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Revisiting Trial Basics Every Time: 
A Ritual for Courtroom Success

Maureen A. Howard

Abstract

With fewer cases progressing to trial, many attorneys do not have adequate opportunities to practice the skills necessary to be successful in the courtroom. Here the author provides a useful and uncomplicated examination of the basic trial advocacy skills, which should be reviewed each time an attorney prepares for trial. Writing for the busy practicing attorney, the author concisely addresses six key stages of trial: voir dire, opening statement, direct examination, cross-examination, impeachment, and closing argument.

Introduction

I write a column on trial advocacy for the local bar journal. In each issue, I focus on one trial skill and offer practical courtroom advice gleaned from over twenty-five years of experience as a civil litigator, a criminal prosecutor, and a trial judge. I challenge lawyers to think about trial skills in a fresh way to help them internalize the advice and to better connect with the jury when presenting their case. Lawyers—both new and not-so-new—report that the columns have been helpful in that they are both practical and motivational. One former student telephoned me to say that she has collected them and placed them in her “trial notebook” and that she reads them before each trial to get her head “in the game.” She likened reading them to hearing a coach’s pre-game speech and she encouraged me to craft a single, more comprehensive article for other lawyers—and for law students who participate in mock trial competitions—to have at their disposal before “game time.” This got me thinking about whether such pre-game sports rituals were actually effective, and if so, whether there could be a similar benefit for lawyers in adopting some sort of pretrial ritual.

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Researchers have studied the effects of pre-game sports rituals on players’ performance. When players gather together to hear their coach’s final thoughts immediately prior to the start of a game, the coach’s speech commonly includes information about opponents, reminders of team strategy, as well as arousing and emotional words and phrases. Coaches use these speeches hoping to contribute to the athletes’ performance, and ultimately, to a victory, and the research suggests this hope is well-founded.

One research study found that coaches can impact athletes’ efficacy and emotion prior to competition through a pre-game speech. Self-efficacy is defined as a person’s belief in his ability to perform a specific task. A player’s self-efficacy determines how much effort he will expend as well as how long he will persist when faced with obstacles. Stronger efficacy beliefs result in greater effort being put forth for a longer period of time.

Researchers at the University of Cologne in Germany conducted a series of experiments to test whether the use of rituals or motivational speeches or “lucky” charms actually improves performance or whether

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1 See, e.g., Tiffany M. Vargas-Tonsing, An Exploratory Examination of the Effects of Coaches’ Pre-Game Speeches on Athletes’ Perceptions of Self-Efficacy and Emotion, 32 J. SPORT BEHAV. 93 (2009) (a study seeking to explore the influence of the pre-game speech on athlete perceptions of self-efficacy and emotions); Perry B. Wright & Kristi J. Erdal, Sport Superstition as a Function of Skill Level and Task Difficulty, 31 J. SPORT BEHAV. 187 (2008) (a golf putting experiment testing whether professional athletes were more superstitious during difficult tasks than easy tasks).

2 Vargas-Tonsing, supra note 1, at 92.


4 Id. at 194.

5 Id.

6 Researchers have not draw[n] a [clear] distinction between rituals, pre-performance routines, and superstition in sport. Rituals are commonly defined as conscious activities that focus on coping with a high-stress situation, such as taking a deep breath before shooting a free throw in basketball. Similar to rituals, pre-performance routines are delineated as specific actions and movements, such as taking practice swings before hitting a golf ball, which have been shown to effectively improve performance. [One researcher] made the distinction that a routine became superstition when an action gained special magical significance, such as carrying a rabbit’s foot to bring good
they were "inconsequential creations of irrational minds." They concluded that activating good-luck-related superstitions using a lucky charm or a common saying or action (e.g., "break a leg" or "keep your fingers crossed") actually improved subsequent performance in golfing, motor dexterity, memory, and anagram games. They also found that these performance benefits were produced by changes in perceived self-efficacy: activating a superstition boosted participants' confidence in mastering tasks, which in turn improved performance. Increased task persistence is one performance benefit of superstition-enhanced self-efficacy. In one experiment, test subjects better performed memory and vocabulary tests when they had a lucky charm with them. The subjects also reported feeling more confident about their ability to perform the tasks when their chosen charm was right beside them than when it was in the next room, and they worked harder and longer at the tasks than the charmless group—apparently believing that since luck was with them, they should not quit too soon.

It seems that good-luck superstitions or rituals actually improve performance in athletic games as well as with various mental tasks. The "placebo effect" of such rituals, while grounded in superstition, appears to increase self-confidence, reduce anxiety, and increase endurance, all of which augments performance. It follows, then, that some sort of luck. [Another researcher] defined superstition as a person's false belief that she can influence an outcome in a situation when realistically she has no control.

Wright & Erdal, supra note 1, at 188 (citing Daniel Czech et al., An Examination of the Maintenance of Preshot Routines in Basketball Free Throw Shooting, 27 J. SPORT BEHAV. 323 (2004); Stuart A. Vyse, Believing in Magic: The Psychology of Superstition 90 (1997); Jeffrey Rudski, The Illusion of Control, Superstitious Belief, and Optimism, 24 CURRENT PSYCHOL. 306 (2004)).


8 Id.

9 Id.

10 Id. at 1016.

11 Id. at 1016-17.

pretrial ritual would have a similar performance-enhancing effect for lawyers.

As fewer and fewer cases go to trial, even the most motivated students of trial advocacy are hard-pressed to get enough courtroom experience to hone their trial skills and internalize trial lessons. Unfortunately, most trial lawyers on the eve of trial lack the luxury of time to engage in a self-motivational pre-game "speech" on the art of trial advocacy by revisiting one of the many excellent books written on the subject. The focus at the eleventh hour before jury selection is on preparation of the substance of the case: review of deposition transcripts, preparation of witness examinations and exhibits, analysis of potential juror profiles vis-à-vis the issues in the case, and the construction of jury speeches. A review

Collegiate Baseball Player, 11 SPORT PSYCHOL. 305, 310 (1997) (maintaining those rituals "under conscious control" should not be considered superstitious).

of the basic trial advocacy skills before each trial may promise value as a performance-enhancing ritual, but many of the texts on the subject are almost five hundred pages long. What is missing from the trial advocacy literature is a compact review of the basic trial advocacy skills that can be quickly reviewed each time a lawyer goes to trial.

Lawyers stumble and fall—often fatally—in their approach to six key areas when presenting their case to a jury: (1) voir dire, (2) opening statement, (3) direct examination, (4) cross-examination, (5) impeachment, and (6) closing argument. This Article identifies the goal of each of the six trial stages, the inherent obstacles to success in each, and strategies to maximize performance.\(^\text{14}\) My goal is to provide the equivalent of a coach’s “pre-game speech” on each of these aspects of trial practice in a short, easily digestible format suitable for review each time a lawyer goes to trial. In my role as a Director of a National Institute of Trial Advocacy trial training program I find that even lawyers with over ten years legal experience find themselves needing to “brush up” on the basic rules of trial advocacy on the eve of trial. My hope is that this short review of the six key stages of trial will be more accessible to these lawyers than a full text covering all aspects of trial advocacy.\(^\text{15}\)

I. Key One: Getting Jurors to Talk During Voir Dire

“Jury Selection” is a misnomer because lawyers do not actually get to “select” ideal jurors; they get a limited opportunity to “deselect” the worst prospective jurors.\(^\text{16}\) The goal of voir dire is to identify these jurors

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\(^{14}\) In addition to reviewing these six key areas of trial practice, I have included at the end of the Article a brief courtroom etiquette checklist. Even the most technically skilled trial lawyer can damage her client’s case—and her own reputation—by violating the expectations of the judge, the jury, and the court personnel.

\(^{15}\) A “short review” obviously cannot be all inclusive. I have focused on those areas of trial practice I believe to be the most perilous for trial lawyers based on my experiences in the courtroom, and I have attempted to keep my comments brief so that advocates can easily review it before each trial. For the trial lawyer looking to deepen her understanding of any particular skill discussed in the article or consider the perspective of other scholars and advocates, I have annotated the article with references to other major works.

\(^{16}\) See, e.g., BERGER ET AL., supra note 13, at 209-10; PERRIN ET AL., supra note 13, at 85.
by uncovering their attitudes, beliefs, opinions, preconceptions, biases and prejudices.\textsuperscript{17} To accomplish this, a lawyer has a difficult task: she must foster an honest, intimate conversation among strangers in a very public, formal environment.\textsuperscript{18}

Even honest jurors may give misleading answers during voir dire due to nervousness, inattention, faulty memory, or misunderstanding.\textsuperscript{19} The formal courtroom atmosphere can have a chilling effect at odds with the judge’s instructions and the oath to be honest and forthcoming.\textsuperscript{20} Jurors may resolve this conflict by interpreting questions narrowly and literally, and responding with short, \textit{technically} truthful answers.\textsuperscript{21} The key to getting jurors to open up is to think about voir dire as an intimate conversation.\textsuperscript{22} The goal is to get the jurors talking; and once they start, to keep them talking.\textsuperscript{23}

\textsuperscript{17} Maureen A. Howard, \textit{Taking the High Road: Why Prosecutors Should Voluntarily Waive Peremptory Challenges}, 23 GEO. J. LEGAL ETHICS 369, 395 (2010); see also \textit{Read}, supra note 13, at 32 (“Voir dire is the selection process where potential jurors are asked questions to determine whether they can be fair in a particular trial.”).

\textsuperscript{18} Howard, supra note 17, at 395; see also \textit{Read}, supra note 13, at 31-32 (“The hardest part of voir dire is getting the jurors to talk. It is very difficult because the setting is formal, and you are necessarily asking jurors questions about their own biases.”).

\textsuperscript{19} Howard, supra note 17, at 395 n.132; see also Dale W. Broeder, \textit{Voir Dire Examinations: An Empirical Study}, 38 S. CAL. L. REV. 503, 510-14 (1965) (researchers found 7% to 50% of jurors gave inaccurate responses during jury selection, but they did not conclude the inaccurate responses were due to intentional deception); Robert Helmreich & Barry Collins, \textit{Situational Determinants of Affiliative Preference Under Stress}, 6 J. PERSONALITY & SOC. PSYCHOL. 79 (1967) (study that tests the hypothesis that affiliation under stress might be produced by a dependency-motivation mechanism —rather than the social comparison and direct-anxiety-reduction mechanisms); Paul McGhee & Richard Teeven, \textit{Conformity Behavior and Need for Affiliation}, 72 J. SOC. PSYCHOL. 117 (1967); Irving Samoff & Philip Zimbardo, \textit{Anxiety, Fear and Social Affiliation}, 62 J. ABNORMAL & SOC. PSYCHOL. 356 (1961) (experimental investigation of the differential effects of fear and anxiety upon social affiliation).

\textsuperscript{20} Broeder, supra note 19, at 513 (Broeder’s research found that some jurors deliberately hid or distorted information during voir dire); see also \textit{Read}, supra note 13, at 32 (“Not many people are willing to talk openly about their prejudices and shortcomings in front of a group of strangers.”).

\textsuperscript{21} See Howard, supra note 17, at 385-97.

\textsuperscript{22} See, e.g., \textit{Trial Techniques}, supra note 13, at 41.

\textsuperscript{23} See BERGER ET AL., supra note 13, at 185-88.
A. Getting Jurors to Open Up and Talk—Ten Tips That Work

1. Have Jurors Introduce Themselves

Ask the judge to have the jurors introduce themselves, providing background information about children, reading material, or hobbies. This may not produce useful information, but it is effective as an icebreaker. Perhaps because it is not in a question-and-answer format, or because everyone is participating, it seems to help jurors relax.24

2. Begin With a Neutral Topic

Begin with a non-threatening topic, particularly if you are the first to talk with the jurors.25 Although identifying neutral topics may be more art than science, a fairly safe route is to get jurors to talk about themselves. One successful criminal defense lawyer was known for asking only about what folks did for a living. He successfully engaged them in conversation because he focused on what was important to them and seemed genuinely interested in what they had to say.

3. Include Everyone

Begin with questions likely to prompt a majority of raised hands. This helps jurors become comfortable responding. Then, narrow your questions until you get a manageable number of responses. Once you start polling jurors, give each a chance to speak: nothing makes a juror feel more left out than listening to other jurors express their opinions and then not getting a chance to share her thoughts as well.26 Remember to invite jurors who do not respond to “join in,” but do this in a conversational, nonjudgmental way.27 When one juror answers, consider following up

24 See, e.g., Fontham, supra note 13, at 48.
25 See, e.g., Perrin et al., supra note 13, at 88-89.
26 Id. at 91.
27 Id. at 107; see Fontham, supra note 13, at 73.
with other jurors: for example, "Mr. Jones, . . . what do you think?" This allows even the slowest responding and shyest jurors to be included.  

4. Develop Rapport with Jurors

Show an interest in and treat each juror with respect. The key is to be genuinely interested in what the jurors have to say, and to be yourself. This has two benefits: jurors are more likely to be open and candid in their answers if they like and trust you, and the positive impression you create increases your persuasiveness at trial.

5. Follow, Do Not Lead

Point jurors in a general direction, and then step back and take their lead. Open-ended questions allow jurors to answer in their own words, providing insight into their thought processes. Be careful of "why" questions, however, as they can put jurors on the defensive. Given that

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28 See BERGER ET AL., supra note 13, at 188.
29 See generally FONTHAM, supra note 13, at 48 (discussing counsel's initial exchange with the jury and the importance of "portraying an interest in the prospective juror," but not to "pry excessively into jurors' personal histories or put them on the spot").
30 BERGER ET AL., supra note 13, at 187.
31 Id. at 185.
32 Id.; JANE WILBUR & LOY VAN NATTER, ADVOCACY—GOING THE REST OF THE WAY: THEATER CRAFT AND THE CRAFT OF ADVOCACY 36 (1987) ("More cases are lost through the attorney's inability to project sincerity rather than the failure to present the facts and the law. Projection of sincerity is based on honesty with a simple, straightforward approach."). There is a body of research that supports the position that people like and trust people who dress like them. See, e.g., Robert B. Cialdini, INFLUENCE: SCIENCE AND PRACTICE 148, 151 (4th ed. 2001).
33 See generally FONTHAM, supra note 13, at 73; MOORE ET AL., supra note 13, at 322-23; MURRAY, supra note 13, at 97; READ, supra note 13, at 33, 41.
34 BERGER ET AL., supra note 13, at 185.
35 See id. at 192; FONTHAM, supra note 13, at 59; READ, supra note 13, at 34. But see BERGER ET AL., supra note 13, at 193 (Use closed-ended questions when planning a challenge for cause or trying to elicit specific information.).
36 See generally MOORE ET AL., supra note 13, at 323-24; READ, supra note 13, at 34.
some jurors already feel like they are being cross-examined, a “why” question can feel like a challenge. Do not make assumptions about or interpret answers or finish jurors’ sentences. When you do, you redirect jurors to your thinking instead of discovering theirs.

6. Do Not Telegraph the “Right” Answer

Jurors want to avoid looking unfair, prejudiced, or uneducated. Avoid questions beginning with phrases like “Do you understand that . . . ?” Such questions have the “correct” answers built right into them and beg for agreement. “Do you understand the defendant is presumed innocent unless proven guilty?” will predictably be answered “yes,” both because it presupposes the answer and because jurors are familiar with the mantra from television and movies. A better question is, “If you had to go into the jury deliberation room right now, how would you vote?” A common answer is “I don’t know, I haven’t heard the evidence yet,” which is a great platform for discussion.

7. Ask Clear, Simple Questions

Make sure you and the jurors are using the same concepts and definitions or even truthful answers can be misleading. When asking whether jurors, or one of their family members, have ever been accused of sexual

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38 This phenomenon has been identified by social scientists as the “social desirability effect.” Hazel Markus & R.B. Zajonc, The Cognitive Perspective in Social Psychology, in THE HANDBOOK OF SOCIAL PSYCHOLOGY 137, 184 (Gardner Lindzey & Elliot Aronson eds., 3d ed. 1985); see also Read, supra note 13, at 34.

39 See, e.g., Howard, supra note 17, at 391-94.
harassment, confirm what “sexual harassment” means. If a juror believes it is limited to physical contact or sexual demands, you may get a “no” answer, even if the juror was fired for creating a sexually hostile work environment as a result of jokes and innuendo. How is the juror defining “family member?” Does that include or exclude ex-husbands? Also avoid double negatives. Questions beginning: “Wouldn’t you,” “Couldn’t you,” and “It’s true, isn’t it” are confusing: does answering “yes” mean yes or no?

8. Listen to the Answers

Nothing shuts down a conversation faster than demonstrating a lack of interest. Just like the gaffe of the cross-examiner who fails to follow-up on a patently absurd or outrageous answer by a witness because the lawyer is so focused on her next question, it is a mistake to fail to really listen to the answers of the jurors.40 Jurors know when lawyers are not paying attention, and they respond by cutting off the flow of information.41 Also avoid interrupting a juror: it tells the entire venire that you do not really care what they have to say and that the “conversation” is really all about you.42

9. Use “Active Listening”

Encourage jurors to talk by using those cues we give when interested in what others are saying, like nodding and interjecting expressions like: “uh huh . . .,” “and . . .,” “go on . . .,” “really?,” “is that so?”43 When you are not sure what a juror meant and you cannot think of a good follow-up question, try repeating the last few words of the juror’s answer, raising your voice at the end, like you were asking a question. See if the juror picks up your cue and continues talking.44

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40 See generally FONTHAM, supra note 13, at 48, 75; READ, supra note 13, at 51.
41 See generally READ, supra note 13, at 51.
42 Id.
43 See BERGER ET AL., supra note 13, at 187.
44 See generally READ, supra note 13, at 51.
10. Participate in the Conversation

Do not ask questions in a staccato-like series, one right after the other, because it makes jurors feel they are being interrogated. Follow the basic principles of good conversation. Look jurors in the eye as they answer your questions. Otherwise, you may seem rude and you will lose valuable information gained by watching facial expressions, general demeanor and body language. If you use the jurors' names, make sure you are pronouncing them correctly. If in doubt, ask. Speak loudly and clearly, and stand when you talk. If you can, have a colleague take most of the notes. Even without the luxury of a note-taker, the benefits of information-gathering and rapport-building usually trump those of copious notes.

II. Key Two: Persuade Without Argument in Opening Statement

A basic rule of trial practice is that a lawyer cannot argue in opening statement. A lawyer who breaks this rule runs the risk of drawing an objection from opposing counsel and having it sustained by the judge. Of course, like most rules of trial practice, a lawyer can get away with de minimus violations in most cases and wholesale disregard in cases where opposing counsel—whether as a result of inexperience, inattention

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45 See generally MOORE ET AL., supra note 13, at 323.
46 Id.
47 BERGER ET AL., supra note 13, at 186; ROSE, supra note 13, at 300.
48 BERGER ET AL., supra note 13, at 186. But see READ, supra note 13, at 32-33 ("It is naive to think that a lawyer can consistently predict how complete strangers will decide a complex matter by evaluating their body language and mannerisms.")
49 BERGER ET AL., supra note 13, at 186.
50 Id.
51 See ROSE, supra note 13, at 301.
52 See, e.g., BERGER ET AL., supra note 13, at 243; FONTHAM, supra note 13, at 85; LUBET, supra note 13, at 370, 378; TRIAL TECHNIQUES, supra note 13, at 68; TRIALS, supra note 13, at 85; TRIAL NOTEBOOK, supra note 13, at 174-80; MOORE ET AL., supra note 13, at 106-07; MURRAY, supra note 13, at 104; READ, supra note 13, at 75.
53 See, e.g., BERGER ET AL., supra note 13, at 243; MURRAY, supra note 13, at 104.
or trial strategy—does not object. Although simple in concept, lawyers commonly falter in practical application of the “no argument” rule in two ways: (1) failing to understand what “argument” is, and (2) failing to appreciate that argument is not the most persuasive tool in opening statement, even if they can get away with it.54

A. The Goal of Opening Statement

The legitimate purpose of opening statement is to provide jurors an overview of the anticipated evidence to facilitate their understanding of the testimony and exhibits in relation to the larger case.55 This is particularly useful in trials where evidence is presented out of chronological order.56 Having heard a “preview” of the evidence, jurors have a conceptual construct in which to place the bits and pieces of evidence as they are presented.57

A trial lawyer’s goal in opening statement is broader: to convince the jurors of the righteousness of her case and persuade them that her client deserves to win.58 An advocate can (and should!) certainly do this in opening statement, but the arsenal of persuasive tools are limited to those appropriate to the legitimate purpose of opening—to provided the jurors an overview of the evidence, or the facts, of the case.

B. Exceptions to the “No Argument” Rule

There are three safe harbors during opening statement where a lawyer may argue: at the very beginning when presenting the theme of the case,59

54 See generally BERGER ET AL., supra note 13, at 243-44; MOORE ET AL., supra note 13, at 101-04.

55 See BERGER ET AL., supra note 13, at 236; FONTHAM, supra note 13, at 85; LUBET, supra note 13, at 370; MOORE ET AL., supra note 13, at 95; MURRAY, supra note 13, at 97; READ, supra note 13, at 66.

56 See BERGER ET AL., supra note 13, at 235; LUBET, supra note 13, at 370; MOORE ET AL., supra note 13, at 99.

57 See BERGER ET AL., supra note 13, at 235; LUBET, supra note 13, at 370; MOORE ET AL., supra note 13, at 99.

58 See BERGER ET AL., supra note 13, at 236; FONTHAM, supra note 13, at 85; see generally MURRAY, supra note 13, at 99.

59 See generally FONTHAM, supra note 13, at 86-91; LUBET, supra note 13, at 382; TRIAL TECHNIQUES, supra note 13, at 64; READ, supra note 13, at 110-14.
at the very end when repeating the theme, and when reviewing the elements of and burden of proof on a claim or defense. These exceptions have evolved as part of the "law of trial advocacy." They are not clearly defined and interpretation varies across jurisdictions and between judges in a single court.

The theme concisely embodies the case theory (the true story that takes into account both the admissible evidence and the law and leads to the inevitable and logical conclusion that the clients wins) and packages it with an emotional "hook" that has universal appeal to the jurors' sense of justice. There is no rule as to permissible length of a theme in opening statement, but conventional wisdom is that a theme of one to three sentences is acceptable. There is an inverse correlation between the degree of argument and theme length—more fact-based themes can run a bit longer; extremely argumentative themes need to be very brief.

As for including the elements of claims and defenses or the burden of proof in opening statement, the latitude allowed by different courts varies greatly. Brief coverage of what must be proven to win, a conclusory statement that the evidence will or will not meet these elements, or a pithy statement as to which party has the burden of proof is almost always allowable, but not an explanation of why the elements will or will not be proven or an explanation of the meaning of the quantum of proof.

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60 See generally MAUET & WOLFSON, supra note 13, at 27 ("The more modern view, recognizing the psychological significance of opening statements, is somewhat broader and permits stating themes, theories of the case, characterizations, and even conclusions so long as they are not excessively argumentative.").

61 See generally LUBET, supra note 13, at 376-77, 408; READ, supra note 13, at 77-87, 119; TANFORD, supra note 13, at 153.

62 See generally PERRIN ET AL., supra note 13, at 163.

63 LUBET, supra note 13, at 374; TRIAL TECHNIQUES, supra note 13, at 68; PERRIN ET AL., supra note 13, at 121.

64 BERGER ET AL., supra note 13, at 247; LUBET, supra note 13, at 7-8, 382; MOORE ET AL., supra note 13, at 95-97; READ, supra note 13, at 80-81.

65 LUBET, supra note 13, at 7-8, 382-83 ("best presented in a single sentence"); MOORE ET AL., supra note 13, at 95 ("no more than four to five sentences"); see also generally BERGER ET AL., supra note 13, at 66, 249 ("a word, a phrase, an analogy").

66 See generally BERGER ET AL., supra note 13, at 236; FONTHAM, supra note 13, at 85; MURRAY, supra note 13, at 99.
C. Recognizing “Argument”

A general rule of thumb is that argument is anything other than a recitation of evidence, whether testimonial or exhibit, that the advocate has a good faith belief will be admitted at trial. A simple test is to examine each sentence in your opening statement and identify which witness (or exhibit) will say what you are saying. If you cannot point directly to a witness or exhibit, then you are arguing.

Examples of argument include: conclusions, deductions, characterizations, analogies, discussion of witness credibility and rhetorical questions. Talking about the law (except a perfunctory notation of elements and burden of proof) is also off-limits. In some jurisdictions, an advocate may be allowed to include reasonable inferences from the facts, but remember that reasonableness lies in the eye of the beholder! An inference helpful to your case may well be perceived as quite unreasonable by your opponent, triggering an objection. While you may survive the challenge, it interrupts the flow and impact of your opening statement.

Argument can occur when a lawyer talks about the other party’s intent, motivation, or emotions. For example, if you say “Mr. Smith was jealous and out for revenge,” you are not arguing as long as you can point to the source of the statement and it is admissible at trial. Will Mr. Smith testify to this at trial? Is there an admissible letter written by him that says this? Will another witness report that he said this? If so, will this evidence survive a hearsay objection? On the other hand, if the

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67 See generally LUBET, supra note 13, at 374-76.

68 PERRIN ET AL., supra note 13, at 138.

69 Id.

70 See generally FONTHAM, supra note 13, at 86 (credibility of witnesses); MOORE ET AL., supra note 13, at 106 (inferences and conclusions); PERRIN ET AL., supra note 13, at 160-61 (rhetorical questions, analogies, anecdotes, appeals to common sense, repetition, or other techniques).

71 See generally PERRIN ET AL., supra note 13, at 166.


73 See generally MOORE ET AL., supra note 13, at 107; PERRIN ET AL., supra note 13, at 146.

74 See BERGER ET AL., supra note 13, at 245.
statement logically follows from the anticipated evidence, but is not
directly stated, you are arguing.\textsuperscript{75}

Generally, a fact-based opening statement will keep an advocate out
of the murky waters of argument.\textsuperscript{76} However, even facts can constitute
impermissible argument when repeated multiple times for oratorical
effect.\textsuperscript{77}

\textbf{D. Power-Protecting the “Sounds Like Argument”}

Even a carefully crafted, argument-free opening statement may contain
statements that could sound like impermissible argument to the opposing
counsel (and the judge).\textsuperscript{78} A lawyer can protect against an objection by
prefacing such a statement with the source of the evidence.\textsuperscript{79} For
example, “\textit{Mary Smith will tell you herself} that her boss made her life at
the plant a living hell—she had never before imagined that a boss could
make her feel so humiliated—and \textit{it seemed to her} that he enjoyed every
minute of her humiliation, which only made it worse.”

A more generic prophylactic preface is the ubiquitous, “The evidence
will show. . . .” But this is only effective if the evidence \textit{will} show what
you are saying, and not just suggest or imply it.\textsuperscript{80}

\textbf{E. Why Not Argue?}

Some lawyers view the rule against argument as a restriction to be
endured, worked around, and violated if possible. On the contrary.
Social science research suggests that until the jurors have heard the
evidence facts are far more persuasive.\textsuperscript{81}

\textsuperscript{75} See PERRIN ET AL., \textit{supra} note 13, at 140.

\textsuperscript{76} See BERGER ET AL., \textit{supra} note 13, at 243.

\textsuperscript{77} LUBET, \textit{supra} note 13, at 376; PERRIN ET AL., \textit{supra} note 13, at 161.

\textsuperscript{78} See BERGER ET AL., \textit{supra} note 13, at 244; MOORE ET AL., \textit{supra} note 13, at 107;
PERRIN ET AL., \textit{supra} note 13, at 164.

\textsuperscript{79} See MOORE ET AL., \textit{supra} note 13, at 107.

\textsuperscript{80} See BERGER ET AL., \textit{supra} note 13, at 244; MOORE ET AL., \textit{supra} note 13, at 107-
08; PERRIN ET AL., \textit{supra} note 13, at 164-65.

\textsuperscript{81} See BERGER ET AL., \textit{supra} note 13, at 243.
Empirical studies show that conclusions drawn by the jurors themselves—from facts presented by the lawyers—are far more indelible and color the jurors’ perception of and reception to the evidence during trial.\textsuperscript{82} Even if you can get away with it, why would you want to telegraphically argue that “Mr. Smith was drunk out of his mind” when you have facts that he had red, blood-shot, watery eyes, his speech was slurred speech, he had urinated on himself, he could not remember his birthday or his address, he fell getting out of the car and he staggered to his house?

Jurors have only a baseline impression of the attorneys when they hear opening statements, limiting their ability to assess credibility. They understand the trial is an adversarial proceeding and that the lawyers are “selling” their case. Conclusions and characterizations are viewed as “claims,” and jurors look for facts that support or refute them.\textsuperscript{83} The advocate who relies on a colorful conclusion or a sweeping generalization will lose the battle of first impression in opening statement if her opponent presents specific contradictory facts.\textsuperscript{84}

Certainly an advocate who argues in opening statement can bounce back during trial with supporting facts (after all, research confirms that verdicts are closely tied to the weight of the evidence),\textsuperscript{85} but why not use your time during opening statement to effectively marshal and sequence your most compelling facts into a story that brings the jurors to their own conclusion that your client should win?

\subsection*{F. Speak Directly to the Jurors}

Opening statement is an opportunity to connect with the jurors, but only if the advocate can capture and keep the jurors’ attention.\textsuperscript{86} This means effectively employing traditional oratorical skills to maximize

\begin{footnotesize}
\begin{enumerate}
\item See Damisch et al., \textit{supra} note 7, at 1014.
\item See Trial Techniques, \textit{supra} note 13, at 68.
\item See id.
\end{enumerate}
\end{footnotesize}
persuasive communication: eye contact, hand gestures, variations in tone, pace and emphasis, use of purposeful physical movement, and creative use of visual aids.\(^8\) Also, remember to use the words of a speaker and not those of a writer when presenting opening statement.\(^8\) If a lawyer chooses to write out her opening, she should reduce it to bullet points and practice it using everyday language and cadence.\(^8\) The written word, while frequently more elegant, can hit jurors’ ears as stilted or artificial, which undercuts an advocate’s credibility in the courtroom, and credibility is the foundation of an advocate’s ability to persuade.\(^9\)

III. Key Three: The Lawyer as Director on Direct Examination

A trial lawyer presenting her case in chief through direct examination is somewhat like a film director: the lawyer thoroughly analyzes the case and develops a plan for the most effective way to present the case to the jury to best advance her theme and theory.\(^9\) Just as no script would play out on film the exact same way in the hands of different directors, the same case will be presented in various ways by different trial lawyers.

\(^8\) See Berger et al., supra note 13, at 263-76; Murray, supra note 13, at 72-73; Read, supra note 13, at 90, 93-95; Rose, supra note 13, at 66-67.

\(^8\) Moore et al., supra note 13, at 100-07; Read, supra note 13, at 80-81.

\(^9\) See, e.g., Berger et al., supra note 13, at 18 (“Jurors can detect a phony, so be yourself.”); Fontham, supra note 13, at 25-26 (“Perhaps the single most important attribute... is factual command and credibility.”); Johnson & Hunter, supra note 13, at 112; Lubet, supra note 13, at 410, 462 (stating the credibility of the advocate is considered critical to the ability to persuade the jury); Lavine, supra note 13, at 31-32, 35 (“The advocate’s credibility is, without question, his most precious asset.”); Lubet, supra note 13, at 25-26 (“[C]redibility of the lawyers can play a large part in shaping the trial’s outcome.”); Trial, supra note 13, at 11 (“At every stage of the trial, show that you are the lawyer the jurors can trust.”); Trial Notebook, supra note 13, at 146; see Perrin et al., supra note 13, at 19; Read, supra note 13, at 15-16 (“[Y]our goal is to show the jury that you are trustworthy....”); Spence, supra note 13, at 47-65; Wilbur & Van Natter, supra note 32, at 36 (observing that “more cases are lost through the attorney’s inability to project sincerity”); see also Carl I. Hovland & Walter Weiss, The Influence of Source Credibility on Communication Effectiveness, 15 Public Opinion Q. 635-50 (1951).

\(^9\) See generally Berger et al., supra note 13, at 334-35; Fontham, supra note 13, at 296-97.
Yet there are constants to be found in the steps effective trial lawyers take during their case in chief when presenting their evidence through direct examination.92

A. The Witness is the Star, Not the Lawyer

With the exception of actor-directors (such as Woody Allen, Clint Eastwood, and Mel Gibson) or those who fancy cameo appearances (such as Alfred Hitchcock, Spike Lee, and Martin Scorsese), most directors operate behind the scenes. So, too, on direct examination, effective trial lawyers relinquish the spotlight and let the witness take the lead role.93 One way to do this is for the lawyer (in state court) to position himself back near the corner of the jury box, which forces the witness to talk "to" the jurors when answering questions on direct exam.94 Another way is to allow the witness to tell her story, not to merely confirm the lawyer's recitation of it.95 This means that even when good trial lawyers know they can get away with leading questions on direct exam, they do not do it.96 It takes more effort to craft a direct examination using the non-leading questions "Who . . .?" "What . . .?" "Where . . .?" "Why . . .?" "Explain . . ." "Describe . . ." or "Tell me about . . .," but the benefit is that the jury hears the witness tell the story in her own words, boosting credibility.97

B. The Witness Does Not Testify in a Void

Few films have characters that appear in critical scenes before allowing the audience to get a sense of who the character is vis-à-vis the overall story. Likewise, good trial lawyers allow the jurors to learn who the

92 See generally TRIAL NOTEBOOK, supra note 13, at 407-29.
93 See FONTHAM, supra note 13, at 296; MURRAY, supra note 13, at 73, 108-09.
94 See BERGER ET AL., supra note 13, at 364-66; MURRAY, supra note 13, at 73; READ, supra note 13, at 159-60; ROSE, supra note 13, at 100.
95 See BERGER ET AL., supra note 13, at 370; MURRAY, supra note 13, at 108.
96 See READ, supra note 13, at 146; ROSE, supra note 13, at 93.
97 TRIAL TECHNIQUES, supra note 13, at 111; MOORE ET AL., supra note 13, at 113; READ, supra note 13, at 136, 147-48.
witness is vis-à-vis the case before eliciting critical testimony. This is separate and distinct from eliciting background information about the witness. While background information is useful for a number of reasons such as building witness rapport with the jurors, relaxing the witness, building witness credibility, qualifying an expert and so on, jurors are best able to process the significance of the background information—and the rest of the testimony—if they first understand where this witness “fits” in the case. The jury has already been read a short statement of the case by the judge, been exposed to case issues through voir dire, and heard opening statements. As each witness takes the stand, they ask themselves: who is this person in relation to the case? One way to answer this is to ask the witness directly at the beginning of the direct examination:

Q: Mr. Jones, are you familiar with the plaintiff, Margaret Smith?
A: Yes. She was my secretary at the time of the fire and she was with me in the office lunchroom when the firefighters arrived.

Q: Alright, I’m going to come back and ask you some more questions about that in a bit, but first I’d like to talk to you a little about your background.

C. The Witness Is Not the Director

While a director does not speak the lines or hand over a script wholesale to the actors, she does plan and control the pace and delivery of the story by controlling the dialogue. Likewise, effective trial lawyers thoughtfully plan for direct examination, with an eye always towards supporting the theme and theory of the case. Even if a witness were

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98 See TRIAL TECHNIQUES, supra note 13, at 110; READ, supra note 13, at 157.
99 MURRAY, supra note 13, at 116-19; PERRIN ET AL., supra note 13, at 198.
100 MURRAY, supra note 13, at 118.
101 LUBET, supra note 13, at 46, 52; TRIAL TECHNIQUES, supra note 13, at 102; MURRAY, supra note 13, at 116-19.
102 PERRIN ET AL., supra note 13, at 382-83.
103 Id.
104 See FONTHAM, supra note 13, at 296-97; see also MURRAY, supra note 13, at 109; READ, supra note 13, at 149-50, 156.
allowed to give narrative testimony to the jury, it may erupt as a rambling, unorganized account that includes too many unnecessary details and too few critical ones. One way a lawyer maintains control on direct examination without asking leading questions is by using headlines and transitions. These directional statements alert both the witness and the jury to where the testimony is headed. Usually, a headline statement refers back to early testimony, which was intentionally only touched on briefly, now to be revisited in more detail—such as “I’d like to now talk about what happened at the partner’s meeting in July,” “Let’s talk now about what happened after you arrived home from the hospital,” or “I’d like to talk a little bit now about your financial situation today.”

The overall organization of the exam also controls the flow of information to the jury. On direct examination, a chronological approach is frequently the most persuasive because the jurors—who are receiving the information aurally for the very first time—can easily comprehend the facts. Americans are accustomed to receiving information primarily through visual media. Thus, effective trial lawyers look for ways to incorporate visuals into direct examination by using demonstrations, exhibits or demonstrative aids. The use of visuals accomplishes more than simply keeping the jury’s attention (which is no small feat); it actually helps jurors receive, store and retrieve information.

105 See Fontham, supra note 13, at 302; Read, supra note 13, at 156, 177.
106 See Berger et al., supra note 13, at 372-73; Trial Techniques, supra note 13, at 99-100; Rose, supra note 13, at 94; Read, supra note 13, at 148-49, 177-78.
107 See Trial Techniques supra note 13, at 105.
108 Id. at 100.
109 See Berger et al., supra note 13, at 351-52; Fontham, supra note 13, at 301; Lubet, supra note 13, at 57-59; Trial Techniques, supra note 13, at 99; Moore et al., supra note 13, at 111, 123; Murray, supra note 13, at 112.
111 See Berger et al., supra note 13, at 383-85; Fontham, supra note 13, at 302; Trial Techniques, supra note 13, at 115; Moore et al., supra note 13, at 139-40; Read, supra note 13, at 152.
112 See Berger et al., supra note 13, at 383-85; Fontham, supra note 13, at 302; Trial Techniques, supra note 13, at 115; Moore et al., supra note 13, at 139-40; Read, supra note 13, at 152.
D. Witness Preparation Is Key

Just as directors understand the importance of rehearsing a scene before shooting it on film, effective trial lawyers understand the importance of thorough witness preparation—including a run-through of direct examination. Ethical witness preparation allows the lawyer to work with the witness to understand how her testimony furthers the themes and theory of the case. The lawyer can use witness preparation to practice the pace of the direct examination, to educate the witness on the goals of the different sections of the examination, and to advise the witness about how much detail to share at various intervals as the testimony unfolds.

Information can be elicited from the witness in either large or small pieces. At times, the lawyer wants the jury to hear only a global answer to a question, to be revisited in more detail later. At other times, the lawyer determines that greater detail is needed to build witness credibility and maximize persuasion. The lawyer can slow the pace of the examination and increase detail by asking a series of incremental questions. For example, instead of the general question “What did the man look like?” the lawyer might ask a series of open-ended questions, such as: “How tall was he?” “How heavy was he?” “What color was his hair?” “Eyes?” This technique of asking incremental questions can also create the illusion of lengthening time in the minds of the jurors when used to talk about events. Social science research suggests that there is a correlation between the amount of time spent talking about an event during testimony and jurors’ perception of the duration of the event:

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113 See Berger et al., supra note 13, at 383; Fontham, supra note 13, at 296; Rose, supra note 13, at 91; Trial Techniques, supra note 13, at 117; Moore et al., supra note 13, at 157; Read, supra note 13, at 141; Murray, supra note 13, at 121.

114 See Berger et al., supra note 13, at 380; Murray, supra note 13, at 122; Read, supra note 13, at 143.

115 See Berger et al., supra note 13, at 380; Murray, supra note 13, at 122; Read, supra note 13, at 143.

116 See generally Read, supra note 13, at 159.

117 Berger et al., supra note 13, at 374; Lubet, supra note 13, at 66-68. But see Berger et al., supra note 13, at 141-42.

118 See Trial Techniques, supra note 13, at 123.
longer the jurors hear about the event, the longer they perceive the event to be.\textsuperscript{119}

Trial lawyers do not create the story, but methodical organization and preparation can vastly influence how that story is perceived by the jury.

IV. Key Four: Controlling the Witness on Cross-Exam

In the wonderfully entertaining and instructive video \textit{The Ten Commandments of Cross-Examination},\textsuperscript{120} the late Irving Young offered this appraisal of lawyers' ability to conduct cross-exam: "Most lawyers do it badly all the time, no lawyer does it well all the time, and no lawyer in the early stages of his career does it well at all."\textsuperscript{121} Happily, we have come a long way since Younger's grim assessment, due to the instruction of maestros like Younger, Terence MacCarthy,\textsuperscript{122} Larry Pozner, and Roger Dodd.\textsuperscript{123} All too often, however, lawyers still find themselves in trouble on cross-examination, sparring with an out-of-control witness. There is, however, a simple system for maintaining witness control on cross-exam, and there are some easy techniques for regaining control if things go awry.

A lawyer has lost control of a cross-examination when she engages in an ad hoc dialogue with the witness.\textsuperscript{124} That is because, despite the question-answer format, cross-exam is \textit{not} a conversation. A trial lawyer who finds herself embroiled in an impromptu discussion with a witness on cross-exam (or worse, an argument) has lost control of the witness and

\textsuperscript{119} Id.
\textsuperscript{120} Irving Younger, The Art of Cross-Examination, ABA Monograph Series No. 1 (ABA Section on Litigation 1976). Younger's rules for cross-examination are: (1) be brief, (2) use short questions in plain words, (3) ask only leading questions, (4) never ask a question unless you know the answer, (5) listen to the answer, (6) do not quarrel with the witness, (7) do not repeat the direct exam, (8) do not allow the witness to explain, (9) do not ask the one-question-too-many, and (10) stop when you have accomplished your goals. \textit{Id.}
\textsuperscript{121} Id.
\textsuperscript{122} MACCARTHY, supra note 13.
\textsuperscript{123} LARRY S. POZNER \& ROGER DODD, CROSS-EXAMINATION: SCIENCE AND TECHNIQUES (1993).
\textsuperscript{124} Id.
the examination.\textsuperscript{125} The key to avoiding this loss of control is preparation, preparation, and more preparation!\textsuperscript{126}

\section*{A. Get the Facts Before Trial}

Once trial begins, a lawyer must accept the fact that the time for discovery has come and gone. A good cross-examiner will have mastered the facts of the case before trial and constructed a cross-examination based exclusively on those facts.\textsuperscript{127} No matter how desperately a lawyer is itching to learn the answer to a newly conceived question during trial, she will resist the urge if she wants to maximize witness control.\textsuperscript{128} The best cross-examiners will tell you they only ask questions when they already know the answers.\textsuperscript{129} This strategy maximizes predictability and control on cross-exam and allows for quick impeachment if the witness fails to agree on any fact.

\section*{B. Source Every Fact\textsuperscript{130}}

A corollary to the maxim “only ask questions you know the answer to” is “source the answer to each question.”\textsuperscript{131} This means that for each question, a lawyer will not only know the fact-based answer in advance, she will know where to quickly access the evidence to prove up that fact if needed.\textsuperscript{132} In most cases, this will be a prior inconsistent statement, such as a deposition.\textsuperscript{133} Do \textit{not} rely on your memory in this circumstance.

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\end{enumerate}
\end{footnotesize}
Rather, annotate the source of each answer right next to the question.\(^{134}\)

It is frustrating for jurors (and the judge) to wait for a lawyer to search for impeachment evidence.\(^{135}\) Yet, when the adrenaline is pumping and a witness stubbornly refuses to confirm that a straight-forward fact is true, it can be difficult for a lawyer to maintain composure and put a finger on a fact in a deposition based on memory alone.

**C. Just the Facts**

A foolproof cross-exam is constructed of facts because a witness can quibble with anything subjective, such as conclusions, opinions, or inferences.\(^{136}\) Therefore, a tight cross-exam does not include any comparators or adjectives, because they invite dialogue.\(^{137}\) For example, in a trial for assault:

Q: There were a lot of people present when the fight broke out?
A: Nah, I wouldn’t say that.
Q: Well, this was at Safeco Field?
A: Yes.
Q: During a Mariners baseball game?
A: Yes.
Q: During the middle of the fourth inning?
A: Yes.
Q: And the fight broke out on the pitcher’s mound?
A: Yes.
Q: So, there were a lot of people present?
A: Not really. Safeco Field holds about 50,000 fans, but it was raining that day and the Mariners were playing the Texas Rangers—so there were only about 6000 people there.

As the above illustrates, “shortcut” adjectives or conclusions are often anything but shortcuts. A more reliable route is to rely only on facts, sequencing them so jurors come to the subjective conclusion on their own.\(^{138}\)

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\(^{134}\) BERGER ET AL., *supra* note 13, at 406.

\(^{135}\) PERRIN ET AL., *supra* note 13, at 317.

\(^{136}\) MURRAY, *supra* note 13, at 206-08.

\(^{137}\) PERRIN ET AL., *supra* note 13, at 312.

D. One New Fact at a Time

Another technique to maximize witness control on cross-exam is to include only one new fact per question.\(^{139}\) A question may contain multiple facts, but only one of them should be new. Otherwise, if the witness rejects the facts as presented, the lawyer is left unsure where the fight lies.\(^{140}\) Which fact, or facts, is the witness disputing? For example, suppose the question is “You were walking down Third Avenue in Seattle at noon on August 14 when you saw three men run out of the Bank of America?” If the witness responds, “No,” the lawyer is forced to retreat and review each fact one by one to identify which one is disputed. This method is awkward and time-consuming, and it can damage the lawyer’s credibility with the jury.\(^{141}\)

E. Techniques to Regain Control

Even lawyers who craft short, simple, single-fact, leading questions may sometimes find themselves facing a witness who refuses to cooperate.\(^{142}\) In that case, there are techniques to expose such a witness as evasive and uncooperative without injuring your credibility with the jury.\(^{143}\)

1. Do Not Interrupt the Witness

If the witness refuses to give a straight answer to your clean, short, one-new-fact question, do not become agitated and declare war.\(^{144}\) Unless the witness is damaging your case, such as starting to talk about a matter previously ruled inadmissible (or one you would like to have the judge

\(^{139}\) See TRIAL TECHNIQUES, supra note 13, at 260; MOORE ET AL., supra note 13, at 162; MURRAY, supra note 13, at 206; PERRIN ET AL., supra note 13, at 302; POZNER & DODD, supra note 123, at 304; READ, supra note 13, at 214-16; ROSE, supra note 13, at 128; Younger, supra note 120, at 74.

\(^{140}\) See PERRIN ET AL., supra note 13, at 305; READ, supra note 13, at 215.

\(^{144}\) See generally PERRIN ET AL., supra note 13, at 315-16.

\(^{142}\) BERGER ET AL., supra note 13, at 425.

\(^{144}\) See generally FONTHAM, supra note 13, at 469-72.

\(^{144}\) See id. at 474-75.
rule inadmissible), do not interrupt him.145 You will appear rude and seem like you are trying to hide the ball from the jury.146 If the witness refuses to give a straight answer to a simple fact-based question, let him blather on. The jury will see him for the truth-dodging weasel he is.147

2. The Hand Stop148

Although you should not interrupt a witness, you can sometimes silently direct him to stop speaking by putting your hand up as if to say, "Stop."149 It is amazing how well this technique works, even with arrogant, caustic witnesses. Perhaps this is because the nonverbal command is rooted in childhood and hardwired into us. The hand gesture should not be flamboyant, however. The goal is to subtly cue the witness to stop, not to draw the jury’s attention to you by parodying a police officer directing traffic. The beauty of the subtle hand stop is that the lawyer regains control of the witness without appearing rude.

3. Repeat Your Question

If the witness blathers on non-responsively, just repeat your simple question.150 Doing this three times underscores for the jury the witness’s refusal to cooperate.151 It can also be effective to write the question down for the witness to drive home to the jury the simplicity of the question and the inherent unfairness of his refusal to answer the question.

145 Id. at 475; see also generally READ, supra note 13, at 234. But see MOORE ET AL., supra note 13, at 187 (discussing interrupting a witness attempting to offer an explanation to a closed-ended question)

146 See FONTHAM, supra note 13, at 475; PERRIN ET AL., supra note 13, at 307; TRIAL TECHNIQUES, supra note 13, at 304; see also POZNER & DODD, supra note 123, at 300-01.

147 See FONTHAM, supra note 13, at 470-72.

148 POZNER & DODD, supra note 123, at 413-16 (discussing several other methods of "physically interrupting"); see also BERGER ET AL., supra note 13, at 426.

149 See POZNER & DODD, supra note 123, at 413.

150 BERGER ET AL., supra note 13, at 426; MOORE ET AL., supra note 13, at 184-85, 187; MURRAY, supra note 13, at 207-08; PERRIN ET AL., supra note 13, at 308; READ, supra note 13, at 232-33.

151 PERRIN ET AL., supra note 13, at 308.
4. “Okay” and “That’s Right”\textsuperscript{152}

Another reason foolproof cross-exam includes only simple leading questions the lawyer knows the answer to (and can readily impeach with pre-sourced answers) is because a question put to a witness on cross-exam but not admitted is often viewed by the jury not as yet unproven—but rather that the opposite is proved!\textsuperscript{153} If the witness refuses to acquiesce, you must impeach. If the witness gives a substantively comparable answer, however, do not fight it.\textsuperscript{154} Instead, use the “Okay” technique:

\begin{center}
\textbf{Q:} The traffic was heavy?
\textbf{A:} Well, there were a lot of cars.
\textbf{Q:} Okay, there were a lot of cars.
\end{center}

Likewise, if the witness gives a better (but different than you expected) answer, do not fight it! Instead, use the “That’s Right” technique:

\begin{center}
\textbf{Q:} Sir, you had two insurance policies on your wife’s life at the time of her death?
\textbf{A:} No, I had three.
\textbf{Q:} That’s right; you had three insurance policies on your wife’s life.
\end{center}

5. The “Reverse and Repeat”

If a witness will not answer a simple, one-fact question after multiple attempts, try flipping the question 180 degrees and putting the polar opposite fact to him.\textsuperscript{155}

\begin{center}
\textbf{Q:} There were other people at the office party besides you and Mr. Smith?
\textbf{A:} Well, it was really late and pretty much everyone had left early. . . .
\textbf{Q:} There were other people at the office party besides you and Mr. Smith?
\end{center}

\textsuperscript{152} I learned this technique from a gifted trial lawyer and advocacy teacher in San Francisco, John Farrell.

\textsuperscript{153} PERRIN ET AL., supra note 13, at 310.

\textsuperscript{154} MOORE ET AL., supra note 13, at 186.

\textsuperscript{155} POZNER & DODD, supra note 123, at 409; see also MOORE ET AL., supra note 13, at 188.
A: Well, all the people from my department had left well before seven o’clock.

Q: So, you and Mr. Smith were the only ones left at the office party? It is amazing how a witness who will stubbornly refuse to agree with something will quickly reject the 180-degree opposite proposition.

6. Beware of the “Nonresponsive” Objection

It is the prerogative of the examining attorney to object when a witness is nonresponsive. The danger is that the objection may well highlight the nonresponsive testimony for the jury. As a general proposition, the “nonresponsive” objection is a tripartite endeavor: the lawyer (1) objects to the testimony as “nonresponsive,” (2) moves to strike, and (3) asks the judge to give an instruction to the jury to disregard the testimony. Doing this can have the unintended consequence of having the testimony repeated multiple times in front of the jury, which is counterproductive. The better road is often to let the non-responsive answer slide.

7. Do Not Go to the Judge for Help

If you have crafted clean, short, one-new-fact questions, you will not need to seek help from the bench. If you use the “repeat the question three times” technique, it is unlikely the judge will need to jump in and instruct the witness that he needs to answer the question. You, as the lawyer, do not ask the judge to do this—it signals your loss of control to everyone in the courtroom.

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156 Moore et al., supra note 13, at 184; Murray, supra note 13, at 208; Perrin et al., supra note 13, at 307; Pozner & Dodd, supra note 123, at 412.
157 Moore et al., supra note 13, at 185; Perrin et al., supra note 13, at 364.
158 Berger et al., supra note 13, at 426; Moore et al., supra note 13, at 185-86; Perrin et al., supra note 13, at 307.
159 Trial Techniques, supra note 13, at 305.
160 Moore et al., supra note 13, at 186.
161 Pozner & Dodd, supra note 123, at 405.
162 See Fontham, supra note 13, at 506; Perrin et al., supra note 13, at 307; Rose, supra note 13, at 129.
8. Do not Scold the Witness Until Ten Minutes After the Judge and Jury Want You to

Although cross-exam need not be "cross," there are times when it is appropriate to deliver some attitude to the witness. Just make sure the judge and jurors are grateful when you do this. Remember, the goal on cross-exam is to discredit the witness, not yourself. Having an attitude with a witness before it feels appropriate to the jurors conveys that you are motivated by emotion instead of logic. This undermines your credibility, which is your most valuable asset as a trial lawyer.

V. Key Five: Impeaching the Witness on Cross Examination

There are certain trial moments that set a lawyer’s heart a-flutter. One is the opportunity to show the jury that an adverse witness is not to be trusted. Even better is the chance to expose the witness to be a bald-faced liar.

Welcome to the wonderful world of impeachment. Impeachment is the art of discrediting the witness on cross examination. Impeachment techniques include: (1) bias, interest and motive; (2) interest; (3) prejudice; (4) inconsistency with another witness; (5) inconsistency with physical evidence; (6) inconsistency with things not done; (7) inconsistency with common sense; (8) omissions; and (9) inconsistent statements. Pozner and Dodd list nine techniques: (1) bias; (2) interest; (3) prejudice; (4) inconsistency with another witness; (5) inconsistency with physical evidence; (6) inconsistency with things not done; (7) inconsistency with common sense; (8) omissions; and (9) inconsistent statements. Pozner and Dodd, supra note 123, at 358.

See FonTham, supra note 13, at 506-08, 531-32 (citing Alford v. United States, 282 U.S. 687, 692 (1931)); see also Henry v. Speckard, 22 F.3d 1209, 1214 (2d Cir. 1994) (holding that “[t]he motivation of a witness in testifying, including her possible self-interest and any bias or prejudice against the defendant, is one of the principal subjects for cross-examination”) (cited in FonTham, supra note 13, at 531 n.52).
(2) prior convictions; (3) prior bad acts; (4) prior inconsistent statements; (5) bad character for truthfulness; (6) treatises; and (7) contradictory facts.

Impeachment is mostly governed by common law and requires a good faith belief on the part of the advocate. The challenging attorney is also required to raise impeachment issues on cross-examination, giving a witness a chance to explain, before introducing any extrinsic evidence. Although the Federal Rules of Evidence permit an attorney to impeach her own witness, it is ill-advised. Instead, either clarify your question or, using some other non-confrontational technique, reexamine your witness’s testimony.

A. Collateral Versus Non-collateral

Not only must an attorney have a good faith belief, she must be ready to “prove up” the impeachment if it is non-collateral—meaning the issue directly affects the disputed issues in the case. On the other hand, if the witness denies a collateral matter (one not central to the issues), the lawyer may very well be stuck with a false denial by the witness. This is because extrinsic evidence proving the witness to be lying may be inadmissible. Some types of impeachment are always deemed non-
collateral (bias, interest, motive), while others can be either collateral or non-collateral.\textsuperscript{184}

**B. Prior Inconsistent Statements**

Of the various impeachment techniques, impeaching by prior inconsistent statements (PIS) can be exceptionally devastating.\textsuperscript{185} It is premised on the concept that the jury cannot believe the adverse witness's testimony at trial because on an earlier date, under circumstances far more reliable, she stated something different.\textsuperscript{186}

Impeachment by prior inconsistent statement consists of three steps: “commit, credit, and confront.”\textsuperscript{187}

1. **Commit**

First confirm there is a fight.\textsuperscript{188} If done correctly, impeachment is very time-intensive,\textsuperscript{189} so you do not want to finish with a squeak, but with a bang! This means you must ensure you have a fight before you go down the long impeachment road.\textsuperscript{190} Otherwise the jury might resent your efforts.\textsuperscript{191} Imagine taking twenty minutes to set up an impeachment where you ultimately confront the witness: “And you told the officer that the light was red for the Volkswagen?” To which the witness responds, “That’s right, it was red for the Volkswagen.” Great. Now you are in a dialogue with the witness—someplace you never want to be on cross-examination.\textsuperscript{192} “I thought you said on direct examination that the light was green for the Volkswagen.” Witness: “No. Is that what I said? I must have misspoke—no, no—the light was red for the Volkswagen.”

\textsuperscript{184} ROSE, \textit{supra} note 13, at 206.
\textsuperscript{185} BERGER ET AL., \textit{supra} note 13, at 427.
\textsuperscript{186} MURRAY, \textit{supra} note 13, at 184.
\textsuperscript{187} TRIAL TECHNIQUES, \textit{supra} note 13, at 286; see MURRAY, \textit{supra} note 13, at 185; READ, \textit{supra} note 13, at 190-93.
\textsuperscript{188} READ, \textit{supra} note 13, at 223; see also MURRAY, \textit{supra} note 13, at 185-87.
\textsuperscript{189} BERGER ET AL., \textit{supra} note 13, at 427-28.
\textsuperscript{190} Id.; see MURRAY, \textit{supra} note 13, at 185-87.
\textsuperscript{191} BERGER ET AL., \textit{supra} note 13, at 427-28.
\textsuperscript{192} See generally READ, \textit{supra} note 13, at 223.
Commit: Old School Versus New School

There are two ways to think of the prior inconsistent statement "commit" phase. One is to commit the witness to the lie. The other is to commit in your own mind that you have a fight. I advocate the latter technique.

When committing the witness to the lie, the lawyer asks the witness to confirm the false testimony. Many lawyers still embrace this technique because they like to catch a witness in a lie and scold him in front of the jury. I prefer the more modern approach to confront the witness with the truth and ask for agreement. If the witness agrees, we have nothing to argue about (no further impeachment); if the witness resists, then I impeach.

The advantage to the modern approach is twofold. First, the lawyer does not want to utter the "lie" to the jury. This may seem of small consequence, but as suggested by Tom Wolfe in The Bonfire of the Vanities, even the messiest housekeeper, during the course of a two-week trial, will notice the dirt on the courthouse windows. This is to say that all jurors' minds wander. Think back to law school: how often did your mind wander during even the most invigorating of classes? In trial, if I have done my job well, such that the jury likes me, thinks of me as competent, intelligent and prepared: why do I want any juror to misremember me in the jury deliberation room as saying, "Well, remember Maureen Howard said X, Y & Z (the lies)? And I trust her so it must be true."

Second, by stating the truth (the PIS words) you have set up the confrontation most effectively because the exact words of the PIS have

193 READ, supra note 13, at 224.
194 POZNER & DODD, supra note 123, at 335; ROSE, supra note 13, at 218.
195 See READ, supra note 13, at 223; see also MURRAY, supra note 13, at 185-87.
196 MURRAY, supra note 13, at 185-87.
197 See generally MOORE ET AL., supra note 13, at 192; READ, supra note 13, at 224; see also POZNER & DODD, supra note 123, at 352 (discussing my preferred method as an "advanced variation" of impeachment).
198 TRIAL TECHNIQUES, supra note 13, at 286.
199 See POZNER & DODD, supra note 123, at 352.
been rejected by the witness, and so when confronted, there is no doubt in the jurors’ minds that the witness is a liar.\(^{201}\) Otherwise, the witness may quibble with a lie, but one which is not 180 degrees opposite of the PIS.\(^{202}\) If you commit the witness to the lie (the alternative wording), there may not be an effective “confrontation” because the jury may miss the absolute contradiction of the two statements.\(^{203}\)

2. Credit

This is the “accreditation” phase\(^{204}\) (modified for a bit of mnemonic alliteration) where the advocate walks the jury through the conditions under which the prior inconsistent statement was made—and establishes why the prior statement is far more credible than the trial testimony.\(^{205}\)

Frequently, a PIS will be deposition testimony.\(^{206}\) My practice is to begin the “accreditation” phase by asking, “Sir, this is not the first time you and I have talked about this case? You came to my office last summer? Your attorney was with you? I asked you some questions and you answered them? There was someone taking down my questions word-for-word, and your answers. That was the court reporter. He also had you take an oath? An oath to tell the truth? The whole truth? And I told you it would be the same oath you would take if the case went to trial? I also said that it was important to give full, truthful answers to my questions, because if the case went to trial and you gave different answers, then the jury would be entitled to hear the answers you gave that day?”

The “commitments” phase of a deposition is thus extremely useful when impeaching a witness.\(^{207}\)

\(^{201}\) POZNER & DODD, supra note 123, at 352.

\(^{202}\) See READ, supra note 13, at 225.

\(^{203}\) See MOORE ET AL., supra note 13, at 193.

\(^{204}\) See MURRAY, supra note 13, at 187-88.

\(^{205}\) POZNER & DODD, supra note 123, at 342-43, 348; READ, supra note 13, at 224; ROSE, supra note 13, at 218.

\(^{206}\) See, e.g., READ, supra note 13, at 223.

\(^{207}\) For an excellent discussion of the “commitments” one might obtain at the outset of a deposition to effectively impeach at trial, see DAVID M. MALONE ET AL., THE EFFECTIVE DEPOSITION 82-93 (rev. 3d ed. 2007).
3. Confront

The confrontation phase is brief.\textsuperscript{208} The lawyer informs opposing counsel what she is using ("Counsel: deposition page 53, line 17") and asks for permission to approach. Remember you are still on cross-examination and all questions should be leading. "Mr. Smith, I am handing you a copy of your deposition. Please look at the last page, page 89. There is a signature there. That is your signature? And above that signature is a statement that reads: I have reviewed the foregoing testimony and I declare under penalty of perjury under the laws of the state of Washington that the forgoing is true and correct?"

Then, the lawyer reads the PIS.\textsuperscript{209} "Mr. Smith, please read along silently as I read aloud." This is the better practice because the lawyer can control the "presentation" of the prior inconsistent statement to the jury—and put some "attitude" into it.\textsuperscript{210} The final step in this stage is to ask the witness "Did I read that correctly?" Do not ask if that is what the witness actually remembers or what the witness recalls testifying. If you ask, you will be disappointed.\textsuperscript{211} The witness who lies on direct examination is highly motivated to defend that testimony\textsuperscript{212}

C. Impeachment by Omission

Here, the witness "remembers" more details at trial than they documented in a prior statement.\textsuperscript{213} Most commonly, this occurs with a professional witness charged with creating detailed, reliable records such as an investigating police detective.\textsuperscript{214} The argument is, "This witness is trained to include important information in her reports, and so it is not believable that she now remembers critical facts that she didn’t

\textsuperscript{208} See generally READ, supra note 13, at 224. But see POZNER & DODD, supra note 123, at 348.

\textsuperscript{209} See, e.g., READ, supra note 13, at 224-25.

\textsuperscript{210} ROSE, supra note 13, at 218; TRIAL TECHNIQUES, supra note 13, at 286.

\textsuperscript{211} See, e.g., READ, supra note 13, at 223.

\textsuperscript{212} Id. at 202.

\textsuperscript{213} Id. at 222, 225-26; MOORE ET AL., supra note 13, at 198-200.

\textsuperscript{214} See, e.g., POZNER & DODD, supra note 123, at 376-77.
write down in her report." A most satisfying method of conducting the "confrontation" phase in this case is to hand the witness a marker and ask them to search through the report for the "detailed facts" they testified to at trial and to mark them in the PIS. When the witness hesitates, mumbling, "It's not there," turn to the jury and say, "No, please officer, take your time. . . ."

D. Hearsay? Not a Problem

A PIS is admissible at a minimum not for the truth of the prior statement but for the purpose of showing the witness to be unreliable.\footnote{See PERRIN ET AL., supra note 13, at 332.} In such cases, it is not substantive evidence, and cannot be argued as fact in closing argument or used for sufficiency of the evidence on appeal.\footnote{POZNER & DODD, supra note 123, at 386-87.} However, many prior inconsistent statements are admissible for substantive purposes over a hearsay objection because there is a hearsay exception, such as admission of a party opponent,\footnote{FED. R. EVID. 801(d)(1)(A); see also FONTHAM, supra note 13, at 518-19; TRIAL TECHNIQUES, supra note 13, at 285.} excited utterance,\footnote{FED. R. EVID. 803(2).} or present sense impression.\footnote{FED. R. EVID. 803(t).} The well-prepared advocate will look to see if the evidence is admissible substantively.

VI. Key Six: Connecting the Dots for the Jury on Closing Argument

A common error made by unseasoned attorneys during the closing argument is retelling the "story" of their case.\footnote{See BERGER ET AL., supra note 13, at 537; PERRIN ET AL., supra note 13, at 475.} Storytelling is best used in the opening statement, not in closing argument.\footnote{BERGER ET AL., supra note 13, at 537; see also MURRAY, supra note 13, at 353; PERRIN ET AL., supra note 13, at 475.} By the time the
jurors hear closing arguments, they are well-acquainted with the story, because they have heard two opening statements and all the evidence.

Closing argument, as the name suggests, is instead the time to argue.\textsuperscript{224} This means that in addition to revisiting the theme(s) presented in the opening statement, a lawyer may use rhetorical questions,\textsuperscript{225} draw conclusions and inferences from the evidence,\textsuperscript{226} discuss the credibility of the witness,\textsuperscript{227} examine the plausibility of testimony,\textsuperscript{228} use analogies,\textsuperscript{229} and refer to stories from film and literature.\textsuperscript{230} Most importantly, a lawyer must walk the jury through the key jury instructions.\textsuperscript{231}

When a lawyer stands to address the jurors in summation, they expect her to explain the law and the evidence to them—to give them tools that will help them do their job.\textsuperscript{232} They do not want a recap of the evidence; they want to know what the evidence means for them as fact-finders.\textsuperscript{233} An attorney who fails to meet this expectation risks losing the jurors’ attention and misses an opportunity to prepare a “shadow advocate” to argue her case in the jury deliberation room.\textsuperscript{234}

When a lawyer talks to the jury during closing argument and has presented her case well, there will be at least one juror who has tentatively concluded that the attorney’s client should win. The lawyer’s job is to confirm this fledgling conclusion and equip that juror (or jurors) with

\textsuperscript{224} See Berger et al., supra note 13, at 523; Fontham, supra note 13, at 684; Trial Techniques, supra note 13, at 391; Murray, supra note 13, at 356-61.

\textsuperscript{225} See Fontham, supra note 13, at 700-01; Trial Techniques, supra note 13, at 395-96; Murray, supra note 13, at 366-67.

\textsuperscript{226} See Fontham, supra note 13, at 693-95; Rose, supra note 13, at 262.

\textsuperscript{227} See Fontham, supra note 13, at 684, 696; Murray, supra note 13, at 359-61; Rose, supra note 13, at 267.

\textsuperscript{228} See Trial Techniques, supra note 13, at 403-06.

\textsuperscript{229} See Fontham, supra note 13, at 699-700; Trial Techniques, supra note 13, at 396-97.

\textsuperscript{230} Perrin et al., supra note 13, at 477-81.

\textsuperscript{231} See Berger et al., supra note 13, at 528; Fontham, supra note 13, at 683, 692-93; Perrin et al., supra note 13, at 455-62.

\textsuperscript{232} See Fontham, supra note 13, at 683; Perrin et al., supra note 13, at 457.

\textsuperscript{233} See Trial Techniques, supra note 13, at 401, 403; Murray, supra note 13, at 354-58.

\textsuperscript{234} See Fontham, supra note 13, at 682-85.
the tools to persuade the other jurors during deliberation. In doing this, the lawyer creates a shadow advocate able to reiterate and clarify her points to the other jurors.

Unlike in an opening statement, where the structure is usually chronologically driven to maximize storytelling, the structure of a closing argument is very much guided by the jury instructions. The lawyer must review key instructions with the jury and explain how the evidence meets or fails to meet the various elements of the claims or defenses. This review is best arranged topically, not chronologically or by witness.

In reviewing the evidence, a lawyer should walk the jurors through the key instructions to ensure the jurors understand what the law requires (or allows) and how, when applied to the evidence, the law leads unequivocally to a verdict for her client. This connect-the-dots approach may seem overly simple, but it is well advised. Remember that jurors are unlikely to ask questions of the court during deliberation; even if they do, the judge will not allow the attorneys to clarify their arguments. Thus, it is important to identify any potential areas of confusion in advance and take particular care in explaining those points during summation. To the extent that there are jurors who are still undecided, this is the advocate’s final opportunity to win them over.

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235 Id. at 683-84; see also MOORE ET AL., supra note 13, at 214; TRIAL TECHNIQUES, supra note 13, at 390; PERRIN ET AL., supra note 13, at 452.

236 See FONTHAM, supra note 13, at 684.

237 See generally id. at 691; BERGER ET AL., supra note 13, at 528, 535.

238 PERRIN ET AL., supra note 13, at 455.

239 TRIAL TECHNIQUES, supra note 13, at 400-01; see generally BERGER ET AL., supra note 13, at 556-57.

240 TRIAL TECHNIQUES, supra note 13, at 387; see BERGER ET AL., supra note 13, at 528; FONTHAM, supra note 13, at 682-85.

241 See FONTHAM, supra note 13, at 684-85.

242 See BERGER ET AL., supra note 13, at 540-42.

243 Id.

The importance of explaining what the jury instructions mean cannot be overstated. I have observed more than fifty mock trial jury deliberations and have interviewed jurors post-verdict in more than thirty real cases. A common occurrence during deliberation (which may or may not be outcome determinative) is that jurors misunderstand a portion of one of the instructions.\textsuperscript{245} Juror misunderstanding happens even though those of us on Pattern Jury Instruction Committees try our best to draft standard instructions in clear, understandable language.\textsuperscript{246} But some legal concepts can be confusing to jurors, even when instructions are clearly drafted.\textsuperscript{247} When such misunderstandings occur, jurors may apply the wrong law to the facts.\textsuperscript{248} During one mock jury deliberation I observed, the jurors misunderstood the three alternative prongs of a "to convict" instruction as requiring them to find all three prongs had been proved by the prosecutor beyond a reasonable doubt. The three prongs were set forth in the disjunctive (X, Y, or Z) and not the conjunctive (X, Y, and Z) so that the jury needed to find only that one of the three alternatives was proven, not all three. In that mock trial, the misunderstanding was fatal to the prosecution's case: the jury returned a not guilty verdict.

Visual aids are of great assistant when reviewing instructions with the jury.\textsuperscript{249} Visual aids are particularly helpful because the jury receives the instructions aurally before deliberation, despite the fact that jurors are accustomed to receiving information visually.\textsuperscript{250} When choosing visual aids, a lawyer need not use a high-tech PowerPoint presentation—butcher paper will work just fine.\textsuperscript{251} Nor does the lawyer need to set out the

\begin{itemize}
\item \textsuperscript{245} See Fontham, supra note 13, at 693.
\item \textsuperscript{246} See sources cited supra note 244.
\item \textsuperscript{247} See sources cited supra note 244.
\item \textsuperscript{248} See sources cited supra note 244.
\item \textsuperscript{249} Berger et al., supra note 13, at 563; Perrin et al., supra note 13, at 484.
\item \textsuperscript{250} Susan Valz, Visual Culture and Today's Demand for Instant Information, in The Science of Courtroom Litigation 13-14 (Samuel H. Solomon et al. eds. 2008); see also Internet Overtakes Newspapers as News Outlet, The Pew Research Center (Dec. 23, 2008).
\item \textsuperscript{251} See, e.g., Berger et al., supra note 13, at 565.
\end{itemize}
It is very effective to write out just key phrases or short summary phrases as a visual assist. A lawyer can summarize (and shorten) instructions as long as she does not misstate or mischaracterize the law. A lawyer who has any doubts about her summary should run her visual aids by the judge in advance.

My advice to a lawyer who elects to set out the entire instruction in a visual aid is to think about breaking it into manageable chunks and presenting each section in a different "frame," whether on poster board or in a PowerPoint presentation. This makes it easier to keep the font large enough that the jury can actually read it. It will also limit the amount of information presented to the jury at one time. Too much information can overwhelm the jurors and cause them to tune out. The fact is that a visual aid that is crammed with information and printed in font that is too small to read is not much of an aid!

While jury instructions provide a skeleton for closing argument, a lawyer must resist falling into the mode of a professorial drone reviewing instruction after instruction. A dry, clinical review of the instructions will fail to engage the jury. Instead, a lawyer should bring all aspects of persuasive speaking into her summation, including her discussion of the jury instructions: eye contact (keeping eye contact with the jurors, not with the visual aids), purposeful movement about the courtroom (if allowed), complementary hand gestures, and variations in delivery to augment content and keep the jurors’ attention. Silence can also be

252 Id.; see PERRIN ET AL., supra note 13, at 484.
253 See MOORE ET AL., supra note 13, at 240.
254 ROSE, supra note 13, at 264.
255 PERRIN ET AL., supra note 13, at 486.
256 Social science research informs us that humans can absorb and manage only seven “chunks” of information at any one time. George A. Miller, The Magical Number Seven, Plus or Minus Two: Some Limits on our Capacity for Processing Information, 63 PSYCHOL. REV. 81 (1956).
257 See FONTHAM, supra note 13, at 691.
258 See TRIAL TECHNIQUES, supra note 13, at 394.
259 ROSE, supra note 13, at 263.
260 See BERGER ET AL., supra note 13, at 562.
261 PERRIN ET AL., supra note 13, at 486.
an effective way to highlight an important point just delivered to the jury.\textsuperscript{262}

Remember, just as in an opening statement,\textsuperscript{263} to use the words of a speaker and not those of a writer. If a lawyer chooses to write out her closing argument, she should reduce it to bullet points and practice it using everyday language and cadence, enhancing her credibility with the jurors.\textsuperscript{264}

The following are a few final reminders of what to avoid during summation.\textsuperscript{265}

- Do not vouch for witnesses.\textsuperscript{266}
- Do not misstate the law.\textsuperscript{267}
- Do not misstate or mischaracterize the facts.\textsuperscript{268}
- Do not refer to facts or exhibits not in evidence.\textsuperscript{269}
- Do not state your personal belief in the righteousness of your case.\textsuperscript{270}

\textsuperscript{262} ROSE, supra note 13, at 59.

\textsuperscript{263} See MOORE ET AL., supra note 13, at 100-07; FONTHAM, supra note 13, at 101.

\textsuperscript{264} PERRIN ET AL., supra note 13, at 464. The written word, while frequently more elegant, can hit jurors’ ears as stilted or artificial, which undercuts and advocate’s credibility in the courtroom, and credibility is the foundation of an advocate’s ability to persuade. See id.


\textsuperscript{266} ROSE, supra note 13, at 264; SALTZBURG, supra note 13, at 453-59, 464-65.

\textsuperscript{267} FONTHAM, supra note 13, at 686; LUBET, supra note 13, at 469; TRIAL NOTEBOOK, supra note 13, at 669.

\textsuperscript{268} LUBET, supra note 13, at 468-69; TRIAL NOTEBOOK, supra note 13, at 669.

\textsuperscript{269} FONTHAM, supra note 13, at 686; LUBET, supra note 13, at 470; TRIAL NOTEBOOK, supra note 13, at 669; ROSE, supra note 13, at 264.

\textsuperscript{270} See, e.g., FONTHAM, supra note 13, at 685; TRIAL NOTEBOOK, supra note 13, at 669, 675; SALTZBURG, supra note 13, at 458, 464-66; see also MODEL RULES OF PROF’L CONDUCT R. 3.7 (2009); MODEL CODE OF PROF’L RESPONSIBILITY EC 7-24 (1980). As James McElhaney notes, however, “[t]he ethical rule forbids that you say you personally believe in your client’s cause. It does not forbid you actually to believe in it or to show that belief in ways other than words.” TRIAL NOTEBOOK, supra note 13, at 145.
• Do not appeal to the passions or prejudices of the jurors.\textsuperscript{271}
• Do not violate the "golden rule"—that is, do not ask jurors to put themselves in the position of a party or the victim in a criminal case.\textsuperscript{272}

In short, closing argument is the time to connect the dots for the jury by walking them through the jury instructions and explaining why the evidence supports a verdict for your client.\textsuperscript{273} This should be accomplished in large part through using persuasive rhetorical devices to motivate the jurors to \textit{want} to return that verdict.

**Conclusion**

As fewer and fewer cases go to trial, even the most motivated students of trial advocacy are hard-pressed to get enough courtroom experience to hone their trial skills and internalize those trial lessons discussed in longer trial advocacy texts. My hope is that this short review of the six critical stages of trial will provide lawyers a handy motivational "pre-game speech" in an easily digestible format that can be revisited each time a lawyer goes to trial. Perhaps it will even find its way into a trial notebook or two.

\textsuperscript{271}See, e.g., Fontham, \textit{supra} note 13, at 685-86; Trial Notebook, \textit{supra} note 13, at 669.

\textsuperscript{272}Berger et al., \textit{supra} note 13, at 571; Fontham, \textit{supra} note 13, at 685; Lubet, \textit{supra} note 13, at 471; Trial Notebook, \textit{supra} note 13, at 677; Murray, \textit{supra} note 13, at 368.

\textsuperscript{273}Murray, \textit{supra} note 13, at 353.