

TRIAL ADVOCACY TRAINING FOR PRO BONO LAWYERS

PRACTICE POINTS



JANUARY 11, 2013

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
500 PEARL STREET
NEW YORK, NEW YORK 10007**

INTRODUCTION

The materials that follow are practice points that will be presented and developed at the January 11, 2013 Trial Advocacy Training for Pro Bono Lawyers. They do not constitute legal advice. They are provided solely as informational material from the Court's Training.

Information concerning the Court's Pro Bono Program can be found on the Court's website at http://nysd.uscourts.gov/pro_bono.php.

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OPENING STATEMENTS

The trial is a morality play. The lawyer's role needs to be practiced and rehearsed. As much as possible, you want to be coherent, interesting and compelling. Speaking without notes is impressive, but takes a lot of experience and practice. It is fine to use notes, but you have to be able to connect with the jury. You must rehearse it, believe in your case, make eye contact, and sell your case without overselling it.

The opening is the lawyer's *promise* to the jury about what the evidence will show. You want to tell the jury what happened, why it was wrong, and why they should care. Figure out what engages you about the case, and figure out how to make it important to them.

The opening

- tells the jury your theory of the case.
- provides a directional orientation for understanding the evidence.
- explains why the evidence points to the conclusion that makes sense (your theory).

Some research suggests that most jurors vote consistently with their feelings before deliberating. Opening statements provide jurors with a narrative for thinking about the case and sets the direction for their thinking while the trial takes place.

Think about the case from the jury's perspective

Go through what the deliberations will look like. What dialogue needs to happen in the jury room for the jurors to vote your way? You are asking them to do a lot of work for you.

- listen to you.
- hear and learn about things they know nothing about.
- take all that information into the jury room.
- convince others that your case should carry the day.

Prisoner cases present particular challenges.

Any case involving one main witness testifying about one particular moment in time is difficult. Jurors may have bias against prisoners, and corrections officers can be sympathetic figures because they work in difficult surroundings with potentially dangerous people. Keep this in mind.

First Impressions are Important.

Because voir dire is limited in federal court, the opening statement may be the first time the jurors will see and hear the attorneys. The jury is constantly evaluating you, even if they see you at the courthouse entrance. The jury wants to know you and why this case is important to you. Remember that your credibility (and not just the credibility of the witnesses) will be the subject of juror assessment from beginning to end. Everything you do and say, including all your relationships – with the court, the adversary, your client etc. – tend to fall under the jurors' microscope as much as the 'evidence' in the case.

There is no such thing as complete impartiality, and no one is a blank slate. Jurors should not be so biased that they cannot view the evidence reasonably, but they are supposed to bring their life experience into deliberations.

People are different; they learn differently: some are “emotional learners” and others are “rational learners”; some learn through listening, others must see something, and some must touch an object for its significance to be absorbed (auditory, visual and tactile modes of learning). The presentation of your case needs to appeal on both an emotional and rational level and provide information in various forms – not just your narrative but what is your visual case and do you have a physical component (something the jurors can experience – for example, what does a cell door sound like when it is opened to invite someone out for a fight)

Practice Tips

Connect. Connect with the jury; build your credibility, have a conversation rather than talking at them.

Themes. Establish a theme that you will reinforce at trial and on summation.

Tell a Story. Tell a story with a beginning, middle and end.

Don't Argue. Opening is not a time for arguments. Stick with the facts, avoid inferences (too subtle and confusing at that early point in the trial).

Speak Like a Layman. Speak like a regular person. Don't use legalese. It's OK to sound colloquial.

Appeal to Right and Wrong. Make the case about right and wrong, and explain to the jury why it should see the case your way.

Shorter Is Better. Be brief. Don't confuse the jury.

Think Big Picture. Don't get bogged down in the details. You want to address the key themes and facts, but save the details that the jury will not understand for later in the trial.

Don't Overstate. Don't overstate your case. It undermines your credibility.

“Pull Teeth.” Anticipate and address any vulnerabilities of your case that your adversary will raise.

Say What You Want. Tell the jury what you want it to do.

Know Your Judge. Learn in advance of the trial whether your judge will allow the use of demonstratives and, if so, if the judge has any restrictions on the type used or when

they can be used – e.g., can they be used during the opening. It's also important to know whether the judge will allow the lawyer to move around the courtroom, which is ideal, or will require that the lawyer stand behind a podium.

A recommended reading on jurors and how jurors perceive cases might include:

- a) Hans Zeisel and Harry Klaven Jr., *The American Jury*
- b) Jim Perdue, *Winning with Stories: Using the Narrative to Persuade in Trials, Speeches & Lectures*
- c) David Ball, *Theatre Tips and Strategies for Jury Trials*
- d) Richard Waites, *Courtroom Psychology and Trial Advocacy*
- e) Rick Friedman & Patrick Malone, *Rules of the Road; A Plaintiff Lawyer's Guide to Proving Liability*

DIRECT EXAMINATION

I. Introduction to Direct Examination

A. General How to Do Direct

Juries identify with witnesses – lay persons, unfamiliar with the process just like they are.

Direct examination is a conversation between you and the witness, with the witness conveying the key parts of the narrative. You are just facilitating. The story should come from the witness, not the lawyer (opposite of cross-examination, in which the lawyer should provide the narrative and the witness should just say "yes").

1. *PREPARATION IS CRITICAL*

a) **Plan for repeated review of the factual content of the direct; conduct mock examinations.**

What makes a great conversational direct is rapport between the lawyer and the witness. That rarely happens magically. You must make the time for thorough preparation.

Particularly when the witness is the party making the claim, you must explain to the witness that the jury has no idea what the facts are and that your questioning is designed to give the witness the chance to explain/describe the key facts. So do several mock examinations and stay in role to the extent possible. (*E.g.*, try not just to sit across the table or next to the witness; question from a distance (if only to get the witness used to having to project his or her voice). (When you get to court, it is a nice reminder is to say to the witness at the outset of the examination to “speak loud enough so that the last juror in the box can hear you.”)

b) **Explain how the witness’s narrative fits into the theory of the case**

It is useful for the witness to get a broader sense of what the case is about. Explain what you need to prove and how you expect to prove it. You may need to explain to your client that you will prove certain elements of the case through other witnesses/docs (to avoid having the client feel that he or she has to add details/facts to their testimony...).

c) **Bad facts.**

Deal with it; they sometimes exist. If your witness has a criminal record, or other issues, deal with them head on. You are generally allowed to “draw the sting” by eliciting on direct examination facts that would sound terrible if the jury were surprised with them on cross.

“Bad facts” can represented an opportunity. Candor sells. Credibility – of the advocate, of the client – is critical. Jurors like it when witnesses (and advocates) admit weakness or flaws.

It humanizes a witness and makes it easier to sell the case when you are candid about the bad facts. (Of course, your theory has to be able to survive the bad facts, but that's another session....) Here, note that Mr. Jonathan is not able to identify all of the officers who beat him, and he doesn't know whether the defendants learned of his interview with Ms. Jones at the Board of Correction. By frankly acknowledging that, he is likely to get credit from the jury. And those facts can be proven in other ways (without Mr. Jonathan's direct testimony).

d) Demonstrative evidence, charts, pictures, etc.

Now more than ever jurors have short attention spans and have an easier time absorbing information visually. So consider using charts or pictures or other demonstrative exhibits. Remember that the narrative should come from the witness to the extent possible. So, *e.g.*, if you are using a floorplan of the area of the jail where the fighting took place, it is best for the witness to use the pointer, etc., and have you direct them to point to where X happened, then Y happened. You need to practice doing this with the witness. Again, it's important for your in-court presentation to be crisp, organized and done without meandering and fumbling. The best way to maximize the chance of that happening is preparation.

e) If you are using documents with the witness, make sure the witness (and you) know the facts necessary to get them introduced.

Don't fumble with foundation questions. Make sure you know them and have gone over them with the witness. (It's also part of preparing for direct (or cross) to know the evidence issues that are raised by the testimony. Do the research beforehand and have the relevant rule and/or case law with you.)

2. DEMYSTIFY THE PROCESS FOR THE WITNESS

You should prepare your witness about the following:

a) What to expect in court:

Unlike you, the witness probably has no idea what a courtroom looks like or how formal the proceedings are. You need to spend time explaining the rules – *e.g.*, the witness must wait for the entire question to be posed before answering; the other lawyer is permitted to interrupt by objecting; the judge may ask questions; on material topics, leading questions are prohibited; the ways that memory can be refreshed, etc.

b) How to listen to and answer questions

Direct examination is not like sitting around and chatting. It is a conversation conducted under formal rules. So explain to the witness certain basics: (i) listen to the *entire* question, pause a second or two, and then answer; (ii) don't attempt to speak over opposing counsel's objections; (iii) don't speculate, ruminate or speak about things that the witness doesn't know from personal knowledge

c) Reassure the witness about anxiety.

Don't just say "there's nothing to worry about." Explain that it's natural to feel anxious taking the witness stand in a courtroom. But *do* seek to demystify the process. "Look, it's normal to be nervous when you have to talk in front of strangers, but remember that all you are doing is talking to me about facts that you – and probably only you – know personally. Just remember that in the end all you are doing is telling what happened to you."

Also explain that even if you have prepared carefully, sometimes people just forget things. Explain that if that happens, you are allowed to help the witness try to remember, e.g., by showing her a document.

Also explain that there may be times when you interrupt the witness, either because he is rambling, or not answering the question. Explain that you will say something like "Excuse me, Ms. Witness, there are a lot of facts here; why don't we take them one by one. When was the first time you left your cell that Tuesday?"

3. TIPS FOR THE EXAMINATION ITSELF

a) Organize your examination by "Chapters"

One of the most important things about trying a case is being yourself. So while I don't like question-by-question outlines – you don't want to be so focused on the script that you miss the answer – if you feel more comfortable with detailed outlines, use them. But if you do, make sure you are not so focused on the outline that you forget to listen.....

In my experience, I think it is very helpful to break the examination up into chapters, and put one topic on each page. I write the chapter/topic on the top of the page, and include the key points I want to elicit (and any docs I want to get in to help to make the points I am making).

Organization – Pick the order of topics that makes the most sense for your theory, but remember that the jury hasn't been living with the case like you have. Chronological order is not always the right way to go, but jurors do naturally understand chronology. [As a general matter when preparing for a trial, creating a good time line is invaluable.]

b) Don't be formal for the sake of being formal, and be nice!

Remember that jurors are likely to identify with the witness (they were nervous when being questioned in voir dire and know the witness must be). So be nice! Don't just start by saying: "Please state your name for the record." Try something warmer, more natural, such as "I know you, of course, but please tell the jurors and the court reporter your full name." If the court clerk has already elicited the witness's name, you can open with something like "Good morning, Mr. Jonathan. Let me start by asking you a few questions about yourself." Either before or after

the first question, you might also want to ask the witness if they are comfortable, if they know how to use the mic (if there is one), that there is water available, etc. This will not only break the ice and make the witness a little more comfortable, it will show the jury that you are sensitive to the witness.

c) Actively listen

Don't look down at your notes or start thinking ahead to other questions; look at the witness when she is answering and actively listen to what she is saying. In a good examination the prior answer is often the springboard into the next question. And you want to be sure you don't miss something the witness said – perhaps he said something incorrect that is very damaging if you don't correct it; perhaps he said something he hadn't said before that is very helpful and needs to be developed.

d) Use short, direct, open questions

Remember that you want to be in the background and let the witness shine. So after giving context and creating continuity by looping in part of prior answer, use simple Who, what, when, where, why, how, explain, describe questions.

e) Your questions should continue the flow; looping

Don't just ask "What happened next?" time after time. Try to take some portion of the answer and incorporate it into your next question. For example, "After Officer Cruz hit you with the baton, what did you do?"

e) Use silence

If there is an effective answer that is important to your case, let it linger in the minds of the jurors for a few seconds before you move on to the next question or area. Some lawyers like to repeat the "good answer" but I think that's irritating and will wear thin on the jurors after a while.

f) Use Transitions

When you have elicited what you need in one area, make a transition before moving to the next – *e.g.*, "Now let me ask you some questions about _____."

g) Be aware of pacing

Good preparation helps a lot here. Jurors have short attention spans. They want clearly, concisely presented facts.

B. Issues in Direct Examination Specific to Pro Se Office Cases

When preparing and doing direct examinations, think about the clients who typically come to the pro se office – the actual clients you are likely to represent, because they require in some ways different approaches than the clients you may ordinarily represent in your paid practice.

Direct examination is in large part about your establishing rapport with the client and allowing the client to speak directly to the jury, so you need to think through ahead of time how best to do that with clients who may suffer from mental illness or drug addiction, and who certainly suffer from poverty, and may well have difficulty with authority figures. This is crucial both for the client's ability to follow your guidance during direct, and for the jury's belief in the client's credibility, despite what may be large differences between the client's experiences and the jury's.

1. Preparation is even more critical for the typical pro se office client than for your paid clients.

Client Trust. This client has not chosen you, is not paying you, and may well wonder why you are interested in helping him. You have to get her trust if you are going to build rapport on the stand. You also have to get her trust so that she will tell you the bad facts as well as the good ones, and intimate details of her past that you will need to humanize her. How do you get someone to trust you who has no reason to? You've just shown up at the prison and said you are the lawyer, to someone who may have had poor experiences with court-appointed lawyers in the past or be mistrustful of people in authority, which you will likely seem to be. The most important thing you can do is to put time into forging the relationship with the client. Don't see client visits as secondary to your ground-breaking legal motions and perfect courtroom advocacy. These cases are often won on client credibility. You have to put in the time with the client so he will trust you, and follow your lead, especially in unexpected situations that arise on the fly in the courtroom.

In addition to putting in the time, which shows the client you care and are committed, you are hauling yourself to the prison regularly, which few if any people may do for him, you have to be entirely true to your word. You may think it is no big deal if you tell the client you will send him a document on Monday and it doesn't go out until Wednesday. It is a big deal for someone who has lived through a lot of empty promises. Giving the client the ability to rely on your word on the smallest thing will give him the ability to rely on you in court.

Involving the Client. The second step in preparation is to make sure the client knows what the arguments and themes of the case are. Don't assume the client knows what arguments and facts are important. Spell them out for the client. Ask him if he has a different view, and tell him you want to win the case for him, but it is also important to you that his view be heard – this is his case. For many pro se office clients, this is far more important than winning.

Talking Client through courtroom dynamics. Most clients will never have been to federal court. They likely have been to state court of some kind, which is very different. Most clients will never have testified in any form, and have no experience of speaking in public of any kind. You have to explain that juries – and judges – pay a lot of attention to how you act and speak, as much if not more as what you actually say. I like to tell the client what I find likeable, appealing in him, and then what a jury might react badly to.

Clients understand – we all do – that people make snap judgments, and that we can control those judgments by how we act, dress, look, speak.

Client shame about bad facts. Being a witness is frightening even if you are not personally under scrutiny, let alone if your life is there under the microscope, let alone if you have life events you are ashamed of, as many clients will. Don't shy away from discussing this. The client needs to know both that he will be scrutinized on cross and that you will help the jury to understand those past life experiences, the past crimes, the past lies, the past mental health problems. You must discuss these things explicitly and constantly so the client becomes comfortable enough to deal with cross-examination.

2. The examination itself

How you act. The jury picks up on how you feel about the client. You convey it to the jury through your body language and how you speak to him, when he is sitting next to you, when he is on the stand, and when you are speaking about him to the jury. If you are scared or disdainful of the client this will come through. You need to lend the client your status and your credibility.

Criminal History. In most cases, the jury will learn something about your client's criminal history -- at least the fact of a prior felony conviction. You must bring this out before your adversary does on cross, and you must make client feel comfortable discussing it. You also have to be very clear and spend a lot of time with client explaining legal parameters of what facts can come out, so she doesn't blurt out more information than judge has ruled admissible in an effort to appear truthful and forthcoming. You have to help the client present past crimes to the jury as a source of shame, as something client has taken responsibility for, as something client is honest about.

Going to the Scene. Harder to do than for a street drug sale, because have to get access to a government building, or the inside of a prison, but absolutely essential.

Special Credibility Issues. Mental health. Clients are who they are. You can help them a lot in how to present themselves and the facts, and how to speak in court. But for a schizophrenic client or one with severe delusions, this will come out in front of the jury. So you have to decide ahead of time how to use this to further your legal case and to get the jury's sympathy.

Jury has to affiliate with, identify with, your client. Key to think about how to accomplish that. No matter how different client background is from jury's, have to find some common motivation or emotion that puts jury on your client's side. Tie in with your themes from opening.

II. **MOCK DIRECT**

A. **Client's Life Story:** Fiercely Loyal to Family, Pragmatic

1. **General Intro**

2. **Childhood**

Grew up in E. New York, rough

Single mother, alcoholic

Three younger siblings, all close in age, protective of them

He was man of house at young age

3. **Juvie Center**

Age 13 went to center for kids in trouble, upstate NYC

Met Victor there, reminded me of my younger brother

Rough place, skinny kid, picked on a lot, learned to defend myself

4. **Teenage Trouble – Short Stints at Rikers, Lots of Infractions**

Back to East New York

Taking care of siblings

Need money, get in minor troubles with law, no violence --> Rikers

Fights there – young guys, all worked up, in adolescent facilities

Guards unfair, making up rules, learned hard way have to stay on guards' good side

5. **Burglary Takes Jonathan To Rikers Again**

Spring 2009, ABC Facility, held on pending burglary charge, first felony case

6. **Victor Is At ABC Too**

Saw Him, Didn't Get to Talk To Him

B. Arena Fighting at ABC and the Beating of Mr. Jonathan

The ABC facility 1

-For people who have been in before [Rikers has many "jails" on the island – for woman, etc.]

-Picked up on burglary charge; sent to ABC facility on Rikers.

[page break]

The ABC facility 2

-Very restrictive – locked down; cuffed.

-Physical layout – two tiers of 8 cells each; one guy to a cell; locked down pretty much all the time - except for rec one hour a day

-Restrictions when out of cell: Rear-cuffed to and from gym -- only time out of cell

[page break]

Fighting at ABC

-Different from other jails; no real opportunity to fight with other inmates; Only fought when guards made us

-How learned of it and ground rules. (Saw it – happens in front of lower tier, audible to all; was made to participate; CO explained "ground rules" to him – fight, KO or TKO ends fight, no medical treatment for injuries, no discussion of the fighting with anyone, winner gets extra rec time, or alcohol [no hearsay problem here because statements by the COs are admissible as admissions by a party opponent])

Involvement of guards --Many watched, including Cruz, Nateon and Belling. Describe how guards who were watching acted, what they did? - Rooting, yelling, trash talking; after the fight was over I sometimes would see money change hands. It felt very much like a MMA, sports-type event

[page break]

The Refusal to fight Victor

-Was there ever a time when you refused to fight? Victor; Saw him - refused

-Reaction by COs? Cruz, Nateon and Belling were pissed; said they would beat us

[page break]

The Board of Correction Interview

- Did anyone ever ask you about this "arena fighting"

- Interviewed by Ms. Jones at Board of Correction
- Did you tell anyone? Do you know if defendants' knew? [No, and no.]

[page break]

The Beat Down

- Next day I was being escorted back to my cell from rec time by CO smith
- Saw Victor, also out of his cell; weird to see him out since rule is that only one prisoner out of his cell at a time
- Nateon, Cruz and Belling appeared. They had gloves on and batons.
- Nateon and Cruz approached fast; Nateon went to grab me; Belling ran toward the stairs, toward where I heard Victor's voice and a struggle
- Nateon grabs, Cruz swings – even though rear-cuffed, tried to avoid getting hit by ducking down; but the baton still hit me, just below my right eye – intense pain, like I never felt before.

After you were hit below your right eye with the baton, what did you do? [Crumpled to ground, tried to pull knees up to get into a ball – getting kicked, pushed around]

Other officers there? If so, able to identify any? [Yes, no.]

Other than Nateon, no

Kicks coming from both front and back; could not have been one person. At least two.

Taken away for medical treatment

III. Special Issues in Direct Examinations

A. Anticipating/blunting force of cross in direct

Make a list of the worst facts and figure out whether and how to bring them out, how to tie them in with your themes, how to turn them into positives.

– how to take the sting out of prior disciplinary infractions at Rikers? Does it give Jonathan a motive to lie about the guards?

– how to explain why he would choose Victor over staying out of trouble with the guards, if has not seen Victor in years?

– how to keep jury from thinking he probably deserved it given that he's only 19 and has already been in a lot of trouble already.

B. Preparing the witness for Cross-Examination

1 Explain what cross-examiner can do

Explain that opposing lawyer can be aggressive, confrontational and is allowed to be that way to some extent. Encourage the witness not to take it personally; a mistake to fight.

Encourage witness not to be defensive; to admit what has to be admitted; not to fight. But you should explain to the witness what the issues in the case are so that the witness doesn't get lulled into simply agreeing with everything. If the cross-examiner insists on a yes or no answer to a question that can't fairly be answered that way, you need to prepare the witness to say – calmly, respectfully – that “I can't answer that yes or no without my answer being incomplete or misleading. I can explain if you will allow me.” Also make sure witness understands that you get a chance for re-direct.

2 Have a colleague do mock cross-examination

If there are no privilege issues – *e.g.*, when working with your client – then seriously consider videotaping the mock examinations. You can tell a witness a hundred times that his body language changes when the cross-examination starts, but until they see themselves push themselves back in the chair and fold their arms, they won't really believe it.... Sometimes, for example, when your witness is incarcerated, it won't be possible to videotape, in which case it's even more critical to have a colleague do a number of mock cross-examinations of the witness.

Review advice about answering questions – listen to *entire* question; wait a few seconds; respond only to the question asked. [shortens cross; deprives questioner of fuel]

CROSS EXAMINATION

1. How and When to Start Preparing

The importance of effective cross-examination cannot be overstated. The jury has just heard direct testimony from a witness who helped your adversary. The jurors turn to you to point out flaws in that testimony. You want to lead them to adopt your theory of the case.

Think about the case holistically. Cross-examination and summation should be considered from day one. The facts elicited on cross will form the basis of the summation.

What is the theory of the case?

-legal theory

-facts

-disputed

-undisputed

What was learned through discovery?

There are two types of witnesses:

Honest -Elicit undisputed facts by asking leading questions.

Lying - Do not expect a Perry Mason-style admission from the stand.

Demonstrate a witness's lack of veracity by highlighting inconsistencies and the fact that the witness's story is illogical and incredible.

If the jury sees that a witness is inconsistent about some things, even if minor, it can disregard the witness's entire testimony.

Know the judge. Go to the courtroom and watch him or her in action. Familiarize yourself with what the judge will and will not allow.

2. How to Structure

Have topics on separate pages

-outline areas of inquiry (subtopics)

More experienced litigators do not have a list of hard questions. Novices may benefit from having a list they can refer to. What matters is that you **LISTEN TO THE ANSWER** and be prepared to do any necessary follow up, whether a witness makes statements that help or hurt the case. **PREPARATION** is key.

Start with impeachment. This is how to challenge witness credibility. Cross is designed to undermine a well-rehearsed witness. The jury may lose focus if impeachment testimony is not elicited until the end of the cross.

3. How to Perform

Build the witness up, and then bring him down. It is not effective to merely point out inconsistencies. Ask a series of questions that lock the witness into what he or she said or wrote previously. For example, if you are questioning a police officer whose direct testimony contradicted a written report, ask, “you have been on the force for x years, is that correct?, in that time you have written many reports, you are trained to fill out those forms completely, accurately, honestly, etc.” The questions should elicit a stream of yesses. A momentum builds.

Cut off any possible escape routes (ability to explain inconsistency). Anticipate what the witness will say to explain an inconsistency and show, through your questions, why the explanation is not credible.

Elicit any motive to lie.

Do not ask a question you do not know the answer to, or ask an open-ended question. Cross is about controlling the witness. Ask an open-ended question only if the answer doesn't really matter.

Do not panic if you get a bad answer. Maintain composure.

Do not bully the witness. The jury doesn't like it.

Do it, and get out. Make your points, and sit down. Know where you are going. Is the jury listening? Have you made them care?

4. The Rules of Evidence

It is very important to ask questions that will not draw objections. It kills momentum.

- You may lead on cross
- The subject matter of the cross must be within the scope of the direct.
- Think about how you will respond to objections about scope (i.e., you can argue that even if questions are outside the scope, they are relevant to impeachment).
- Character witness - question the character witness about whether he or she has heard about any allegations of misconduct against the person at issue.

Prior Bad Acts - you should either make a motion in limine prior to trial, or ask for a sidebar, before questioning a witness about prior bad acts.

Practice Tips

- 1.) Keep your leading questions short. Long questions are more likely to lead to long answers.
- 2.) There should be a point behind every question. If another lawyer asked you, "Why did you ask that question?," you should always know the answer.
- 3.) Build up to your key point. For example, an eye witness who you are trying to undermine is not going to agree at the outset that he/she could not see the incident well. But if you build up that it was dark, he/she was far away from the incident, and he/she was distracted by something else, your point has been made and you will be able to argue it in closing.
- 4.) You should be the focus in the courtroom during cross. Unlike direct examination, where you want the jury watching the witness, on cross, you want people to pay attention to you, as though you are testifying yourself.
- 5.) Signal to the jury when you are moving to a new chapter. You can say something like, "Now I want to talk to you about ____" so the jury understands you are making a new point.
- 6.) Always start cross with a strong point and end with a strong point.
- 7.) Learn proper impeachment. Lock in the false/inconsistent testimony, build up the prior testimony or document, and then confront with the impeachment material.
- 8.) Always ask for permission from the Judge to approach a witness or to publish an exhibit to the jury. The jurors appreciate manners and it is important to demonstrate to the jury and the Court that you understand and respect the rules. [This, of course, applies to direct as well].
- 9.) Be organized - have multiple copies of key exhibits or transcripts organized and at your fingertips. Jurors do not want to wait for you to fumble around trying to find documents. [Also true for direct].

DOCUMENTS AND OTHER EVIDENTIARY ISSUES

The Use of Depositions

Advantages to using deposition testimony at trial – It's there. You know what the evidence is – so you can use it safely in opening without fear that witness will forget or otherwise explode.

Disadvantages – It's boring.

1. A lot of the work with respect to depositions should be done pre-trial.
2. Most judges in PTO require you to list deposition excerpts by page and line that you intend to use on your case.
3. Fed. R. Civ. P. 32 governs use of depositions at trial.
 - a. 32(a)(3) most common use –
 - i. Deposition of adverse party or its agent for any purpose – if when deposed witness was the party's officer director or managing agent.
 - ii. Managing agent criteria [to be summarized]:
 1. whether the individual is invested with general powers allowing him to exercise judgment and discretion in corporate matters;
 2. whether the individual can be relied upon to give testimony, at his employer's request, in response to the demands of the examining party;
 3. whether any person or persons are employed by the corporate employer in positions of higher authority than the individual designated in the area regarding which the information is sought by the examination;
 4. the general responsibilities of the individual respecting the matters involved in the litigation; and
 5. whether the individual can be expected to identify with the interests of the corporation.

Accord United States Fidelity & Guarantee Co. v. Braspetro Oil Servs. Co., No. 97 Civ. 6124, 2001 WL 43607 (S.D.N.Y. Jan. 17, 2001); *Zurich Ins. Co. v. Essex Crane Rental Corp.*, No. 99 Civ. 2263 (SWK), 1991 WL 12133, at *1 (S.D.N.Y. Jan. 29, 1991).

In PTO will have listed such excerpts for your case –

Per Fed. R. Civ. P. 32 (a)(6) counter designations "other parts that in fairness should be considered with the part introduced"

Most PTO's will require these counter designations to be listed.

This all forms another set of issues that should be resolved in limine

Since generally objections except as to form are reserved for trial –

1. At pretrial conference or in limine motions/argument – deal with objections to deposition excerpts or to counter-designations.
2. Argue Counter designation not necessary for completeness or fairness but just negative testimony that the adverse party wants you to read in on your case.
3. Once judge has decided what designations and counter designations come in – then attorney will read Q & A with co-counsel, paralegal.

This can be even more boring if judge hasn't ruled on counter designations pre-trial, but rather is doing it as the reading goes along – so be selective.

Another reason to be selective about using deposition excerpts – once you've used excerpts from a witness's deposition, your adversary per Fed R. Civ. P. 32(a)(6) can read in *any* other parts of that deposition – but on the adversary's case

Usually adversaries don't do that because they are having the deponent testify live on their case – but still a risk.

Fed. R. Civ. P. 32(a)(4) Allows use of deposition where party unavailable – death, more than 100 miles away, illness, imprisonment, can't procure by subpoena – or other good cause – unlikely

All of this creates a tension in taking depositions –

Instinct is to take deposition for discovery purpose – to let adverse witness talk and talk, but if parts of deposition have to be used for trial, not going to want such long-winded answers, perhaps would have phrased questions differently

As an example of how deposition excerpts might be used in the fact pattern we have:

You might want to read the portions of the various officers' depositions where they admit prior use of force incidents – for the purpose of establishing on the plaintiff's case that there is enough evidence to meet the Monell standard of a governmental policy of using such force, or ignoring and not correcting the incidents

Not the subject of our presentation, but such deposition excerpts may be necessary to get in sufficient evidence on the plaintiffs' case to avoid the Rule 50 motion to dismiss at the conclusion of the case.

Use of Documents & Exhibits at Trial

- Know your documents
 - May be helpful in some respects, damaging in other respects
 - Anticipate how your adversary will use them/attack them

- Whether in balance a document is more helpful than harmful
- Determine what documents you intend to use at trial and how you intend to use them
 - Documents you might want to introduce into evidence must be identified in PTO
 - Documents you might need to impeach an adverse or hostile witness or to refresh your witness's recollection need not be identified in PTO
 - Don't overwhelm the jury with unnecessary documents
- Prepare your exhibits
 - Consider the manner of presentation most effective/efficient under the circumstances
 - Prepare your witness to use the exhibit, as well as preparing the exhibit itself
 - Consider how you are going to get your exhibits to court
- Know how you are going to introduce a document into evidence
 - Stipulate to exhibits
 - If not stipulated, identify witness(es) necessary to lay foundation (and make sure that witness is both identified in PTO and secured for trial)
 - If not stipulating, anticipate grounds for objections
- Know what you are going to do with exhibit once it is admitted into evidence
- Have a system to manage your exhibits
 - Manage documents, both before and after they are introduced
- Use of demonstrative evidence

- Exhibits that aid a jury’s understanding of information presented through other evidence
- Many different forms of demonstrative exhibits
 - Charts, diagrams, maps
 - Powerpoints (or the like) used to organize events, facts or documents
- Motions in limine
 - Applications regarding disputes over potential or expected key evidence/arguments
 - Resolve key issues in advance of trial/help guide in presenting case
 - Resolve disputes outside of jury’s presence
 - Court will typically set schedules, although may be made at any appropriate time

CLOSING STATEMENTS

Closing statements present the lawyers with the opportunity to tell the jury what the evidence has shown. Start planning the summation from the beginning. What arguments do you want to be able to make at closing? This is how you formulate and build your case.

The Mechanics

Pursuant to this Court's Local Rules, the judge has discretion to decide which side gets to do summation first.

The charge conference occurs prior to summations. The parties have an opportunity to object and/or make suggestions regarding the jury charge and special verdict sheet.

The judge instructs the jury on the law after summations, so the lawyers should avoid focusing on the law. Summation includes:

- the facts.
- the evidence.
- how to answer questions on the verdict sheet.

Note about discussing damages.

It is acceptable to discuss losses but not to suggest a specific dollar amount for damages.

The Second Circuit has “not adopted a per se rule about the propriety of suggested damage amounts” during summation, however, “specifying target amounts for the jury to award is disfavored. Such suggestions anchor the jurors’ expectations of a fair award at a place set by counsel, rather than by the evidence.” *Consorti v. Armstrong World Industries, Inc.*, 72 F.3d 1003 (2d Cir. 1995) (quoting *Mileski v. Long Island R.R. Co.*, 499 F.2d 1169, 1172 (2d Cir. 1974)), vacated on other grounds, *Consorti v. Owen Corning Fiberglas Corp.*, 518 U.S. 1031 (1996).

Practice Tips

Pick your best points. You will not be able to address all the evidence, so pick 3-4 main subject areas and think of 2-3 dramatic lines.

Theme. Remember your theme from your opening and be consistent.

Alternative Arguments. It can be a delicate balance to make alternative arguments. (For example: defense counsel argues that the assaults did not happen, but if they did, they were not done in retaliation for exercising a constitutional right). This can backfire because it signals the jury that you do not have confidence in your theory of the case. Proceed with caution.

Your demeanor. Do not be nasty or condescending. Be yourself. Argue like you do in real life. Get over any stage fright by practicing and mastering trial techniques.

Your tone. Speak in measured tones. Use your voice as a weapon. Raise it slightly, bring it down, establish a cadence, pause for effect.

Your credibility. Your credibility is paramount. The jurors want to know they can trust you. It is improper to vouch for your case or witnesses (“believe me, I know this witness is telling the truth). But you indirectly vouch by standing up for the case and that is acceptable.

Respect. Judges like jurors and believe they pay attention and want to get it right. Jurors like the judge and know that he or she is in control. Do not fence with the judge or elicit a smackdown. Win by reason, proof and reasonableness, and do not be baited.

Objectionable statements. Avoid opening yourself up to objection on summation.

Be organized. Do not ramble, speak simply so that the jury can follow you

Analogies. Avoid analogies and hypotheticals if you are summing up first. Your adversary may turn it against you.

Appearances. Follow the lectern rule - do not wander.

Also Keep in Mind

- The jury will constantly be studying you and your bearing.
- It is important how you interact with your client.
- Be aware of your body language.
- Have a sense of humor about yourself. Show that you’re human, and reasonable. Smile, be relaxed, don’t get rattled and go with the flow.
- Clothing: pant suits are acceptable for women. Dress professionally, not ostentatiously. You want to convey to the jury that you are reasonable, sensible and practical.

Prisoner Cases

It can backfire to attack a witness’s credibility because of a criminal record. Some jurors might react badly because they want to be fair. Excessive force is excessive force, and most people think that prisoners have a right to be safe.

PRO BONO PROGRAM

1. The Standard for Granting a Request for *Pro Bono* Counsel

- a. The *in forma pauperis* statute provides that the courts “may request an attorney to represent any person unable to afford counsel.” 28 U.S.C. § 1915(e)(1).
- b. The standard for granting *pro bono* counsel is set forth in *Hodge v. Police Officers*, 802 F.2d 58, 60 (2d Cir. 1986).
 - i. As threshold requirements, the court must decide whether the plaintiff’s claim “seems likely to be of substance” and whether the plaintiff is indigent. *Id.*
 - ii. If the plaintiff satisfies these requirements, the court must next consider such factors as:
 1. the indigent’s ability to investigate the crucial facts;
 2. whether conflicting evidence implicating the need for cross-examination will be the major proof presented to the fact finder;
 3. the indigent’s ability to present the case;
 4. the complexity of the legal issues; and
 5. any special reason in that case why appointment of counsel would be more likely to lead to a just determination.
 - iii. In considering these factors, district courts should neither apply bright-line rules nor automatically deny appointment of counsel until the application has survived a dispositive motion. *See Hendricks v. Coughlin*, 114 F.3d 390, 392-93 (2d Cir. 1997). Rather, each case must be decided on its own facts. *See Hodge*, 802 F.2d at 61.

2. *Pro Bono* Opportunities with the District Court

- a. All Purpose Appearances
 - i. The *pro bono* counsel appears for all purposes and is expected to litigate the case consistent with her ethical obligations to her client.
 - ii. File a Notice of Appearance of *Pro Bono* Counsel.
- b. Limited Appearances
 - i. The *pro bono* counsel appears for a limited purpose, such as:
 1. Mediation;
 2. Settlement conference before a Magistrate Judge; or
 3. Motion practice.
 - ii. File a Notice of Limited Appearance of *Pro Bono* Counsel.