

Should a judge insist that you proceed by way of standing objection, it is imperative that the objection be articulated as clearly as possible. Avoid the following scenario if you can:

THE COURT: Counsel, you may have a standing objection to that line of questioning.

COUNSEL: Thank you, Your Honor.

THE COURT: Ask the next question.

Imagine the dilemma of an appellate court charged with reviewing this record for error. What is the evidentiary basis of this standing objection? How long will it obtain? How should it be interpreted if some of the following questions contain new issues or subtle variations? The appellate court will be confused and unhappy; this is not a record of which counsel can be proud.

The alternative, once the trial judge has informed you that a standing objection looms in your future, is to take matters into your own hands:

THE COURT: Counsel, you may have a standing objection to that line of questioning.

COUNSEL: Thank you, Your Honor. For the record, we object to all further testimony concerning any conversations between the defendant and Ms. Loughlin, including Ms. Loughlin's alleged references to the investigative report. Ms. Loughlin's statements are hearsay and the comments on the content of

the report are double hearsay. Additionally, the secondary evidence concerning the report violates the best evidence rule.

THE COURT: Very well. Ask the next question.

Although not perfect, this record is far better than the one preceding it. No recitation of a standing objection is ambiguity-proof. Counsel must remain alert for nuances in the testimony that require the raising of a new objection.

c. Timing

Having determined what to say when initiating an objection, one must consider when to say it. The general rule is that an objection must be made as soon as it is apparent that it is called for. On the other hand, an objection may be premature if it interrupts an incomplete question or if it anticipates testimony that may or may not be given. To be timely, an objection must come neither too early nor too late.

Most objections to questions should be held until the examiner has had the opportunity to complete the question. Not only is it rude to interrupt, but the final version may turn out not to be objectionable. On a more pragmatic level, many judges will refuse to rule on an objection until the question has been completed. An interrupting objection, then, merely insures that the question will be stated twice, thereby emphasizing its objectionable information or implications.

There are times, however, when it is necessary to interrupt the questioner. Some questions are objectionable not because of what they will elicit, but because of what they assert. A question may contain a damaging suggestion or proposition which, once heard by the jury, cannot be wholly remedied by objection. Such questions must be interrupted in order to cut off the interrogator's inadmissible statement. For example, a cross examiner may be about to question a witness about an inadmissible criminal conviction. Imagine this scenario:

QUESTION: Isn't it true that you were convicted of the crime of selling heroin?

OBJECTION: Objection, Your Honor, that was a juvenile offense. It is inadmissible under Rule 609(d).

THE COURT: Sustained.

Although the objection was sustained,[9] the jury has already heard the inadmissible, though nonetheless damning, truth about the witness. It would obviously have been far more effective to cut off the question earlier:

QUESTION: Isn't it true that you were con—

OBJECTION: Objection, Your Honor. Counsel is seeking information that is prohibited under Rule 609(d).

THE COURT: Sustained.[10]

Even if it does not interrupt a question, an objection may be premature if the examination has not yet reached the point where the inadmissibility of the answer has become certain. An objection must be made immediately before the inadmissible answer, not in anticipation of it. It is not uncommon for a diligent and eager lawyer to object one question too soon, as in the following example:

QUESTION: Did you have a conversation with Ms. Loughlin?

OBJECTION: Objection, Your Honor, hearsay.

THE COURT: Overruled. At this point the only question is whether a conversation occurred. The witness may answer.

ANSWER: Yes, I had a conversation with Ms. Loughlin.

QUESTION: Did Ms. Loughlin tell you anything about the investigation report?

OBJECTION: Hearsay, Your Honor.

THE COURT: Still too soon, counsel. Proceed.

ANSWER: Yes, she did.

QUESTION: What did Ms. Loughlin tell you about the investigation report?

OBJECTION: Objection on the ground of hearsay.

THE COURT: Sustained.

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9. In reality, it is most likely that this information would have been the subject of a pretrial motion in limine. For the purposes of this illustration, assume that for some reason no pretrial motions were made.

10. If the judge does anything other than immediately sustain the objection, the objecting lawyer will want to approach the bench for argument.

The first two objections were overruled because under the hearsay rule only the content of the out-of-court statement is inadmissible. The fact of the conversation is admissible evidence.

Timing the objections to questions is relatively easy. Often, however, a witness will respond to a seemingly proper question with a wholly inadmissible response. The timing in these situations is trickier since, by definition, the answer was not foreshadowed by the question. The general rule is that an objection must be made as soon as the inadmissible nature of the answer becomes apparent. This necessarily means interrupting the witness. For example:

QUESTION: When did you begin your investigation of the defendant's financial situation?

ANSWER: I began the investigation as soon as I received an anonymous letter charging that—

OBJECTION: We object on the grounds of hearsay and foundation.

THE COURT: Sustained.

It will not do to allow the witness to finish the answer because by then the jury would have heard the testimony and the harm would be done.

Unfortunately, it is not always possible to recognize and respond to inadmissible testimony before it happens. Counsel may be momentarily distracted or may suffer from rusty reflexes. And some witnesses, either innocently or by design, just have a way of slipping improper testimony into the record. When this happens counsel's only recourse is the motion to strike:

QUESTION: Are you the comptroller of the defendant corporation?

ANSWER: The only thing I knew about skimming funds came through the rumor mill.

OBJECTION: Objection, hearsay. We move to strike that answer.

THE COURT: Sustained. The answer will be stricken from the record.[11]

11. Note that the "stricken" testimony will not actually be deleted from the transcript. For the purpose of review on appeal it is necessary that all of the witness's testimony, as well as all of the rulings of the court and the arguments of counsel, appear on the transcript. Thus, the testimony is stricken only in the legal sense, not literally.

In a jury trial it is also important that the judge instruct the jury to disregard the inadmissible answer:

QUESTION: Will Your Honor please instruct the jury to disregard that last answer?

THE COURT: Yes, certainly. Ladies and gentlemen, you are to disregard the answer that the witness just gave. Proceed.

While this sort of curative instruction is hardly a satisfying remedy, it is the best that can be done under the circumstances. In many jurisdictions the request for a curative instruction is a necessary predicate to raising the issue on appeal.

d. Witness voir dire

The basis for an objection may not always be apparent from the question or even the answer. Counsel may have access to information that is not yet in the record but which negates the admissibility of some part of a witness's testimony. This information can be brought to the judge's attention through witness voir dire. The term *voir dire* is derived from "law French" which was once in use in English courts; it means "speak the truth."

In the context of witness examination, voir dire refers to a limited cross examination for the purpose of determining the admissibility of evidence. The voir dire examination interrupts the direct and gives the opposing lawyer a chance to bring out additional facts that bear directly on the admissibility of some part of the balance of the testimony. Counsel who wishes to conduct voir dire must ask permission of the judge:

QUESTION: Whose signature is on that document?

ANSWER: It appears to be the defendant's.

OBJECTION: Your Honor, we object to that testimony and ask leave to conduct a limited voir dire of the witness.

THE COURT: You may proceed with voir dire of the witness.

OBJECTION: You did not see the document being signed, did you?

ANSWER: No.

OBJECTION: You have never seen the defendant sign his name, have you?

ANSWER: No.

OBJECTION: You have never received any signed correspondence from the defendant, have you?

ANSWER: No.

OBJECTION: Your Honor, it is obvious that the witness cannot identify the signature from her own personal knowledge. We renew our objection to the testimony and move to strike the previous answer.

Voir dire examination is most commonly utilized with regard to the qualifications of an expert witness or the foundation for a document or exhibit, but it can be used in other situations as well. Note that following voir dire the offering attorney is entitled to conduct additional examination aimed at reestablishing the admissibility of the evidence.

2. Responding to Objections

Many judges like to rule on objections as soon as they hear them, without even a response from opposing counsel. Believing that they know the law and have been attentive to the proceedings, judges often consider it a waste of time to entertain argument. In truth, a majority of evidentiary objections present no great problems in jurisprudence. A judge can sustain or overrule a good many objections without recourse to counsel's views.

It is common, therefore, for opposing counsel to make no response to an objection unless invited to do so by the judge:

QUESTION: What did the police officer say to you?

OBJECTION: Objection, hearsay.

THE COURT: What about it, counsel?

QUESTION: It is not hearsay because . . .

The judge might also signal the desire for a response nonverbally, perhaps by looking at counsel or by nodding in counsel's direction. It is important to be on the alert for such gestures, since failure to respond might be interpreted by the judge as waiver.

a. Requesting argument

Many objections will not be readily susceptible of summary disposition because they raise subtle or complex legal issues. Aspects of an objection may escape the judge or may require consideration of additional information that is not apparent from the record. In these circumstances counsel cannot rely on an invitation to argue from the judge and will need to inform the court, as politely as possible, that

argument is necessary. It is preferable to do this before the judge has ruled, if that can be accomplished without interrupting. An effective signal is to stand while the objection is being made, in order to alert the judge that argument is desired.

Despite counsel's best efforts, the judge may rule on a disputed objection without input from the opposing side. If the point is important, counsel cannot be shy about letting the judge know that there is another side to the objection:

QUESTION: What did the police officer say to you?

OBJECTION: Objection, hearsay.

THE COURT: Sustained.

QUESTION: Your Honor, we would like to be heard on that.

THE COURT: Very well, what do you have to say?

QUESTION: The statement falls under the "present sense impression" exception.

THE COURT: I see. Overruled. The witness may answer.

b. Specific responses

The key to responding to any objection is specificity. A judge who has agreed to listen to argument on an objection has indicated that he is persuadable. A good argument will result in the admission of the evidence only if it provides the judge with a good reason to overrule the objection. Tell the judge exactly why the proffered evidence is admissible. Some lawyers, for reasons known only to themselves, respond to objections by repeating the evidence and exhorting the judge to admit it. The following scenario is not at all unusual:

COUNSEL: What did the defendant do immediately after the accident?

ANSWER: He began yelling at his eight-year-old son.

OBJECTION: Objection. The defendant's relationship with his son is irrelevant.

THE COURT: It does seem irrelevant. What do you have to say, counsel?

COUNSEL: It is very relevant, Your Honor. It shows that he was yelling at his child.

This response communicates very little to the judge. What is the probative value of the defendant's conduct? Note how much more effective it is when counsel explains why the evidence is being offered to the court:

COUNSEL: What did the defendant do immediately after the accident?

ANSWER: He began yelling at his eight-year-old son.

OBJECTION: Objection. The defendant's relationship with his son is irrelevant.

THE COURT: It does seem irrelevant. What do you have to say, counsel?

COUNSEL: The defendant's anger at his son tends to show that he was distracted by the child just before the accident. It goes directly to negligence, Your Honor.

The judge may or may not agree with your assessment of the case, but at least he will have the benefit of your analysis.

c. Limited admissibility

Evidence may be inadmissible for some purposes yet admissible for others. When responding to objections it is extremely important to advise the judge of the precise purpose for which the evidence is offered.

For example, evidence that a dangerous condition has been repaired is generally inadmissible to prove negligence.[12] Counsel cannot argue to the jury, "Of course the owner of the car took inadequate care of the automobile; he had his brakes repaired just two days after the accident." On the other hand, evidence of the repair is admissible to prove ownership of the automobile. Counsel can argue, "The defendant denies that he was responsible for the upkeep of the car, but he was the one who ordered and paid for the repair of the brakes just two days after the accident."

With this dichotomy in mind, consider the possible objections and responses in the cross examination of the defendant:

COUNSEL: Didn't you have your brakes repaired just two days after the accident?

12. *See* Rule 407, Federal Rules of Evidence.

OBJECTION: Objection, Your Honor, this testimony violates Rule 407.

THE COURT: What do you have to say, counsel?

COUNSEL: We are offering it only to prove ownership and control, Your Honor.

THE COURT: The evidence will be received, but only for that limited purpose. Ladies and gentlemen of the jury, you are to consider this evidence only for the purpose of showing ownership and control of the automobile. You must not consider it as proof of any negligence on the part of the defendant.

If the court does not immediately give a limiting instruction, one should be requested by the attorney whose objection was overruled.

d. Conditional offers

The admissibility of certain testimony, particularly with regard to relevance, may not always be immediately clear. This is a frequent occurrence on cross examination since counsel may be utilizing the technique of indirection[13] or otherwise attempting to avoid being too obvious about the direction of the cross. Nor is such subtlety unknown on direct examination. In either case, the ultimate admissibility of the evidence might depend upon other testimony to be developed through later witnesses.

In these circumstances counsel may respond to an objection by making a "conditional offer." This is done either by promising to "tie it up later" or, preferably, by explaining to the court the nature of the evidence that is expected to follow. For example:

COUNSEL: Isn't it true that you had an important meeting scheduled for the morning of the accident?

OBJECTION: Objection. The witness's business schedule is not relevant.

THE COURT: What is the relevance of that inquiry, counsel?

COUNSEL: We intend to introduce evidence that the defendant had a meeting scheduled with a prospective client, that he was already late for the meeting at the time of the accident, and that he stood to lose a great deal of money if he didn't arrive on time.

13. *See* Chapter Five, Section V B(3), *supra* at p. 111.

The question is therefore directly relevant to show that he was speeding and inattentive.[14]

THE COURT: Based on that representation I will allow the testimony, subject to a motion to strike if you don't tie it up.

A conditional offer is always subject to the actual production of the later evidence. The testimony can, and should, be stricken if counsel's representations are not fulfilled.[15]

e. Anticipating objections

Being specific is a challenge. When you are interrupted in mid-examination by a maddening objection, the precise, and hopefully devastating, reply may not spring spontaneously to mind. It is therefore essential to plan for likely objections as part of the overall preparation for trial.

Planning for relevance objections should be nearly automatic since it is really part and parcel of developing your theory of the case. Recall that every question you ask, indeed every item of evidence you put forward, should be calculated to advance your theory of the case. By definition, then, you will have considered the probative value of each question before the trial ever starts. To respond to a relevance objection, you will really need to do nothing more than explain to the judge why you offered the evidence in the first place. In other words, "The testimony is relevant, Your Honor, because it contributes 'X' to my theory of the case."

Other objections may not be as easy to anticipate. At a minimum, however, trial preparation should include an evaluation of the admissibility of every tangible object, document, or other exhibit that you intend to offer into evidence or use for demonstrative purposes. It is similarly necessary to do an "admissibility check" on all testimony involving conversations, telephone calls, meetings, and other out-of-court statements. Finally, potential objections should be considered for all opinions, conclusions, calculations, and characterizations you expect to elicit. Why is the evidence relevant? What is the necessary foundation for its authenticity? Does the witness have sufficient personal knowledge? Is there a hearsay problem? Might it be privileged?

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14. Depending upon the sensitivity of the information, it would be appropriate to request that the argument on such an objection be conducted outside the presence of the witness.

15. *See* Rule 104(b), Federal Rules of Evidence.

f. Judicious non-responses

It is not necessary to fight to the death over every objection. Counsel can frequently avoid an objection by rephrasing the offending question, either before or after the judge rules.

Since the precise language of a question is seldom of vital importance, it should be possible to circumnavigate virtually any objection as to form. Leading questions, compound questions, and vague questions can all be cured. Even if your original question was perfectly fine, you may be able to move the trial along, and earn the gratitude of judge and jury, by posing the same inquiry in different words.

Other objections that can be undercut through rephrasing include personal knowledge, foundation, and even relevance. For example:

QUESTION: Did the plaintiff follow his doctor's advice?

OBJECTION: Objection. Lack of personal knowledge.

QUESTION: Let me put it this way. Did the plaintiff say anything to you about his doctor's advice?

ANSWER: Yes.

QUESTION: What did he say?

ANSWER: He said that he would rather risk the consequences than stay in bed all day.

Note that in this scenario the examination was made stronger by rephrasing the question in response to the objection.

Making and meeting objections involves a certain amount of gamesmanship. No lawyer likes to be seen as an evidentiary naif or pushover. From time to time it may be tactically important to stand behind a question, if only to establish your mastery of the rules. Another alternative is to rephrase a question without saying so. In the above example the attorney neither withdrew the question nor overtly rephrased it, but rather said, "Let me put it this way." Problem solved.

D. Arguing Objections

1. Where

As an initial matter, lawyers usually argue objections from wherever they happen to be standing or sitting when the issue first arises. Even in a jury trial most objections are resolved without anyone moving from their location. The language of objecting is arcane, and in

most circumstances it does no harm to have the discussion in the presence of the jury.

Occasionally, however, it is important that the jury not hear the content of the argument. It may be necessary to recite the expected testimony so the judge can rule on the objection, or to refer to other evidence that has not yet been admitted. In these circumstances either side may request that the argument take place out of the presence of the jury.

The most common way of insulating the jury from the attorneys' argument is for counsel to approach the bench and hold, in whispered tones, a sidebar conference. Alternatively, the jury can be excused from the courtroom while counsel argue. This latter approach is used fairly infrequently, and only in the case of extended arguments, since it is cumbersome and time-consuming to shuffle the jury in and out of the courtroom.

A sidebar can be called by the court or requested by either the party making or the party responding to the objection. Typically, the lawyer whose case is most likely to be harmed by disclosures in the course of the argument requests the sidebar. Ethical counsel, however, will volunteer the need for a sidebar whenever she realizes that her own argument may prejudice the other side. The opposition's failure to ask for argument outside of the jury's presence should not be taken as license to make statements containing potentially inadmissible evidence. Unfortunately, this practice is all too common. It has no place in a trial conducted by professionals.

2. How

Arguments on objections should be conducted as a conversation between counsel and the court. The general scenario is for objecting counsel to argue first, followed by the attorney who offered the evidence, and concluding with a reply from the objector. In practice, however, the format is often much less formal, with the judge asking questions and counsel responding.

If there is one signal rule in arguing objections, it is that counsel should not argue with, or even address, each other. It is the judge who will make the ruling and the judge who must be convinced. It is ineffective, distracting, and even insulting to the court when counsel turn to each other to argue their objections:

PLAINTIFF'S COUNSEL: Your Honor, our objection to the testimony is lack of foundation.

DEFENDANT'S COUNSEL: What more foundation could you want, counselor?

PLAINTIFF'S COUNSEL: Well, you could start with a basis for personal knowledge.

DEFENDANT'S COUNSEL: He already testified that he is the comptroller. Isn't that enough for you?

No matter how foolish, trite, or easily disposed of the other side's position seems, avoid speaking directly to opposing counsel. All of your arguments should be made to the court. If, in the course of an argument, you are ever tempted to turn to opposing counsel, remember that she is being paid to disagree with you. There should be nothing in the world that you can say to make her alter her position. Her job is to take the other side of the issue. The judge, by contrast, is employed to keep an open mind. The judge can be persuaded, but only if you take the trouble to address the court directly.

Your evidentiary arguments will be most convincing if they are delivered with a tone of firm conviction. When you argue an objection you are asking the judge to do something—either to admit or exclude evidence. The wrong decision can lead to reversal, a matter of at least passing professional concern to the judge. Your argument, then, should give the judge a reason for ruling in your favor. Emotive histrionics will be counterproductive. The sort of diffidence or lassitude often displayed by attorneys when arguing to the bench is also unlikely to succeed. A judge, despite the robe, is human. If you do not believe in your argument, why should she?

Finally, counsel must be certain actually to obtain a ruling on every objection. Judges may often prefer to avoid ruling on objections, either because they didn't hear them, don't understand them, or simply because they want to reduce the possibility of being reversed on appeal. In some courtrooms this practice has been raised to the level of a fine art:

OBJECTION: Objection, Your Honor, relevance.

THE COURT: Rephrase the question, counselor.

Or,

OBJECTION: Objection, counsel is leading the witness.

THE COURT: The question is leading. Proceed.

Or,

OBJECTION: We object on the ground of hearsay.

THE COURT: The witness cannot testify to what someone else said. Ask another question.

In none of the above examples did the judge actually rule on the objection. If evidence is received or withheld on the basis of these non-rulings, counsel will have a difficult time making an argument for reversal on appeal. The court never actually ordered anyone to do anything; it was all left in the hands of counsel.

The remedy to this sort of decision by default is simply to insist politely on a ruling:

"Before we proceed, Your Honor, I have an objection pending."

"Has the court ruled on counsel's objection?"

"May we please have a ruling, Your Honor?"

Here and there a judge may be chagrined, but few will ever be offended by an attorney's request that evidence either be admitted or not. A clear record is in everyone's best interest.

E. Once the Judge Has Ruled

The judge's ruling on an objection is not necessarily the end of that particular discourse. Counsel must remain alert to protect and develop the record. Both the proponent of the evidence (offering lawyer) and the opponent (objecting lawyer) may have more yet to do.

1. Objection Overruled

a. Proponent's job

The proponent's job when an objection is overruled is to ensure that the evidence actually makes its way into the record. In other words, the proponent must make sure that the witness answers the question that the judge has just ruled to be permissible. The following is an all-too-frequent scenario:

QUESTION: After the accident, what did the crossing guard say to you?

OBJECTION: Objection, Your Honor, the question calls for hearsay.

QUESTION: Your Honor, it has already been established that the crossing guard observed the accident immediately before making the declaration, so it

qualifies as either an excited utterance or a present sense impression.

THE COURT: Yes, I think there is a hearsay exception there. Overruled.

QUESTION: What is the next thing that you did?

ANSWER: I went to a telephone and dialed 911.

Despite the court's ruling, the witness was never given an opportunity to answer the original question. The proponent, apparently flushed with victory, just went on to another subject.

A variation on this theme occurs when the witness's answer has been interrupted or when the arguments on the objection overlap the testimony. Moreover, even when the witness was able to get an answer out, the import of the testimony may have been drowned out by the subsequent wrangling over the objection.

Some lawyers utilize the dubious tactic of having the court reporter read back the prior question and answer (if there was one) following an overruled objection. While this approach is technically correct, it has very little forensic merit. Presumably, the lawyer has prepared an examination that is designed for maximum impact. Counsel knows which words to emphasize and knows how the witness is likely to respond. Why would an attorney choose to forego the persuasive force of her own examination in favor of turning it over to the inevitably monotonous reading of a court reporter? It is the lawyer, not the stenographer, who has been retained to represent the client.

Following an overruled objection, the proponent's safest course is to repeat the question, and to be sure to get a clear answer from the witness.

b. Opponent's job

The opponent's job following an overruled objection is to stay alert to the possibility of excluding all or some of the offending evidence.

In the first instance the opponent of the evidence should not withdraw an objection. Many lawyers, perhaps out of embarrassment or obsequiousness, seem to think that they can gain points with the trial judge by withdrawing an objection once it has been overruled. In fact, the opposite is probably true. Having already taken the court's time by making and arguing an objection, one can only convey indecision or lack of seriousness by withdrawing it immediately

thereafter. Even more to the point, withdrawing an objection has the effect of waiving the issue for appeal.

In any event, once an objection has been overruled the objecting lawyer must continue to scrutinize the subsequent testimony. Perhaps the witness will not testify in the manner that was promised by the proponent of the evidence in her argument to the court. For example:

QUESTION: After the accident, what did the crossing guard say to you?

OBJECTION: Objection, Your Honor, the question calls for hearsay.

QUESTION: Your Honor, it qualifies as either an excited utterance or a present sense impression.

THE COURT: Yes, I think there is a hearsay exception there. Overruled.

ANSWER: She said that she didn't really see what happened, but that it looked as though . . .

OBJECTION: Your Honor, I renew my objection. If the witness didn't really see the accident then she can't have a present sense impression.

THE COURT: Yes. The objection will be sustained on those grounds.

Alternatively, other grounds for objection may become clear in the course of the testimony, or perhaps the witness will begin volunteering evidence that is inadmissible for some additional reason. In the above scenario counsel could also have objected on the ground that the declarant's statement ("it looked as though . . .") was speculative.

2. Objection Sustained

a. Proponent's job

A sustained objection means that the proponent of the evidence has been denied the opportunity to place the testimony or exhibit into the record. This ruling leaves the proponent with two tasks.

i. Offer of proof

The proponent's first task is to protect the record by making an offer of proof. When a witness is not allowed to testify, the record is silent as to the content of the evidence. An appellate court reviewing

the record, however, must know the content of the omitted material in order to determine whether the judge's ruling was reversible error. The offer of proof is the means by which counsel can place into the record a description of the excluded testimony[16] so that the right to an effective appeal may be preserved.[17]An offer of proof also gives the trial court an opportunity to reconsider its ruling on the basis of a more complete description of the excluded evidence.

There are three generally accepted ways to present an offer of proof. The first method is to excuse the jury and proceed with the examination of the witness. This approach has the obvious benefit of accuracy since the witness's actual testimony will be preserved. It is also time-consuming and somewhat awkward, and for those reasons it is only employed in exceptional circumstances.

The most frequently utilized method of presenting an offer of proof is for counsel to summarize the excluded testimony. For example:

QUESTION: What did the crossing guard say to you immediately after the accident?

OBJECTION: Hearsay, Your Honor.

THE COURT: Sustained.

QUESTION: May I make an offer of proof?

THE COURT: Certainly. Proceed.

QUESTION: If the witness were allowed to testify, he would state that the crossing guard made the following statement to him: "I saw the fire truck and heard the siren. All of the traffic stopped except for the red car in the left lane, which just ran right into the back of the blue car without even slowing down."

THE COURT: Very well. The ruling stands. Ask another question.

Although certainly time-efficient, the summarization method has its drawbacks. One problem is that it is very easy to leave out crucial information. In the above scenario, for example, the offer of proof contains nothing to show that the crossing guard's statement would

16. When a proffered exhibit, as opposed to testimony, is not admitted, it usually remains part of the record as an exhibit "for identification" as opposed to an exhibit "in evidence." Thus, exhibits can generally be reviewed by an appellate court without the need for an offer of proof.

17. Rule 103(a)(2), Federal Rules of Evidence.

qualify under an exception to the hearsay rule.[18] A further problem is that enterprising and less than scrupulous lawyers have been known to pad their summaries with "testimony" far more favorable than the witness ever would have produced.

The third approach to offers of proof is the submission to the court of witness statements, reports, or deposition transcripts. This method can have the benefit of both thoroughness and brevity, as follows:

> "Your Honor, we submit as an offer of proof pages 12-21 of the witness's deposition, which we have marked for identification as Plaintiff's Exhibit 8."

Or,

> "Your Honor, this witness gave a written statement to Officer Lucas, which has been marked as Defendant's Exhibit 11. If we were allowed to proceed the witness would testify to the facts contained in that statement, which we present as an offer of proof."

This method is used relatively infrequently, however, due at least in part to the difficulty of assembling the right written materials at exactly the right time.

ii. Keep trying

The proponent's second task in the face of a sustained objection is to keep trying to have the evidence admitted. When a judge sustains an objection, the ruling usually applies only to the specific question (or answer) and grounds that were then before the court. Unless the judge says so explicitly, the ruling does not extend to the ultimate admissibility of the underlying evidence. In other words, a sustained objection says only that "the evidence cannot be admitted based on the testimony and arguments heard so far." It does not say that "the evidence cannot ever be admitted no matter what you do." Counsel generally has the option to offer the evidence through other means.

These "other means" may consist of nothing more than rephrasing a question. Any objection as to form—leading, compound, vague, argumentative—can be cured by altering the language of the inquiry. Leading questions on direct examination can easily be restated:

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18. *See* Rules 803(1) and (2), Federal Rules of Evidence.

QUESTION: You had the green light when the defendant's car hit yours, didn't you?

OBJECTION: Objection, leading.

THE COURT: Sustained.

QUESTION: What color was your light when the defendant's car hit yours?

ANSWER: It was green.

Objections are frequently sustained not because of the form of the question but because of some missing predicate in the testimony. Objections to foundation can be cured by eliciting additional foundation. Objections to a witness's lack of personal knowledge can be remedied with further questions showing the basis of the witness's information. Relevance objections can be overcome through continued questioning aimed at demonstrating the probative value of the original question. In the following cross examination the witness is the defendant in an intersection accident case:

QUESTION: Immediately after the accident you started yelling at your twelve-year-old son, didn't you?

OBJECTION: Objection, relevance.

THE COURT: Sustained.

QUESTION: Well, your twelve-year-old son was in the car at the time of the accident, wasn't he?

ANSWER: Yes.

QUESTION: He was sitting in the front seat?

ANSWER: Yes, he was.

QUESTION: He had a "boom box" with him, didn't he?

ANSWER: He did.

QUESTION: And there was a "heavy metal" tape in the boom box?

ANSWER: I guess that is what you call it.

QUESTION: That music can be awfully loud, can't it?

ANSWER: I suppose so.

QUESTION: Most adults find it extremely annoying, don't they?

ANSWER: I couldn't really say.

QUESTION: Are you aware that the police report says that the boom box was still playing in your front seat when they arrived at the scene?

ANSWER: I remember something like that.

QUESTION: And immediately after the accident you yelled at your son, didn't you?

OBJECTION: Same objection.

QUESTION: Your Honor, I believe we have established the likelihood that the defendant was distracted by his son's music. Yelling at the child is probative on that issue.

THE COURT: Yes, I see your point. Overruled.

The same approach can work for hearsay objections. Additional facts can often be established that will qualify a statement for an exception to the hearsay rule. Moreover, out-of-court statements may sometimes be recast in the form of conduct or observations. In the following example a police officer has just testified on direct examination that she received a radio dispatch that a crime had been committed:

QUESTION: What was the content of the radio bulletin from the dispatcher?

OBJECTION: Objection, hearsay.

THE COURT: Sustained.

QUESTION: What did you do immediately after receiving the alert?

ANSWER: I drove to the corner of Grand Avenue and State Street.

QUESTION: What did you do there?

ANSWER: I began looking for a suspect wearing glasses and a white lab jacket.

The effect of the sustained hearsay objection was avoided by continuing the examination on the admissible subject of the witness's actions, as opposed to the inadmissible subject of the dispatcher's out-of-court statement.

It is not always possible to overcome a sustained objection. Some testimony will be flatly inadmissible no matter how many approaches counsel attempts. On the other hand, there are often numerous routes to admissibility, and a sustained objection usually closes off only one. Keep trying.

b. Opponent's job

When an objection is sustained the opponent of the evidence has been successful. This should bring satisfaction to the objector, and in some cases even rejoicing, but it is never a reason to rest on your laurels. The very next question may ask for the identical evidence, in which case an additional objection must be made. A sustained objection will be a temporary victory indeed if the proponent of the evidence succeeds in having it admitted later in the witness's testimony. This is not uncommon. Successful objections can come undone as soon as the objector relaxes vigilance:

QUESTION: Who told you to begin your financial investigation?

ANSWER: I received an anonymous note charging that—

OBJECTION: Objection, hearsay.

THE COURT: Sustained.

QUESTION: What caused you to begin investigating?

ANSWER: There was a charge that money had been skimmed from one of the trust accounts.

QUESTION: How did you learn of the charge?

ANSWER: I received a note.

The opponent of the evidence in this case let down her guard. When the first hearsay objection was successful she allowed her attention to lapse. She therefore failed to notice that the identical testimony was being introduced as the "cause" of the investigation. The information, of course, is no less hearsay (and no less anonymous) the second time around. A second objection should have been made.

The cardinal rule when your objection is sustained is don't fall asleep.

3. Evidence Admitted for a Limited Purpose

If the evidence is admitted for a limited purpose, the opponent's job is to ask for a limiting instruction that explains the nature of the court's ruling. Most judges give such an instruction as a matter of

course. Counsel may occasionally want to forego the limiting instruction, on the theory that it will only call attention to the harmful evidence.

4. Theory Reevaluation

Rulings on objections govern the flow of evidence at trial. The availability of evidence forms the underpinning of every attorney's theory of the case. Theory planning, in turn, involves calculated predictions as to the admissibility of evidence. It may be, therefore, that the court's ruling on a particularly important objection will require counsel to reevaluate her theory of the case.

Evidentiary rulings must be understood in the context of the entire case. They are not merely passing successes or failures; they can be crucial turning points in the progress of the case. If an essential item of evidence is excluded, or if some controversial proof is admitted, counsel may have to switch theories, or abandon a claim or defense, even if this occurs in mid-trial.

In some instances the effect of an evidentiary ruling may be only to strengthen or weaken your case. If the court excludes some testimony of one of your witnesses, you might be able to proceed as planned but with a lesser volume of evidence. Recall the fire engine/intersection case that we have been using as an example. The plaintiff's theory was that the defendant caused the accident because he was hurrying to a business meeting for which he was already late. Assume that the court, for whatever reason, sustained an objection to testimony that the defendant was seen rushing from his home that morning with his tie undone and a coffee cup in his hand. This ruling diminishes the proof available to the plaintiff, but so long as other evidence is available, the "hurrying to work" theory can remain intact.

Other missing testimony might vitiate entirely one of your claims. Return to the fire engine case and assume now that an objection was sustained to evidence that the defendant had declined to have his brakes repaired despite a mechanic's advice to the contrary. Following this ruling the entire claim of negligent maintenance will probably have to be scrapped. Plaintiff's counsel will be in trouble indeed if she does not have a back-up theory available.

Theory alterations cannot be well made on the spur of the moment. As a consequence, trial preparation must always take into consideration the possible effects of evidentiary rulings. It is not enough to plan to make objections. Counsel must go further to determine the impact on her theory if the objection is overruled and the evidence is

admitted. By the same token, it is not sufficient to anticipate one's response to the opposition's objections. It is also necessary to plan conceivable theory adaptations in the event that those objections are sustained.

III. ETHICS AND OBJECTIONS

Ethical issues frequently arise in the context of making and meeting objections. Because the objecting process is one of the most confrontational aspects of the trial, it often tests counsel's reserves of good will, civility, restraint, and sense of fair play. The three most common problems are discussed below.

A. Asking Objectionable Questions

As we have discussed above, assessing the likely admissibility of evidence is an essential component of trial preparation. There is no question that counsel may offer any evidence that she believes is either clearly or probably admissible. What about evidence that is probably inadmissible? Is it ethical to offer such testimony in the hope that either opposing counsel will fail to object or that the judge will make an erroneous ruling?

It is ethical to offer any evidence over which there is a reasonable evidentiary dispute. Our adversary system calls upon each attorney to make out the best case possible, and relies upon the judge to rule on disputed issues of law. Valuable evidence should not be preemptively excluded on the basis of counsel's assessment, so long as there is a reasonable basis in the law for its admission.

As we have seen, an attorney is usually wise to refrain from objecting to every objectionable question or answer. This raises the possibility that opposing counsel may choose not to object to testimony even if its admissibility is open to debate. That decision is the opposition's to make, and there is no need for an attorney to save them from having to make it.

By the same token, the judge is the arbiter of the law. If her evaluation of admissibility is different from counsel's, then the judge is correct, at least until the matter reaches an appellate court.[19] This is not a novel concept. Boswell reported that Dr. Johnson took the same position with regard to arguing a case which he knew to be weak:

19. There may be purely tactical reasons to abstain from offering proof of questionable admissibility. If the trial judge admits the evidence over objection, and counsel relies on it in winning her case, that same evidence may later become the basis for reversal on appeal.

> Sir, you do not know it to be good or bad till the Judge determines it. * * * An argument which does not convince yourself, may convince the Judge to whom you urge it: And if it does convince him, why, then, Sir, you are wrong and he is right.[20]

This principle does not, however, relieve counsel of all responsibility to cull inadmissible evidence from the case. A corollary to counsel's right to offer evidence for which there is a reasonable basis is the obligation to refrain from offering evidence for which there is no reasonable basis. As stated in the Model Rules of Professional Conduct, a lawyer shall not

> [I]n trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence . . .[21]

In other words, it is unethical to offer evidence knowing that there is no reasonable basis for its admission. Even though opposing counsel might neglect to object, and even though the court might err in its ruling, the adversary system does not extend so far as to allow the intentional use of improper evidence. Indeed, one of the justifications for the adversary system is precisely that counsel can be relied upon to perform this minimum level of self-policing.

When does counsel have a reasonable belief as to the admissibility of evidence? This determination lies within the thought processes of the individual lawyer. For this reason it is unlikely that any single proffer would ever result in discipline, although repeated efforts to offer clearly inadmissible evidence could lead to sanctions in an extreme case.

The test of ethical conduct, however, cannot be found in the likelihood of punishment. An appropriate rule, therefore, is to consider it improper to offer evidence that cannot be supported by an articulatable theory of admissibility. Counsel should be able to complete, with specific and recognizable legal arguments, the sentence that begins, "This evidence is admissible because . . . ." If the only conclusion for the sentence is "Because it helps my case," then there is not a reasonable basis for the offer.

Finally, it is unethical to attempt to use the information contained in questions as a substitute for testimony that cannot be obtained. Some lawyers apparently believe that the idea of zealous

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20. 2 Boswell, *The Life of Johnson* 47 (Hill Ed. 1887).

21. Rule 3.4(e), Model Rules of Professional Conduct.

advocacy allows them to slip information before a jury by asserting it in a question, knowing full well that the witness will not be allowed to answer. The usual scenario is something as follows:

LAWYER: Isn't it true that you were once fired from a job for being drunk?

OBJECTION: Objection, relevance.

LAWYER: I withdraw the question. (*Sotto voce*: Who cares about the ruling? I never expected to get it in, but now the jury knows that the witness is a drunk.)

This conduct, even if the information is true, is absolutely unethical. Testimony is to come from witnesses, with admissibility ruled upon by the court. It subverts the very purpose of an adversary trial when lawyers abuse their right to question witnesses in order to slip inadmissible evidence before the jury.

B. Making Questionable Objections

The same general analysis applies to the use of objections as it does to the offer of evidence. Counsel need not be positive that an objection will be sustained but must only believe that there is a reasonable basis for making it. Again, under the adversary system it is up to the judge to decide whether to admit the evidence.

The license to make questionable objections is available only if counsel is truly interested in excluding the subject evidence. That is, an attorney may make any reasonable or plausible objection, but only so long as the purpose of the objection is to obtain a ruling on the evidence. As we will see in the following section, objections may also be employed for a variety of ulterior purposes, most of which are unethical.

C. Making "Tactical" Objections

Many lawyers, and more than a few trial advocacy texts, tout the use of so-called "tactical" objections. Since an objection is the only means by which one lawyer can interrupt the examination of another, it is suggested that objections should occasionally be made to "break up" the flow of a successful examination. An objection can throw the opposing lawyer off stride, or give the witness a rest, or distract the jury from the content of the testimony. This advice is usually tempered with the admonition that there must always be some evidentiary basis for the objection, but the real message is that

an objection may be used for any purpose whatsoever so long as you can make it with a straight face.

This view is unfortunate. It amounts to nothing more than the unprincipled use of objections for a wholly improper purpose. No judge would allow a lawyer to object on the ground that the opposition's examination is going too well. The fact that disruption can be accomplished *sub silentio* does not justify it. The same is true of other "tactical" uses of objections. It is unethical to use a speaking objection to communicate with the jury or to suggest testimony to a witness.

The tactical use of objections is widespread and seldom punished. The use of "colorable" objections to accomplish impermissible goals can insulate a lawyer from discipline, but it does not make the practice right.[22] The "true exclusion" standard being urged here may well be unenforceable by judges; it is virtually impossible to evaluate a lawyer's thought process to determine the underlying reason for any particular objection. The standard is, however, attainable by any lawyer who is committed to practice in good faith.

IV. A SHORT LIST OF COMMON OBJECTIONS

A complete discussion of evidentiary objections is beyond the scope of this book. The following list of some frequently made objections (and responses) is intended only as a reference or guide, not as a substitute for a thorough knowledge of evidence and procedure.

This section provides a brief description of the grounds for each objection followed by an equally brief statement of some possible responses. Where appropriate, citations are made to the Federal Rules of Evidence (FRE).

A. Objections to the Form of the Question (or Answer)

1. Leading Question

A leading question suggests or contains its own answer. Leading questions are objectionable on direct examination. They are permitted on cross examination. *See* FRE 611.

Responses. The question is preliminary, foundational, directing the witness's attention, or refreshing the witness's recollection. The

22. Racial or religious discrimination can also be accomplished, at least on a small scale, through undetectable means. One can often find an arguable excuse for bad actions. In this context it is easily recognizable that hiding one's motivation does not justify the result.

witness is very old, very young, infirm, adverse, or hostile. Leading questions can most often be rephrased in non-leading form.

2. Compound Question

A compound question contains two separate inquiries that are not necessarily susceptible of a single answer. For example, "Wasn't the fire engine driving in the left lane and flashing its lights?"

Responses. Dual inquiries are permissible if the question seeks to establish a relationship between two facts or events. For example, "Didn't he move forward and then reach into his pocket?" Other than to establish a relationship, compound questions are objectionable and should be rephrased.

3. Vague Question

A question is vague if it is incomprehensible, or incomplete, or if any answer will necessarily be ambiguous. For example, the question, "When do you leave your house in the morning?" is vague since it does not specify the day of the week to which it refers.

Responses. A question is not vague if the judge understands it. Many judges will ask the witness whether he or she understands the question. Unless the precise wording is important, it is often easiest to rephrase a "vague" question.

4. Argumentative Question

An argumentative question asks the witness to accept the examiner's summary, inference, or conclusion rather than to agree with the existence (or nonexistence) of a fact. Questions can be made more or less argumentative depending upon the tone of voice of the examiner.

Responses. Treat the objection as a relevance issue and explain its probative value to the court: "Your Honor, it goes to prove . . . ." (It will not be persuasive to say, "Your Honor, I am not arguing." It might be persuasive to explain the non-argumentative point that you are trying to make.) Alternatively, make no response, but wait to see if the judge thinks that the question is argumentative. If so, rephrase the question.

5. Narratives

Witnesses are required to testify in the form of question and answer. This requirement insures that opposing counsel will have the opportunity to frame objections to questions before the answer is given. A narrative answer is one which proceeds at some length in the absence of questions. An answer that is more than a few sentences

long can usually be classified as a narrative. A narrative question is one that calls for a narrative answer, such as, "Tell us everything that you did on July 14." Objections can be made both to narrative questions and narrative answers.

*Response*s. The best response is usually to ask another question that will break up the narrative. Note that expert witnesses are often allowed to testify in narrative fashion since technical explanations cannot be given easily in question-and-answer format. Even then, however, it is usually more persuasive to interject questions to break up big answers.

6. Asked and Answered

An attorney is not entitled to repeat questions and answers. Once an inquiry has been "asked and answered," further repetition is objectionable. Variations on a theme, however, are permissible, so long as the identical information is not endlessly repeated. The asked and answered rule does not preclude inquiring on cross examination into subjects that were covered fully on direct. Nor does it prevent asking identical questions of different witnesses. (Judges do, however, have the inherent power to exclude cumulative testimony. *See* FRE 611(a).)

Responses. If the question has not been asked and answered, counsel can point out to the judge the manner in which it differs from the earlier testimony. Otherwise, it is best to rephrase the question so as to vary the exact information sought.

7. Assuming Facts Not in Evidence

A question, usually on cross examination, is objectionable if it includes as a predicate a statement of fact that has not been proven. The reason for this objection is that the question is unfair; it cannot be answered without conceding the unproven assumption. Consider, for example, the following question: "You left your home so late that you only had fifteen minutes to get to your office." If the time of the witness's departure was not previously established, this question assumes a fact not in evidence. The witness cannot answer yes to the main question (fifteen minutes to get to the office) without implicitly conceding the unproven predicate.

Responses. A question assumes facts not in evidence only when it utilizes an introductory predicate as the basis for another inquiry. Simple, one-part cross examination questions do not need to be based upon facts that are already in evidence. For example, it would be proper to ask a witness, "Didn't you leave home late that morning?"

whether or not there had already been evidence as to the time of the witness's departure. As a consequence of misunderstanding this distinction, "facts not in evidence" objections are often erroneously made to perfectly good cross examination questions. If the objection is well taken, most questions can easily be divided in two.

8. Non-responsive Answers

It was once hornbook law that only the attorney who asked the question could object to a non-responsive answer. The theory for this limitation was that opposing counsel had no valid objection so long as the content of the answer complied with the rules of evidence. The more modern view is that opposing counsel can object if all, or some part, of an answer is unresponsive to the question, since counsel is entitled to insist that the examination proceed in question-and-answer format. Jurisdictions that adhere to the traditional view may still recognize an objection that the witness is "volunteering" or that there is "no question pending."

Responses. Ask another question.

B. Substantive Objections

1. Hearsay

The Federal Rules of Evidence define hearsay as "[A] statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." FRE 801(c). Thus, any out-of-court statement, including the witness's own previous statement, is potentially hearsay. Whenever a witness testifies, or is asked to testify, about what she or someone else said in the past, the statement should be subjected to hearsay analysis. Statements are not hearsay if they are offered for a purpose other than to "prove the truth of the matter asserted." For example, consider the statement, "I warned him that his brakes needed work." This statement would be hearsay if offered to prove that the brakes were indeed defective. On the other hand, it would not be hearsay if offered to prove that the driver had notice of the condition of the brakes and was therefore negligent in not having them repaired. There are also numerous exceptions to the hearsay rule.

Responses. Out-of-court statements are admissible if they are not hearsay or if they fall within one of the exceptions to the hearsay rule.

In addition to statements that are not offered for their truth, the Federal Rules of Evidence define two other types of statements as

non-hearsay. The witness's own previous statement is not hearsay if (A) it was given under oath and it is inconsistent with the current testimony;[23] or (B) it is consistent with the current testimony and it is offered to rebut a charge of recent fabrication;[24] or (C) it is a statement of past identification. *See* FRE 801(d)(1). In addition, an admission of a party opponent is defined as non-hearsay, if offered against that party. FRE 801(D)(2).

Some of the more frequently encountered exceptions to the hearsay rule are as follows:

Present Sense Impression. A statement describing an event made while the declarant is observing it. For example, "Look, there goes the President." FRE 803(1).

Excited Utterance. A statement relating to a startling event made while under the stress of excitement caused by the event. For example, "A piece of plaster fell from the roof, and it just missed me." FRE 803(2).

State of Mind. A statement of the declarant's mental state or condition. For example, "He said that he was so mad he couldn't see straight." FRE 803(3).

Past Recollection Recorded. A memorandum or record of a matter about which the witness once had knowledge but which she has since forgotten. The record must have been made by the witness when the events were fresh in the witness's mind and must be shown to have been accurate when made. FRE 803(5).

Business Records. The business records exception applies to the records of any regularly conducted activity. To qualify as an exception to the hearsay rule the record must have been made at or near the time of the transaction by a person with knowledge or transmitted from a person with knowledge. It must have been made and kept in the ordinary course of business. The foundation for a business record must be laid by the custodian of the record or by some other qualified witness. FRE 803(6).

Reputation as to Character. Evidence of a person's reputation for truth and veracity is an exception to the hearsay rule. Note that there are restrictions other than hearsay on the admissibility of character evidence. FRE 803(21). *See also* FRE 404, 405.

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23. Regarding the use of prior inconsistent statements for impeachment, see Chapter Six, Section II, *supra* at p. 160.

24. Regarding the use of prior consistent statements for rehabilitation, see Chapter Seven, Section V B(2), *supra* at p. 214.

Prior Testimony. Testimony given at a different proceeding, or in deposition, qualifies for this exception if (1) the testimony was given under oath; (2) the adverse party had an opportunity to cross examine; and (3) the witness is currently unavailable. FRE 804(b)(1).

Dying Declaration. A statement by a dying person as to the cause or circumstances of what he or she believed to be impending death. Admissible only in homicide prosecutions or civil cases. FRE 804(b)(2).

Statement Against Interest. A statement so contrary to the declarant's pecuniary, proprietary, or penal interest that no reasonable person would have made it unless it were true. The declarant must be unavailable, and certain other limitations apply in criminal cases. FRE 804(b)(3).

Catch All Exception. Other hearsay statements may be admitted if they contain sufficient circumstantial guarantees of trustworthiness. The declarant must be unavailable, and advance notice must be given to the adverse party. FRE 804(b)(5).

2. Irrelevant

Evidence is irrelevant if it does not make any fact of consequence to the case more or less probable. Evidence can be irrelevant if it proves nothing or if it tends to prove something that does not matter. FRE 401, 402.

Responses. Explain the relevance of the testimony.

3. Unfair Prejudice

Relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. Note that evidence cannot be excluded merely because it is prejudicial; by definition, all relevant evidence must be prejudicial to some party. Rather, the objection only obtains if the testimony has little probative value and it is unfairly prejudicial. The classic example is a lurid and explicit photograph of an injured crime victim offered to prove some fact of slight relevance, such as the clothing that the victim was wearing. The availability of other means to establish the same facts will also be considered by the court. FRE 403.

Responses. Most judges are hesitant to exclude evidence on this basis. A measured explanation of the probative value of the testimony is the best response.

4. Improper Character Evidence, Generally

Character evidence is generally not admissible to prove that a person acted in conformity with his or her character. For example, a defendant's past burglaries cannot be offered as proof of a current charge of burglary. A driver's past accidents cannot be offered as proof of current negligence. FRE 404(a).

Responses. A criminal defendant may offer proof of good character, which the prosecution may then rebut. FRE 404 (a)(1).

Past crimes and bad acts may be offered to prove motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake. FRE 404(b).

5. Improper Character Evidence, Conviction of Crime

As noted above, the commission, and even the conviction, of past crimes is not admissible to prove current guilt.

The credibility of a witness who takes the stand and testifies, however, may be impeached on the basis of a prior criminal conviction, but only if the following requirements are satisfied: The crime must have been either (1) a felony, or (2) one which involved dishonesty or false statement, regardless of punishment. With certain exceptions, the evidence is not admissible unless it occurred within the last ten years. Juvenile adjudications are generally not admissible. FRE 609.

Note that the impeachment is generally limited to the fact of conviction, the name of the crime, and the sentence received. The details and events that comprised the crime are generally inadmissible.

Responses. If the crime was not a felony the conviction may still be admissible if it involved dishonesty. If the conviction is more than ten years old it may still be admissible if the court determines that its probative value, supported by specific facts and circumstances, substantially outweighs its prejudicial effect. FRE 609.

6. Improper Character Evidence, Untruthfulness

As noted above, the past bad acts of a person may not be offered as proof that he or she committed similar acts. Specific instances of conduct are admissible for the limited purpose of attacking or supporting credibility. A witness may therefore be cross examined concerning past bad acts only if they reflect upon truthfulness or untruthfulness. Note, however, that such bad acts (other than

conviction of a crime) may not be proved by extrinsic evidence. The cross examiner is stuck with the witness's answer. FRE 608(b).

Responses. Explain the manner in which the witness's past bad acts are probative of untruthfulness.

7. Improper Character Evidence, Reputation

Reputation evidence is admissible only with regard to an individual's character for truthfulness or untruthfulness. Moreover, evidence of a truthful character is admissible only after the character of the witness has been attacked. FRE 608(a).

Responses. Explain the manner in which the reputation evidence is probative of truthfulness or untruthfulness.

8. Lack of Personal Knowledge

Witnesses (other than experts) must testify from personal knowledge, which is generally defined as sensory perception. A witness's lack of personal knowledge may be obvious from the questioning, may be inherent in the testimony, or may be developed by questioning on voir dire. FRE 602.

Responses. Ask further questions that establish the witness's personal knowledge.

9. Improper Lay Opinion

Lay witnesses (nonexperts) are generally precluded from testifying as to opinions, conclusions, or inferences. FRE 701.

Responses. Lay witnesses may testify to opinions or inferences if they are rationally based upon the perception of the witness. Common lay opinions include estimates of speed, distance, value, height, time, duration, and temperature. Lay witnesses are also commonly allowed to testify as to the mood, sanity, demeanor, sobriety, or tone of voice of another person.

10. Speculation or Conjecture

Witnesses may not be asked to speculate or guess. Such questions are often phrased as hypotheticals in a form such as, "What would have happened if . . . ."

Responses. Witnesses are permitted to make reasonable estimates rationally based upon perception.

11. Authenticity

Exhibits must be authenticated before they may be admitted. Authenticity refers to adequate proof that the exhibit actually is what it seems or purports to be. Virtually all documents and tangible

objects must be authenticated. Since exhibits are authenticated by laying a foundation, objections may be raised on the ground of either authenticity or foundation. This subject is discussed in greater detail in Chapter Ten.

Responses. Ask additional questions that establish authenticity.

12. Lack of Foundation

Nearly all evidence, other than a witness's direct observation of events, requires some sort of predicate foundation for admissibility. An objection to lack of foundation requires the judge to make a preliminary ruling as to the admissibility of the evidence. FRE 104. The evidentiary foundations vary widely. For example, the foundation for the business records exception to the hearsay rule includes evidence that the records were made and kept in the ordinary course of business. The foundation for the introduction of certain scientific evidence requires the establishment of a chain of custody. The following list includes some, though by no means all, of the sorts of evidence that require special foundations for admissibility: voice identifications, telephone conversations, writings, business records, the existence of a privilege, dying declarations, photographs, scientific tests, expert and lay opinions, and many more. This subject is discussed in greater detail in Chapter Ten.

Responses. Ask additional questions that lay the necessary foundation.

13. Best Evidence

The "best evidence" or "original document" rule refers to the common law requirement that copies or secondary evidence of writings could not be admitted into evidence unless the absence of the original could be explained. Under modern practice, most jurisdictions have significantly expanded upon the circumstances in which duplicates and other secondary evidence may be admitted.

Under the Federal Rules of Evidence, "duplicates" are usually admissible to the same extent as originals. Duplicates include carbons, photocopies, photographs, duplicate printouts, or any other copies that are made by "techniques which accurately reproduce the original." FRE 1001-1003.

Other secondary evidence, such as oral testimony as to the contents of a document, is admissible only if the original has been lost or destroyed, is unavailable through judicial process, or if it is in the exclusive possession of the opposing party. FRE 1004.

Responses. Ask additional questions demonstrating either that the item offered is a duplicate or that the original is unavailable.

14. Privilege

Numerous privileges may operate to exclude otherwise admissible evidence. Among the most common are attorney-client, physician-patient, marital, clergy, psychotherapist-patient, and a number of others that exist either by statute or at common law. Each privilege has its own foundation and its own set of exceptions. FRE 501 did not change the common law privileges, but note that state statutory privileges may not obtain in federal actions.

Responses. Virtually all privileges are subject to some exceptions, which vary from jurisdiction to jurisdiction.

15. Liability Insurance

Evidence that a person carried liability insurance is not admissible on the issue of negligence. FRE 411. This exclusion is necessary because it is generally assumed that juries will be promiscuous in awarding judgments that they know will ultimately be paid by insurance companies. The improper mention of liability insurance may be considered so prejudicial as to warrant a mistrial.

Responses. Evidence of liability insurance may be admissible on some issue other than negligence, such as proof of agency, ownership, control, or bias or prejudice of a witness. FRE 411.

16. Subsequent Remedial Measures

Evidence of subsequent repair or other remedial measures is not admissible to prove negligence or other culpable conduct. FRE 405. The primary rationale for this rule is that parties should not be discouraged from remedying dangerous conditions and should not have to choose between undertaking repairs and creating proof of their own liability.

Responses. Subsequent remedial measures may be offered to prove ownership, control, or feasibility of precautionary measures, if controverted. FRE 407. Evidence of subsequent repair may also be admissible in strict liability cases, as opposed to negligence cases.

17. Settlement Offers

Offers of compromise or settlement are not admissible to prove or disprove liability. Statements made during settlement negotiations are also inadmissible. FRE 408.

Responses. Statements made during settlement discussions may be admissible to prove bias or prejudice of a witness or to negate a contention of undue delay. FRE 408.

Appendix F

"Effective Closing Arguments in Civil Trials"

Leonard Ring

***TRIAL*, October 1993**

Association of Trial Lawyers of America

Trial Techniques

Effective Closing Arguments in Civil Trials

Leonard M. Ring

Not all are cut out to be trial lawyers. And fewer still are destined to become great trial lawyers. But there are tried and true techniques that can enhance even the inexperienced attorney's closing arguments.

Technique, of course, is not the same as style. Style is personal, and attorneys should never mimic another's mannerisms or way of speaking. Be yourself. Technique refers to methods that can be learned from others and adapted to your style.

Some techniques are so basic they do not require discussion. Be serious and sincere. Be courteous, but do not be too friendly with opposing counsel. Maintain good eye contact with jurors and stand an appropriate distance from them. Do not use big words. Thank the jury from the outset, and impress upon them their responsibility as the conscience of the community. Anticipate the defenses and discuss them first, thus taking the wind out of your opponent's sails.

Other techniques are not so intuitive.

Start with the Jury

Closing arguments do not exist in a vacuum. Persuasion begins when the prospective jurors enter the courtroom. Find out if they are predisposed to a defense verdict or adverse to awarding a lot of money. In cases involving serious injuries you need to know whether a juror could give a verdict in excess of a million dollars. Don't ask, "Could you award $20 million or $10 million?" In fact, if asked, jurors who might have given that amount may say, "No."

If you talk about $4 million or $5 million, a juror may say, "That's a lot of money." Say, "I know it is. That's a lot of money for you and me. I just want to know if the evidence and the law support such damages, could you sign a verdict for that kind of money?" The juror will probably say, "Well, yes, I guess I could." That same juror will sign a verdict for much more if you prove your client is entitled to it.

Also in voir dire, find out whether prospective jurors will identify with the evidence supporting the plaintiff's issues. For example, with respect to damages, the plaintiff may no longer be able to enjoy hiking, golf, or travel. Jurors' attitudes toward recreational activities provide insight as to whether they will be sympathetic to the plaintiff's losses.

Select the Evidence

At trial, have the treating physicians and the plaintiff's friends and relatives testify about the plaintiff's disabilities, not the plaintiff. Then, in closing argument, draw attention only to key aspects of this testimony. Where defense witnesses have corroborated this testimony, tie it in so the jury knows the issue is not in dispute. Too often, lawyers go through the testimony of each witness in closing. Instead, pick out the significant points of a few key witnesses.

Do not let plaintiffs gripe about their conditions. Most plaintiffs say, when asked, that they are "fine." The more apparent the injury, the better. You do not need to comment on this in your closing. If your opponent focuses on what the plaintiff said, this gives you leeway to comment on it in rebuttal.

In serious injury cases, try to keep the plaintiff out of the courtroom during closing argument. Jurors find it difficult to look at the victim, and they will appreciate being sheltered from that emotional pressure.

Discuss the Applicable Law

It is important to review the applicable law. While the instructions on the law are for the court, it is proper to explain to jurors the law that the court will give them to use in deciding the case. Tell or read them the charge the court will give them before they retire to deliberate.

In one case I tried, a young woman suffered extensive brain damage after being struck by a taxicab that was traveling along a private hospital road. The taxi carried only $100,000 in insurance coverage. We charged in a suit against the hospital that the road lacked proper signs and crosswalks from the visitors' parking lot to the hospital entrance. The hospital had provided stop signs and speed bumps on the road from the doctors' parking lot on the other side of the building. I said,

> It was the duty of the hospital to exercise ordinary care to keep this property reasonably safe for use by pedestrians . . . by the plaintiff. In other words, it was their duty to be free from negligence. And in that respect, they owe the same duty as every other landowner. This is what they're doing: They're operating a facility. This has nothing to do with the function as a hospital.

Leonard M. Ring is head of Leonard M. Ring and Associates in Chicago. He is a former president of ATLA, the Illinois Trial Lawyers Association, the Illinois Appellate Lawyers Association, and Trial Lawyers for Public Justice.

> So their duty was to provide a reasonably safe place, to keep the property reasonably safe for pedestrians walking to and from the visitors' parking lot. Just as they kept it reasonably safe on the other side [the doctors' parking lot].
>
> All it would have taken was the cost of a stop sign and chopping down a half dozen trees.

You must specifically explain the burden of proof. Jurors have to understand the plaintiff's burden. Do this in voir dire. In the closing, where warranted, contrast the difference between the plaintiff's burden in a civil case (preponderance of the evidence) and in a criminal case (reasonable doubt), which is what most people see on television.

In many states, the phrase "preponderance of the evidence" is no longer used in civil cases. In Illinois, for example, the test is "more probably true than not." But in either case, if your style permits, be graphic. Use your hands to demonstrate the slight tipping of the scales of justice in favor of the plaintiff --to explain that this is enough.

Develop the Whole-Person Concept

The late Moe Levine formulated the thesis that you cannot injure part of a person without injuring the whole person. Internalizing this concept is very important:

> A headache does not just affect the head. It affects the whole person. Similarly, a sprained ankle and a splinter in the finger affect the whole person.
>
> You do not sleep at night as well because of pain and you do not feel well the next day . . . and your whole body changes as a result.[1]

Develop this thesis throughout the trial and focus on it during closing. Laborers who lose legs may not only be unable to earn a living, but may also be unable to do their share of household chores or fish, run, and play with their children. A person who has been brain damaged may never again experience love or the joys of family life.

Pride and dignity are components of the whole person. A young associate in my office tried a case where a third-year apprentice ironworker had slipped and fallen off a roof at a steel mill. He was unable to continue working as an ironworker, so he became an insurance salesman. He earned more as a salesman than he would have earned as an ironworker.

Proving liability was difficult, and some might think that damages would be compromised because there was no lost income. But the plaintiff's father and uncles were ironworkers, and the plaintiff's dream was to follow in their footsteps. My associate convincingly argued that the plaintiff had wrongly been denied his right to pursue his lifelong ambition and that this loss was a significant element of damages. He obtained a more than satisfactory verdict.

Defense lawyers like to tell jurors that it is natural for them to have sympathy for the plaintiff, saying, "I, too, have sympathy for her. But you must leave sympathy behind in reaching a verdict."

Try to keep the plaintiff out of the courtroom during closing argument.

This argument is appealing, but it should not be a stumbling block for plaintiff's counsel. Stress that the plaintiff is not looking for sympathy. Say, "The plaintiff is seeking full, fair, and just compensation for her injuries. She has received sympathy since the day of her injury. Everyone will give her sympathy. Only you can give her money to compensate her for the loss she suffered."

In the case I tried for the young woman who suffered extensive brain damage after being struck by a taxicab, I prepared the jury to bring back a fair award with the following argument:

> If we had a person with a leg off below the knee, you would not, in this day and age, think that $1,000,000 was too much. Or not reasonable. If it was off at the hip, you would not think $2,000,000 was unreasonable. If the person lost both legs, $3,000,000 to $4,000,000 would not be unreasonable.
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> Well, Lynn's loss is worse. She still has her limbs. She can use them. The imbalance problems are tolerable. But she hasn't got full use of her brain. The part that makes everything else work.
>
> I submit to you that if you gave $5,000,000 for "disability," it would be reasonable. Some may think it should be more.

Some skilled trial lawyers compare loss of physical abilities to loss of physical objects such as a prize thoroughbred or a valuable painting. The lawyers remind jurors that no one would have any trouble assessing large damages for the loss of valuable properties like these.

All jurors want to reach a verdict they can be proud of. Inspire them to reach this peak by stressing that anything less than full justice is part injustice.

Guide the Jury with Analogies

It has been said that analogies are the most powerful form of argument.[2] They are especially persuasive in closing arguments to juries for two reasons. First, they get the jury's attention. Second, jurors are challenged to test the analogies' appropriateness to the case. Once jurors have reasoned the problem through for themselves, they will hold their conclusion more firmly than any conclusion you tell them to reach.

One example of a good analogy comes from Craig Spangenberg, a Cleveland attorney. In a trial where acceptance of circumstantial evidence was a big part of the case, he used this analogy:

> This reminds me of my father reading *Robinson Crusoe* to me when I was a little boy. Remember when Robinson Crusoe was on the island for such a long time all alone? One morning he went down to the beach and there was a footprint in the sand. Knowing that someone else was on the island, he was so overcome with emotion, he fainted.
>
> And why did he faint? Did he see a man? He woke to find Friday standing beside him, who was to be his friend on the island, but he didn't see Friday. Did he see a foot? No. He saw a footprint. That is, he saw marks in the sand, the kind of marks that are made by a human foot. He saw circumstantial evidence. But it was true, it was valid, it was compelling, as it would be to all of you. We live with it all of our lives. So let's look at the facts of this case—for those tracks that prove the truth.[3]

Not only is this a good story about circumstantial evidence, but, as James McElhaney, a great teacher of trial advocacy, analyzed,

> It signals to the jury that this is a man who loves and reveres his father or his memory. It demonstrates the sort of basic values that make us accept that lawyer as a decent, credible person. It follows . . . that we are more likely to accept what this lawyer says is true.[4]

Use Understatement

Moe Levine probably gave the greatest example of effective use of understatement in a closing. He tried a case involving a boy who lost both arms.

I said to the jury that I could spend a good deal of time talking to them about what the loss of two arms meant to a human being, but I thought this would be an affront to them, since they are human beings and all they need do is think about all of the things that they could do and how many things they could not do without arms.

"And so, I am not talking about it, jurors, but I would like to tell you that I went to lunch with him. You know, he eats like a dog."

That was my total summation. There was no need of more.[5]

Moe's closing took guts. And very few cases allow for such understatement. But his point is well-taken. What the jury imagines can, in the right case, be more graphic and effective than anything you can tell them. Rhetorical questions like "What else could we expect him to do?" or "Do you think that's *fair*?" can be highly effective for the same reason.

If you have used a day-in-the-life film during the trial, understatement in closing argument may be especially important. The same is true if plaintiffs can demonstrate their disabilities. I once asked a plaintiff who had lost three fingers on each hand to unbutton his shirt *in front of the jury*. It seemed to take forever. In my closing, I did not have to highlight the plaintiff's severe physical difficulties.

When calculating damages, it is important to involve the jury. Use a blackboard or posterboard when discussing each element of allowable damages. Write down each figure you believe has been proven for each element. Then, add the total for the jury. This is invaluable. While you do this, watch the jurors; some will always be writing down the figures with you. Getting jurors involved in the exercise makes them a part of it. As with analogies, those jurors who are "with you" will have the figures to argue the damages.

Specifically explain the burden of proof.

Better still is a technique I learned inadvertently while trying a case on behalf of a 42-year-old attorney who suffered massive brain damage. During my closing argument on damages, I realized I did not have a list of the figures for special damages, including lost earnings and past and future medical expenses. I saw that lead counsel for the defense had the charts with those numbers in front of him.

I casually walked over to his table and gently pulled the chart from his pile. I thanked him for the jury to hear, and I walked back to the blackboard and wrote the numbers on it. When I finished writing, I noticed that I had not aligned the numbers so that I could easily add them.

I knew it would be a slow process to calculate the total. Not wanting to lose my cadence—you have to keep moving so as not to lose the jury's interest—I quickly looked to see what I had on the chart.

Then I said to the jury, "I guess I should have been looking when I was writing. By my calculations, it comes to $_____ [a figure that was way short—you should never make a mistake in your favor], but I'm sure I'm wrong. But you have all the numbers; *you* add it up, so we'll get it right."

The jurors correctly added the numbers. And that was their verdict.[6] I was accused of having deliberately goofed in

order to involve the jury. I wish I could take credit for that, but I was not that smart. I have, however, done it a few times since then.

Keep Your Rebuttal Short

There is always something in defense counsel's closing that will give you an opening for rebuttal. But keep your rebuttal short, focusing on a few salient points. As Tom Lambert, professor at Suffolk University School of Law, has said, "The mind can only retain what the seat can endure." By this time in the trial, the jury is tired.

At the end of rebuttal, remember to thank the jurors again, emphasizing that they must strive to do justice. The jury should feel that its presence in the courtroom and the decision it renders are important. For example:

> Your job, and it's a tough one, is to decide what is fair and reasonable compensation for the injuries wrought on Lynn.
>
> You're to judge this case on the evidence. And I submit to you, you're the final judges of what is fair and reasonable. This is your function. That's why you're so important. And I can only tell you that when you leave here, and you feel that you've done the right thing, that you have followed the evidence and the law, and that you have awarded what is fair and reasonable and can come out holding your head high, you will live to remember this day as your finest hour. I thank you.

Other lawyers say that their job is done, but the toughest part of the jury's job has just begun.

Most cases aren't won on closing arguments. Persuading the jury begins when you walk through the courtroom door. Winning requires the right jurors and a good case. Knowledge and use of effective techniques in closing arguments, however, can go a long way toward helping your client win. □

Notes

1 Moe Levine, The Psychology of the Closing Argument, Address at Illinois Bar Association seminar (1967), *in* THE BEST OF MOE 231-32 (on file with author).

2 James W. McElhaney, *Trial Notebook: Analogies in Final Argument*, LITIG., Winter 1980, at 37.

3 Craig Spangenberg, *Basic Values and the Techniques of Persuasion*, LITIG., Summer 1977, at 13, 16.

4 McElhaney, *supra* note 2, at 38.

5 Levine, *supra* note 1, at 229.

6 Richter v. Northwestern Mem. Hosp., 532 N.E.2d 269 (Ill. App. Ct. 1987), *appeal denied*,