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THE CRIMINAL TRIAL FROM OPENING TO CROSS AND DIRECT

By Jon Katz

Following are some critical considerations for presenting the trial from opening to cross and direct examination:

- **Tell your persuasive story throughout the trial**. People are accustomed to storytelling in ordinary conversation, and because arguments are ordinarily made more sensible through storytelling. This storytelling approach is not limited to the opening statement and closing – but also extends to voir dire, opening, direct and cross examination, and closing. Consequently, cross examination becomes less an attempt to discredit or destroy the witness and is more an effort to tell the advocate's story, to the point that the cross examiner may have little concern about the witness's responses.

Through storytelling, the advocate de-emphasizes attacking the opponent's case, and instead emphasizes why the advocate's story makes sense and why a verdict for the advocate's side will be the right thing to do. In the end, the jury ordinarily wants to feel it did the right thing. The jury wants to solve problems, and will not necessarily obey a judge's jury instructions if those instructions appear to interfere with doing the right thing.

- **The root of persuading jurors is being real**, as real as the attorney acts while taking a walk with a good friend. After all, to not be real is to be false, and to be mistrusted. To be real in front of a jury can be scary, because being real means revealing our weaknesses as well as our strengths. However, to hide our weaknesses makes the jury wonder what we are hiding. It is better to admit to the jury a concern about a weakness in the case or about a fear of letting down the client, than to try to hide such concerns only to end up lugging them along like a fifty-pound ball and chain.

The jurors must be engaged. To tune the jurors out during the trial is to invite being tuned out by the jurors. Notepads, over-thinking, and relying too much on memory are a barricade to engaging the jury. By the time the trial starts, the attorney has hopefully absorbed so much of the facts of the case, the passion for the case, and skills needed to win the case that the attorney will be in the moment, with little reference to pre-written notes or outlines. The jury trial is the time to be in the moment, as much as the batter at

the plate must be in the moment. It is better to discard prepared notes and miss ten percent of an intended trial presentation, than to be reading an opening statement, witness examination, and, most importantly, the closing argument.

To engage the jurors during direct and cross examination can be difficult. So much else is going on at the time. The opponent may be making objections, the opposing witness may be slipping away from cross examination, and the direct examination may not be going as intended. Nevertheless, during the whole trial, natural eye contact with the jury is essential. This natural eye contact tells the jury that the attorney cares about and respects the jury, and the eye contact also keeps touch with the jurors' non-verbal cues about their view of the trial and the evidence presented. Eye contact also helps assure that the jury is not getting bored, or at least that the boredom is only directed at the opponent's case.

The jury trial is not about presenting the jurors with the raw facts and allegations to sift through on their own. The lawyer, if well prepared, has already mentally tried the case, has already found strong reasons to support the case, and is as close as ever to believing in the case. The trial is the time to share why justice is on the client's side, to persuade the jury, and, hopefully, to leave the courtroom victorious.

- **First-person opening statement**. Presenting a party or critical witness in the first person in opening or closing, when done right, can be a powerful way to convey a party's story to the jury without the impediment of legalese.

This year, a federal judge forbade doing opening statements in the first-person of the criminal defendant, in part because the prosecutor cannot cross-examine a criminal defendant who asserts the Fifth Amendment right not to testify. At least, though, the same judge confirmed that a prosecutor may not take on the role of a crime victim in the opening statement, either. The case is *U.S. v. Lemieux*, U.S. Dist. Ct. Crim. No. 05-104-P-H-02 (D.Me.) (order on opening statements issued June 12, 2006). When a judge prohibits the first person, a skilled lawyer will move right into the third person as if s/he is playing back a film.

Meanwhile, a counterpoint to the foregoing *Lemieux* decision is the unpublished *People v. Barsotti*, 1997 Mich. App. LEXIS 526 (Mich. Ct. App. February 4, 1997), which confirms that: "A prosecutor [and, therefore, the criminal defense] is not required to state his arguments in the blandest possible terms...In addition, the prosecutor's use of a vulgarity while cross-examining defendant, although perhaps crude, was not legally improper." Prohibiting first-person openings hamstrings a party's right to present a persuasive case.

- **Cross examination**. When an opponent objects during my examination of a witness, I keep my eyes on the prize (the witness) unless the judge invites a reply or if I feel one is needed. This helps keep control of an opposing witness and comfort in my own witness.

Part of telling the story effectively throughout the trial involves a series of storytelling direct and cross-examination questions of witnesses, rather than examination with question marks (e.g., in questioning a cooperating government witness: "In jail, you've always had to watch your back" versus "Don't you have to always watch your back in

jail?"). If the judge tells the lawyer s/he's testifying rather than questioning, as Roger Dodd effectively suggests, the lawyer can switch to: "In jail, you've always had to watch your back, haven't you?" Eventually, the judge may appreciate the eventual deletion of the added "don't you's", "didn't you's" and "wasn't it's" at the end of each cross-exam question, back to where the examining lawyer started from.

- **Preparing our witnesses**. Aside from death, most people are the most terrified of public speaking. Help your witnesses overcome this fear by, *e.g.*, focusing on looking at the questioning attorney when s/he speaks, and then looking at the jury when answering.

Most people in society lie more than in a blue moon. Convince the witness that any lying will harm the defendant, will cause defense witnesses and evidence to impeach each other, and will bring the risk of a perjury conviction. Convince the witness to have enough confidence in you to know that you will do whatever possible to rehabilitate the witness's testimony on redirect examination.

Practice the testimony with the witness; do not just give a list of possible questions. Try to recruit another attorney to play the role of the prosecutor, both for objections and for cross examination. Tell the witness that the judge may interject questions, as well.

Better yet, put together a top notch focus group(s) to prepare the defendant's possible testimony. If the defendant will testify, consider hiring a psychodramatist or psychological professional (or both) to help prepare the client's testimony and the attorney's direct examination.

- **Loving jurors rather than fearing them**. In *Practical Jury Dynamics*, amazing human, trial lawyer, and storyteller Sunwolf says of amazing Denver criminal defense lawyer Lisa Wayne that Lisa loves her jurors and they love her back. Sunwolf and Lisa Wayne both know the wide, deep, and profound injustice that is inextricably intertwined in our criminal justice system, but know that cursing that darkness rather than skillfully lighting multiple candles against it only plays into the hands of those who would perpetuate such injustice.

Loving jurors who sit in judgment over our clients is easier said than done. Just ask the late Samuel Leibowitz, who spent years defending the Scottsboro Boys at no charge. When hired, he had a fifteen-year winning streak. Perhaps nothing had prepared him for the vicious racism he would face defending these gentlemen, who went through convictions, harsh sentences, and retrials after Leibowitz successfully argued to the Supreme Court that they were unconstitutionally deprived of fair trials due to the absence of African Americans on the jury. *Norris v. Alabama*, 294 U.S. 587 (1935).

Asked about the initial trial loss, Leibowitz replied: "If you ever saw those creatures, those bigots whose mouths are slits in their faces, whose eyes pop out like a frog's, whose chins drip tobacco juice, bewhiskered and filthy, you would not ask how they could do it." This certainly did not endear Mr. Leibowitz to the locals and new jurors when the case went back for retrial.

Being human, juries are far from perfect, and may include bigots, people who do not care about justice, and people who lied that they would be fair jurors, just to get on the

jury. This truism plays itself out in *Twelve Angry Men*. Yet, who persuades the eleven guilty voters to vote not guilty? The gentle juror number 8 (or criminal defense lawyer as the thirteenth juror), who persuades the rest to an acquittal not by anger nor by being overbearing, but by being gentle, kind and caring.

The challenge for all criminal defense lawyers is to accept that we are not going to change who our jurors are as people in the span of a few days or weeks or even months. The best we can do is to seek to motivate the jurors as best they can be motivated for justice, and to harmonize the situation as best we can for our clients.

- **IMPORTANT BOOKS AND VIDEOS**

-- Stephen C. Rench., *The Rench Book: Trial Tactics and Strategy* (unpublished).

-- Larry Pozner & Roger Dodd, *Cross-Examination: Science and Techniques* (Lexis Nexis).

-- Dr. Sunwolf, *Practical Jury Dynamics, Jury Thinking,* and *Jury Talk* (Lexis Nexis).

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