Examining Witnesses

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This book is dedicated to my children, and their children

Preface

This book is by a trial lawyer for trial lawyers. I have been trying cases for thirty-five years and writing about trials for nearly that long. For nearly fifty years, I have been soaking up as much trial lore as I could. I believe that fair trials in the adversary system are the best way to settle disputes that cannot be settled amicably. Most cases do settle, but the best settlements are made only after the lawyer has understood the case enough to try it.

These days, too many judges are hiding in their chambers and, with the help of law clerks,
scratching out written responses to pleadings, instead of getting on the bench and making decisions. Judge Patrick Higginbotham has documented that federal "trial judges" are in fact trying fewer cases than in the past. This failure to use open court hearings to resolve disputes saps confidence in the system that calls itself justice.

This is a second edition. Some subjects, such as expert witnesses, have been changed in significant ways by United States Supreme Court decisions and amendments to the rules of evidence. Since the first edition, I have tried cases to juries and judges, taught advocacy, written about persuasion, and reflected on the themes in the first edition. My colleagues and friends mostly concurred that a second edition was a good idea. I have reworked every chapter, and added much new material.

I continue to believe that "the great advocates of this and every other time in recorded history have been students of society and not carnival barkers." This statement covers a lot of territory. For purposes of this book, which deals with the art, science, and technique of advocacy, it means that to win trials, you have to understand how jurors and judges are persuaded by the drama of evidence and the rhetoric of lawyers.

In this book, I have tried to provide more than recipes. With a recipe, you can cook something. With theory, techniques, and skill--informed by experience--you are a cook.

I believe that good lawyering can be taught. We are talking about skill in this book. Mark Twain, in an 1870 story called "Science and Luck," tells the story of a dozen men on trial for running a game of chance, to wit, "seven-up" or "old sledge." Their lawyer, old Jim Sturgis, brought witnesses to say that it was a game of skill, but deacons and dominies summoned by the prosecutor pronounced it a game of chance. So Sturgis convinced the judge to put four deacons and two dominies on the jury, along with six old gamblers, give them candles and a couple of decks of cards, and "just abide by the result." As the deliberations went on, various of the "chance" jurors sent word into court to borrow money from their friends. At dawn, the jury returned its unanimous verdict:

> We, the jury in the case of Commonwealth of Kentucky vs. John Wheeler, et al., have carefully considered the points of the case, and tested the merits of the several theories advanced, and do hereby unanimously decide that the game commonly known as old sledge or seven-up is eminently a game of science and not of chance. In demonstration whereof it is hereby and herein stated, iterated, reiterated, set forth, and made manifest that, during the entire night, the "chance" men never won a game or turned a jack, although both feats were common and frequent to the opposition; and furthermore, in support of this our verdict, we call attention to the significant fact that the "chance" men are all busted, and the "science" men have got the money. It is the deliberate opinion of this jury, that the "chance" theory concerning seven-up is a pernicious doctrine, and calculated to inflict untold suffering and pecuniary loss upon any community that takes stock in it.

Good lawyering is not a game of chance, or luck, even though both of these may play a role. Day in and day out, in the tournament of trial, skill wins out.

Mostly, this book is about jury trials, civil and criminal. The American jury has taken a lot of criticism; I think it is the best way to resolve the cases that can't be settled. You will find, however, that persuasive techniques are the same whether a judge or jury is deciding. Lawyers who think that they can present their case more "neutrally" to a judge will quickly learn from that mistake, though at their clients' expense.

Indeed, you can usefully master the theory and skill of persuasion even if you are not a trial lawyer. Historically, the study of rational and nonrational persuasion was the work of philosophers and dramatists before it became the province of lawyers. Today, as I show in Chapter One, social scientists and students of language contribute to our understanding of trials; representatives of these disciplines can usefully be retained to help prepare for specific cases.

Authors think they write clearly enough that nobody needs a road map through the thicket of their words. Editors, who fancy themselves advocates for readers, think otherwise. The editors usually win. Here is a road map.

This book is designed so that young lawyers and law students can read it from cover to cover and see how one moves from meeting your client, to seeing your case, to presenting your case. The chapter arrangement and internal headings permit all readers to find a discussion of a particular point even though they have not read the whole book. There are no footnotes, but the Chapter Notes contain citations to material. There is also a bibliography.

I hope everyone will read the first and last chapters, which contain my view--I hesitate to call it a theory--of the trial process and which put the remaining chapters in context. When you read these chapters, you will see why the book is called Examining Witnesses rather than Trial Strategy. In brief, the theory is that you cannot sum up on a case you have not tried nor open to the jury on a case you have not prepared.

Chapters Two, Three, Four, and Five deal with direct examination. Chapter Two contains the basic ideas on which all direct examination must be based and the basic techniques for presenting a witness--any witness. The remaining chapters identify types of witnesses you are likely to meet. As to each type, there is a discussion of the decision to put the witness on, witness preparation, and adaptations of the basic theory to that type of witness.

Chapter Six discusses demonstrative evidence and other illustrative materials. This chapter might have been put right after Chapter One because the methods I discuss will find a place at every phase of the trial, in your case and during cross-examination of the opponent's witnesses. I suggest that everyone read this chapter because it is based upon the theories of juror perception set out in Chapter One.

Chapter Seven deals with the discrete problem of adverse witnesses. It logically bridges the gap between direct and cross-examination, for the adverse witness is called in your case but is treated as if on cross-examination. The decisive difference in my view is that if the adverse witness bites you, the jurors are more likely to think it is your own fault than if a witness called by the other side does so.

Chapter Eight sets out basic rules about how to cross-examine, then immediately suggests that you need not always follow the rules. I have resisted suggestions to break this into two chapters. Learning the basic rules about cross-examination is rather like playing scales. You must start by mastering basic techniques. But you will not enjoy practicing scales unless you have a vision of one day playing a sonata, and you must have in mind that eventually your performance will have nuances of expression and technique that go beyond the basics. For me,

the metaphorical connection between playing music and cross-examination is proved by what I term "the theory of minimal contradiction." Chapter Eight introduces and explains this theory and moves you from basic cross-examination techniques based on witness control to more advanced techniques based on likely juror responses.

Chapter Nine collects material on witnesses that pose particular difficulties and integrates each discussion into the theory set out in Chapter Eight.

Chapter Ten is new to this edition. It is an annotated and edited cross-examination, to let you get the "feel" of such a thing.

Chapter Eleven on preparing witnesses to face the other side's cross-examination, is very detailed and intensely practical, even while overshadowed by the ethical considerations that govern you and your witnesses' conduct.

Chapters Twelve through Fifteen treat expert witnesses. These four chapters integrate expert testimony into the overall themes of this book. Expert witnesses appear in almost every kind of lawsuit. I have a particular theory about the varieties of expert testimony and think it useful to talk about "hard subjects" and "soft subjects." Also, I have a distinct point of view about selecting and presenting experts.

Chapter Sixteen is a kind of envoi, or leave-taking. It tries to weave the main strands of the book together.

A Note on Sources

This book did not rise up overnight by some volcanic process. Its themes and thoughts are more like layers of an alluvial deposit. I hope that like all "bottom land" there is enough good earth here to let the reader raise whatever crop he or she has in mind.

Like all such sedimentary phenomena, the book contains things that are washed down from works I have read, experiences I have had and things I have written or said. I abhor footnotes, and will not willingly use them. A partial bibliography of my own work is at the end of the book. It contains citations to my own work and to general works on the topics covered in the book. Notes at the end of each chapter contain more specific citations.

I have traced the journey that brought me to this place in my professional life in Fighting Injustice, published by the ABA in 2002.

Acknowledgments

In this space, I would like to acknowledge what I have learned from others. Were I to do so completely, the list of debts would make this introduction a voluntary petition in intellectual bankruptcy.

My mentor in the law was Edward Bennett Williams; I owe him insights without number. In my book Persuasion: The Litigator's Art, published by the ABA Section of Litigation, I have tried to capture some of his wisdom about argument to courts and juries.

In Fighting Injustice, I wrote of the lawyers whose work inspired me and led me to the law. Clarence Darrow was the clearest example. I also paid tribute to comrades, colleagues and partners in my nearly forty years in the law. I do so again, at the risk of slighting people. Jane, Sam, Ron, Hal, John B., Mike, Michael – thank you all.

In a larger sense, we trial lawyers stand in a tradition that dates back more than two millennia. We inherit, sometimes without knowing it, styles of discourse from Greek and Roman times. We draw freely on imagery first used by the leaders of the common law bar – More, Erskine, Brougham and others. I wrote about some of these early leaders in Law and the Rise of Capitalism, the second edition of which appeared in 2000. I also wrote on these themes

in Persuasion: The Litigator's Art. In today's courtrooms, we have learned to broaden our study, searching for images that reflect the diverse elements of our multicultural society.

I also thank the jurors before whom I have appeared, even though some of their most instructive comments were the least flattering; wise judges for letting me try my cases; interfering judges for helping me figure out how to try my cases despite them; my opponents in similar vein; and law students and lawyers I have taught in trial advocacy programs for forcing me to rethink the reasons for approaching trials in a certain way.

Thanks also to the clients who have let me help them defend their lives and their rights.

In writing this book, I have borrowed here and there from my own articles and essays. I have also relied on the works of others from time to time and on reported cases. Rather than burden the text with footnote reference marks, I have put the relevant material into notes at the end of each chapter.

My thanks also to the editors: John Koeltl and John Segal who worked on the first edition, but who have had no role in this second edition, and Priscilla Schwab, whose editorial assistance has helped me on this edition as on so many other writing projects. Priscilla Schwab is not only a great editor, but also has a gift for finding just the right word.

Whenever possible, I have illustrated points in this book with examples. Sometimes I have used trial transcripts or trial notes. These are non-privileged materials. Sometimes I have wanted to capture the flavor of exchanges between myself and other lawyers, or with clients and witnesses, that are not part of any public record. The attorney-client and work product privileges prevent me from reporting most such exchanges verbatim. At other points, an actual transcript does not make the point clearly enough, so I have amalgamated several real experiences into a single series of questions and answers. When you see an exchange of that type reported in this book, it is a fictionalized account for illustrative purposes and is not meant to refer to any actual persons or events.

Chapter One

The Theory of the Case: Dead Reckoning, Gestalt, and the Closing Argument

If you would undertake a project, you should first envision it completed, then figure out what materials, tools, and techniques you must use to do it. If you want to build a house, you will first see it completed in your mind's eye, then perhaps sketch it.

If you are going to try a lawsuit, you must first think about the trial as a whole and then consider what materials (witnesses, evidence), tools (arguments, questions), and techniques (leading questions, styles of discourse) you will use. More broadly, if you are going to make a profession of trying cases, you must first understand the trial process and then analyze what your role in it will be.

This book lays out the tools you will need. It suggests the proper ways to use them. This chapter introduces the structure and approach that I have adopted.

In Persuasion: The Litigator's Art, a companion volume to this one, I traced the development of learning in the fields of rhetoric and semiotics, and cited some sources worthy of study. Edward Bennett Williams wisely likened trials to dramatic presentations, in which the lawyer is producer, director, actor, and stage manager, but all within the demanding constraints of the evidence and the law. If we take Williams seriously--and we should--we will study the role of drama in history. For our ancestors, the Greeks, drama is a principal means by which moral and political lessons are taught. The drama of a trial is a search for justice in a public forum. In the Anglo-American tradition, publicized trials are means to teach about important events.

Both rhetoric and drama are essential to the trial lawyer. This is true for three reasons. First, when we try lawsuits, we are doing something that has been done before, and for centuries past. Those who first wrote down and taught the techniques we still use believed that this craft was knowable and teachable. This power to influence events cannot be, must not be, controlled by a few for the benefit of a very few. Some have said that trying cases is an art form, so that innate talent will always trump study and practice; I do not believe that.

Returning to our traditional roots reminds us that there are principles of presentation and argument that have been validated through experience. Gaining this experience vicariously does not require one to wade through Aristotle or Cicero or Quintilian, although doing so is entertaining. You can learn by reading accounts of trials, old and new. If you choose this ostensibly easier path, you will probably be reading the words of lawyers who did study the ancient art and science of rhetoric.

Second, it is always easier to act yourself into right thought than to think yourself into right action. Training to be a trial lawyer involves doing things the right way until you acquire the habit. I found that to do this efficiently, I needed names for particular devices and techniques so that I could classify what I had done. For example, I want to learn how to use metaphor effectively. I want to know when to ask rhetorical questions. I want to advance from an accepted principle through a series of steps to the result I advocate. In each of these cases, I am using a device of classical rhetoric. Why trouble to invent new categories for what I am doing when the old ones lie ready at hand?

Third, by placing ourselves within a professional tradition, we reaffirm that we have a role in achieving justice. We are not simply hired speakers. To put the matter differently, the jurors do not believe that they are playing a zero-sum game, in which one party may be required to give a sum of money to another so that the debit and credit are equal. The jurors think they are adding to the store of justice in the world. They are striving to reach a right result, consistent

with their values, their oaths, and the law and evidence. The lawyer who convinces them will understand their concerns.

Rhetoric became formulaic and arid well before the Middle Ages. In the early history of the United States, the very term was used to denote a system of rules for stilted speech. Even today, the word may be coupled with "mere" to mean artificial elegance or empty phrasing. Happily, there has been a modern revival of rhetorical insight into communication and persuasion.

Rhetoric and its kindred discipline semiotics are not concerned solely with speech making. They deal with the use of language in persuasion, including the language that witnesses use to describe events. In my view, there has been too much emphasis on lawyer argument and not enough on how witnesses spell the difference between victory and defeat.

Ed Williams told of a motion argument he made as a young lawyer. He staggered into the old District of Columbia Court of General Sessions with two books under each arm. (This was when law books had to be carted to court, before the days of photocopiers.) A courthouse habitué, a lawyer whose office was no doubt the telephone booth in the courthouse hall, looked at him disdainfully and intoned, "Throw away those books, boy. Get yourself a witness."

Almost all legal education in one way or another deals with rhetoric in the narrow sense, that is, with the form of arguments. A brilliant and provocative modern literature exists on this subject. For us, it is enough to understand this characteristic of legal education. Most of the advocacy writing and speaking that law students do is purely legal argumentation to a hypothetical tribunal. Until the late 1980s, appellate advocacy competitions stressed debate skills to the exclusion of the students' ability to parse a factual record and restate factual contentions persuasively. In law practice, young lawyers spend less time now than formerly with witnesses and more time with law books.

In the same vein, some lawyers ignore the witnesses as they prepare to try a big case. Depositions and discovery responses have mounted up. A trial consultant is hired. The trial consultant begins--and sometimes ends--by working with the lawyers to develop an expanded opening statement. This statement is exhibited live or by video to one or more focus groups selected from the community where the case will be tried. In these exercises, the emphasis is on the persuasiveness of lawyer speech, not so much on evidence and witnesses.

Yet witnesses are more important in trials now than two or three hundred years ago. When Andrew Hamilton addressed the jurors in the case of John Peter Zenger, the colonial newspaper editor, he told them they were summoned from the vicinage because they had "the best knowledge of the facts that are to be tried." Today, jurors with personal knowledge of the disputed facts may be disqualified. Indeed, Hamilton was probably guilty of hyperbole. Juror personal knowledge was not much of a factor in trials after the sixteenth century.

For the past hundred years, the rules disqualifying classes of witnesses have been struck down one by one. Parties, accomplices, married women--their alleged implied bias becomes simply one more fact for the jurors to consider in evaluating their testimony.

Yet judges, jurors, and experienced advocates report that lawyer performance when examining witnesses is lamentable. To avoid such a judgment of your own performance, this book moves from three important major premises into a series of chapters that contain insights into the witness examination problems you will encounter in trial. The three premises are:

1. Deciders perceive whole stories.
2. The way you tell it makes all the difference.
3. You always navigate by dead reckoning.

I discuss these in turn.

DECIDERS PERCEIVE WHOLE STORIES

Harry Kalven and Hans Zeisel, in their pathbreaking work The American Jury, developed a way to measure the different attitudes of judges and juries in particular kinds of cases. The book, and the research since then, repays study.

People, including judges and jurors, understand and restate events in terms of stories. They take the available evidence and weave it into a coherent whole. If pieces are missing, they will fill in the gaps based on intuition, probability, or prejudgment about "what must have happened," or "how somebody like that would have acted." Some writers call this process of filling in "confabulation."

A lawsuit is a contest between two different stories. Jurors hear the judge's initial instructions and the opening statements and begin to build a possible story that tells them how the case should come out. As they receive evidence, they fit it into their story. It is harder to put across evidence that challenges a juror's tentative story than evidence that supports it.

What shapes a story? We have spoken of juror attitudes, the judge's instructions, and lawyer rhetoric.

Every trial lawyer knows that jurors' attitudes vitally affect the kind of story they will make from a given set of facts. Some lawyers hire jury researchers and voir dire consultants to help them identify people likely to be favorable. Other lawyers use only their experience in and of the community and their accumulated trial skills. For our purposes, we can ignore those preferences.

For example, assume that many people believe large corporations conspire with one another against the public welfare by fixing prices, evading environmental controls, or selling unsafe products. In some communities, a majority believes at least some of this.

It is obvious that if you are a plaintiff in an antitrust conspiracy case, you would put the conspiracy theory out front. That is an insight, but not much of one. The more important insight is that jurors who believe the conspiracy theory more readily infer conspiratorial behavior from concerted or parallel conduct. Your order of witnesses, presentation of documents, and points stressed with witnesses will emphasize that theme.

Now turn to the other side of the case. What will be the defendant's (or defendants') response? Unadorned denial is a possible stance, but it is almost always inadequate. There is no story to a denial and therefore no coherent alternative to the plaintiff's story. I say "almost always" because, in some criminal cases, a defense based entirely on reasonable doubt--a form of denial made possible only by the burden of proof and the trial judge's repeated insistence on it--may be tenable.

The defense story may be that the plaintiff signed a fair contract at a fair price and is trying to weasel out by invoking the antitrust laws. The story may be that the plaintiff got knocked around in honest competition.

Stories like these fulfill the three requirements of which we have been speaking. They appeal to juror's common sense and sense of justice, they are consistent with the substantive legal rules about antitrust and the procedural rules about what may be proved in an antitrust trial, and they can be told by a lawyer in an opening statement and closing argument. When we say that a story may appeal to jurors, we are not invoking supposed universal truths about "common sense" or "the way things are." Jurors' perception of what is just has been formed by their socialization in the communities of which they are a part. I use the plural "communities" advisedly. We are all members of multiple communities, where we live, work, study, play,

contemplate, worship, read, listen, and watch. Jurors' sense of what is right is formed out of this contradictory mass of material.

How do we know that jurors view evidence as stories? Theoretical works, all based to some extent on Gestalt theory, support my view. But you can give yourself a simple test, to see if I am right. Think back to a time when you and someone close to you were with friends, and one of you was telling a story about an experience you two had shared. How many times have you interrupted – or very much wanted to interrupt – to correct some detail in the story being told? Your friend is not lying. She just remembers things differently. Time has dimmed your and her memory of the event, and your minds supply the missing details so that you can each "remember" the event as a complete story.

We see the same thing when someone has witnessed something, but whose view may have been obstructed for a part of the time. The mind supplies the missing moments, and the witness insists that he saw what objective reality says he cannot have seen.

For me, however, the most persuasive evidence has been given by jurors in their verdicts, reinforced by mock jury studies conducted by first-rate trial consultants. Jury studies even provide the opportunity to listen to deliberations; in a real case, you have to rely on the jurors' recollections of deliberation, if indeed the local rules permit you to talk to jurors at all. In those jurisdictions that permit lawyers to talk with jurors after a verdict, I have profitably listened. Jurors have told me how they used the basic ideas of the human condition with which they arrived at court to evaluate the evidence and make sense of it. They were trying to figure out "what happened" so that they could "do something – the right thing – about it." They were harshly critical of lawyer behavior that got in the way, and they lauded lawyers who understood their task and wanted to help them perform it.

In the end, therefore, the idea that deciders perceive whole stories is linked to the idea of jury empowerment. Your story empowers the jurors to see the world in a certain way.

If you agree that there must be a story, how will you choose it, and how will you tell it? Choosing the story is a necessary predicate to identifying witnesses and planning the trial. I often tell young lawyers to write the closing argument in a case right away, recognizing that some parts of the story will necessarily be incomplete and contingent.

Consider an example. A widow and her children come to you. Their husband and father has been killed. The death is a traumatic event. How will you, hired to be their champion, tell that story?

You are going to be limited by the substantive and procedural law, and you may need to do some legal research before you actually make choices. Who was killed? A diplomat in exile from his country. How was the death caused? By a bomb placed under his car. Who placed the bomb? We don't know yet, but we think the killing was politically motivated and carried out under orders from officials of a foreign government. What kind of political motivation do you mean? The present regime wants to silence its critics in exile.

Our story begins to become clear: What is, at minimum, a wrongful death case becomes a murder carried out for political purposes with the connivance of a foreign government. The dead man was killed for his laudable principles. The theories of liability multiply to include killing an internationally protected person (a diplomat) and violating customary international law. The problems mount, too, because making a foreign state and its officers parties and obtaining evidence of their conduct will be difficult.

As I reconstruct the facts more completely, I see legal rules that add to the power of the story. As I consider new legal rules, I am guided in looking for new factual insights. You may

well decide that the most effective telling of your story requires you to argue for a change or extension of existing law; if so, well and good.

On the factual side, you are limited ethically and practically by the truth. As we shall see, truth can be elusive. Perceptions of events differ and recollections are debatable; rules of evidence may limit admissibility; you may not be able to find a witness. But truth is not so contingent that you are ever justified in disregarding it. Being careless with truth invites disaster in our adversary system, which encourages your opponent to take advantage of your heedlessness. To this practical concern, add the ethical rules under which we all function, obedience to which defines us as members of this profession.

For the defense, you will usually be presented with the opponent's complaint or indictment, and you can guess at the story behind the formulaic allegations. Too many times, I have come to a case to represent the defense and found this basic work not yet begun. Sometimes the defense team has not tried to "game out" the plaintiff's or the prosecutor's story. More often, it has focused only on disproof and denial rather than structuring a story of its own.

The story is more important than technique. If you respect the jurors, they will probably forgive your technical faults. But if you forget the story, you will lose. This book is entitled Examining Witnesses, but the following fifteen chapters are worth little unless you know that the whole of a trial is different from the sum of its parts. That, too, is a Gestalt insight.

In a criminal case, the jury convicted a developer of bank fraud. The defense lawyer had tenaciously battled every prosecution witness. The defense case even showed the logic of all the "deals." The jury convicted because the jurors agreed with the prosecution's story. "Nobody could make this much money, this fast, honestly. There had to be a conspiracy."

Jury work tells us that most people in the developer's community are ready to believe that those in business conspire against the public good. But most people in that community also believe that it is possible and not necessarily bad for somebody to make a lot of money quickly by shrewd investing and taking risks. If the defendant is personally admirable to the jurors, this story has an even chance. But unless this positive story becomes the theme of defense, no amount of competent cross-examination can succeed in winning the jurors over.

It is not enough to show that the prosecution witnesses are thieves or that they are singing for lenient treatment. The defense story of the case is that this defendant profited in the same way that many others have lawfully done--by recognizing and seizing opportunity, and attendant risk, in a volatile market.

In an antitrust case, the plaintiffs' theory was that the corporate defendants had conspired to depress the prices paid for crude oil under a long-term contract with the plaintiffs, who owned an oil field. Faced with such an accusation, the quick answer is, "We deny the allegations, and we despise the allegators." But jurors are usually not content to disbelieve or reject a story put forward by one side. They want to see how and why people act, including the plaintiffs who bring lawsuits.

The defense story began by observing that there was a contract between the plaintiffs and the defendants. It was negotiated among experienced people on both sides of the bargain. A deal's a deal, and the claim of collusion was arguably a means to jettison the agreed price.

In addition, the defendants were not making supernormal profits refining the crude oil. Indeed, because the crude they were buying was of such low quality, they were compelled to spend millions of dollars on sophisticated refining techniques to get value out of it.

The advocate cannot begin to see such a story unless she delves deeply into the client's life and lore. It empowers jurors to walk with them through the background and history of the

issues they are to decide. From this survey emerges, in the well-planned case, principles on which jurors will agree, such as "a deal's a deal," and "the person who takes investment risk to make a useful product is entitled to a fair, competitive return."

In another case, an attending physician ordered a nurse to inject a patient with a drug. The physician was negligent, for the reference materials cautioned against using the drug except in life-threatening situations. The physician settled. In a trial involving the nurse, what is the story? Professional principles dictate that a nurse should not unhesitatingly follow orders to give dangerous medications. She should exercise independent judgment. In addition, the dose was allegedly administered contrary to the directions in the reference manual.

Once the professional rules are proved, the story might be that this is just another case of somebody following orders and denying responsibility. Don't we say to our kids, "Just because the older children do it, that is no reason for you to follow along"? Don't we hope that if we take our car to a garage, the mechanic will exercise independent judgment when the owner tells him to perform a dangerous and expensive repair that the mechanic's training and skill tell him should not be done?

Put another way, there is no such thing as worthwhile advocacy technique for its own sake. Technique must be in the service of a claim for justice, a story with a moral. Choosing a story is an exercise in seeing the whole case while keeping an open mind as new facts and legal theories appear.

The most dramatic tale I know about choosing a story involves the historic litigation against the tobacco companies. In 1995, Texas Attorney General Dan Morales decided that such a suit was a good idea. However, he faced great obstacles. Florida's attorney general had sued, but was helped by special state legislation. There was a suit in Mississippi, but in a favorable forum.

The tobacco companies had faced about 800 lawsuits over the dangers associated with smoking. They had never paid a penny in damages. Their scorched-earth litigation tactics were legendary. Juries often blamed the individual smoker for having become addicted to cigarettes. Sometimes, juries could not find a causal link between the plaintiff's smoking and the plaintiff's cancer. In our industrial society, we are exposed to so many potential carcinogens that causation may be difficult to prove against any particular defendant.

In addition, Morales knew that tobacco industry lobbyists would seek to head off or derail a lawsuit by legislation or by pressuring the governor, who was of the opposite political party. In fact, the companies ran a phony "poll," in which respondents were first told that Morales had been taken a million-dollar bribe to sue the tobacco companies, and were then asked what they thought about such litigation. This poll was circulated to political figures, including those in the governor's office.

Texas law was hostile to a product liability suit against tobacco companies. Legislation that the companies' lobbyists helped to draft stated that there could be no product liability for consuming a "natural" product, such as butter or tobacco.

So the challenge was clear. What story of tobacco's harmful effects would fulfill the complex legal requirements for victory, avoid the shoals of Texas product liability law, and yet appeal to a jury? The answer has at least two parts. The first part is defined by the complaint in a civil case, just as it would be by the indictment or information in a criminal case. The allegation that a defendant has committed a wrong takes a classic form:

- There was a duty
- The defendant breached the duty

- The breach proximately caused harm to the plaintiff
- The plaintiff needs money or specific relief to repair the harm

There are of course variations on the theme – if the harm is imminent, perhaps the remedy will be prohibitory rather than looking-backwards redress. But the structure of justice-seeking remains remarkably consistent across the criminal and civil legal rules, and across categories such as tort and contract. Indeed, the civil law systems of Europe have, following the Roman pattern, kept tort and contract together under the rubric "obligations."

In the Texas tobacco case, the private lawyers who agreed to represent the state knew they were taking a big risk. They agreed to a contingent fee and agreed to carry the out-of-pocket expenses of the litigation – a sum that ran into tens of millions of dollars. Their complaint identified the story they intended to tell the jury:

- The tobacco companies had a federally-created duty not to lie about their products and otherwise to defraud the consuming public, and not to use the mails and wires to commit those frauds
- They breached this duty by lying about the harmful effects of tobacco
- Texans consumed tobacco products as a result of this fraud, and contracted cancer and other diseases as a result, thus causing Texas to incur health care costs it would not otherwise have had to bear
- Texas was entitled to billions of dollars to reimburse it for these costs, and specific relief to regulate tobacco advertising in the future

This somewhat truncated, but nonetheless accurate, account of the Texas lawyers' theory shows how the proposed story in the complaint overcame the obstacles that had barred recovery from the tobacco companies in previous suits.

The complaint relied on federal law, pre-empting inconsistent state rules; the federal judge upheld this theory. The complaint focused on demographic harm to an entire population, thus permitting the federal court to hold that the tobacco defendants could not try to examine every smoker to see if his specific cancer was smoking-related, and that Texas had standing to sue. It was enough that epidemiologically and demographically there was a link between smoking and preventable illness.

In a more general sense, this is the sort of challenge we face at the outset of every lawsuit, whether we are representing a plaintiff or a defendant. How shall we frame the story in terms of legal principles to give ourselves the best chance to win? Because this initial decision is so important, I counsel lawyers to address it at their first opportunity. It is tempting to get lost in marginalia – especially if one is a defendant. Forum selection, personal jurisdiction, and so on are all important, but what is the story?

Once one has outlined the story, the second part of the challenge arises. How will you tell it? In the Texas tobacco case, the first and most obvious challenge was to sustain the complaint against dismissal motions. How, then, would one prove the case? The harm done to a large group of people could be proved to a jury only by a damage model that identified what had happened and then credibly showed what would have happened if the wrong had not been done. Experts would have to distill the human tragedies of tobacco-related illness into a coherent, persuasive and admissible presentation for the jury. That presentation would have to deal with causation and results. The Texas lawyers spent a lot of time, effort and money to develop that model.

But to have the right to present such a model, one would have to show first the breach of duty. The federal judge in Texarkana, where the case was filed, examined the complex factual

and legal issues that a jury would face. Judge David Folsom, a scholarly judge who also believes in moving the docket, decreed that the case would be divided into three parts for jury consideration. He held the RICO fraud issue would be tried first, then liability, and then damages. By invoking RICO, the Texas lawyers had nationwide service of process. They issued subpoenas to present and former top tobacco executives. They planned to ask each of them whether smoking caused health problems, and then to confront each of them with testimony given under oath that denied this was the case.

In Texarkana, with little more than a month to go before trial, the tobacco executives and their lawyers faced the district judge. They vowed that they would try the case. Publicists for big tobacco planted stories that the Texas litigation was the "line in the sand," and they were prepared to fight. This metaphor was not entirely happy, for it invoked the Alamo, where a foolish band of Anglos lost badly to General Santa Anna.

Within a week or ten days, however, the defendants thought better of their decision, and they began settlement discussions that resulted in a consent judgment in January 1998. This historic success was due, of course, to the "facts" about smoking. Those "facts", however, had not historically been enough to force tobacco companies to pay damages. The difference in Texas lay in the story chosen by plaintiffs' counsel and their wise choice of a federal claim and federal forum where that story could be told.

Once you have made those choices, you turn to the job of telling the story. If it's a good story, you should be able, before your preparation is far along, to summarize it persuasively in a few sentences. I call this idea "get up every morning and say your case." Say your story every day, even if only for a few minutes on the way to work. In the initial days after you get into a case, try out different ways of telling the story until you get it right. The mock trial, or focus groups, or similar effort, that you do as trial or settlement approaches, is too late a time for this exercise. Your case theory guides every step of preparation.

It is also important that every member of your litigation team know the story, and be kept current on variations necessarily required by ongoing research into law and facts. A lawyer, paralegal or law clerk cannot do well on an assigned task without a sense of where that task fits in the overall scheme of things.

From the well-crafted sentences of the story come the key words and concepts that you will stress with every witness – at trial, of course, but also in preparing your cross-examination and in discussions with witnesses you will present. The unifying theme of this book is that every witness's testimony must be related, while that witness is on the stand, to the story you are telling.

Impossible, you say. Do that with a custodian of documents. I'm glad you asked. My client was charged with an attempt to evade income taxes, allegedly by understating his personal income by about $7 million over four years. He did report several hundred thousand dollars of income each year. We would not stipulate to the admissibility of the original tax returns from the IRS Service Center.

Part of our defense story was that our client was not in charge of the financial side of the partnership. He reported income on the basis of what he knew he had received. His manner of living did not bespeak greater income than he reported.

On cross-examination, we took the Service Center witness over the tax returns, noting that the income reported was very high--in the top bracket--and that our client paid a hefty amount of tax. We noted that our client had not taken questionable deductions or gone in for tax shelters. We noted the various stamps on the forms, showing that IRS personnel had checked

them for accuracy. By the time this first witness left the stand, the jury had already begun to see that witnesses would bear out the story that we told in the opening statement.

In another case, the government relied heavily on documents from various foreign and domestic archives. In defense, we focused on the reliability of the government's archival searches. Could we be sure that the government's chosen witnesses have found all the relevant documents? If not, then contradictory or explanatory records might lurk in the files. Some of this kind of evidence goes to admissibility, of course, but the court had taken a fairly liberal attitude as to what would be in evidence.

I spent days cross-examining the government's witnesses about the deplorable conditions of the archives from which the documents had come. Our team had assembled a mountain of proof as to these conditions, and the witnesses could not well deny them. This sort of examination requires patience, and one must signal the trier of fact about the importance of such lengthy excursions into how and why records are kept.

In our case, which involved an allegation that the defendant had served the Nazis by guarding prisoners of war, we also wanted to show that one could not always rely on what was contained in documents made by people without personal knowledge or with a motive to falsify. That is, we wanted to explore why hearsay evidence of this type is not necessarily reliable. Indeed, we characterized the reliance on documents as "trial by archive." The government's witness had already admitted that the archival records were kept in a "vandalous" way. Here is an excerpt from my cross-examination, using the government's witness to make our point:

> Q. Now, when you look at historical documents, a moment ago you told His Honor that you would regard the statement of Danilchenko [a Soviet POW interviewed after World War II by the Soviets] as recorded by his interrogators as more intrinsically valuable to you as a historian than the [KGB] wanted list [of suspected Nazi collaborators], is that a fair statement?
>
> A. As a statement summarizing or detailing information, I thought I heard your question to be, is that more extensive and reliable than the information contained on a wanted list?
>
> Q. I'll take that.
>
> A. And yeah, I would.
>
> Q. Now, the most reliable way to find out what somebody said is to have an experienced court reporter take it down, correct?
>
> A. That's correct.
>
> Q. And for example, sir, you wrote me a very nice e-mail saying if we were going to have a conversation before this trial, you wanted it to be with a court reporter, right? [This refers to my having written to the witness asking him to meet with me informally, and his having refused to do so except in the context of a deposition.]
>
> A. Yes, sir.
>
> Q. And one reason for that is that if I were to talk to you and then tell somebody else what we talked about, I might not remember it right, correct?
>
> A. Yes, sir.
>
> Q. And I might not hear you correctly, I might make a mistake about what you said, correct?
>
> A. That's right, yes, sir.

Q. And you might use a word that I had never heard before like "vandalous," and I might not understand what you meant, right?
[He had used the term “vandalous” in referring to Soviet record-keeping.]
A. Yes, sir. And I probably would use something that's not even a recognized term in the English language.
Q. Well, I'm not criticizing your syntax, sir. I don't even know what syntax is. But the next thing is, of course, I'm biased, correct, about this case, institutionally biased? I'm for Mr. Demjanjuk, correct?
A. Okay.
Q. And you are being paid by the government, correct? We are on different sides?
A. Yes, sir.
Q. And bias is important in your evaluation of what people say, correct?
A. Yes, sir.
Q. Even without any intention to falsify, bias is a problem, right?
A. Yes, sir. Bias --
Q. So if I can go through this, meaning, memory, perception, and bias, correct? Those are four problems with things that aren't taken down by court reporters, correct? [Now we have gone through the hearsay dangers.]
A. Yes, sir.
Q. Now, your daddy was a criminal lawyer down in Richmond, wasn't he?
A. Yes, sir.
Q. Did he ever tell you about this problem of hearsay?
A. Yes, sir.
Q. So I'm not saying lawyerism is genetically transmitted, but you did learn at an early age, sir, that there's a problem with hearsay accounts of things, correct?
A. Yes, sir.
Q. And so direct evidence is going to be more valuable in some instances at least than something made by someone who doesn't have personal knowledge or firsthand knowledge, right? [Yes, I am combining hearsay with the personal knowledge requirement of Fed. R. Evid. 602, but for these purposes, that is acceptable.]
A. Yes, sir.
Q. Now, you testified, sir -- and we will continue on methodology here. Let's talk about this card. Let's look at this [identification] card [issued to a Soviet POW who guarded prisoners at a German concentration camp]. This card was typed up by a German, correct? [Now we are going to go step by step as to how the record was created. This is a technique that can be used in any document case. Take your time. Let the story develop before the trier of fact.]
A. Yes, sir.
Q. And the German who typed it up, we don't know whether or not he spoke Russian or Ukrainian, correct?
A. Correct.
Q. And in fact, from the protocols [sworn statements compiled after the war by Soviet investigators[, there's some kind of a picture about how the information was obtained that went on the cards, correct?

A. Yes, sir.
Q. And one way was that groups of these prisoners of war would be marched into the camp, correct?
A. That's correct, yes, sir.
Q. And an SS officer would walk up and down the line selecting them, correct?
A. In the POW camp, you are referring to, yes, sir.
Q. Now, that would not be at Trawniki?
A. No, sir.
Q. All right. And alongside the SS man, according to your knowledge and experience, would there typically be a translator, someone who spoke the Russian language, correct? [A lay witness familiar with procedures could give this testimony, as well as someone qualified as an expert.]
A. Yes, sir.
Q. And also very often a medical doctor, correct?
A. Yes, sir.
Q. These were POWs. Some of them didn't have their identity papers with them anymore that they had in the Army, correct?
A. I believe that to have been true, yes, sir.
Q. And this person would take down the information, right?
A. Yes, sir.
Q. Now, if you got selected, then there was going to be a personalbogen [personnel file card] made, correct?
A. That's correct.
Q. Now, for the personalbogen you had to take an oath, right?
A. Yes, sir.
Q. And you had to take an oath that you weren't a Jew, right?
A. That's right.
Q. You had to take an oath you hadn't been a member of the Communist Party or the Komsomol?
A. Right. That's spelled K O M S O M O L.
Q. Thank you. I knew that, Your Honor, but I didn't want to testify. Now then, you had to swear some kind of allegiance, is that right?
A. Yes, sir.
Q. To the Germans?
A. Yes, sir, I believe that's part of it.
Q. To the Nazis, right?
A. Yes. That's part of the service declaration.
Q. Now, if you're a young soldier 21 years old and somebody presents you with an oath to be loyal to the Nazis and you grew up in the 1930s in the Soviet Union, does common sense tell you would have a pretty good idea that there was danger connected with this? [I used the words “common sense” because we are not really talking about the witness’s alleged expertise – which we did not concede. I want to use him to make a point that could be argued in summation as a matter of “common sense,” but which is more powerful if the other side’s witness will concede it.]

A. Yes, sir.
Q. Because if the Germans lost the war, common sense tells us what that young fellow is going to think might happen to him, right? [I am trying through these questions to make a word picture. More detail on this later.]
A. Yes, sir, if the Germans lost the war.
Q. He wouldn't be buying any green bananas, would he, as the saying goes? [The "saying" means that a person's life expectancy is rather short.]
A. No, sir.
Q. Okay. So now that's common sense, right?
A. Yes, sir.
Q. Now, it's common sense, sir, that people who want things sometimes use false identities, correct?
A. Yes, sir.
Q. People who are afraid of consequences sometimes use false identities, correct?

I continued the examination by going over the sloppy record keeping at the camp and the retrieval and storage of key documents; there are further excerpts in a later chapter.

Note the effort to paint a word picture. Tony Axam and Robert Altman have written of the picture theory of advocacy. Suppose I say to you "pediatrician." You will conjure a mental picture of a doctor. Male or female? What does your pediatrician look like? You can bet that he or she looks different from the pediatrician that somebody else would imagine, and that if you said "pediatrician" to twelve jurors there would be at least a half-dozen different images. The same would be true of "motel room," or "sex" or myriad other evocative words. If you are not convinced that different jurors have different mental images of the same event or place, then ask detailed questions to paint a detailed picture. Or, as discussed in Chapter Six, use a picture.

Each chapter of this book contains signposts and directions for the journey through preparation and trial. For the plaintiff, who must go first and bear the burden of proof, telling the story means organizing witness testimony, deposition evidence, and exhibits. Ideally, all exhibits should have been pre-marked and as many as possible admitted by agreement or in a motion in limine process. In the ordinary case, the exhibit list is appended to the pretrial order.

All noncontroversial exhibit rulings should, by one means or another, be obtained before trial. Each party, the plaintiff and the defendant, must consider how many exhibit admissibility rulings to try and defer until trial. There are some evidentiary issues, such as the balance between probative value and time wasting, that cannot be made in the abstract and must usually be deferred.

An advocate who is well prepared and skilled in argument benefits by deferring some evidence rulings until trial, on the theory that she will win more contested trial rulings than the opponent. One risk is that you are not as persuasive as you think you are. However, a party whose case rests to any great extent on uncertain evidentiary, procedural, or substantive law premises will want more certainty about what will be admissible. That advocate will make maximum use of the in limine motion and pretrial evidence ruling process, simply to have the ability to plan how the story should be told.

I have learned this lesson painfully. I had prepared a fairly complex affirmative defense to a criminal case and had brought witnesses great distances to support it. The defense was that the defendant had changed his name to avoid unjust prosecution and that the injustice he faced was provable. This was a form of "necessity" defense. We had drafted proposed jury

instructions, waiting for the charge conference. Just before voir dire began, the prosecutor rose and made an oral in limine motion to exclude a theory of defense that sounded like the one I had planned to use. The judge listened, pretended to hear my response, and granted the motion.

Since I believe in a full opening statement when the defense is going to put on evidence, I had very little time to reconsider the story we were going to tell. This was federal court, and voir dire wouldn't take long. The moral: Find out what will be allowed, or at least be prepared to make changes. The obvious corollary is that pretrial rulings on evidence and issues help ensure that your opening statement does not make promises the judge is going to prevent you from keeping.

In that case, we were able to shorten our story and still have it make sense, and we won. The jury acquitted on two counts, and the court of appeals reversed the third count with directions to acquit. In retrospect, the judge may have helped us by forcing us to try a leaner, cleaner case.

We did not retreat to bare denial. Rather, we decided, first, that we would not put on a defense at all. The prosecutor would be left with a case of somebody who had two different names that he used at different times. The prosecutor was not much freer to attribute a motive to the defendant's use of another name than we were.

The case then became one about what harm could possibly have been done. What was all the fuss about? Roy Rogers was born Leonard Sly, John Wayne started out as Marion Morrison, and Gary Hart (then a political contender) was once Gary Hartpence.

Pretrial clarity on evidence matters saves time and keeps you from doing time-wasting exercises that detract from your story--and indeed from your image as storyteller. "Were these records made and kept in the regular course of business?" "Was it in the regular course of business to make and keep such records?" "And were the entries . . . ?" And so on. Formulas such as this are part of our lawyer lore, but when we exhibit them in court we disempower the jurors and reinforce bad stereotypes of lawyers. Cicero was a brilliant lawyer. Yet when he wished, in argument, to mock a lawyer on the other side, he did so by acting out the formalist incantations of Roman civil procedure. These he contrasted with the work of one who practiced a useful art, like defense of the Roman Republic. You adulterate the story by ornamenting it with useless ritual.

Those who try cases with me grow tired of my repeating, "Go to court every day and say your case." I intend this sentence to describe what we have been discussing. Know the story of your case. Be able to evoke that story in few words. With every witness, every exhibit, every objection, every gesture, consider how to underline some part of your story. Repeating the sentence helps to guard against regarding some witnesses as simply routine or some tasks as unrelated to victory. Your opponent, the judge, your client, busy witnesses, and your own sloth may nudge you toward changing a sensible order of proof. Don't fall for it. In the heat of trial, there may be surprises that seem to call for a radical and immediate change in your well-crafted trial plan. Almost every time, that urge must be resisted. You win by keeping on course.

THE WAY YOU TELL IT MAKES ALL THE DIFFERENCE

I could hunt among the ancient treatises on rhetoric to illustrate this point, but I prefer a more modern example. Here is Professor Jack Balkin, talking about a torts case that we probably all studied in law school.

> Every torts professor has a favorite hypothetical about causal responsibility--some wildly improbable and outrageous chain of events triggered by the defendant that somehow leads inexorably to the plaintiff's injury. I have always been partial to the facts of United

Novelty Co. v. Daniels. In Daniels the defendant negligently set the nineteen-year-old decedent to work cleaning a coin-operated machine with gasoline; the decedent worked in a small room warmed by a gas heater with an open flame. The gasoline vapors surrounding the machine ignited when a rat ran from the machine into the flame, caught fire, and then ran back toward the machine, causing an explosion that killed the decedent. Naturally, the defendant company argued that it was not causally responsible for the freak accident. Nevertheless, the court upheld a jury verdict against the company because it could have foreseen that setting the decedent to work in the room under these conditions was unduly dangerous.

The opinion in Daniels takes up barely a page in the reporters, but within this miniature one can find many of the most common structures of argument about human moral responsibility that occur in legal discourse. Consider, for example, the arguments that the defendant company might make (and probably did make) on its behalf:

(1) The explosion was caused by the unpredictable movement of a rat, not by the defendant's negligence.

(2) When the decedent began cleaning the machine with gasoline, it was completely unforeseeable that a rat would jump out of the machine, run headlong toward an open flame, catch fire, and then run back precisely where it could do the most damage.

(3) Decedent was at fault for cleaning the machine with gasoline in the first place. The decedent must have known of the danger when the decedent voluntarily began to work.

Next consider the plaintiff's likely responses:

(1) Although the rat was the immediate cause of the explosion, the real cause was the defendant's ordering the decedent to work under unsafe conditions.

(2) It is completely foreseeable that if you set someone to work in a small room filled with gas vapors and an open flame, there is an unacceptable risk of an explosion.

(3) The decedent cannot be held responsible for the explosion, because the decedent was following the orders of the defendant employer and was a minor.

As one would expect, the defendant's arguments are designed to minimize the defendant's causal, legal, and moral responsibility, while the plaintiff's arguments are designed to enhance them. More importantly, however, each side recharacterizes the facts to support its position, emphasizing some details, minimizing or even omitting others--creating a coherent portrait of the situation from the raw materials of experience. Like all pictures, these characterizations are selective, for to record experience is always also to reorder and even to suppress it. In the second argument presented above, for example, the defendant describes the situation in minute detail, while the plaintiff speaks in more general, abstract terms. In this way each side can make plausible its claim about the foreseeability or unforeseeability of the decedent's injuries.

Balkin uses the terms "picture" and "portrait" instead of "story," but he is talking about lawyers and the trial process in the same way that we have been. "Story" is more descriptive of the rhetorician/dramatist/troubadour. "Picture" is metaphorical, but also helpful. Manuals on photography tell you to decide what will be the main subject of your picture and tell you to choose a point of view that will emphasize that subject.

When a witness describes a scene, you want to use enough detail to make the jurors form a mental picture. When proving how the accident happened, plaintiff's counsel will ask the witnesses to start by talking about the workplace and the boss's control of people's schedules

and duties. By the time the decedent gets into that room, the plaintiff wants the jury to picture acts being directed and controlled by others.

There are two aspects to "how you tell it." The first is the rhetorical exercise of structuring the argument to lay the facts in a certain order and pattern. The second is understanding how principles of proof serve or disserve the advocate's effort to present the pattern.

STRUCTURE AND ORDER

In the incendiary rat case, both sides begin with accepted principles of personal injury litigation. The defense stresses that we are all responsible for our own actions. We all ought to feel good about having such a sense of responsibility and about expecting others to have it. Therefore, we will not hesitate to treat the plaintiff's decedent as we would want to be treated--as someone who freely chose a certain course of action--even when the consequences are uncompensated injury.

The plaintiff will stress the employer's superior knowledge and control of the situation--its power to affect events, including the power to put the decedent in a place of danger. We should, as community representatives, want to have and enforce rules about the exercise of such power.

Professor Balkin's article, however, is not about rat and gasoline cases. He shows how the basic positions I have just described, which he calls "individualist" versus "communalist," take a very similar form throughout the law of torts. Similar sets of ideologically based pairings can be found in contracts, property, or criminal law--indeed, every field of law that is shaped by the adversary system.

A litigator faced with two persuasive ways to describe the same facts may have a sense of insecurity or unease. If either formulation may be validated by the verdict of a jury, how will the jurors choose? The answer will lie in the ability of the lawyers on both sides and on the choices made by judges who preside at trials and review the results of trials.

Being able to render issues in these opposing, mutually exclusive pairings does not mean that legal rules are indeterminate or without principle. The statement of issues is paradigmatic, simply a structure to be filled in each case with particular factual content. When the content has been added, then juries and judges must exercise judgments based on their perceptions and, inevitably, their own sense of rightness. The fact that a legal form may at times be filled with different content does not mean that it is "empty" or inherently contingent or indeterminate.

In our daily lives, we often say, "that's just a value judgment," or "that's just your opinion," meaning that all such judgments or opinions are unverifiable and therefore arbitrary. Yet, as lawyers, we must constantly embrace value judgments about such things as responsibility, "just deserts," and rights. We must exhibit evidence to jurors and make arguments to build images of reality and validate the opinions and judgments that we want the jury to use in deciding.

Nor, as we shall see, will there always be a bright line between appeals to principle and arguments about facts. The line that Aristotle tried to draw, separating ethical, logical, and emotional arguments from one another, has long since proven impossible to maintain. Similarly, the Aristotelian distinction between matters merely probable and those demonstrable has evaporated, at least in litigation, and probably in the sciences as well.

Whether we like it or not, jurors bring all their faculties to bear in making sense of a case: intuition, feeling, and attitude, as well as the ostensibly rational processes of inductive and deductive reasoning. Therefore, persuasion through evidence must reach all of these faculties.

We are returning to the historic roots of rhetoric, and we are seeing the unity of rhetoric and theater.

PROOF OF FACTS

I once wrote,

> Facts are mutable because we never see them in litigation. We see instead their remnants, traces, evidences, and fossils--their shadows on the courthouse wall. The witnesses recount: They have perceived, do now remember, can express and want to tell the truth, more or less. Things--paper, hair, bones, pictures, and bullets--parade by, each attached to a testifier who alone can give them meaning. At proceeding's end, the advocate will try to impose some order on all of this, and convince the trier that it makes a certain kind of picture.

This passage summarizes many rules of evidence. A witness is more or less valuable based on perception, memory, expression, and veracity. It is an article of adversary system faith that every witness should be tested on these four elements in the presence of the trier of fact. Departures from this rule are justified only as permitted by exceptions to the hearsay rule or by showing that the rule does not apply because an utterance is "not offered for its truth."

With respect to objects, the passage recalls familiar lore: an object must be sponsored by a witness who shows that it is something that the jury should consider. The defendant's fingerprint on a gun is dramatic but irrelevant unless a witness connects the gun, and the defendant's chance to touch it, with the homicide.

In our daily lives, we make decisions based on what we have seen and heard. In trials, we must make sure that every out-of-court statement that is repeated satisfies a rule. Is it offered for the truth of it? If so, is it nonhearsay because of Rule 801? If not, can it come in under Rules 803 or 804? Have we remembered to satisfy the personal knowledge requirement, which applies to hearsay declarants as well as to witnesses on the stand? To be a trial lawyer, you must so internalize rules, including the hearsay rule, that moving through a foundational showing becomes second nature.

The main point, however, is that it is misleading to talk about "the facts" as constituting some objective reality to be "discovered" in past time. The "facts" will be "found" by jurors putting together the tales of witnesses. In this process, the jurors will be guided by their internal attitudes as well as attitudes imposed by the court's instructions.

We can see this in another way. Suzuki, a writer on Zen, drew a series of pictures of an ox and a man, each picture framed by a circle. The last circle was empty and was titled "The Ox and the Man Have Departed." By the time we get into a lawsuit, the ox and the man are gone. We start with a blank circle--and must fill it with the evidence that we find.

Let us see how this works in the incendiary rat case. For our purposes, Balkin is wrong in saying that "the defendant describes the situation in minute detail, while the plaintiff speaks in more general, abstract terms." That may be the form of utterance in an appellate argument, but at trial the plaintiff has as much interest in factual precision and detail as the defendant.

In deciding the order of proof, along come the familiar concepts of primacy and recency. Start strong, because people remember beginnings. End strong, because people remember things that happened more recently. In the structure of a trial, first events and last events of a particular phase--such as the plaintiff's case-in-chief--hold jurors' attention.

To begin, we want an image of the room--and of its dangers. Jurors cannot accept a story unless they can envision it. The plaintiff's evidence assembles the locations and objects and then introduces the events. The events will seem to be a foreseeable consequence of the arrangement

of the objects, for which the defendant is responsible. It is not enough for the plaintiff to have us imagine a room, any room, with an indeterminate machine. We want the picture painted by witnesses' words, and by the exhibits, to be so rich a tableau that the jurors can imagine themselves there with the plaintiff's decedent.

The defendant's evidence will focus upon the decedent's choices and decisions. The defendant may be less interested in the room and its contents than in the relationship between the decedent and the employer, and among the decedent, the events and the decisions the decedent had to make. After focusing on these elements, the proof introduces the objects as logically placed to avoid foreseeable dangers. Note that I have put Balkin's third defense contention--contributory negligence--first. I would do this even in a jurisdiction that has abolished or limited contributory negligence. Stories are about "just deserts," and the defendant must, in order to win, displace responsibility onto the decedent for his own death. "I was careful enough" is not only defensive, but it invites the plaintiff to embark on the risk/cost/benefit calculus that paints the defendant into a corner.

We repeatedly play out the adversary process by example. Let us pause now to see it in this case. The defendant employer takes the stand and testifies about the room where the death occurred. What is the most important point for cross-examination? Without waiting to see how, or whether, the witness trips up, you should be able to choose. The most important point will be raised first, for primacy's sake. Moreover, the jurors expect that when you rise to cross-examine your opponent, you will inflict some damage.

The most important point must be one that you can make by cross-examination, without useless arguing with the witness. It must not be the sort of point that is better left to final argument. It must, in short, be nearly foolproof. It must be a point that tells your story rather than one that deflects or denies the other side's. In the suicidal arsonist rat case, the plaintiff's point is that the defendant set the scene. He will not likely deny it. Your strong opening on cross takes the defendant through the charts, pictures, and objects with which you began your own case, getting agreement along the way.

One can imagine key elements of the cross-examination of the owner:

Q. You own United Novelty?
A. My family and I do.
Q. You run the business on a day-to-day basis?
A. I guess you could say that.
Q. No. Please tell me. Who runs the business?
A. I do.
Q. You hired Mr. Daniels?
A. Yes.
Q. You hired all the people who work at the company headquarters?
A. All except the accountant.
Q. He comes in only once a week, and your wife chose him, right?
A. Right.
Q. If you see a machine that needs cleaning, you decide who will clean it and when?
A. Yes.
Q. You have the power to say where machines are put on the company premises?
A. I guess that's right.
Q. Don't guess. Do you have the power?
A. Sure.

Q. You are the man in charge?

A. Yes.

Q. You can fire people who won't take directions?

A. I have done that.

Q. You tell people what to use to clean dirty machines?

You could think up dozens more questions, each of which shows a way in which this witness is in charge. The witness wants to tell you these things because he likes to think of himself as a person in charge. As long as you pitch the questions to that desire, you will probably get the answers you want. You can plot out this line of cross-examination before trial, taking care not to prolong it unduly.

But that is obvious, you say. Not so, say I. We make notes on a pad of paper as the witness testifies on direct. Usually, we draw a vertical line on each page--one side for notes of the testimony, the other side to make notes of points for cross. When the direct is over, we jump up and try to spear the witness on something in the direct that jumps up at us off of our notes. We forget our careful game plan. I have seen this done too often, and confess to having done it myself.

Hew to your planned cross. Use the surefire stuff. Then take a few "opportunity shots," and end strong. Remember recency.

Economy of motion is matched by parsimony of expression. The poet Stevie Smith wrote:

It is the privilege of the rich

To waste the time of the poor.

Lawyers think their privilege is to waste the jurors' time. The jurors will get even.

THE ESSENCE OF DIRECT AND CROSS

A famous trial lawyer once asked an audience, "Would you rather do direct examination or cross examination? The correct answer is "yes." As we think about trials, we must respect not only the primacy of storytelling, but also the values of the adversary system. The dialectical form of trials is often touted as the surest means to uncover error. This form is also best adapted to presenting the contingent set of recollections and evidences that will be found by the jury as "truth."

Direct examination exposes a story, bit by bit. The examination is by questions, not narrative. The advocate and opponent silently evaluate each question and answer to see if they meet tests of relevance, absence of privilege, and all the other rules of evidence. Direct examination is the basic method for setting out a story. You cannot do it unless you are equipped with all the rules of evidence and procedure by which each question will be tested. You must wear those rules like a cloak.

Cross examination, which is the subject of later chapters in this book, is rightly praised. But some lawyers see it as a kind of slash and burn exercise, designed to destroy but not to help build. True, a "good" cross examination pumps adrenaline into your system, and you are at risk of becoming so addicted to that feeling that you forget the contextual role of cross-examination in story-telling. One can imagine all those intensity junkies, standing outside courthouses, wearing cardboard signs that say "will cross-examine for food."

ARE YOU SURE?

One evening in Umtata, South Africa, my friend Ken Frazier began teaching the trial advocacy program for students at the University of the Transkei. He started by asking each one to

introduce himself or herself and to say a few words. Then he strode to the lectern of the classroom and said something like:

"Listen to you. I got here only today. I am just a black trial lawyer from Philadelphia, but I can't help noticing that most of you introduce yourselves timidly, tentatively. Maybe it is the atmosphere we have created here without meaning to do it. Maybe it is a part of the political system here in South Africa. But let me ask you something. You are going down the road and you need directions, and you ask somebody and they say, kind of hesitantly, 'Well, I guess it's maybe, well, about a mile and then I think you turn right.' Then, you ask the next person you come to, and they say with great conviction, 'Go down this road one mile. At the BP station, turn right and go one-half mile. It's on the left. You can't miss it.' Which one of those two people are you going to trust? I'll tell you. You are going to trust the person who looks like they know what they are talking about and believes what they are saying."

I think that makes the point.

YOU ALWAYS NAVIGATE BY DEAD RECKONING

Sailors use a method called "dead reckoning." You know where the voyage began. You know your course and speed, and you have some idea about the current and the side-setting effect of the wind on your sails. You can plot an approximate, dead-reckoning fix. But you cannot be sure where you are until you sight land or a fixed object on the sea, such as a navigational buoy.

In trial, you have a similar experience. You can't know for sure what the jurors are thinking about your presentation until they come in at the end and give you their verdict. You look for clues, but the available clues are notoriously unreliable. In the first criminal trial in which I was involved for the defense, I was seated on the back row behind my mentor, Edward Bennett Williams. One of the jurors seemed to be "with us." He smiled at all the "right" times, he followed the significant points we were making. He nodded affably to us in the halls. When deliberations began, the other jurors elected him foreman, and he led the jury to guilty verdicts on eight out of seven possible counts.

Given the limitations of dead-reckoning navigation, what must you do?

First, keep to the trial plan you began to develop when you got the case; hasty change is bound to be based on inadequate data.

Second, have markers for yourself and the jury that predict your progress and then permit you to go back and refer to points along the way. Everything is leading to the closing argument, when you will try to bring the elements of the story together. Put your story, and its elements, clearly at the first opportunity, in the opening statement, and in voir dire. Tell the story and outline the evidence.

Third, use demonstrative evidence to underscore key themes in your story.

You have the best chance of predicting how the jurors will vote if you understand and identify with them and their life experiences.

It matters to jurors who is speaking, and who they are. If you are a prosperous-looking white male, an urban African-American female juror will probably approach the story you tell with caution, perhaps even suspicion. If you think to navigate past this obstacle by overcorrecting your course and focusing undue attention on that juror, you will make the problem worse because you are going to be viewed as condescending.

Your task is to step outside of your own education and upbringing and try to see the world from all the different perspectives that jurors will bring to bear. In argument, all trial lawyers use analogies from everyday life. Your analogies are worth nothing if they describe an

everyday life that might be yours but is foreign to the jurors. You live in a law firm. You might hang out with people who make, or think they make, broad-gauge economic and social decisions, weighing and sifting and deciding at a distance. Most jurors deal with the consequences of those decisions--they buy the products, breathe the air, pay the prices, try to get along. Brecht asked,

> In the evening when the Chinese Wall was finished
> Where did the masons go?

In thirty-five years of lawyering, I have found nothing so striking about my profession as its members' cultivated ignorance of what people think of them and their clients. I say "cultivated" deliberately. We are, in our litigation practice, champions for our client's position. If we step too readily and too uncritically into that role, we learn to disregard what others say about our clients as meaningless or wrong-headed.

That sort of arrogance is costly. The jurors do not begin with a commitment to our client's point of view. They may well come to court with attitudes and prejudices that cut directly against what our client says and wants. If we cannot appreciate that jurors feel that way, we will be hard put to convince them. I knew a lawyer once, who represented a codefendant in a civil antitrust case that involved oil companies. He was proficient in all the trial lawyer skills. He knew the economic facts and arguments that would insulate his client from liability. He dressed well. But he appeared completely innocent of any knowledge or appreciation of what jurors would think of an obviously rich white male representing a big oil company with a reputation for greed and arrogance.

Fortunately, we did some jury work that helped all the lawyers to see the pitfalls that lurked out there, and that they might avoid. Good jury researchers can help us overcome our ignorance and arrogance. Their work need not be unbearably costly. In fairly large cases, a couple of good jury studies will be helpful--I am not talking about full-blown dress rehearsals, but more modest efforts designed to make sure you are on the right track. Of course, in the "big" case, the client may be able to pay for the full treatment. In pro bono cases, some of the brilliant jury consultation firms will volunteer their time. You can get the same sort of help from political consultants, whose help I have found invaluable in cases where we had no money for formal research.

If you are going to use this kind of expertise to help you navigate, get it early. Lawyers tend to wait until the case approaches trial before retaining a consultant. It would be better to get help as soon as you have your story in some tentative form, to help you make sure you are not making early and significant errors.

The jurors are going to size you up. They will look as well as listen. They will watch how you treat the lawyers you work with and the paralegals who help you, the court personnel, and the witnesses.

If I am going to navigate, I like local knowledge. Read all the papers in town. Listen to all the radio and television stations. Think about what churches people attend, who their political leaders are, what the issues that concern their daily lives are. Even in your own town, it is so easy to live apart from the people around you.

I am not suggesting that you try to pretend you are a hometown person. Rather, the local media will tell you what concerns people and how they express those concerns. Understanding local political squabbles can help you see how particular jurors from particular neighborhoods might view your case. It can be as simple a matter as seeing which newspaper or magazine a juror carries in to the courtroom, or which local radio or television station a juror prefers to watch.

I used to have a favorite saying about this, but I ruined it. I was arguing in front of Judge James Leff in the New York Supreme Court, Criminal Part, and urging him to take a kindly view of my clients' political views. I dragged out my saying, "And avert thine eyes from the lore of the wise, that have honor in proud men's sight. The simple, nameless herd of humanity hath deeds and faith enough for me."

"That's from Euripides," I added, smugly, I guess.

My opponent, a redoubtable chunky Assistant DA from Homicide with a heavy Brooklyn accent, rose to respond.

"Your Honor, I don't know about these Greek poets. I know when I take my pants to the tailor, he says, 'Euripides?' And I says 'Yeah, Eumenides.' "

In sum, understanding the voices and aspirations of jurors helps you to understand whether the course you think you are steering is the same one the jurors are following.

You are going to find your own voice through experience. It had better be your own, and not a borrowed one, because none of us is good enough to maintain pretense through a long trial. Jurors are quick to know who is being a phony and who is not. In mock jury survey work, trial consultant Hale Starr asks the panel whether they think the presentations were being made by an actor playing a lawyer or by a real lawyer. It's a good question. You want the jurors to think you are a real lawyer, with a real client who will really hurt if this case comes out the wrong way. Everybody knows that television actors' "clients" don't really win or lose.

As you navigate, remember also that you are trying to reach all of the jurors, to bring their collective judgment to bear. A good jury is a good cross-section, and you want their different life experiences, backgrounds, knowledge, and recollection to come together in the jury room.

When you make your closing argument, you will tell the jurors where you think the voyage has taken you. The clearest way to trace the voyage is by the markers you have passed along the way. The closing evokes the witnesses and exhibits in a coherent pattern that fits the story. That pattern cannot be made anew. Its elements must be found objects, gathered up from the signals you have sent in examining witnesses. That is, your witness examinations must have been properly crafted to leave your most persuasive points ready to revisit. The exhibits you have used now reappear in logical order.

Dead reckoning takes us past markers familiar to us, if only in our minds. We should have made this journey many times before. I have seen so many lawyers who take their cases one witness, or one day, or even one week at a time. They have not put together in mind's eye all the testimony and all the exhibits to have a firm sense of the whole voyage. This is wrong.

All through this book, I suggest ways to lay down markers that you can revisit in final argument. A marker may be a repeated question or answer. It may be a walk across the courtroom to hand the witness an exhibit. It may be a particular exhibit that you published in a particular way. It may be a limiting, cautionary, or explanatory instruction that you persuaded the judge to give mid-trial and perhaps to repeat in the jury charge. These are markers. They are things you say or do or show that are designed to stick in jurors' memories so you can recall them in final argument and bring them together. A voyage begins and ends, and is described by the markers passed along the way.

In federal criminal cases you are entitled to a "theory of the case" instruction. Regardless of forum or case, you should always draft and request such an instruction. Having the judge tell the jurors your theory--and note that you are entitled to a verdict if the evidence supports it--does more than help put your story across. The judge's involvement may cause jurors to examine your

story more seriously than they otherwise would, as a plausible alternative to the view they had been inclined to take.

None of these suggestions means that you should continually turn to the jury like a one-person Greek chorus to draw the appropriate lesson from some bit of testimony or try to provide a voice-over as in a B movie. Usually, you must wait till closing argument to bring it all together.

> "Members of the jury, do you remember when I spent about a half-hour reading Mr. Smith all the things he said before, and making sure he said them, and that he was under an oath when he did? I guess some of you must have said, 'What is that lawyer doing, wasting time with that?' I want to suggest I was doing something very important. I was giving Mr. Smith a chance to deny he swore to those things, and he didn't deny it. I didn't want anybody in this courtroom to say we didn't give him a chance. Because make no mistake, the evidence that you heard shows something pretty serious. This fellow Smith tells two different stories under oath. He is a person who would lie under oath, and he admits that. You have got to decide whether he lied here in your faces, and whether what he told when it was all fresh and before the prosecutors put pressure on him wasn't the real story. In order to decide that, you would need Mr. Smith to admit that he said those things, and that's what I was asking him to do."

In this example, you are calling to mind markers left along the way and suggesting to jurors a way of analyzing the case for themselves. This is not a new insight. Here is what Dan O'Connell, the great Irish advocate, said about it:

> You all know how to argue to a group of people who are set against your basic beliefs. You never get them by showing them that you have got the matter all worked out, in a set speech like the catechism--or whatever might be the Protestant equivalent of the catechism.
>
> We can't drag the jurors along with us. Make them imagine that their movements are directed by themselves. Pay their capacities the compliment of not making things too clear. Rather than elaborate reasonings, throw off mere fragments, or seeds of thought. These will take root and shoot up into precisely the conclusions we want.

If the seafaring idea of dead reckoning does not appeal to you, you can use the metaphor with which I began: Your closing argument is a detailed plan of the house you have built by your examination of witnesses.

Notes to Chapter One

1. On rhetoric, see the discussion in Persuasion: The Litigator's Art. See also Rhetoric, 26 Encyclopaedia Brittanica 803 (15th ed. 1990); Quintilian, 9 id. 863.; R. Barilli, Rhetoric (G. Menozzi, trans. 1989) (originally published as La Retorica (1983)), a survey from ancient to modern times. On the relationship between drama and rhetoric see G. Thomson, Aeschylus & Athens (2d ed. 1945).
2. Juror decisions based on personal knowledge rather than on evidence are last reported in the mid-1500s. The question whether jurors were ever "witnesses" in the formal sense is debatable. Compare J. F. Stephen, 1 A History of the Criminal Law of England 301–02 (1883) with T. F. T. Plucknett, A Concise History of the Common Law 126–29 (5th ed. 1956). Surely, the character of village life in England meant that jurors had personal knowledge of the facts, and this knowledge appears to be one basis of the vicinage requirement.

3. The history of witness disqualification rules is narrated in McCormick, Evidence §§ 62–68 (1st ed. 1954). P. Westen, The Compulsory Process Clause, 73 Mich. L. Rev. 71 (1974), contains useful history. See also Washington v. Texas, 388 U.S. 14 (1967) (invalidates Texas accomplice disqualification rule).
4. The reference to The American Jury is to Harry Kalven & Hans Zeisel, The American Jury (1966). Under a grant from the Ford Foundation, Kalven and Zeisel directed a research project that studied about 3500 criminal jury verdicts. In every instance where the trial judge would have decided the case differently, they asked the judge to give reasons. They were able to build an impressive model to explain why and how jurors and judges see cases differently. For most offenses, jurors tended to be more lenient than judges, because jurors were more open to "human" factors. I have tried to use the insights of the Kalven-Zeisel study in discussing lawyer storytelling, and the testimony of witnesses.
5. On Gestalt theory, see, e.g., W. Kohler, Gestalt Psychology (1959). Introductory material can be found in Psychology, 26 Encyclopaedia Brittanica 322 (15th ed. 1990), and Human Perception, 25 id. 474. See also Barry Stevens, Don't Push the River (It Flows By Itself) (1970), a highly personal account of Gestalt theory, dealing with both perception and personal empowerment.
6. On pretrial evidence rulings, see Federal Rule of Civil Procedure 16 and 26. See also my article, cited in the Bibliography on the 1994 rule amendments.
7. The rat story is from Jack Balkin, The Rhetoric of Responsibility, 76 Va. L. Rev. 197 (1990). The Daniels case is reported at 42 So. 2d 395 (Miss. 1949). Modern legal scholarship on rhetoric focuses on the relative indeterminacy of legal rules. This work can help the trial lawyer understand the process in which we engage. In addition to Balkin's cited work, see Symposium, Beyond Critique: Law, Culture, and the Politics of Form, 69 Tex. L. Rev. 1595 (1991).
8. The quoted lines of Stevie Smith are from her poem "Childe Rolandine," Collected Poems 331 (J. McGibbon, ed. 1976), about an artist who "went to work as a secretary-typist." Thanks to Professor Carolyn Heilbrun (aka Amanda Cross) for steering me to it.
9. The Brecht poem is "A Worker Reads History," Selected Poems 109 (Hays, trans. 1947).
10. As we think about the different voices and cultures that we find among jurors, we can look to the eloquent work of Professor Mari Matsuda. She does not write about trial lawyering, although the Yale article cited below is an account of a case in which she was counsel. Rather, she understands the need to listen to voices of victims, jurors, and witnesses. The term "victim" can here refer to anyone who feels wronged and seeks redress in the judicial system, for every case is a plea for justice. Indeed, a well-tried case will see a plea for justice from both sides. Professor Matsuda's work includes Voices of America: Accent, Antidiscrimination and a Jurisprudence for the Last Reconstruction, 100 Yale L.J. 1329 (1991); Public Response to Racist Speech: Considering the Victim's Story, 87 Mich. L. Rev. 2320 (1989); and When the First Quail Calls: Multiple Consciousness as Jurisprudential Method, 11 Women's Rights Law Rep. 7 (1988). I have written on these issues in Retaining Wall.
11. On the theory of the case instruction, see United States v. Cullen, 454 F.2d 386, 390 (7th Cir. 1971); United States v. Vole, 435 F.2d 774 (7th Cir. 1971); Strauss v. United States, 376 F.2d 416 (5th Cir. 1967); Pattern Jury Instructions, Criminal Cases 52 (1990 edition).

Chapter Two
Direct Examination: Friendly Folks
WHY DIRECT EXAMINATION IS DIFFICULT

Direct examination of a friendly witness is the most difficult part in the trial lawyer's repertoire. You have understood the story of the case. The witness understands her part of the story. That is, although this witness may contribute only a small fragment of the overall picture, she recalls that part as a single story. She came to a certain place, and witnessed certain events. Were you to engage her in conversation, she would narrate her story as all of us do, in a more or less cohesive way. Yet the rules of evidence prevent her from doing that, for "narrative" is forbidden when you are doing direct examination.

Why "forbidden"? The witness must respond to your non-leading questions one at a time. How often do friends sitting around swapping stories interrogate one another in this way? Not often, although some forms of discourse are more clearly interactive than an exchange of narratives.

The witness must speak from personal knowledge. This is a bedrock requirement of evidence law and a counsel of procedure. Yet, in daily speech, our narratives are a blend of observation, intuition, surmise, and speculation. In court, the witness who strays from the observable "facts" courts a double danger: the opponent's objection will be sustained, and the opponent gains fuel for cross-examination.

In daily conversation, a person usually speaks colloquially, even elliptically, leaving out ideas and events that are mutually understood among the conversants. In court, the witness is telling her story to strangers. Until sometime in the 1500s, the jurors often had personal knowledge of the facts in issue, and could apply that knowledge to the case. Even in later years, venue and vicinage requirements, which localize trials where key events happened, were designed to ensure that the jurors shared some common experiences with the litigants and witnesses. Today, however, trial may take place thousands of miles from key events. Even a trial in the same city as the matters in issue will be heard by jurors who might as well have been summoned from a thousand miles away, because although they live in the same general area as the events at issue, they may not really be concerned with what is happening to their neighbors. We live our lives more isolated from one another than formerly. This isolation is more pronounced when the parties to litigation are from one racial or ethnic group and the majority of jurors are from another.

So, the question becomes, How should the witness be when testifying? How should she show respect for the jurors and self-confidence in what is being told? How can she be ready with enough detail so the story makes sense to those who have never heard it before, and who do not share her background and experience?

In addition, the witness must do the unfamiliar task of testifying in a courtroom, more or less isolated from those who are to evaluate the testimony. The questioner will be in one place, the intended audience in another, perhaps within two different lines of sight.

All of this summarizes the witness's difficulties, which the lawyer must help her to surmount. The lawyer's problem does not end there. Direct examination is difficult because, as lawyers, we get relatively little practice at it. When our clients or other "friendly" witnesses are being deposed, we "defend" the deposition rather than directly examining them on our own. The deposition to preserve trial testimony is relatively rare. When we take depositions, the rules of relevance are relaxed and we are often permitted to examine using leading questions. Here, again, we are not practicing the skills of courtroom direct examination.

These skills involve both positive and negative aspects. We must adopt a persuasive manner and help the witness and jurors. We must avoid setting up the witness for needless objections and cross-examination. In both aspects, we are doing anticipatory deconstruction, breaking down the witness's story into testimonial elements while at the same time critically examining each piece of it to determine how it fits with our whole story and how it can be made persuasive and attack-proof.

I have labeled this chapter "Friendly Folks" and the next one "Neutral Fact Witnesses" to describe important differences in witnesses' attitudes. The friendly witness wants to help. The neutral witness wants to get it right. `Neither goal is, in the nature of trials, completely attainable. The direct examiner must help any witness avoid being frustrated by the limits that a trial process puts on the natural desire to tell a whole story coherently and be done with it.

THE STORY WITHIN THE STORY

You will tell the trier of fact a story. The elements of it are woven from the recollections of witnesses, and from pictures, documents and objects that the witnesses sponsor into evidence. In telling that story, which is your trial theme, you will necessarily assign greater and lesser roles to people and witnesses. In other work, I have spoken of round characters, whom the jurors will come to know in detail, and flat characters, who have a minor role and whose life experiences may be less important.

Yet, almost every witness also has a story, of which his or her contribution to your trial is a part. Your client's story may be bound up inextricably with the trial story. This is not necessarily true of a witness.

Your case is about a hostile work environment, in an office. Your client Wendy Nelson resigned, but you say she was constructively discharged because the office manager made unwanted sexual overtures, punctuated by rude comments. You need evidence that senior management knew about this behavior. You need to corroborate your client's version of events. Your investigator has found a witness. Sheila Levine worked in the same office during several months when your client also worked there. She sat at a desk near your client, and reported to that same office manager. She is willing, indeed eager, to be a witness. Your antennae are finely tuned, because this witness could be very powerful and persuasive, or could seem to be so biased and hostile that she will repel jurors.

You want the witness to set a scene and to tell a set of experiences that lend weight to your client's version of events. Ms. Levine inevitably has a different agenda. She may never before have been involved in a lawsuit. Being interviewed by an investigator, then by a lawyer, and then having her deposition taken – all these are new and exciting experiences. She may either be nervous about testifying, or may relish the idea of being on such a stage. How she came to have a job with that company, what happened to her there, and why she left are ingredients of her story, and she may be eager to tell that story. But, as the saying goes, "It is not about Ms. Levine. It is about Wendy Nelson." You want only those parts of Ms. Levine's story that bear upon the case you are trying.

So you have two major tasks. First, you must make the witness comfortable with what he is to do. Second, you must prepare yourself to serve as an intermediary between the witness and the trier of fact.

PREPARING THE FRIENDLY WITNESS

You and the witness are in your office. It is days or weeks before the witness will testify. Here are some things you might say. Edit the narrative as needed, because procedures vary. In real life, it will not be one-sided. The witness will want to interrupt with questions. Make sure

someone else from your office, or connected with the case in a way not to disrupt the lawyer-client privilege, is sitting in. Think about whether notes you take are discoverable.

"Hello. Have a seat. Can I get you some coffee, or a soft drink or water?"

Do not order somebody else to do this.

"I wanted to get a chance to talk about the trial and answer your questions. This should take a couple of hours, but I think you set aside the time so we can really do a good job.

"Have you ever been a witness in court before? Tell me about that. . . . Well, just for myself, I'd like to go through it all with you, but I'll cut it short if I am talking about something you already know. Every case is different. Every judge, jury, and courtroom are different.

"Here is a diagram of the courtroom we are going to be in. It might not be just like this one, because there can always be changes. But this is basically it. You will be out here in the witness room until we call you. They have this rule that you can't sit in and listen to the testimony of any other witness. Now, when you are done testifying, we can ask the judge to let you stay for the rest of the trial, and usually she'll grant that.

"When you are called, the bailiff will walk with you into the courtroom. I'll make sure that Mr. Wilson from my office is there, too. I know you'll be a little nervous, but just walk right in. You'll walk up to this desk here, where a woman is sitting, just in front of the judge's bench. She should stand up, if she's paying attention. She'll say, 'Raise your right hand.' Do that, and she'll ask you to swear that you'll tell the truth. Do you have a religious objection to swearing the oath--I mean, would you rather affirm that you will tell the truth?"

Always ask this, and if the answer is "yes," work it out beforehand with the clerk.

"Then, you take your seat right here in the witness chair. Put your hands in your lap, sit up straight, and look at me. I'll be standing right here.

"Now comes the hard part. You know more about what you saw than anybody else in the world. More than I do, more than [the client], certainly more than the other side. The lawyer on the other side knows you know what you're talking about, and he might try to make some objections or interrupt us to keep you from telling what you know in the most effective way possible.

"I need a big favor from you. I need you to trust me on this. I am the lawyer for [the client]. It's my job to make sure that if the lawyer on the other side makes some objection or interruption, that gets handled.

"Another thing. There are all these rules in court. They don't let you just come in and tell your story like you know it. Maybe some of what you know is based on what you heard from other people. Or the jury can understand it better if we show them some pictures of the scene. For a lot of reasons, the way we do this is that I ask questions and you answer to the jury.

"In a few minutes, we will go over all the things you know. I have some pictures here, and I will be making sure they show the intersection the way it was. Everything you have to do in court can be summed up like this: Listen to every question, no matter if I ask it, the other side's lawyer asks it, or the judge asks it. Listen to it. Then take a second or two to make sure you've got the question in mind. Then answer that question straight and true. If the question is not clear, just say, 'I'm sorry, I don't understand what you're asking. "

At this point, you might have a chart with the rules on it.

1. Listen to the question.
2. Take a second or two.
3. If the question isn't clear, say so.
4. If the question is clear, answer that question.

"If you remember these principles, you'll do fine. Now, maybe you're thinking, 'Who is this bozo telling me I'll do fine? What if I get confused and flustered in there and he asks me a question and I forget what I'm supposed to say?' Or maybe you watched some lawyer program on television and you're thinking, 'What do I do when the other side's lawyer puts his face about a foot from mine and hollers cross-examination at me?'

"For what it's worth, I think those are great questions. The answer to both of them is the same. Do just what's on the chart. Let's go through it.

"I ask a question. I don't know as much about the case as you do, so the question doesn't seem to make sense. You pause and say, 'I don't understand.' Or suppose I ask you, 'Did the red Ford stop here at the stop sign?' And you know it did, but then it started right up again and went on through, even though Stacy Wilson was in the crosswalk.

"All I'm asking is, please, you've got to trust me to know the case, trust me to know that you know all the important facts, and I want the jury to hear all you know. So just answer the question I asked, and then I will ask the next question that brings out more of the story. Also, there are all these rules about the form of questions I can ask, and the way things have to be done. If you let me ask the questions, then I can try to make sure we let the jury know the truth, and do that in the way the rules require.

"There's a whole other reason for listening, pausing, and just answering the question. That's the way we're going to control the lawyer on the other side. Because you are going to treat him the same way you treat me. Listen to his question. Then pause. In that pause, I get a chance to do my job. If the question is improper, or if he is being abusive and in your face, I can stand up and object. If the judge sustains the objection, good. If she overrules it and says 'Answer the question,' you have had a few more seconds to focus on rules 3 and 4, so you do the next right thing."

We interrupt this catechism because the next portion would deal with preparing for cross-examination; we resume that dialogue in a later chapter.

"Now suppose my question is clear, but you just plain forgot the answer for a moment. That happens to everybody, especially sitting up there in the witness chair. Maybe it'll happen today on something and we can practice. If you forget, smile and say something like 'I know that, but it just escapes me at the moment.' Then I get to ask, 'Is your memory exhausted on this right now?' And you say, 'Yes.' Then I can remind you of that fact, and we go ahead.

"You probably wonder who you should look at when you are answering. Half of that is easy. When I, or the other lawyer, or the judge is asking you a question, look at whoever is asking."

We have to step out of the narrative here because courtrooms and judges are so different. Do you examine from a seated position at the counsel table, from behind a lectern, standing at your table, or from wherever you like? How is the courtroom laid out? How far are you from the witness; that is, does the witness have to pan the courtroom with her eyes to look from the jury to you and back again?

Will you be in one of those small, almost intimate, courtrooms of the modern type where counsel, parties, jurors, witnesses, and spectators are seated in a kind of circle, so that it really looks like anybody can talk to everybody?

Whatever the rule and whatever the interior design, you want your witnesses to be comfortable. You do not want them jerking their heads back and forth and looking agitated. I operate on several key assumptions born of experience. The courtroom is an unfamiliar place for most witnesses. Jurors may not forgive the normal signs of nervousness, which may seem to

betoken insincerity. You must be in charge, and every witness on your side needs to be reminded. You assert your control by preparation and by adopting techniques of examination that preserve your options.

You and the witness may benefit from videotaping a part of the proposed examination. Beware any requirement that you turn the tape over to your opponent, and make sure your witness is able to answer cross-examination questions about the process. I prefer to videotape only a few questions and answers so that the witness can truthfully say, "They just wanted me to see how I looked to other people, so they videotaped about a dozen questions and answers."

Your relationship with a friendly witness, particularly one who will testify at length or on an important subject, will say a great deal to the jury. The respect you and the witness show one another and to the other trial participants is vital. You are the only person who can help the novice witness know how to "relate" to the jury. Once, Lady Bird Johnson was a character witness for a defendant I represented. She came in over the weekend to be prepared to testify, accompanied by a Secret Service agent and our mutual friend Bob Strauss.

The questions one asks a character witness, and the answers she is permitted to give, are well confined. I was surprised that Mrs. Johnson worried about the basic matters of how to look, act, and present herself to the jurors. I made the mistake of thinking that with all those years in public life, this cameo role as a witness would not concern her. She was concerned, not only because the experience was novel. She is so gracious and accomplished that she wanted her testimony to be effective. She cared in the same way that most friendly witnesses care.

I described the courtroom. Then I said something like, "Mrs. Johnson, when I first came to Washington, D.C., in 1966, we lived on Capitol Hill. Your husband was president. And I still remember how you would dedicate those 'vest-pocket parks' and other green spaces. The children in the neighborhood and their parents would come to hear you. Those jurors are the mothers and fathers you were so effective at talking with. They are concerned about the same issues, and they have the same common sense they always did."

That explanation, Mrs. Johnson said, and Bob Strauss told me later, worked because it tied the experience of being a witness to other events in Mrs. Johnson's life. Every witness you will ever meet has--sometime, somewhere--explained something to somebody. That may be a good place to start.

How did this episode come out? Mrs. Johnson was asked, and answered, the standard character witness questions. The last one was, "Do you have an opinion about his integrity and honesty?" She said, "Yes. He has integrity, and he is honest." And then she turned to the jurors, looked them in the eyes, and said in tones redolent of those speeches in the parks, "You know, there's many people who don't like John, but nobody ever said he wasn't honest."

Almost every witness has special qualities that can make their testimony real. The nurse can say, "I checked the blood pressure," or, "I checked the blood pressure, just as I was trained to do." The second answer dignifies the witness in the jurors' eyes and lets the witness exhibit a quality of which she is proud. An experienced employee, well-briefed on antitrust risks, is better able to know if anything improper happened at a meeting than someone with less experience. A bank teller may have been trained to observe the characteristics of those at his workstation. A court official will have been trained to notice whether certain procedures were or were not followed. Learn your witness's special qualities, and integrate them into the direct examination. To this extent at least, the witness's story helps the client's story.

How you say it is important. Barry Stevens, in Don't Push the River, gives an example. Compare these statements: "He's new at the job, but he's doing fine," and "He's new at the job, and he's doing fine."

In addition to making your witness comfortable with the job of testifying, you must make her aware of the various tools you, as the lawyer, have: refreshing recollection, making objections, showing pictures to the jury, filling in gaps on redirect examination. You tell the witness of these tools in order to instill confidence and to help the witness to focus on one, and only one, task: Do your best at answering the questions.

BEGINNING STRONG

The scene moves from your office to the courtroom. The witness has something to contribute. As my colleague and friend Pat Hazel reminds us, you have choices about where to begin.

Usually, you will begin by introducing the witness. Sometimes the court clerk or reporter will ask the witness's name and perhaps even his address. We begin with the witness sitting in the chair, looking at you. You are as much in a line of sight between the witness and jurors as you are permitted to be. If you can move the obligatory lectern, do so. There are courtrooms in which there is a fold-down tray on the front edge of the jury box on which to put your papers. That's a good spot.

Even in a jurisdiction that requires you to examine from a seated position at the counsel table, there is probably nothing wrong with your having stood while the witness is being seated and sworn, and remaining standing for your first, introductory question. Later chapters talk about extending the time you are on your feet.

How should you introduce the witness? Well, certainly in a way that identifies and dignifies him. You want to let the jury know why this witness's testimony is going to be believable and important.

"Good morning. Will you tell the jury your name?" This question reminds the witness to speak to the jurors.

"Do you live here in Denver?" Or, if not, "What city and state do you live in?" You don't need to get more than the city and state unless the address is important to the story.

Remember, and be cautioned by, the story of a Texas lawyer who asked the witness, "Where do you reside, ma'am?"

"Tyler," she answered.

"Have you lived there all your life?"

"Not yet."

Your next question can be, "What do you do for work?" You can leave this out or defer it if it doesn't help the narrative. Notice that, borrowing from Tony Axam of Atlanta, we don't ask the ponderous, "What is your business or occupation?" We want an answer in which the witness shares his vocation.

Now, end the suspense, and tell the jury what you're doing. "Do you know why you're here?"

"Yes," should be the answer, and no more.

"Why?"

"Because I saw the train run into Mr. Thompson's car." Or, "Because I was the company engineer at those meetings in 1975."

Next, consider asking a question or two that sum up what the witness is going to say. "Was the railroad crossing gate shut or open when the train ran into Mr. Thompson's car?" Or,

"When you were at those meetings, did you hear anybody discuss the price at which crude oil should be sold?"

These three inquiries--What work? Why are you here? What did you see?--may seem simple. If you think so, go to court and listen to the stilted introductions of witnesses--in language that neither the witness nor the jurors would ever use. Then comes a labored trudge through preliminary details. By the time the lawyer has dragged the witness to the place where something important happened, the journey has already exhausted the jurors' patience.

STATING AND RESTATING YOUR THEME – HELPING THE JURORS

I reiterate a major theme of this book. We ask jurors – and to a lesser extent other triers of fact – to do an important job under the most difficult conditions imaginable. I can make this point with a couple of comparisons. In France, a trial may feature only a witness or two. There is a file – a dossier – containing witness statements, expert reports and all the important elements of proof. These are arranged in logical order. The "trial" seems to consist of connecting the dots and shoveling the predigested evidence into some sort of record. In some administrative and judge-tried cases, you will see the same orderly process.

By contrast, a jury trial should have spontaneity. It would be impossible to maintain juror interest by dully stacking one exhibit upon another with a parade of lackluster witnesses Yet, there is a price for this spontaneity. Proof by a series of live witnesses is inherently disorderly. Unless you constantly provide guidance, the testimony and exhibits will seem disconnected from each other. In most cases, the jurors do not get instructions on the law until the case is over. They are supposed to be like sponges, soaking up the evidence. Your job, from voir dire, through opening statement, and with each witness, is to provide a constant context. The rules of courtroom procedure seldom let you step out of character and provide narrative commentary. Yet, you must figure out ways to do this within the rules. Starting direct examination with a few direct questions to focus the inquiry is one such technique.

DIRECT EXAMINATION ORGANIZATION

Omit needless words, unless forced by your opponent and the court to use them, and only then after making it clear that you would rather do without them. The following is a partial list of phrases that must be stricken from your vocabulary. If you find yourself using them, even in practice sessions, stop and think. These are only examples; they could be multiplied at will.

"Directing your attention to," followed by a place or time. Use a transition or a loop, having used a prologue to set up the action.

"Did there come a time when . . . ?" Use a transition or a loop.

"What, if anything, happened next?" This device is used so you don't lead the witness by suggesting the answer. Nonsense. Something happened next, the laws of physics say. It's probably a dumb question in any case. If you want to find out what happened next that was relevant, use a loop or a transition.

What are these "loops," "prologues," and "transitions"? A loop is a repetition of a part of a previous answer to underscore the answer and to help guide the witness to the next event. A prologue sets out themes in advance. A transition is a statement or question that signals a change in subject matter. All three devices can be used in direct and cross-examination--and with any type of witness. They are among the most important devices for focusing on important elements of proof and providing context.

LOOPS

Here are some examples, from a mock trial based on a war crimes case:

Q. On that day, did you go to a village called My Lai?

A. Yes, sir.
Q. What time did you get to the village of My Lai?
A. About 1:30.
Q. Did you see Lt. William Calley on that day, sir?
A. Yes.
Q. Where did you first run into Lt. Calley?
A. In the village, sir, along a road that ran east and west.
Q. Did he say anything to you?
A. He told me to round up the people in the village.
Q. Who did you "round up" in response to Lt. Calley's order to you, sir?
A. About four or five women and kids.
Q. Were they all women and children, or were there any men?
A. Well, when we got back to the trail, we got back with Lt. Calley, and there were about thirty or forty Vietnamese there. I remember one old man; the rest were all women and children.
Q. Did Lt. Calley give you another order, later?
A. Yes, sir.
Q. What did he tell you to do?
A. He told us to take care of those people, and then he left. He came back a half-hour later, and we still had the people under guard. He said, "I thought I told you to take care of those people." And we said, "We are." And he said, "I mean kill them."
Q. When Lt. Calley said "Kill them," did he say anything else?

The loops in this example restate key points--the name of the village, the identity of the accused, the words spoken, information about the victims. Loops keep the story and the witness on track. Overused, they will draw an objection. Worse, overuse will cause the parts of the case you want emphasized to recede into a background of emphasis, like an actor's soliloquy delivered all in the same stentorian tones.

PROLOGUES AND TRANSITIONS

Your direct examination must be divided into main themes. Perhaps the witness saw only a part of the action, so there is only one theme. The witness testifies and is off the stand; your "Why are you here?" is all the transition you need.

However, most witnesses will cover more than one subject. Usually, the witness's background and experience require separate emphasis, for they tell us why her views are important. The relevant action may have happened in separable episodes, each of which you have decided to make into a theme. A transition takes the witness--and the jurors--from one theme to another, without excess words and old verbal formulas.

An introduction is a collection of transitions, given at the beginning of the direct examination. It tells the jurors where you and the witness are going to go. To continue the metaphor, the transition tells them where you are now, and the loop reminds them where you have been.

You have introduced the witness and asked the summary question. Now announce your purpose, and how you will achieve it. "Ms. Jones, I am going to ask you first to tell us about yourself, then to show us where you were standing at the intersection on December 4, 2000, and, finally, to tell us just what happened." That is not a question. It is perhaps technically objectionable. Few opponents will be foolish enough to object to it. If you get an objection, stop

using prologues in this form. Use transitions coupled with a quick question: "Before you tell us just what happened that day, tell us about yourself; do you live here in Tucson?"

A transition is an introduction to a subject of examination, so the jurors can shift mental gears. "Now, I'd like you to show us where you were," followed by a question. "Finally, I want you to explain for us just how X Company set crude oil prices in Alaska in 1965," followed by the first question in that series.

A transition can be punctuated by putting a new piece of demonstrative evidence, as discussed in Chapter Six, in front of the witness and the jurors.

DEMEANOR, TONE, AND MOVEMENT

The rules of evidence that require you to move the story along one question at a time are second nature to you. You know where to sit or stand. Your demeanor must be respectful and not condescending. You must show genuine interest in the witness's story, though you have heard it a dozen times.

You must be ready to weave exhibits into the examination effortlessly, easily, and without causing interruption. The pace and timing of exhibits should help to unshackle you from your seated position or the lectern--and even from the accustomed place you have chosen if permitted to do so. Do not talk and walk at the same time, throwing away your words in the bustle of movement. You can make an exception where the action is suited to the words: "I am going to show you this letter . . . " as you move to the witness stand to do just that.

In some courts, be warned, the judge will prevent you from even this amount of visual drama. You will be compelled to hand the exhibit to the bailiff, who will then hand it to the witness. You can sometimes break this system by having exhibits, such as the kind described in Chapter Six, that can best be explained by the witness stepping down in front of the jury. Try to do that.

The witness, remember, is likely to be nervous in court. You bear the burden of preparing for both of you. For some, the choreography comes almost naturally. For others, it is more difficult. Rehearse enough to learn it. Learn not to turn your back on the jury--or anybody else--unless you mean to. Learn to move--backpedaling if necessary--to keep attention focused on the witness and the exhibits. Use your words to guide the witness and the jurors. "Please look at the screen, where I have just put up this letter, in evidence as Plaintiff's 1034. You sent that letter?" "Your Honor, may Ms. Jones step down to the exhibit? Ms. Jones, please take this pointer and show us where you were standing."

DECONSTRUCTION (WITHOUT A YELLOW PAD)

The witness is introduced, the story has a prologue, the transitions are set. Your outline of the direct examination takes shape. You mark the places where you will use an exhibit. You are ready for the next step, which is to fill in the details.

First, however, you must remember that doing it "by the numbers" is deadly. Most of us have seen lawyers who write out on a yellow pad the questions they will ask, or create complex and detailed notebooks or checklists. Some of us have even seen the most compulsive example of such behavior, the lawyer who asks each question from the list, gets the answer, grunts "Uh-huh," and obviously crosses out the answered question. Avoid the chronological recitation that begins so far before the action that the jurors are asleep when the punch line arrives.

All such behavior is the enemy of communication. Don't do it. Make your lists if you must. Then get free of them, so that you frame your questions in the context of what is going on and taking account of the answer just received. Your notes can be on cards or sheets of paper, in large enough letters so you can glance quickly at them. An examination conducted with head

down, gazing at the yellow pad, shows disrespect and disinterest, and makes it appear that you, and not the witness, are in charge. You will look like you are going through the motions of replaying what is on your yellow pad.

Lawyers march out of law schools accustomed to taking notes. They go to law firms where they attend meetings and take notes. The yellow pad comes to occupy too large a place. Get away from it.

Demeanor aside, you will fill in your outline by a method that works best for you. I agree with the expert advice, by Jim McElhaney for example, to think in paragraphs. This is obviously an artificial concept because the proper length of a written paragraph can vary depending on many arbitrary stylistic choices. By "thinking in paragraphs," I mean doing so in the way my eighth grade teacher taught me. A paragraph has a topic sentence, usually the first one. It contains one idea, and ends. The next paragraph tells the reader to take a breath and start a new idea.

In direct examination, each "paragraph" consists of several questions that, taken together, present one idea. In your notes, that one idea should be reducible to one or two key words. You ask your questions, develop that idea, and move on to the next one.

A paragraph is a smaller unit than a theme. Introduce each theme with a transition. Then move idea by idea, paragraph by paragraph, until you have exhausted that theme.

By thinking in terms of paragraphs, you should remember to have a topic question for each paragraph and to use loops when appropriate to tie the ideas together.

Transition: "Now, Mr. Wilson, I want to ask you about the bank holdup."

First paragraph, topic question: "Did you get a look at the robber's face?"

More questions, using loops: "How long a time did you look at the robber's face?" "How far was the robber standing from you?" "Do you see the robber here in court today?"

Second paragraph, topic question: "Did you give the police a description of the robber when they talked to you?"

More questions, using loops: "How long after the robbery did you talk to the police officer?" "When you talked to the officer a half hour after the robbery, did you tell him what the robber looked like?"

You might decide to vary the order of paragraphs. In this hypothetical, I chose in-court identification as the dramatic starting point for this theme and put that idea first. In a car crash case, you might open a descriptive theme by having the witness step to a map or diagram. Then you can ask for a description of the cars involved. The next idea might be the crash itself.

If you use an outline form for your direct that fills up themes with paragraph-ideas, you will free yourself to have a natural conversation with the witness that is purposeful and organized. Objections and interruptions will be less likely to throw you off.

TWO EXAMPLES

In the trial of Terry Nichols, we wanted the jury to hear about how a government witness, Roger Moore, submitted an insurance claim for firearms and other items that he claimed Nichols had stolen from him. Our theory was that Moore's conduct towards his neighbors, law enforcement investigators and insurance company representatives was inconsistent with his having suffered the loss he claimed.

A young woman who worked for her mother's local insurance agency had tried to help Moore with his claim. She was reluctant to come to Denver to testify, and nervous about being on the witness stand. My wife and law partner Jane Tigar met with her and helped her become comfortable with the idea of testifying. Indeed, when she arrived at trial she was hostile to us

and frightened at the idea of testifying. We were imposing on her, and she resented that. Perhaps for that reason, she belongs in the next chapter. But after Jane talked to her at length about the importance of the trial issues, and of her unique contribution to the overall picture, she was willing to tell her story.

However, we still had the task of introducing her and helping the jury to see her insurance agency office through her eyes. She would not have been comfortable getting up from the witness chair and pointing to a diagram on an easel. Her soft voice needed that witness chair microphone, or so we thought. Her mother had just finished testifying. Here is the beginning of her testimony:

Q. Good morning, Ms. [P].
A. Good morning.
Q. I'm going to ask you if you would please to keep your voice up so that at least everybody within this enclosed area can hear you. There is a microphone there so you don't have to shout.
A. Okay.
Q. Ms. Priddy, would you tell the jurors, please, where you live.
A. Hot Springs, Arkansas.
Q. Are you married?
A. Yes.
Q. Do you have children?
A. Yes.
Q. How many children?
A. Two beautiful boys.
Q. And how old are they?
A. I have a five-year-old and a three-month-old.
Q. Is the three-month-old here with you?
A. He's in the witness room.
Q. We'll try to get you back there. What do you do for a living?
A. I'm a licensed insurance agent, and I'm employed with the [X] Insurance Agency.
Q. Who is [X]?
A. That's also my mother.
Q. How long have you been in the insurance business?
A. For about three-and-a-half years, maybe four.
Q. Now, in order to be a licensed insurance agent, tell the jury what you have to do.
A. You have to have a high school education, go to insurance school, get your accreditation hours and take a test – three tests.
Q. Three tests. And you passed them?
A. Yes.
Q. Moving to November of 1994, where were you working?
A. [X] Insurance.
Q. What was your job there?
A. To provide customer service and to service the policies that belonged to [my mother], to take claims, take payments, etc.
Q. Now, how many folks work for your mom's -- for the insurance agency, the [X] agency?
A. At that time?

Q. At that time, yes.
A. Just she and I.
Q. Where is it? Hot Springs?
A. Uh-huh.
Q. If I were to go to Hot Springs, Arkansas, what does your office look like?
A. Well, we have one big room. I'm not sure on square footage, maybe 600 square feet, with a big counter; and that's our main office. And she has a small office in the back.
Q. Where did you sit at that time?
A. I sat at the counter.
Q. Now, the counter: Could you tell the jurors about how high is it?
A. About as high as the jury thing here.
Q. And was your desk behind the counter so you could see customers when they came in?
A. Yes. It's very long, and it has three desks behind the counter; and I was at one of them.
Q. Now, on the other side for the customers, do they stand when they talk, or do they sit? What kind of things do you have there?
A. We had two barstools. Sometimes they stand, sometimes they sit.

In that introduction, you will find a couple of loops and at least one transition. You can also see a conversational style that invites the jurors to know this person, and invites her to speak to the jurors. Her use of the jury rail as a guide to the height of her office counter was her own idea, but it arose because I had been asking her to talk to the jury. There is also a subtle hint that the prosecutors should not take too long on cross-examination because her baby was waiting in the witness room. Note also that I asked the witness to tell us details about her office. I would use a picture or diagram in this situation; that would slow us down and break my eye contact with the witness. Yet, I wanted the jury to have a mental picture of the place where the action occurred.

Now, let's see a witness who is a part of the defense team: Edward Killam, an investigator through whom we wanted to admit exhibits. This is the introduction. Note my first remark about where things should be put. Killam carried a cardboard box to the witness stand with him. The jurors had the natural human desire to see what was in that box, and we wanted to oblige them. This part of Killam's testimony was designed to show the jurors items that the FBI had missed in its search of Mr. Nichols' house, and to lay the basis for later argument that Mr. Nichols' possessions were consistent with innocence.

Q. I'll put those things next to you, sir. Thank you. Mr. Killam, will you tell the jury, please, what is your business or occupation?

[Yes, I would usually ask what he does for work. However, one of the young prosecutors had read an earlier edition of this book, and had adopted that locution in the government's direct case. So I did not want to look like I was copying him. And of course I could not tell the jury how he came to use "my" form of words.]

A. I'm a private investigator.
Q. How long have you been in the investigation field, sir?
A. Privately, about 19 years.
Q. Before you became a private investigator, did you work in law enforcement?
A. Yes.

Q. Would you tell the jury what your experience was in law enforcement before you became a private investigator?
A. Yes. I was with the Colorado State University Police Department in Fort Collins, and then eventually I was the detective sergeant of the Aspen Police Department.
Q. And in your police work, what kinds of work did you do?
A. In both departments, I started as a uniformed patrol officer. I was patrol sergeant up in Aspen. In both departments, I was a detective and then finally a detective sergeant.
Q. Will you tell the jury, please, what is your educational background?
A. I have a bachelor of science degree from Cornell University, an associate in applied science and police science from Mesa State College here in Colorado and a master's degree in forensic anthropology from Colorado State University.
Q. And you will appear here in several instalments. Let's finish your qualifications so we don't have to do it again. Have you taken any chemistry courses?
A. Yes, sir, I have.
Q. What were those?
A. At Cornell, I had two semesters of general inorganic chemistry; and at Colorado State as a graduate student, I had two quarters of organic chemistry.
Q. Do you have any certifications that are relevant to your work as an investigator?
A. Yes, sir, I do.
Q. What are those?
A. I belong to several organizations: National Association of Legal Investigators, associate member of the National Criminal Defense Lawyers Association. I belong to the Professional Private Investigators Association of Colorado. And then certifications for the State of Colorado, certified as a police officer, as a police academy instructor. And I have other certifications which are less specific to police work.
Q. Do you have a certification as a firearm instructor?
A. Yes, I do, through the National Rifle Association.
Q. Have you published any articles in the field of investigation and law enforcement?
A. Yes, I've published 35 articles over the years.
Q. Have you authored a book?
A. Yes, I have.
Q. And has that book been published?
A. Yes, it has.
Q. What is the title of the book?
A. It's entitled "The Detection of Human Remains." It was a version of my master's thesis which was reedited and republished for police professionals and coroners' offices.
Q. Directing your attention, sir, to the year of 1995, were you appointed by the United States District Court for the Western District of Oklahoma to provide investigative services to the Nichols defense team?
A. Yes, I was.
Q. Do you remember about when that was?
A. It was in early June of 1995.

Q. And after you were appointed, sir, did you have occasion to conduct a search of 109 South 2nd Street, Herington, Kansas?

[I am asking these questions in a rather stilted and formulaic way, treating Mr. Killam as a prosecutor would treat a law enforcement witness, and as jurors would have seen such witnesses depicted in television programs and in the media.]

A. Yes, I did.

Q. And did you receive the key from a member of the defense team?

A. I did.

Q. Was it your understanding that that was after the FBI had released the house?

A. That's correct.

Q. Did you go to the house?

A. Yes, I did.

Q. Was it locked?

A. Yes, it was.

Q. Now, sir, in that house, did you find some things connected with model airplanes?

A. Yes, I did.

Q. I'm going to ask you to reach into the box there, the brown cardboard box, and ask you to look at D1785, D17 -- without showing it to the jury, 1786, 1787, 1788, 1789, 1790, 1791 -- actually, all the way, then, through 1796. If you would just look at those items, please.

A. I've looked at them. . . .

MR. TIGAR: Your Honor, we offer the exhibits numbered D1785 through D1796. I understand counsel may wish to voir dire with respect to one of those.

Prosecutor: . . . I think it would be easier if we went through the exhibits. . . . I would ask that they wouldn't be brought in in one group, if we could go through the exhibits.

THE COURT: Okay.

BY MR. TIGAR [The prosecutor's insistence that we admit the items one at a time may have been a delaying tactic, or simply designed to permit her to evaluate her position one item at a time. Had the dozen items come in all at once, I would then have gone back over them one at a time to get an explanation of what they were and where they were found.]:

Q. Do you see 1785 there, sir?

A. Can you describe it to me?

Q. A radio-control unit.

A. Yes.

MS. WILKINSON: Your Honor, we have no objection to that item. . . .

BY MR. TIGAR:

Q. All right. Let's start a stack on your desk, and we'll go through these. D1786, a red, white, and blue cardboard box?

MS. WILKINSON: No objection.

THE COURT: D1785 and D1786 received.

Q. D1787, sir.

A. Yes, sir.

MR. TIGAR: We offer that, your Honor.

Prosecutor: I didn't hear what that was.

MR. TIGAR: Propeller.

Prosecutor: No objection.

THE COURT: D1787 is received.

The examination continued through the rest of the items. Looking back at that examination, I took my time to introduce the witness and to accredit what the jury was about to hear. He was more qualified by education and experience than most of the prosecution's law enforcement witnesses.

Of course, you have more choices when you are choosing an investigator than with ordinary fact witnesses. In the latter case, you are obviously limited by the universe of people who saw something relevant. Killam is a near-perfect investigator. He is a careful observer, a meticulous note-taker, a solid report-writer and an articulate witness.

LEADING QUESTIONS AND AVOIDING NARRATIVE

The rules of evidence tell you that the witnesses' answers must be material, relevant, nonhearsay or admissible hearsay, and that exhibits must be admissible, as discussed in Chapter Six.

The most difficult problem in direct examination is to divide the action into a series of nonleading questions that do not call for uninterrupted narrative. The secret of doing this is to imagine each paragraph as a picture that you want to convey to the jurors. Then divide the picture into as many aspects or items of information as necessary to avoid narrative. Each aspect or item becomes a separate question. You control how much information the witness is supposed to provide by the breadth of the question you ask. The breadth of the question is determined by the importance of the information (more important items should be broken down into more parts) and how much help the witness needs.

Remember at all costs to avoid unnecessary repetition. Jurors often complain that the lawyers do not respect their ability to retain information and needlessly repeat the same information over and over. Some repetition is obviously effective. There is no hard-and-fast rule; one must simply be aware of juror impatience. Indeed, lawyer consciousness that the jurors are jealous of their time and critical of those who waste it is the principal reason that jury trials usually take less time than bench trials. I know this is contrary to conventional wisdom but have had it confirmed by too many judges and lawyers--as well as by my own experience--to doubt it. Dr. Andrew Watson calls this the "principle of parsimony."

The technique of asking good questions must be learned so well that it becomes habitual. Take an example. The person you want the witness to describe was wearing a tie. How can this fact be brought out and the tie described? Most broadly, you could ask the witness, "What was X wearing?" You would ask the question in this broad form if the information were not very important. You might get the response, "Oh, a blue suit," or "Overalls." If, however, the attire is important, the paragraph of your examination that deals with it must be broken into a number of items. Opening question: "Do you remember what X was wearing?" To this, the answer should be simply, "Yes." Next questions: "Was he wearing a jacket?" "Can you tell us what kind of jacket?" "What color was the jacket?" "Could you see the shirt underneath the jacket?" "What kind of a shirt was it?" "What color was the shirt?" "Was he wearing a tie?" "What kind of a pattern did the tie have?" "What color or colors was the tie?" "Could you see his trousers?" "What color were the trousers?" "Do you remember what kind of fabric?" "Can you recall the style of his trousers?"

And so on. The question is the final and smallest unit of a direct examination. You can see this process in the insurance agent's testimony quoted above, as I broke down the relevant details about the office, the witness's desk, and the counter where customers come in and present

their problems. In that way, when the witness reached the point in her story where the large and threatening man named Roger Moore came in and yelled his threats, the jurors would have a mental picture of what happened.

Each paragraph of the examination consists of one or more questions. It is nearly impossible to tell in advance how many questions it will take to fill a paragraph. You can and should have a general idea, but if you decide this matter a priori, you will risk either needless repetition or failure to give all the information that the paragraph is intended to encompass. Think of the paragraph as a picture you want to replicate. Ask a question. The witness responds and fills out a part of the picture. With each succeeding question, you fill out more of it until you are done. Then you go on to the next paragraph. In this way, you retain control; you do not fluster yourself or the witness when the answer is not as precise as planned.

Practice this skill. Imagine that you want to convey information about an experience that you have had or a scene that you have witnessed. Break the event down into its important constituent parts. Formulate a series of questions that will convey the event completely yet parsimoniously. You can practice on your way to work or in small blocks of spare time. The only risk is that people will look at you strangely because you will appear to be talking to yourself.

Take another example. Suppose you want the jurors to know the witness's occupation. In many cases, this is simply a biographical detail, so the paragraph that contains occupation information is short. You could fill it with one question: "What do you do for work?"

In another case, however, the witness's occupation may be important to bolstering the testimony. For example, the case may involve something that the witness did as a part of her employment. Then the occupation paragraph requires more questions to fill up, and the picture you want the jury to have is of a competent person who knows what she is doing and who can be trusted to tell it. The questioning might go like this: "What do you do for work?" "How long have you been doing that?" "Did you have any education that prepared you to do this work?" "Did you hold other jobs in the company before this one that prepared you to do this work?" "What part of the company's operations are you responsible for in your work?"

This series of questions prepares the jury to hear what is to follow. By thinking of your direct examination as a movement from one mental image to the next, you will nearly automatically obey the no-leading-questions and no-narrative rules. You will be able to have a normal, conversational relation to the witness without excessive reliance on your notes. After all, it should be easy to keep one mental image in mind at a time, and to fill it up before moving on to the next one, perhaps with just a glance at your notes to pick up the key word that triggers or suggests the next mental image.

Notes to Chapter Two

1. On direct examination, see J. Patrick Hazel, Direct Examination, LITIGATION MANUAL 2D 506. I have also benefited greatly from Tony Axam & Robert Altman, The Picture Theory of Trial Advocacy, 12 LITIGATION 8 (Winter 1986), and from the insights of JIM MCELHANEY, TRIAL NOTEBOOK 233–54 (2d ed. 1987). Many of the techniques discussed in this chapter will be useful in taking depositions or in preparing your witnesses for them.
2. Federal Rule of Evidence 602 requires that you establish, by the witness's testimony or otherwise, that the witness has personal knowledge. The personal knowledge requirement also applies to all statements offered under Rules 801, 803, and 804.
3. As you prepare witnesses to testify, remember that writings you make or use may be producible to your opponent, in criminal and civil cases. In Nobles v. United States, 422

U.S. 225 (1975), the Supreme Court upheld production to the prosecution of defense witness statements taken by an investigator employed by defense counsel. On the facts of that case, there was no work product or lawyer-client privilege issue. The Nobles result is codified in Federal Rule of Criminal Procedure 26.2. Prosecution witness statements are producible under the Jencks Act, 18 U.S.C. § 3500.

Chapter Three
Direct Examination: Neutral Fact Witnesses
ARE THERE NEUTRAL FACT WITNESSES?

You have a limited amount of time to devote to any given case. By now the message is clear that for that time you must immerse yourself completely in the story you are going to tell. This lesson is often forgotten when it comes to neutral witnesses, people who just happened to be present when something important happened.

You may, at this point, contradict me with my own teaching. "There are no neutral witnesses, right?" "Everybody is a partisan, right?"

To which I reply, "No." In the old days, you were said to "sponsor" or "vouch for" any witness you put on. This principle led in turn to archaic and convoluted rules about whether, when, or how you could "impeach your own witness." Those rules hardly survive anymore. The Federal Rules of Evidence and their state counterparts have done away with them. So witnesses are no longer "partisans" in the old sense of belonging to one side or the other in the trial context. In most jurisdictions, you can call any witness and interrogate him without suffering the legal consequence of adopting the testimony.

There are exceptions to this principle. Some of your witnesses may be agents of your client or retained by your client to express opinions and conclusions. An expert witness might fall into the latter category. The statements of such a witness may be deemed authorized admissions of your client. This designation might attach to any statement of such a person--in a memorandum done before the litigation began, in deposition, or at trial. I have taken account of these distinctions by giving separate treatment to "interested" witnesses and to experts in other chapters.

True, every witness is a partisan of his story, but that does not contradict my description of some witnesses as neutral. Somebody has to conduct direct examination, and usually that must be done with nonleading questions. The other side "cross-examines," and thus is functionally adverse to the witness. That is not what I am talking about.

Of course, you are not going to call witnesses whose testimony doesn't help your case. In that sense, no witness is neutral. I'm not talking about that either.

By neutral, I mean the jury will likely see the witness as not having an ax to grind. I mean someone without provable bias. Such a witness is cross-examinable on all sorts of grounds; see Chapter Eight for an introduction to them. This kind of witness has no connection with your side of the case except for recalling a version of events that fits the story you are telling. A neutral witness is Everyman in the sense that any one of the jurors might have wandered into the same set of events, remembered what happened, and be sitting in the witness chair instead of the jury box.

In summation, you will dwell upon the witness's motivation to tell the truth. In addition, you will stress the particular characteristics discussed below about some important types of neutral witnesses.

Many of these neutral witnesses are reluctant to "get involved"; they require careful, thoughtful attention. Others have manufactured a view of their own importance that makes them difficult to deal with and, more important, dangerous. The danger arises from their firmness of recollection--leading them to cling to obvious errors or misperceptions and to strike unpredictable poses on the witness stand.

Some neutral witnesses are professionals--police officers, investigators, firefighters, social workers. They have probably been witnesses before now. They may be cynical about trial

lawyers, impatient with delay, and unwilling to spend much time discussing nuances of fact and presentation.

One generalization holds for all of these witnesses: Courteous attention to them, their schedules, and their evidence will yield best results. If your law office has an investigator, make sure she follows these principles. As trial approaches, review the file on each witness and identify the points each can make. You, another lawyer in your office, or the investigator should contact each of them. Remember not to do any interview alone, to avoid problems in using prior statements during trial.

How early you are able to meet with witnesses depends on how your firm, your schedule, and the case are organized. Before any witness takes an oath at trial--and preferably before any deposition--the lawyer who will try the case must pay that witness the courtesy of a face-to-face meeting. No matter how good the investigator's notes or how thorough the deposition, the meeting--however brief it may be--is the only way to figure out the best method of presentation.

These witnesses owe you nothing. Neither they, their careers, nor any organization of which they are a part is helped by their appearance in your case. It is always exciting when one of these witnesses takes the stand because all of your careful preparation is likely to go out the window if the witness gets a bright idea. "Independent as a hog on ice," as the saying goes.

THE PARTISAN

Below, I discuss varieties of neutral witnesses. However, you will find that many themes of witness preparation and presentation are the same, no matter what kind of neutral witness you are presenting.

In one instance, I was called in with a couple of days' notice to try a criminal case. A young lawyer had found and interviewed witnesses, and had prepared excellent summaries of what they had seen and heard. One witness seemed particularly important to our case. I called him at home the night before trial and made an appointment to meet him the next morning at the courthouse. I promised that we would be sensitive to his schedule and would undertake to have him "on call" rather than waiting around in the courthouse.

As we chatted, I learned that he had been an aircraft mechanic for twenty-five years and was a member of the International Association of Machinists and Aerospace Workers. We talked about the hard times his union had been having and about my dad's experiences as an IAM leader.

The next morning, we talked some more. I warned him that the judge was likely to find his testimony objectionable. I said he should not worry if the lawyers and the judge got to fussing about matters while he was on the stand. He knew what he had seen and heard, and I would be sure to ask him all about it.

"Don't worry," he said. "I've been putting up with Frank Lorenzo all this time; I reckon a federal judge won't bother me." We continued the conversation and went carefully over the events he had seen. I told him that we could not go into his opinions about what he had seen and heard. I was just going to ask what happened, who said what, and where people were standing. We had to try to keep things matter-of-fact.

That's about all we needed. I had the notes of the earlier interview, and I double-checked them. This man had testified in arbitrations. He had held office in his union. He knew about communication. When he testified, he was a superb witness.

The lesson: Honor the witness's abilities to communicate. Warn that opinions are not going to be allowed. Help the witness see the limits on hearsay and how you will have to lay a

foundation for any out-of-court statements. Use your questions and manner to keep the witness's effect relatively unbiased and neutral.

This witness recalled events in a helpful way. He was a partisan, not of mine or of my client, but of his truth. In preparing him to testify, I could not appeal to him in the name of anything but his own self-interest. For example, all witnesses must remember that a combative stance on cross-examination, no matter now much suffused with self-righteousness, makes it easier for the examiner to set and spring traps.

In the paragraph above, I spoke of the witness's version as "his truth." So it is. The structure of your direct honors the witness's truth but exercises control (1) to focus only on relevant matters and (2) to guide the places and statements.

"Tell the court and jurors your name, please?" "What do you do for work?" "Do you live here in Austin?" After another personal question or two about family, get right to it with a somewhat leading question. "Were you on the corner on that August day when the collision happened?" Or, "Were you at the meetings in 1961 when the components of crude oil were talked about?" Or, "Were you at the meeting where Mr. Bishop spoke, in Estes Park in April?"

This transition question must remind the jurors of time, place, and event and put the witness there. In the rest of the examination, use the loops described in Chapter Two to keep the story on track. "After the red car collided broadside with the green truck, where did the two cars come to rest?" Use demonstrative evidence to make a record of the answer.

Often, a neutral witness will have described an event in one way, and then later have seen the error of her observation. "You say the light was green. Have you ever remembered it differently?" It is difficult to convince anybody, especially a self-willed person, gracefully to admit to being wrong. You must spend enough time with the witness to put your personal credibility behind the assertion that admitting a mistake is the best and inescapable course. "I was wrong about that. As I looked at the diagrams and thought about it, I realized I was wrong." Or, "The man who came to talk to me interrupted me when I was eating. I'm sure I said that, but I just didn't get a chance to think clearly." And, at that, full stop. No amount of coaxing on cross-examination should push the witness into a more complete exercise in self-justification.

I am strong-willed myself. I think trial lawyers tend to be. I know that lead trial counsel must be. Sometimes, though not often, my own sense of where the case should go and my own enthusiasm create barriers between me and a potential witness. Usually, the problem arises with a "partisan." Sometimes I fear that a particularly nervous witness, not a partisan, will choke up if I conduct the direct examination.

If you are not solo at the counsel table, this is the time to consider your co-counsel. Somebody has to be lead counsel, I concede. But I disagree with those who say that a cooperative relationship among lawyers for the same client is inconsistent with the discipline needed for a jury trial.

In a complex case, when co-counsel and I divide up responsibility for witnesses, we try to take advantage of our relative strengths. If a particular witness and I are unlikely to achieve a certain unity in front of the jury, perhaps co-counsel can get the job done. On the other hand, some witnesses feel that their own importance is enhanced based on the lawyer who conducts the direct examination. You will probably have to honor those choices.

In one major case, we presented 80 witnesses in the space of ten defense trial days. Each witness had a relatively small piece of the overall picture to contribute. The difficulty of scheduling that many witnesses, keeping their files straight and then presenting them bore heavily upon me and my co-counsel. Many of these witnesses had never testified before. Many

had come a long distance to the trial. Many of them resented the interruption of their lives. We used our investigators and paralegals to talk to them, help them with arrangements and keep them informed about the progress of the trial.

My co-counsel and I decided to ease the burden by having junior lawyers on the team conduct some direct examinations. We assumed that since these lawyers had watched us examine witnesses, and had some experience in the courtroom, they would be able to do a creditable job. "Creditable" is a good description. I thought that some of the direct examinations were lackluster, and that these young lawyers had mannerisms that distracted from the conversations they were supposed to be having with the witnesses. Later, one of the jurors remarked that the jurors were irritated by the seeming lack of polish and preparation of these lawyers.

The lesson I draw is this: Jurors are grading your paper all the time. They are alert to what they see as the professionalism, or lack of it, that you display. They are not simply listening to questions and answers, but rather evaluating the entire process of communication between witness and lawyer and among all those in the courtroom. This is but one instance of the general principle that all communication is contextual.

THE RECORD KEEPER

Defending a complex tax evasion case, we wanted to show that the government's principal witness and chief informer was the real culprit. Our theory was that he had stolen the partnership moneys that were being attributed for tax purposes to our client. We wanted to show a pattern of large expenditures for this man's personal benefit.

Witnesses to the true culprit's extravagance were not hard to find, mostly through careful poring over financial records. The problem was to get the witnesses to the courthouse and present them effectively.

All these witnesses shared certain characteristics. They were, of course, neutral in the sense that they did not objectively favor one side or the other of the lawsuit. If pushed, some of them might lean toward the true culprit, who had been their benefactor. None of them wanted the notoriety a court appearance might bring. In one way or another, all of them tried to escape testifying. Our response was the same to all: Come to our offices, bring the documents, and be interviewed. We will not use you if we can avoid it.

Remember that witnesses can stall you if you have no mechanism to make them produce documents and objects before their testimony. If, under the rules, you cannot obtain and enforce early production of exhibits, the witness will play poker with you. "I won't show you the documents until I get on the stand. Maybe they help you, and maybe they don't. Do you want to take a chance?" The discovery and subpoena rules will tell you how much leverage you have. Your rules of practice may permit an application to the trial judge, in the name of trial efficiency, to stop this charade. A good investigator can usually tell you whether the material will do you any good. This problem does not usually arise in complex civil cases, in which waves of discovery have produced mountains of paper. It will surely bedevil you in criminal cases, where discovery is very limited, and in the workaday world of shorter trials.

In our tax case, we talked to the witnesses. "We are not in this case to cause you problems. We have to defend our client the best way we can. We are sure you didn't do anything wrong. Nobody is saying you did." We were reminding the witnesses, and ourselves, that their reaction was the same one that many people, including at least some jurors, might have.

"All we are going to do is go through the records and ask you questions based on those records. If you don't remember a particular situation, you can say so. You have told us that these

records are accurate." We are talking about witnesses whose activities left a more or less complete paper trail.

Our potential witnesses included a sales representative of a large New York jewelry retailer, two women who had been flight attendants on the true culprit's Lear jet, a department store fur salesman, and the owner of a well-known restaurant.

The jewelry retailer's records told of jewelry purchases in the real culprit's own name and in the names of others. The latter records turned up because we drafted the subpoena to call for records relating to transactions with or involving X, under any name. The sales representative recounted meetings with X in several locations, including hotel rooms. X had purchased more than $1 million in jewelry in a little more than a year. Other witnesses were able to confirm that most of this jewelry was then given as gifts to women.

We were able to convince the restaurant owner to show us X's charge slips. We put him on a telephone call basis and also agreed to put him on in mid-afternoon, between the lunch and dinner business. We did not otherwise prepare him, although my co-counsel was a regular customer of the restaurant and knew the restaurateur fairly well.

He showed up in white coat and toque. He looked uncomfortable, not only from the experience of testifying, but from revealing the activities of a customer whose assiduous study of the wine list ran checks for a four-person dinner up to $4,000 or thereabouts, plus a generous tip. His discomfiture added to the impact of his testimony.

We did not use all of the witnesses that the records revealed to us. For example, we did not call the flight attendants. Employing a flight attendant on a five-passenger aircraft might seem unusual to a jury, particularly when X bought most of them $10,000 fur coats at a fancy Dallas department store. None of them wanted to testify. Any of them might have volunteered, if given a chance, that X was a generous, caring person and that they liked him. Such assertions would not have been particularly harmful to us, for we were not arguing personalities but the quiet force of financial facts. Nonetheless, we had enough evidence without taking the risk of seeming sensationalistic, or even prurient.

The prospect of a neutral witness's irrelevant detours dictates a structured examination. Arrange the records you have in a sensible order. Perhaps you will begin with a total amount, and then backtrack through some significant transactions. Perhaps you will pick out one or two significant events and then double back. Keep the examination short, for two reasons. First, the witness is more likely to detour if you keep him on the stand a long time. Second, the jurors will resent your hammering the point too long and hard. You can usually introduce the records themselves, or even a summary of them, to highlight totals and significant transactions.

You have introduced the witness and her work. Now move right to the main issue: "Did you ever handle cash for Mr. X?" The next question should represent your selection of the best way in to the data. For example, "What's the largest amount of cash he ever gave you at one time?" Or, if the amounts of individual transactions are not so significant, "How much cash did you handle for him in any given thirty-day period?"

If the witness remembers the correct answer, or has been reminded of it in your preparation, you move on to a summary chart, the records themselves, or a fuller development of the issue.

If the witness decides to play cagey, you have the records. Your immediate response to "I don't remember" is, "Would it refresh your recollection if I showed you this exhibit?" Match your action to the question; hand the witness the document, and point to the right place. Then ask

the question again, “Please, tell the jury now, what’s the largest amount of cash he ever gave you at one time?”

If the witness begins to feign a more complete loss of memory, go through the refreshing recollection routine about twice more. After that, apply to the judge for leave to proceed by leading questions, as against a hostile witness. In the presence of the jury, say, “Your Honor, may I continue by asking leading questions as provided in Federal Rule of Evidence 911(c)? That would save a lot of the court’s and jury’s time.”

THE BYSTANDER

In a negligence case, the bystander is the one at the intersection. In a store robbery case, the bystander is the one over by the canned goods. In an antitrust case, the bystander may be someone who was at an important meeting or overheard an important conversation.

Bystanders rarely announce themselves. The newspaper ads pleading for automobile accident witnesses to come forward are testament to the desire not to get involved--or perhaps to how busy people are. If you are a witness, people are going to take up your time with interviews. You will probably lose a day from work, in exchange for the puny witness fee, to give a deposition. The secretary or paralegal in the lawyer’s office will treat your schedule cavalierly. At least, that is what people fear, and with some justification.

The first task in the presentation of a bystander is to find the witness, get the witness’s statement in a form usable at trial, and tell her candidly what to expect by way of further interviews, depositions, and trial testimony. The relationship you build at this stage will carry through the entire case.

Any law firm that litigates should either employ or have access to an investigator who knows how to take a statement. The investigator should be presentable enough to testify if the need arises. You can sometimes use a paralegal, law clerk, or law student for this purpose, although you will turn to a trained and experienced investigator when there is a problem locating a witness or persuading her to give a statement.

Experience has proven to me the importance of moving quickly to find and meet with potential witnesses. In several cases, media publicity has prompted people to call the office to say they know something. I make it a practice to follow up on these calls, and if the caller sounds sufficiently serious, I’ll take somebody along and go meet that person myself. Sometimes the caller has nothing admissible. It has been reported that some law enforcement authorities generate phony calls to lure lawyers into doing something that obstructs justice. But if you don’t go it alone, and if your ethics are in order, there is little risk there. Quick response pays off often enough.

You must start the factual investigation before the trail gets cold. In one case, a media barrage announced charges against our client. The rumor mill churned out the name of one potential witness. That very evening, my partner and I sent an investigator to the man’s house. His wife answered the door, and when the investigator began to ask her about her husband, she said, “Would you like to talk to him? He decided that staying home was as good a place as any.” In the interview, the witness confirmed that he had no knowledge of any unlawful behavior by our client. That statement not only carried its own worth, but left us free to build our defense with other witnesses.

All of this underscores the importance of using an experienced investigator. A good investigator knows how to encourage people to talk to her. The investigator writes reports that are part of your work product. The investigator’s work is less expensive than oral discovery. The investigator can winnow out the potential witnesses from among the many who just might

have something to contribute but who will not "make the cut" when you are choosing who will testify.

Sometimes witnesses will ask you whether they should have their own lawyer. Examples include coworkers in an employment discrimination suit who are worried about their own jobs, employees of a corporate antitrust defendant who wonder if their exculpatory testimony will trigger hostile scrutiny by a governmental or private plaintiff, and neighbors in a police misconduct case.

In such a case, your answer is governed by the ethical rules. If there is a conflict between the witness and your client, actual or potential, you cannot represent the witness and must make it clear that you are not the witness's lawyer. Beyond the mandatory ethical rules on multiple representation, you must consider the appearance of propriety. Many jurors have a low enough opinion of lawyers to begin with; you harm yourself and your client by appearing to bottle up a witness's story by being that witness's lawyer as well as your own client's lawyer. In deposition or at trial, your relationship with the witness will be shown.

The witness has the right to counsel. It is up to the witness, in the first instance, to exercise or not exercise that right. If you are convinced the witness's interests would be served by having counsel, you should say so. If you represent a corporation, you may be able to invoke corporate bylaw provisions for counsel of the witness's choosing to be paid for by the corporation. A labor or employment agreement may provide for counsel.

When you or someone in your firm first meet with a bystander, you may not yet know the story you will eventually tell the jury. You may not have reference points in other factual research by which to evaluate what the bystander is telling you. You can make only tentative judgments about what you are being told. You must, however, begin to make a working decision about who is doing the telling. That is, you must begin to decide if this person can be a good witness. One test is to run through a checklist of points that a cross-examiner will seize upon. You would do that anyway in preparing the witness to withstand cross-examination.

For me, the difference between the bystander and the partisan lies in the witness's different degree of suggestibility. The partisan can come untethered by defending even untenable positions on cross-examination. The bystander can be pushed off a position by a strong cross-examiner who appeals to innate doubt. If the bystander backslides, your only solace will be in the positions to which your direct examination has irrevocably committed the witness. You need to conduct a direct examination that almost promises victory but guarantees at least a draw even if the very worst happens.

Your direct examination begins by introducing the witness, her work, and her importance to this case. You ask questions that enhance the witness's believability--her vantage point, how long she looked, or how she came to know what she is going to describe. All of this should take no longer than five minutes.

Q. Ms. Wilson, I am going to ask you to keep your voice up so that everybody within this space can hear you. I'll try to do the same. Will you tell the jurors your name, please?

A. Martha Torrey Wilson.

Q. What do you do for work, Ms. Wilson?

A. I am a clinical psychologist.

Q. What do you do for people as a clinical psychologist?

A. I meet with clients, or patients you might call them, who want to understand their behavior and their lives. I listen to them. I observe them. Then I apply my experience to

what I see and hear, and we try to understand how they can make helpful changes in their lives.

Q. Are you a doctor?

A. I have a Ph.D. degree from the University of Texas at San Antonio, but in my practice I don't encourage people to call me doctor.

We have introduced Ms. Wilson. She has told the jury about her work. We have selected that part of her work in which she listens, observes, and interprets what she sees and hears. She is a professional observer. In our case, she is an observer also--a bystander, a witness.

Almost every witness is in some measure a professional observer. In introducing the witness, you must bring out that part of their profession in which observation is important.

Q. Do you know the intersection of Sixth and Lamar, here in Austin?

A. Oh, yes.

Q. How do you know it?

A. I drive North on Lamar from Riverside up to Martin Luther King Boulevard almost every morning, going from my house to my office.

Q. Did you see a car crash at Sixth and Lamar last year?

A. Yes, I did.

Q. I'd like to ask you some questions about what you saw and how well you could see. First, Your Honor, may Ms. Wilson step down to the overhead projector? [The judge responds:] She may.

Q. Please step down here. Ms. Wilson, I've put up here a diagram of the intersection. We've got a lot of these diagrams, and each witness has been using one of them to help us see what they saw.

The diagram is schematic, and the witness is going to mark it to show what is on the four corners of the intersection, the crosswalks and signal lights, the path of the cars that collided, and where the crashed cars came to rest. Get the essential facts while the witness is at the projector. Then go into more detail when she gets back on the stand.

Q. What kind of car do you drive?

A. A Ford Ranger supercab pickup.

Q. I guess we want to know how well you can see from the driver's seat?

A. One reason I drive a truck is that I like to sit up a little higher off the road so I can see better.

Your style of interrogation must be easy and conversational. You are interested in a story being told by a neutral nonprofessional observer, not sharing an experience with a partisan. In every way possible, mark off each theme with a tangible exhibit, a prior statement, or a reference to some other witness. A tangible exhibit can include a photograph, a diagram on which the witness makes mark, a chart, or a document. A prior statement can include admissible hearsay or nonadmissible matter used to refresh recollection.

Suppose the witness, in response to the last question, says, "I could see very well." In your office, she had volunteered the statement about why she drives a truck. You could ask, "Is there a reason you prefer to drive a truck?" The approach is rather obvious, but one or two such transparent devices in any given trial day are justifiable.

The reference to another witness will help tie the story of your case together, provide a reference point for this witness, and be a useful anchor to windward if this witness does not do as well as you expect. For example, you might ask, "Can you tell us who else works in that same office?" "How far is his desk from Ms. Rowe's?" Or, "Is there a gasoline service station at that

corner?" "Have you been in that station?" "Do they have a 'full serve' line of gas pumps where an attendant fills up your tank?" You have by this means introduced the coworker or the gas station attendant.

In our earlier example, you would make sure Ms. Wilson marked the location of the bus stop at Sixth and Lamar on the chart if you had another witness who saw the accident while waiting for a bus. You are telling a story. Parts of a story are connected. Make sure the connections are proved so you can pick them up and weave them together in summation.

If the bystander is buffeted on cross-examination, redirect can be particularly valuable. Remember, this witness is a neutral who has taken the trouble to come to court. You hope the jurors identify with her. If your opponent has arguably been rude, as well perhaps as effective, you can go back over the markers you left on direct: the exhibits, the statement, and the other witnesses. The scope of admissibility of statements is broadened because prior consistent statements are now more freely usable.

You should not be faced, on redirect examination, with an inconsistency exposed for the first time on cross-examination or with an attribute of the witness (such as a prior conviction of crime) that you did not deal with on direct examination. If there are bad facts about your case, the jurors should hear about them from you first.

Surprises do happen, however. Particularly in criminal cases, where discovery is limited, your opponent may have information that you do not. The danger of ambush on cross-examination can be lessened only by pretrial investigation and preparation.

If you are permitted to talk to the witness between cross examination and redirect, you may be able to find out enough detail to construct a redirect examination that deadens the sting. You may be prohibited from doing this by court rule or order, and you may thus face the task of rehabilitation without meaningful input from the witness.

If the witness is shaken by the attack, she is in no position to work with you in a logical or sensible way. Asking an open-ended question that calls for an explanation of the damaging matter invites nervous, unpersuasive self-justification that will not pass the straight-face test. The witness will harm herself further in the jurors' eyes. No, you are the advocate. You are in charge. If there is repair to be done, you must do it.

If there is an explanation for a seeming inconsistency or for another impeaching fact, and if you are sure the witness can make that explanation tersely and persuasively, ask for the explanation in so many words. "Ms. Olmstead asked you if you had been convicted of something. Tell us a little more about that." The explanation might be that the offense was situational, the witness was put on probation, and paid the debt. If you are not sure, do the reinforcing redirect outlined below. Then, let the witness go. You cannot try your whole case all at once. You will have the luxury of time to consider the best means of rehabilitation, perhaps through other witnesses.

Your redirect must be short, with gently pointed questions. It is designed to set up an argument blaming the witness's confusion on your opponent: "She saw what she saw."

Preparation should begin by organizing all prior statements of the witness that were not used on direct. The attack will almost surely have opened up your right to use these statements. Do so.

Get back to the basics of the witness's testimony. Most ambush cross-examination is collateral, in the sense that it relates to prior statements, prior conduct, or suggestions about what other witnesses may have seen. If you dwell on the collateral material, no matter how

emotionally loaded it may seem at the time, you implicitly vouch for its power to erase the witness's perceptions as related on direct examination.

Q. Ms. Wilson, long before this trial, and one week after the accident, did you give a statement to an investigator?

A. Yes.

Q. Is this it?

A. Yes.

Q. Did you sign it?

A. Yes. [Offer it.]

Q. I have put it up on the overhead projector. Would you read the part I have highlighted?

The witness complies. Repeat the process with deposition testimony and other prior statements.

After using the prior statements, or at the beginning if you don't have any of them, restate the basics very quickly. Do not take so long that you bore the jury or excite the judge's ire. Your demonstrative evidence helps you be efficient.

Q. I have put up on the projector the diagram you made for the jurors. Does anything on that need changing based on what's been asked since we made this?

A. No.

THE PROFESSIONAL

Public and private professionals dog our steps. They investigate disturbing events. Even while dealing with an accident scene or fire, the professional may well be trained to observe and report on possible causes. The investigator from the fire or police department will almost surely be trained, and he may have the kind of legal duty to report that makes that report admissible into evidence under Federal Rule of Evidence 803(8). Most people's medical conditions are documented, in some respect, by doctors. Emotional disturbances may have been chronicled by a psychologist, teacher, counselor, or pastor.

I am not talking here about experts. You are calling the professional as a fact witness, and it just happens that professional expertise may give this witness's observations special force with the jurors.

Also, under Federal Rule of Evidence 701, a witness not called as an expert may nonetheless give an opinion helpful to understanding his testimony; the driver seemed drunk, the woman seemed sad, the child seemed remorseful, the secretary looked agitated.

You will find some of these witnesses' names on accident reports, medical charts, school records, and other such records. Names of others will appear by carefully questioning your client.

Most of these folks are busy. Some of them are subject to rules about being witnesses in litigation; in such cases, their helpful records may also be difficult to get. Public and private entities routinely have their employees sign contracts that confer on the employer a property right in all information gathered by the employee in the course of her duties. The employee is thus forbidden by contract from sharing documents and other information with you unless you have the employer's consent or have used compulsory process.

If your witness is a public servant or corporate employee, go through the right channels to get access to her and to the relevant documents. Public agencies have regulations to look up. Corporations can be approached through their counsel. The witness may be able to tell you the right approach.

If you have an informal way in, use it. Your investigator may have contacts in law enforcement. Your lawyer friends can help you with a public or private entity's rules and procedures. If all else fails, you can use the discovery or subpoena process to get records and obtain the witness's presence. You want, however, to avoid putting a witness on the stand who has not spoken with you.

Privacy or privilege rules may block access to some witnesses and their records--for example, pastors, doctors, journalists, and bankers. Get the necessary waivers, permissions, or legal process before you talk to the witness, or have an explainable plan for doing so.

Unless procedures get in your way, you, the trial counsel, should make the first contact with these professional witnesses. You understand what it means to be busy. You undertake to consume as little of the witness's time as possible. The witness has a special perspective that no one else can give. You will honor the witness's professionalism and schedule, in the interview process, during any discovery, and at trial. Can you make an appointment? What time and place are convenient for the witness?

At trial, when you call the professional to testify, use his title: Detective Jones, Reverend Smith. Your introduction must include a brief recital of the special qualifications that make this witness's story particularly important. "Did you take courses on accident scene investigation?" "How many street accident cases have you had any part in?" Or, "Do you counsel families in trouble?" "Is that part of your responsibility as a pastor?" "What training do you have in that?"

The professional's prior statements are more likely to be admissible on direct examination than other witnesses', because her trade or business may involve keeping records. Those writings may provide you with a way to maintain the chronology of recollection. Even a series of calendar notations can provide this kind of continuity.

If you are going this route, you will move from introducing the witness's qualifications to introducing the writings you will use. If, as in most civil cases, the writings have been premarked and admitted by the pretrial order, you will have them ready to display to the jurors and the witness. If the witness does not remember the episode, then the writings will come in as past recollection recorded. If recollection falters, they may be used to refresh recollection. Different bases for using the materials require different foundations in direct examination.

If the witness has trouble remembering, it is usually better to start him on the story, and then refresh recollection at a convenient point.

Q. How many people were in the car?

A. It was four or five. I'm not sure.

Q. Have you exhausted your recollection?

A. Yes.

Q. Did you make some notes at the time?

A. I sure did.

Q. Would it help you to remember if I showed you the notes?

A. Yes.

Q. Here they are, and here is a copy for counsel. [Handing to the witness or to the bailiff to give to the witness.]

I like this method better than asking about notes at the beginning of the examination, which is often done but arguably improper. Busy prosecutors do it all the time:

Q. Officer, can you remember all the details without your notes?

A. Not really.

Q. Do you have your notes with you?

A. Yes.

Q. With the Court's permission, would you take those out and refer to them as you go along. [At this juncture, the defense counsel interjects:] Objection. This is not a proper use of refreshed recollection. And there is no foundation for past recollection recorded. [The judge wearily responds:] Move it along, counsel.

Regardless of evidentiary rules, this sort of wholesale refreshing is unpersuasive. The witness shuffles the notes and loses eye contact with you and with the jury. He may not even look as if he is trying to remember what happened. If you have any opportunity to prepare the witness beforehand, try to avoid such a scene. Sometimes, to be sure, you will have no choice.

Past recollection recorded requires you to establish that the witness once remembered, but no longer does. He can then use the notes to testify, but they may not be shown to the jury.

If the witness's prior writings qualify as business records or official records, you have more creative options. Because such materials are admissible, you can usually obtain them before trial by subpoena. You can decide if they would make good exhibits for reproduction as overhead projector transparencies or other visual aids to publication. You can then plan the examination to highlight the best aspects of recollection and the exhibits:

Q. Mr. Taormina, what work do you do?

A. I am in charge of helping people borrow money when they come in to our bank to apply for a loan.

Q. Did you work on the loan for the Creekside apartment development?

A. Yes, I did.

Q. In your work as a lending officer at Sunshine Savings, did you make memos and reports?

A. Oh, yes.

Q. Tell the jurors why you would make those memos and reports.

A. Well, when I loan out the bank's money, I have to check that the borrower is qualified and can pay us back, and I have to check that the property that he is putting up is really worth enough to cover us if, for some reason, the borrower can't pay. Those are two of the reasons.

Q. Mr. Taormina, you know that I served a subpoena on the Resolution Trust Company and got the memos you wrote about this Creekside loan?

A. I know that.

Q. I know you've seen these before, so let me ask you to look at Defense Exhibits T-1 through T-12--T for Taormina, I guess--and tell us if you wrote those.

A. That's right.

These are premarked, and you should have had them admitted under the pretrial order. If not, refer to Chapter Six for the litany of admissibility. The examination continues:

Q. Mr. Taormina, would it help you to tell us just how and why Mr. Austin got this Creekside loan if we went through these memos?

A. It sure would.

Q. In your business, why are the memos important?

A. They go in the note case.

Q. I'm sorry. What is a note case?

A. That's the file on the loan.

Q. Who gets to look at that file?

A. My boss does, and the other lending officers. And then the federal regulators come in and inspect the bank. They look at it.

Q. So let's start with this first one, T-1. I am going to put up a copy on the overhead projector here. Tell us about that.

A. This is about my first meeting with Mr. Austin on Creekside. I note that he has been a bank customer, and I have his account balances and credit history.

Q. Based on that information, tell the jurors how you sized up Mr. Austin as somebody who should or should not be trusted with a sizable loan.

One by one, the documents will take you and the witness through the examination. Do not leave the documents up on the screen all the time. Do not have the witness read all of them. Move from a document excerpt to the witness telling the jurors something, and back again. The jurors will then have the documents in the jury room, and their looking at them will help recall what the witness said.

One difficulty with such witnesses is the jargon of their trade. Police officers do not go places and get out of their cars. They respond to scenes and exit their vehicles. In preparing for trial, you may find it difficult to impose a new vocabulary. You should not, however, unwittingly adopt the professional's mode of expression. Sometimes, even, you will want the image of the professional speaking in her own language, as a symbol of authority and therefore of authoritativeness.

If you are not striving to have the professional stand apart by use of language, keep steering back to standard English. If the witness says, "We arrived at the scene at 1300 hours and exited our vehicle," your next questions can be, "I'm sorry. You got there at 1:00 o'clock P.M.?" and, "When you got out of your police car, could you see anyone lying in the roadway?"

Particularly in a criminal case, police officers may have done an investigation that yields helpful information. Yet, the officers may be reluctant to be seen as helping the defense. The key here is to make sure you have subpoenaed their reports, and the records of their activity, such as radio logs. Then you have a road map to direct examination. As long as you confine your questions to facts that appear in the records, the officer is likely to stay on track. You must of course be sure that there is nothing damaging that might be brought out on a friendly cross-examination.

You may be wondering why a police officer is not an adverse witness. Many times, that will be the case. However, a state or local officer is not necessarily adverse in a federal case, and an officer from another jurisdiction may not be.

In the example that follows, I was introducing the officer to accredit his coming testimony, and starting down the road to an examination that would confine itself to what he had reported seeing. As it happened in this case, the officer turned out to be helpful to us because in our federal case he resented the way the FBI had treated him and the other local officers, and had disrespected their work when their conclusions did not match the FBI's. Nonetheless, you can tell from the clipped answers that he is not going to volunteer anything.

Q. Good morning, Mr. [K]

A. Good morning.

Q. Will you tell the jury, please, what work you do.

A. I'm a deputy sheriff in Garland County, Arkansas.

Q. Where is Garland County, Arkansas?

A. It's where Hot Springs National Park is located.

Q. How long have you been in law enforcement?

A. In law enforcement altogether since 1961.
Q. Will you tell the jury, please, briefly what your career in law enforcement has been since 1961.
A. I served 25 years with the Detroit Police Department in various positions. I retired from there in 1986 as a lieutenant.
Q. And then in 1986?
A. Moved to Arkansas. In 1990, I was hired by the Garland County Sheriff's Department, and I'm still currently employed there.
Q. So you were employed there on the 5th of November, 1994; right?
A. That's correct.
Q. Well, on the 5th of November, 1994, did you get an armed robbery call?
A. Yes, sir, I did.
Q. About what time did you get that, sir?
A. It was approximately 11:30. I don't know the exact time.
Q. And how did that call come to you?
A. On a police radio.
Q. Were you on duty that day?
A. Yes, sir.
Q. Were you in uniform?
A. Yes, sir.

THE JOURNALIST

A journalist is a sort of professional that deserves separate mention. If the journalist works for a radio or television station, for a newspaper or magazine--as opposed to being free-lance--you may have a long fight on your hands to get the most basic documents and the most limited access to the witness. Some news organizations routinely instruct their news gatherers not to volunteer to be witnesses and routinely resist subpoenas for documents and testimony. Many jurisdictions recognize a qualified privilege for news gatherers' sources, and even for their notes.

Almost all print media journalists carry spiral-bound notebooks, access to which can help your trial preparation and refresh the journalist's recollection.

Even if you can win a discovery fight, most journalists are reluctant witnesses. Most of them are also agile of mind and articulate of speech. I tried a case some years ago in which my opponent called a local journalist as a witness. On direct, the journalist didn't harm us much, and even helped us on some issues. At the recess, we talked it over and decided the witness had given every sign of wanting to help our side, and we would give him that chance.

I began to cross-examine, and the witness turned on me, being just as sullen and unhelpful to me as he had been to my opponent. He just didn't want to testify at all, and would punish anybody who asked him a question.

Sometimes the journalist will be a key witness whom you must call. You will usually do best with a brief, focused examination limited to the necessary material. Even, and perhaps especially, if the journalist seems willing or eager to testify, keep the examination focused. The willing journalist may be looking to enhance her or his own career by recounting a sensational story.

Notes to Chapter Three

1. The common law vouching rule is expressly abandoned by Federal Rule of Evidence 607.

2. As to agents of the client, see Federal Rule of Evidence 801.
3. On joint representation, see generally United States v. Cunningham, 672 F.2d 1064 (2d Cir. 1982) (attorney not disqualified by prior representation in light of minor nature of alleged conflicting representation; as to other attorney, hearing required to determine if he was party to crucial conversation so that he "should be" a witness); United States v. Garcia, 517 F.2d 272 (5th Cir. 1975) (waiver of conflict possible after full hearing); United States v. McKeon, 738 F.2d 26 (2d Cir. 1984) (attorney disqualified because of making statement as agent of client that made it likely attorney should be witness); J. Sutton, The Testifying Advocate, 41 TEX. L. REV. 477–85 (1963).
4. On refreshing recollection, see M. Freedman, Counseling the Client: Refreshing Recollection or Prompting Perjury? See also Federal Rules of Evidence 612 (writing used to refresh memory) and 803(5) (past recollection recorded).

Chapter Four
Direct Examination: Difficult Attributes

THE DIFFICULT DIRECT EXAMINATION

The sages who say that direct examination is more difficult than cross could point, if challenged, to categories of witnesses that pose special problems. These problems can arise from a characteristic of the witness, such as age or lack of fluency in English. Or they may arise from the peculiar kind of testimony you are offering, such as character evidence.

There are no difficult witnesses. There are difficult direct examinations. You would not be presenting the witness unless she had something important to say. The job of bridging the gap between the witness chair and the jury box is yours. That is the challenge of your art, technique, and skill.

The old rule that you "sponsor" every witness and are bound what what he or she says no longer applies. However, unless the judge has declared the witness adverse, in the sense discussed in Chapter Seven, the jurors will identify the witness with you. If you do not treat the witness with dignity and respect, they will blame that on you or be as dismissive of the witness as you seem to be.

For all the categories of witnesses below, brevity will probably work to your advantage. Jurors, like most of us, may be uncomfortable with difference--the difference between themselves and the foreign language, young, elderly, or physically challenged witness. In addition, the process of questions and answers may be longer for the witnesses of whom we speak.

You will not find a category below for every type of difficult direct examination you--or I--have confronted. I have chosen examples that illustrate some useful techniques. For each of these examples, you will find suggestions that can help for other categories of direct examination.

FOREIGN LANGUAGE TESTIMONY AND RELATED PROBLEMS

Court proceedings in most parts of the United States are conducted in English. Witnesses who do not speak English are examined through a translator. Dealing with a translator poses special challenges that I believe are paradigmatic of communication problems in the entire trial process.

The out-of-court event that jurors are to imagine does not recreate itself. Rather, as discussed in Chapter One, witnesses and objects mediate "reality," the past events that you are attempting to recreate. Translation simply puts another filter between jurors and "the facts." Because the filter is so obvious, we can recognize and address the ways in which it may interfere with the jurors' understanding of the witness, as human being and as testifier. We might use those insights to study other filters through which jurors are to see a story.

In Texas, New Mexico, Arizona, and California border towns, translated testimony is an everyday occurrence. It also appears in multinational criminal cases, complex civil cases, and transnational commercial disputes.

Typically, the translator is a court employee who stands next to the witness. The translator is sworn to translate accurately. Voir dire may be available to test his qualifications.

The examiner puts a question. The translator translates to the witness. The witness answers. The translator gives the response in English. The court reporter takes only the English version of events, so the transcript appears as though the witness had answered your question with the translator's answer. There are many cases in which you would seek an audio recording of the entire process, to have a record by which to judge the accuracy of translation.

The principal difficulty of the direct examiner, however, is to maintain a relationship with the witness for the jurors' benefit. Take an extreme, though real, case to illustrate the point. The witness is a criminal defendant, or maybe a key defense witness. The translator is a police officer or other ally of the prosecutor. By manner and intonation, the translator takes a confrontational posture with the witness.

After a few questions and answers, the witness is firmly focused on the translator and not the examiner. After all, the witness is alienated enough to begin with, coming into a courtroom where the formalistic proceedings are conducted in a language she does not speak.

The translator renders the questions in ways the examiner cannot control, and then edits the answers. It would be better to have a deposition translated and read by people of your choice, except of course that the witnesses are "available" and the deposition would not be admissible.

I have seen this scenario dozens of times. Variations include the translation booth for trials in which a defendant does not speak English. One hopes in such a case that the translator, and not the defendant, is in the booth and that the earphones and other translation paraphernalia are relatively unobtrusive.

As your first countermove, try to cut the figurative distance between you and the witness. If you speak the witness's language, move for leave to put your questions in that language, have the questions translated, get the witness's answer, and have that translated. The benefits are great and obvious. Now the witness is focused on you, responding and perceived by the jurors to respond to you. Even if you are not completely fluent in the witness's language, I recommend seeking leave to use this approach; you can prepare your questions more completely than you otherwise would. Your increased rapport with the witness will more than balance the loss in spontaneity caused by using prepared questions.

If you are compelled to use the more traditional method of getting the testimony, you usually have an advantage as a direct examiner because you can prepare the witness. When cross-examining through a translator, you will not have had the chance to meet with the witness, except perhaps in deposition. You may then have to contend with a translator who is trying to protect the witness. At the least, the witness has time to think about answers. Your best bet will be to stick to short, simple, leading questions.

When preparing the witness for direct examination, you should create the courtroom scene. Accustom the witness to the distances and sight lines. Tell the witness to look at you while you are asking questions, then turn to the translator. You must have somebody at your counsel table fluent in both languages. Tell the witness, "If you don't understand my question as it is translated, or even if it seems that the translator is not asking you the same question I did, stop and say, 'I don't understand. Please ask me again.' " When the witness answers your question, she should turn to you or the jurors, not to the translator. Do not be afraid to remind the witness to do this during your direct examination, for example, "Please, when you answer, look at the jurors, so they can hear you clearly."

You and your counsel table assistant should also have an agreed means of communicating so that you are aware of mistranslations and can timely object.

What of the witness who speaks English well enough to testify in that language but whose first language is not English? The trade-off is clear, but you will not value the elements of it the same way in every case. You lose spontaneity and visible rapport if the witness does not testify in English. However, the witness gains valuable thinking time on cross-examination because everything stops while the questions are being translated.

The problems of translation should sharpen your sense of how alienating and difficult all witnesses find the courtroom environment. They should also quicken your appreciation of nonverbal language such as demonstrative evidence, and even gestures. By having the foreign language witness use the same charts, diagrams, and objects as English language witnesses, you universalize the former's message and tie it to your overall theme.

Dealing with gestures is more problematic. In every culture, communication is both verbal and nonverbal. Yet the gestures that are thought to convey sincerity and openness in one culture may signify the opposite in another. Juror bias toward particular ethnic groups, accents, and mannerisms affects judgments on credibility. The subjectivity of such judgments is one ingredient in the mix of substantial doubts about the value of demeanor evidence.

This problem is not limited to witnesses who testify in a foreign language. It affects all people perceived by the jurors as "not us." Mannerisms of an English-speaking witness that jurors identify as "gay," "black," "Jewish," "Oriental," or whatever, are going to be a part of the cues that jurors use to evaluate the testimony.

You may have to deal with this in summation by stressing the ideal of equal justice under the law:

"Members of the jury, if you get back in the jury room and somebody says, 'Well, look at that witness. You know you can't trust those Japs.' You know you can look right at that person and say to them, 'Hold on there. We took an oath to be jurors here. We swore that we were not going to let any prejudice get in the way. And if we were going to have any trouble, we were supposed to raise our hands and get off the jury. Even the judge told us we had to put all that prejudice out of our minds.' On the marble lintel of the Supreme Court building in Washington, D.C., they have the words 'Equal Justice Under Law.' Equal--for rich or poor, black or white, neighbor or stranger. And we can't let anybody try to get us to go up there some dark night with a high ladder and an ax and chop those words off there."

For such a summation argument to be effective, it is better to have prepared the way in voir dire and the opening statement. Tell the jurors who your witnesses will be. Ask whether they would hold it against a witness that she is from another country and doesn't speak English. Will they hold it against the witness because it might be difficult to interpret the words, gestures, and expressions of someone who is different from the rest of us? Venirepersons' nonverbal reactions to these questions may be telling.

You might have a case in which many witnesses will be from another country, and speak a language other than English. Ethnic stereotypes abound. You must ask the jurors what they think of Japanese, or Mexican, or Vietnamese, or French people. Do this with open-ended questions, as few people are likely to confess their own prejudgments on such an issue.

When you prepare a witness to testify, you must try to understand how that witness's cultural and personal background affects his mannerisms and gestures. Using a video camera may help the witness see how a particular gesture gets in the way of communication. However, some habits are so deeply ingrained that trying to exorcise them will only add to the witness's difficulty in communicating.

In some instances, you can ask about the gesture. "I notice that you nod your head slightly whenever I ask you a question. Does that mean that you automatically agree with me?" The reply might be, "Oh, no. In our culture, the nod is simply a mark of respect toward another person. So, if I nod at you, or even at the other lawyer when she asks me questions, that doesn't mean 'yes.' "

To help understand a communications problem, you may consult a linguist or sociologist, either in person or through library research. Your everyday experience will tell you that many people interpret the words and gestures of those from other cultures in negative ways. To demonstrate this proposition, watch a series of customers interact with someone from a different culture – in a store or at a restaurant. You can also read the works of leading scholars on ethnic differences, such as Leti Volpp and Mari Matsuda, whose works will show up with a computer search.

There are, however, gestures and mannerisms that are universal or nearly so. Pointing at a person, a chart, or part of a demonstrative exhibit; marking on a diagram or map; demonstrating some physical action--all of these recreate a reality and unite this witness to other witnesses and to the story of the case.

Federal Rule of Evidence 611(c) permits you to use leading questions with any witness "as may be necessary to develop the witness's testimony." Usually, one thinks of this provision as permitting leading on introductory matters. The rule has, however, been interpreted to permit leading when dealing with witnesses who are young or who have a disability. The same rationale would permit at least selective use of leading questions if a witness had difficulty in communicating in the English language.

With foreign language witnesses, one must also consider that Americans are accustomed to thinking about trials and the adversary system. Litigation dramas, real and fictional, run through the print and electronic media. Most Americans know about direct and cross-examination, or think they do. People from other countries may lack that sort of understanding about the American judicial system, or even about their own. For such witnesses, you must spend a great deal of time simply getting them used to the differing rhythms of direct and cross-examination.

THE CHILD WITNESS

A child will be ruled competent to testify if he understands the meaning of the oath. We have all seen the kindly old judge leaning over to the kid in the witness box, asking if the kid knows what happens if he lies. The kid usually smiles right at the camera (poised to make it look like the judge is getting it right in the eye) and intones some sacerdotal whizbang about the uncomfortable afterlife of liars. The kid is then permitted to testify and wins the case for the lawyer, who may or may not be played by Jimmy Stewart.

The testimony of anyone, child or adult, who does not understand the legal obligation to tell the truth will not be received. Your direct examination must therefore begin by establishing this precondition.

It is also settled that testimony subjected to undue suggestion is not admissible or, if the suggestion is revealed after the direct examination, will be stricken out or a mistrial granted. Your preparation of any witness, of any age, must avoid these perils.

In some jurisdictions, children who are parties or witnesses may have a guardian ad litem appointed for them. The guardian may be a lawyer, someone from a social service agency, or a student in a law school clinical program. If the law permits appointment of a guardian, you may wish to have this done to give the child a sense of security about his testimony, and the testimony itself accrues an added dimension of independence and therefore credibility.

In some cases, one or more expert witnesses will give an opinion for the jury about the weight to be given a child's testimony. The expert evaluates the stresses and pressures on the child and the effect of the courtroom environment.

You will not meet your prospective child witness alone, nor should you. Not only must you not overpower the child, but also you must be able to rebut with witnesses any charge of having tried to do so.

You must insist as well that the child not be accompanied and coached by someone with a partisan stake in the testimony. There are several versions of the compelling story of a child witness who on cross-examination repeated the story told on direct--three times, without changing a word of the story as the child had been taught to say it. The story may be apocryphal, or maybe it really happened to all the trial lawyers who say that it happened to them. In any case, the lesson is clear.

You will of course deny a desire to teach the child witness a set speech. It is unethical to do so and destructive of your credibility with the jurors when the tactic is exposed in court. But you must be equally vigilant that no one else has unfairly coached the child before you begin witness preparation.

In sum, the child should be accompanied by someone he trusts but who is not a partisan. "But I want to be there," the mother or father may say. You reply, "I understand, but, if you are, it will actually hurt our case because they'll accuse us of influencing X's testimony." It may be hard to find the relatively neutral person to be with the child--perhaps a child-care person, another relative, or someone appointed as a guardian.

You will be accompanied for the preparation session as well, to have a witness but also to have help. Some of us can talk naturally with a child, and others have more difficulty. Our ability may vary from child to child, issue to issue. Fewer of us are able to tell what kind of impression we are making--on the child or on spectators.

If you can use an inconspicuous video camera to record a part of your interchange with the child, you can better gauge how well you are communicating.

At trial, make sure there is a comfortable chair from which the child can see and be seen. Many courts permit the child to be accompanied to the witness stand by a caring adult--again, someone who is not obviously a partisan but in whom the child reposes trust. The child can sit on that person's lap, or the person can sit alongside the child. Make sure the child can be heard, even if you have to make special arrangements for a sound system.

In your brief and dignified, and non-condescending, direct examination, make full use of the loops, prologues, and transitions discussed in Chapter Two. Note that Federal Rule of Evidence 611(c) may permit you to use leading questions. When the examination is finished, you will have the satisfaction of having done it well and of knowing that your opponent who is about to cross-examine faces a more difficult challenge than you did.

THE WITNESS WHO WAS WRONG

You may find that your witness has made a statement in a deposition or before the grand jury that is demonstrably wrong. You may have striven mightily to keep the prior statement out of evidence until your witness testifies, thus giving you and the witness the first chance to introduce the prior statement and talk about it.

You must meet such a statement head-on. You and the witness lose credibility by trying to twist and reconstrue words to make them say what they did not. Sometimes context, errors of transcription, and explanation can make the contradiction evaporate. Your efforts along this line must pass the straight-face test; otherwise, abandon them.

In a criminal case, the government alleged that the defendant, a former public official, had lied to the grand jury about the time of day at which he met with another political figure, J, who had allegedly paid the defendant an illegal gratuity. Before going to the grand jury, the

defendant had reviewed his typewritten itinerary from the day in question and concluded that he must have met J in the late afternoon.

The itinerary had been prepared as a plan for the day, but the planned order had been rearranged. Most of us have seen witnesses, particularly busy people who keep time sheets or desk calendars, or who generate many memos, being fooled by the written record into forgetting what really happened. In fact, the defendant had met J in the morning, in a hotel room, and a room service waiter remembered serving them coffee.

The direct examiner's job in such a case is to deal with the wrong statement quickly, easily, and naturally--and so bury it that the cross-examiner has nothing to grab. If the inconsistency will be proven before it can be explained, you must anticipate this in the opening statement.

In our case, we asked the defendant, "Did you meet J that day?" "What time of day was that?" "How do you know?" The answer was something like, "It was for coffee in the morning. You know, I even told the grand jury that it was in the afternoon, because that's what my schedule suggested, and I remembered that we met in my room while I was putting my tie on to go out. But my schedule was rearranged after it was typed up, and instead of meeting him when I was getting dressed for dinner, it was in the morning. As soon as I saw that room service waiter--whom I've known for years--I knew I had remembered it wrong."

The witness must squarely admit having been wrong. He must have a reason for giving a wrong answer and state that reason. Haste, failing to study the situation, confusion with another event--these are some benign reasons.

Sometimes the earlier statement was wrong because the witness was lying. Everybody is willing to lie for some reason that to them is sufficiently grave: "I was afraid of what my husband would do." "I thought I would lose my job if I didn't go along with it." "I was scared of what would happen if I told the truth, but now that I have told the truth and taken the consequences, I feel better."

Lead up to that moment of admission, move through it, give it a moment to sink in, and then move on to something else.

THE WITNESS WHO DOESN'T WANT TO BE THERE

There are witnesses whose attitude is somewhere between neutral and adverse. They don't like you much, but you can't get the judge to let you use leading questions. Control, distance, and brevity are the key words. The witness will probably be sullen, an attitude perhaps enhanced by the witness's lawyer having railed at you or having tried to quash the subpoena.

So be it. The testimony is then in the form of truthful reluctant concessions. You exercise control with documents and other tangible objects and with prior statements. You keep distance by setting up the interrogation as an exercise of power: the court's power, not yours. "You are here today because of a subpoena issued under the seal of this court?" "Was the subpoena served on you?" "Did you receive the witness fee that the law requires?" "Did you get your own lawyer to help you understand your rights and your duties?" Now the witness's incipient or overt churlishness seems directed at the neutral institution, the court, rather than at you for any purported discourtesy or lèse majesté you might have exhibited to the witness.

Q. I am handing you Defendant's Exhibit 40. Is that your memorandum? [With witnesses of this sort, it is far better to have laid a foundation and admitted the exhibits before trial.]

A. Yes.

Q. Did you write that memorandum on July 24, 1990?

A. That's what it says.

Q. Oh, yes. I see that. But as best as you can figure out, is that right?

A. Yes.

In this exchange, the advocate establishes some witness control without acting hostilely. With the memorandum--or patient chart, or notebook--in front of the jury, what do you do with it? If you just leave it alone, the jurors will have little idea of what is there, and you will not have made an impact with this witness. No, you must get the witness to spell it out, even though the witness's manner may lack the persuasive effect you would wish.

Q. I have put the memorandum up on the overhead projector. Will you please read out the brief paragraph that I have highlighted in yellow?

A. [The witness complies.]

Q. Now I am going to show you a patient chart, Defendant's Exhibit 41. That is a chart from your office?

[You can ask this because you can lead on foundational matters.]

A. It is.

Q. The jurors need to know what you wrote on the chart on July 3, 1990, and how you came to write that. Let me put that entry up. Can you decipher it for us?

A. Right great toe edema, warm, painful to touch, movement. Gouty arthritis. Colchicine, and then a dosage.

Q. You have read us the words on there. Can you tell us what you saw, just as though we were your patient and you were explaining it to us?

[You are asking her to talk to the jurors in a way she knows. She will probably take the hint. She may not want to be there, but she has a motive to preserve her professional persona.]

A. As you can tell, your right big toe is very swollen and red. You can put your hand over the area and feel warmth. It hurts like the dickens when you touch or move it. I am going to give you some colchicine, which is a traditional drug that has been used to treat this gout.

The pattern is to move from signpost to signpost, gently coaxing the witness along the way. The need for brevity--getting the witness on and off--requires no explanation.

THE CHARACTER WITNESS

The rules give you choices in the use of character evidence. For example, an accused may call witnesses on a trait of character relevant to the alleged offense or on truthfulness if the accused testifies. The prosecution may then call character witnesses to rebut. A victim's character may be opened up by the accused, again giving the prosecution leave to rebut. A witness's character may be attacked or supported by character evidence on the issue of truthfulness. Under Federal Rule of Evidence 806, you can use the same character evidence against a hearsay declarant as you would have used if the declarant were a live witness.

In a criminal case, sometimes character evidence for the accused, and evidence of a prosecution witness's bad character for truthfulness, will be the only testimony offered by the defense. Most jurisdictions still cling to the rule that, in a criminal case, character evidence standing alone may raise a reasonable doubt and that the jury must be so instructed on proper and timely request.

In the old days, character evidence was surrounded with formalisms, now largely shorn away. The rules required that the witness testify about "reputation in the community," a special kind of hearsay akin to gossip.

Justice William J. Brennan, Jr., tells of being appointed as a young lawyer to defend a vehicular homicide case and calling a police officer as a character witness. He established that the officer and the young defendant were near neighbors, and had been for some time. "And can you tell the jury, what is the defendant's reputation in the community for veracity?" Counselor Brennan intoned. "Well, I'd say he's a pretty good driver," the officer replied. After several more efforts, and when things had quieted down, the judge turned to the officer and asked if he knew the young man.

"Oh, yes."

"And have you ever known him to lie?"

"Oh, no, Your Honor."

"Well, that's what young Mr. Brennan has been after asking you, but he went to the Harvard Law School and forgot how to speak English."

Today, in most jurisdictions, you can take the character evidence by way of opinion, reputation, or both. To elicit reputation--the older form of character evidence--you can ask the witness, as young William Brennan did, whether he lives in the defendant's community, whether he has heard people talk about the defendant, and then to tell the defendant's reputation for some relevant character trait. The witness is not speaking of his personal view. Rather, he is purportedly distilling and repeating hearsay references to the defendant from countless and unidentified speakers. In a simpler time, when one could more meaningfully speak of "community," such evidence made common sense, though its theoretical basis was uncertain.

Character evidence based on opinion is more straightforward. The witness knows the defendant, victim, or witness and tells the jurors how and for how long. The witness has an opinion on a relevant trait of character. What is it?

You cannot use specific instances of conduct on direct examination as evidence of propensity, but you can get the next best thing by asking for the basis of the opinion or reputation evidence. Specific instances are proper subjects for cross-examination.

Relaxation of the rules means that you have fewer barriers between the witness's words and the jurors' perception. Know that, and help your witnesses to know it. Character evidence is a kind of relic in our legal system, harking back to the days of compurgation and oath helpers. It has power--if the witness will look the jurors in the eye and perform the vouching ritual.

In Chapter Two, I described the preparation and testimony of Lady Bird Johnson as a character witness. Another character witness in the same case was the Reverend Billy Graham. Frankly, I was worried about the impact he would make on the jury. Character witnesses are often the defendant's very good friends; they often think the prosecution is trumped-up and unfair. They may be anxious to impart this view to the jurors, to "help the case." You have to discourage their ad lib additions to the routine of testimony.

Reverend Graham's unplanned addition worked out fine. One juror carried a New Testament in her purse. She read it during breaks in the trial. Reverend Graham was sworn.

"What is your business or occupation?" Ed Williams asked.

"I preach the gospel of Jesus Christ all over the world."

"Amen!" said the juror.

The court will limit the number of character witnesses you call, and this is perhaps just as well. You will also remember that a witness to someone's positive trait of character may be asked questions about disreputable incidents in that person's life; this inquiry goes well beyond what would be provable if you did not present character evidence. In selecting witnesses, make sure that they are able to handle such cross-examination and that they are prepared for it.

Character witnesses should be as different from the defendant as possible. They should be people with whom the jurors will identify. If you present several character witnesses, they should differ from one another.

You will introduce the witness. How long has she known Mr. X? How did she come to know him? How often do they see each other? At what kinds of events? Has he visited her home? Has she visited his? Notice that this line of inquiry establishes a "foundation" for opinion and reputation evidence, but it also inevitably lets you introduce some specific instances of conduct. For example, "Well, I see him a lot at the school, because for the past ten years he has been in charge of the Booster Club fund drive for the athletic teams."

Continuing, has the witness heard others talk about Mr. X's honesty? Does she know what people in the community think about his honesty? You must, of course, define the community of which you speak. You have some latitude. Most of us in today's complex society live in several communities--at home, at work, in our profession, in performing community service. Familiarity with any of these communities is enough foundation for character evidence, even that based on reputation.

When you have painted a picture of the witness, the person whose character is in issue, and their relationship, there is one more hurdle before asking the key questions. "Before I ask you these last questions, tell us if you are generally familiar with the issues in this lawsuit being tried by these jurors." The correct answer is a simple "Yes, I am."

Now for the key questions: "From all of this, do you know Mr. X's reputation in the community for integrity?" The answer is "Yes." "What is his reputation?" "That he is a person of the highest integrity."

"Do you have a personal opinion about his integrity?" "Yes." "Tell the jurors what that is." "I also think he has the highest integrity."

As the example shows, you should ask separate questions on reputation and opinion, as well as a separate pair of these questions for each relevant trait of character, such as integrity, which may relate to an element of the offense, and truthfulness, which is relevant because Mr. X has testified or will testify. Your questions in this final part of the examination will be crisp, but a small amount of repetition helps to drive the point home.

Notes to Chapter Four

1. Do not overlook that some testimony may be so unreliable that it should not be received at all. Testimony that has been subjected to undue suggestion is excluded on a variety of rationales. On eyewitness testimony, lineups, photo arrays, and kindred issues, see generally W. LaFave & J. Israel, Criminal Procedure §§ 7.1–7.5 (1985). Hypnotically refreshed evidence is dealt with in Judge Alvin B. Rubin's learned opinion in United States v. Valdez, 722 F.2d 1196 (5th Cir. 1984). Threshold competency issues are resolved under Federal Rule of Evidence 601.
2. See J. Solovy & R. Byman, Foreign Witnesses--Alien Concepts, 1992 Fed. Litig. Guide Rep. 35.
3. See L. Ring, Cross-Examining the Sympathetic Witness, Litigation Manual 2d 608.

Chapter Five

Direct Examination: Your Client

I had read the transcript of a trial. I was retained for the appeal, and won. Now there was a chance to try the case over again. I sat down with the client. "Look," I said, "your testimony at the first trial was a disaster. Your answers on direct examination were unfocused, the direct examination itself did not anticipate the problems you would face on cross, and your cross-examination made you look evasive."

"I know," the client said. "My lawyer was heavily involved in other matters and did not have the time to spend with me. Sometimes, on direct examination, I didn't even know what answer was expected of me. I didn't understand the questions I was being asked."

Can you think of a more damning criticism of that trial lawyer?

Contrast Houston lawyer David Berg's direct examination of his client in a family inheritance feud, of which a journalist wrote rhapsodically: "He turned his chair toward the witness box, sat facing her (not the jury) and asked her about her life. He never let the action slack off, never waited more than a heartbeat to get to the next question, and let shine possibly the best witness he would ever get on a stand in his lifetime. The two became a duet. The rest of the world seemed to disappear." The journalist went on to describe Berg's having spent days with his client, at her home, in his office, at mealtimes, in order to understand her so fully that his direct examination could serve as a window to the soul of her claim for justice.

Not all clients are, in their natural state, woven of such sympathetic material. Their claims for justice may not be obviously worth the jurors' attention. Not all client direct examinations can be structured as a duet for the benefit of spectators or jurors. David Berg was able to find the right set of techniques for this case and client because he listened. He got out of his office to listen to his client on her home ground. He listened to her in many settings, not just in the interpretation of her legal matter.

To restate: The lifeline of a trial is the lawyer earning credibility in the jurors' eyes, keeping that credibility in the heat of combat, and sharing that credibility with the client. So many times the last step does not work; the jurors come back with tears in their eyes and afterward apologize to the lawyer. "You are such a nice person, but I just didn't think your client had a case."

DOES THE CLIENT TESTIFY?

In civil cases, this is seldom an issue. Of course the client will testify because her deposition has been taken, it can be used by the other side, and there is no principle to explain to the jurors why the client stayed silent.

In criminal cases, the approach differs. Thinking about the issue illuminates the credibility problem for all kinds of cases. My mentor, Edward Bennett Williams, thought it essential that the client testify in almost every case, certainly in white-collar crime cases. I came to disagree with him, and my view took firmer shape after several acquittals in cases where the client did not testify.

In a criminal case, the jury can know on voir dire, in argument, and again in the instructions that they may draw no adverse inference from the accused's not taking the witness stand. In summation,

"Suppose you are in the jury room, and somebody looks at you and says, 'Well, you know, that defendant didn't take the stand.' What can you say to that person? You can look them in the eye and say, 'Now wait a minute. We all took an oath that we would follow the law as the judge gave it to us. And the judge said, just as clear as anything, that the prosecutor has the

whole burden of proof and the defendant doesn't have to prove anything. You can't hold it against the defendant that his lawyer advised him that this jury was made up of honest people who would follow the law the way the judge laid it out.' "

If you agree with me that jurors care about the law, you will see it is possible that the client not testify. But is it wise in a given case? Here is a lesson that goes beyond criminal cases. The credibility of your client, and of her claim for justice, does not depend only on her. If you try to make victory depend on your client's performance at trial, you will invest it with too much importance and risk overstatement through the client--and perhaps you--losing control and perspective.

Jurors assess the client's credibility from the client's words, deeds, and aspirations, tempered by their own experience and placed into the context created by trial evidence that supports or saps the strength of the client's claim. It is fortunate that this is so, for the reasons given above: Not all clients can carry a load as heavy as the claim for justice they are making. By definition, as well as in jurors' minds, the client has the greatest interest in the outcome, so great indeed that she was disqualified as a witness at common law and is still disqualified in many legal systems. Jurors don't forget that self-interest affects credibility; unfortunately, lawyers sometimes do. Let us examine the question from two perspectives, namely, the practical decision in a criminal case and the client's role in storytelling generally.

THE CRIMINAL DEFENDANT AS WITNESS

Defending a criminal case, you are in trouble unless you are ahead on points at the end of the prosecution's evidence. Cross-examination and consistent exposition of your story are that important. I contend also that most criminal defendants on the stand harm their cause. Most judges allow prosecutors the widest latitude on cross-examination. Thus, it is difficult to protect your client by objecting. In any case, objecting makes you look weak, and in this context makes it appear even more strongly that you and the client have something to hide.

You can endlessly and vigorously prepare some defendants for cross-examination, and they will yet trap themselves by arrogance, anger, or some other misplaced emotion into disastrous behavior on the stand.

The agony of a criminal trial, particularly one that comes after a long and hard-fought investigative phase, puts incredible pressure on the defendant and those close to him. Even when the defendant is articulate and knows information that is part of a credible defense story, he may simply not be a good witness. Looking the defendant in the eye and saying "Don't take the stand" is one of the most difficult jobs you will face as an advocate.

Don't shrink from the decision. If the client insists on testifying anyway, memorialize your advice in writing and redouble your efforts at preparing him for the ordeal. Sometimes you cannot make the decision not to put the client on the stand until you have spent several days preparing him to testify.

And let's face it: By the time the defense case rolls around, you may be tired of your client's constant demands on your skill and emotional support. The most difficult trial decision you face must be made at a time when your personal resources are stretched thin.

A criminal defendant whose case rests on "reasonable doubt" should presumptively not testify. Testifying opens up cross-examination on numberless collateral matters, going to credibility as well as the facts of the case. As the defendant is cross-examined by an able prosecutor, you can watch the ambiguities in the proof, and the jurors' ambivalence, fade away. For example, if the evidence is the testimony of an informer and a collection of ambiguous tape

recordings, there is little point in putting the defendant on. This precept can be overruled only if you are confident that the defendant will make a stellar impression.

A criminal defendant who will alienate the jury through arrogance, evasiveness, or provable misconduct should not testify. Arrogance and evasiveness can often be controlled through careful preparation. A prior record or involvement in activities that the jurors will find disquieting cannot be compensated for. Two examples come to mind. In one case, the client had felt persecuted by the government's long-time effort to prosecute and punish him. He resented the prosecutor, who had been involved in the case from the beginning. No amount of preparation could dull that sharp edge of despair. Our theory of the case was that the defendant was a responsible businessperson who had behaved honestly, seeking to conform to conflicting and confusing government guidelines. A few hours on the stand might have wrecked that image. At the time of the alleged offenses, the defendant indeed fit the picture we were painting. By the time of trial, the stresses to which he had been subjected made him someone else--someone we did not think the jury would like.

In another case, the path led in the opposite direction. The defendant had muddled through the business dealings that were the basis of the trial in an alcoholic haze. Some of his conduct supported the government's theory. He had done some things--not provable in the government's case-in-chief--that would have been revealed on cross-examination, perhaps in detail. These things involved booze and women and money. Our defenses were that the defendant's partner--who had become a government witness--was the true wrongdoer and that the defendant's alcoholism made him unable to form a specific intent to violate the law. We were able through cross-examination to present a full picture of the partner's peculations and, in our defense evidence, to paint the defendant and his malady. We did not need the defendant on the stand.

Finally, there will be cases in which the defendant promises to behave on the witness stand, but you know that the promise is hollow. For example, your client may be a lawyer or politician who cannot resist the opportunity to spar with the cross-examiner, give answers that go beyond the question, and pose and posture for the jurors. You have to advise against testifying.

PREPARING THE CLIENT TO TESTIFY

To prepare your client for direct examination, start with a set of prior statements and relevant exhibits, arranged and indexed for study. If your client can easily absorb information in this way, she can study these materials on her own. Many people do not profit greatly from written material; for such a person, someone in your office (maybe you) will have to sit down and track through the material.

The key to preparation, however, is understanding. David Berg took the time to know his client in many moods and many settings. By seeing his client on her turf, where she was in control, he not only derived insight but also was able to accord her dignity when she testified. Even when the case does not permit so intensive an investment of time, you must adopt some strategy to gain this kind of insight. Take the time to know your client "in the round," not just as a walking legal theory.

I once tried a one-day criminal contempt case. The defendant, a lawyer, was going to testify. One factual issue was whether he had heard something in court that the judge had said; he denied it. In taking the time to talk informally with the client over several hours, we were talking about his habits. One of his consistent habits was also consistent with his denial; while prospective jurors were filing into the courtroom, being seated, and then waiting for the voir dire to begin, he sat at counsel table and watched them. If there was a bench conference or some other

event that required attention, he would send the other lawyers on his team to cover it. For this lawyer, using every proper and available clue to know the potential jurors was of decisive importance. Not only could we use that on direct examination, but also we were able to have other witnesses remark on it as a kind of preview of the client's testimony, as they described having been at the crucial bench conference and noting that the defendant was not there. You will get important clues by breaking yourself and the client out of a rigid mold of witness preparation.

Direct examination is not only about what the witness experienced, but also about how she dealt with the event and why she perceived and remembered it in a particular way.

Let us reflect on some typical cases, to identify and critique some usual styles of client preparation.

First case: For prosecutors, the "client" role is often taken by the victim. Why do prosecutors lose perfectly good cases with fairly simple facts? Usually, they lose because their schedules force them to rely on police reports, and they don't take the time to know the victim well enough to conduct her direct examination. Often, the victim has been shuffled through the bureaucratic maze, with little or no emphasis on what she will face at trial. The result is that she looks flat on direct examination and does not do well on cross.

Second case: A busy defense counsel has trouble dealing with the client; appointments are hard to set. Maybe the client is in jail or speaks a different language from the lawyer. The client puts up a facade of bravado. The lawyer makes a few suggestions and leaves it at that. The client takes the stand and looks guilty.

Third case: In a busy negligence practice, the lawyer has the paralegal or secretary schedule the client for a preparation session. The lawyer orders up the file to get ready. The entire session is conducted in a routinized and "usual" way. The lawyer sees the client as an object to be molded into a certain mode of testifying--and according to a certain schedule. The client never truly feels comfortable, and the lawyer misses clues to human strengths and frailties that would have given ideas for direct or sounded alarms about cross-examination.

A fourth case, one in which the lack of preparation is the result of choice and not circumstance: There are lawyers--I have worked with them--who disdain detailed preparation of their clients to testify. They sit with the client, describe the issues, discuss potential problems with the facts and exhibits, talk about the opponent's strategy, and let it go at that. Sometimes they justify this approach by saying that undue preparation distorts the client's testimony.

In all four cases, the lawyers are wrong. In case four, the lawyer is retreating to a position rather like that of the English barrister, who has the solicitor as a buffer between himself and the client. Such a lawyer stands at a physical and emotional distance from the witnesses in court. Arguably, the British trial process is in this respect so unlike the American that witness preparation strategies must differ as well. In my view, however, the best British barristers are those who descend from their lofty perch and learn about their clients.

To begin with the ethical aspect, there is nothing wrong with intensely preparing your client to give truthful testimony in a persuasive way. You serve truth by understanding your client's human predicament and then helping the client to communicate this predicament. This is a process of overcoming the alienating and artificial environment of the courtroom. Your preparation is not building barriers to truth, it is tearing them down. To see this point fully, recur to the discussion in Chapter One.

Cases one, two, and three yield the same result for different reasons. Lawyer one professes to be confined by the system for preparing and trying cases. Lawyer two may indeed

be unduly burdened, but does have the option of not putting the client on. Lawyer three is confined by a self-devised schedule and method.

There is almost always enough time to break through routines that impair your client's ability to communicate with the jury. The prosecutor can find or make a space within which to prepare witnesses. Defense counsel can devise ways of communicating that overcome the barriers imposed by the system. Civil litigators have the most freedom of all--they can meet their clients outside the office or at least outside the structure imposed by undue delegation of functions and unseemly worship of the billable hour.

Clients who are to be witnesses fall into two groups. Some are accustomed to taking control, in their daily lives and in litigation, as a means of fighting back at the system that frustrates them. Others see their existence controlled by others, and the litigation process is merely one more step along that path.

The first type of client risks alienating the jurors through arrogance. That same arrogance may cause the client to disregard your advice at a crucial juncture in direct or cross-examination and "go it alone." The second type may appear uncredible on direct and be malleable during a pounding cross. These types do not describe absolutes. A person may exhibit symptoms of both at different times. Or a person normally controlled may let go a burst of arrogance in frustration.

Your basic response to both types is the same: assert and maintain control. The differences will become important only when you are spotting symptoms of discontrol in the process of preparation or testimony.

For the arrogant client, you can borrow authority from the trial process: "Look, I know how you want to handle this, but the rules don't permit it. The judge wouldn't stand still for it."

That admonition may not be enough. I think back at trials where my client thought that his or her appearance on the stand would be a defining moment. The client had a self-image of "by god showing those bastards something." The buildup to trial is usually so long and so contentious that such an attitude readily takes root and flowers. You may have contributed to it, by talking up the chances of success in order to get people's spirits up.

There is an inherent conflict between your control of the litigation and encouraging a sense of client involvement and participation. This dichotomy is inherent in the nature of lawyering as a kind of special purpose agency relationship.

For the insecure client, the rules are the matrix within which you work to tell his story and to protect against the opponent's unfairness: "The procedures in court permit us to tell your story persuasively and strongly, and that's what we are going to do. That's why I'm here. Let's prepare so that the process will seem familiar."

The direct examination must not be the sort of wooden performance that turns off the jurors, in part because that is what they expect. Preparation should begin with deconstruction, to sweep away your client's prejudgments, grandiosity, fearfulness, and other assorted imaginings.

You begin with some variation of "Tell me what you think your appearance on the stand is going to be like?" Do not be put off; get a full answer to this question. Ask follow-up questions: "Hmm, can you remember how you got that idea of it?" "What do you think the other side is going to do then?" You have to listen to all of this, to drain it off so that you can put back the parts that are real and helpful and throw out the ones that aren't.

In the process, you are going to uncover fears that can be allayed, misconceptions that can be corrected, and underneath it all some important facts about your client. Fears may include revelation of private matters; you may be able to give assurance that the matter has been covered by a motion in limine.

Misconceptions include the common one, "Well, I am going to swear to tell the whole truth. So when I get up there on the stand, I'll let them have it. They can't cut me off because I swore to tell the whole truth." You can explain that you'd like to do it that way but that choices are limited. If your client is the plaintiff, living by what seem to be silly rules is the price of admission to the courthouse. If the client is the defendant, the rules are just another indignity--one that probably pales alongside being sued in the first place.

The truths underneath are contained in the internal dialogue that almost everyone has about being a witness and that you are asking your client to share with you. They are the parts of the story that the client feels must be told, that she is afraid will not be told. They are the anticipated responses to this or that line of your, or your opponent's inquiry.

Having exhausted all that the first question yields, ask your second one, even though you have asked it a hundred times before: "What do you want to get from this jury?" Some clients are going to say "a medal." Some are going to say, "I just want them not to think I am a blithering idiot."

I have had clients who wanted a medal or, as they sometimes put it, vindication. Sometimes that happens, but usually the process isn't built that way. The most dangerous kind of righteousness is self-righteousness. In a criminal case, an acquittal will do nicely. Loud huzzahs from the jury would be nice but are not required. When you lower your client's expectations in such a case, you are bringing the focus down to the realm of facts and credibility that are the focus of direct examination preparation.

The low-goal client needs your assurance that the important process of presentation is part of telling the story that you have agreed is important.

THE CLIENT ON THE STAND

I don't think much depends on whether your client is the plaintiff or the defendant. You will probably have prepared the jury, in opening statement, for the client's appearance, though in some cases this is not advisable – as in a criminal case where you are not sure whether the client will testify. You will seldom bet the entire result on the client's testimony. The client is one part of the entire story. Plaintiffs should generally wait to appear until late in the case, to build juror expectation, to let you and the client get used to the jury, and to see exactly how the case story is crystallizing so you have a surer idea of where the emphasis must be. Civil defendants should generally appear first or last in the defense case: first if you need to start really strong to fulfill a promise made in opening, and last as a clean-up hitter. In a criminal case, last is probably best, or almost last: Character witnesses and summary witnesses can follow the defendant to the stand because they are not adding any new pieces to the story.

As you think out the direct, ask, "Who is this person?" Is your client someone who has been robbed by the clever frauds of others? If so, you will not prepare him to take the stand and wade through stacks of financial records to show a discerning ability to spot error; that would be inconsistent with the personality of this client as you have portrayed him. On the other hand, if your client is someone who is habitually careful and was careful in handling the matter in litigation, then she should exhibit that care and attention in handling your questions and the exhibits.

Your questions to yourself always lead to "Am I making sure the client is communicating her true self?" Legendary Chicago lawyer Gene Pincham tells the story of his summation in a criminal case. The defendant was charged with killing his wife, but no body had been found. Pincham urged this as reasonable doubt.

"Members of the jury, who is to say? Who is to say beyond a reasonable doubt that she is not alive out there somewhere? Maybe she is going to walk through the door of this courtroom any minute now. Good God! Look! There she is!" And when the excitement died down, he continued, "You see, you have a reasonable doubt. You all turned and looked at that door, because you were not sure she was dead."

The jury convicted without much deliberation, and a juror explained, "Well, that was a good trick you pulled, but your client was the only one in court who didn't turn his head. He knew she wasn't coming back."

The point at which you call the client to testify finally arrives. She has been sitting at counsel table. The jurors met her during voir dire. They have been watching her. More important, they have been watching your relationship to her. There are many different theories about what a counsel table should look like, even to how many pieces of paper can be on it. Some lawyers sit alone at a clean table, look at the jury, other lawyers, the judge, or the witness, and just maybe take an occasional note. They do not interact with the client in the jurors' presence.

I think this is a mistake. If the idea of transferring credibility has any meaning, you should visibly be part of a team with your client. Granted, there are times when you will not want to be interrupted, and the client should have a note-pad on which to make an occasional note. You should put your arm on your client's shoulder, talk to her, visibly pay her deference. You and she are in these moments conducting a direct examination every bit as important as the viva voce exercise to come.

When you call the client, make it an event, but without pomposity. Demand respect for the client by the manner of calling her name. This is particularly important for criminal defendants, women, and minorities, whom the other side and even the judge may try to trivialize by demeanor or word.

"Your Honor, members of the jury, we call Ms. Juanita Wilson as a witness." If you have been helping people with their chairs on other occasions, help pull Ms. Wilson's chair. Motion her to the clerk's desk to be sworn. See that she has a glass of water if you have been extending that courtesy to others. If there is a microphone, make sure it is adjusted. Let her get comfortable in the chair.

Custom and rule dictate whether you examine seated or standing and, if standing, whether you must remain at a lectern. Whatever you have done with other witnesses, pick a spot for this direct examination and stay there. Move only when you are helping the witness work with an exhibit or when you are going to stand somewhere to help the witness make a point. For example, if the witness is going to be talking about an opposing party or counsel, you might move over and stand behind that person if the rules permit. People don't like other people standing behind them, especially when they are being talked about; it makes them uncomfortable, and they look it.

Begin. "It is very important for the jurors to hear every word you have to say. Please, could you keep your voice up so that at least everybody within this space [indicating the judge and the jurors] can hear you. Thanks. Tell the jurors your full name. Where do you live? What do you do for work?"

The examination follows the precepts of Chapter Two. However, you must decide where the key points will come. The idea of beginning and ending strong must at times yield to your need to build slowly, accustoming the witness to the rhythm of testifying and the jurors to the

witness. Before the witness says anything strong and dispositive, the jurors must be prepared to accept it, and the witness must be prepared to say it in a nontheatrical, natural way.

Therefore, beginning strong usually means telling the jury why this person is here and who she is. After "What is your work?" the next question might be, "Why are you in court?" The answer will be partial, preliminary--for example, "I sued the insurance company because they wouldn't pay me what they owe." That answer packs a lot of information, but can be given in a fairly matter-of-fact way. If the client begins too intensely and combatively, there is little room for more intensity--the entire examination will be on one high note.

Now, move through background, experience, and on to the events that led to the lawsuit. In organizing this material, make sure you punctuate it. Identifying people and exhibits will give natural breaks to the examination. Your loops and prologues will do this as well. Exhibits make good punctuation because in summation you can use them to help summon up the image of the client's testimony:

Remember when Ms. Wilson told you about how Mr. Johnson reacted to her complaint? She had saved his handwritten note. Here it is . . . .

When you first set, then vary, the tone of interrogative discourse, you are also trying to set a pattern that will hold for cross-examination as well. Your client listens to each question, pauses for a moment, then answers it directly and simply. You cue the level of intensity by your question, although you will also have discussed this in preparation. Your loops and prologues can signal that the mood changes up or down. The client responds to you in the same collected way she will respond to the cross-examiner.

You must ask your questions and listen to the answers as though you want information, and as though you are getting what you want. You cannot expect the jurors to be interested if you are obviously not. You signal noninterest by fussing with elaborate notes, checking off questions as you ask them--in short, by any technique or mannerism other than complete focus on the witness. If the interrogation looks rehearsed, it will be judged to be. If you have more than a few words of notes, easily readable without bending over, you have too much.

Your understanding of the client's personality will not so much affect the kinds of demonstrative and tangible evidence you use as the way in which you use it. The witness who radiates competence walks with you through the documents and helps explain them to the jurors. The witness who was bamboozled by the documents shares your wonder at them and keeps them at arm's length.

Let me illustrate. In a medical malpractice case, the doctor defendant wants the jury to believe that she operates efficiently and carefully. She therefore displays a confident familiarity with patient records, medical journal articles, lab reports, and the like. Not arrogance, mind you, but the ability to grasp and then to interpret the material. "Yes, I saw that report. When one of my patients is in the hospital, I look at the chart twice a day to see what tests the hospital has done, to get the results of tests I have ordered, and to make sure that my instructions are being carried out. This particular report told me that Mr. Johnson had responded to the medication in a normal way and that we had given him the right amount for his condition."

By contrast, a defrauded investor looks at and readily acknowledges having seen documents--letters, proxy statements, a prospectus, advertisements--but wrinkles his brow at them and talks about his understanding of them rather hesitantly. "Yes, I got that proxy statement. I don't remember reading all of it carefully, because it is about forty pages of little type. But I did read what the president said about these recent setbacks the company was having."

Both witnesses are testifying truthfully because they are communicating to the jury how they really did view the documents and exhibits they are now looking at. It is important for you, however, to ensure that the client in each case is for the jury the same person you know him to be.

Let us take a leisurely example. The client is charged with bank fraud. Your examination begins by setting the stage, introducing the client, and making him comfortable on the witness stand. Your story of the case turns on understanding the relationship between smaller banks such as the one your client owned and ran and larger urban banks.

Q. Tell us your name, please.

A. Ronald Marshall.

Q. [Softly, not stridently.] Did you commit the crimes that you are accused of in this case?

A. [Softly, directly.] No, I did not.

Q. In the brief time we have together, I want to ask you about your background in banking, so the jurors and the other lawyers here can understand how you made some important decisions. Then I want to ask you about some specifics that other witnesses have tried to describe. Along the way, I'll ask about people like Mr. Dandridge [the bank examiner]. Where did you do your growing up?

A. I was born in Port Arthur, Texas, in 1931.

Q. Where did you get your schooling?

A. I went to the schools in Port Arthur until I graduated high school in 1948. Then I went to the University of Texas at Austin for two years.

Q. Was that all the schooling you had?

A. No. I enlisted in the Army and served a little more than two years, then I went back to school.

Q. Where did you see Army service?

A. They sent me to Fort Ord in California for training, then to Korea.

Q. Did you get an honorable discharge?

A. Oh, yes.

Q. Any commendations?

A. I got the Silver Star for gallantry and a Purple Heart for a sniper bullet that I took.

Q. After you returned to the University of Texas, did you finally get to graduate?

A. Oh, yes, I took an accelerated course and got a degree in finance in 1954.

Q. Now, this case is about banking. So can you tell us what work you did in banking?

A. I got a job in Victoria, Texas, at the State Bank of Victoria. It was a small bank, so I did every job in the place to learn how to do it.

Q. Now these days we are used to big statewide banks, and even to these multistate banks. How was it different then? [The prosecutor interjects:] Objection. What is the relevance of the banking structure? [The defense responds:] The nature of Texas banking, and how this witness understood it, is central to the loan at issue. [The court decides:] Overruled. He may answer.

Q. I'll ask it again. How was the banking system different then?

A. There were no branch banks in Texas in those days. Other states, like California, permitted statewide branching, but Texas did not. Every bank had to stand on its own.

Q. Why is that important?

A. A bank that stands on its own is all in one building. The senior officers, the loan officers, the tellers, the secretaries--they all work right there alongside each other. If you have business in the bank, they are more likely to know you.
Q. What kind of management style did you learn in those days?
A. In a single-branch bank, you count on the people who work with you. You have to work together, and a lot is based on trust, not on formulas and memos and all that bureaucracy.
Q. But how could a little bank in Victoria survive against the competition of larger banks?
A. Well, a little of it was artificial. We survived because the law said no branch banking. But I learned very quickly the most important element of small bank survival--both for our financial health and to be able to serve our customers. And that was that you had to go and work out a cooperative arrangement with a bank in the nearest big city. That's what they had done in Victoria, and that's what I did in every single bank I ever worked with.
Q. Does that include this case?
A. Sure. I was President of the National Bank of Seguin, and our relationship was with SouthBank in Houston. They cleared large checks for us, so we could get the money quicker. Sometimes a customer would come in and want to borrow more money than we could lend since we were a small bank. SouthBank could participate in the loan. Or maybe somebody needed an introduction to a potential business partner in Houston.
Q. Can you give the jurors an example or two?
A. Sure. We had a Western wear designer in Seguin who was doing pretty well and starting to sell to the major department stores. But she needed capital to finance expansion of her workshops. We want her to succeed because all of Seguin benefits. But we are a small bank. We don't have the funds to make a loan that size. At the same time, we don't want her to go off somewhere else and borrow. We lose the interest that she would pay, and we just might lose her as a customer, lose that banking relationship. So I call up Abner McDonald at SouthBank and work out a deal where they will participate with some of their funds, although we will be the lead bank.
Q. How can you count on Abner McDonald taking your phone call when you call up there?
A. Like anything else in business--we try to work out an arrangement where both sides make a fair profit on the relationship.
Q. Is there any particular thing that smaller banks in Texas did around that time to make sure they had a good relationship like that with a big city bank?
A. Oh, sure. It went by different names. The economists might have one word for it, the business people another. Basically, a smaller bank builds a relationship by putting funds in the big city bank--you can call it a correspondent account, a demand deposit account, or sometimes even a compensating balance, but it all means the same thing.

The subject matter of inquiry is not the main concern. Our banker is talking about something that he has done for years--and knows inside and out. He is becoming comfortable with the idea of testifying. Under your guidance--to prevent shows of ego and self-importance--he is displaying himself as the kind of person you hope the jurors will see him to be. From this point, you can carry the examination to the transactions at issue in the case.

It should not be necessary to say, "End strong." Do so. Take your client in summary fashion over the high points--to emphasize those points and build a kind of semantic wall for your opponent to try and deconstruct.

Q. The indictment says, sir, that on January 10, 1971, you got money from Will Winston. Is that true?

Q. Did you, on January 20, 1971, get any money from Will Winston?

Q. During the whole time that you were secretary, did you ever accept money from Will Winston?

The answer in each case should be, "No, I did not," or something more than a monosyllable.

Notes to Chapter Five

1. My thoughts on client testimony are set out more fully in the works cited in the Bibliography, particularly the Litigation article on jury argument.

Chapter Six

Demonstrative Evidence and Illustrative Materials: Say It with Pictures

Demonstrative evidence, for our purposes, is any evidence other than the live testimony of a witness. In my opinion, everything that happens in a trial except witness testimony, lawyer arguments, and judicial remarks is governed by a single, coherent set of principles of presentation. This "other " can go by various names--demonstrative evidence, visual aids, writing on the chalkboard, "publishing" the exhibit--but the same basic ideas govern, whatever the name. Works on demonstrative evidence are usually limited to charts, summaries, and graphic aids. They consider tangible objects a different subject and use of depositions still another area. I think the similarities of tactics and basic principles are greater than the differences. You might also call these things "tangible evidence."

Wigmore reminded us

> We are to remember, then, that a document purporting to be a map, picture, or diagram is, for evidential purposes simply nothing, except so far as it has human being's credit to support it. It is mere waste paper--testimonial nonentity. It speaks to us no more than a stick or a stone. It can of itself tell us no more as to the existence of the thing portrayed upon than can a tree or an ox. We must somehow put a testimonial human being behind it (as it were) before it can be treated as having any testimonial standing in court. It is somebody's testimony--or it is nothing.

Because neither the law nor lawyers know a bright line between demonstrative evidence and "other" illustrative materials, I am going to discuss them together. There is, I think, a continuum from the single document shown to the witness and then read to the jury, all the way to an interactive video reconstruction that may not be "in evidence" but may be exhibited to the jury as "illustrative" or even "argumentative."

The question here is the impression that pictures and physical objects make on jurors, and for this purpose we can put aside the rules of evidence after a brief introduction.

I confess a strong bias, which I have often expressed, against getting too "high-tech." Here are some examples of my bias in action. In a recent non-jury hearing, I wanted to focus on key admissions made by the other side, and on legal principles I thought drove the result. I typed up about fifteen sheets, in Times Roman 12 point type, on a standard piece of paper with generous margins and spacing. I had those enlarged – after trying some bombing cases, I no longer say "blown up" – at a copy service onto 2 by 3 foot foam boards. I used an easel in the courtroom to show them to the judge as I presented my case.

Another lawyer in the case wondered aloud why I did not use Power Point. I said that in an urban state court, where you would have to bring your own fancy equipment to do a Power Point presentation, my message would be drowned by the medium. I would look too slick.

In the Terry Lynn Nichols case, we were compelled to work in a "state of the art" courtroom. I think our Luddite logic and tactics helped us in front of the jury. We relied on real exhibits and not electronic versions that flashed on a television screen and then were gone.

The courtroom was equipped with all the modern equipment. All the government's exhibits had been digitized and placed on CD-ROMs. There were TV monitors at all key locations. An exhibit would appear on the monitors, so that jurors, counsel, parties, spectators and the judge could see it. One had only to key in an exhibit number and there the exhibit would be.

I disdained all of this. The defense team brought out exhibits to court in boxes. To show a photograph, document, or tangible object, I would put it on the ELMO projector device. The

exhibit then appeared on the monitors, but I could touch it, move it, put my finger on it to point to something. I was visibly handling the exhibit in the way the sponsoring witness had done at some time in the past, and as the jurors would be able to do when they retired to deliberate. I was making the process transparent, and (I hoped) empowering the jurors.

I admit that a slick Power Point presentation can get attention, and I would use that device in some settings, as I discuss later. For now, I insist only that the availability of a high tech colution does not mean you have to use it.

BASIC PRINCIPLES

Five sets of rules govern the use of demonstrative evidence. I hold in my hand a chart. I want the jury to see it.

1. Is it authentic? That is, under Federal Rules of Evidence 901 through 903, is it what it claims to be? A letter is what it claims to be if the sender or recipient says so. A rock is what it claims to be if a witness says it was found in such and such a place. A gun is what it claims to be if "chain of custody" is established.

2. Is it the "best evidence?" This question arises only for "writings" and "recordings," but Federal Rule of Evidence 1001(1) makes those terms cover a lot of territory: they include any "form of data compilation." Federal Rule of Evidence 1002 says: "To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise required in these rules or by Act of Congress." Rule 1003 adds that "a duplicate is admissible to the same extent as an original unless (1) a genuine issue is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original." Rule 1003 thus creates a rebuttable presumption of admissibility, but one must still prove that the item offered is a duplicate.

3. Is the item admissible hearsay or admissible nonhearsay? If the exhibit contains statements of a witness other than while testifying, offered for the truth of the matter asserted, you must find a hearsay exception.

4. If the chart is a summary of other data, does it meet the standards of Federal Rule of Evidence 1006? This rule is one of the trial lawyer's most valuable allies, especially when you want to present complex data persuasively.

5. Finally, does the chart tend to make a matter in issue more probable than it would be without the evidence, and can you overcome objections phrased as "cumulative, time-wasting, misleading or unduly prejudicial?"

If the chart does not meet these tests, you may still be able to use it as "illustrative," in the opening statement, the closing argument, or even while the witness is on the stand. It will not be "in evidence," however, and it will not go to the jury room. This is not necessarily a disadvantage, as we shall see, provided it brings to life evidence that the jury will have--and which they will be more likely to remember in deliberation.

The term "authentication" takes in a lot of territory. The Federal Rules of Evidence and their state counterparts have simplified the matter by suggesting easy ways to authenticate and by providing for self-authentication as to some documents.

If the exhibit is a stack of complicated charts that purport to summarize boxes and boxes of data, authentication by the proponent may require putting a live witness on the stand. By the same token, the opponent can challenge admissibility by showing that the summary is incorrect or misleading in some important way. Again, this is a tactical question. You may decide that the inaccuracies, in the venerable cliché, "go to weight and not to admissibility." That means, as the opponent, you will lay behind the log and cross-examine about the errors when your turn comes.

There is no better way to rattle an expert than to conduct a disciplined cross-examination that tears apart the factual basis of the expert's conclusion.

The most sophisticated authentication problems arise in connection with computer animations, video recreations, and other complex representations of a past event. Consider, for example, a computer reconstruction of the last ten minutes of an airplane flight that ended in disaster when the airplane missed the approach, skidded off the runway, wound up in the bay, and caused death and injury. Using data about weather, airfield lights, the airplane's flight recorder readings on speed, altitude, flap settings, and so forth, with an overview provided by the recorded conversation between the cockpit and the tower, a computer animation expert can recreate on a video screen the conditions as the pilot "must have seen" them on approach. Drama may be added by using the flight recorder as a voice-over. Computer animation is also used to recreate vehicle accidents. For example, to show what happens to a passenger belted inside the cab of a car, truck, or other vehicle on impact.

The computer animation technique, which results in a sort of cartoon, is subject to a high risk of error. First, there are simple calculation errors; the designer may have misinterpreted the data. Second, the designer must fill in some information gaps by making more or less educated assumptions. Third, the resulting animation can be very dramatic, heightening the effect of any errors and of all the choices made by the originator.

To figure out what demonstrative evidence you will use, first decide your goals, then choose the best technique for reaching them. Only then should you try to decide the details of admissibility. Admissibility theories and limits vary from jurisdiction to jurisdiction. Because the trial judge has so much discretion on what to permit, individual judges in the same courthouse may have widely differing attitudes.

I can recall having invested money and time in video- and computer-based demonstrative evidence in a complex case, only to have the trial judge say that he "didn't believe in all that stuff." Fortunately, the investment was not great, and we had already decided that high-technology evidence was not going to present the persuasive picture that we wanted our client to sponsor.

It is a good idea to have a file memo on admissibility and nonevidentiary use of illustrative materials, with cases on both sides. Then, when an issue arises, you can quickly generate a short memorandum of law to support use of your materials or oppose your opponent's plans.

AGREEMENT OR RULING?

In addition to reading up on evidence law and finding out the judge's attitude toward your proposed techniques, you will have to figure out the mechanics of admissibility rulings. Some of the methods we will discuss are expensive and involve a lot of lead time. Your opponent knows this--and will delight in having the court limit or reject your presentation on the eve of trial.

Whatever demonstrative devices you choose to use, you must maintain the flexibility to change your presentation in light of trial events. In one case, the prosecutors had invested great sums in "story boards" to use in summation. These were not exhibits as such. They were colorful visual aids. Because of the lead time in making them, the boards had no doubt have been planned and ordered before the trial was very far along.

The problem was that the trial evidence varied from the government's confident expectation, so the summation based on the boards had a kind of unreality to it, a sort of

disconnect. If a visual depiction will help you, then you must use a technique such as Power Point, that you can edit easily.

The pretrial order in your case should provide for exchange of demonstrative evidence and other illustrative material, whether or not the party will seek to offer it in evidence. The timing of this exchange can vary depending on what is involved. Obviously, a party cannot be expected to produce opening statement graphics until motions in limine are resolved.

With exchange, and with understanding of the judge's attitude and the law, agreement usually follows on most items. Remember, if your opponent's materials are misleading, you may want to withhold an objection in favor of conducting a scathing cross-examination of the sponsoring witness. If agreement fails, the trial judge or, in federal civil cases in some districts, the magistrate can make rulings before trial.

In every case, subject to the limits imposed by the pretrial order, there will be an exhibit that you want to introduce at trial or a graphic representation that you decide to use at the last minute. Then, as Professor Pat Hazel says, MIAO. Mark it; ask the witness to Identify it; Accredit it by going through as many as necessary of the five steps set out above; and Offer it.

You usually mark exhibits with press-on stickers furnished by the court clerk or purchased from a legal supply store. The court is likely to have a preference about the exact kind of sticker to use. Check with the clerk's office, and get a plentiful supply. Have a bunch of blank stickers in your litigation bag to use on exhibits that must be offered at trial.

If your materials are computer generated or otherwise not able to be marked in the traditional way, work out an arrangement with co-counsel and get approval of the judge or the courtroom deputy clerk. If you have not resolved admissibility issues before trial, the litany of admissibility is fairly standard.

Q. Ms. Bolger, I am showing you [or asking the bailiff to show you] what I have marked as Plaintiff's Exhibit 3.

The exhibit has now been "marked."

Q. [Continuing.] Is that a memorandum from your company?

You can lead on preliminary matters. If you are not permitted to lead, ask this:

Q. Without telling us what's in there, what is Exhibit 3?

A. It is a memorandum from the vice-president of our company, EnviroScene, to the comptroller of EnviroScene.

Q. Is it the original memorandum?

A. No, it is a photocopy of the original.

Q. How do you know?

A. By looking at the distribution list at the bottom and noting that one of the names has been checked on this copy.

Q. Is that memorandum made in the regular course of business of EnviroScene?

A. Yes.

Q. Is it the regular course of business of EnviroScene to make and keep records like this?

A. Sure. That's the way we keep track of things, with memos like this.

Q. Were the entries made on this memorandum done at or about the time of the events that are described, and by people with personal knowledge?

A. Sure.

Now we have almost finished "accrediting" a business record. An admission of a party opponent would require fewer questions. A chart summarizing many documents would require

additional questions, first, to lay an authentication and hearsay exception to the underlying records and then to inquire if the witness knows that the chart or summary is accurate.

One step remains to "accredit." You must show that the memo is relevant.

Q. What is this memo about?

A. It is the memorandum with the August sales figures on the Micromanager pocket PC.

Q. I offer Exhibit 3. [The court:] Without objection, it will be received.

Q. Your Honor, I have a copy of Exhibit 3 on a transparency, and I'd like to put it up now so that the jurors and Ms. Bolger can see it. [The court:] Move along, counsel.

Once a chart or other visual aid is in evidence or used in argument, you have a powerful motivation to keep it where the jurors will see it. Your opponents have the same motivation about their materials.

BASIC PUBLICATION STRATEGY

I confess a love of archaisms, the words our legal forebears passed along to us. So I catch myself saying, when I have successfully completed a MIAO, "Your Honor, may I publish this to the jury?" And she either says, "Why, certainly, counsel," or, archly, "Well, you can sure show it to them."

Jargon aside, you must decide when the jury will see your exhibits, to enhance, not interrupt, the flow of testimony. The first limitation on your power is Federal Rule of Evidence 106, the "rule of completeness." When you offer something in evidence, your opponent can ask that the rest of that something, or a related something, come in at the same time. When you show the jury the part you are interested in, your opponent may ask that some other part be shown at the same time, to make your presentation not misleading.

The trial judge has latitude in applying these principles. The paired arguments are "Your Honor, let each side try its case in its own way " and "Your Honor, let's not mislead the jury by unduly one-sided presentations."

Suppose your witness has just identified an important letter. What are you going to do with it? Don't pass it to the jurors. Even if the judge would let you stop everything while they all read it, all the jurors but one would be unoccupied at any given moment. You could make twelve copies and pass them out, so that everybody could read at once. Don't laugh; this technique may sometimes make sense.

The best way to "publish" is to have the witness read aloud the portion you want to emphasize while you simultaneously display that portion on a screen. What kind of screen? The choices are discussed below.

For now, the point is that you have choices about handling exhibits, and your choices influence the kind of graphic material you decide to use. There is an industry of graphics/demonstrative evidence/illustrative material specialists. The approaches, techniques, and fee structures of these outfits vary widely. Some of the best of them are members of the Demonstrative Evidence Specialists Association (DESA). Some DESA members are first-rate, but I would not retain anybody to help you with graphics until you know the story of your case. Much money and time spent on visual evidence is a substitute for thinking about how to try your case. I am an experienced procrastinator, and have a lot of on-the-job training in it, so I know whereof I speak.

A final word about publication: No complicated experiments in the courtroom, please. The device you or your expert builds to go whiz, pop, or bang will fail in the jury's presence. Do the experiment under controlled conditions, and videotape it.

SKEPTICISM ABOUT HARDWARE

I am skeptical of expensive gadgets. You can spend hundreds of thousands of dollars on hardware and software for your exhibits. Be careful before doing so. One good reason will pop into your mind if you think about the week you tried to install a new computer system in your office. If you didn't have any trouble, then talk to another lawyer because you are in a distinct minority. I am not knocking the folks who sell this stuff. Usually, the problem is with the humans trying to run the system.

It's sort of like the sign just east of El Paso: "Last Gas for 100 Miles." It's tough to halt the trial while you dial the toll-free number to ask the technical wizards to help you show the jury the next document. I do not say, "Rule out the high-tech stuff." Rather, I urge you to climb the technological mountain a step at a time, pausing often to see if you are high enough to enjoy the view.

Here are some stops on the trail.

READ IT

Asking the witness to read something can be effective. Almost always, that alone will not put the contents before the jury in a memorable way. There is one exception. When the real evidence is not so much the words, but the fact of the witness saying them, reading may be enough.

Example: A former Secretary of the Treasury was accused of having accepted a $10,000 illegal gratuity from a lobbyist who had been his good friend. The former friend was now a government witness. Cross-examination covered informer perfidy, motivation to lie, and prior inconsistent statements. The informer had written to our client, after the alleged payment but before he became a government witness, expressing friendship and gratitude and professing undying respect. The precise words are not so important. Indeed, if you think about it, the letter could even be double-edged. But the informer had been painted a liar, and we wanted to make him an ingrate as well. We laid the predicate for it, got it admitted, and had the witness read it out to the jury.

Another example: Your client sues an insurance company for bad faith refusal to settle a claim. The insurance company has sent one of those officious letters denying a claim. The letter is just one step in a series of relevant events. To keep the examination moving, you may decide to have your client read aloud the relevant part of the letter. You can wave it around, and even show parts of it, in argument or with a later witness.

ELMOs AND OVERHEAD PROJECTORS

I consider these two related devices together. The ELMO is more modern, but many courtrooms don't yet have one, so one must be proficient with both devices. The ELMO is an updated version of the overhead projector. It has a base on which one can put a document or other tangible exhibit. An overhead light and lens pick up the image and send it to courtroom TV monitors located where the jurors, judge, parties and spectators can see it. You can zoom in on parts of the exhibit as well. For such things as X-rays, the base can be illuminated from below. You can bypass the ELMO by scanning your exhibits so that they are shown directly on the screen. As I have noted, I don't recommend this.

With scanning technology, you can also have excerpts of long exhibits ready to show particular witnesses. Again, I am doubtful about this technique. In one trial, our opponents had many small excerpts from a major exhibit. They used the chosen excerpts with witnesses and in argument. I invariably used only the big exhibit itself. I would say to the witness as I hauled it out for cross-examination:

Sir, you were asked some questions and shown some snippets about these phone calls. Now I want to put the actual original exhibit, Government 665, up here instead of the little excerpts, because I want to put some of this in context.

You remember the overhead projector. You put 8-1/2" x 11" transparent sheets on them, and they project the sheets onto a screen. Depending on the lamp power and lens magnification, the screen can be quite large. The item being projected sits faceup on the machine so you can write on it with a felt-tip pen and have the marks show on the screen.

These machines have persuasive potential. Consider the ways in which a simple overhead projector can do the jobs usually reserved for much more elaborate and expensive gear. Mind you, we are talking about a good machine, one that is easy to set up and focus and that throws a powerful, clear image. You may have to bring your own.

Almost any copier can reproduce a document onto a transparency. If yours cannot, the neighborhood copying service can do it, even in color. A felt-tip pen highlights key images or phrases. You can do the same with a deposition transcript.

In a major antitrust trial, Chief Judge Singleton insisted that all documents be reproduced on transparencies and shown to the jury on a screen. The original paper versions were available to go to the jury room. In the suit by William Tavoulareas against the Washington Post, which Tavoulareas won, though the verdict was reversed on appeal, plaintiff's counsel used the overhead projector effectively. You or the witness can read the key words while the jurors both listen and read along.

Any image that your computer can devise and that your laser printer can print can be printed on a transparency and used immediately. In cases involving financial information, a spreadsheet program permits you to present information in graphs and charts of many different forms, and with a variety of typefaces. A color printer--or an assistant with marker pens--can dress up these exhibits for copying on transparencies.

Despite the advantages of working with originals, you may have documents that are marginally legible or very long. You want to publish key excerpts. You want the witness to read them out. You can type these excerpts out, with a citation to the exhibit number and page, and print them on a transparency, or prepare something to use with the ELMO. These are not exhibits; they are a method of publishing the exhibit to the jury. Again, you place the exhibit number on the image because you want the jurors to begin remembering numbers of key exhibits. If you are using excerpts in this way, have the actual original with you so that the jurors associate it with what you are showing. They will remember. I can recall a jury coming out after an acquittal in an eight-week trial, and the prosecutor asked, "What did I do wrong?" They began right away to analyze a key exhibit in the case, referring to it by number.

A related concept requires expert help, although if you or somebody in your office is handy with computer graphics, you can home-grow these things. Some documents are so dense or illegible that they do not show up well on a transparency. Take the document itself, shrink it, and move it to the left side of the page. Box the relevant language, and point to another box on the right side of the page. In this box goes the language you want to emphasize, in large, easily readable type. This is another way to keep the connection between the excerpt and the parent document.

You can provide further emphasis by putting a heading on the page and by using color. Some computer printers generate color transparencies. You can also make a multicolor exhibit on 8-1/2" x 11" white paper and use a color copier to reproduce the image on a transparency. Here is an instance where Power Point can be useful, if the courtroom is so equipped. If you

have long or difficult-to-read exhibits, you can make the simple graphic representation described above by integrating the scanned original exhibit into an image that also contains a text box. The text box will contain, in legible form, the portions of the original that you want to attract attention. Again, you are keeping the original in the picture.

In a recent case, we had a big budget for graphics--and therefore plenty of choice. We had bar graphs, physical exhibits, summary charts, charts with words that highlighted key arguments--in short, a full array. We tested all of these with several focus groups of mock jurors.

Those with a refreshing "keep it simple" attitude have already figured out the result. So have those who go to rodeos and know that the cowboy whose eight-second ride wins the event is the one with a horse trailer on an old Caddy and faded jeans, who just gets on the bull and remembers "hold on with the left fist, hang on when the stock twists." The cowboy who looks like he just toured Nieman-Marcus is probably only a spectator. Fancy and expensive is not necessarily better.

The jurors preferred the documents. They liked the physical exhibits, too. On the whole, they disregarded the charts and summaries unless a given chart followed in sequence after the documents that it summarized, or unless the original exhibit remained the visible basis for the graphic display.

Why did jurors have so much more faith in the more down-to-earth materials? In our case, we were arguing a position that was against many jurors' intuitive feelings and preconceptions. If they were going to adopt our story, they would do so only on their own, by testing it themselves against hard evidence.

I think our insight from this study holds for any case. A position that a juror has taken and held on her own will more likely survive the rigors of jury deliberation than an undifferentiated sense of how things should come out. Your highest and best service as a lawyer is to take the evidence itself and put it in a form that jurors can use.

You can create graphic images of a stack of papers, representing a long exhibit, with several boxes containing key excerpts. You can create boxes that summarize. As you get farther from the raw data, keep an "icon" in the picture that represents the exhibits themselves. Never let go of the power represented by "the evidence."

Transparencies or Power Point graphics that follow these rules are useful for illustrations that go beyond the documents. The artwork for transparencies can be computer generated, computer edited, and constantly updated to accommodate changes in your trial plan or hostile rulings from the court. The final product can even be enlarged to become a chart. Charts produced in the more traditional way may be more expensive and harder to change.

You can use transparencies with your witnesses in ways that other devices will serve. Suppose you have a map or a diagram. The witness can mark on it with a felt-tip pen to describe the action. If several witnesses are going to be describing the same scene, you can have several copies of it on transparencies, each as a subexhibit--for example, Plaintiffs Exhibit 55A, 55B, and so on. Each witness can then mark his own descriptive material--location of the cars before and after the wreck, where the witness was standing, etc. In argument, you may find it useful to superimpose these images by stacking the transparencies. Using exhibits in this way gets the witness off the chair and down in front of the jury, talking and illustrating in a more natural way.

As you see yourself using the overhead projector, there is one more image to capture. If permitted by the court, handle the ELMO, overhead projector, Power Point or other device yourself. Get used to the required order, and learn how to operate the machine. If somebody else on your team is assigned the task of running the projector, the inevitable foul-ups will create

awkward moments in which you will be tempted to say or do something that makes you look overbearing, uptight, or pompous. If you are out there making your own mistakes, you can only look vulnerable, and that is preferable.

MULTIPLE COPIES

In a complex tax evasion case, the government served the charts and summaries on us the night before their summary witness was to testify. We had not been using an overhead projector or ELMO in the trial up to that point. There were several charts for each of the four tax years at stake, and they were complicated--in part, the result of being prepared at the last minute.

I had already planned my cross of the expert and would now need to refine it in light of these charts. The government was not using large posterboard charts or an overhead projector.

I wanted to deconstruct this witness, his conclusions, and his charts. I wanted to go after his credibility as a witness in addition to refuting his numbers. The cross was structured, but I was not locked in. I had a stack of documents on which to examine, a list of the problems with the witnesses on which he had relied, and some errors of arithmetic.

I was stuck for graphics because I didn't have the time to do anything elaborate. Nor did I want to be hemmed in by some visual image I had chosen to use. So I made twenty-four copies of the government's exhibits and brought a supply of pencils to court. When I reached the point in the cross where I attacked the numbers of the first calendar year, I gave the witness his chart and passed a copy to each juror, each alternate juror, counsel, judge, law clerk, and court reporter.

I could then direct everybody's attention to a particular entry and quiz the witness about it. If I wanted to make sure everybody was watching the witness and not reading the chart, I would say, "Now, Agent, please look right at the jurors and tell them. . . ." A side benefit was that the technique almost guarantees that the judge will follow along--and the jurors see the judge doing so.

Here is an edited sample:

Q. Agent Smith, I want to ask you now about the $50,000 item for the year 1976. Do you see that, sir? Will you tell the jurors please how they can find it on their copy?

A. It is on page 3, about half way down the page.

Q. Do you remember, sir, the accountant who testified here telling the jury that this check for $50,000 was marked "Expenses"?

A. I remember that.

Q. In fact, sir, let me show you the check, Government Exhibit 472. That's the check?

A. Yes, it is.

Q. It shows, at the bottom, "Expenses"?

A. Yes.

Q. Would you tell the jury why you on your chart here, you included $50,000 as part of Mr. X's taxable income, when everybody knows that expense reimbursement isn't taxable income?

A. I didn't think the evidence sustained the idea that it was a deduction rather than income.

Q. You are a Special Agent of the IRS, aren't you?

A. Yes.

Q. That means you get to carry a gun?

A. Yes.

Q. You weren't always a Special Agent, were you?

A. No.
Q. You used to be a Revenue Agent?
A. Yes.
Q. When you were a Revenue Agent, you used to do audits on people just like members of the jury, and make them justify their deductions. Isn't that right?
A. Yes.
Q. In those audits, who had the burden of proof?
A. The taxpayer.
Q. But this is a criminal case, isn't it, Agent?
A. Yes.
Q. Look at the jury, Agent, and tell them who has the burden in a criminal case of proving things.
A. The government.
Q. That's right. And what is the burden of proof that the government has to meet?
A. Beyond a reasonable doubt.
Q. But you decided to count this check as income rather than expenses, which is what it says on the check, because you didn't think that the proof sustained the proposition that it was expenses? Is that what you've told us?
A. Yes.
Q. Who has the final word here about whether or not you have sustained your burden of proof?
A. The jury.
Q. And if the jury decides that you have not sustained your burden of proof on this $50,000 item, how would they have to adjust your figures on this sheet where you claim that you show Mr. X's income for 1977?
A. Well, it would be deducted from the total.
Q. So, the jurors would look down here on the lower right-hand corner of the sheet where you have the figure $375,000, and they would just subtract the $50,000 right off of there? Isn't that right?
A. Yes, that is what they would do.

Much later, the judge--by then retired--told me that the cross of the summary witness had done a lot to change his own perception of the case and his prediction of how the jury would vote. The judge gave the jurors permission to use a pencil to follow the testimony, although we had to collect the copies when the witness stepped down.

On reflection, transparencies might have been better, or at least as good. But the multiple copies strategy put the jury more into the process of my cross-examination and I think contributed to the jurors' assessment that the agent was the government's "worst witness."

You may ask how we learned of this assessment. The jurors took seriously the admonition not to deliberate on their verdict until the case was submitted to them. Among their ways of not deliberating was to take a daily informal vote on "best witness" and "worst witness." The defendant's former wife (who testified for the defense) won "best," and the testifying case agent won "worst."

LARGE POSTERBOARD CHARTS

Most of the work of large charts is better done by the ELMO, overhead projector or Power Point. When you consider the costs of a first-class version of each one, the relative benefits of large charts diminish even more. However, modern photographic and xerographic

reproduction techniques make some sophisticated chart work easier than before, so it may be possible to generate smaller images on a computer and have them blown up. I have sometimes made up or typed out 8-1/2 x 11 sheets and had them taken to a copy service to make large charts for courtroom use. This is inexpensive and quick.

There are some jobs for which charts are the illustrative material of choice. If you have an image that you want the jury to see as much as possible, put it on a chart. Suppose your case involves a collision at a dangerous crossroads. The danger, you say, is immanent in the way the streets come together, or perhaps the terrain. Witness after witness will describe the scene. You want them all to use the same sketch map but to be able to compare their versions. You need a chart, sized to fit your courtroom, but large enough to be seen by the judge and jurors without squinting or straining. You may get away with leaving the chart on an easel near your counsel table, even when it is not being used. You couldn't do that with a transparency. To use the chart for multiple witness examinations, put a couple of alignment marks on it, and use large acetate overlays clipped to the top.

The professional chart makers, of whom there are many, can create charts with as many layers and image changes as you like. For example, you can use Velcro strips, so that additional materials can be added to the display. In a recent case, I wanted an expert witness to talk about the development of sophisticated crude oil refining techniques. Most people think that crude oil is used pretty much as it comes out of the ground and that refining it into products is neither expensive nor complicated. We needed to address these issues.

We had a choice of themes to present the information. One can visualize refining techniques developing in at least four ways--technological innovation over time, relative cost, the range of products that can be made from a particular crude oil, and the use of given processes as a stream of crude oil moves through the refinery. Interestingly, in this example, the order of topics will be the same no matter which of these you choose as an organizing theme because developments in refining have mainly consisted of adding additional, expensive units that produce a greater amount of high-end product like gasoline from a given quantity of a given type of crude oil.

Our expert begins with some crude oil and product samples. He could also use some models of hydrocarbon molecules. Now we turn to the chart. The large posterboard depicts a schematized version of a simple refinery, which basically takes crude oil and obtains the products of distillation. On the right side of the poster is a dollar figure, representing the cost in today's dollars of this unit. There might also be an indication of the product mix obtained. With time, progress, and money, we can use less desirable crude oils more efficiently to make more "light" products such as gasoline and jet fuel. Our expert uses schematic models of additional parts of the refinery, which are revealed as he takes away blank pieces of posterboard that have been covering them up. As he reveals each new component, he takes away a blank rectangle from the right side, exposing the cost figure for the new unit. When the expert has finished the description, the chart shows a modern refinery as well as complete cost and production figures.

If the chart summarizes evidence, it may itself be admissible. In that case, take a large-format Polaroid shot of it in its final form, because your photo stands a much better chance of going to the jury room. Alternatively, if the chart began as a computer-generated graphic, you can make a smaller copy of it. The copy should, however, be larger than a standard sheet of paper, and on stiff stock, so that the jurors can find it easily among the exhibits.

This example shows the power of the chart. You can use the same technique for any linear event, regardless of the "line" you choose, which may be time, money, the expert's trip through the data, or something else.

Two technical notes: Notice that I have the expert taking away blank pieces of posterboard to reveal the finished work. In this way, the finished chart is on a single surface that you want the jury to continue to see. Second, the "posterboard" is in fact a foam panel covered with art paper, which you can get at an art supply store.

You can glimpse the power in this process in preparing an accounting or economic expert's testimony, illustrated in understandable segments, as described in later chapters. If your courtroom is so equipped, and your expert is a good teacher who uses computer image in daily work, you can use Power Point to create this kind of imagery. Remember though to keep it simple. The graphic effects should be the same ones that the witness would use in talking to a community college or high school class.

Here is another example of the way that items can build on one another by using charts or Power Point. In a wrongful death case, it can become difficult to separate the items of damage and to quantify each of them. If the case is to be submitted on special issues, the plaintiffs' damage presentation must be precise, detailed, and memorable. You risk overpowering the onlookers, including the jurors. I have chosen a plaintiff's expert, but the same technique can be used to deconstruct damages in the defense case, as discussed in Chapter Fourteen.

The numbers expert builds conclusions an item at a time. He uses a chart that groups the items by topic; as the blank rectangles peel away, the column of numbers becomes larger until it is time to add them all up. This chart, or a good copy of it, should be admissible in evidence. Again, the expert is up at the easel while testifying, helping to put the points across.

THE OBJECT ITSELF

If you doubt the power of symbols in litigation, your lawyer cynicism has so far overcome your humanity that you need a rest cure. The courthouse in which you try cases is probably filled with symbols, from the image of justice in the lobby to the seal behind the judge's bench. Maybe, where you live, the symbols have fallen on hard times. I wrote this more than twenty years ago about a courtroom in New York:

> Someone, in a forlorn battle to preserve the trappings of justice, had put a large plastic bag over the American flag in the corner to keep it clean. The bag itself had yellowed and was covered with grime. And in back of the judge's bench--not a bench really, just the most comfortable chair in the house--an incomplete set of aluminum letters proclaimed
>
> IN GOD WE RUST

In all societies, symbols of life, belief, or state are given a special place. Our totemic ancestors understood not only the value of the symbol itself, but also the special consideration given to those who were permitted to handle it. If the totem of the tribe was an animal, the priests and elders were thought to gain or possess special powers by eating it.

The exhibits in evidence in your trial are symbols that have significance as rational instruments of persuasion, and in the handling and keeping of them in the presence of the trier of fact. The ways you stand, walk, and speak are part of the symbolism of the trial process.

Mocking a symbol that has acquired significance in trial can bring unexpected instant rebuke. I was sitting in court waiting for a jury to return, and, as the deliberations promised to be long, another trial was being held. The case involved allegations that the defendants had falsified the records on firearms shipped in interstate commerce in order to obtain a cache of weapons for some political group--Croatian, if memory serves.

The prosecutors had patiently amassed the records of falsified purchase slips. Knowing the power of symbols, they put these exhibits on the corner of their table closest to the jury, so that the jurors would always be aware of them.

Whenever a prosecutor examined a witness about these documents, he would meaningfully pick them up from their assigned place, conduct the examination, and carefully replace them when he was through.

In the closing argument, defense counsel sought to challenge the symbols, failing to understand the power they had acquired. Striding to the prosecution's table, he picked up a fistful of the documents. He waved them in the jurors' faces and declaimed, "Look at this! Look at this, now what does this mean? What does this mean?"

Juror number 5 responded equably, "Illegal dealing in guns."

Defense counsel compounded the error by quickly dropping the papers back on the prosecution's table and moving for a mistrial. The motion was denied; after all, while the rhetorical question is recognized as far back as Aristotle, in the real and modern world one ought not to ask unless one is prepared to listen to the answer.

In one case, our story was that the other side was using the lawsuit to get out of a contract that was fair to both sides. The contract was the center of our case. I had a copy of the contract to use in the opening statement, with an official certificate on it attesting that it was a true copy. The contract had a special place at counsel table, in an easily identifiable folder. Whenever it was time to examine a witness about the contract, I would use that copy. I might put the exhibit itself in front of the witness, but that copy became one of our symbols.

If you represent a person or entity with a symbol, consider using the symbol throughout the trial. Defending a multidefendant antitrust case, I directed that our exhibits all carry our company logo to set us apart from the plaintiffs and the other defendants.

What are the lessons? First, that a major exhibit, identified early, can become a powerful symbol. Second, and more important, the thing itself is often more powerful than a reproduction. In most cases, the documents were originally handled by the witnesses in their paper form. I think something is lost when you don't have the witness handling the piece of paper as she handled it to begin with. Moreover, I want the witness and the jurors to have the chance to see the documents and to arrange them as they wish when they deliberate.

In a product liability case, your symbol might be a report showing that a safer alternative existed. In a civil rights case, maybe a pamphlet copy of the Constitution will do. Perhaps a few key depositions will always be on the counsel table.

Of course, objects can both empower and disempower. A gun or knife may be scary enough that its message is lost--no matter who is brandishing it. If you try cases in a community where gun racks and pickup trucks are familiar sights, the symbol means something different than in another place.

In the courthouse where I first practiced, old-timers told of a suit over allegedly inflammable children's clothes. The lawyer for the company thought it significant that the clothes would not catch fire unless exposed to an open flame--or equivalent heat source--for many seconds. So he had some of the clothes in court--and had a witness set fire to them. Sure enough, it took some doing to set them alight.

The jury brought in a plaintiff's verdict. The courthouse observers--whose view I tend to share--said that the image of kids' clothes burning canceled every other message, including the one about how hard it was to set them afire.

There is another good story in here. In all big cities, and not a few smaller ones, there is a group of court buffs who sit in on interesting trials. Mostly these are older folks who regard trial watching as better than the soaps. Often, they will share powerful insights with you about your trial technique. I was in the middle of a political corruption case when my partner reported that the court buffs had foregathered in the men's room and were imitating one of my favorite cross-examination gestures. It made me stop and think whether I was appearing too contrived.

PAD OR BLACKBOARD?

Almost every courtroom has one of those blackboards or whiteboards on a stand that can be carted or wheeled around. You can use these while examining a witness. A witness can, with permission, step down and illustrate something. You can write things to use in closing argument. Sometimes the board swivels around so you can write something on it to be revealed when the time is right.

I do not like blackboards. Buy and use whiteboards instead. They are better than chalkboards because one can use washable felt-tip markers in many colors. They can be taken to court. When you write on them, the jurors are not gritting their teeth in fear of that fingernails-on-the-blackboard screech.

Sometimes you cannot easily get whiteboards to court. You can buy large tablets of white paper that serve a similar purpose. Take along some large binder clips to attach them to a blackboard, or invest in a folding easel.

Hardware aside, the blackboard, whiteboard, or tablet gives you a lot of freedom. You can use it as an excuse to move from the lectern or counsel table to make your examination more animated. You can ask the witness to move down in front of the jury box. You can underscore key concepts that have appeared in the opening statement and are going to reappear when other witnesses testify and in the closing argument.

In many criminal fraud cases, there is a serious issue of valuation. The prosecutors, supported by an informer-witness, argue that the defendant has inflated the valuation of property as part of a scheme to cheat the bank regulators, the revenue collectors, or the investing public. Typically, the government calls an investigator as a summary witness. Laden with charts, the witness summarizes the testimony and exhibits. On cross-examination, use your paper tablet or the whiteboards. You might begin by writing "Collateral," "Insider," and "Documents." As the examination begins, the juror is more likely to be looking at the cross-examiner, not at the government's charts. This examination is a composite of several:

Q. Agent, let me begin by asking about collateral. The price of land in this corner of Texas has been up and down a lot, hasn't it?

A. It has varied some, yes.

Q. In fact, you have seen situations where the valuation of a parcel of real estate will double overnight, correct?

A. I have seen that, but not very often.

Q. You are not a real estate appraiser, are you?

A. No.

Q. You do not live in Texas, do you?

A. No.

Q. So you cannot tell us the history of land prices in Texas, can you?

A. No, I cannot.

Q. I am showing you Government Exhibit 5407. That is an appraisal on this Circle J land that supports the amount of the loan that was made, correct?

A. On its face, it does.
Q. On its face. I will come to that. Your answer is that the document supports the loan?
A. Yes.
Q. And the jury can look at this Government Exhibit 5407 and see that, right?
A. Right.
Q. They do not need a CPA or a Special Agent from Washington in order to see that, do they?
A. No, I guess not.
Q. Well, do you have any doubt about it?
A. No.
Q. Coming to the phrase you used, "on its face," you want to say that this appraisal sort of fudged, right?
A. That's right.
Q. You were not there in that bank when this appraisal was discussed, were you?
A. No.
Q. The people there were my client Tim Ransome, the appraiser Mr. Wolfert, and a bank vice-president named Lou Anthony, correct?
A. That's right.
Q. Mr. Wolfert and Mr. Ransome say that the appraisal was honest, right?
A. Right.
Q. Mr. Anthony says it was phonied up?
A. He did. The jury heard him.
Q. Exactly, sir. And who is going to decide whether Anthony is telling the truth or whether Mr. Ransome and Mr. Wolfert are telling the truth?
A. The jury.
Q. And that's the American way, isn't it? Trial by jury?
A. Well, yes.
Q. Tell the jury about Mr. Anthony. Did you ever talk to him before August 5, 1983, when he did not lie his head off to you?
A. I would not say he lied his head off. He was not candid with us until he made a plea bargain.
Q. I am sorry. I didn't understand your answer. It is a fact that Mr. Anthony habitually lied to you, right?
A. That is right.
Q. And Mr. Anthony's story is one basis for your saying that this loan did not have enough collateral?
A. That is right.
[You might draw a line through "Collateral."]
Q. And when we come to "'Insider," sir, you told this jury that there was a silent partner in Circle J who was a director of the bank, correct?
A. I said that there was a silent partner, and that your client knew that, right?
Q. I am sorry, Agent, I don't mean to fuss with you. But please look the jury straight in the eye and tell them the name of the only human being in the world who ever told you that Mr. Ransome knew a bank director was in this deal.
A. Well, it was Lou Anthony.
Q. I am sorry. Could you repeat that?

A. Lou Anthony.

Q. This is the Lou Anthony you just told us a moment ago was a liar.

A. I didn't say he was a liar. I said he had lied.

Now is the time to draw a line through "Insider," and pause briefly. In one case, I turned back to the witness and said absently, "Would you buy a used car from Lou Anthony?" The prosecutor stood up. I started to say, "Withdrawn." The witness blurted out, "If the price was right." Some jurors actually looked at one another and shook their heads, and, in a postverdict discussion, they said that was the "worst answer" by the "worst witness."

Most of the time, your use of the blackboard, whiteboard, or paper will be illustrative and evanescent. Sometimes, however, you can offer this material in evidence, and you had best be prepared to do so. If, for example, a police officer is describing an accident scene, and makes a sketch while testifying, you can mark the sketch and offer it, provided you have asked him to write on a large pad of paper.

If your witness starts out on a whiteboard or blackboard, admissibility presents a practical problem. Your options are to use one of those electronic boards that delivers a color copy of what is written on it when you push a button or be prepared with a Polaroid camera.

MODELS

A model can make spatial relationships understandable. If you are trying a tractor accident case, the important portion of the tractor--from real life or in a model--can help the jury see how the plaintiff got his hand in the machinery. If your case involves a refinery, an apartment block, or some other complex collection of objects, a model can help.

A large model will sit in the courtroom as a silent teller of your story even when a witness is not talking about it. Jurors do not listen attentively to the witnesses all the time.

Besides being admissible, the model must satisfy another canon. It must never lend itself to uses that cast doubt on your case. You have passed off the model as a substitute for the real thing, or even as a piece of the real thing. If it fails to work satisfactorily when required to do so, your credibility suffers. This is a special instance of the general rule to avoid experiments in the courtroom.

The model maker, or someone who supervised the work, should be called to describe how the model was built. What scale is used? Are any parts simplified or left out entirely? Why? The final question will always be, "Based on what you have told us, does this model fairly and accurately represent [whatever you have said it does]?"

VIDEO IMAGES

The books on demonstrative evidence, and the commercial providers of this high-tech persuasive material, tell you what, how, and--often most important--how costly. I focus briefly on issues relating to examination of witnesses.

Videos can be live or animated. If a live video was taken at the event, it is admissible as a photograph. Video reconstructions can be live, animated, or a combination of the two. They may be offered in evidence or used only for argument and illustration.

All torts lawyers have seen or heard of the "day in the life" video designed to show the plaintiff's disability. These videos work best when narrated by a family member or treating physician.

A professionally produced video can explain complex events and processes to a jury better than any competing evidence. For example, in a case involving recovery of crude oil, the oil company produced a video that showed personnel and equipment moving to a drill site. It then used animation to depict the underground processes by which crude oil was recovered. The

overall impact was positive. In an antitrust case, the court permitted the parties to show a fifteen-minute video, combining actual footage with animation, on how a refinery works. Note that the video was shown by agreement, which avoids knotty problems of admissibility.

More controversial is the animated, often computer-generated re-creation of a disputed event from information gathered by the expert.

The expert sits in the witness chair next to a video screen, holding a light pen. At any point, the image can be frozen, and the expert can use the light pen to show significant details with circles and arrows.

In another use, the animator takes available data and makes a video of what must have happened to a driver, inside the cab of an industrial vehicle, when it was struck by a passing truck. The video can be stored in any number of formats. Videotape is the least expensive, but the most difficult to handle in court because it takes time to cue the tape. CD-ROM and DVD-ROM technology has the quickest retrieval capability and the most exhibition options, and it can be integrated with a computer central processing unit with an interface card.

Production of these exhibits can be so expensive, and revising them so difficult, that admissibility issues should be resolved long before trial. The root question is whether the video fairly represents an event without unduly trespassing on the jury's function. The jurors' job is to make inferences from evidence of an event; it is often arguable whether they need an expert computer graphics person to re-create an alleged reality.

Moreover, the information on which the graphic material is based may be questionable and, if presented through witnesses, can be cross-examined. Counsel cannot cross-examine the video, though the sponsoring witness is fair game.

To make the video effective and admissible, take the witness through the process of making it. I have interviewed jurors who spoke scathingly of a computer graphics video expert who arrogantly overstated his own abilities and the reliability of his product. Suppose your witness has prepared a cartoon or animated version of an air crash, using the FAA tapes, the cockpit flight recorder, known information about the weather near the airport--including radar data, charts of the airport area, and investigators' reports. All of this background information is itself admissible in evidence, and you should pile it up on the counsel table. Establish the witness's qualifications to reconstruct the events. Move efficiently through the evidence used as the basis for the exhibit. Then offer it.

Be not afraid of your opponent's high-tech wonder, and be skeptical about making your own case too fancy. A high-tech exhibit is no more reliable than the evidence on which it is based and therefore is no better than the reliability of the sponsoring witness. In a homicide case, a witness made a video graphic reconstruction based in part on a tape recording of a 911 emergency call. The witness claimed, in addition to technological expertise, the ability to tell the differences among different kinds of gunshots on the tape recording. Cross-examination of such a claim uses the same techniques as with any "expert" who was not present when the events happened but who is willing to imagine how things must have been.

Sometimes the technology comes prepackaged. If so, use it. Many doctors, engineers, architects, physicists, and others use computer imagery in their day-to-day work. For example, a doctor who has done a CAT scan probably has a videotape of the scan that appeared on the screen as the test was being done. This is different from a re-creation; it is the real thing. Using the principles discussed in Chapters Eleven and Thirteen, you can guide the doctor through the video and make the expert opinion truly accessible to the jurors. They are empowered to see

what the doctor saw. The same technique can be used with any expert whose ordinary duties include use of computer modeling.

I have vetoed the use of high-tech exhibits when they would look obviously expensive and would reinforce my client's image as a "win at all costs" party. I always look carefully at the vulnerability of the exhibit, whether I am thinking of using it or considering how to oppose its introduction. As a proponent, you must anticipate your opponent's moves.

As an opponent, I usually ask for the right to take the sponsoring witness on the voir dire out of the jury's presence. I use the same cross-examination techniques as with an expert witness. The basic principle is the computerese acronym GIGO, which stands for "Garbage In, Garbage Out." A computer, whether it is making spread sheets or animated graphics, does no more than rework the data it gets. If the data are unreliable, the result is, too. Since the visual impact of the animated material is great, it is often not sufficient to reply that the opponent can cross-examine after the jury has seen the exhibit. The risk of misleading and unfair prejudice may be too high.

I handled a criminal case on appeal. The trial court had admitted an animated video that allegedly showed how the defendant entered his brother's home, confronted his brother in a dark hallway and shot him five times. There was no dispute about the shooting, but the defendant claimed self-defense. The producer of the prosecution's animated video had based the sequence and timing of shots on another "expert's" opinion. The victim's paramour had dialed 911 as the altercation began. The "expert" identified popping sounds on the 911 tape as the shots from the defendant's .22 rifle. This expert said the "pops" were a "signature," unique to a particular model of gun and to a particular place where the shots were fired.

The "expert" lived in Florida and the case was in California. So he test-fired a similar rifle in the hallway of his own Florida home and pronounced his results good enough to simulate the actual shooting conditions. So the video was based on a set of assumptions that were, to say the least, open to attack.

The video producer added to the problems. To rebut any claim of self-defense or provocation, the video showed the animated shooter taking cover, aiming, crouching for a better firing position, and so on. None of these actions was uniquely consistent with the ballistics evidence of bullet trajectory, and the defendant had a different version of events. The defendant said that his brother had, in a drunken rage, threatened to kill him. Therefore, he had come to the brother's house armed. The victim confronted the defendant in the dark hallway holding something that looked like a gun. The shooting began.

Trial counsel had not only filed extensive legal memoranda on the "experts" and the video, but had also cross-examined the witnesses effectively. The court of appeal held that the video should not have been admitted. It was not sufficiently related to provable reality.

There is nothing inherently wrong with video. Indeed, jurors are accustomed to getting information from television. However, your first instinct must be to keep it simple; you do that by first choosing a witness who can persuasively teach the principles you want to get across, then working with that expert to develop the visual aids with which she feels most comfortable. If a high-tech wizard dictates the form of your case, your props may get in the way of your story.

CD-ROM AND DVD-ROM DOCUMENT STORAGE AND RETRIEVAL: ANOTHER CAUTIONARY TALE

CD-ROMs and DVD-ROMs look like a compact discs from the record store or a videodisc from the movie store. I have been before a good judge who strongly urged us to invest in this technology to show documents to the jury. He was convinced that the investment of

several hundred thousand dollars would greatly help the lawyers, judge, and jury during a multimonth trial with thousands of exhibits. My client settled out before trial, so I cannot know with certainty if he was right.

The nonsettling parties went to trial with a truncated version of the setup. The courtroom was a mess, with video equipment blocking movement and vision. In my opinion, the system did not do its job. What is the "job?" The system retrieves documents and shows them. Witnesses and counsel can use light pens to underline and point. Deposition transcript can be called up. The same system can be used, if it is expensive enough, to play videotape deposition excerpts or deposition summaries. Some judges and lawyers like the idea of summarizing and extracting depositions rather than playing parts of them. They will tell you that the impact of a multimedia event based on video rendering of documents and testimony is overwhelming.

For almost every case and almost every lawyer, simpler is better. Every trial lawyer needs to assert courtroom control and case control. You lose the former when the equipment is in the way and the latter when the mass of documents and depositions obscures the story you are trying to tell. My response to the laser disk is that both sides should be compelled to reduce the number of exhibits on their lists to a manageable number. The jury cannot keep track of thousands of exhibits, except perhaps through summaries that are independently admissible. There is, therefore, no rational reason to have a machine capable of storing and displaying thousands of exhibits.

In the case of which I speak, the other side argued for making the courtroom into a high-tech area by saying, "We need a laser disk system because we have 20,000 exhibits."

I replied, "Nonsense, Your Honor. Nobody has actually tried a jury case with 20,000 bulky exhibits. I don't think it makes sense. We need to sit down with the lawyers on the other side and hammer out which exhibits are admissible and will really be used. In their proposed pretrial order, I have valid objections to two-thirds of what they have marked." The trial judge ordered the parties to confer.

Some courtrooms are already wired for the high-tech equipment. If that is your situation, I maintain the position I set out above. Use the gadgets to emphasize the tangible, memorable quality of exhibits the jury will be able to handle later. Use short deposition excerpts, because long ones put the jury to sleep. Remember your job: to empower the jury to argue in deliberation for your position.

Notes to Chapter Six

1. The Wigmore quotation is from 3 J. Wigmore, Evidence § 790 (3d ed. 1940). For a more complete treatment of themes in this chapter, I recommend Gregory Joseph, Modern Visual Evidence, published by Law Journal Seminars Press and updated regularly. There are several chapters on demonstrative evidence in Litigation Manual 2d. Deanne Siemer's chapter in the Faust Rossi book cited in the Bibliography is entitled Demonstrative Evidence and Expert Witnesses.
2. On computers and litigation, there are several helpful articles in Winning with Computers: Trial Practice in the 21st Century (J. Tredennick, ed. 1991), published by the ABA Section of Law Practice Management. See also M. Keating, Computer Evidence, Litigation Manual 2d 754.
3. The "forlorn battle" quotation is from my article in 84 Harvard Law Review.

Chapter Seven

Adverse Examination: Inviting the Enemy in to Dine

It would be better to abandon the Federal Rules of Evidence term "hostile witness," blessed though it be by decades of use. Real or feigned confusion marks the use of the term. In a famous Chicago conspiracy trial during 1969 and 1970, the defendants called Mayor Richard Daley in their case and tried to ask him leading questions. Objections were sustained. "But, Your Honor," defense counsel said, "Mayor Daley is a hostile witness." "Oh, no," said the judge, "his manner has been that of a gentlemen." The judge was wrong about the law of adverse witnesses and wrong about Mayor Daley, who had been seen on national television mouthing the f-word about people with opinions similar to those of the defendants.

RULES AND CASES

Before deciding when, whether, and how to call an adverse witness, you must thread your way through a maze of evidence rules and case law. Federal Rule of Evidence 607 says, "The credibility of a witness may be attacked by any party, including the party calling the witness." Rule 611(c) says, "When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions." Finally, Rule 801(d)(1)(A) permits substantive use of a witness's prior sworn statement.

The trial judge has discretion to permit leading questions on cross-examination of an adverse witness, although the practice is frowned upon because the witness is most likely friendly to the cross-examiner. In a deposition taken by your opponent, using leading questions to "cross-examine" a witness identified with your side may lead to exclusion of the answers.

The Rule 801(d)(1)(A) provision has proven to be a powerful incentive to call a hostile witness. The interrogator is able to use prior statements that might otherwise not be admissible and that the witness now disavows. This tactic is sometimes so transparent that judges forbid it. Appellate courts have reversed judgments when the trial judge permitted a party to call an adverse witness only to offer an otherwise inadmissible prior statement.

You can impeach any witness, but using your right to do so does not guarantee that you can use leading questions. Unless you are calling the adverse party, there is room for argument. The Eleventh Circuit has said that Rule 611(c) "significantly enlarged the class of witnesses presumed hostile." The Advisory Committee Notes to Rule 611(c) say that the language "witness identified with" is designed to relax the old Federal Rule of Civil Procedure standard, which required that the witness be an agent or employee of the adverse party in order to be deemed hostile without further inquiry.

The combination of case law and rules says that if a witness is identified with the opponent in the sense described in the admissions rule, Rule 801(d)(2), hostile witness status is virtually automatic. Beyond that, you must make your argument to the trial judge.

Going back to our Mayor Daley case, Seventh Circuit law today would make it an easy question. In a suit against the City of Chicago and a police officer for killing the plaintiff's dog, the court held that police officers should have been regarded as hostile witnesses. One might argue that the police are there to serve everybody, just as the mayor is, and that they cannot be termed "hostile" to either party. The case law is more realistic than that.

WHEN AND WHETHER TO CALL AN ADVERSE WITNESS

No matter what the rules say, there is a great difference between the witness, called by the other side, who counterpunches on cross-examination and the witness, called by you, who savages you. If you call the witness, the jury expects you to win the encounter. On cross-examination of a witness called by the other side, a draw will sometimes do. The jury expects

parties to move the ball and score during their case. This is the usual understanding of the adversary system, and modifications such as Federal Rule 607 cannot change the popular perception.

Jerry Solovy and Robert Byman cite a telling example of the misfiring adverse witness. In a recent trial between two brothers who are fifty percent shareholders of a closely held company, the dissenting brother (call him Cain) claimed, among other things, that his brother (Abel) had purchased $200,000 worth of gold with company funds and attempted to conceal the purchase from Cain. In his deposition, Abel was asked, "Did you have the gold stored at the Jefferson State Bank to keep Cain from finding out that you had bought the gold?" Abel answered, "Yes, I did not want him to find out."

At trial, Cain's counsel called Abel as an adverse witness and asked, "You stored that gold at the Jefferson State Bank in order to keep your brother from finding out that you had bought it, isn't that right?" Abel admitted, yes, he had done that because they needed gold to run the business, and every time Cain had heard that Abel ordered gold, Cain called the supplier and canceled the order. So Abel decided to keep the purchase secret, but only for a few days, to keep Cain from "destroy[ing] the company's business out of spite."

The surefire impact of reading the deposition transcript and letting Abel and his lawyer explain it was lost. Of course, one could fault the plaintiff's lawyer for giving the witness a chance to explain instead of simply getting him to acknowledge the prior statement and making him read it to the jury. But many judges will let witnesses on cross-examination explain answers, and in any case the explanation will arrive just as soon as cross-examination begins.

The deposition was admissible as an admission of the party-opponent, whether or not the defendant testified, and regardless of whether the witness was available. If the plaintiff had simply offered the choice morsel, subject of course to the rule of completeness, the defense would have had to wait until its case-in-chief to give the explanation.

This example captures the dilemma. If your principal purpose in calling an adverse witness is to gain admission of a prior statement, the cost may not be worth the benefit. The prior statement may be admissible in any case, as in our example. If the statement is not admissible, the trial judge may well forbid you to call the witness for so transparent a purpose.

The other horn of the dilemma is that to avoid being hurt by the adverse witness, you would ordinarily not call her unless you had enough prior statements in hand to guarantee control of the examination.

In sum, I agree with Solovy and Byman that almost every bit of evidence you can get from an adverse witness can be presented more easily and safely, provided that you have taken proper discovery. In one criminal case, we avoided calling an adverse witness by asking every government witness on cross-examination if they had met this person, and whether he would be testifying. Finally, the prosecutors took the foolish risk of putting him on, and on our cross-examination he helped the defense a great deal.

We can test this assertion by thinking of cases in which adverse testimony is usual, for example, where a plaintiff calls the physician in a medical malpractice case, or a plaintiff calls the other driver in a negligence case. If there will be other witnesses to the same events these witnesses describe, and if you are going to argue that these witnesses are mistaken (or even untruthful), it is better to wait until you have firmly established your own version of events before you give them a platform.

Should you ever call an adverse witness? Of course. Plaintiffs will often want to call witnesses identified with the other side, perhaps even the opposing party. In a product liability,

antitrust, or securities fraud case, the defendants' agents and employees may be crucial witnesses. Of course, they are not going to admit liability, but they have documents, they went to meetings, they signed papers, they conferred with others--they performed actions that are consistent with the plaintiff's version of the case. The more the other side's witnesses can be compelled to admit facts essential to your case, the fewer matters over which to argue to the jury.

In the kinds of cases we are discussing, you will have depositions. You may not be able to use them because the witnesses are available. If the depositions give you sufficient control so that you can elicit the helpful information and then quit, calling these witnesses in your case can be persuasive. If you plan such a tactic, you will need to take precautions. First, tell the jury in the opening statement: "We are going to start by calling as witnesses a lot of people who work for the Squamus Corporation. The rules here let us do that. Now, you wouldn't expect they will agree with our whole case, and they won't. But they will admit to you the following things. . . ."

The other precaution is to move in limine under Federal Rule of Evidence 611(b) to limit cross-examination to the scope of the direct, and then reconsider your position if the motion is denied. In one case, plaintiff's counsel announced that they would call several dozen employees and former employees of the defendants. The defendants quickly moved for leave to cross-examine beyond the scope of direct, so that they could turn each adverse witness's appearance into an endorsement of the defense position.

If the judge is going to permit this kind of interruption of your case-in-chief, calling the adverse witnesses becomes a much more risky business. It is unlikely that the court of appeals will reverse a trial court judgment for rulings under Rule 611(b), regardless of which way the judge leans. In jurisdictions that permit wide-open cross-examination, the chances of an adverse witness inflicting damage are greatly increased.

Your best tactical and evidentiary position is this: "Your Honor, I am going to call Dr. Jones for a brief examination, limited to the following items. It serves no purpose to permit a cross-examination broader than those limited issues. Indeed, a shotgun cross-examination simply makes the entire case much more difficult for the jury to comprehend."

You will sometimes call an adverse witness who is so marginal for the other side that they will not call him. A technician may have conducted a test whose results are inconsistent with the other side's theory but which do not really support your case. An agent or employee of the opposing party may have authored a series of memoranda that make it unlikely the other side will call him but that are helpful enough that you will take the risk that the employee may explain them away.

Sometimes you cannot get the evidence in as an admission because the employee's duties do not include making statements on this subject matter. Some judges will let the other side mousetrap you in this way: The judge is convinced it is unfair to let the written evidence in without calling the employee and giving the other side a chance to "explain" the documents. The risk/benefit calculation will depend on the extent to which the jurors will think that someone in that witness's position is so accustomed to saying exactly what he means in memoranda that the subsequent explanation must be discounted.

In one case, an employee of my opponent had handwritten some very powerful comments on drafts of reports. There could be doubt whether the handwritten comments qualified as the opponent's admission. The employee had at one time worked for one of my codefendants. With candid explanation in the opening statement about the evidence, how it came to be, and what it was and was not worth, I opted to call the witness if the plaintiff did not.

Sometimes you have little choice. You learn of the witness after discovery is closed. Or it is a criminal case, and you get only derisory discovery to begin with. You simply have to take the risk.

This brings me to the final tactical consideration. If you are the defendant, you have the luxury of parading statements of witnesses before the jury and then saying, "And if they don't call Mr. Jones to testify, we are going to call him in our case." The plaintiff can try to wait until rebuttal to call the adverse witness, but can hardly announce that strategy in the opening statement because there are limits on rebuttal, and the defense might not open the door.

In an antitrust case brought by a public entity, and in which I represented a defendant, discovery had yielded up a draft reports by public officials about the subject matter of the case. Employees of the public entity had written derogatory comments on these reports, casting doubt on the plaintiff's theory.

These employees were ideal candidates for adverse witness status. They were hostile under the rule. Their own writings gave the examiner control over their testimony by means of leading questions. Even in this case, however, one might be able to get the same material in evidence during cross-examination of the plaintiff's lay or expert witnesses or by invoking the rule of completeness, Federal Rule of Evidence 610 if the plaintiff offered the reports themselves in its case.

HOW TO DO IT

In adverse examination, you should hesitate to do anything that will give the witness a platform. The ideal examination consists of a series of short statements with which the witness must agree or be impeached.

"You are Miriam Wilson?" "You were a registered representative at Squamus Corporation?" "That was in 1985 and 1986?" "Can you give us more exact dates?" "Mrs. Albertson was your client?" "You called her on January 5, 1986?" "You don't recall the date?" "Here is your call slip, Plaintiff's 105. Does that remind you that it was January 5, 1986?"

Take the witness through the documents.

"Mrs. Albertson said that she would follow your advice and buy the stock?" If the answer is "Well, she said she would buy it, yes," your response is the same as if you had encountered an evasion on cross-examination. One repetition for emphasis, and then the impeachment:

"Mrs. Albertson said that she would follow your advice and buy the stock?" If the answer is other than "Yes," go through the routine of making the witness read out the deposition answer in which she admitted that Mrs. Albertson bought the stock on the witness's advice. After all, you wouldn't ask that question in that form unless you had an impeachment answer in that form. The surest method of control is to have the witness's prior statements--in whatever form--and to make the witness acknowledge them one by one.

Get through the items that compelled you to call the witness--and then quit. Give thanks that no disaster befell you.

If the witness begins to unravel the adverse evidence that you are trying to introduce, or is otherwise making a fool of you, what do you do? You cannot just give up. You will hear in summation about how quickly you backed away when confronted with powerful opposing evidence. You are permitted some repetition, as on cross-examination, so consider yoking the unfavorable answer with a favorable one, and then quickly moving on. For example: "It is your testimony, then, that you did not tell Mrs. Albertson that company's financial reports looked funny, but you thought she knew that? Correct?"

In addition, you must save one or two surefire strong questions so that, no matter what happens, you end strong.

The need for control should not lead you to write out your questions or to stick so closely to an outline that you miss gifts from the witness. Often you can call an adverse witness with little or no notice. Even when you have subpoenaed the witness and kept her waiting awhile in the witness room, the witness is nowhere near as ready to testify as someone your opponent called, examined on direct, and then tendered to you for cross-examination.

Perhaps your opponent did not foresee that this person would be a witness and did nothing to prepare him. The short time available between the summons and the testimony may not cure that problem. Or perhaps the opponent has simply not yet had time to prepare the direct examination and ready the witness for cross-examination. All I know is that some adverse witnesses take the stand and look like deer in your headlights.

In one case, plaintiff's counsel had seen that the defendant had done a fairly lackluster job of preparing its witnesses for depositions. At trial, a fairly senior executive of the defendant was sitting in the courtroom, presumably to "represent" the entity. Plaintiff's counsel took a calculated risk, betting that the executive had not been prepared to testify, or at least not yet. Right after the opening statement, he called the executive as his first witness.

The scene was dramatic, and the tactic successful. The problem, of course, is that one cannot overgeneralize from this one event. We litigators love dramatic gestures and sometimes do not think beyond the gesture to the risks of playing out the gambit thus begun.

In this one case, the witness's evident lack of preparation was the lawyer's signal to get right to work, ask the questions, display the exhibits, and make the point before the witness settled into the routine of testifying. Counsel finished the examination before the trial day was over, and had planned enough time so that the cross-examination was over as well. In my own experience, I have scored points against adverse witnesses and left them overnight only to find that in the morning they are full of explanations and theories that undercut the previous day's work.

Be alert to the witness's expressions and gestures. Often an adverse witness will start looking at your opposing counsel, to try and check how things are going or even to get a cue. Sometimes the witness will grimace or even smirk. If the gesture or expression has been obvious to at least some jurors, call the witness to account.

"Mr. Johnson, why are you looking at the plaintiff's lawyer before you answer every question?" I know a lawyer who followed up by saying, "You won't get wisdom, or knowledge, or courage, or anything else you lack, by looking over there." That was, however, in a deposition, and it is not recommended courtroom commentary. If you catch a smirk, you may be able to ask, "I'm sorry. Do you find this funny?" It depends on the mood and tenor of your questions and the witness's answers.

The adverse witness will be a rarity in your practice. There is no type of witness whose use depends on thoughtful answers to so many preliminary questions: Does this witness qualify as adverse? Will I be permitted to use the evidence that is responsible for my calling this witness? Do the rules of evidence permit me a risk-free way to admit the same evidence? Will my opponent use the opportunity to break the rhythm and flow of my case, through extensive friendly cross-examination? Will my risks be less, or the impact of this witness better for me, if I defer my questions until I cross-examine?

Notes to Chapter Seven

1. The Eleventh Circuit case is Haney v. Mizell Memorial Hospital, 744 F.2d 1467 (11th Cir. 1984).
2. The dog case is Ellis v. City of Chicago, 667 F.2d 606 (7th Cir. 1981).
3. See J. Solovy & R. Byman, The Adverse Witness: Don't Call Me, I'll Call You, 1990 Fed. Litig. Guide Rep. 251. Compare G. Spence, Questioning the Adverse Witness, Litigation Manual 2d 577.

Chapter Eight

Cross-Examination: Venial Violations of the Ten Commandments

Paeans to cross-examination abound. Wigmore's "greatest legal engine ever invented for the discovery of truth" is most often quoted. The Supreme Court has repeatedly emphasized the fundamental role of cross-examination in criminal cases and has insisted that the lawyer be given the tools to do it and the arena to perform it. Even in civil cases, undue limits on cross-examination will trigger reversal.

I was trying a court martial case, sitting next to my law partner Jane Tigar. The client, while outwardly retaining her composure, became distinctly uneasy as the principal prosecution witness went on and on under the prosecutor's questions. The client passed Jane a note, "Is there any cure for this endless agony?" Jane wrote back, "Yes! It's called cross-examination." They shared the exchanged notes at the next recess, so that I would know what was expected of me.

Cross-examination and confrontation are central to the adversary system, but they are not merely talismanic rituals. Nor are they solely a means of putting questions and getting answers. They are devices for letting the jurors see how the witness reacts, to assess whether they want to believe him. They are a part of empowering the jury, of giving it the tools to decide, and of jurors participating in building the story of a case.

Of course, you can get hurt on cross. There is a Zulu warning about cross-examination: Bhasobha ingozi! Izoshaya wena? Noma ufakazi? It means: It is a boomerang. Will it strike you? Or will it strike the witness?

Cross-examination is about immanence, about what is inherent and indwelling. It is the process of finding and revealing the contradictions in a story told by a witness. You cannot expect to get what is not immanent. Most of cross-examination simply traces the inherent deficiencies in any human perception of events. My mother told me, "don't try to eat soup with a fork." You can't get out of a cross-examination something that is not there, or ask cross-examination to do something that it cannot do. Some lawyers try, and are punished for their insensitivity.

The foreperson of the jury in a capital case was asked about her views of the prosecutors. She said they tried unfairly to influence the jurors by "innuendo." She meant that the prosecutors, doing their cross examinations, would pose and posture, trying to squeeze more meaning from the performance than the witness's answers were giving. The jurors resented this behavior. The reporter asked whether defense counsel also used "innuendo." The juror said yes, that they made clear what they thought of witnesses, but kept their conduct within bounds determined by what the witnesses were saying and how the witnesses were responding.

The rules limit your ability to ask the witness on the stand to explain or comment on the testimony of another witness. This is a marked contrast to other legal systems, such as the British and South African, in which putting others' versions to the witness is often done. Almost all your cross will consist of uncovering different aspects of the same story told on direct. This will especially be true if your opponent is wise enough to anticipate on direct examination any troublesome areas of cross.

Because cross-examination is a process of extracting good from someone who has been placed there to harm your case, and because you are limited by the principle of immanence, cross-examination is said to require control of the witness. Control is important for two reasons. First, the witness has already hurt you. She has gone through all the harmful details of a story. You should exercise control in order not to invite or permit her to repeat.

Second, the witness probably wants to hurt you. The witness is at least situationally against you. Even a neutral observer is cast by the adversary system on one side or the other. The abolition of sponsorship and vouching rules does not change the human desire to be seen as right. (Have you ever noticed how the tenor of a friendly pickup game of basketball or tennis changes when a couple of people stop to watch the action?) The cross-examiner necessarily challenges rightness. The witness looks for chances to reaffirm the right--"Yes, but. . . ." You exercise control to stay in charge.

The goal is to have a working plurality of jurors say "Aha," meaning "We see now the flaws in what this witness has said." Many lawyers do not understand that the "aha" can come at many possible times during trial, and need not even be the result of cross-examination. The jurors can choose to discredit a witness because of what some other witness has said or based on some other evidence; effective lawyer argument shows the contradiction and points to the right result. In short, you don't have to cross-examine every adverse witness.

Even when you do cross-examine, the "aha" needn't occur while the witness is on the stand. Trying to make it appear may lead you to take excessive risks with the witness.

When Edward Bennett Williams had Jake Jacobsen, ex-Treasury Secretary Connally's accuser, on the stand, much of the cross-examination was derided by journalistic onlookers as boring. Ed was taking Jacobsen through a long series of prior inconsistent statements, most of them under oath. In some measure, Ed was showing Jacobsen power--that he had mastered all these facts about Jacobsen, making Jacobsen reluctant to hazard disagreement with the examiner.

The main purpose of the cross was to lay the basis for the closing argument, where the inconsistencies could be spread out again and made part of the story of the case. Then the jurors would say, "Aha!"

It is important, however, to make the witness agree with one or more important elements of the cross-examiner's story. Later in this chapter, we discuss the how and why of that exercise.

The leading writers and speakers on cross-examination ask whether it is a science or an art. If it is a science, its precepts can be taught. If it is an art, they cannot. Or so the argument goes. I reject any such distinction. There are basic principles of cross-examination that every lawyer can and should learn. These principles distill experience, and they honor the essential characteristics of an adversary process. Following these rules can make any lawyer a reasonably good cross-examiner.

In this chapter, however, I want to go beyond rules. It is possible to acquire an art of cross-examination based upon one's sense of case theory and storytelling. For this process, one can suggest approaches and ideas but not rules. If there are indeed ten commandments of cross-examination, I am going to advocate constructive sin.

THE TEN COMMANDMENTS

The best-known rules of cross-examination are derived from the need to control the witness. The late Professor Irving Younger's well-known list is:

1. Be brief.
2. Short questions, plain words.
3. Ask only leading questions.
4. Never ask a question to which you do not already know the answer.
5. Listen to the answer.
6. Do not quarrel with the witness.
7. Do not permit the witness to explain.
8. Do not ask the witness to repeat the testimony he gave on direct examination.

9.Avoid one question too many.

10.Save the explanation for summation.

Other lists abound. Some savants add "No why questions," "Begin and end strong," and "Have a point" to the list. The attentive student adds "Consider not doing any cross at all."

These rules summarize the basics. But in a career trying cases, good sense and good tactics will tell you at some time to violate every one of them. When you do, however, understand that you are doing so and why.

Even on their own terms, the ten commandments do not tell you how to cross-examine. Like the original ten, they are largely negative warnings about pits into which you should not fall.

THE TRUE RULES OF CROSS CONTROL

You want to know how to cross-examine, not how not to. The witness has finished the direct examination. "Pass the witness," says your opponent, or the equivalent in your jurisdiction. The jury expects you to do something.

If your case plan includes not cross-examining, tell the jury in the opening statement: "In this case, we are not going to waste your time on the obvious. When the other side puts up a witness to testify about something that isn't even being disputed here, we will just say, 'No questions.' Or, if the other side puts up a witness that the other evidence shows is just plain wrong about something, I might not cross-examine. Instead, I'll leave it to the closing argument to show how that witness can't be trusted. And, of course, we'll be counting on you to keep an open mind until the case is all over."

But the witness currently before you is not that "no cross" witness. You have to do something. As with every other form of examination, you have internalized the Rules of Evidence. That is, you have a sense in your mind of the form, structure and purpose of the rules, and therefore an innate sense of what is and is not admissible. For example, you may ask leading questions, you have great latitude in asking questions about bias, you are limited on using extrinsic evidence to impeach on "collateral matters."

You know also what a leading question is. It is, according to Bergen and Cornelia Evans's Dictionary of Contemporary American Usage, "simply a question so worded as to suggest the proper or desired answer." By contrast, the classic "Have you stopped beating your spouse?" inquiry "is not a leading question but a misleading question," at least unless the witness has admitted the predicate facts.

Of all the principles of cross-examination, two stand out:

1. Begin and end strong.

2. This is not a deposition.

The second one should be unnecessary. If you think it is, go to court and watch lawyers in your town. What passes for cross-examination is often as inconsequential as a pillow fight in a pizza parlor.

The first principle reminds you that however much sinning you do against the ten commandments, you should always come home to virtue with a tight, strong close in which the witness agrees with a fundamental point.

To begin strong, you must choose an area in which the witness will agree with you. Preferably, the witness will also want to agree with you. What do I mean "want to"? If you are going to cross-examine a police officer on a defect in his report, you will begin by establishing how careful a report writer the witness is. The witness wants to tell you this.

Face the witness. Smile. The smile need not be friendly, but it must be polite. Remember, you want this witness to agree with you. You will see British barristers take a superior attitude toward the witness, lofty and disdainful. You will see American lawyers--real or on television--sneering and snarling. Don't do any of that. With whom will the jury identify in a contest between a witness who is just sitting there and a snarling, sneering, supercilious lawyer? Oh, maybe later, when the jury is brought along to your point of view, you can change mien. But for now, a polite smile.

The next idea is borrowed from Terry MacCarthy. Actually, all good trial lawyers have done what he suggests, but Terry has refined the technique into a "method." The idea is this: Don't ask questions. Make statements with which the witness must agree or suffer impeachment. Most good cross-examiners use leading questions:

Q. You were in charge of the city's oil properties, right?

Q. It was your job to review the prices the city was paid, isn't that right?

You can even eliminate the words "right" or "isn't that right."

Stand up. If the rules where you practice require you to examine from a seated position, start your cross with a document or exhibit that requires you to approach the witness so you have a reason to stand. After the obligatory smile, look the witness in the eyes, and make a positive statement, all the while smiling and nodding.

Q. You were in charge of the city's oil properties?

Q. You reviewed the prices the city was paid for its crude oil?

If the witness agrees with you, but does not answer audibly, give a reminder.

Q. That's "yes"?

This method is particularly effective when you are leading the witness through a series of assertions, each one part of a picture.

Q. You were in the bar?

Q. You were with John?

Q. Somebody came in?

Q. He had a gun?

Q. This person had on a jacket?

Q. Red?

The last in the series illustrates MacCarthy's shining example of brevity: a one-word question. Brevity is, however, not a result but a means. This style of questions encourages the witness to agree with you by a series of "yes" answers. It leads from point to point, giving the jurors a picture of the action.

Best of all, the MacCarthy method lets you jettison most of the ten commandments as unnecessary. You will almost automatically be brief, short, plain, and nonrepetitive. Because your statements are questions only because you verbally punctuate them as such, you are not likely to ask "one question too many," "permit the witness to explain," or "ask the witness to repeat" the direct examination.

If the witness does not agree with you, have your impeachment material ready, to be used in the same fashion:

Q. You gave a deposition in this case? [Pulling out the deposition, or cueing the video recorder, or doing whatever gesture symbolizes deposition impeachment in your case.]

Q. You were under oath to tell the truth, just as you are now?

Q. Your lawyer was there?

Q. You were asked this question and gave this answer? [Reading.]

In this style of cross-examination, you must have the impeachment material so ready at hand that the flow is not interrupted by your pulling it out and using it. You "listen to the answer" in part because you want to administer the discipline of impeachment if it is not what it should be.

Preparing for this kind of cross-examination consists of making a list of points that you want to make and taking the witness through them. Almost the entire list should be made before the witness begins direct examination. If you have not anticipated the direct well enough to make such a list, something is wrong with your preparation. Making a list does not mean writing out the questions. It means making notes in a few words, so you are not chained to your legal pad. The encounter must be between you and the witness. You weaken yourself by breaking eye contact to scan your notes, and you will miss clues that the witness may inadvertently give that will lead you to depart from your plan of attack.

In preparation, you have kept in mind (using the Federal Rules of Evidence as an example) that you may ask leading questions under Rule 611(c). You are generally limited to the scope of the direct examination and matters bearing upon credibility, as controlled by Rule 611(b). However, in many cases efficiency and jury comprehension will be served by a more expansive cross, and case law supports your right to move for relaxation of the rules. On collateral matters, you will not be able to impeach the witness's answer with extrinsic evidence.

When you internalize these rules, you can anticipate problems with your cross-examination. You should consider making a written motion in limine on doubtful matters to protect your rights and to limit your opponent's chance to derail you. At a minimum, you should be prepared with a case or rule citation to justify your actions.

If you are shut off, promptly make an offer of proof out of the jury's presence as to what you would have done if permitted. If the court denies leave to make such an offer, ask to do it at the end of the day. Failing that, write it up, and file it. In any case, you may wish to file a motion to reconsider, listing authorities.

In the heat of cross-examination, as at no other time in the trial, preparation wins the little battles over objections. Making a thorough record can also provide grounds for appeal.

THE THEORY OF MINIMAL CONTRADICTION

Up to now, we have been concerned with the techniques of cross-examination. Most of the essays and checklists deal with technique, as do all of the ten commandments. Lawyers who know the rules often do bad cross-examinations because they do not have a point--and expect from cross-examination more than it can give. They violate the principle of immanence.

What do you want to accomplish with this witness? How will you argue that her testimony fits the story of the case? How will the jury think about the story? You will seldom be able to argue that all the other side's witnesses are liars. Jurors are looking at witnesses and trying to figure out how to make sense out of what they say. They are trying to sort out contradictions and to explain them. By the time you rise to sum up, the jurors will have pretty well figured out what they think of each witness who has testified. The summation is a means of gathering facts for the jurors who lean your way, to use as ammunition in the jury room. It is a time to emphasize pieces of evidence that might be overlooked, such as documents that may have been alluded to but not published in full. It is a time to evoke the memory of testimony and to weave it into a coherent pattern.

Looking through the record you have made, you want to maximize the number of things that fit and minimize the number that do not. Claiming that all the opposing witnesses are liars

violates this principle and calls on the jurors to perform the distasteful job of labeling an entire group of testifiers as perjurers. You will, in trying cases, come to label many witnesses as liars and should not shrink from this duty when the occasion demands. The occasion demands, however, far less frequently than some people think. I conclude this chapter with an instance where "liar" seemed an appropriate epithet.

I call my view the "theory of minimal contradiction." It directs attention to all four of the defects in evidence that cross-examination is designed to show up. These four are meaning, perception, memory, and veracity. A potential cross-examination must focus on all four. Let us see how this works.

MEANING

The witness may have used words that convey one impression to us but which the witness was using in a different sense. This is the problem of expression, or meaning. It is the stuff of which a classic story was told by Dan O'Connell, the great Irish advocate:

> There was this lawsuit over the validity of a will, and one of the attesting witnesses swore on his oath that, at the time the will was witnessed, "the deceased still had life in him."
>
> So I crossed him: "On your oath as a Kerryman, are you telling this jury he was alive?"
>
> "He had life in him, Mr. O'Connell."
>
> "Well, isn't it the fact that you put a live fly in the dead man's mouth before you attested the will?"
>
> "That's what I've been after saying. He had life in him."

In your case, the witness may describe someone as "tall" or "hairy." You may want to make the evaluative word precise. Without some prior statement of the witness, this course risks creating additional unfavorable evidence. With such evidence in hand, there is no reason not to let the witness explain what the imprecise word means.

> Q. You told the jury this person you saw was "tall." Can you put a number on that? How tall?
>
> A. Well, I don't really know . . .
>
> Q. You told the police he was six feet two. Was that about right?

The tone is conversational. The questions are not leading. You have violated the commandments. To what purpose? You have given the jurors a tool to use in evaluating this witness. It is not that the witness lied. The witness told us the literal truth, but used a word that might lead us to get the wrong impression.

Sometimes you can go on to blame the problem on your opponent, who claims after all to be presenting a true story. You end up saying, in effect, "There is no contradiction here. When we take what Mr. X said in the way that Mr. X was trying to tell us, it all comes together."

The problem of meaning is particularly acute when a witness interprets a document. Perhaps it is a document prepared by our witness, and we have the luxury of taking the witness through it on direct, to clarify meaning.

The trouble starts when one of our client's documents is offered by the other side. Sometimes the authentication and admission in evidence come without any chance for cross-examination. The offending document is then like a sword plunged in, for us to pluck out later, after we have bled a little or a lot.

If we are lucky, there is a witness to cross-examine. That witness can help the jury understand that the words on paper may bear more than one meaning--and even how best to see

what meaning is right. Your cross can include major themes such as "the person who wrote it knows best what is meant" and "often when you write something, you go back later and find out that somebody has misinterpreted it." Smaller themes might be based on meanings used in a particular company or office for particular words.

I once had a translator on cross-examination. His relentlessly literal translation of my client's letters was damaging. One major theme was the danger of literal translation. The male witness had worked in a military setting and knew a lot of barracks idiom in three languages.

"Making a literal translation can be very misleading, can't it?"

"Well, it might be sometimes?"

"Let's take an example. Suppose I said to you in French, 'Il y a du monde sur le balcon.' Literally, that is a very polite statement: 'There are a lot of people on the balcony,' correct?" The witness looked at me warily and wide-eyed.

"Yes," nodding.

"But you know from all the soldiers you worked with that it doesn't mean that at all, don't you?"

"Yes."

"Tell the judge and jurors what it really means."

The witness paused, made a suggestive gesture, and gulped. "Stacked," he said. The judge and jurors laughed out loud.

"It is something that men say about women they are looking at, right?" The witness's insistence on literalism was seriously undercut.

The problem of meaning also arises in cases involving videotapes and audiotapes. Sometimes cross-examination alone will not present the issue clearly. An expert witness may be able to explain how meaning depends on context.

PERCEPTION

Chapter One explains that we are all victims and beneficiaries of the Gestalt. We want to remember an event as a whole, and we tend to embroider our recollection so that we can tell a coherent tale. A witness may swear to having seen something that objectively she could not have seen. She may not be a liar, and you need not argue that she is. She may simply not have seen what she thought she saw.

The controversial comedian Lenny Bruce was on trial in New York for making an obscene gesture during a nightclub performance. A police officer swore he had seen the gesture. Defense counsel set the scene carefully. Where was the officer sitting? How was the club arranged? Did this sketch seem to be accurate? Was the stage right here?

The cross built up the objective picture that the lines of sight made it unlikely that the officer had a good view. Counsel unfortunately tried to end with a dramatic gesture, and his verbal shaft went astray. He strode masterfully to the end of the jury box, wheeled, pointed at the witness, and declaimed, "So isn't it a fact that you couldn't actually see Mr. Crotch put his hand on his Bruce?"

You can do the perception cross with short, sharp shocks. You can make a series of statements about where the witness was standing, the lighting, the time available to observe, and the witness's emotional state. Prefer this method when the witness has been trained to hurt you by repeating the direct or injecting prejudicial matter.

As I discuss in more detail in Chapter Nine, an eyewitness is often the worst possible witness. The event she is to describe was brief, upsetting, unfamiliar and ill-lit. Yet the proponent, who may be a police officer or prosecutor, has drilled the witness so often that a new

mental image has been created. The real and imperfect memory has faded with time, to be replaced by a sharp recollection of the prepared story.

The perception cross erodes the story. The erosion must of course continue by going over the number of times the witness has been coached.

If your point is that the witness is honest but mistaken, you may wish to tread a gentler path--and to violate a commandment or two. Set a scene with the witness. Ask where she was standing. Ask how many people were around. Ask what kind of lights were shining. You do not need to structure this examination as a series of tight, leading questions. You will know the scene. You will have impeachment material at hand. Let the witness talk. Let the jury see the witness tell the facts that objectively contradict her version.

Of course, you would not make the mistake of asking the witness to admit that her direct examination does not make sense. The "one question too many" commandment is valid, but it may now be derived from a different premise. You are letting the witness answer questions so that the jury can see her and make up its mind. You are not doing lawyer tricks to keep the witness from talking. By the same token, there is no reason to let the witness argue conclusions by reaffirming some ultimate reality that has now become improbable.

In exploring perception, you may wish to invite the witness to mark on a diagram or map. If you want to work toward a comparison of vantage points, you will have an agreed diagram with multiple clear overlays so that the various witness descriptions can be compared at trial's end.

It may be objected, here as with other sins against the commandments, that the witness who is not on a short leash will very likely jump out at you with a repeat of the direct. For example, an eyewitness may bridle if during your cross-examination you keep referring to the one the witness has identified as "this person," or may react to a suggestion that he cannot accurately identify the accused. That's when you may hear "I picked out that man right over there." Or, "I just know it is this defendant."

These are said to be the untoward risks of letting the witness run free. What should you do? One commandment says "Never quarrel with the witness." There is a judge who will enforce the rule against argumentative questions. The problem with this commandment is that it derives from a faulty premise. Here is the sinner's response. First, I reject such statements as Irving Younger's that the "clever advocate controls a witness, . . . making him say only what the advocate wants him to say."

Too clever by half, I say. The jury knows when you are straining to prevent the witness from completing a thought. Sometimes you want to shut the witness off; the liar, the crafty, and the ruffian deserve no quarter. But the honest witness whose errors you are trying to probe deserves better treatment at your hands.

So you will need to be able to respond to sallies such as "Well, it was your client." Understand that the jury knows which side everybody is on. You could just let it go by, figuring that the jury understands the adversary system. But I like to use these episodes to quarrel openly with the witness in a permissible way--and thereby carry the argument back to the jury.

Q. I understand you have already told the jury that. But you do understand, Ms. Johnson, that the jury has to decide this case?

A. Yes.

Q. You don't mind my asking you these questions, do you?

A. I suppose not.

Q. Because the jury needs to know all the facts that both sides bring out, don't you agree?

A. Yes.

Q. I mean, neither you nor I am going to decide this case, are we? That's the jury's job, don't you agree?

A. Sure.

Q. That's the American way, isn't it--to give both sides a fair chance?

A. Yes.

Q. Well, then, let me go back to this group of photos that the policeman picked out for you to look at.

And back to the job at hand. This is the "Do you believe in America?" line of cross-examination, and I am proud of it. This cross helps discipline the witness who is taking unfair advantage of being permitted to answer civil questions. It reminds the jury of their power and helps them to anticipate your argument about how they should use it.

MEMORY

Most of what passes as "memory" cross-examination is nothing of the sort. The witness says the light was red. In a deposition, he said it was green. The lawyer impeaches with the deposition, then adds, "Was your memory better when you gave your deposition than it is today?" or the only marginally better, "Your deposition was only six months after the accident, and now three more years have gone by, right?"

We know from experience and science that memory of an event drops off quickly and sharply, then continues to fade at a slower rate. Whether memory, once lost, can be refreshed or even revived by such techniques as hypnosis is controversial. It is certainly likely that much allegedly refreshed recollection is a tribute to the powers of lawyer suggestion.

Yet the system of jury trials is based on the idea that public oral recitation of recollected events is the best way to decide disputes. A witness who claims to remember clearly an event three years ago may not be lying. He may simply be laboring under our human need to tell a whole story and our consequent willingness to latch onto devices--such as lawyer suggestion--that fill in the gaps in our memory. This is called "confabulation." The witness may even be unaware that such a process has occurred since, at each retelling of the story, the new version has become superimposed upon the old in the mind's eye.

Faulty memory is not mendacity. However, witnesses can tell remembered stories quite convincingly because they truly believe they are telling the truth. Only occasionally will you be able to develop the entire theme of inherently defective memory and inevitable confabulation. You get nowhere by violating the theory of minimal contradiction. Your style must aim to develop the objective facts that support your version of events and call into respectful question the contradictory statements of the witness. The contradictory witness, the prior statement, pretrial preparation, and the objective facts are four prime ingredients of a lapse-of-memory cross-examination.

The contradictory witness is not wholly available, because you usually cannot ask witnesses to comment on one another's testimony. You can establish that others were present or know "the facts." You can ask about their qualifications and whether the witness knows any reason why they should not be credited. If this witness did not make a report or statement soon after the event, but another witness did, you can bring this out. You need not, in this process, "ask only leading questions." Your mien need not be hostile. You are simply making a list of reasons, to be added to your closing argument, why one point of view is better than another.

The inconsistent prior statement need not be used to suggest fabrication. You can take the witness through the contradictions and use them to observe later what a jumble memory can be.

The drill is almost the same no matter what your ultimate objective. Accredit the statement by a short litany of positive statements, then go through the contradictions.

Q. You made a statement to Mr. Johnson, the investigator?
Q. He came to your house?
Q. This was about a week after the accident?
Q. He took notes on what you said?
Q. He wrote up a statement?
Q. He gave it to you to read?
Q. This is the statement?
Q. It says here that you read it?
Q. It has some changes in your handwriting, on pages four and five?
Q. You signed it right here?
Q. In the statement, you said . . . ?

Sometimes you can tell why the witness has changed some detail, and help the jury to see why the change is so important. I wrote this in a tribute to Edward Bennett Williams:

> In the Connally case, for example, he confronted the witness Jacobsen, who had testified on direct that Connally counted money with a "glove or gloves" in order to leave no fingerprints:
>
> Williams: You told us that Mr. Connally and you had a meeting in his office alone, that he excused himself, left his office for ten minutes and came back with a cigar box and a rubber glove or rubber gloves on top of a pile of money in the cigar box, is that right?
> Jacobsen: Well, it was something like that.
> Williams: No, tell me what it was, Mr. Jacobsen, not whether it was something like that or not. You tell us exactly how it was, Mr. Jacobsen.
> Jacobsen: I believe the rubber glove was on the side of the money in the cigar box. The rubber glove or gloves was on the side of the money.
> Williams: I'm sorry?
> Jacobsen: I say the rubber glove or gloves was on the side of the money, not on top of the money.
> Williams: Now, when you told Mr. Tuerkheimer in your interview with him back last year about this episode, you told him it was a rubber glove, did you not?
> Jacobsen: Yes.
> Williams: And when you testified before the grand jury on March 23rd, you told the grand jury it was a rubber glove, did you not?
> Jacobsen: Yes, sir.
> Williams: But when you testified on Thursday here in this courtroom before His Honor and this jury, you said it was a rubber glove or gloves; is that correct?
> Jacobsen: Yes, sir.
> Williams: When did you decide it might have been a glove or gloves?
> Jacobsen: Between the time I testified before the grand jury and the time I testified here.
> Williams: What was it that changed your recollection from it being a glove to it being a glove or gloves?
> Jacobsen: Just the logic of it being gloves instead of glove.
> Williams: It was the logic of it, is that right?

Jacobsen: Yes.

Williams: Was that because, Mr. Jacobsen, the prosecutors pointed out to you that nobody could count money with one glove on one hand and a big pile?

Jacobsen: No, sir.

Williams: Well, what was the logic of it that changed your mind . . . and caused you to testify on Thursday that it was a glove or gloves?

Jacobsen: Well, the fact that you couldn't hardly handle money with one glove.

Williams: Well, that was what I just asked you, Mr. Jacobsen.

This cross has it all. Control: "You tell us exactly how it was." Pace: we get each prior inconsistent statement and the witness agreeing to it. Preparation: The prior grand jury testimony and the prosecutor's notes--produced after a hard fight--are deployed. Daring: There are at least four non-leading questions in the series, including the ones laden with the most significance. Closure: Ed does not stop until he has the devastating admission that this witness kept working on his story until it was "logical," and then Ed moves on to another topic. This cross, like all of them, was sharp and clear.

Many lessons can be drawn from this excerpt. The present lesson is that some changes in the witness's story are driven by the need to make things "consistent." Uncovering this fact is effective summation fodder.

Williams's cross-examination suggests the pretrial preparation theme mentioned above. In criminal cases, where discovery is limited, I almost always start cross with a hunt for prior statements. I get the witness to catalog all the meetings with the police and prosecutors and then demand all the notes and statements that resulted from those meetings. In a civil case, I use the hunt only to fill in gaps in what I have.

Where preparation has apparently been lengthy and the witness tells a much more polished, directed, or damaging story in court than in prior statements, I want to help the jury see just how this story was built up over time. I assemble the prior statements and a time chart of meetings with lawyers and their minions and put the puzzle together. I am not leading toward accusing the witness of intentionally lying. I am showing how the fickle memory that we all have can be cudgeled or persuaded. In the Nichols case, the prosecution witness Michael Fortier had met with the FBI agents and prosecutors dozens of times, reshaping his story in the retelling. I reproduce much of that cross-examination in Chapter Ten.

The objective fact cross-examination uses the same techniques that one employs when getting at problems of perception. Confront the witness with time, place, vantage point, and other undeniable details.

VERACITY

Most commandment-based theories of cross-examination are designed for the witness you will claim is a liar. There is some merit in virtue, and there are greater penalties for sin when you confront such a witness.

We seldom find a witness who is a liar through and through, like the Kerryman who was charged with stealing chickens and confessed to the crime under fierce cross-examination by Crown counsel. His lawyer, wise in the ways of a Kerry jury, argued that the defendant should be acquitted because he was such an obvious liar that you couldn't believe a thing he said.

Some lying witnesses are professionals, with long experience on many witness stands. Some are informers recruited for the particular case, and they are promised not money but that reward that only a grateful sovereign can bestow: immunity from just punishment.

Such witnesses usually want to hurt you. They will take advantage of lapses in control. For your part, you will use them as objects not only to enhance control but also to diffract moral and tactical superiority.

Let me explain this. When you ask a series of short, tight, leading questions on cross-examination and obtain the witness's acknowledgment of each, you say two things to the jury. First, you demonstrate that the only facts from this witness that anybody should care to hear are those that support your version of events. You know all the important facts. This is tactical superiority.

Second, you are saying to this witness and the jury that the only truth of which the witness is capable is that wrung from him in the form of circumstantial evidence that his main message is untrue.

But have you considered the possible delights of a petty sin or two, even in the face of such a witness as this? Remember that jurors still want the chance to make up their own minds about whether and what to believe.

Let us take the paradigmatic liar: the informer. I have, to my sorrow, assumed sometimes that exploring the informer's deal would inevitably undercut what the informer has to say about my client. Maybe that worked in days now gone. Maybe it works in places where I do not try cases. But I doubt it.

Sure, the jury wants to know what rewards the witness will receive and what threats of harm may have influenced her testimony. But jurors understand what it means to cop a plea or do a deal. They understand that somebody who is guilty might do that and still be telling the truth about her cohorts.

Jurors will not reject an informer's testimony unless their consciences are shocked by what she is getting away with--or unless they can find some circumstantial evidence of mendacity beyond the objective facts of an "immunity for truthful testimony" deal.

One must also keep in mind that the theory of minimal contradiction limits the extent to which you can attribute a malign motive to the informer. The informer is often a person that committed a crime and got caught at it. She is offered a way out of trouble, or a way to minimize consequences. She takes it. Whose fault is that? More important, whose fault will the jury think it is?

Let me suggest a sinful scenario. You know the witness once told a story that exculpates her and your client. You know she was jailed, interrogated, and eventually counseled to make a deal. You know that the deal recites that she must testify truthfully and that she will be subject to prosecution for perjury for lying. Here is an example based on an old National Institute for Trial Advocacy file, United States v. Peters. The witness is the informer, Laura Hobson.

Q. Let me take you back to that night when you were arrested. Where were you when they arrested you?

A. In the car.

Q. Do you remember who arrested you?

A. A bunch of agents. I think there was somebody named Johnson.

Q. Did they have guns?

A. Yes.

Q. Were you scared?

A. Sort of.

Q. Then what did they do?

A. Well, they warned me of my rights, and handcuffed me, and put me in the police car.

Q. Where did they take you?

This line of inquiry paints a far more compelling picture than one pursued with leading questions to which the witness must answer "yes" or "no." You have the chance, by reflecting the rising tension in your voice, to have the witness relive the terror she must have felt. Arrested, with a prior drug record, facing near-certain jail, she took the deal that was offered.

Q. What did you tell the agents when they first talked to you?

A. I told them I didn't know anything about it.

Q. Was that true?

A. No.

Q. Why did you lie to them?

There it is. A sinful nonleading question that also begins with "why." There are dangers here. Maybe the witness will say that she was afraid of your client. If there is any real prospect of that, leave the question alone unless you have some surefire impeachment for that answer.

But, in the usual case, the answer will be "I was afraid" or "I was confused" or "I don't know." You want to stretch out the fact of the witness lying, and the pressure she felt. You want her to face the jury and try to argue around the plain facts. Her exhibition of fear, uncertainty, and plain old unbelievability is more powerful than anything your leading questions can do. If your questions build a box of the right size and shape, you can drop the witness in and let her run around.

Q. In fact, you were involved in that drug deal, weren't you?

A. Yes.

Q. So you lied, right?

A. Yes.

Q. If you admitted you were in the drug deal, what did you think would happen?

A. I guess I would go to jail.

If you don't get this answer, prompt for it with a leading question. Leading questions can be used to keep the witness on track, but the point here is that sinful open questions are all right--and even preferable.

Q. So you are a person who would lie to keep from going to jail, isn't that right?

As you build the theme, you will be letting the witness tell of her fall from grace, induced by prosecutors who made her an offer she could not refuse. There will, almost as surely as sunrise, be two themes the witness will try to develop: (1) her bargain to tell the truth and (2) her desire to protect your client when she lied in the first place. The "control" commandments teach you to prevent the witness from blurting out these themes.

But I tell you to violate those commandments, and sin with glee and confidence. You are going to hear about these themes on direct examination or on redirect. The jury will not think well of you for dancing around them. Let them out, and then deal with them. You will have to do it at some time, in the summation, if not earlier.

A. I lied to protect Fred [the defendant].

Q. Are you saying that you would lie to protect a friend?

A. No.

Q. You have just told us that you lied to protect Fred Peters, haven't you?

A. Yes.

Q. And you told us earlier that you considered him a friend, didn't you?

A. Yes, I suppose so.

Q. Tell us, Ms. Hobson, who is your best friend in the world, an even better friend than Fred Peters?

A. I don't know.

Q. Aren't you your own best friend?

You might get a variation such as "My family," to which the answer is: "They would be really upset to see you go off to Club Fed--that's the federal prison--wouldn't they?" You can then follow by pointing out that she is her own best friend.

The second theme is: "Well, I'll only get off if I tell the truth. If I lie, they will prosecute me." Your inquiry must focus on the witness's understanding of who makes the decision whether her testimony is true or false. It's not defense counsel. The decision of what to believe is for the agents and the prosecutor.

Certainly, summations without number have told the jurors that they must decide who is telling the truth and who is not. Jurors will not brand someone a liar without a reason and an objective basis. The reason is given by bringing out, usually with short leading inquiry, the facts showing implied bias--relationship, plea bargain, employment, friendship, preparation, or prior statements not admissible for their truth.

The objective basis can be supplied by a prior statement admitted for its truth but more completely and powerfully by demeanor and evasive answers that the jurors will see only if you let the witness run a little. To do that requires strategies based other than on the commandments.

One can come at this view from another direction. In martial arts and Buddhism, one learns that the opponent's onrushing power can be turned against him or her. So, the lesson sometimes goes, let it come – provided only that you have something decisive, small though it may be, to apply to that onrushing force rather as a lever is applied to a great object.

I confronted a woman who said that my client had stolen many valuables from her. She was outraged at the theft, self-righteous on direct examination, and indignant that she would have to endure cross-examination. The prosecutor had committed the sin of believing this witness entirely, to the extent of not checking and double-checking her story and the supporting materials she brought with her.

I spent hours on cross-examination, pointing up events that could cast doubt on the witness's story: the failure to report the loss promptly, the curious way in which she had assembled a list of missing items, her husband's tactics with the insurance adjuster. All of these might, in the mind of a skeptical juror, weave a fabric of unbelievability. But as I watched the jurors, it seemed clear to me that she was winning these exchanges. She remained pouter-pigeon confident, and the jurors seemed to be accepting her dismissals of my sallies.

Overnight, I brooded on my seeming inability to get to her. My wife Jane counseled me by pointing to the martial arts and Buddhist metaphors. And, she pointed out, I had one item in reserve that I had not yet used. One of the witness's lists of allegedly stolen items included a valuable gun that my client had purchased years before, and had registered in his name. It was not entirely clear how she could have had the make, model and serial number of this gun on her list. The FBI had searched my client's house, and perhaps had shared their search inventory with the witness, who had borrowed from it. Regardless of how it happened, the witness's handwritten list, produced by the prosecutors, had this whopping error.

The prosecutors had not seen the mistake. When I showed up in the morning ready to spring the mistaken list and the government documents verifying my client's ownership, the prosecutors at first resisted in surprise and then had to back down. Because I had the witness

under examination, and because I always get the judge to caution the witness not to discuss her testimony with anyone, the prosecutors could not warn her. In any case, there was not to be a recess anytime really soon.

I sprung the list. Didn't she write this list. Did she give it to the prosecutors? Did she intend that they would rely on it? Did she intend that the jurors would have the right to see it? Let us look at it. Isn't this item here something that never belonged to you and your husband and in fact belonged to my client for many years? No? Here then is the self-authenticating government record, which I offer.

She began to fulminate. "You can't tell me he didn't steal these things? What are my valuables doing in his house, tell me that?" There was her strength again, coming at me, but already the jurors were beginning to shift in their seats.

Q. Do you understand that I cannot shout back at you when you shout at me?
A. I suppose so.
Q. Do you know that all I can do is ask you questions, and then hope you will answer them?
A. I suppose.
Q. Do you understand that these jurors will listen to what you have said on direct examination, and on cross-examination, and to the other witness, and it will be these jurors who will decide the case?
A. Yes.
Q. Since I cannot shout at you, but only ask questions, would you agree to help me help the jurors by answering my questions?
A. Well, all right.
Q. Now, I want to be fair here. Tell the jury please, how you came to produce a list like this exhibit [putting it up on the screen] that contains a lie?

She would not accept "lie," but only "error." That was all right. Explanation she had none. She simply could not account for what was on that list. So this was a witness with a strong, self-confident story. Let her tell it, and watch the balloon get larger and larger. Then prick it. Your one small point, which you might have thrown away with a tight, short, controlled examination, looks large.

MINIMAL CONTRADICTION REDUX

Nothing said here authorizes a departure from the principles "Have a point" and "End strong." Pointless doggedness not only elicits more harm than benefit, but also tumbles into time wasting and witness harassment, both of which trigger juror resentment. Never abandon tight, controlled, "look good" cross without a careful plan.

Ending strong can help cure some problems that may have arisen when the witness runs on a little too much. You can bring it all home and show you always had control--even when you didn't.

So far, however, the discussion can permit us to make some practical conclusions. Until one summer day, I thought I had acquired a kind of reputation as a cross-examination sinner. I had preached the message contained in this chapter in a good many forums. Some of these presentations had been tape-recorded. That day, a lawyer I have known for more than thirty years upbraided me for being too abrupt with witnesses. He had listened to a tape recording. He wanted me to go farther than even I had dared. This lawyer got me thinking.

Then I reflected back on what the jury foreperson I mentioned earlier had said after a months-long trial. The jurors, she said, were put off by the lawyers' "innuendo," that is, their posturing while cross-examining witnesses, trying to let the world know what <u>they</u> thought about

the witness and what she was saying. The staccato cross-examination recommended by the rulebooks is often redolent with this sort of "innuendo." We have all seen it. The lawyer hectors and badgers, makes faces and looks more and more like the Red Queen in Alice in Wonderland. Or, still worse, the lawyer rambles pointlessly on, simply asking the witness to repeat the direct examination's most damaging answers.

When we say that on cross-examination we must control the witness, we are really telling a universal truth about all witness encounters. On direct examination, we control the witness. We ask these non-leading questions, each of which seeks a response permitted by the rules of evidence and calculated to advance our case. Usually, we have prepared the witness so that our exchange is as natural and easy as possible.

On cross-examination, we usually cannot have a helpful session with the witness where we influence him or her to behave in a certain way. That does happen, for example, when our opponent has called a witness who is associated with our client but who is not sufficiently adverse to be termed hostile. Then, we may meet with the witness to plan the cross-examination. By similar coin, there may be witnesses we present on direct examination who will not meet with us and who we must put on "cold" – if we still dare to call them when they have given us signals of hostility to our cause.

This idea of control, therefore, does not describe a two-position switch, but rather a range of choices about the lawyer's relationship to the witness. To describe the range of choices on cross-examination, the best image is of the box. On cross-examination, you build a box and let the jury see the witness run around in it. Sometimes, the box is small, tight and made from short leading questions. This is for the witness who wants to hurt you. That cross-examination will almost necessarily be brief.

Other witnesses will have a larger box, with more non-leading questions and more opportunity to exhibit behavior for the jury. If you are building a big box, you may have to take some time to do it. Contrary to the commandment, cross-examinations are not necessarily brief. Oscar Wilde did not break until the third day on the stand.

WITNESS AS OBJECT, WITNESS AS OBSERVER

In choosing a place on the spectrum of control, you may wish to distinguish between two basic roles that the witness can play. The extent, in any given examination, to which the witness plays one or another of these roles indicates the degree and nature of control.

In some cross-examinations, the witness is an object, like a talking rock or a ventriloquist's dummy. This is the witness generally imagined in the commandments. So the saying goes, the lawyer on direct examination is telling information--or letting the witness tell it. On cross-examination, the lawyer is "showing" information by making a series of statements with which the witness is asked to agree. The witness is an object of the trial lawyer's action.

The theory of minimal contradiction tells us that sometimes we must not use the witness as an object of action but must see him as a subject of it. When you ask a well-planned open-ended question, or explore areas in which the witness agrees with your story, you are letting the witness be a subject. You are letting the jurors see you treat the witness with dignity. You are giving the jurors information to use in evaluating the testimony.

You will seldom have the unalloyed pleasure of a witness breaking down on the stand and admitting perjury. Cross-examination is an exercise in circumstantial evidence. Because the witness received a certain benefit, or was threatened in a certain way, her testimony should not be believed. Because the witness was standing in a certain place, or only saw the assailant for a few seconds, one may doubt the accuracy of his description.

You must take this circumstantial evidence and weave it into a coherent argument about credibility. You must empower the jury to evaluate what the witness has said. The commandment approach of staccato questions can make an excellent and lasting impression on jurors. Do not abandon this approach.

You should, however, consider adding more leisurely, open-ended lines of inquiry, turning from witness-as-object to witness-as-subject. Giving the witness a chance to perform in front of the jurors gives you a store of shared experience to interpret in summation.

The jurors are smarter than the commandments theory gives them credit for. They know when a lawyer is cutting off the witness from saying something damaging. They know when a lawyer is cutting off the witness from saying something damaging. They know when lawyers are using technique to mask substance. Make the jurors part of your quest to tell the true story.

"LIAR"

At an ABA meeting several years ago, I did a mock cross-examination of Jake Jacobsen. I was not trying to imitate Edward Bennett Williams, which would have been foolish. Rather I wanted to illustrate a cross-examination that began provocatively and then justified the provocation. Of this encounter, James McElhaney wrote:

> It was at the fall meeting of the ABA Section of Litigation in Washington, D.C. Four hundred fifty lawyers were watching Michael Tigar re-create the cross-examination of Jake Jacobson in the trial of John Connolly. It was done the first time by the late Edward Bennett Williams in the early 1970s, with a young Michael Tigar sitting second chair.
>
> It was the criminal case in which the late John Connolly was on trial for his political life. Connolly had been the Secretary of the Treasury under President Nixon. And Connolly was charged--as part of the fallout of Watergate--with having received a $10,0
> 00 bribe from the milk producers' lobby to urge President Nixon to increase the level of milk price support.
>
> Now Tigar had returned to Washington, D.C., to do the cross-examination of the government's principal witness--Jake Jacobson--one more time; not as Williams had done it but as Tigar might. Tigar's very first question showed he was going to do it his way:
>
> Q: Mr. Jacobson, you're a liar--aren't you, sir?
>
> The 450 lawyers gasped. They knew they were watching magic. This was no Saturday morning bar association demonstration. This was the dragonslayer returning to take on a very special dragon, and the battle had begun in earnest and at once.
>
> What's more, the dragonslayer seemed to have thrown caution to the wind. He had used the dreaded "L" word out loud, and in his first question. Wasn't that a fatal mistake that would prove to be his undoing?

McElhaney then canvassed the views of many trial lawyers on the lying witness, and at the end of his article returned to his theme:

> Now return to Mike Tigar's cross-examination of Jake Jacobson. Remember his first question, "Mr. Jacobson, you're a liar--aren't you, sir?" Was it a mistake?
>
> In "Examining Witnesses," Tigar says . . . , "You will, in trying cases, come to label many witnesses as liars and should not shrink from this duty when the occasion demands. The occasion demands, however, far less frequently than some people think."
>
> So, did the occasion demand?
>
> Jacobson had lied to the grand jury, lied to the bankruptcy court, and lied to the

prosecutors before he testified against John Connolly. There was no way to call his conduct a mistake, a failure of perception, a lapse of memory.

Immediately after his first question, Tigar exposed the lies. One after another, Tigar confronted the witness playing Jacobson with what he had said. Jacobson squirmed and evaded but had to admit that what he had said was untrue.

Then came time for final argument, and Tigar was more eloquent than Edward Bennett Williams.

"The government," said Tigar, "is not what it says, but what it does. And look what it does. These prosecutors put a man they know is a liar on the stand. They know he lied to the grand jury--and they don't care. They know he lied to the bankruptcy court--and they don't care. They know he lied to them-- and they don't care."

It was magic.

Notes to Chapter Eight

1. For the "legal engine" quotation, see 5 J. Wigmore, Evidence § 1367, at 32 (Chadbourn rev. 1974).
2. Leading cases on cross-examination include Coy v. Iowa, 108 S. Ct. 2798 (1988) (screen between defendant and child-witness violated confrontation right); Delaware v. Van Arsdall, 475 U.S. 673 (1986) (constitutional error to forbid inquiry into witness's bias and motive to falsify); Davis v. Alaska, 415 U.S. 308 (1974) (discovery and disclosure of witness's juvenile record for impeachment); Giglio v. United States, 405 U.S. 150 (1972) (disclosure of rewards to government witness). A leading lineup case is Manson v. Braithwaite, 432 U.S. 98 (1977).
3. The view I take in this chapter owes much to my mentor, Edward Bennett Williams, a brilliant cross-examiner. Ed was of the "control" school. Terry MacCarthy has caused me to rethink my theory of cross-examination. My tribute to Ed, and the Jacobsen cross-examination excerpt, are in the "one man's faith" article cited in the bibliography.
4. The "ten commandments" are from I Younger, Cicero on Cross-Examination, Litigation Manual 2d 532.
5. For fuller discussion of tape recorded evidence, see my article Crime on Camera, 9 Litigation 24 (Fall 1982).
6. The point about a witness being situationally adverse may be obvious. Dr. Bernard Diamond has explored this issue in the context of expert testimo-ny in his article The Fallacy of the Impartial Expert, 3 Archives Crim. Psychodynamics 221 (1959).
7. The Oscar Wilde cross-examination is recreated in an excellent play, "The Trials of Oscar Wilde." The transcript is available from Professional Education Group, Minnetonka, Minnesota.
8. The McElhaney article, "Liar," is from the January 1994 ABA Journal, page 74.

Chapter Nine

Cross-Examination: Difficult Witnesses, Witnesses with Difficulties

Once you grasp a theory of cross-examination and tailor it to fit your style, almost all that remains is practice and study of examples. I agree with the preachers of commandments that there is a science of cross-examination; I contend, however, that it is more complex than they say it is.

Beyond the science is an art. The art cannot be gathered from study, however intense, of general principles. The Cartesian deduction cannot be adapted to say, "I think, therefore I cross-examine." You will build up the art through personal and vicarious experience, gaining the latter through observation and reading.

There are, however, some categories of witness for which generalizations can be made.

THE EYEWITNESS

Among the most powerful cross-examinations based upon perception are of eyewitnesses who identify the defendant. Studies abound on the unreliability of these identifications and of the ways in which improper suggestion can taint the testimony. The Supreme Court has set out rules about line-ups and photo spreads designed to place a due process floor under eyewitness testimony. Some courts will permit expert witnesses to comment on the questionable value of eyewitness testimony in particular circumstances.

For me, however, cross-examination is the most powerful tool for attacking eyewitness testimony and helping the jury to see that what seems to be most valuable is in fact counterfeit coin.

Most eyewitnesses are not liars. They may have the natural desire to see their prior impressions vindicated, and so they are, to that extent, hostile to the examiner's purpose. They are often victims of a crime or citizens drawn into the judicial process by the happenstance of being near a crime. They did not control the lineup they viewed or make up the photo array they were shown.

Neither they nor the jury will appreciate your trying to "control" every response. The witness is not, in short, an object. She is someone who in many cases has had a frightening experience, with which the jurors will empathize.

Q. For how long a time did you see this person?

A. Oh, for a minute or so.

Q. Let's think about that. Would you just close your eyes and imagine the robbery. When you can see this person in your mind's eye, say, "Go." When you stop seeing him, say, "Stop." I'll time it.

A. [The witness complies.]

This little experiment works often enough to be worth trying in most cases. People tend to overstate the time it takes for things to happen.

Q. Were you scared while all of this was going on?

A. Sure I was.

Q. Was this person pointing a gun at you?

A. Yes, he was.

Q. Did you happen to notice whether the streetlight was on?

A. I think it was.

Q. That streetlight is up at the corner, isn't it?

A. Yes.

Q. How was this person dressed?

A. He had on a black jacket and white shirt. I didn't notice what kind of pants he was wearing.

Q. If you didn't notice what kind of pants he was wearing, did you notice his shoes?

A. Not really.

Q. When did you first tell the police about this person?

A. Well, they got there pretty fast. Half an hour or so.

Q. When you talked to the policeman, was he making notes of what you said?

A. I suppose so. I think so.

Q. Do you remember telling him that this person had a white shirt or a blue shirt?

A. No.

Q. Do you remember saying that you couldn't really tell because the light wasn't too good?

A. I may have done.

Obviously, if the witness signed the police report you are using for these questions, you will want to make that point now. A little later, the examination might continue.

Q. The policeman showed you some photographs, didn't he?

A. Yes, he did.

Q. How were the photographs arranged?

Notice what is happening here. The advocate has a point, uses simple questions, puts things in bite-size pieces, and controls the flow of examination. But the witness is telling us something, so the jury can make up its mind about her testimony. In summation, the advocate can recall this testimony with pride because the witness was not pushed around.

Cross-examination that permits the witness leeway to answer is not uncontrolled because the indicia of eyewitness unreliability are well established. The examiner uses these as an outline but gives the jurors a chance to size up the witness.

This sort of latitude should not be extended to a professional identifier such as a police officer. If the witness becomes too talkative, you can use the "Do you believe in America?" series noted in Chapter Eight and resume inquiry with more controlled questions.

THE REPRESENTATIVE

It is often a good idea to present a witness to represent an institutional--government or corporate--party. However, few lawyers wisely select the representative. Thus, they sow seeds of effective cross-examination for the opponent to harvest. There are many kinds of representatives, ranging from the custodian of documents to the chief executive officer. All of them share two characteristics, one in the law of evidence and the other in the dynamics of trial.

In evidence law, admissions of a party opponent or its cohort or representative are broadly admissible. Any representative can be confronted with a broad array of such admissions and be asked if she knows about them and has an explanation.

This leads us to the trial advocacy dynamic. A representative is the entity. There is no exception to this principle. The chief executive or other senior official is presented as a representative. But you can make any employee of your opponent into a representative by your questions.

In summation, you may remind the jury that a corporation cannot do, say, think, or believe anything. Only humans who do the corporation's business can do those things. So we have the rule that a corporation is bound by and responsible for what these humans do or fail to do. I have even used a Mr. Potato Head kit in summation to illustrate how a faceless potato--the corporation--has eyes, ears, nose, and hands. I took a potato and stuck the body parts on, one or

two at a time, each time recalling what one corporate employee had done, failed to do, or testified.

Often your opponent will choose a low-level corporate employee to testify to try to limit cross-examination. This strategy can be undone. Suppose an engineer is called to testify about how a part is made and what it is designed to do. Your case rests on a corporate decision to ignore available technology in choosing to make the part one way rather than another.

Confront that witness with evidence of the choice you are assailing. If the witness knows nothing of the matter, you have strengthened the image of the uncaring entity whose right hand feigns ignorance of its left-hand doings. If your opponent objects that the cross is too far-ranging, remember that the federal rule limits you to the subject matter, not the scope, of the direct examination.

Some chief executives are excellent witnesses on direct and cross because they take the time to prepare and the care to understand the issues and concerns that the jury must face. More often, the chief executive representative is often a good cross-examination target because of the structure of corporate life. The time of today's executive is protected in many ways. He lives a relatively cloistered existence. The executive may not have genuine and sympathetic insight into the views and aspirations of those who oppose corporate goals. At a more practical level, the chief executive is accustomed to ordering lawyers around. The corporation's trial counsel may well find that the executive has not set aside enough time to really prepare for testimony. If you are going to depose or cross-examine corporate executives, go to the video store and rent a copy of the motion picture Roger and Me, about a documentary film producer's quest to interview General Motors president Roger Smith.

The result: a wooden witness, by turns evasive and arrogant when confronted with hard questions about details and basic issues. This evasiveness and arrogance cannot be made to appear if your examination is a staccato burst of focused inquiries. You have to let the witness talk, which he is usually willing to do. The jurors will get the idea.

True, not all executives fit this mold. Some of your opponents will have read this book also. You must be prepared for a controlled and controlling cross-examination as well as for a more leisurely one.

THE INFORMER

Perhaps "informer" conjures an image of that 1930s movie about the Irish Republican Army, or possibly some celebrated criminal case. Think again. An informer, for purposes of worthwhile generalization, can be any "turncoat" witness. The informer, once identified with one side, to gain reward or avoid punishment, changed her story and allegiance.

A former employee or disaffected friend, testifying in a civil case, is cross-examined on the same principles as a Mafia hit man in the federal witness protection program.

We have already shown that a change of allegiance may not itself give the jury a reason to disbelieve the witness. After all, a change of allegiance can be the sinner being redeemed as well as the veracious being suborned. See Chapter Ten for a sample cross-examination.

Why did the witness turn her coat? Why is she now telling a new untrue story in place of the old true one? Witnesses switch allegiances for different reasons: some in a cynical trade of testimony for freedom, some from a misplaced sense of duty, some because their lawyers led them to it, still others because an unscrupulous prosecutor led them into doing it.

Consider, for example, a witness who held a responsible position in the defendant's corporation, who once told the grand jury a story that the defense can live with and now says that the defendant is a scoundrel and a defrauder. If you attack her directly as a conniving liar, the

jury may begin to feel sympathy for her. If it is already your theory that the prosecution's case is ill-motivated, your best line of attack is to show that the witness turned only after being subjected to unreasonable pressures.

If the witness has made prior statements that you believe are true, begin by accrediting and using them. Then move to the events that led the witness to recant the prior statements.

Q. Ms. Bonthrone, you were vice-president of the bank?

A. Yes.

Q. You were responsible for making loans?

A. Yes.

Q. In fact, my client, Mr. Wilson, consulted you on loans?

A. He did.

Q. He consulted you on the Bar-C loan, didn't he?

A. He may have done.

You are accrediting the witness, putting her into the picture. Your questions are tight and controlled because in the early stages of examination you cannot give the witness maneuvering room. Indeed, the questions are almost entirely statements, made in an interrogating mode, to which the witness must agree.

Next, move to the prior statements.

Q. I show you what I have marked as Defendant Wilson's Exhibit G. Isn't that a memorandum that you sent to Mr. Wilson, responding to his asking you for advice on the Bar-C loan?

A. Yes.

Q. He asked for your advice, and you gave it to him?

A. Well, yes.

Q. You don't have any doubt about that, do you?

A. No.

Q. Let me show you Wilson Exhibit H. Isn't that a memorandum you gave the bank examiners on April 15, 1985?

A. It is.

If the rules of court permit it, go and stand next to the witness, and ask her to read out the parts of the document that show her vouching for the loans. Alternatively, you can have an overhead projector transparency on a screen. Remember not to block the jurors' view of the witness, at this of all times.

You may have other, similar documents or prior statements in other forms. Then comes the turning point.

Q. Sometime after April 15, 1985, you met Mr. Snyder?

A. Yes.

Q. That's the Mr. Snyder sitting over there at the prosecution's table?

A. Yes.

If you are permitted by the rules, walk over and stand behind Mr. Snyder. You are about to have the witness refer to him unflatteringly. If you are standing behind him, you emphasize your point, and there isn't much that he can do about it.

More generally, standing by the witness and then standing by the prosecutor is thoughtful use of courtroom space. Symbolic claims to courtroom territory are a part of trial strategy.

CHARACTER WITNESSES

Many character witnesses should not be cross-examined. You will wait until the closing argument and point out that almost nobody is entirely friendless. "We can all remember people in our neighborhoods that we thought were the very soul of honesty. Then it turned out one day that they had stolen or cheated or done something else that is very wrong. And many friends and family members, if they were honest, would have to say, 'Gee, I never thought he was like that.'"

However, offering a witness to vouch for good character opens up a wide field of cross-examination. You may inquire into prior bad acts of any relevant sort, even if the conduct did not result in conviction or even arrest. The cross-examination is said to bear upon the weight that ought to be given the witness's opinion or upon his knowledge of reputation. If the character evidence is in the form of opinion, the questions on cross-examination are in the form: "Did you know that Mr. Johnson was arrested for bookmaking?" If the evidence was in the form of reputation, the form is: "Have you heard that Mr. Johnson was arrested for bookmaking?"

You should also consider simply asking the witness whether he or she has listened to all the testimony in this case now before the jury. Be careful, however, lest an overbroad question give the witness a chance to vouch for the defendant in ways that would not be permissible on direct examination.

SPECIAL CARE WITNESSES

In a mock trial demonstration in London, England, a few years ago, I defended and former Attorney General Benjamin Civiletti prosecuted John Burns, an alleged robber-murderer whose defense was alibi. The defendant had a criminal record. His wife was the alibi witness, but she concededly had been in the basement of their home during a part of the afternoon and might not have heard the defendant go out.

There was no quarreling with those objective facts. Each side had the advantage of being able to select the people who would portray the witnesses. I was lucky. The exquisitely talented film and stage actress Estelle Parsons agreed to be "Mrs. Burns." Estelle created a working-class Massachusetts housewife, concerned about her errant husband and believing profoundly that he could make good if the cops would just stop hassling him.

When Ben Civiletti began to home in on her being in the basement doing the laundry, "Mrs. Burns" burst into tears. "Don't you think a wife knows? Don't you think I listen for Johnny?"

"Like trying to cross-examine the waterworks," Ben muttered.

The experience brought up a vivid recollection of a witness I tried to cross-examine in a weapons trial many years ago. She had changed her story and made a most advantageous bargain with the government to avoid criminal prosecution. Every time I got close to these uncomfortable facts, her voice dropped and the tears welled in her eyes. The judge protected her with clucking noises, signaling to the jurors that I was badgering her.

We will all confront witnesses--of both genders and of any age--who present us these problems. Here the ten commandments come in handy. Get up, do your stuff with dignity and control, and sit down. Make a series of assertions with which the witness will agree, and quit.

Be sure, however, to cover meaning, perception, memory, and the implied bias part of veracity. Save the summing up for the summation.

Sometimes, perhaps usually, you can anticipate that a difficult witness will appear. Prepare the jury in your opening statement. In the Nichols case, we were to face dozens of witnesses who had seen or been harmed by the federal building bombing that left 167 dead and

hundreds injured. I told the jury in opening statement that we would cross-examine every witness:

By cross-examining, we intend no disrespect to those who died. As the philosopher said, "It is to the living we owe respect; to the dead we owe only the truth."

Cross-examination is designed to help the jurors find truth. The jurors will understand that you have a right, and they a need, to have it done. As you begin your cross-examination, your mien must be one of dignity and concern. Do not fawn over the witness, but ask questions politely and directly. Listen to the answers. If the witness makes a fuss, ask the Court to remind everyone that in a trial, cross-examination is part of the process.

FOREIGN LANGUAGE WITNESSES

I have probed this subject in Chapter Four, with greater attention to direct examination. There is little to add. Sometimes a witness who is presented in a foreign language understands and speaks English quite well. He elects to testify in another language to have extra time to consider responses to questions on cross-examination. By keeping your questions short and plain, you cut the time between question and response.

You should also attempt to get as much demeanor evidence from the witness as you can. If you succeed, you may get the witness looking at you and reacting to your questions in English, thus giving away the pretense of nonfluency.

I was at a political trial in South Africa. The witness was testifying in Xhosa, although he had been educated at an English-speaking school. The defendants were charged with committing a politically motivated murder--a daytime shooting of people at a taxi stand. Siraj Desai, a brilliant black South African advocate who is now a judge, took the witness through his prior statement. He impaled the witness on contradictions between the statement and his direct testimony. The witness said on direct that the shooters were wearing police-type blue uniforms, with police caps and jackets. In his statement, he had said they were dressed in coffee-color overcoats with balaclavas on their heads, which they pulled down over their eyes just before they started shooting. Desai wisely did not show the witness his statement until he had finished with all the contradictory material.

The witness attributed the contradictions to errors in translating his statement. He said he had spoken to the police in Xhosa, and they had prepared a statement in English, which he admitted having signed. He claimed to be unable to read and write English, though he admitted having attended school.

Desai handed the witness the statement to authenticate it. The bailiff put it between the translator and the witness. Desai let it stay there. The court could see that the witness was in fact running his eyes over the statement, belying his assertion that he could not read.

Desai concluded his examination. During a recess, I suggested we ask the defendants the Xhosa word for balaclava. As I expected, there is none--it is a borrowed foreign word, as it is in English, so the Xhosa word is "balaclava."

The next advocate asked a few questions on other subjects, then in a matter-of-fact voice demanded, "What is the Xhosa word for balaclava?" The translator translated, using the word "balaclava." The witness, without thinking, replied, "Balaclava." His Lordship could not repress a smile, and he looked at me with a knowing grin.

The witness quickly recovered, and said the Xhosa word was a compound word meaning folded cap. By that time, the damage was done. If the Xhosa and English words were the same, the witness would have understood the word when it was read to him before he signed the statement. At the very least, he had sworn he knew the word in both languages.

In a demonstration that it is possible to do effective cross-examination through a translator, Desai won a judgment of acquittal for his client at the close of the state's evidence. His Lordship found the witness utterly unworthy of belief.

Chapter Ten

A Real World Cross-Examination, Annotated

In looking at "real world" cross-examinations, my favorite is Michael Fortier, in the trial of Terry Lynn Nichols. I have lightly edited the transcript, and have added notes. Michael Fortier had been Timothy McVeigh's friend. He had known of the Oklahoma City bombing plot, and finally and reluctantly became a government witness. He had given the FBI dozens of statements, which were not recorded but memorialized in FBI 302 agent memoranda. According to Fortier, McVeigh had told him that Terry Nichols was part of the plot to blow up the Murrah Building in Oklahoma City. In opening statement, I reminded the jury that such statements, admissible as conspirator declarations, faced two hurdles. First, one had to think that Fortier was telling the truth that McVeigh said these things, and second that McVeigh was telling the truth if and when he said them. I was entitled under the rules to attack Fortier's and McVeigh's credibility, for a declarant such as McVeigh is subject to the same impeachment rules as if he or she had testified as a witness. I could therefore use Fortier to undermine McVeigh's hearsay.

Fortier had reached a plea bargain with the government. He pled guilty to a conspiracy to sell stolen firearms, transporting stolen firearms in interstate commerce, making a false statement that he did not know of plans to blow up the Murrah Building, and misprision of felony. He was not asked to plead guilty to a conspiracy to blow up the building, nor to any offense directly connected with the bombing. This was a key point in the cross-examination, as you will see.

In the end, the jury acquitted Terry Nichols of murder, arson and use of a weapon of mass destruction. They convicted of conspiracy and of involuntary manslaughter. I did not write out questions in advance. I had file pockets with all the prior statements, and an outline with key phrases to guide me from topic to topic. The statements in the file pockets had tape flags on them to help me find key items. I wanted to keep looking at Fortier and at the jury, not at my notes. Other than these "props," this examination was entirely unscripted.

Q. Good morning, sir.

A. Good morning.

Q. My name is Michael Tigar. I'm one of the lawyers appointed to represent Terry Nichols. You've told several different stories about what happened to you in April 1995, haven't you, sir?

A. Yes, I have.

[The battle lines are being drawn. He has changed his story. This examination begins and will continue with leading questions until we get some preliminaries sorted out.]

Q. I want to ask you first about what you told us yesterday and today, and then I'm going to ask you about some of the things you said other times. You have a written agreement with the government. Is that right?

A. Yes, I do.

Q. You are not charged with a conspiracy to blow up the Murrah Building, are you, sir?

A. That's correct.

Q. You did not plead guilty to that; is that correct, sir?

A. Yes, sir.

[Note how carefully he is phrasing his answers. He has been through many hours of preparation for this moment, and we are sizing each other up.]

Q. And you did not plead guilty to blowing up the Murrah Building; correct?

A. That is true.

Q. You didn't plead guilty to murdering anybody inside it; is that correct?

A. Yes, sir.
Q. And didn't -- the prosecutors told you, did they not, that you were being asked to plead guilty to everything that you did. Is that your understanding?
A. Yes, everything that I could be charged with.
[He waffles a little on that last one. But this man, who was in our view closer to McVeigh and his plans than was Terry Nichols tells us that the government did not term him a conspirator or a murderer. We will argue that Terry Nichols' guilt is, at most, no greater than this. The jurors are getting this point, but I will save the explanation for summation. To be sure, Fortier will claim some credit for having become a government witness, but later on we will see some characteristics that make him perhaps less than worthy to bear that standard. So now we turn to McVeigh.]
Q. Now, you mentioned that you first had a political discussion with Mr. McVeigh in the Army; is that correct? Did he share some literature with you?
A. Yes, he did.
Q. He gave you a copy of a book called The Turner Diaries; correct?
A. Yes.
Q. And is it fair to say, sir, that from that day down to the time when you last saw him, he often gave you political literature?
A. Yes, that is true.
Q. And is it fair to say, sir, that he made copies of political literature that he had and handed it out to others?
A. I believe he did.
Q. Did you see him using the copy service in Kingman for that purpose?
A. No, sir.
[A non-leading question, to which I did not know the answer. All I knew was that McVeigh used the copy service and spent a lot of time with the Fortiers. So I kept the tone easy. A leading question implies that I do know the answer and if the witness does not agree with me, and I have nothing with which to impeach, I have lost that exchange. So I change the inquiry a little.]
Q. Did you know that he used the copy service in Kingman for that purpose?
A. He had told me he did.
Q. And is it fair to say that this political literature that Mr. McVeigh began to share with you in the Army had a certain character?
A. Yes, I think that's fair.
Q. It was white supremacist literature; correct?
A. The book in the Army certainly was, yes.
Q. And -- now, you did not agree with the white supremacist agenda, did you, sir?
A. I do not.
Q. You do not and you did not; correct?
A. That is correct.
Q. You were his friend all of these years, but you did not share his racism; is that right?
A. That is correct.
Q. Now, you mentioned that Mr. McVeigh's attitudes changed over time. Is that fair?
A. Yes.
Q. After the events in Waco in 1993, he became much more agitated; right?
A. He was upset about the events in Waco.

[Fortier is waffling. He knows that my characterization is right, and probably knows I could impeach him, but it is no use taking time to argue with him. The evidence of McVeigh's violent reaction to Waco is already in the record, and more is yet to come.]
Q. Now, during your friendship with Mr. McVeigh, he asked you to defraud some credit card companies; correct?
A. Yes, he did.
Q. He asked you to -- he asked you to go to Kansas and said he would pay you $10,000; correct?
A. May I respond to the previous question, please.
[Always dangerous when a witness has a sudden desire to clarify a previous answer, but as you will see, we know the facts so let him go.]
Q. Yes, sir.
A. He didn't actually ask me to defraud the credit card companies.
Q. He asked you to max out your credit cards?
A. And give him the money.
Q. And give him the money. Did you discuss whether or not you would pay back the credit card companies?
A. I certainly would have paid back my credit card companies.
[Let this answer go. The later examination will show just who this witness is and the jurors can evaluate this relatively harmless invention.]
Q. What did you understand he was asking you to do?
A. Give him money.
[We are now filling in blanks in the direct and factual details from the defense opening.]
Q. And when you had a discussion with him about false identification, you told us you thought that was so that he could get his own credit cards; right?
A. That's what I told him.
Q. He told you that he was -- you were going to get $10,000 from him for going to Kansas; correct?
A. He used the term "10 to the power of 10."
Q. Well, 10 to the power of 10 is not $10,000, is it, sir?
A. No, it's not. It's not even close.
Q. All right. But you understood that meant $10,000?
A. That is correct.
Q. You got some guns, but you never got anything worth $10,000 from him, did you?
A. No. Those weapons all together were not worth $10,000.
Q. So he didn't tell you the truth; right?
A. That is correct.
Q. Now, you know that he's a thief; correct?
A. What do you mean?
Q. Well, sir, you and Mr. McVeigh snuck into a National Guard yard and stole things together; correct?
A. Yes, sir, that is correct.
Q. So that's thieving, isn't it?
A. Yes, it is.
Q. And Mr. Nichols wasn't with you then, was he?
A. No, he was not.

Q. Didn't have anything to do with that; correct?
A. No, he did not.
Q. So you learned that Mr. McVeigh was a thief; right?
A. Yes.
Q. Now, in addition to that, you heard Mr. McVeigh on a number of occasions say that he was going to blow up a building; correct?
A. Yes.
Q. And he told you that he was going to blow up a building while it had people in it; correct?
A. Yes, he did say that.
Q. You learned that Mr. McVeigh uses narcotics; correct?
A. He has.
Q. On how many occasions have you seen Mr. McVeigh use controlled substances?
A. Two or three times.
Q. What controlled substances did you see Mr. McVeigh use on the occasions when you were with him?
A. He smoked a marijuana joint with me once; and on two or three other occasions, he used crystal meth.
Q. Now, towards the end of your direct testimony, you said that there was an LSD experience. Did that involve Mr. McVeigh?
A. Yes. He attempted to take some LSD along with me and my wife.
Q. You say "he attempted"?
A. The LSD was bunk. It was no good. It didn't do anything.
Q. So you all took what you thought was LSD and it didn't do anything for you. Correct?
A. That is correct.
Q. What was it supposed to do for you?
A. I'm not really sure. It was -- I've only taken it one other time, and it just makes you feel kind of goofy.
Q. Kind of what?
A. Goofy.
Q. Goofy?
A. Yes.
[I had heard him the first time.]
Q. So that when you were taking it with Mr. McVeigh, was it your objective to get goofy with him?
A. Yes, it was.
Q. And what was the objective of taking crystal meth with Mr. McVeigh?
A. Mr. McVeigh wanted to experience it.
Q. And did he experience it?
A. I believe he did.
Q. Now, you also told us that Mr. McVeigh moved out of your house because you were going to start baby-sitting. Correct?
A. Yes, that is.
Q. And he didn't like little kids?

A. I always thought he did; but when I mentioned bringing in other children, he became upset and left.
Q. Upset and left within the hour; correct?
[I am trying here to paint a picture of McVeigh the racist loner who resents children and resents those like Fortier – and Terry Nichols – who have children and who care for and about them. This is part of the defense theme that McVeigh was disappointed that Nichols and to a lesser extent Fortier would not help him and so he tried to inveigle them into helping and then reached out to others. This theme recurs throughout the examination.]
A. That is absolutely correct.
Q. And you had another conversation with him in which he said in a mocking way that you had become domesticated; right?
A. No, that's not correct.
[We need to stop now and break this down to see what he is disagreeing with. You can ask compound questions to move things along, but when you get a "no," consider dividing the inquiry.]
Q. He said you had become domesticated?
A. Yes. I'm mistaken. He was mocking me when he said that.
[He sees me reach for something, which he probably thinks is impeachment, so he backpedals.]
Q. Well, I don't want to put words in your mouth, sir; but what's a better word than "mocking" for the way he said "domesticated" to you?
A. What confused me was your smile. I thought you were saying he said that to me in a joking manner.
[This witness is really locked on to the examiner now, trying to get clues.]
Q. No, I'm sorry. Please don't take anything from the facial expressions. He said it as an insult. Right?
A. That is correct.
[This was a key exchange, though we had to save for summation the explanation of it. For McVeigh, "domesticated" was a key word. Frustrated by Fortier's and Nichols's unwillingness to help in the final stages of his plans, McVeigh reached out to a man named Steve Colbern, to whom an Arkansas gun dealer had referred him. McVeigh's note to Colbern, in a recruiting effort, stridently contrasted the brave and adventurous man with the domesticated one. On a related note, the FBI failed to give the Nichols and McVeigh defense teams its many memoranda on Colbern. This issue is still being litigated as this chapter is written. Later, when he was on death row, McVeigh sent me a book inscribed "To Michael Tigar, a domesticated man who nonetheless has some redeeming qualities." Fortier is still trying to argue with me a little, so this next series of questions will be leading.]
Q. Now, you never saw Mr. Nichols steal anything; right?
A. Never.
Q. And you know that Mr. Nichols has two little kids; right?
A. At that time -- now I do, yes.
Q. Yes. And as a matter of fact, his daughter is the same age as your Kayla; correct?
A. About a year -- I think there is almost a year difference.

Q. Is there almost a year? But you remember when the Nicholses first came to your house that Mrs. Nichols, Marife, and your wife, Lori, were talking about your two kids; correct?
A. Yes.
Q. And since April 19, 1995, you and Lori have had another child; correct?
A. Yes.
Q. And it's your understanding Mr. and Mrs. Nichols have had another child; correct?
A. Yes.
Q. Now, after the Army, you knew -- you at least knew who Mr. Nichols was in the Army; correct?
A. Yes.
Q. The first time after the Army that you saw Mr. Nichols was in the fall of '93. Is that right?
A. Yes, that's correct.
Q. You met him at a Wal-Mart and he came to your house and spent a little while. Right?
A. Yes.
Q. And that was the time you told us that he and your wife -- or that Mrs. Nichols and your wife, Lori, talked about babies and you and Mr. Nichols talked about that he was going to get a job as a carpenter in Las Vegas. Is that fair?
A. Yes.
[Note the tenor of these leading questions. Seeking agreement, one can use the simple interrogatory, or the word “right?” or “correct?” or the formulation “is that fair?”. It is boring to use any one form. In this exchange, I like the sound of “fair.”]
Q. Now, during that time -- during that conversation, did Mr. Nichols -- did you hear Mr. Nichols threaten anybody?
A. No.
Q. He didn't say that he was going to bomb anything; right?
A. No, he did not.
Q. He didn't express any political views to you, did he?
A. No. We didn't speak about political issues.
Q. Didn't give you any political literature; correct?
A. No, he did not.
[Nichols never proselytized. All Fortier knew of Nichols’ alleged political views was what McVeigh had told him.]
Q. Now, then you said that you had a conversation sometime after that in early 1994 with Mr. McVeigh. Do you remember that?
A. Yes.
Q. And he called you from the Nichols farm in Michigan; is that correct?
A. That's where he told me he was calling from.
[Since the phone records are in evidence, this bit of hearsay goes unchallenged, and is probably admissible anyway.]
Q. Now, the second time you saw Mr. Nichols was at a dinner at a house in Golden Valley. Correct?
A. Yes.
Q. That was a house that had been rented by Timothy McVeigh; is that right?

A. Yes.
Q. You told us also that Mr. McVeigh had got some wood from the True Value Hardware and made berms. Is that right?
A. Yes.
Q. Did you see the berms that he made?
A. At his house?
Q. Yes.
A. Yes.
Q. What did those wooden berms look like?
A. About 15 feet long by about 3 or 4 feet high of stacked wood.
Q. And Mr. McVeigh told you that that was going to defend him in the event that something happened?
A. That's what he said.
Q. Well, what did he tell you that this stack of wood was going to do?
A. He told me it was going to block bullets.
Q. Did that sound rational to you that a stack of wood could block bullets?
A. Oh, yes.
Q. It did? Have you read the story of the three little pigs and the wood house?
A. Not lately.
Q. But from your experience, do you think that wooden blockades can actually stop heavy weapons?
A. Yes. The berm that he built would stop a bullet.
[I really didn't care which way this exchange was coming out. The point here was that McVeigh had become paranoid enough to think that U.N. forces or somebody like that would attack his house with heavy weapons, so he built a wooden barricade around it. If his barricade was insufficient, as I (and I think the jurors) began to see, so be it. If it was not, then McVeigh's level of worry was obviously that much higher. Our story had been of McVeigh's descent into madness, in the course of which his friends one by one fell away from him.]
Q. And you said that he also had guns at the corners of rooms in his house?
A. His house was mainly one large room. He had a weapon in the corners.
Q. And by the way, when we talk about your wife, Lori, you were -- you were together as a couple from shortly after you got out of the Army; right?
A. And before that.
Q. And before that. And then there came a time when you decided to go through the official ceremony, but you always had considered yourself married before that; right?
A. Yes.
Q. Okay. So when I talk about your wife, Lori, or Mrs. Fortier, you had lived together in that way for quite some time. Correct?
A. Yes. I considered her that same way.
Q. Yeah. Okay. Now, that evening, Mr. Nichols talked about nutrition; correct?
[A "yeah" and an "okay."Both unnecessary words, hiding the search for the next question. Court reporters can help one learn about those superfluous words. Best to fill the pause with silence.]
A. He talked about bread.

Q. And he was talking about he likes, what, wheat bread or things like that?
A. He told me wheat bread is what he can only eat or what he likes to only eat. And he told me also that he likes to make his own bread.
Q. Now, you know, Mr. McVeigh -- he's not exactly a health-food addict, is he, would you say?
A. No, I wouldn't say he's concerned about that.
Q. No. You'd say -- I mean he eats at Wendy's, where you all ate once -- Wendy's, he goes to Pizza Hut and eats, places like that?
A. Yes.
Q. The fast food/junk food?
A. Yes.
Q. Is that fair to say?
A. Yes, that's fair.
[We are painting a picture here of Terry Nichols through the words of somebody who observed him, and of his differences from Tim McVeigh. Since it was unlikely that Mr. Nichols would take the stand, we needed to use every possible chance to paint this picture of him – perhaps odd, perhaps eccentric, but not the sort of driven zealot that McVeigh was.]
Q. Now, that evening when you met with Mr. Nichols, did he say -- did he threaten anybody?
A. Not that I remember.
Q. You didn't have any political conversation of any kind with him that evening, did you?
A. Not that I remember.
Q. Now, in -- sometime in 1994 later on, Mr. McVeigh left Kingman. Correct?
A. Yes.
Q. Now, when he left Kingman -- and you told us that -- he had some kind of a sale. Correct?
A. He did. He had a sale, but it wasn't when he left. It was prior to that.
Q. All right. When he had the sale, did you buy something from him?
A. Yes.
[Note how well-trained he is. He just answers the question, and does not go on to tell what he bought. I have to ask for it.]
Q. What did you buy from him?
A. Among other items, I bought some explosive items from him.
Q. What explosive items did you buy from Mr. McVeigh there in 1994 when he left Kingman?
[I am repeating the answer for emphasis, as a kind of loop to the next question.]
A. I bought some cannon fuse.
Q. Some what? I'm sorry?
A. Some cannon fuse.
Q. Cannon fuse. All right, sir.
A. Some blasting caps.
Q. Yes, sir?
A. Some aluminum powder that he said would blow up in some way. A can of gun powder. Possibly other items, but I can't remember.

Q. In addition to explosive items, did you buy fertilizer from him?
A. No, sir.
Q. Did you ever get fertilizer from Mr. McVeigh?
A. Yes.
Q. When did you get fertilizer from Mr. McVeigh?
A. That night he asked me to -- if I wanted to buy the fertilizer also, ammonium nitrate in the bag.
Q. That's the same night as the garage-sale night?
A. Yes.
Q. And he asked you if you wanted to buy some ammonium nitrate. What did you say to him?
A. I told him no. I didn't know how to use the ammonium nitrate. And he asked me if I would just hold onto it for him then.
Q. Did you hold onto it for him then?
A. I took it home and put it in my shed.
[Look back at this exchange. He got ammonium nitrate, which can be used to make an explosive device, and was in fact the main ingredient of the Oklahoma City bomb. He didn't pay for it, so his answer to me that he did not "buy" it was literally true. But I had a piece of paper showing that he obtained ammonium nitrate, so went on to the follow-up question. Note that I asked a non-leading question at that point. Fortier's parsimony of expression is not helping his image with the jury. He is not looking careful, he is looking evasive.]
Q. Now, during this garage sale, Terry Nichols wasn't there, was he?
A. No, he was not.
Q. To your knowledge, he wasn't even in Kingman, Arizona, was he?
A. I didn't know where he was.
Q. But you certainly didn't see him in connection with all of this; correct?
A. I did not.
Q. Now, you mentioned that Mr. McVeigh talked to you about the New World Order. Correct?
A. Yes.
Q. Now, that night that you went thieving with Mr. McVeigh in the armory, had he told you there were U.N. vehicles down there?
A. What he told me was there was a big build-up at the armory, and we went to check it out.
Q. Did he also tell you that he had been to look for U.N. markings on military vehicles in Mississippi?
A. No, he never told me that.
[This exchange relates to one of McVeigh's letters, which refers to such an alleged buildup, and to his proven conversations with others on this subject. One can believe Fortier on this or not, but the evidence as to McVeigh was clear, so I did not care which way he answered.]
Q. You also mentioned in talking to us yesterday something about a militia. Correct?
A. Yes.
Q. Did you all contact some individual or organization about the possibility of forming a militia?

A. We contacted an individual in Prescott, Arizona, and talked to him about what his militia consisted of and how myself and Tim could build one.
Q. And who was that person?
A. I believe his name is Walter Bassett.
Q. And is that the National Alliance?
A. I don't know about that.
[We will call Bassett in our case, and he will describe the contact. He was a "semi-hostile" witness, but he had every motivation to tell the truth in order to avoid being thought of as involved in the Oklahoma City bombing.]
Q. In addition to that, during that time you and Mrs. Fortier and Mr. McVeigh, you said, set off a pipe bomb in the desert together; right?
A. Yes.
Q. Now, during this period of time, 1994, Mr. McVeigh was frequently in your home; correct?
A. Yes.
Q. He lived there for a part of the time; correct?
A. Very early part of 1994, he lived at my house for approximately a week.
Q. And then later in 1994, he house-sat your house; correct?
A. That's right.
Q. He was best man at your wedding; correct?
A. That is correct.
Q. Anytime Mr. McVeigh wanted to come by, he felt free to do so; right?
A. Yes.
Q. Now, when was it that you and Mr. McVeigh and Mrs. Fortier set off that pipe bomb in the desert that you told us about?
A. I believe it was right around May of 1994.
Q. Was that just a lark?
A. Yes.
Q. I mean, that is to say, you just were going to go see if something blew up; right?
A. Well, actually, we went out to the desert, and Tim brought it with him and he pulled it out of a bag; and I didn't have any objections to him blowing it up.
Q. All right. Now, you told us that you had received a letter from Mr. McVeigh sometime in August or September, 1994. Remember that?
A. Yes.
Q. All right. And sometime after you got that letter, Mr. McVeigh came to Kingman. Is that your testimony?
A. Yes.
Q. Was Mr. Nichols with him when he came to Kingman?
A. Not that I know of.
Q. You didn't see them together; right?
A. No, I did not.
Q. So you and Mr. McVeigh had a discussion about the possibility of some action. Correct?
A. That is correct.
Q. But Mr. Nichols wasn't there, was he?
A. No, he was not.

Q. So what you were learning about this -- and Mr. Nichols never wrote you a letter, did he, sir?
A. No, sir.
Q. Now, you also told us that sometime Mr. McVeigh asked you to look for a locker for him; correct?
[In the letter, McVeigh had said that he and Nichols planned to take action.]
A. Yes.
Q. And that was Mr. McVeigh calling and saying, "Get a locker"; right?
A. Yes.
Q. Now, sometime after that, you told us, Mr. McVeigh and Mr. Nichols did come to Kingman; correct?
A. Yes.
Q. And that was the time that you told us that you went to a storage locker; right?
A. Yes.
Q. You showed us a picture of a storage locker; right?
A. Yes.
[This is damage control. There were explosives in the locker. Did Nichols know about them? Another government witness, an expert from England, would testify that she has written an article using a hypothetical of two men who shared a storage locker where explosives were kept, but one of them was ignorant of that use. So I am going carefully here, trying not to ask too many questions.]
Q. Now, that evening, Mr. McVeigh went into the storage locker, lifted up a blanket, and showed you some explosives; correct?
A. He didn't actually lift the blanket. He reached underneath the blanket and pulled a box.
Q. All right. Reached under the blanket, pulled a box out and showed you some explosives; correct?
A. Yes.
Q. And what was those -- was that sausage [a form of plastic-type explosive] or something?
A. I can't remember exactly what it was he showed me.
Q. Now, during that time, Mr. Nichols was getting a spare tire out of the shed and handling other things that were in the shed; right?
A. Yes. I think he was loading stuff from the shed into the truck.
Q. When you say "stuff," you don't mean explosives, do you?
A. No, I don't mean that.
Q. All right. And in fact, it was Mr. McVeigh that was showing you explosives; correct?
[Enough. On to something else.]
A. That is right.
Q. Now, that evening, did you discuss politics with Mr. Nichols?
A. No, sir.
Q. Now, was there any time in your life when Mr. McVeigh and Mr. Nichols were standing so that everybody could hear when Mr. McVeigh said in words or substance: "This is my friend Terry. We're going to blow something up that belongs to somebody else, like a building"?
A. No, sir.

Q. Was there ever a time in your life where Mr. McVeigh and you and Mr. Nichols were standing side by side, where everybody could hear each other, when Mr. McVeigh said in words or substance: "My friend Terry and I are going to blow up a building with people in it and kill people"?
A. No, sir.
Q. Now, you [also told us] that Mr. McVeigh came by and he told you to watch over his storage shed; right?
A. Yes.
Q. And he gave you a key and a piece of paper; right?
A. Yes.
Q. What did he do with the piece of paper?
A. He wrapped it around the key.
Q. What side was the writing on?
A. I don't know.
[McVeigh also gave Nichols some coins, wrapped in a receipt for ammonium nitrate. We were at pains to note this habit of McVeigh's. I left in this exchange as an example of mining every bit of an ostensibly hostile witness's testimony for things that may help. Note that we have not yet turned to the attack on Fortier. It is coming.]
Q. Okay. Now, you also told us that there came a time when Mr. McVeigh left a message with you for Mr. Nichols; correct?
A. Yes.
Q. About a storage locker.
A. Yes.
Q. When was that?
A. Just prior to October 31.
Q. All right. Now, were you ever in that storage locker after the time that Mr. McVeigh left that message?
A. Yes. Excuse me. No.
Q. Well, which is it? Yes, or no?
A. It is no.
Q. Because you did go in the storage locker using that key to put in the O2 bottle you had stolen; correct?
A. That is correct.
Q. And can you recall now that it was before Mr. McVeigh left -- supposedly left this message that you put the O2 bottle in there?
A. Mr. McVeigh did not leave me a message to put the O2 bottle in there.
Q. No, no. My question is inartful. There was an episode where you put an O2 bottle in. Correct?
A. Yes.
Q. And then there was a time when you say you gave a message to Mr. Nichols; correct?
A. Yes.
Q. Which event happened first?
A. The event that I put the O2 bottle into the storage shed.
Q. Now, you didn't know what things Mr. Nichols was supposed to get out of the shed, did you, sir?
A. No, sir.

[The prosecution theory was that McVeigh's message was that Nichols was to take explosives from the shed. Fortier does not know what if anything Nichols got from the shed, and we are about to see that McVeigh still had explosives in Kingman long after he had supposedly told Nichols to get things from the shed, so our argued inference is that Nichols was not told to get explosives, or at any rate did not do so.]
Q. And, in fact, in December 1994, you met Mr. McVeigh in a motel room, didn't you?
A. Yes, I did.
Q. And at that time, he had explosives, didn't he?
A. Yes, he did.
Q. And in fact, you wrapped explosives with him; right?
A. My wife did.
[We will follow up on this tidbit later.]
Q. Now, during the conversation when Mr. Nichols came, did you talk about politics, when he came to get this message you say you gave him?
A. No.
Q. Okay. So now is that the fourth time you saw Mr. Nichols? We count once in '93, once at dinner, once the night of the shed, once to get the message. Right?
A. I believe there was one other time.
Q. When is the one other time? Oh, I'm sorry. That's the time you told us about when they came by and said they were going in the desert; right? That is it?
[I have prior statements covering these meetings, but they are not entirely clear. They are clear enough to permit some non-leading questions, because if Fortier gives a bad answer I can impeach him. However, now things are getting a little uncertain. There is danger here, and I will try to go carefully.]
A. Actually, I was thinking of another time.
Q. All right. What's the fifth -- what's the sixth time?
A. Outside of Kingman -- in the desert outside of Kingman when Tim told me that they were planning on robbing this guy Bob in Arkansas.
[Whoops. This could be bad. Fortier had already said on direct that McVeigh said Nichols would rob Bob, the Arkansas gun dealer, whose real name is Roger Moore. I need to get that back into the open, and deal with it, even though there is some risk.]
Q. All right. You saw them out there. Now, where was Mr. Nichols when Tim was telling you this?
A. He was standing about 50 yards away.
Q. That's the 50 yards away. Okay. So now let's go back through these times. Six times you've seen Mr. Nichols from that time in '93 when he came through until the time you saw him yesterday. Is that correct?
A. That is correct.
Q. Did Mr. Nichols ever say he was going to rob anybody?
A. No, sir.
Q. Did he ever say he had robbed anybody?
A. No, sir.
Q. Did Mr. McVeigh ever say within earshot of Mr. Nichols that Mr. Nichols was going to rob anybody?
A. He did not.

Q Did Mr. McVeigh ever say within earshot of Mr. Nichols that Mr. Nichols had robbed anybody?
A. No, sir.
Q. And as we've established before, Mr. McVeigh never said within earshot of Mr. Nichols that Mr. Nichols planned to explode anything in a way that was going to hurt anybody; correct?
A. That is correct.
Q. And Mr. Nichols never said he was going to explode anything in a way that was going to hurt anybody; correct?
A. That is correct.
[Whew! But I can't leave it alone, because there is more there. Fortier knows he has helped me, and he will try to get even, but I chose to take that risk.]
Q. But Mr. McVeigh told you that he was going to be responsible for robbing somebody; correct? He told you he was going to have Bob robbed. Correct?
A. He told me that him and Nichols were going to rob Bob.
Q. I understand that, but Mr. Nichols wasn't present then when he said that?
A. That is correct.
Q. And Mr. McVeigh said this fellow Bob was a traitor; correct?
A. That is correct.
[In hindsight, I should have quit this line three questions ago.]
Q Well, let's continue on with what you told us yesterday. Christmas of 1994: Now, Mr. McVeigh said, "Go get some wrapping paper"; correct? Did he ask you to do that?
A. He asked me to bring some wrapping paper to his motel room.
Q. Did you get the wrapping paper, or did Mrs. Fortier get the wrapping paper?
A. I think we just brought it from my house.
Q. Did you know what it was you were going to wrap in wrapping paper?
A. No, sir.
Q. And when you got there, you discovered it was explosives you were going to wrap in Christmas paper; correct?
A. Yes.
[I am trying to paint this picture of Fortier helping McVeigh to conceal the explosives for transportation to the Oklahoma area by wrapping them in Christmas paper.]
Q. Had Mr. McVeigh asked you especially to get Christmas paper to wrap whatever it was he wanted to wrap?
A. Yes, he did.
Q. And what kind of Christmas paper did you choose to wrap the things that Mr. McVeigh wanted you to wrap?
A. We just got some stuff that was laying around the house.
Q. Now, Mr. Nichols wasn't there, was he?
A. No, he wasn't.
Q. After you wrapped the explosives in the Christmas wrapping paper, you took a trip. Is that correct?
A. Yes.
Q. Did you have the Christmas-wrapped packages with you on the trip?
A. I believe Tim had them with him.

Q. Well, you were together in the same car; correct?
A. That is correct, but I didn't -- I did not visually see them in the car.
Q. Didn't see them. And you told us that you drove to Oklahoma City; correct?
A. We drove through Oklahoma City.
Q. Now, you told your people at work you were going to Florida; correct?
A. Yes, that's what I told them.
Q. Why did you lie to them?
[A "why" question, but good.]
A. In an effort to get time off work.
Q. You thought it would be easier to get time off work to say you were going to Florida instead of saying you were going to Oklahoma?
A. I'm not sure why I said Florida. I don't remember why that was the state I chose.
Q. Did you know of any business relationships that Mr. McVeigh had in Florida?
A. No.
Q. Did Mr. McVeigh suggest Florida to you?
A. He may have. I don't recall.
Q. Have you ever been to Elohim City, Oklahoma?
A. No, I never have.
Q. Do you deny that?
A. I absolutely deny that.
Q. Have you ever used the name Michael Fontaine?
A. Never.
Q. Do you deny that?
A. Absolutely deny that.
[Denials were expected. We have other evidence, later in the trial. So why ask him? If our other evidence is believed, the jurors will think he was trying to cover up some of his activities with McVeigh.]
Q. Have you ever stayed in the Dreamland Motel in Junction City, Kansas?
A. I may have. I'm not sure of the motel's name.
Q. Did you stay at the Dreamland Motel in Junction City, Kansas, Easter weekend of 1995?
A. No, I did not.
Q. Do you deny that?
A. Absolutely.
[Now we resume talking about this trip he admits taking with McVeigh in late 1994, when Terry Nichols was out of the United States.]
Q. You say you got to Oklahoma City, and you looked at the building; right?
A. Yes.
Q. Did that discussion with Mr. McVeigh in Oklahoma City cause you to say to him that you wouldn't have anything more to do with him?
[He has seen the target building and knows the plan, and does not split with McVeigh.]
A. I don't believe I said that.
Q. Now, before you went to Oklahoma City, you mentioned about this oxygen bottle.
That was a trip you took or a thieving trip you took with Mr. Rosencrans; correct?
A. And another person
Q. Who was the other person?

A. His name is Jason Hart.
Q. Pardon me?
A. Jason Hart.
Q. Are you related to him?
A. No, sir.
Q. Now, Mr. Rosencrans you also told us is a dope dealer; right?
A. Yes.
Q. He's your neighbor, or was?
A. Yes.
Q. How did you know he was a dope dealer?
A. By what I observed.
Q. Did you buy from him?
A. On occasion.
Q. Did you sell to him?
A. No.
[We will call Hart and Rosencrans, two of Fortier's neighbors, to substantiate our claim that Fortier dealt narcotics – offenses for which he is not being prosecuted.]
Q. Now, you told us in direct examination that you had used methamphetamine; correct?
A. Yes.
Q. How did you use it?
A. I either smoked it, or I snorted it through my nose.
Q. And when you "smoked it," you smoked it in some kind of -- how did you smoke it?
A. We either put it on glass or on tinfoil, and you heat the bottom of it and it will smoke.
Q. And then what do you do with the smoke as it comes up off the glass or the tinfoil?
A. You inhale it.
[He says "you" inhale it. I do not accept this careless terminology. I am trying to make a point here.]
Q. Well, you can inhale it. One does inhale it. Is that what you do with it?
A. Yes.
Q. What does it do for you?
A. It makes you feel very excited.
[We are going to present expert testimony on the effect of long-term methamphetamine usage on memory, and on the ability to distinguish truth from invention. Our expert will not be able to examine Fortier, but will have to use the evidence we obtain as the basis for testimony on the drug's effect.]
Q. Does it make you irritable?
A. I believe it does when you're coming down off it.
Q. Did it make you stay awake a long time?
A. Yes.
Q. Did it give you a schedule where you'd be up late at night and then you wouldn't get up until late the following morning?
A. If you didn't have to go to work, yes.
Q. Well, did you have to go to work?
A. On occasion, yes.
Q. After December of 1994, did you have to go to work?
A. No, sir.

Q. Can you remember saying in one of those recorded conversations, "If I had a job, I'd hate Mondays"?
[These "recorded conversations" are FBI wiretaps and bugs of the Fortiers' house trailer. We will play some of them later in the examination.]
A. Not specifically.
Q. Now, you say also you snorted it; correct?
A. Yes.
Q. How would you do that?
A. One would form it into a line on some surface, and you take a straw --
Q. What do you mean "form it into a line"?
A. Well, sometimes it comes in a powder form, or sometimes it comes in a solid form. If it came in a solid form, you'd have to crush it up into a powder. Then you could form that into a line and snort it through a straw into your nose.
Q. And show the jury how you would do that.
A. What you do is you take a razor blade or a knife or some type of sharp instrument and you would just go like this [indicating] and it would form a line.
Q. And then to snort it, what would you do? Put the straw in your nose?
A. Yes.
Q. And then what, go, "Chnchnchnchcn"? Like that?
[I made a snorting noise, which the court reporter tried to approximate.]
A. Just like that.
Q. Just like that. And then it would get up -- what would it do to you when the stuff got into you?
A. Right off the bat, it would burn real bad; and then that would go away.
Q. You did this on purpose?
[I have a quizzical expression at this point. During this line of inquiry, I have tried to have a neutral, nonjudgmental demeanor, to let the facts speak for themselves.]
A. Yes. Many times.
Q. Okay. And then what would happen?
A. And then you would feel like -- I'd describe it as an excitement. It feels as if you would just get off a roller coaster and you're just very excited.
Q. Did you ever talk about blowing something up and hurting people when you were doing this?
A. No, sir.
Q. That morning [of the Oklahoma City bombing], when you saw the bombing on the television, you were playing a video game with Mr. Rosencrans, the dope dealer; correct?
[Picture theory: Mr. Rosencrans the dope dealer – just to remind the jurors.]
A. That is correct.
Q. Were you high? Is that what you call it, high, when you use this stuff?
A. Yes, sir.
Q. Were you high?
A. That morning, yes.
Q. And how long had you been up with Mr. Rosencrans, the dope dealer, that day?
A. All night the previous night.

Q. Now, you mentioned that sometime in November, you got a red-alert call from Mr. McVeigh. Correct?
A. He either said "red alert" or he said "code red." I'm not sure.
Q. And you described going to the Tri-Mart. Do you remember that?
A. Yes.
[We are repeating the direct to set up the next question, as to which we have ironclad evidence of the call about which I will now ask him.]
Q. Isn't it a fact, sir, that days before you ever went to the Tri-Mart that Mr. McVeigh called your home and spoke to you for 11 minutes on the 5th of November, 1994?
A. I'm not sure when I received the red-alert phone call. And all I remember Tim calling me once during that month.
Q. Now, we continue, here, with the Oklahoma City trip. You mentioned that before you went off to Oklahoma City that you had ordered these -- this stuff from the Soldier of Fortune magazine. Right?
A. Yes.
Q. Now, have you talked to your wife about what – what happened to that ID kit?
[We are picking up the thread again of the Fortier-McVeigh road trip in late 1994. I am asking him about his testimony that he ordered a kit from Soldier of Fortune magazine, to provide McVeigh with a false ID.]
A. I have.
Q. Now, you told us that you went to a storage shed. That was in Council Grove, Kansas, where Mr. McVeigh got some guns out; correct?
A. I believe it was in Council Grove.
Q. And he told you: "Wipe the guns down and get my prints off of them." Correct?
A. Yes. He said that to me more than once.
Q. All right. And he said just -- do you remember his words -- don't you?
A. Yes.
Q. "Wipe the prints down" -- "Wipe the guns down and get my prints off them." Correct?
[I am trying, by focusing on McVeigh's instruction to get his prints off the guns, to point away from allegations that Nichols had been primarily responsible for stealing the guns.]
A. Yes.
Q. Now, after you got back from your trip to Oklahoma City and Kansas, you spent Christmas with your family; correct?
A. Yes.
Q. Now, during all of that trip in Kansas and so on, you never saw Mr. Nichols; right?
A. No, sir.
Q. Now, you told us that then Mr. McVeigh showed up in Kingman sometime after the first of the year. Do you remember that?
A. Yes.
Q. And you told us that he had given you a phone call to go to his motel; right?
A. Yes.
Q. And you noticed that he was more agitated than he had been before? Did you notice that?
A. No, sir.

[I don't like this denial, so I come back on a sure theme. I focus on the fact that Fortier regarded McVeigh as so crazy and dangerous that he went armed to see him.]
Q. When did you start packing a weapon for your visits to Mr. McVeigh's motel room?
A. In April of 1995.
Q. Now, at that motel room, he -- he gave you a book to read?
A. Yes.
Q. Now, you've also told us in what you said yesterday and today that you went to three different gun shows. Remember that?
A. Yes.
Q. Now, what name did you register under at the gun shows?
A. I'm not sure, but they were alias names.
Q. They just weren't your name. Right?
A. That's correct.
Q. And Mr. McVeigh told you that -- did he tell you that you should use a different name?
A. I was selling stolen weapons. He did not need to tell me that.
Q. You thought you were selling stolen weapons; right?
A. Yes.
Q. The only thing you know about whether those weapons were stolen is what Mr. McVeigh told you; correct?
A. That is correct.
Q. And he told you that the stolen weapons came from a guy named Bob in Arkansas; right?
A. That's right.
Q. And he told you that Bob was a gun dealer; correct?
A. Yes.
Q. And you're able -- you have some experience with guns; right?
A. Yes, I do.
Q. From across the room here without getting down, you were able, when Agent Tongate held up a gun, to say, "Oh, that's my gun, that's the one I had." Correct?
A. Yes.
Q. And you could say, "That's my gun, and I put a scope on it, and I know it's different from when I first had it"; correct?
A. Yes.
Q. Would you say that anybody who was in the gun business would be able to recognize some gun that belonged to them or looked like one that belonged to them fairly easily?
[Prosecutor]: Objection.
23 THE COURT: Overruled.
THE WITNESS: I believe that's possible.
[This witness has helped us establish that one of the alleged victims of the gun robbery must be viewed with skepticism because she was unable to identify at least some of the weapons. Throughout this part, I am trying to get as much helpful stuff from the witness as possible before turning the corner.]
Q. And so you -- as I say, Mr. McVeigh had told you all this; and Mr. Nichols never talked to you about this, did he?
A. No, sir.

Q. All right. And what Mr. McVeigh told you about Bob, the person from whom this robbery supposedly happened, was that he was a traitor; correct?
A. Yes. He did say that.
Q. And he told you that Bob was a person who had a list of members of the patriot movement that he was going to give to law enforcement in the event he was ever busted. Correct?
A. He did not specifically say the militia movement.
Q. No, I said, "patriot movement."
A. Excuse me. He only said that Bob had a list of names that he would turn over in the event that he got busted.
Q. And McVeigh didn't like that -- did he -- that Bob had this list; correct?
A. That is correct.
Q. When Mr. McVeigh didn't like people, he expressed himself, didn't he?
A. Yes, he did.
Q. And Mr. McVeigh also told you that whoever committed this robbery got tired in the middle of it; correct?
23A. That's not exactly what he told me.
24Q. Well, he told you that the -- that the robber tied up or restrained Bob; correct?
A. He told me that Terry Nichols tied Bob up.
[He volunteers Terry Nichols' name. This is an inevitable risk in these situations. The examiner uses a neutral term like "this person" and the witness wants to help the prosecution so he makes sure to put in the name. That makes it necessary to clear the air.]
Q. I understand. That's what Mr. McVeigh told you.
A. That's correct.
Q. Right? My question to you, sir, was whoever it was he said did it -- he said that person got tired; correct?
A. That is correct.
Q. All right. And I know that he told -- that Mr. McVeigh told you that was Terry Nichols; right?
A. Yes.
Q. But you weren't there, were you?
A. No, sir, I was not.
Q. And you know that Tim McVeigh is a liar, don't you?
A. Not at that time.
Q. You know today that Mr. McVeigh has told a lot of lies to you; correct?
A. I believe he has.
Q. In fact, he gypped you out of the $10,000; right?
[I am sorry to have used the word "gypped," which is an ethnic slur against gypsies or Romish people, just as "jewing down" is a slur. I try not to do that sort of thing, and you will see how the word then keeps cropping up because Fortier adopts it.]
A. That's correct.
Q. Okay. Just for one. Now, he also said some things that later turned out to be true; correct?
A. Yes.

Q. Okay. But whoever it is he said did this robbery, he said that person got tired in the middle of it, untied the victim, and had the victim help him for a while; right?
A. That's what he told me.
[We are perhaps ahead on points on this one, although his blurting out Terry Nichols' name was intended to hurt, and did. The alleged robbery victim, about whom we wove a web of suspicion as having been McVeigh's accomplice and friend, had told a story that did not include any "helping," so the reference to Terry Nichols is less important than the fact that Fortier is contradicting another government witness.]
Q. Anyway, there you were selling these guns that were gotten from Bob in Arkansas; and there came a time when Mr. McVeigh said, "Listen, you got 4,000. I need to send some money to Terry Nichols"; right? Is that what he said? Words to that effect?
A. Words to that effect, yes.
Q. And you gave him a thousand dollars; right?
A. Yes.
Q. Did you get a receipt?
A. No, sir.
Q. Now, this was the guy who had already got you to go to Oklahoma and Kansas and told you he was going to give you $10,000 but didn't; right?
A. That is correct.
Q. Because that already happened; correct?
A. Yes.
Q. And the next time he asked you for a thousand dollars, you just reached in your pocket and said, "Here's a thousand"; right? Right?
A. Yes.
Q. And, of course, you don't know what he did with the money, do you?
A. No. Only know what I seen.
Q. Right. And what you saw, you saw him put it in an envelope; correct?
A. Right. And then write on the envelope.
Q. Okay. Oh, now you're telling us you saw him write on the envelope?
A. Yes, sir.
Q. Okay. All right. What did he write?
A. I don't know what he wrote on it.
Q. Oh, you don't know what he wrote on it.
A. That's right. I only -- he prepared the envelope. It appeared to me he was going to send it to Terry Nichols as what was agreed upon.
Q. It appeared to you. You didn't see what he wrote on it; is that correct?
A. That's correct.
Q. Is that your testimony now?
A. I seen him write on the envelope. I just didn't see what he wrote on it.
Q. On June 21 and 22, 1995, were you interviewed by Special Agents Volz and Zimms of the Federal Bureau of Investigation?
A. I believe so.
Q. And did you describe for them this so-called event where you gave the thousand dollars to Timothy McVeigh?
A. Yes.

Q. And when you described it, did you say anything about seeing Mr. McVeigh write on an envelope?
A. I do not recall.
MR. TIGAR: May I approach, your Honor?
THE COURT: Yes.
Q. I show you a report of interview prepared by those agents of the Federal Bureau of Investigation and ask if that refreshes your recollection that you did not tell Agents Volz and whatever the other one's name was that you saw anybody write on an envelope. My question is not what it says there because that's not yours, but does it refresh your recollection.
A. No, sir, it doesn't.
[It is obvious to the jury, I hope, that there is a contradiction, but the FBI does not record witness interviews. I only have the FBI agents' interview report, so I cannot impeach with it directly. I asked my series of questions in reliance on the FBI report, but Fortier declined to "improve" his testimony by agreeing that he had not told the agents he saw McVeigh write anything on the envelope. That is always a risk with the witness who wants to do a good job for his or her sponsor. It is, however, a risk you must taken in order to get the most from your cross.]
Q. Thank you, sir. Now, after Mr. McVeigh moved out of your house in anger over the baby-sitting episode, you still continued to see him; correct?
A. Yes, sir.
Q. Now, you said that Mr. McVeigh dropped some things by your house; correct?
A. Yes.
Q. So you got some blasting caps from Mr. McVeigh. We talked about that. Correct?
A. Yes.
Q. You got some ammonium nitrate from Mr. McVeigh; correct?
A. Yes.
Q. You got some Primadet from Mr. McVeigh; correct?
A. I don't know what Primadet is.
Q. Oh. You got that stuff that -- the orange tubing that you saw during your direct examination. You got that from him; correct?
A. Yes. Blasting caps, yes.
Q. Well, it's a blasting cap, but it has the orange stuff at the end of it; right?
A. Yes.
Q. You got some Kinepack or some Kinestik, some binary explosive from him?
A. Yes.
Q. You got both halves of it?
A. Yes.
Q. And your understanding is you can mix those together and you can make an explosive; right?
A. Yes.
Q. And you had all of these things at one time or another either in your house or your storage shed; correct?
A. The shed in my yard, yes.
Q. And you didn't conspire with Timothy McVeigh to blow up that building, did you?
A. No, sir, I did not.

[So now we establish that even the possession of many explosives from McVeigh, and all Fortier's other involvement, does not make him a conspirator – in his eyes and according to what the government charged him with, as noted at the beginning of the examination. This ends this theme, so I use a transition to the next one.]

Q. Now, sir, I'd like to turn to the versions of events – the things that you said before you came here today. When is the first time that you were interviewed by the Federal Bureau of Investigation in connection with this case?

A. I believe it's April 22, 1995.

Q. And do you remember on April 22, which would be a Saturday, being interviewed by Agents Williams, Petrie, and Mooney?

A. Yes.

Q. Now, they told you that they were investigating the bombing; correct?

A. Yes, they did.

Q. And you told them that you had not left Kingman, Arizona, for several months; right?

A. That's what I told them.

Q. According to you today, that was true; correct?

A. No, that is not true.

Q. All right. What was untrue about it?

A. I had left to go do gun shows.

Q. All right. And if you included December, you had also left to go to Oklahoma City; correct?

A. I never went -- I went through Oklahoma City. That was not my destination.

[The jury will notice his caviling.]

Q. I understand destination, but you sure didn't tell those agents you had been there; right?

A. No, I did not.

Q. Now, you also told them that you had -- you knew Jim Rosencrans; correct?

A. Yes.

Q. And you told them he was a guy with crazy ideas about the government. Correct?

A. I don't remember exactly what I said. I do remember saying that Rosencrans was crazy.

Q. All right. Now, this crazy man Rosencrans: You and McVeigh had talked about him; correct?

A. Yes.

Q. And you and McVeigh talked about trying to hire him to do some driving; right?

A. No, that's not true.

Q. Well, Mr. McVeigh asked you if he was reliable; correct?

A. Yes. Yes, he did.

Q. Did Rosencrans ever tell you anything about Mr. McVeigh talking to him about driving?

A. Mr. Rosencrans --

Q. Just yes or no, because he's not here. I just want – if he did, then we can obviously call him. Did he ever talk to you about that subject -- Mr. Rosencrans?

A. Yes.

Q. And did Mr. McVeigh ever talk to you about the subject of Mr. Rosencrans' driving?

A. He told me that he had asked Mr. Rosencrans to do that for him.

Q. Mr. McVeigh told you that?
A. Yes.
Q. What did he tell you about asking this fellow Rosencrans to do some driving for him? What did he say about that?
A. I asked him a question, and he told me that he had asked Mr. Rosencrans to give him a ride to Arkansas.
[Note his denial, and how carefully crafted it was. It is almost literally untrue. So I had to go back with very precise and narrow questions to find out where he thought the problem lay.]
Q. Now, in your interview with the -- that first interview on the 22d, you described yourself as a constitutionalist. Correct?
A. Yes.
Q. What is a constitutionalist?
A. One who reads and is concerned about constitutional issues.
Q. Was that an accurate description of your views?
A. Somewhat, yes.
Q. Well, you had written a paper when you were in college about the Second Amendment and gun control; correct?
A. Yes.
Q. You had a lot of literature in your house that Timothy McVeigh had given you, didn't you?
A. Yes.
Q. Some of it Timothy McVeigh had given you, and it talked about Waco; correct?
A. Yes.
Q. Some of it talked about some international conspiracies of various kinds; correct?
A. Yes.
Q. Some of it talked about the New World Order; correct?
A. Yes, sir.
Q. Some of it talked about the significance of April 19 in American history; correct?
A. That's possible.
Q. A Revolutionary War event long before Waco. Do you remember that? Not that you were alive then, but do you remember reading about it?
A. I remember something about it. I believe there was a battle.
Q. Yeah. And you had all of this stuff in your house; correct?
A. Yes.
Q. And some of it you had got; and some of it Mr. McVeigh had given to you and you just kept it. Right?
A. Yes.
Q. Now, you also told the agents that you were not into selling guns with McVeigh; correct?
A. Yes.
Q. Now, you said that you had -- you did tell them that you traveled to Kansas to buy guns from Timothy McVeigh; correct?
A. Yes.
Q. All right. Now, part of that was true; correct?
A. Part of that was correct.

Q. Right. Because you knew that Mr. McVeigh had some guns, wherever he had gotten them, and you knew if you sold them you could make some money; correct?
A. Yes.
Q. That is, the gun shows you went to -- those were perfectly legal events; right?
A. Yes, they were.
Q. People walking around in camouflage suits and selling weapons and ammunition and literature and all sorts of things; correct?
A. Yes, sir.
Q. And from what you could see, that was a perfect -- that was a respectable way to make money -- correct -- just going to gun shows?
A. Yes. That's my opinion.
[Again establishing, whenever possible, that activities such as Terry Nichols engaged in are not unlawful.]
Q. Now, you did tell the agents, however, that you hitched a ride to Manhattan, Kansas, and rented a car to come back. Right?
A. Yes, sir.
Q. And as a matter of fact, you told a story about hitching a ride from a trucker at a truck stop located on Andy Devine Boulevard next to a McDonald's restaurant; correct?
A. Yes, sir. I said something like that.
Q. Yeah. Now, where is that truck stop out there? Is that that Tri-Mart truck stop?
A. No. I wouldn't consider Tri-Mart to be a truck stop.
Q. Well, what truck stop was it you were telling the agents that you hitched a ride from?
A. I believe the one I was referring to would be called Flying J, but I'm not sure.
Q. Okay. You're not sure. Well, is one reason you're not sure is that you were making it up, or you just don't remember?
A. Oh, absolutely I was making that up.
Q. You weren't -- there is a truck stop there; right?
A. Yes, there is a truck stop.
Q. And there is a McDonald's nearby?
A. Beside the McDonald's, yes.
Q. You told the agents that you then hitched and you met McVeigh at an airport and rented a car, picked up the weapons and drove back to Kingman; right?
A. Yes.
Q. Now, you told the agents that you had not stayed in contact with Terry Nichols nor seen him since leaving military service, you didn't know anything about Terry Nichols. Right?
A. That's right.
Q. Now, some of that was false; right?
A. Yes, sir.
Q. That is, you had seen Terry Nichols six times; correct?
A. Yes.
Q. But it was true that you didn't know anything from Terry Nichols' own mouth about what his political views were; correct?
A. That is correct.
Q. Well, where did this interview take place? At your house, or down at some sort of facility they had there?

A. Both places.
Q. So it started one place and then moved to another?
A. Yes.
Q. How did you decide what you were going to tell the truth about and what you were going to lie about?
[This is not only an open-ended question, it is wide open. It illustrates, in my opinion, when and why such questions can be useful during cross-examination.]
A. The factor would be the legality of the issue. Anything that was illegal, I would lie about.
Q. Well, why would you do that? What were you afraid of?
[This is a "why" question, just in case you missed it.]
A. Of getting in trouble.
Q. What kind of trouble did you think you'd get into?
A. Well, for one reason, I had a bunch of stolen weapons in my house. I did not want them to know that.
Q. Right.
A. I had prior knowledge of the bombing, and I didn't know -- I wasn't sure if that was illegal or not, but it sure did seem like it should be; so I did not want to tell them about any prior knowledge.
Q. Had you talked to your wife after you saw the pictures of the bombing about the conversations she had with Mr. McVeigh about the bomb?
A. No, sir.
Q. Did she ever tell you about the soup cans?
A. No, sir.
[McVeigh had showed Mrs. Fortier the arrangement of the barrels containing ammonium nitrate that would comprise the bomb. He used soup cans as models. I thought it likely that Mrs. Fortier told Mr. Fortier of this conversation, but apparently she did not. It was worth asking the question. As it happened, the government did not call Mrs. Fortier as a witness.]
Q. You knew Mr. McVeigh had -- you had watched him, you had gone past a Ryder truck, you had gone to the building, you had done all of those things. Had you seen the thing – the stories on television with public officials talking about what was going to happen to people if they could prove somebody was involved in this?
A. Yes. Because it was my understanding that they were going to go for the death penalty.
Q. That scared you, didn't it?
A. It was certainly a concern, yes.
Q. It scared you, didn't it?
[Although his answer is "almost" OK, I refuse to accept his evasion. The best way to do that is usually to repeat the question.]
A. Yes.
Q. Okay. And so one reason you were lying was that you were scared; right?
A. Yes. That's one reason.
Q. But when you first heard about the -- when is the first time you ever saw your name or heard your name in the media about this event?

A. It may have been the 22d. As soon as the FBI showed up, they brought the media with them. I'm not sure on the date. Maybe it was the 22d.
Q. You had a media invasion at your house?
A. I would certainly call it that.
Q. And when you heard your name on the media in connection with this, did you turn to your wife, Lori, and say: "Let's gather up Kayla and go to the police station and find out what this is about"?
A. Mr. Tigar, they were already talking to me at that time.
Q. Okay. Did you then look at your wife and say: "Lori, let's tell them that we know Tim McVeigh. Let's tell them every time we saw him, and let's do the best we can to remember all these things that happened these last few months so that we can help"? Did you say that?
A. No, sir.
[Terry Nichols had taken his wife and child to the local police station as soon as he heard of the bombing, and answered questions from FBI agents for many hours. He was denied counsel during this encounter, at a time when counsel could have helped. But we needed to make a virtue of Mr. Nichols' cooperation, and one way to do that was to contrast it with Fortier's actions.]
Q. Did you think that?
A. The first day of the bombing, the first morning?
Q. The 21st, sir?
A. Not on the 21st.
Q. Did you do that?
A. No, sir.
Q. In fact, sir, you were extremely proud of the confrontational approach that you took to the FBI. Isn't that a fact?
A. Yes.
Q. And -- now, of course, you were not aware, were you, that there was a wiretap in your house? Right?
A. No, sir, I was not aware of that.
Q. You were not aware that there was a -- also later on – bug in your house; right?
A. That's true.
Q. Now, the wiretap was the thing that listened in on your phone calls; right?
A. Yes.
Q. And the bug was an actual microphone that the FBI had planted in your home; correct?
A. Yes.
Q. Now, your home is a trailer house; right?
A. Yes, it is.
Q. And as a matter of fact, it was -- that's the same trailer house where Timothy McVeigh stayed for a while; right?
A. Yes.
Q. That was his temporary address; correct?
A. No, sir.
Q. Well, he used your phone, didn't he?
A. Yes, he did.

Q. He stayed there for weeks at a time; correct?
A. On occasion.
Q. Did he use your -- used your stuff?
A. Sure. I had no problem with him using my stuff.
Q. Okay. And you wouldn't be surprised to know that his fingerprints are all over that place; correct?
A. No, I'm sure they are.
[Once again, he would not give me the answer I sought – "temporary address." It is perhaps not important, but I needed to discipline him for not being fully forthcoming.]
Q. Okay. Well, I'd like to --
THE COURT: Mr. Tigar, tell us wherever a good time for a break is.
MR. TIGAR: We're about now -- I want to play for him some of these statements about these different subjects, so this would be a good place to break. I didn't keep track of the time, your Honor.
THE COURT: All right. Then we will break at this point. You may step down, Mr. Fortier.
(Reconvened at 1:31 p.m.)
THE COURT: Please be seated.
(Jury in at 1:32 p.m.)
(Michael Fortier was recalled to the stand.)
THE COURT: Please resume the stand, Mr. Fortier.
Mr. Tigar, you may continue.
Q. Mr. Fortier, over the break, we cued up a very short video segment just to show a picture of you back in the April, May, 1995 period.
MR. TIGAR: Your Honor, this has been shown to the government. We'd like to show it now.
(Defendant's Exhibit D566 played.)
[This was a picture of Fortier with shaggy hair and an unkempt appearance, quite a contrast with his dress and demeanor for court. This technique often helps the jury to put the witness in context.]
Q. That was it, Mr. Fortier.
A. Yes, it was.
Q. Now, sir --
THE COURT: Excuse me, Mr. Tigar. Was that marked some way for the record?
MR. TIGAR: D566, your Honor.
THE COURT: Thank you.
Q. Mr. Fortier, you have had an opportunity, have you not, to review the tape recordings that were made of the microphones that were placed in your home and the tap on your phone?
A. Yes, I have.
[We are now going to play excerpts from these recordings. I have not included the text of the excerpts, but they are available from Pub-Netics, a company in Denver, Colorado.
Q. And would you agree with me, sir, that beginning on the 25th of April, you began to talk about the possibilities that might exist to you to sell your story to the media?
A. Yes.
Q. I'd like to play A8, April the 25th.

(Defendant's Exhibit A8 played.)
[He talks about selling his story to the media.]
Q. Is that you?
A. Yes, sir.
(Defendant's Exhibit A8 played.)
[Again, he is talking about selling a story to the media. I pick up a key phrase in the next question.]
Q. That's you and your brother talking?
A. Yes, it is.
Q. "And I could tell stories all day," that's you; correct?
A. Yes.
Q. You also had a conversation with -- about CNN; correct? With your brother John? Remember that on April the 25th?
MR. TIGAR: Could we have A9, please.
(Defendant's Exhibit A9 played.)
[I have made a CD-ROM of just the excerpts that we want to play. I have shown it to the government, in case they wish to object, although arguably Federal Rule of Evidence 106, the rule of completeness, does not apply to tape-recorded conversations. I am playing these tapes in part to show that he is willing to sell a story for money, and in part to contrast his silence and falsehoods with the FBI with his expressed desire to share a story with the media. These tapes also show a rather greedy, sometimes irrational Michael Fortier. He reacted sometimes visibly to their being played, and that was not lost on the jury.]
Q. And that was you talking about the possibility of being on CNN; correct?
A. Yes, sir.
Q. That was April the 25th?
A. I believe it was.
Q. And you were still talking to the FBI, but you hadn't decided to tell them what you knew about Mr. McVeigh; correct?
A. I don't believe I was on speaking terms with the FBI at that point.
Q. And did you become angry that CNN, you thought, had agreed to pay you some money and then backed out?
A. No, sir.
Q. Did you ever say "You know what, CNN sucks. They owe me some money"?
A. Yes.
MR. TIGAR: Could we have A13, please.
(Defendant's Exhibit A13 played.)
Q. That was you?
A. Yes.
Q. On April the 28th?
A. I believe it was on that date, but there was no agreement between me and CNN to exchange money whatsoever.
Q. Why did you think they owed you money, sir?
A. They had taken the clips from my interview with them and -- what I thought they did was pass it out to other -- like ABC, NBC and CBS; and that's what I was upset about. I felt they owed me money for distributing my image.

Q. You thought your story was worth something, didn't you, sir?
A. I imagine it was to the -- the media.
MR. TIGAR: Could we have B1, please.
(Defendant's Exhibit B1 played.)
[Another tape in similar vein.]
Q. That's you saying, "I was thinking one cool one"; is that right?
A. Yes, sir. That's me.
Q. And that meant you were thinking of a million?
A. Yes. That's what I was referring to.
Q. And then did you also think about after the trial, doing book and movie rights?
A. That is something that was discussed.
MR. TIGAR: May we have B2, please, April 30, 1995.
(Defendant's Exhibit B2 played.)
Q. Talking about something that's worth The Enquirer? Is that what we heard?
A. I believe that's what I said.
Q. Now, did there come a time, sir, when your mother started to make comments to the media?
A. I believe she did.
Q. And were you angry at her for making comments to the media?
A. Yes, I was.
Q. And did you not want her talking to the media?
A. That is correct.
Q. And when you heard a tape recording of her doing that, did you react in a certain way?
A. Yes.
MR. TIGAR: May we have B7, please.
(Defendant's Exhibit B7 played.)
[This is a tape of Fortier cursing out his mother for talking to the media, and undercutting his plan to sell his story. The court is going to let this in. The prosecutor's objection therefore simply underscores the issue. If the court has ruled, and you need to preserve an objection, try to do so out of the jury's hearing.]
PROSECUTOR: Your Honor, we would object to this for the reasons stated.
THE COURT: Overruled. Go ahead and play it.
(Defendant's Exhibit B7 played.)
Q. That's you, sir?
A. Yes, sir.
Q. Now, you also talked in May with your friend Lonnie Hubbard about the possibility of a made-for-TV movie; is that correct?
A. That is possible. I don't recall that.
MR. TIGAR: Could we have C2, please.
(Defendant's Exhibit C2 played.)
Q. What you were -- that was you saying, "The bigger the price is going to be later"; right?
A. Yes.
Q. You were being silent that time; correct? That is, you weren't -- you weren't talking to the media at that time?

A. That is correct.
Q. Now, at the time that all this was going on, had someone named Kato become a celebrity?
A. Yes.
[Kato Kaelin was O.J. Simpson's driver, and had become well-known as a witness in the O.J. Simpson criminal trial. His celebrity status, as a result of being a witness, went so far that he is mentioned in a Charles Robison country song.]
Q. And did you think of yourself kind of like that person Kato?
A. No, I did not.
MR. TIGAR: Would you play C3, please.
(Defendant's Exhibit C3 played.)
Q. Is that you saying, "A real Kato, huh"?
[I do not know why he denied thinking of himself as a Kato person, when the contrary evidence was on the tape. We had told the government which excerpts we would play, but Fortier apparently had not been prepared for this.]
A. Yes.
Q. And now, sir, do you remember a long conversation you had with Mr. Lonnie Hubbard about how you would behave if you ever became a witness in court?
A. Yes, I do.
Q. And that was about the 8th of May, 1995?
A. Or thereabouts.
MR. TIGAR: May we have C4, please.
(Defendant's Exhibit C4 played.)
[This tape has Fortier saying, among other things that he would pick his nose and flick the resulting material at the judge. He was, from his tone of voice, obviously high on something, probably methamphetamine, which can make one boastful.]
Q. Now, sir, during this period of time, you and the FBI, you said, were not getting along very well. Is that fair to say?
A. That's correct.
Q. And there were times when the tapes captured your reactions to what the FBI was asking you and how you were feeling about it; correct?
19A. That is correct.
[Tapes show him being angry at the FBI's overbearing tactics.]
Q. And on April 25, did you also talk with your brother John about news reports of sketches of John Doe No. 2?
A. I believe I did.
Q. Now, who did you understand John Doe No. 2 to be, sir?
A. I did not know who he was.
Q. But what did you understand that John Doe No. 2 talk to be about? Something to do with this case?
A. Yes.
MR. TIGAR: May we have A3, please.
(Defendant's Exhibit A3 played.)
Q. Is that you talking about one needing to talk about an alibi?
A. Yes, sir. That was me.

Q. Now, also on April the 25th, did you talk about having bigger and better things to worry about? Do you remember that?
A. I believe I used those words.
MR. TIGAR: Could we have A5, please.
(Defendant's Exhibit A5 played.)
Q. Now, the thing that was terrible that happened was the bombing; correct?
A. Yes, sir.
Q. The bombing that you had seen that morning when you and Jim Rosencrans turned off the video game?
[Fortier first became aware of the Oklahoma City bombing the morning after it happened. He and his friend Rosencrans had been up all night on drugs, playing a video game. They dozed off and when they turned on the TV, the news reports were being broadcast.]
A. That is correct.
Q. What bigger and better things did you have to worry about right then, sir?
A. The media and the FBI being more or less in my face at that time. That's what was concerning me and filling all of my days.
Q. And feeling what?
A. And filling my days at that time.
Q. Now, when you say "filling" your days, you weren't going down to the FBI to tell them everything you knew, were you?
A. No, sir, but they were sitting right out front.
Q. Now, in addition to sitting right out front, the FBI had some talk with you about that John Doe No. 2 sketch, didn't they?
[This is a reference to an FBI sketch artist picture of the person with McVeigh when he rented the Ryder truck used in the bombing.]
A. I believe they did.
Q. April 25, 1995. Could we have A6, please.
(Defendant's Exhibit A6 played.)
[In this tape, Fortier says the FBI agents told him they might change the sketch to make it look more like Fortier. The FBI did not record any such comment in its report of interview. Fortier's progression to becoming a government witness is a combination of his own desire and a lot of FBI pressure. We are going to see his story develop. In summation, I spoke of the way the FBI worked with him to fashion his story. I said, "The Marine Corps builds men. The FBI builds witnesses."]
Q. Now, did someone imply that they were going to change the sketch to make it look more like you?
A. I don't recall what they said to make me say that.
Q. Now, you do recall that you got very angry at the FBI; right?
A. Yes.
MR. TIGAR: Okay. May we have A7, please.
(Defendant's Exhibit A7 played.)
Q. Now, the "standing up and yelling in each other's face," that's you and the FBI; correct?
A. Yes.
Q. Now, the Arizona Republic, you were following the media reports at this time; correct?

A. Yes.
Q. You had taken the Arizona Republic, which is the major newspaper in Arizona; right?
A. I had received one copy of the Arizona Republic from my neighbor.
Q. All right. And was that a copy that had a great deal of information about the bombing and the investigation?
A. Yes. It was all about the bombing.
Q. In addition to the Arizona Republic copy that you had, did you watch television regularly?
A. Yes.
Q. And did you listen to the radio regularly?
A. No.
Q. How many hours a day would you say that you watched television programs of a news character during this period, beginning about the 21st of April and on until the 15th of May?
A. Half an hour at the 6:00 news and half an hour at the 10:00 news.
Q. And is it fair to say that on every major news program, there was some information about the ongoing investigation?
A. That is fair.
Q. Now, did you talk to your friend Lonnie Hubbard about his being down there, talking to the FBI?
A. We may have.
MR. TIGAR: And -- could we play A15, please.
(Defendant's Exhibit A15 played.)
BY MR. TIGAR:
Q. Now, when you said, "I was too, until the last day," that was in answer to Mr. Hubbard saying, "I was calm, I was really loaded"; right? Well, which were you in talking to the FBI, calm or loaded?
A. On the last day on the 24th?
Q. Yes, sir.
A. I was loaded. On the other days, I was just calm.
Q. All right. Well, you were calm except when you were in each other's faces; correct?
A. That only happened on the last day.
Q. Okay. And that last day when you -- by "loaded," you mean that you had been taking some substance into yourself?
A. The previous night, I was smoking crystal meth.
Q. And had you been up all night the previous night smoking crystal meth?
A. Yes.
Q. How many nights in 1993 and '94 and '95 were you up all night under the influence of methamphetamine?
A. Many.
Q. How many? More than you can remember?
A. It's difficult to recall every time. I'd have to do some math right now for you.
Q. Some math?
A. Yes.
Q. Okay. Did you -- what's your dad's name?
A. His name is Paul.

Q. Did you talk to him about what was going on? About the questioning?
A. I spoke with my father, yes.
Q. Did you talk to him about lying?
A. No, I did not tell him I was lying.
Q. No. No. Did you talk to him about whether or not a person should lie?
A. I don't recall.
MR. TIGAR: May we have A18, please.
(Defendant's Exhibit A18 played.)
Q. Was that your dad talking to you?
A. Yes, sir. That was him.
Q. And you said, "I haven't been lying to them"?
A. That's what I said.
[He has already admitted in this examination that he had been lying. So now we have him lying to his father about whether he was lying at that time.]
Q. Now, in questioning you, did the FBI call you names? Did they call you "baby killer"?
A. Yes, they did.
Q. Did that make you angry?
A. Yes, it did.
MR. TIGAR: May we have A19, please.
(Defendant's Exhibit 19 played.)
[A short excerpt, in which he complains about being called that name.]
Q. Now, did there come a time in May when you began to talk about a worry that you might be indicted?
A. Yes. I became worried in -- in May about that.
Q. And did you and your wife, Lori, talk about this possibility that you might be indicted?
A. Yes.
Q. And --
MR. TIGAR: May we have B13, please.
(Defendant's Exhibit B13 played.)
[The content of this tape, in which they discuss his potential testimony, becomes apparent in the next series of questions.]
Q. Now, that's your wife, Lori, talking about the grand jury process; right?
A. Yes.
Q. And she says, "Well, correspond it all"; correct?
A. That is what she said.
Q. Uh-huh. And the tape becomes unintelligible after that. Did you discuss with her later how you would correspond it all?
A. That's what we were discussing. I was worried because I was lying so much to everybody; and once I got in front of a grand jury, I did not think I would be able to get away with all those lies. And that -- and she was encouraging me to continue to lie by corresponding it all.
Q. She was doing what?
A. She was encouraging me to lie still.
Q. Oh, by getting your stories together? Is that what "correspond it all" meant to you?

A. Not together. But just get my own story straight.
Q. Now, in addition to the questions about the media and the others, there were some conversations that were captured about narcotics; correct?
A. Yes, sir.
MR. TIGAR: Could we have A14, please.
(Defendant's Exhibit A14 played.)
[Content obvious from next questions.]
Q. Now, "Lori wants me to load the pipe again," what kind of a pipe is that that you're using?
A. It was a tinfoil pipe.
Q. That's what you described before where you put heat under it and then ingest the -- what do you -- get the smoke from it or something --
A. Yes.
Q. -- like that? Okay. Now, have you been charged with any offenses related to the use of narcotics?
A. No, sir, I have not.
Q. Have you been promised that you will not be charged with any offenses related to the use of narcotics prior to the date of your plea agreement?
A. Yes.
Q. Okay. In other words, you do not expect to be prosecuted for any narcotics use; correct?
A. I believe it says in my plea agreement that any crimes that I have divulged at that time I would not be prosecuted for besides the four felonies.
[The four felonies are the ones mentioned at the outset of this Chapter.]
Q. Now, you told us earlier about Mr. McVeigh and his attitude towards the children that you were going to baby-sit. Do you recall that, sir?
A. Yes, I do.
Q. And isn't it a fact, sir, that your daughter, Kayla, was getting on his nerves because he didn't like to be around a two-year-old?
22A. I believe that's fair to say.
Q. Now, do you know a person named Steve Colbern?
A. No, sir, I do not. I know of him.
Q. And did the FBI ask you about him?
A. I believe they only showed me a picture of him and asked me if I knew him.
Q. And that's the only way -- that's the only knowledge you have of him; is that right?
A. No, sir.
Q. Oh. What other personal knowledge do you have of him?
[I was surprised by this, but pleasantly. McVeigh had, as I said above, reached out to Colbern to help him. The next questions are impromptu, to take advantage of this new matter. During cross-examination, you must look for “gifts,” then decide quickly if the “gift” is real or not, and if real if it worth deviating from your plan of attack. The key is that you must listen, which you cannot do if your cross is scripted.]
A. He is a person that Tim McVeigh was being introduced to by a guy named Bob in Arkansas.
Q. By a guy named Bob what?
A. Bob in Arkansas.

Q. Oh, Bob in Arkansas. That's this Bob?
A. Yes.
Q. And did Mr. McVeigh tell you that Bob in Arkansas had introduced him to Mr. Steve Colbern?
A. No. He -- Bob in Arkansas was trying to get them together to introduce them to each other.
Q. And that's what Mr. McVeigh told you?
A. Yes.
Q. Now, Mr. McVeigh gave you a -- a letter once to mail to Bob, didn't he?
A. Yes, he did.
Q. Did he give you a letter to mail to Bob more than once?
A. No. Just only once.
Q. Do you know what other names Bob has other than Bob?
A. I believe his name is Roger Moore.
[Moore was the Arkansas gun dealer who was a government witness.]
Q. And did you learn that before May the 17th, 1995, or after?
A. After.
Q. After?
A. I believe it was after. It was definitely after the bombing.
[Now back to the planned cross theme.]
Q. Now, sir, there came a time when you got a grand jury subpoena; correct?
A. Yes.
Q. You and your wife, Lori, went to Oklahoma City?
A. Yes.
Q. Did you -- you stayed in a motel?
A. Yes.
Q. Shared a room at a motel, of course?
A. Yes.
Q. And at 4:30 p.m. on the 17th of May, 1995, did you call the FBI?
A. I called a number that was on the subpoena. I don't know if it was the FBI or not.
Q. And did you later that day speak to some FBI agents?
A. Yes.
Q. Were they Agents Volz and Zimms?
A. Yes, they were.
Q. Now, they got there at about 5:35 p.m.; correct?
A. That sounds right.
Q. And you told them you wanted to correct the statements that you had made to the FBI in Kingman, Arizona; is that right?
A. Yes. I said that to them.
Q. And Mrs. -- your wife, Lori, what -- how does she like to be referred to? Mrs. Fortier, Ms. Fortier? What --
A. Mrs.
Q. Mrs. Okay. Mrs. Fortier said that she wanted to correct her statements, as well; correct?
A. Yes. That was her intentions, also.

Q. Now, you also said that you were fearful of reprisals from the Aryan movement if you testified against Timothy McVeigh; correct?
[This corroborates our theory that McVeigh had ties to that movement.]
A. That is correct.
Q. Now, the -- you also said that you did not want Mrs. Fortier to appear before a federal grand jury; correct?
A. I don't remember saying that.
Q. Now, you were asked if you wanted to correct your prior statements; correct? The FBI asked you that?
A. No, sir, they did not.
Q. Do you remember a time when the agents left the room?
A. Yes, I do. May I refer back to the last question?
Q. Of course.
A. The purpose for the agents coming to my motel room was I was wanting to correct my statements. So there came a time when the FBI agents left the room; and when they came back, they asked me if I still wanted to correct my statements.
[Note how careful he is being here. He is ready for this part of the encounter, is listening carefully and measuring his answers. Some of his backtracking is, I think, caused by my rustling my examination notes, so that I appear to be getting ready to impeach him. He is watching me carefully.]
Q. Well, isn't it the way it happened, sir, that the agents got there, you told them you wanted to correct your statement, you talked about reprisals and that you didn't want Mrs. Fortier to go before the grand jury and then they asked you do you still want to correct your statement?
A. Yes, sir.
Q. All right. And then the next thing that happened, sir, isn't it, is that you and Mrs. Fortier started to talk amongst yourselves about just exactly what you were going to do?
A. Yes.
Q. And then the next thing that happened, sir, was that the two FBI agents just left the room? Isn't that what happened?
A. Yes.
Q. And while the FBI agents were out of the room, you and Mrs. Fortier talked; correct?
A. Yes, sir.
Q. It was agreed that they would go away for an hour; is that right?
A. I believe it was, yes.
Q. Now, when the agents came back in, you turned to Mrs. Fortier and said, "Correct your statement," or words to that effect; right?
A. That's what the 302s reflect. I don't remember saying that to her.
[Again, he knows I have the 302s. He is, probably without intending to do so, helping me impeach him. Note that we now have it in evidence that the FBI version is that he asked his wife to go first in the statement-correcting process.]
Q. You have read the FBI report; is that right?
A. Yes, I have.
Q. Okay. You don't remember it that way; is that right?
A. That's right.

Q. And then did she turn to you and say, "No, you correct yours"?
A. That's what the 302s say.
Q. Is that what you remember?
A. No, sir.
[This is, to me, rather remarkable, considering that there are several dozen 302s. It shows his careful study, a point not lost on the jurors. He is helping me here by putting in evidence that the FBI 302s contradict his recollection. I would not call the FBI agents to contradict Fortier because I could not control the scope of their testimony as adverse witnesses. So Fortier is giving me a gift without realizing it.]
Q. Did the FBI agents then leave the room again for a few minutes?
A. Yes.
Q. You do remember that?
A. I do remember that.
[This is to make a point of his earlier not remembering. Note that he has not denied he said the things about which I asked him.]
Q. Then you stepped out of the room; correct?
A. Yes.
Q. Where did you go?
A. I went to speak with Special Agent Volz.
Q. Physically where was that?
A. Outside the room on the balcony.
Q. This is a balcony on the second floor?
A. Yes, sir.
Q. Where is the motel? What motel is it?
A. I don't know which motel it is.
Q. It's a motel in Oklahoma City?
[I am trying here to get a word picture of a two-story motel with a long balcony serving the second floor rooms.]
A. Yes.
Q. All right. Does the Motel 6 refresh your recollection?
A. I -- I'm not sure which motel it was.
Q. And you told the agents in effect, "I want immunity, and I'll give you Tim McVeigh"? Isn't that what you said?
A. In effect, that is what I said.
Q. And they told you that they didn't have the power to give you immunity, didn't they?
A. I don't remember them saying that.
Q. Did they tell you that they were going to give you immunity?
A. No, sir, they did not.
Q. Did they tell you that they weren't?
A. I don't remember them saying they weren't.
Q. Isn't it a fact, sir, that they told you that you would not and could not be granted immunity by the interviewing agents and that only prosecutors involved could do that?
A. I don't remember them saying that.
Q. Didn't they tell you, sir, that they didn't need you to make a case against Mr. McVeigh?
A. Yes, I do remember Special Agent Volz saying that.

Q. And after they told you that, you went back in the room; right?
[This is a key portion of the examination. I could not get him to admit that the FBI said they could not give immunity, but the jury knows he did not in fact get immunity, only a plea bargain. The key here is that he offered only McVeigh, not Nichols, and was turned down flat with the assertion that they already had McVeigh and did not need Fortier to make that case. The clear inference is that he would have to give them somebody else, probably Nichols, who was already in custody. His statements to the government from now on out progressively expand his alleged knowledge about Nichols.]
A. Yes.
Q. And you and Mrs. Fortier began to talk; correct?
A. Yes.
Q. You've read the report of that interview, haven't you, sir?
A. Yes, I have.
Q. How long an interview was that?
A. I believe it lasted for about a half hour.
Q. And in that interview, you told the agents that you knew Terry Nichols; correct?
A. I believe so.
Q. And Mrs. Fortier told the agents that Mr. McVeigh and Terry Nichols had been to their house -- had been to you alls' house together in Mr. Nichols' pickup truck; correct?
A. I don't really remember what my wife said to them.
Q. And you told them that Mr. Nichols had called you once and said that he had gotten your telephone number from Mr. McVeigh. Do you remember that?
A. I may have said that to them.
Q. And Mr. Mc --
MR. TIGAR: May I approach, your Honor?
[I started to ask the next question, then decided to risk some refreshment of recollection to focus him.]
THE COURT: Yes.
MR. TIGAR: 3498 [the Bates stamp number].
PROSECUTOR: What page?
MR. TIGAR: 7.
PROSECUTOR: Thank you.
BY MR. TIGAR:
Q. I show you now, what I -- well, would you look at it first, sir, and see is that the FBI 302 of report of interview of the conversation about which we've been speaking on the 17th of May, 1995, in Oklahoma City at the Motel 6?
A. Yes.
Q. Now, would you look at page 7, sir, the bottom. See the bottom paragraph there?
A. Yes, sir.
Q. Does that refresh your recollection that you told the agents about the visit that the Nichols had had at their -- your house with Mrs. Nichols and the baby Nicole?
A. Yes, I do not dispute that. I just do not remember telling the FBI that.
Q. I understand. I'm just -- I'm showing it to you to refresh your recollection. Right?
A. Yes. I see it, and I agree with it.

Q. Okay. And now, would you look, please, sir, at the top here of page 8. And does that refresh your recollection that Mrs. Fortier told the agents about the -- Mr. McVeigh and Mr. Nichols arriving together in the truck?

[You may wonder why I say "okay" so often. I am trying to give approval when he answers in a satisfactory way. I hope it is not simply carelessness on my part.]

A. Still, I don't -- I don't remember her saying that, but I don't dispute it.

Q. Okay. You wanted to come clean, didn't you?

A. That was my intentions.

Q. And you didn't tell the FBI anything about Terry Nichols there while you were coming clean other than the fact that he came to your house one time with his baby daughter and his wife; isn't that right?

A. That is right. I was -- I did not come clean in that interview. I lied to the FBI throughout that interview.

Q. Oh, you lied more throughout this?

A. Yes.

Q. You didn't lie about Mr. Nichols coming to your house with his baby and his wife, did you, because he did come?

A. Yes. That is true.

Q. And Mrs. Fortier, if she told them that they came one time in Mr. Nichols' truck, she didn't lie about that, did she?

A. I don't think so.

Q. And those are the only things you told them. In addition to that -- well, the agent -- didn't the agent also tell you after he said that he didn't need you to make the case against McVeigh; that you'd have to give them somebody else?

A. I do not remember him saying that.

Q. Now, you also told the agents that you had an opinion about who Unknown Subject No. 2 was; correct?

A. I told him who it could -- possibly could be.

Q. And who did you understand Unknown Subject 2 to be?

A. It could have been one of many people.

Q. But what was the context? Why -- who -- this UnSub 2, that was the kind of a -- a law enforcement name for somebody that helped with the bombing?

A. Yes. John Doe 2.

Q. Yeah.

A. The agents would ask me who -- who do you think it is, or do you think it could be this person, and I would say yes or no.

Q. Yeah. And you told them that it could be Bob from Arkansas, didn't you?

A. Sure, it could have been. I've never seen Bob. It was just a guess.

Q. Now, you were interviewed again by the agents on the 30th of May, 1995, weren't you, sir?

A. I believe so.

Q. By Agents Zimms and Volz?

A. Yes.

Q. All right. And did you tell them at that time that you and Mr. McVeigh had attempted to alter a number on a plastic stock of a .50 caliber rifle?

A. No, sir, I believe that's a mistake by the agent.

Q. All right.
A. I did that myself. Tim did not help me with that.
Q. Oh, you did that yourself?
A. Yes, sir.
Q. Why did you want to change a number on the stock?
A. It was on the .50 cal because I was planning on keeping the .50 cal and I knew it was stolen, so I didn't want the stolen number on there.
Q. You -- you thought it was stolen; right? You didn't know it was stolen?
A. That was my belief.
Q. Right. And your belief again is based on nothing other than what Timothy McVeigh told you; correct?
A. That is correct.
Q. Now, there came a time, sir, when you took a trip to Kansas with the agents. Do you remember that?
A. Yes, sir, I do.
Q. And you drove around Kansas and had a lot of discussion with the agents about what you were seeing and about other subjects; correct?
A. Yes.
Q. Now, that was a time you told the agents about Mr. McVeigh asking you to get a number in Bullhead City, Arizona; correct?
A. I talked to them about that on that -- at that time.
Q. Yes. He wanted you to get the phone number of a white supremacist group. Do you remember that?
A. Yes.
Q. And in addition to that, you said that you were not aware of anyone McVeigh could reach out to help him other -- for help except for Rosencrans; correct? Do you remember saying that?
A. Not -- not exactly.
MR. TIGAR: D9171, page 4.
Q. I show you now what is a report of investigation dated 6-23-95. Ask you to look at page 4, the bottom paragraph, and ask you if that refreshes your recollection, sir.
A. Yes.
Q. Okay. Now, in fact, you did have a conversation with Mr. McVeigh in which you told him that -- excuse me. You – it was your opinion that Rosencrans was somebody that McVeigh could reach out to; correct?
A. Is it my opinion that Rosencrans is somebody McVeigh could reach out to?
Q. Yes, sir.
A. Sure.
Q. You had a conversation with him about Rosencrans doing some driving; correct?
A. Tim told me that he had asked Rosencrans to give him a ride.
Q. And Rosencrans was the dope dealer next door; correct?
A. Yes.
Q. The man that you used to help stash some of the things to keep out of the way of the search; correct?
A. Yes.

Q. Now, was the conversation about driving -- was that before or after McVeigh told you that he wanted you to be a desperado?
A. I believe it was after.
Q. So the first thing that happens is McVeigh says, insulting, that you're domesticated; correct?
A. Yes.
Q. And then -- and he tells you he wants you to be a desperado, but you refused; right?
A. Yes.
Q. And you refused because you had a baby and another on the way; correct?
A. Absolutely.
Q. You refused because you were a married fellow, hoped to put your life together and -- and live within the law; correct?
A. That's correct.
Q. And he was asking you to do things but you refused; right?
A. Yes.
Q. Well, he had gypped you out of some money in December -- right -- in the trip?
A. He did.
Q. And then you went to gun shows later on with him; right? Why did you continue to go to gun shows with him if -- if he'd already gypped you once?
A. He didn't actually gyp me at one time. When I found out that he had gypped me would be after all the gun shows were finished and I found out that all those weapons did not equal $10,000.
Q. I see. So -- but you -- you were doing business with him, but he already told you that he had -- that he had these views that you disagreed with; right?
A. Yes.
Q. He'd already told you he was going to do something that you knew was against the law; right?
A. Yes.
Q. But he's -- he still knew how to work a gun show, didn't he?
A. Yes.
Q. He knew how to go to a gun show and register and make money; right?
A. Yes, he did.
Q. And then when you found out -- you found out at some point that he was a really very bad actor; right? That you didn't want to have anything more to do with him?
A. Well, he became aggressive towards me. That's why I didn't want anything to do with him.
Q. So you quit having something to do with him; right?
A. Yes, I did.
Q. Now, in that same trip that you took, you said that you knew about a note on a telephone pole for Steve Colbern from the media; right?
A. Yes.
[In this series of questions, I am hoping to suggest that a married person with kids would have split from McVeigh by early 1995 at the latest. We have evidence that Terry Nichols did so, but Terry Nichols will not be testifying. I am also pointing out that in his early versions, he identified several people other than Terry Nichols as possible McVeigh conspirators.]

Q. You said you knew about Dave Paulsen, Ed Paulsen, and Kevin Nicholas from watching TV; correct?
A. Yes. Although I believe Mr. McVeigh may have mentioned this guy Nicholas.
Q. Well, I'll ask you about that in a minute, but the answer to the first question is you had heard those names, Paulsen and Nicholas, from the TV; correct?
[These are names of other McVeigh associates, each of whom has something to do with explosives.]
A. Yes.
Q. So you were following the TV carefully enough in those early days that by the 21st of June, you could still remember the names and what you'd heard on the TV; right?
A. I don't know if I could or not.
Q. Do you have any quarrel with the -- with the assertion that you did tell the agents on the 21st and 22d that you did remember those names from TV?
A. No, I have no quarrel with that.
Q. Now, you said a moment ago that Mr. McVeigh had told you some things. He told you he was going to sell the Christmas-wrapped blasting caps to someone in -- to a -- what, a friend in Michigan?
A. I don't remember if he said a friend. He said he was going to sell the blasting caps in Michigan.
Q. Now, where do you think that half a bag of ammonium nitrate you got from Mr. McVeigh came from? Do you know?
A. It was my guess it came from True Value [a local hardware store in Kingman where Fortier worked].
Q. Were you aware that Mr. McVeigh had bought fertilizer -- ammonium nitrate fertilizer at the True Value hardware store in Kingman, Arizona?
A. No, sir, I did not see him do that.
Q. Did you tell the agents that you were aware that he had bought some?
A. I may have.
BY MR. TIGAR: I show you, sir, page 9 of that report of interview, and I ask you to look at the last paragraph; and then with that, tell us whether your recollection is refreshed that you told the agents that Mr. McVeigh had purchased ammonium nitrate fertilizer at the True Value hardware.
A. Yes, I very well could have said that to them. It is my best guess that that's where he got that ammonium nitrate while he was living in Kingman.
Q. Thank you, sir. Now, Mr. McVeigh also described to you during some conversation that -- about fertilizer purchases; correct?
A. Yes.
Q. Now, he told you, did he not, that Terry Nichols had screwed up a fertilizer purchase?
A. That is what he said to me.
Q. And he told you that since Terry Nichols screwed up the purchase, he, McVeigh, had to do the next one? Did he tell you that?
A. Yes, sir.
[This is a recap of the direct testimony, as a lead-in to the next questions.]
Q. Now, you don't know whether he was telling the truth about this or not, do you?
A. No, I don't.

Q. And whatever he said on this subject, he didn't say it when Terry Nichols was present; did he?
A. That is correct.
Q. You have never in your life had a discussion with Terry Nichols about ammonium nitrate, have you, sir?
A. That is correct.
Q. And you also told the agents that you could not recall Mr. Terry Nichols ever using your telephone or coming into your house except for the one -- excuse me -- you could not recall him ever using your telephone; correct?
A. That is right.
Q. And you could not recall him ever coming into your house except for that one time that he was there with Mrs. Nichols and little baby, Nicole?
A. That is true.
Q. Now, Mr. McVeigh, however, did use your telephone, didn't he, sir?
A. Yes, he did.
Q. Certainly had access to it; right?
A. He had my permission. Free use of the phone.
Q. Now, during October of 1994, were you working at the True Value hardware store?
A. Yes, I was.
Q. Do you remember receiving a call from Mr. McVeigh on the 1st of October, 1994?
A. I couldn't pin it down to that date. I remember receiving a phone call during that time period.
Q. Do you remember -- would it refresh your recollection if I showed you this record of two telephone calls, one to True Value and one to your house?
A. Yes.
Q. It does refresh your recollection? See, there are two telephone calls here, one 2 minutes and 26 seconds, the other 9 minutes and 48 seconds.
A. This -- no, it does not help with this one.
Q. Does not?
A. No, sir.
Q. All right.
A. That is the one to Kingman True Value.
Q. Now, the second call, however, could that be one of these calls that you told us about earlier, Mr. McVeigh calling you, asking you to do things?
A. It could be.
Q. Now, on the 7th of October, 1994, do you know where Mr. McVeigh was?
A. No, sir. Except I believe he was in and around Kingman.
Q. Were you at work that day?
A. I don't recall.
Q. Do you know what day of the week the 7th was?
A. No, I do not.
Q. Would it refresh your recollection if I showed you a pocket calendar, and could we agree it was a Friday?
A. Are we on the 7th?
Q. Yes. The 7th, sir. Somewhere in there, yes.
A. Yes. I agree it was a Friday.

Q. Thank you. Was Friday a normal workday for you at the True Value hardware store in Kingman, Arizona, sir?
A. Yes, sir.
Q. So on that day, at -- and did you come home for lunch or did you work throughout the day, usually?
A. No. I usually went home for lunch either at noon or at 1.
Q. Well, did you call the Arctic -- the Arctic Travel there in Alamogordo, New Mexico, on the 7th?
A. No, sir.
Q Did you call VP Racing Fuels in Manhattan, Kansas, on the 7th?
A. No, sir, I did not.
Q. Have you ever called VP Racing Fuels?
A. No, sir.
Q. Did you call Coogle Trucking, Inc., in Otterbein, Indiana, on the 7th?
[If Fortier did not make these calls, then McVeigh did, using the Fortier phone. They are calls related to travel and to assembling the bomb components, as one can infer from what the called businesses deal in. There are also calls from Terry Nichols house to component suppliers, made while McVeigh was staying with Nichols; as to these calls, we wish to suggest that Nichols was unaware, just as Fortier was unaware of the calls from his home.]
A. Unless -- if that was -- call was made from Kingman True Value, I may have. Otherwise, no.
Q. No, sir, it was not. But you didn't -- did anyone – did you, from your house, call Coogle Trucking, Incorporated?
A. Absolutely not.
Q. Okay. Have you ever called Coogle Trucking, Incorporated, from your house?
A. No, sir.
Q. So that if a record showed that a telephone call was made from your home phone to those entities whose names I've read out, that would have been done without your knowledge; correct?
A. Yes, sir.
Q. Now, in driving around with the agents there in June of 1995, you also talked about the storage locker E10 in Kingman, Arizona; correct?
A. Most likely, we did.
Q. Now, were you with Mr. McVeigh in February of 1995 in or near that storage locker?
A. No, sir.
Q. How many times have you visited that storage locker?
A. Three times.
Q. The first time was the evening that you told us about when Mr. McVeigh showed you explosives; correct?
A. That is correct.
Q. The second time was to stash the O2 bottle that you, Jim Rosencrans, and Jason Hart stole; correct?
A. That is correct.
Q. Okay. What is Jason Hart's profession?
A. I don't believe he works.

Q. Did he sell you things, sir?
A. Many times, he tried, yes.
Q. He was your dealer, wasn't he?
A. No, sir.
Q. What did he try to sell you?
A. Junk.
Q. Sir, is it your testimony that Mr. Hart never tried to sell you narcotics?
A. No, sir, that is not my testimony.
Q. All right. What -- would you tell us about Mr. Hart and narcotics, please; what you know.
A. I know that he uses narcotics and he on occasion tries to sell narcotics, but he was not my dealer.
Q. Did he ever sell you narcotics?
A. I can remember once or twice that he did, yes.
Q. And did he ever give you narcotics?
A. Yes. On many times.
Q. I'm sorry? Many times?
A. A few times.
Q. A few times. And what narcotics did you get from him?
A. Crystal meth.
Q. Any other kind?
A. Not that I can recall. No. Excuse me. That's where I got that bunk LSD from was from Mr. Hart.
Q. The --
A. The LSD.
Q. The bonk (sic) LSD, did you say?
A. Yes.
Q. What does "bonk" mean?
A. Bunk. It's no good.
Q. Oh, bunk LSD. Okay.
A. Yes.
Q. Now, and what was the third time you went to the storage unit?
A. I went to the storage unit with a man named Terry. I don't know his last name. He's the gentleman that I gave one of the weapons to go to Phoenix to get drugs. I was with him in his car one day when he stopped by a unit that he had -- he was renting. He had to get something out of it.
Q. And the man's first name is what?
A. The man's name was Terry.
Q. Terry. Not Terry Nichols?
A. No, sir.
Q. No. This was somebody who you'd traded a gun for drugs with; right?
A. Yes.
Q. All right. So it's three times you've been to that storage unit; correct?
A. Yes.
Q. Well, didn't you tell the FBI on the 21st or 22d of June that you'd only been there twice?

A. I may have. That would have just been an innocent mistake.
Q. Pardon me?
A. That would have been just an innocent mistake.
Q. An innocent mistake. Well, by the 21st or 22d of June, were you trying not to make mistakes when you were talking to the FBI?
A. I absolutely was.
Q. Now, during the period between April the 21st and May the 17th, did you have any conversations with James Rosencrans about the investigation?
A. Yes.
Q. And did you urge him to tell the truth?
A. I believe I did.
Q. Now -- and of course, Mr. Rosencrans is your next-door neighbor. You know him; right?
A. Yes.
Q. Did you ever -- were you ever in Mr. Rosencrans' presence, you and Mr. McVeigh, in full BDU's, camouflage military battle dress with full backpacks and weapons?
A. No, sir.
Q. You deny that?
A. I do deny that.
[We have interviewed Rosencrans and expect him to testify to this. Hence, the sequence of questions.]
Q. Now, you mentioned that Mr. McVeigh had asked you to max out your credit cards. Do you recall that, sir?
A. Yes, sir.
Q. And you said you thought that was a way for him to get a free ride?
A. Yes.
Q. What did you mean? What was your understanding of that? What did you mean, "free ride"?
A. He asked me if I would be willing to in the future max out my credit cards and give him the money. It was my impression that he was going to use that money to pay for his food and lodging so he would not have to work and pay for himself.
Q. Now, did he offer to pay you back this money that you were going to use to give him a free ride?
A. No, sir, he did not offer to pay me back.
Q. Now, you told us that Mr. McVeigh had mentioned that -- that he wanted to go to -- one time, he said he wanted somebody to drive him to the desert and another time, he said he wanted someone to drive him to Arkansas. Do you remember that?
A. Yes, sir. That is correct.
Q. Now, he asked you to drive him to the desert; correct?
A. Yes, sir.
Q. And you said no.
A. Yes.
Q. And the Arkansas, was that something that he was saying he wanted Rosencrans to do?
A. Yes, sir.
Q. Now, just to be clear, sir, you have never been in Terry Nichols' house; correct?

A. That is correct.
Q. So that if any fingerprints of yours were found in Terry Nichols' house, that would be for some other reason than your having been there; correct?
A. Absolutely.
[Some of Fortier's fingerprints were found on objects in Nichols' house.]
Q. I show you now, sir, what has been -- . May I approach, your Honor?
THE COURT: Yes.
Q. [continuing] -- what has been marked as Defendant's 397 for identification. And the first page is a government document. I'm asking you, please, to look at the second page and tell us whether you recognize the handwriting.
A. Yes, I do.
Q. And whose is that, sir?
A. That is my handwriting.
MR. TIGAR: Your Honor, we offer pages 1 and 2 of 397. 397 is a self-authenticating government document, and page 2 Mr. Fortier has just identified.
PROSECUTOR: No objection.
THE COURT: All right. D397 is received.
Q. I'm placing up on the device here what has been received in evidence as government's 397, page 2.
THE COURT: Defendant's 397.
MR. TIGAR: Excuse me. Defendant's 397, your Honor. I almost forgot what side I'm on. Pardon me. Defendant's -- D397. Am I not pushing the right button? [I am trying to use the ELMO device to show this exhibit to the jury, but I can't make it work. The deputy clerk helps me.] [The deputy clerk] has taken the lens cap off the device, your Honor, and it now works perfectly. Mr. Fortier, this is a firearms transaction record; correct?
A. Yes, sir.
Q. And you filled it out, did you not? On July 17, 1993? Right?
A. Yes, sir.
Q. And you were asked are you an unlawful user or addicted to marijuana or any depressant, stimulant or narcotic drug or any other controlled substance; and you answered no. Correct?
A. That is true.
Q. And then you signed it; right?
A. Yes, I did.
Q. And before you signed it, did you read the part that says, "I hereby certify that the answers to the above are true and correct. I understand that a person who answers yes is prohibited from purchasing and/or possessing a firearm except as otherwise provided by federal law. I also understand that the making of any false oral or written statement or the exhibiting of any false or misrepresented identification with respect to this transaction is a crime punishable as a felony"? Did you read that?
A. I do not recall. Most likely, I skipped that part.
Q. Well, was the "no" true?
A. No, the "no" was false.
Q. Why did you put a false statement on a firearms record, sir?

A. Because I knew that if you answered yes, they would not let you buy the weapon.
Q. You committed a federal felony because you wanted to have a gun?
A. Yes, sir.
Q. Sir, I have now what has been identified as Defendant's Exhibit D390; and I ask you, sir, are these two issues of The Spotlight, the newspaper to which you subscribed, bearing your address label?
A. Yes, sir.
MR. TIGAR: We offer them, your Honor.
PROSECUTOR: No objection.
THE COURT: Received, D390. But there are two of them with the same number?
MR. TIGAR: Yes, your Honor. It's a group exhibit.
THE COURT: All right.
MR. TIGAR: And they are dated May the 1st, 1995, and April 17, 1995. That was the subscription you were telling us about earlier; correct, sir?
A. Yes, sir.
Q. Now, just because you subscribed didn't mean you agreed with everything that was in there, did you?
A. That is correct.
[Once again I am using him to make a point, because Terry Nichols had some arguably sensational reading material at his home.]
Q. I show you, sir, what has been marked as Defendant's Exhibit D463. I ask you if that is some literature that was taken from your home.
A. I don't really recognize this.
Q. I will go on to something else. Your Honor, to speed this up, I'm going to give him a whole notebook at once, if I may.
THE COURT: All right.
[I am coming to the end here, and I want to keep up the pace. I have the relevant exhibits in a notebook, and this will help move things along – with the court's permission.]
Q. I'm going to place this in front of you, sir; and I'll ask you, please, will you turn to Tab No. 484. Is that a -- a gun purchase form dated December, 1993? Looking at page 2, D484.
A. This is a firearms transaction record.
Q. And whose is it?
A. It is mine.
Q. Did you sign it?
A. Yes.
MR. TIGAR: Offer D484.
PROSECUTOR: No objection.
THE COURT: Received.
Q. Did you make the same false statement, sir?
A. Yes, I did.
Q. And what -- what gun was it that you told the lie to get there?
A. This was a 10/22.
Q. What's a 10/22?
A. It's a small arms. It's a .22 caliber rifle.
Q. Would you look at D485, sir. Is that a firearms transaction record?

A. Yes, sir.
Q. Whose is that?
A. This is mine.
Q. We offer it, your Honor.
PROSECUTOR: No objection.
THE COURT: D485 is received.
Q. July, 1993?
A. Yes.
Q. Did you lie?
A. Yes, sir.
Q. Was it the same lie?
A. Yes, sir.
Q. What gun did you get for that lie?
A. Two guns, actually. A .38 pistol and a Mini-14 rifle.
Q. Now, under your plea agreement, you will not be prosecuted for any one of the lies you've told on these firearms forms; is that correct, sir?
A. I do not believe so.
THE COURT: I'm not sure of the answer. You don't believe it's correct --
THE WITNESS: I don't believe I'm going to be prosecuted for this.
THE COURT: All right.
[Thank you, Judge.]
BY MR. TIGAR:
Q. Would you turn, please, to D491. Is that a Kit Kat candy bar wrapper with notes on it by you?
A. Yes, sir, it is.
Q. When did you write that?
A. It was either late April or early May of 1995.
MR. TIGAR: May I approach for a moment, your Honor?
THE COURT: Yes.
MR. TIGAR: We offer it, your Honor.
PROSECUTOR: No objection.
THE COURT: D491 is received.
25BY MR. TIGAR:
Q. May I take it out of the book here, sir, just so I can display it. Looking first -- there's the Kit Kat candy bar side; correct?
A. Yes.
[I am using the ELMO as required by the judge. However, I want to show the object as a three-dimensional item, so the jurors will recognize it.]
Q. And then we have your notes. Now, did you give this to the FBI?
A. Yes, I did.
Q. Well, why would you use a Kit Kat candy bar wrapper to send a note to the FBI?
A. I have no idea. I just grabbed a piece of paper and wrote a note on it.
Q. It said, "Heard about Colbern on the news. Want to see his picture. Maybe I could be of help." Do you see that?
A. Yes.

Q. Now, is that a reference to this Colbern fellow that you had heard about being somehow connected with Roger or Bob of Arkansas and Tim McVeigh?
A. Yes.
Q. And was the help related to what you've already told us that you know about Mr. Colbern?
A. No.
Q. Well, how were you going to help the FBI -- This is in April; right?
A. April or May. I'm not sure.
Q. Was it before May the 17th?
A. Yes.
Q. Well, the Michael Fortier before May the 17th wasn't very inclined to be helping the FBI, was he?
A. That is true.
Q. You were in their face and they were calling you names and what we heard on the tape; right?
A. Yes.
Q. Well, what help were you going to be to the FBI by passing them the Kit Kat candy bar wrapper with the Colbern note?
A. I had heard on the news that Mr. Colbern was in the Kingman area, and I was going to talk to them; and I thought if I could look at his picture again more closely -- maybe I had seen him around -- I could tell them that.
Q. Well, why were you going to do that?
A. I don't recall.
Q. Well, did -- did you want to get Mr. Colbern in trouble?
A. No, sir. I would not say anything about Mr. Colbern that was not true.
Q. Well, you knew somebody was looking for Mr. Colbern; right?
A. I'm not sure if they were looking for him. But he was certainly on the news. I don't remember exactly what they said about him.
Q. You had heard his name in the news as being someone connected to the bombing; right?
A. Yes.
Q. And you were passing the agents a Kit Kat candy bar wrapper with the Colbern name in order to put the agents onto Mr. Colbern; correct?
A. No. I was only going to offer my help, and I was going to tell them if I had seen him around or not.
Q. And this -- you're going to offer this help at this time before May 17. You had no idea whether Mr. Colbern had anything at all to do with this, did you, sir?
A. No, sir, I did not.
Q. Would you take a look at 513. Was that in your house?
A. I do recognize this. I believe it was in my house.
Q. Where did you get it?
A. I got this from Tim McVeigh.
MR. TIGAR: We offer it, your Honor.
PROSECUTOR: No objection.
THE COURT: E513 received.
MR. TIGAR: 512, your Honor. If I misspoke -- D512.

PROSECUTOR: I understood 513, your Honor.
MR. TIGAR: I'm sorry, your Honor.
BY MR. TIGAR:
Q. Would you look at 512, please. I apologize. Did you get that from Mr. McVeigh?
A. Yes. I got this from Mr. McVeigh, also.
Q. Was it in your house?
A. Yes.
MR. TIGAR: We offer 512 and 513, your Honor. D512 and D513.
PROSECUTOR: No objection.
THE COURT: They are received.
BY MR. TIGAR:
Q. Placing now up here D512, this is a prayer; correct? Patriot's Prayer?
A. Yes, sir. That is what it is.
Q. And among the things it prays "to voice our declaration of independence against the New World Order"; correct? Do you see that?
A. Yes.
Q. Now, did you agree with the sentiments expressed in this prayer?
A. Yes.
Q. And then D513 that you got from Mr. McVeigh is called, "Communist Rules for Revolution"; correct?
A. Yes.
Q. And Mr. McVeigh wasn't -- wasn't a communist, was he?
A. No, sir. I don't believe so.
Q. No. This is a -- an opposition to what the communists think; correct? Is that right?
A. I believe so.
Q. Now, sir, will you turn to 516. Is that a document that was taken from your house?
A. Yes, sir.
Q. And where did you get it?
A. I also got this from Tim McVeigh.
MR. TIGAR: We offer it, your Honor.
PROSECUTOR: No objection.
THE COURT: D516 received.
[These questions bring out that he had a lot of far right literature in his home, yet the government did not consider him a conspirator.]
BY MR. TIGAR:
Q. And this is a newsletter that is against the New World Order, among other things; correct?
A. Yes, sir.
Q. And Mr. McVeigh gave it to you, and you put it in your house; right?
A. Yes. He gave me most all of this stuff in one big stack in the spring of 1994.
Q. When -- when was it?
A. In the spring of 1994.
Q. Where -- and this is one more instance of Mr. McVeigh giving literature about his favorite causes to people; correct?
A. Yes.

Q. Now, would you look, please, at 517. Is that something else you got from Mr. McVeigh?
A. Yes, sir, it is.
MR. TIGAR: We offer it, your Honor.
PROSECUTOR: No objection.
THE COURT: Received.
BY MR. TIGAR:
Q. Now, this one, if I put it up here -- this is one about "U.S. government Initiates Open Warfare Against American People"; correct?
A. Yes, sir.
Q. Now, did Mr. McVeigh give you an original of this document, or did -- was what he gave you a copy?
A. I don't remember.
Q. And do you see on page 1 here the quote from Thomas Jefferson? Correct? "The growth and course of history . . ."
A. I see that.
Q. Now, did you know that Mr. McVeigh had a T-shirt that had a slogan from Thomas Jefferson on it?
A. Yes, sir, I did.
Q. Is that that slogan that has the tree with the blood droplets on it?
A. Yes.
Q. He wore that to your daughter's birthday party, didn't he?
A. No, sir. That wasn't my daughter.
Q. Oh. Whose birthday party? I'm sorry. He wore it to some child's birthday party?
A. Yes. I believe that's what you're referring to.
Q. What child's birthday party did he wear the tree-with-the-droplets-of-blood T-shirt to?
A. A friend of my wife's.
Q. Now, you told us earlier, sir, that Mr. McVeigh had been the best man at your wedding; correct?
A. Yes.
Q. And where -- where was that wedding held?
A. In Las Vegas.
Q. At the Treasure Island hotel?
A. Yes, sir.
MR. TIGAR: Your Honor, if -- if I may have the afternoon recess now, I could collect my notes and be done in a very few minutes.
THE COURT: How could I refuse an invitation like that? I'll accept. You may step down, Mr. Fortier. Members of the jury, we will take the afternoon recess; and of course, during this time, please remember the cautions always given at recesses, which I know you do remember from one time to the next. But remember: I've got a duty to recite this on the record, and you have a duty to obey to avoid discussion of the case among yourselves and with all other persons and keep open minds. And you know, you hear all of these exhibits being referred to. You won't be required to read every word of every exhibit. That's not something that'll happen, although the exhibits are important and will be discussed. So you're excused now, 20 minutes.
(Jury out at 3:06 p.m.)

THE COURT: All right. We'll recess. 20 minutes.
(Recess at 3:07 p.m.)
(Reconvened at 3:27 p.m.)
THE COURT: Please be seated.
(Jury in at 3:28 p.m.)
THE COURT: Please resume the stand again, Mr. Fortier. Mr. Tigar, you may continue.
BY MR. TIGAR:
Q. Mr. Fortier, I omitted to ask you: While you were in the VA Hospital, Mr. McVeigh borrowed your Jeep; correct?
A. Yes, he did.
Q. And what did he say he was going to do with it?
A. He didn't say exactly. He just asked me if he could borrow it.
Q. Didn't he say he wanted to go four-wheeling in the Music Mountains and check the area along Buck-Doe Road?
A. Yes, that is what he did.
Q. That's what he said he was going to do; right?
A. I don't recall if he said at the time that he asked me to use his (sic) Jeep or not.
Q. But you didn't go with him; correct?
A. Oh, no. I was in the hospital at that time.
Q. So all you know about is what he told you?
A. Uh-huh.
Q. Now, just to be sure, did Mr. McVeigh ever give you a copy of a book called or publication called The Soldier's Guide?
A. Not that I recall.
Q. Do you ever remember handling such a book, putting your fingers on it?
A. I don't recall that book.
Q. Do you remember ever handling a publication called Armed and Dangerous?
A. Yes.
Q. And was that something Mr. McVeigh gave to you?
A. Yes.
Q. And after you handled it, do you know what happened to it?
A. Yes. I gave it back to Mr. McVeigh.
Q. Now, you testified on direct examination, sir, that you had spent some time with government lawyers discussing the matters you were going to present in court; is that correct, sir?
A. Yes.
Q. And you said you met with government lawyers about 25 times?
A. Yes. And each one of those times were for either one day or maybe two days.
Q. So that how many hours total have you spent with government lawyers preparing for your testimony?
A. Between 150 and 200 hours.
Q. When did those preparation sessions begin?
A. When I went to Oklahoma City and started meeting with the U.S. prosecutors.
Q. You met with Mr. Hartzler?
A. Yes, sir.
Q. And then you met with Mr. Mendeloff?

A. Yes. I believe I met him twice.
Q. Twice. Did you have a disagreement with Mr. Mendeloff?
A. Yes.
Q. Were voices raised?
A. I would say no.
Q. After the disagreement, you did not meet with him anymore?
A. No, sir.
Q. It is correct you did not meet with him anymore after the disagreement, or that you did?
A. Well, I met him after that disagreement, but I did not meet with him to speak about the issues.
Q. I see. You did not meet with him to prepare your testimony?
A. That's correct.
Q. You met with Mr. Goelman?
A. That's correct.
Q. You met with Mr. Mearns?
A. Yes, sir.
Q. Did you meet with any other government lawyers to prepare other than those I mentioned?
A. No, sir.
Q. This morning is the first time that you and I have ever met. Is that correct, sir?
A. Yes, sir, it is.
Q. Now, you testified on direct examination that you have a plea agreement. Do you remember that?
A. Yes.
Q. Now, as a part of the agreement that you made with the government, did you stop using narcotics?
A. Yes, I did.
Q. When is the last time that you used narcotics?
A. It was before I traveled to Oklahoma City.
Q. It was before the 17th of May?
A. Yes, sir.
Q. Now, I'm going to show you page 7 of the plea agreement portion of government's Exhibit 193 in evidence. That is entitled, "Breach of Agreement," isn't it, sir?
A. Yes, sir.
Q. And is that part of the deal that you have with the government?
A. Yes, it is.
Q. It says, "If further investigation discloses that Mr. Fortier conspired to bomb any federal building" -- and then it continues on with some other things. It says, ". . . then the United States will have the right to characterize such conduct as a substantial breach of this agreement," and so on. Correct?
A. Yes.
Q. And it says, ". . . in which case the obligations of the United States under this agreement will be void, and the United States will have the right to prosecute Mr. Fortier for any and all offenses that can be charged against him in any district or state." Do you see that?

A. Yes.
Q. You have not been charged with conspiring to bomb a federal building, have you, sir?
A. No.
Q. And the United States is aware of everything, all the facts, that we have talked about today, are they not?
A. Yes.
Q. They're aware that you got ammonium nitrate from Mr. McVeigh; correct?
A. Yes.
Q. They're aware that Mr. McVeigh left explosives in your house; correct?
A. Yes.
Q. They're aware that Mr. McVeigh could -- lived in your house and could use your tools; correct?
A. Yes.
Q. They're aware that Mr. McVeigh could use your phone?
A. Yes.
Q. They're aware that Mr. McVeigh borrowed your car?
A. Yes.
Q. They're aware that you went to Oklahoma City with Mr. McVeigh?
A. Yes.
Q. They're aware that you wrapped explosives for transport?
A. I was a part to that, yes.
Q. They're aware that you tried to get a storage shed in a different name than your own?
A. Yes.
Q. They're aware that you handled guns you thought were stolen?
A. Yes.
Q. They're aware you handled explosives you thought were stolen?
A. Yes.
Q. They're aware that you shared money with Mr. McVeigh in connection with the guns?
A. Yes.
Q. They're aware that you wanted to form a militia and took steps to that end?
A. Yes.
Q. They're aware that you had literature that you got from Mr. McVeigh that you had in your house; correct?
A. Yes, they are.
Q. And those are just -- those aren't all of the things we talked about today but some of them; correct?
A. That is correct.
Q. As you sit there today, sir, are you fearful that the United States will decide to charge you with conspiring to bomb a federal building?
A. No, sir, I am not.
Q. Now, you testified in direct examination -- excuse me. One moment. Let's look at more of the paragraph here, if we may. It also says that if further investigation discloses that you refused to answer any questions put to you -- well, you haven't done that, have you?
A. No, sir, I have not.

Q. " . . . or makes any false or misleading statements to investigators or attorneys of the United States or makes any false or misleading statements or commits any perjury before any grand jury or court," do you see that, sir?
A. Yes.
Q. Now, who do you understand has the right to decide whether or not you have committed perjury and prosecute you for it?
A. I believe that would be the judge.
Q. Well, is it your understanding, sir, that it's prosecutors who decide whether to prosecute people?
A. Yes.
Q. You're aware that neither I nor Mr. Woods nor Mr. Nichols has any power to prosecute you if we should think that you're committing perjury?
A. I'm aware of that.
Q. Now, in your direct testimony, sir, you discussed the charges to which you have pleaded guilty and the maximum potential sentence that you might receive. Do you remember that?
A. Yes.
Q. And what do you understand to be the maximum potential sentence that you could receive?
A. 23 years in prison.
Q. Now, when -- do you expect to do 23 years?
A. I think that's a distinct possibility.
Q. Now, Judge Matsch is not the judge who will sentence you; correct?
A. No, sir.
Q. That is, another judge has been appointed for that purpose; right?
A. That is right.
Q. And you understand that's a judge in Kansas; correct?
A. Yes.
Q. Now, at the time you are sentenced, which hasn't happened yet -- correct?
A. That is correct.
Q. -- your lawyer will have the right to present reasons why the sentence should be less than 23 years; correct?
A. Yes.
Q. Do you know what the guidelines' sentence is that --
A. Yes.
Q. Yes. What is it?
A. I believe it's 27 to 33 months.
Q. So if you were sentenced in accordance with the sentencing guidelines, you'd get 27 to 33 months; correct?
A. Yes.
Q. Now, your lawyer and you would have the right to argue for something less than that; correct?
A. I believe that's true.
Q. And a probation report would be prepared; correct?
A. Yes.

Q. In addition to that, the government will have the right to present evidence at that sentencing hearing; correct?
A. Yes.
Q. Now, is it your understanding that the government has the right but not the obligation to say to the judge, should it choose, that you have rendered substantial cooperation?
A. Yes.
Q. Are you aware that neither you nor I nor Mr. Nichols nor Mr. Woods would have any right to ask the judge to consider substantial cooperation? Is that your understanding?
A. Yes.
Q. Now, looking here at page 5 of your plea agreement, sir, do you see paragraph 65, Section 23 -- excuse me – Section 63553(e) motion. What do you understand a Section 3553(e) motion to be?
A. That if I fulfill my obligations with the United States prosecution, they under their sole discretion -- they may file a -- they may ask the judge to reduce my sentence.
Q. Let's read this: "If Mr. Fortier completely fulfills all of his obligations under this agreement" -- that's the first part; correct?
A. Yes.
Q. One of your obligations is to tell the truth. Correct?
A. Yes, sir.
Q. But the decision as to whether you did or not is going to be made by the prosecutors -- right -- for these purposes?
A. Yes.
Q. "At the time of sentencing, the United States will advise the sentencing judge of the full nature, extent, and value of the cooperation provided by Mr. Fortier. In addition, the United States will evaluate the information provided by Mr. Fortier pursuant to the preceding paragraph." Do you see that, sir?
A. Yes.
Q. And then it says, "If the government determines in its sole discretion that Mr. Fortier has rendered substantial assistance in the investigation and prosecution of others involved in criminal activities" -- "others" includes others than yourself; correct?
A. Yes.
Q. ". . . then it will file a motion pursuant to" -- and it cites some laws which will so advise the judge. And then it tells you the judge has the discretion to determine the sentence. Correct?
A. Yes.
Q. Now, we read here that the United States will evaluate the information provided by Mr. Fortier. Do you read that?
A. Yes.
Q. What does "evaluate" mean to you, sir? You worked at the True Value hardware store; right?
A. Yes.
Q. What does "evaluate" mean to you?
A. It means to me like they will grade my cooperation.
Q. Pardon me?

A. "Evaluate" means grade or consider how helpful I was.
Q. Okay. And the United States prosecutors are the only ones under this agreement who have any power to grade or to consider your cooperation. Correct?
A. Yes.
Q. And then the judge will decide based on what they do or do not say; correct?
A. Yes.
Q. When you went into prison, sir, had your youngest child been born?
A. No, sir.
Q. Have you seen your youngest child?
A. Yes, I have.
Q. Is it your hope, sir, to be reunited with your children?
A. Yes.
Q. Of all of the things in the world, is being reunited with your family the most important to you?
A. Absolutely.
Q. And you want that to happen as soon as you can, don't you, sir?
A. Yes, I do.
Q. And you are a man who would lie just to have a gun, aren't you, sir?
A. I did do that, yes.
MR. TIGAR: No further questions.

I wanted to argue that Fortier would tell a lie to gain his freedom, and in fact had told many lies for that and even less noble purposes. I wanted to argue that the government had assessed his maximum liability at the offenses to which he pled, and that therefore Terry Nichols should be treated with at most the same rigor.

Chapter Eleven

Cross-Examination: Preparing Your Witnesses for Its Rigors

This chapter suggests ways to accustom your witnesses to cross-examination. These hints are also useful in preparing witnesses for hostile depositions. Indeed, because there is no referee at a deposition, the hostile examiner will sometimes take liberties that he would not take in court. By the same token, you can protect your witness more in a deposition than you can in court.

If you doubt that a deposition gives more leeway for protecting your witness, think again. Sure, some judges in trial will warn your opponent not to insist unfairly or belligerently on a "yes" or "no" answer. Some judges will remind counsel that the witness may explain a seemingly categorical answer. Another judge, or the same judge with a different witness, will equally firmly say that a "yes" or "no" answer is required--and will upbraid objecting counsel in the jury's presence to leave the impression that counsel is trying unfairly to protect the witness from legitimate inquiry. You will probably know enough about the judge in your case to predict her behavior, but you may not know the judge's identity until the morning of trial, when it is too late to prepare your witnesses for that particular jurist's idiosyncrasies.

The moral: Your witness needs to be prepared to fend for himself, but to do so while remaining composed, controlled, and credible. Preparation falls into two parts: the locker room speech and the scrimmage.

THE LOCKER ROOM SPEECH

"When I finish my questions, I say, 'Pass the witness,' or, 'Your witness,' or 'That's all I have,' or whatever. Then I sit down or shuffle my papers, or look up if I am already seated. One of the lawyers on the other side gets up. We don't know which one it is, but I can tell you about them. Old Phil Jones is, well, just like he was at your deposition--gruff, always looking like he doesn't believe you, always pausing at the end of your answer to see if you'll get uncomfortable and add something else or qualify your answer. He's even been known to look at a witness like he doesn't believe them and pick up a paper as though it has something on it that contradicts what that witness has just said. It is a game he plays. If he has something, he will ask a question about it. It will probably be something we have looked at and talked about.

"Then there's Paula Wilson. She is polite but insistent. You relax. You stop thinking there is danger. Then she asks a complicated question, and you're not ready for it.

"So what do you do? Remember that I asked you to trust me, for the direct examination? Well, trust me some more, but it's a different kind of trust. As long as you tell the truth, you're going to be all right. But you need to follow some rules, because it isn't like direct. I don't ask the next question. I can get up and ask more questions of you after the cross-examination is done, though.

"Here are the rules, just as we discussed in talking about direct examination. First, listen to the question. I mean, really listen to it."

The next part depends on your witness. Maybe you have to warn, "I know you are a quick study. You see the issue even before the question is finished. You want to jump right in and answer it and get on to the next topic. I tell you: Don't do that. Listen to the question. All of it. Every word. Do not be thinking about your answer until you have heard the question."

Maybe the warning is this: "From what I can tell, you like to make sure your answer is right before you give it. Good for you. Obey that rule. Listen to the question, and consider it before you answer."

Back to the more general version:

"Second, pause for just a bit after every question. This helps you to enforce the first rule. It also gives me time to make an objection if I need to. Now you can't expect me to jump up and object every time you are asked a hard question. The judge will make remarks about it, and we'll both look like we are trying to hide something. Believe me, though, if you are asked a question that is improper, I'll stand up.

"Third rule, if the question isn't clear, say so. And, fourth, if the question is clear, answer it. Remember how I asked you to just answer the questions on direct examination? I was getting you ready for cross. We want you to look like you are treating the cross-examiner the same way you treated me. So listen, pause, and answer what was asked. Do not feel the urge to explain your answer. If explanation is needed, we can do that when I get to ask questions again, on redirect examination.

"You see, if you just answer the question asked, the cross-examiner has to think up another question. If you try to tell him what you think he was asking, you make his task easier. There is no reason to do that. Also, by just answering the question, you avoid suggesting a line of inquiry he may not have thought of. You avoid, in short, being taken advantage of."

Add a fifth rule, which is particularly important for partisan witnesses. As far as the jurors are concerned, your opponent has a right to cross-examine. They are unlikely to have the deeply felt feelings about the case and its personalities that the witness has. At least, they will not have such feelings until late in the case, and even then it is unwise to presume that you know what their feelings are. You are navigating by dead reckoning, after all. Here is the fifth rule:

"Fifth rule, and this one is a little hard for me to say correctly. Don't start off the examination with a chip on your shoulder. I know you think their case is bunk--and that old Jones or young Wilson is trying to trap you. Don't project a combative attitude. The jurors expect you to answer the questions. They are looking to you for cues about how to judge you, and we want them to think you are composed and truthful. Don't approach the experience as though it were a contest that you must visibly win. Believe me, that attitude almost guarantees you will lose. This is not the time for you to go toe-to-toe with the other lawyer."

There are a lot of variations on the fifth rule. In one criminal case, a public figure was on trial for allegedly taking a bribe. He thought the charges were trumped-up. The prosecutor had been personally obnoxious--arrogant and self-righteous. The defendant was used to being listened to. We needed to state and restate the fifth rule, and to work on it in the scrimmage portion of preparation. We promised our client that he could have one moment of pique, and just one. We trusted him to limit himself in that way. If, after he had courteously answered questions for a long time, the prosecutor came at him with a sort of supercilious air of disbelief, he could look at his wife and children and say that he swore in their presence that what the prosecutor was claiming was untrue.

I am not saying that every witness, or even most witnesses, should be told they can have that luxury. Far from it. That sort of thing can look maudlin. But this client believed it and was believable in saying it.

For another witness, the fifth rule might be restated: "Look, your accent, your manner, your clothes, the way you treat people--all come across as arrogant as hell. We are going to work on that." The point is that the rule must be tailored to fit every witness, and then you must let the witness see during the scrimmage how to apply it.

"Sixth rule: Maintain the right eye contact and never the wrong eye contact. Look directly at whoever is asking you a question. Usually, it will be the cross-examiner. The judge

may pipe up and ask something. If she does, turn around and look at her. Refer to her deferentially as 'Your Honor.'

"It is all right to keep looking at whoever is questioning you. If you feel it is right, look at the jurors. We will work on that when we prepare you in detail. No matter how much trouble you feel you are in, do not look hopefully, balefully, or in any other way at me or anybody else on our side unless you are referring to one of us, or unless one of us is speaking--for example, to make an objection.

"The jury wants to hear your story. They haven't heard it before. They need to be convinced. Go ahead and convince them, but take it easy."

Of course, the witness will have questions and will need more detailed reassurance. You can give some of that during the scrimmage.

THE GROUND RULES

Even practice games have rules. If you take down the statement of a witness, or even make detailed notes, during a cross-examination scrimmage, those may be producible to your opponent. If the witness is your client, the risk is slight. For witnesses you do not represent, the work product privilege shields much if not all of your note taking. It would be wrong to assume that the privileges will always be enough. Be careful with your notes.

During cross-examination, the witness may be asked about preparation. You are going to find a lot of disagreement among lawyers about how to handle a scrimmage to head off that kind of inquiry, and how the witness should respond when asked. I always think KISS: Keep It Simple, Stupid. Keep the preparation simple and direct, and tell the witness candidly what to expect.

First, preparation. In some cases and for some witnesses, you may hire a trial consultant to advise on presentation. The consultant will meet with you and the witness to talk about demeanor, dress, and issues in the case. Do not let the consultant burden the witness with theories. This is just a conversation about making sure the witness understands the process and is prepared to answer questions.

To do a mock cross-examination, try to use another lawyer or a law clerk. A fresh insight will help you anticipate problems by covering them in direct examination. An observer will see problems with the witness that you may not see. Also, if the mock cross gets adversarial, someone other than you is being the "heavy."

I think it a mistake to have the mock cross-examiners portray specific people on the other side. This fact has a way of slipping out at trial, and I think it looks too cute. Certainly, the preparers ought to be probing, and there is nothing wrong with them using different styles of attack. But no names, please.

Use videotape if you think it will help. You will have to do careful research on the rules in your jurisdiction about videotapes. Can you use the same tape and just keep recording over it? Are you ethically bound to keep it, in order to produce it at trial for the judge to determine whether it should be turned over to the other side? Are the rules clear enough that video of this kind is work product? I hope that witness preparation videos are work product. They certainly should be. If there is the slightest risk you will have to turn the videos over to the other side, I would use video only for a few fairly neutral questions and answers. It is one thing for the witness to describe preparation sessions, but a videotape of such a session almost always makes it look like you have been rehearsing too much. In your preparation sessions, you will not have the studied and careful manner that you want the jury to see.

Now, what should you tell the witness? The witness should be able to make these truthful responses:

Q. Now, did you get together with some people to prepare for cross-examination?

A. Yes, I met with Mr. Tigar and some of the people helping him prepare for trial.

Q. Who did you meet with?

A. With Mr. Tigar, of course, and then at different times with Ms. Doyle, Mr. Alford, and a Ms. Arbogast.

Q. Ms. Doyle is the one at counsel table?

A. Yes.

Q. Who are the others?

A. They are people who work with Mr. Tigar and Ms. Doyle on the case.

Q. Ms. Arbogast is a trial consultant, isn't she?

A. She was introduced to me as a consultant, yes, working on this trial with Mr. Tigar and Ms. Doyle.

Q. Who is Mr. Alford?

A. He is a young lawyer who works with Mr. Tigar. Or perhaps he is a law student. I'm not sure.

Q. How long did you meet with them, altogether?

A. I met with different ones at different times, but, all in all, for several hours.

Q. On more than one day?

A. Yes.

Q. How many meetings, and how much total time?

A. Well, at least five meetings, and a total time of at least ten hours.

Q. Did they ask you questions as if they were cross-examining you?

A. Oh, yes.

Q. Did they videotape you?

A. Yes, they did. Twice. So I could see what I looked like.

This examination may be prolonged. The witness may be asked more detail and should candidly describe reviewing all the exhibits and papers in the case and discussing it with the lawyers and those working with them. Personally, I think it is a waste of time, unless the cross-examiner can show that the preparation session significantly influenced the testimony. For example, a witness may have changed her story from deposition to trial, or from arrest to grand jury to immunity to trial. The examiner may want to blame the new version on opposing counsel. Unless you have got that kind of an issue, dwelling on preparation looks bush league.

IS THERE A GENTLER WAY?

I know some very good lawyers who do not believe in intensive mock cross-examination. They take the witness aside and explain the issues, talk through some of the questions that may be asked, make sure the witness knows the document trail, and leave it at that.

I disagree. I would never give up a chance at scrimmage-type preparation. I will not retain an expert who will not subject herself to such a process because an expert who behaves on direct examination can, on cross, turn either arrogant or equivocal. The very witnesses who think they are too smart or too busy to need preparation are the ones who need it most. For examples of how such witnesses become easy targets, see the chapters on cross-examination and imagine how the characters portrayed would benefit from scrimmage.

PERCEPTION, MEMORY, MEANING, VERACITY

Cross-examination, as I have said, is about perception, memory, meaning, and veracity. Preparation for cross must therefore cover these areas.

You must anticipate and work on problems of perception. The witness must candidly concede every objective fact that casts doubt on the ability to perceive--lighting, time to observe, relative position to the event, responsibility for seeing and reporting, and so on. You can cross-examine with non-leading questions to establish these basic facts. I give some examples below.

Memory poses problems, but you will have anticipated most of them on direct examination. If the witness has refreshed her memory with a document or by talking to someone, you will have made that clear. She remembers what she remembers. For the rest, she may not have remembered it until reminded by seeing or hearing something. Some events she does not remember at all, but she certainly recognizes her signature on a memorandum that may then be admissible. Some cross-examiners delight in taking witnesses over gaps in their memory that have been filled in this way.

Meaning arises in distinct contexts. If the witness has sponsored her own prior statement, or is explaining it, she is open to cross-examination on that interpretation. The cross-examiner may also seize upon a statement made on direct. The witness has the options of denying having made that statement or of accepting or refusing to accept the interrogator's interpretation of it. If the witness admits having made the statement, the examiner may stop right there, leaving his preferred meaning dangling in the air. This confuses some witnesses, who wonder how to correct matters. The witness must be warned just to answer the questions and wait for redirect. If the tactic is obviously misleading the jury, you may object, but only if you have a good chance of succeeding.

Cross-examination about meaning has become more important in these days of e-mail communication. The curse of e-mail is that it creates a retrievable record of the half-formed, ill-expresssed, angry, sarcastic, shoot-from-the-hip communications that people send each other. I have represented many clients whose offices used e-mail. In every case, the servers had stored many messages that did not reflect well on the client or its personnel. These communications must be addressed on direct examination, and the witness prepared for cross-examination on them.

Veracity in the sense of truth-telling should not be much of a problem by this point. In your direct examination preparation, you have dealt with the witness's obligation to tell the truth. Veracity issues remain, however. The witness may have made a prior inconsistent statement that is now being used substantively or for impeachment. Or she may have an implied bias from circumstances--relationship to a party, employment, a plea bargain. The cross-examiner is entitled to probe those circumstances.

HOW TO SCRIMMAGE

The first scrimmage session should be based on your direct examination and be handled by someone other than you if at all possible. If you are really solo, videotape the direct and watch it, taking notes for cross-examination.

The examiner should focus on the issues raised in notes taken during the direct examination. You know the drill. A vertical line slightly to the right of center on the legal pad. Use 8-1/2" x 11" paper; I use the kind with three holes punched, so it goes into a notebook binder. On the left, you note the questions and answers. On the right you make notes and symbols on the cross-examination you plan to do.

The first scrimmage should focus on how well the witness has assimilated the rules laid down in the locker room speech. It needn't take long. You will be evaluating answering the question, pausing before answering, the appearance of credibility versus combativeness or discomfiture, eye contact--the appearance issues.

For this purpose, focus on meaning, memory, and the implied bias part of veracity. Meaning issues will be drawn from the direct. Memory issues will bring in any prior statements. Implied bias issues are a good indicator of witness behavior because the natural tendency is to react when someone seems to be questioning your integrity.

As the bad guy snarled at Mae West, "Have you ever heard my integrity questioned?" "Honey," she purred, "I've never even heard it mentioned."

Remember that all answers must pass the straight-face test. There are explanations of human conduct, even true ones, that defy belief. If your witness comes up with one of these, particularly when challenged on cross in a way that invites an explanation, the witness, you, and your cause lose credibility. I cannot explain this. I just know that in many cases the witness's earnest and truthful first recollection is not enough. You have to probe deeper.

"Watson," said Holmes, "I don't believe in coincidence."

Let me illustrate. A corporation makes a decision on product design. It had several choices. Nobody can remember why they chose design A over design B--it just seemed to the deciders that was the right thing to do on that day. I tell you that if it turns out in a lawsuit that there was a material difference between A and B, the answer "It got down to those two choices, and we just chose the one we liked that day" will not pass the straight-face test. The answer is, as far as the witness is concerned, truthful, but it is not good enough because it is incomplete. You must independently research the setting in which the decision was made and the background to it. Then probe until you get more persuasive detail. You must help the witness recall the perhaps unspoken reasons why he would have made that choice on that day. He may even then be unable to tell you that these were the reasons; he will only be able to say that these factors were present and it seems reasonable to say they were dispositive.

After the first, relatively short scrimmage, later sessions should focus on documents, objects in evidence, and prior deposition testimony. In a complex case, you can divide this work among others, and let them conduct some of the scrimmages.

All the examiners should carefully note the witness's difficulties so you can talk about them. Keep circling back over issues, questions, and tactics that make the witness forget the rules. Reinforcement must be as a good trial advocacy class--repetition, very short critique, learning by doing, plenty of positive reinforcement.

You want the witness to appreciate that she is not working without a net. You are there for some purposes. The truth is there as a constant reference point: "What though the tempest 'round me roar, I hear the truth, it liveth." There can be redirect examination. In most cases, no one witness takes the entire case on her shoulders.

When should you do the scrimmage? Do most of it before trial. In a long case, you can use weekends and off days. Evenings should presumptively be free for the lawyers to do other work, including the urgent work of preparing a last-minute witness. Do not scrimmage with the witness once direct examination begins, and surely not after cross begins. You may in any case be forbidden to talk with the witness about her testimony once your opponent has started cross, unless the witness is your client. But it certainly looks bad when the jurors find out you are intensely prepping the witness to shore up the performance on cross-examination.

Chapter Twelve
Expert Witness: Soft Subjects--Choosing and Presenting Your Expert

In my first trial, I was so junior that I sat at a table behind the counsel table--more distant from the action even than our case expert. The defendant was charged with tax evasion. Edward Bennett Williams was lead counsel. The redoubtable Boris Kostelanetz was co-counsel.

One defense was that the items of income and expense had been reported as the defendant had been advised by Kostelanetz's partner. The partner took the stand and testified, on direct and cross, at great length. This virtuoso performance included a detailed treatment of the distinction between ordinary income and capital gains.

The jury was sequestered. The next morning, one of the marshals reported that one juror turned to another during the walk back to their hotel at the end of the day and said, "Who's this Captain Gaines they were talking about today?"

The other juror replied, "He's going to testify tomorrow."

I reflect often on this experience. I have added to its lessons with the passing years. This chapter and the three that follow are based on two basic principles. First, most jurors discount expert testimony as the set speech of a hired gun. They think that you can find somebody to take an oath in support of almost any proposition. Second, jurors can understand, appreciate, and critique the testimony of any expert--if the lawyers give them the proper tools. This is another version of empowering the jury.

These two principles may lead you not to call an expert as a witness in your case, even when the other side has assembled a formidable array of them. They should also lead you to spend the time and resources necessary to understand the experts' fields, as well as their backgrounds and prior testimony.

In the intervening decades since my first trial, the use of expert testimony has been debated. In 2000, the Supreme Court adopted new federal rules of evidence, and most states have followed the federal lead. The "old" rules about experts – which conventionally dated back to the Frye case in 1923 – have been swept away, replaced by a set of "factors" and "standards" designed to control the misuse of expert testimony.

As this introductory chapter will argue, these changes have not barred the door to very much expert testimony. They have opened the way to judges indulging ideological preferences about particular kinds of tort litigation. Mainly, however, the ostensibly new rules reinforce one message of this book: Careful preparation and presentation, whether on direct or cross examination, can put expert testimony into perspective for jurors. Chapters Twelve through Fifteen are designed to be read together, for an overall view of expert testimony in trials.

The rules on admissibility are, analytically, little different from other rules that reflect skepticism about jurors' ability to filter out extraneous matter. We trust jurors to evaluate a wide range of evidence, but draw some clear lines. Some of these lines, such as those relating to privileges, reflect what Wigmore called considerations of "extrinsic policy." That is, a client's communication to her lawyer may be relevant, but preservation of the attorney-client relationship trumps the search for truth. The restrictions on opinion testimony are of a different type. They are akin to the restrictions in the 400 series of federal evidence rules, which in various ways limit juror exposure to evidence that jurors might overvalue or wrongly apply. If probative value is far outweighed by prejudicial effect, the evidence stays out. Evidence of settlement negotiations, or subsequent repairs is admitted only under special circumstances.

Indeed, some judges do not permit lawyers to refer to expert testimony or witnesses. They insist on the term opinion testimony or witness, to discourage jurors from overvaluing what they hear.

We see the same idea at work in criminal cases. United States v. Bruton forbids admission of one codefendant's statement against the other defendant, unless the declarant is available for cross-examination. The Supreme Court has held that jurors cannot be trusted to obey a cautionary instruction that the statement is admitted only against its maker.

So while cross-examination might be trusted to uncover phony expertise, or good expertise badly or corruptly applied, the trial judge must act as gatekeeper – in the popular image – to ensure against wasting the jurors' time or exposing them to evidence that they might wrongly credit because of the aura that surrounds the idea of expert.

Navigating the rules of admissibility has, as a result of all this controversy, become more difficult of late. However, this does not mean that the basic work of direct and cross-examination has become less important. To the contrary, admissibility decisions are usually made at the summary judgment stage of a civil case, or in pretrial hearings in criminal matters. Persuasive presentation, and hard-hitting cross-examination retain their usual roles, but must begin to be exercised at an earlier procedural hour.

HARD EXPERTISE AND SOFT EXPERTISE

Long ago, I began to think of two kinds of expert witnesses: soft subject and hard subject. A hard expert deals with what can be measured, drawn, photographed, recorded--qualities that we exercise within the left hemisphere of our brains. Examples include a ballistics expert, a pathologist, a fingerprint expert, and an accountant who testifies about technical accountancy issues.

A soft expert deals with intuitive matters of judgment, discretion, imagination--for which we use the right hemisphere of our brains. Soft experts include psychiatrists, theoretical economists, and "life value" experts.

Many experts bring both hard and soft qualities to the courtroom. The psychiatrist is a physician who can tell us that a patient ingested a chemical substance that reacted in a certain way with what was already in the patient's body. That is hard science. When the doctor goes on to tell us that the patient took the substance from a compulsion that has its roots in childhood experiences, that is soft science. An accountant testifying about a public company's duties of disclosure is a soft expert to the extent that such decisions involve a substantial use of discretion. She is a hard expert when interpreting the maze of federal and state rules that govern her duties to management, the board and shareholders.

The distinction is important for your choice of expert, your tactical decisions, and your appreciation of how jurors view experts. This last consideration is easily overlooked. In a complex antitrust case, the other side recruited a theoretical economist to review documents and depositions and to opine about collusion in the relevant market. There was a strong temptation to dismiss this sort of testimony as "conspiracy-ology" or, in lawyer cliché terms, rank speculation. Indeed, a solid motion to exclude can be drafted for such a witness.

I caution against facile dismissal of such a soft expert. The negative or positive effect upon jurors of soft expertise is greatly enhanced by jurors' intuitive responses to the expert, the expert's field, and the expert's conclusions. You may even be able to turn the expert's conclusions around to benefit your client.

Soft science experts are accustomed to drawing inferences from impressions that cannot be wholly documented. Although there are exceptions, they are likely to be far less prosaic and

straightforward in their presentations than, say, a fingerprint or chemical analyst. This tendency presents a challenge in selecting and presenting an expert, and it provides unique opportunities for the cross-examiner.

Many fields of soft science evoke strong juror feelings. These feelings vary depending on current public controversy, geography, and the demography of the jury. For example, media attacks in the wake of an unpopular jury verdict may push psychiatric expertise into disrepute. Some jurors react negatively to psychiatric testimony about alcoholism, perhaps because of their personal or family experiences, or their religious convictions.

One can see the effect of intuition--juror and expert--most strongly when looking at a soft expert's conclusions. Returning to the economist who saw collusion in the market, lawyers and jurors are likely to view her conclusions quite differently. Jurors in the area where the case was pending were disposed to believe that large corporations conspire against the public good and that such conspiracies may remain hidden for a long time. So, when a plausible-looking expert takes the stand and testifies that she has studied the case and finds collusion in the market, many jurors will find their prejudgments reinforced. "Aha," they will say inwardly, "I thought as much."

In Texas capital cases, a jury is asked whether the defendant is likely to commit crimes of violence in the future. This "future dangerousness" inquiry leads prosecutors to put on a mental health professional to opine that the defendant will indeed be a danger if permitted to live, even in the confines of prison. Over and over again, defense counsel have shown that this sort of claimed predictive ability rests upon a shaky foundation. But judges continue to allow the testimony and despite attacks on cross-examination and from competing experts, jurors credit their testimony and answer yes to the dangerousness question, beyond a reasonable doubt.

The reason lies in the dynamic of the capital trial. This jury has found the defendant to be a murderer. All jurors with conscientious scruples against the death penalty are excluded from a capital jury. So all those remaining are already leaning towards death. An opinion that reinforces a preconceived idea is more readily accepted than one that challenges it. We can call this "juror intuition," but intuition is often a softer word for prejudice.

The same intuitive faculty might press other jurors to reject a soft expert. I have tried criminal cases in which the defendant had an alcohol problem so severe that psychiatric testimony was admissible. In such cases, many jurors are poised to say, "Oh, that is just headshrinker stuff!" This reaction is coupled with a sense that the defendant brought his troubles on himself or that psychiatrists are easily fooled by articulate patients.

The lesson is clear: When presenting or opposing soft expertise, you must honor juror intuition. In this and the next chapter, I discuss ways of tapping into juror attitudes that support you and dealing with hostile ones.

Soft science is also a good testing ground for rules of evidence and procedure. Analyze proposed expert testimony at four levels: materiality, relevancy, rules about experts, and demonstrative evidence.

MATERIALITY

In Molzof v. United States, the Supreme Court held that a Federal Tort Claims Act medical malpractice plaintiff could recover damages for loss of enjoyment of life. The Court reversed a Seventh Circuit holding that such recovery is a form of statutorily prohibited "punitive damages." The case illustrates the importance of materiality determinations. If the issue of enjoyment of life is not properly in the case, no expert testimony--no matter how reliable--will be

admissible on that issue. The testimony would not be "material" as that term is used in the law of evidence.

Evidence is material if it related to an issue that "in bounds," that is within the issues properly being heard in the case. Dawson v. Delaware provides a more dramatic example. Dawson was convicted of capital murder. His white supremacist views and associations were immaterial to the question of his eligibility for the death penalty, because, as the Supreme Court has held, ""An aggravating circumstance is invalid if it authorizes a jury to draw adverse inferences from conduct that is constitutionally protected." That is, a rule of law – in the Dawson case of constitutional dimension -- puts an issue out of the case.

If the issue is properly in the case, testimony or other evidence on it will be material but might not satisfy the other criteria listed below.

RELEVANCY

The Federal Rules of Evidence and their state counterparts broadly authorize admission of relevant evidence that makes any matter in issue more or less probable than it would be without the evidence. Relevant evidence is generally admissible. However, it may be excluded if it wastes time, risks prejudice, or may confuse the jury. Some types of evidence, such as prior bad acts, are the subject of special rules.

Many lawyers mistakenly jump from materiality analysis directly to the rules governing experts. The relevancy rules are, as the guidebooks say, worth a detour. Even if an expert may be qualified under Federal Rule of Evidence 702, the testimony may nonetheless be ruled inadmissible under Rule 403 as too speculative, cumulative, prejudicial, or time-wasting. Particularly when a litigant offers more than one expert, and where the claimed expertise or its basis presents a close question, the court will simply hold that Rules 702 and 703 seem to be satisfied but that there is too much risk of jury confusion.

In some complex cases, the number of experts designated and then deposed is shocking. Whatever tactical sense the proponent may make of barraging the jury with expert testimony, the trial judge can and usually will impose limits.

Expert testimony may be unduly prejudicial, particularly if accompanied by photos, charts, or other demonstrative evidence.

RULES ABOUT EXPERTS

Federal Rule of Evidence 702, which is echoed by many states, was amended in 2000 to say:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

The rule is vague and general. A trial judge is free to fashion appropriate standards within its broad language. The rule was amended in response to the Supreme Court's 1993 decision in Daubert v. Merrell-Dow Pharmaceuticals, Inc. In the later case of Kumho Tire Co. v. Carmichael, decided in 1999, the Court held that the admissibility decision on experts would be reviewed under an abuse of discretion standard. Of course, if the trial judge clearly misapplies the law to an admissibility decision, that error would be reviewed de novo.

Federal Rule of Evidence 703 provides:

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted. Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect.

When the Supreme Court decided Daubert in 1993, it signaled renewed focus on the reliability of expert testimony. The Court recognized that jurors might overvalue such testimony, and that as in so many other areas, the trial judge would have to limit what jurors hear in order to promote reliable fact-finding. The Daubert majority did not examine any evidence that jurors are suspicious of hired gun experts.

In practice, the Daubert holding has licensed trial judges to exclude crucial expert testimony in tort cases, and to do so at an early stage. Admissibility determinations are likely to be made on summary judgment, ending the case if the judge holds the testimony inadmissible. Expert testimony is crucial in many toxic tort and product liability cases. When a client is exposed to a "chemical soup" of potentially toxic or carcinogenic substances, the issue of causation is often difficult. When a trial judge is somewhat hostile to the plaintiffs' position, the expert witness determination is one place to shut the case down.

In the post-Daubert world, the trial lawyer cannot defer selection and preparation of the expert. I have long preached the need for early work, as a counsel of prudence. That teaching is now essential to survival.

In the early stages of case preparation, the most important Daubert-based concept is peer review. You will want an expert whose work is respected by his or her peers, applying concepts that have also been validated by her peers. When cross-examining, you will often challenge an opposing expert with the work of others. I discuss these approaches later in this series of chapters.

In order to choose, and then to qualify, an expert, you must know something about the field of expertise. The same holds true if you wish to oppose or cross-examine an expert. You will not portray yourself before the jury as an expert, for doing so will interfere with your role in helping the expert empower the jurors.

I always begin the search by reading a few sources about the field, and then finding someone to help me become educated enough to do my job. Often, a graduate student will be the ideal teacher: eager, up to date, and less expensive than the testifying expert you may eventually hire.

In one case involving chemical reactions, a chemistry graduate student who supervised the college teaching laboratory was glad to help us understand chemical reactions and the various machines and tests that experts might use to study them. In a case on the economics of petroleum extraction and refining, I called a leading economist and found one of his students working on the very issues we were confronting. The professor was glad for his student to make some extra money and delve into the real world.

Deconstructing the Rule 702 criteria, we can identify the when, how and who of expert testimony. The 2000 amendments limited the scope of lay opinion. In former days, a police officer might give an opinion helpful to understanding her testimony, without being qualified as an expert. Rule 701 now provides that any opinion based on "scientific, technical or other

specialized knowledge" must be filtered through the Rule 702 criteria. This is an important limitation, because many "fact" witnesses have some specialized knowledge that is relevant to their testimony, and a good direct examiner always uses that knowledge to bolster the testimony. That should be clear from the earlier chapters. Now, however, the examiner must give notice of any intention to bolster in this way, and give the opportunity for voir dire or pretrial examination.

So our first observation is that the scope of Rule 702 is broad, both in its scope of application and in what it will allow. The old argument of whether someone qualified by life experience but not by education, or whose conclusions were not "science," must or could be qualified as an expert is over. That person can be an expert witness, and her testimony is subject to scrutiny under the expert rules.

SCIENTIFIC, TECHNICAL OR OTHER SPECIALIZED KNOWLEDGE

The sea-change reflected in Daubert and the new rules was designed to eliminate "junk science" and "junk scientists" from the courtroom. The idea that expert or opinion testimony must be helpful to the jury, and will be based on scientific, technical or other specialized knowledge marries two principles. The first principle is that the qualified witness may give an opinion, beyond what a "lay witness" can do. The second principle is an extension of the idea of relevance. If the testimony does not logically tend to prove a matter in issue, it will be excluded. In the realm of opinions, this means that the assertedly scientific or technical field must have the support of the relevant professional community. If not, all testimony on this subject, no matter how expert the witness, will be excluded.

QUALIFIED

Once the first hurdle has been crossed, the proponent must show that the intended witnesses are qualified. In civil cases, the trial judge will make this determination before trial based on the discovery. In criminal cases, the judge should order pretrial briefing and often hold an evidentiary hearing. The new rules on expert testimony ensure that expert witnesses will, once their names are provided to the opposition, almost always be deposed. Motions practice to exclude the testimony may follow.

Of course, the proponent is entitled to go through the expert's qualifications at trial, for the jury's benefit, even if the trial judge has already ruled the proposed testimony admissible.

FACTS OR DATA

Too often, lawyers choose an expert witness, feed him or her selected material and then continue with trial preparation. Only as trial approaches does this careless lawyer call the expert and try to refine the issues on which the expert is to opine, and provide additional factual material. Trial, or a last-minute deposition, may be close at hand. This sort of treatment angers experts, and under the new rules can lead to exclusion of the evidence.

The expert must have access to all the relevant facts. Relevancy for this purpose is determined by the standards of the expert's own discipline. "Sufficient" data means enough data, collected in a reliable way, on which to base an opinion.

As we shall see, the "facts or data" inquiry can be fruitful for cross-examination, even if the testimony is admitted. One-sided fact collection takes its place alongside expert arrogance as a devastating error for the witness to make.

PRINCIPLES AND METHODS

Again, this requirement is an extension of the principle of relevance. Unreliable science cannot logically help the jury.

In criminal cases, for example, such fields as toolmark analysis and handwriting comparison have come under attack as lacking an adequate basis in empirical research. Opinions

on alleged race-linked characteristics might also be excluded. If plaintiff's counsel wishes to show a connection between a medication and an adverse reaction, she must first show the court that the relevant scientific discipline has devised ways of establishing such a connection.

Issues of this type will almost always be litigated before trial. The parties may bring texts, treatises, and articles. They may present the testimony of witnesses who would not in any case testify at trial. In deciding this issue, the trial judge is making a kind of legislative judgment about reliability.

RELIABLY APPLIED

This branch of the rule is often overlooked. Yet, it can be the most important, as to both weight and admissibility. As we were preparing for a federal criminal trial, a scandal erupted over mismanagement of the FBI Laboratory. Unqualified people were conducting the tests on which expert witnesses would then opine. Devices for measuring were miscalibrated, giving potentially inaccurate readings. Items that were to be tested were mishandled, so that one could not tell whether they had undergone change between the time they were collected in the field and the time they were tested.

The controversy echoed analogous events in Great Britain. I can remember watching a trial in London's Old Bailey in 1997. A prosecution witness was prepared to testify that a small quantity of residue collected from a defendant's car was a dangerous plastic explosive. The morning this evidence was to be presented, prosecution and defense counsel watched a videotape of the police search. To their surprise, one police officer was apparently frustrated in trying to pry the door panels of the car loose, so he got a screwdriver from his own tool kit and used that. The screwdriver had been used at other crime scenes, and might therefore have been contaminated with plastic explosive residue. Result: the evidence was excluded because a proven method was not reliably applied.

It is usual for experts to use helpers in collecting and analyzing data. However, admissibility and weight of testimony determinations depend vitally upon the degree of supervision that the expert gave the collectors of raw data. True, some experts are personally involved in every step of their conclusion-drawing, from data collection to testimony. More usually however, the expert must rely on the work of others. The forensic ballistics technician relies on the field work of police officers and on the chain of custody of the questioned item. The chemist relies on proper handling of the samples, and on the laboratory work of assistants.

DEMONSTRATIVE EVIDENCE

I cannot imagine ever presenting an expert without using demonstrative evidence. I want the expert's message in more than one medium. I want tangible reminders of the message to use in the summation and previews of it for the opening statement.

I want the expert off her perch on the witness chair and down in the well of the court, talking directly to the jurors. If the expert has an intuitive message, I want eye contact and informality--to help the jury size up the message and the messenger. If the expert has an arcane specialty or suffers from the "expert's disease" of terminal arrogance, I want the interaction of expert and jurors to help break down the barrier between the jurors and the message.

For these reasons, planning the use of demonstrative evidence must begin while you are selecting the expert and continue through preparation and trial. You want a teacher, and one who is accessible and persuasive rather than lofty and didactic.

CHOOSING A TESTIFYING OR SHADOW EXPERT

In choosing an expert, your dilemma is that the experienced courtroom performer can be attacked as a professional testifier, while the novice does not see how his professional judgment intersects with the law-defined claim or defense being supported or attacked.

I have argued both sides of this question and therefore have the solace of knowing that I have not been wrong more than half the time. To temper my fears, I now say that there is no answer; all depends on the expert you are dealing with. If the expert has demonstrable integrity, significant professional qualifications, and is willing to work under your direction toward an effective presentation, the level of experience is not so important.

By focusing upon qualifications and your own control over presentation of the case, you will learn to be suspicious of three things: the expert shop, the always-on-one-side expert, and the prepared dog-and-pony show. A given expert may exhibit more than one of these traits.

First, watch out for the expert who only testifies, and has not spent significant time practicing her profession outside the work necessary to prepare for litigation. There are dozens of opinion factories; if you are a member of any trial law organization, you are no doubt on their mailing lists. They claim every possible kind of admissible expertise: economic, engineering, chemical, medical, and so on. The fact that an expert comes from one of these shops is good fodder for cross-examination. More significantly, an expert closeted in such an environment may well have lost touch with the continuing research in her profession and with the academic peer review, symposia, teaching, and debate processes that sharpen theoretical formulations and expose their flaws.

This is not to say that an expert who is marketed by one of these firms is always inferior to one who is not. Some formidable witnesses use these firms to avoid the hassle of replying to inquiries, sending out bills and other business aspects of testifying. For example, a medical school professor might well use such a firm so that his expert-related work will not consume time that should be devoted to teaching and research. In that case, use of the search firm might be portrayed as a positive thing.

You must also consider that a professional expert is motivated to define his expertise to maximize opportunities to testify in litigation. From there, we get alleged branches of expert knowledge such as “accidentology,” and “hedonic value of life.” These may be legitimate branches of scientific or professional inquiry, but they have little relevance outside the litigation context. It is a double burden to present an expert who subsists only by litigation and who sponsors an expertise devised solely for litigation.

Second, the expert who always takes a particular side is more easily dismissed by the jury. The countervailing consideration is that such an expert will not let cross-examination change his opinion. You can adjust for these characteristics in your direct examination by letting the expert tell of the many cases he refuses to participate in because he cannot support the opinion asked for.

Third, beware the expert who has a prepared performance. Your investment pays dividends of difficulty. Your control of the presentation will either be diluted or achieved after time-wasting battles. At trial, the necessary rapport between you and the witness can evaporate. You lose credibility with the jurors. Jurors may be repelled by the witness’s rigidity or by the barrier she seems to be erecting to two-way communication. Of the three symptoms listed, this is most likely to betoken an incurable malady. I wouldn’t hire an expert who would not accept my guidance on how to run the litigation.

SEARCH TECHNIQUES

At the end of your search, you may wind up with one of the experts from a company that has sent you its literature. I would not start there.

Litigation, in court and through arbitration and mediation services, is a means of settling a broad range of disputes in our culture. Even if you are not an experienced litigator, or practice in a town with few lawyers, you doubtless know many people who have been involved in lawsuits. If you care about building your practice, you have friends and associates in many professions in your community. Your college classmates went on to many callings. Lawyer friends have tried cases involving the same issue as your case.

You have, in sum, a ready-made collection of people who are, or know something about, experts who might be witnesses for you. Using this resource is more time-consuming than going to an expert store or expert farm, but the results will be better. Once you have personally selected and prepared an expert, you can go back to that person again in your career.

From the following examples, you can gather all the techniques of expert finding you are likely to need. I twice used at trial and often consulted the late Dr. Bernard Diamond, who had taught courses on forensic medicine at the law school I attended. Another time I needed some advice on economic issues and turned to a professor I had heard speak at a program on Third World debt. For a bank fraud case, a colleague and I read all the economic literature we could find, and we then called the author whose work most impressed us as sensible and understandable. In a mental condition case in which the defendant's problems were complicated by alcohol and prescription drugs, I wanted a pharmacologist to add to the psychiatrist's testimony; a former dean of the University of Texas, San Antonio Medical School steered me to a dynamic witness. In a complex antitrust case, friends among the trial bar helped locate an economist with an impressive teaching and publication résumé who also worked with a research group that helped him be an effective expert witness. I have found an expert by reading testimony he presented in a congressional hearing. I needed an expert on explosives for a homicide case; at the suggestion of a friend, I turned to an expert witness consortium that advertises in bar publications. Lawyers in law firms where I have been an associate and partner have helped me as well. Also, if you have hired someone to help you understand the field in which you seek an expert, that person may be able to help you find your testifier.

HOW TO PREPARE YOURSELF FOR THE SEARCH

In these pages, I caution against exhibiting arrogance when presenting or opposing an expert. Read deeply, but don't show off.

One joy of a diverse litigation practice is to be a nuclear science expert one week, an economics expert the next, and a pathologist the next. The hard question is the order of things. You cannot evaluate a potential claim or defense without reading and study. Sometimes legal research will be enough. In other cases, referral to a consulting physician will give you a report on which you can go forward.

You cannot, however, intelligently choose your expert until you have a coherent theory of the case--until a tentative story is written. You cannot write the story until you have read deeply enough to see how you are going to tell jurors about the matters on which the expert will testify.

At this stage, look for general reference works--college (or even high school) texts, the Encyclopaedia Britannica, magazine articles, and mass market books. You need at least this much help simply to talk meaningfully with potential experts.

For example, the bank fraud case I mentioned above involved compensating balance bank stock loans. These loans were common in states that prohibited branch banking and were

part of the structure of correspondent bank relationships. To see the structure of the banking industry, I turned to Martin Mayer's book, The Bankers, a thoroughly researched and critical overview. Second, I learned that this type of loan had been the subject of congressional hearings. I have a dozen hearing transcripts; Congress hears from many experts whose prepared testimony is often laden with useful insights and citations to other authority. These experts often present partisan conclusions for which they argue as eloquently as they can. The rest of the file consists of a few relatively more scholarly articles.

Serial publications for almost every specialized field are stored in computer retrieval systems, either as abstracts or in full text. In our own field, the Index to Legal Periodicals no longer appears in print; one finds law journal articles on computer databases. Medical, economic, and other fields have similar resources. A growing number of providers store information about expert witnesses, which can be a source of information about the field of expertise as well as about particular experts. These days, I often browse Google or another internet search engine, and then skim through the items I have located, just to get my bearings.

THE NONTESTIFYING EXPERT

In some cases, you should not present expert testimony, even when your opponent does. If you are the proponent of a claim on which expertise is helpful, you will almost always need an expert. If you are the opponent, you should always consider whether you need one.

When you cross-examine an expert, you should be empowering the jurors by equipping them with insights that lead to rejecting the expert and his conclusions. Having done that, you risk "redignifying" the expert and the expertise when you present your own witness who claims superior knowledge and, on the basis of that knowledge, reaches a different result. Many cases are top-heavy with experts these days, adding to case costs and "turning off" the jurors. Powerful cross-examination can do more than an opposing expert.

The theme of your cross, aided by your shadow expert, is that the soft expertise of the opponent's witness can be unravelled by common sense, the juror's superior ability to judge the facts, and by any treatises or other materials you are able to introduce under Federal Rule of Evidence 803(18).

Another approach is to make clear that your expert is only going to isolate a few major errors and mistaken assumptions in the plaintiff's expert's opinion. If one corrects these, one can see that the basic theory is flawed and that the opponent's view should be rejected. You can, of course, designate an opposing expert, see how the trial goes, and perhaps decide not to call her.

If you are going to do without a testifying expert, you must learn enough to cross-examine the other side's experts effectively. Search for a well-qualified expert. Retain the expert as your assistant, helping you provide professional legal services. Consultations are then shielded by the attorney-client and work product privileges. The purpose is not to learn so much that you can put on a show of knowledge on cross-examination to rival that of the testifying expert. Such a combination of arrogance and technical virtuosity makes the expert's calling and opinions more distant from the jurors, rather than arming them to demolish the expert's testimony. Rather, you will want to help in deconstructing the opposing experts and their expertise.

As noted above, you can recruit a nontestifying expert from the ranks of bright graduate students or from friends in the right profession. This kind of expert need not have the communications skills you would expect of someone who was going to testify.

Working with the nontestifying expert can help you clarify your case presentation. You might start by trying to explain the opposing expert's views. Your first effort may be labored, hypertechnical, even condescending. Your nontestifying expert can help you put those views in

terms that you understand well enough to communicate to others. Next, introduce the expert to the discovery materials.

He can go to work to find writings by the opposing expert and other relevant material for cross-examination. Thus armed, he can help you gain a good sense of how to dismantle the opposing expert's views through a well-structured cross-examination. You will probably have the expert on call for the trial, to help with the last minute details of cross-examination. He may have good suggestions about demonstrative evidence.

PREPARING YOUR EXPERT TO TESTIFY

During a program on expert testimony, the lawyers and the experts traded ideas. The lawyers examined and cross-examined the experts, and a judge provided helpful comment. But the most impassioned statement of the day was from an expert who pleaded with the lawyers to treat their witnesses with consideration and dignity. The expert told stories of being asked at the last minute to rework presentations and of being ignored while cases were prepared and then being asked to drop everything to prepare to testify.

I sympathized because I had been guilty of treating experts shabbily--and had seen my case presentations suffer in consequence. The point was further driven home when I agreed to be an expert witness. A lawyer of my acquaintance called me and got my verbal agreement to testify after answering my questions about the facts and promising to send some materials for me to review. Then silence, for months. My faxed memos were not answered. Finally, a junior associate in the law firm that had retained me called and said my deposition had been scheduled. I protested that I had not been given the chance to learn enough about the case, that the short notice was not acceptable.

A good expert must be prepared, as well as directed in ways that fit the sponsor's theory of the case. She must be given heavy doses of self-confidence and dire warnings on the pitfalls of arrogance.

The expert should attend some trial team planning meetings and be invited to discuss how expert insight can help shape the case. The expert may have a suggestion about a new line of proof or legal argument. More than once, I can remember taking an expert through the tough questions that she must handle at trial, only to have her pause and say, "Well, I can answer that. But have you thought of [this or that alternative view]?" If expertise is to be convincing, it must be integrated with your trial plan. If you think of expertise in this way, you will treat the expert with proper regard. The expert may be asked on cross-examination about all meetings with counsel, so one must be careful in choosing the subjects to be discussed with the expert present.

DIRECT EXAMINATION BEGINS: BIOGRAPHICAL INFORMATION

"Will you tell the jury your name?"

"What do you do for work?" The answer should be nontechnical and supportive. "I analyze the way big companies buy and sell things like crude oil. I write books and articles about that, and I teach about that at Massachusetts Institute of Technology." Or, "I work with people who are mentally ill, and with their families, to try and resolve problems and help them lead productive lives." "Have you made a list that shows what you did to prepare yourself to do this?" The answer might be: "I have a biographical statement that I have prepared." Your response is, "To save time, let me put that up on the overhead projector, or the ELMO." You probably premarked this as an exhibit.

Using a highlighting pen or a pointer, go over the biography, pausing at experiences or publications that are especially relevant. For example, "That was a study we did on the factors

that influence young offenders not to fall back into criminal behavior. Our work there helped me form the conclusions I will be talking about today."

Spouting off the biography from memory or from notes makes almost any expert look arrogant. You can use the exhibit to make the telling more informal, in a question-and-answer format. Offer the biography in evidence so you can refer to it again in argument or later in the examination.

The biography should include the expert's prior litigation activity. There are four possible scenarios: experienced testifier with the same ideological bent, experienced switch-hitter, relative novice, and complete novice.

For the witness with experience all on one side: "It says here you have been a witness in a lot of cases. Let's look at the Bronson case. How did you decide you had an opinion to give in that case?" The expert goes through the process of decision in a few short sentences. "You listed here the cases where you were an expert witness. Have you been asked to be an expert, but declined?" "Are those cases listed here?" "How many times have you declined?" "Why?" You must defuse the image of a biased hired gun by having the witness refer to the technique of deciding and the fact of having rejected cases where the facts would not support a favorable opinion. If you can bring out instances of pro bono testimony, without fee, do so. "Can you tell us how many times you have been accepted by a court to testify as an expert?"

If the witness is a switch-hitter, let the jurors know early. "Here on page three of your biography, you have listed cases in which you have been a witness. Were these basically all on the same side?" This question may strike you as inartful. In a sense it is. Its purpose is to permit the witness to say, with conviction and without arrogance, "Not at all. In X, Y, and Z case I was an expert for the plaintiff. In A and B case, I testified for the defendant. My opinion is based on the individual facts that are presented to me."

The relative novice and complete novice have the advantage of not being professional witnesses. "Are you in the regular business of giving opinions in court cases?" "Not at all. My profession is. . . ." The witness can add, if appropriate, "In fact, this is the first time I have ever testified in court."

QUALIFYING THE EXPERT

In most civil cases, qualification of experts will have been handled in the discovery and pretrial process, along with any limitations imposed on the expert's opinions. You will seldom need to "tender" the expert for a ruling on whether he may give an opinion. To review the standards with which this chapter began, the expert's testimony must meet four conditions: (1) that the testimony will "assist the trier of fact," (2) that the testimony is based upon sufficient facts or data; (3) that the testimony is based on reliable principles and methods, and (4) that the expert is qualified to give an opinion because he or she has applied the facts and principles properly and has the background to do so.

Testimony concerning these issues may be taken outside the jurors' presence. If I am sure that the expert will be able to testify, I want all to take place in the jurors' presence. If I am not sure, I opt to have testimony taken before the judge alone. If the judge rules for me, I will retrace the same steps in front of the jury, who may use this information to assess the weight of the testimony.

As I noted above, in civil cases the threshold ruling will be made pretrial and embodied in the pretrial order. You will then simply put on the qualifications testimony to introduce the expert, certain that you will get a favorable ruling on admissibility. The opponent will object pro forma to preserve the point. The opponent may have the right to take the witness on voir dire,

even under these conditions, in order to renew the objection and to argue that "law of the case" does not preclude reconsideration. These are matters of local procedure.

At the point that local practice dictates, you say something like, "I tender Dr. Wilson as an expert witness in this case, in the field of pathology, and on the issue of whether the ingestion of cigarette smoke contributed to the plaintiff's cancer."

It is important to iterate that the admissibility decision does not turn solely on the "expert witness" rules. The court may also consider--under Federal Rule of Evidence 403--whether the expert's opinion, even if relevant and admissible, should be excluded as prejudicial, cumulative, or a waste of time.

INTRODUCING THE THEMES

Now the expert is qualified, and the judge has said the magic words: "The doctor may testify and give opinions as an expert." Move quickly to introduce your theme or themes. Remember that a soft expert requires more careful introduction than a hard one.

In your opening statement, you will probably have told the jury that there are hard questions presented for them to solve and that you will probably be calling witnesses whose life work is to help understand these questions. You will not have said that the expert is going to solve all the problems from a perspective of Olympian detachment. I say you will "probably" have promised an expert because you may have decided to cross-examine your opponent's expert and only then determine whether to call one of your own.

Your introduction of the expert will have shown that this is one of the people you promised to call. Your introduction of the theme must do two things: (1) it must foreshadow the testimony that is to come, and (2) it must legitimize that testimony by relating it to the jurors' own intuition. Some jurors may be predisposed to accept the brand of soft science you are presenting; others may not.

In a criminal case, the defendant's mental condition was in issue. He was a chronic alcoholic. Because of his drinking, he let his business partners handle details. He worked on deals. He would often black out from drinking and forget what had gone on the night before. He had suffered measurable brain damage from alcohol.

We hoped the jurors would understand that he would not have understood the tax consequences of his actions. He was not living a lifestyle that was beyond the amount of income he reported. We argued that his partners in fact concealed from him how well the business was doing.

Psychiatric evidence is difficult for some jurors to accept. Evidence of alcoholism is doubly difficult because many people think the disease is self-inflicted. Others are deeply into denial of their own incipient or actual alcohol abuse. We worked on this problem by pairing hard and soft experts. The defendant's former wife also agreed to appear as a lay witness to describe the ravages of alcohol on the defendant and their marriage.

I selected our psychiatric witness first as a treating doctor. I did not think the defense would be credible unless the defendant acknowledged his problem enough to seek help for it. The doctor had never testified for a criminal defendant. He had testified in favor of suspending licenses of impaired doctors and had twice been appointed by courts to examine defendants in celebrated cases. He looked and sounded--and was--credible and qualified.

To introduce the themes of his testimony, I borrowed from a suggestion made by Chief Judge David Bazelon:

> Q. Doctor, when someone like X here comes to you as a patient, do you find that their family has a hard time understanding why they are behaving as they do?

A. I would say that most people feel that way, about alcohol problems of others, and even about the alcohol problems in their own family.

Q. Do you ask the family to come in so you can discuss the condition that X is suffering from, and what can be done about it?

A. We do more than ask. We actively try to get them to come in.

Q. Do you sometimes find that family members are fearful, or skeptical, or even maybe a little hostile, about what you do, and about X himself?

A. Oh, yes. I think working with families is the most challenging part of what we do.

Q. Doctor A, I want you to imagine that the jurors and I are X's family and that we have come to ask you for an explanation of why he has been behaving as he has. Would you do that?

A. Sure, I'll try.

The next questions get the expert's opinion, the work done to come to an opinion, and how this condition manifests itself in behavior. With a psychiatrist, I always ask along the way, "Doctor, what you tell us about X is based a lot on what he told you, right?" "Do you have ways to check up on information the patient gives you?" The answers should include the physician's normal appreciation that any patient may be misinterpreting things for quite understandable reasons. If there will be witnesses in support of the expert's conclusions, remember to mention them. Because the patient's version is central to most treatment modes, your expert should be able to show that this is the kind of factual basis usually relied on by experts in the field.

With a soft science witness, you must introduce the themes of the testimony with a selection of topic sentences. In these, you must devise an introduction of theme that deals with the pitfalls of soft science as well as the particular conclusions being presented. With all experts, the root issue is, What do you know? With soft experts, you must also inquire, How can you possibly know this?

Let us take another example. You call a theoretical economist to testify that the participants in a given market are not behaving collusively. Testimony, pro and con, on this issue is a feature of many antitrust cases, subject to intense sparring on admissibility.

Start strong, with a clear summary statement of the expert's opinion. Then back up and find out the details.

Q. Ms. Z, have you studied the Alaska crude oil market for the years 1970 through 1975?

A. I have.

Q. Did you look for evidence that the companies purchasing crude oil colluded with each other?

A. I did, through thousands of documents, dozens of depositions, and a review of the economic data.

Q. What is your opinion on that?

A. In my opinion, there is simply no believable evidence that A, B, C, D, and E company colluded with each other or with anybody else.

Q. Tell us how you can say that.

The next answer should give the key reasons for the opinion--five or so tests that you would expect to see met if there were collusion. If your expert is countering one already presented by your opponent, these five or so tests should carry the answer to that expert.

Once you have these forthright answers, your tone and manner should become more skeptical, inquiring, prodding. You are the jury's surrogate inquirer, and you share their doubts and their need/desire to interpret and judge the expert's conclusions.

MAKING THE POINT

You will probably use an exhibit that contains the topic sentences that summarize each theme. Then you can go back and develop the themes in greater detail.

Remember, with soft expertise, you must counter not only skepticism about your factual position, but also disbelief in this method of supporting it. How do we conquer disbelief? Two key methods are tapping into shared experiences and tying in to verifiable information.

From a criminal case, here is an example of using shared experiences. The witness is professor and chair of the pharmacology department of a major medical school.

> Q. Now doctor, you say that the defendant could still function and appear fairly normal despite having drunk that much? Somehow that doesn't sound logical. Tell us how that could be.
>
> A. [Turning to the jurors]. Oh, this is well documented in medical journals. You can drink so much that you are a sleepwalker. You are at the party and people think you are a little spaced out, but essentially all right. You carry on conversations. The next morning you wake up and you cannot remember much about the party or even how you drove home. Studies I've seen say this has happened at least once to about 30 percent of Americans. Maybe it has happened to someone on the jury. I sure know it has happened to me.

The answer was humane, fallible, and vivid. Several jurors nodded their heads in agreement. We had tapped in to one of their own experiences, personal or vicarious.

Could you do the same sort of thing with a theoretical economist? Yes. "One of the things that convinces me there was no collusion here is there was no mechanism to enforce a price-fixing scheme. When you get together with somebody to fix prices, you've got to have a way to make sure that your partners aren't taking advantage of you." The answer that taps shared experience begins "It makes sense that . . ." or "It doesn't make sense to say. . . ."

The second assault on disbelief is by verifiable information, by concretizing the expert's opinion in a demonstrable reality that exists in this lawsuit. In our tax case, the defendant's former wife provided that. So would a hard expert. The soft expert can self-verify by referring to procedures and tests used in coming to a conclusion and by consistent reference to hard evidence in the case. Remember Federal Rule of Evidence 703: "If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data [on which the opinion rests] need not be admissible in evidence."

You will ask, "How do you know [this or that]?" and the expert will tell the jurors about a test, an equation, a measuring device. Or the expert will direct the jurors--perhaps with visual aids--to depositions, documents, or tangible objects.

You want the jurors to be able to recreate the expert's results in the jury room. A juror who supports your position should be able, in discussion with another juror, to restate the tests and controls the expert used and the key evidence that supports the expert's conclusions.

ARROGANCE

"Be careful what you say," Carl Sandburg wrote. "Use words that taste good, because you might have to eat them," somebody else said. As we have seen, arrogance is a fatal disease of witnesses. Experts seem to be more susceptible than most.

If you are the proponent of the issue for which the expert is called, and bear the burden of persuasion, your expert--and the other evidence--must withstand challenge and leave the jury convinced. Don't let this circumstance propel you to a siege mentality or let your expert adopt a stance of arrogant inflexibility. In your direct, anticipate some of the cross. Your expert must

willingly admit that there are or could be opposing views--about the subject, and about this case. In his job, as in almost everybody's, the highest and best challenge is to make difficult choices among alternatives; his testimony is stronger because he has considered the alternative formulations. One series of questions on direct must begin, "Did you consider alternative ways of interpreting the facts?" Another series must acknowledge that the jurors are fact-finders and, in the usual case, have some leeway. You might ask, for example:

> Q. Suppose the jurors should look at the same weather report and radar data and conclude that the cloud cover was thicker than your analysis shows. How would that affect your conclusions?
>
> A. I did do my very best to get it right about the cloud cover. But if somebody should try to claim that the clouds were thicker and lower, that would not affect the ultimate conclusion. The pilot would have had one less way of judging the approach. But that is one meaning of redundancy--he is supposed to be paying attention to all the systems that are there to inform him and guide him.

If your expert is being paid, which is usually the case, track the hours spent, fees incurred, and the nature of the work on direct examination, rather than leaving the inquiry to the cross examiner. Warn your expert not to get into a debate with the cross-examiner and to answer the questions as succinctly and directly as possible.

Your presentation of a soft expert, in sum, is an appeal to intuition and reason. You and the expert will break down the barrier between the witness stand and the jurors, physically by the expert moving from the chair, visually by demonstrative evidence, and figuratively by questions that focus on how to figure out the right answer.

Notes to Chapter Twelve

1. In addition to works cited in the Bibliography, juror attitudes toward experts are reported in a superb empirical study, A. Champagne, D. Shuman, & E. Whitaker, Expert Witnesses in the Courts: An Empirical Examination, 76 Judicature 5 (June–July 1992).
2. Molzof v. United States, 112 S. Ct. 711 (1992).
3. See generally Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993); Kumho Tire Co. v. Carmichael, 119 S.Ct. 1167 (1999)
4. In addition to Daubert and its progeny, see United States v. Daly, 842 F.2d 1380 (2d Cir.), cert. denied, 109 S. Ct. 66 (1988) (FBI agent testimony admissible on definitions of terms used on tapes and general information on organized crime; little overlap between this evidence and allegations of indictment, hence minimal impact on confrontation rights). However, the warnings in those cases against overuse of experts went unheeded by prosecutors and trial judges, leading to the reversal in United States v. Castillo, 924 F.2d 1227 (2d Cir. 1991) (reversing narcotics conviction because purported expert testimony not helpful to jury, trespassed on jury's role, and violated cautionary statements in earlier cases; admission violated Federal Rule of Evidence 702; if admissible under that rule, Federal Rule of Evidence 403 would be required) (Newman, J.). Castillo echoed the concerns of other circuits. See, e.g., United States v. Doe, 903 F.2d 16 (D.C. Cir. 1990) (police detective called as expert testified that "Jamaicans" had taken over drug trade in District of Columbia; evidence irrelevant and prejudicial because it tended to connect defendants to unlawful activity based solely on their ancestry and not acts they were proven to have committed). See also the Second Circuit's rejection of the vouching witness called in Andrews v. Metro N. Commuter R.R., 882 F.2d 705 (2d Cir. 1989). On related issues, the cases are many that reject lay opinion not based on personal knowledge. See, e.g., United States v. Rea, 958 F.2d

1206 (2d Cir. 1992) (error, though harmless, to admit opinion of lay witness that defendant "had to know" that invoices were sent for purpose of evading taxes; such opinion not "helpful" under Federal Rule of Evidence 701); Coca-Cola Co. v. Overland, Inc., 692 F.2d 1250 (9th Cir. 1982) (affidavits of bartenders and waitpersons that they believe customers ordering "Coke" mean "a cola drink" inadmissible under Federal Rule of Evidence 701 as lacking personal knowledge sufficient to form such an opinion); Swajian v. General Motors Corp., 916 F.2d 31 (1st Cir. 1990) (lay opinion on crash improperly admitted; under Federal Rule of Evidence 701, lay opinion must be based on personal knowledge, have a rational connection to the facts on which it is based, and be helpful to understanding the issues); United States v. Calhoun, 544 F.2d 291 (6th Cir. 1976) (error to permit probation officer to give lay opinion that defendant was person shown in bank robbery photographs; officer did not have expertise superior to that of the jury). In criminal cases, there may be confrontation clause issues because the rules give the expert latitude to rely on facts reasonably relied on by like experts, though not admissible in evidence--and therefore, by definition, not subject to cross-examination, let alone to the personal knowledge requirement. In United States v. Ruffin, 575 F.2d 346 (2d Cir. 1978), the court held that although an FBI agent with a J.D. and substantial property law experience was an expert for some purposes, his opinion on certain property title issues was impermissible because it was improperly based on hearsay. See also United States v. Calhoun, 544 F.2d 291 (6th Cir. 1976) (defendant could not effectively cross-examine identifying probation officer without revealing damaging and otherwise inadmissible information; cross-examination, the "antidote" to broad admissibility under the Federal Rules of Evidence, could not do its job; exclusion required in any case under Federal Rule of Evidence 403 for this reason). Courts have also excluded expert testimony based on unreliable data, under Rule 403 as well as Rule 703. See, e.g., Advent Systems Ltd. v. Unisys Corp., 925 F.2d 670 (3d Cir. 1991) (plaintiff's damages expert used factual basis not proven to be reliable nor found to be "data experts in the field find reliable"; testimony based on outdated figures, unsupported assumptions, and "wildly optimistic" projections); Shu-Tao Lin v. McDonnell Douglas Corp., 574 F. Supp. 1407 (S.D.N.Y. 1983), rev'd in part, 742 F.2d 45 (2d Cir. 1984) (expert testimony rejected where factual basis not adequate to support particular expert conclusions; expert testimony also internally inconsistent). See 2 Evidence Manual 79–80 (an expert's opinion must be based only on data reasonably relied on by those in the profession; for example, it would be improper under most circumstances for an expert to rely on selected documents without interviewing their authors, and without distinction as to which authors knew what they were talking about and which did not).

5. The case by Judge Higginbotham is In re Air Crash Disaster (Eymard), 795 F.2d 1230 (5th Cir. 1986).

Chapter Thirteen

Expert Witness: Soft Subjects--Cross-Examination

The theory of cross-examining a soft subject expert may be summed up: "An expert is someone who was not there when it happened but who for a fee will gladly imagine what it must have been like."

Cross-examining a soft subject expert is an exercise in jury empowerment. You want to give the jurors the tools by which they can deconstruct the expert and her conclusions. Because, by definition, soft subjects contain intuitive elements, jurors will be readier than in other situations to make critical judgments that go to the heart of the expert's testimony.

"SOMEONE"

Who is this expert? Does she possess adequate qualifications? Are there others equally qualified? Are the expert's theories questionable? Debatable?

Most of us have heard junk science decried. Much of this rhetoric misidentifies the issues. Take almost any soft subject (and a few hard subjects) and find two opposing experts. Usually, the experts will arraign one another's conclusions from every conceivable perspective. They will start with lack of respect for the opposing expert's credentials and academic work, continue through rejection of the theoretical basis of the other's position, consider questions about the reliability of the methods used, and move on to a more case-specific analysis.

Almost all of these mutual criticisms are fair game for cross-examination, to help the jurors decide based on the clash of opinions. Only extreme instances of lack of qualifications or scientific foundation should call for excluding expert testimony altogether. However, as noted in the last chapter, judges have become bolder about exclusion--over objections that they are invading the jury's province.

With respect to some marginal soft expertise, concern for the jury's proper role points toward exclusion rather than admissibility. One clear example is the use of police witnesses in criminal cases to give expert opinion on narcotics transactions, crime world vocabulary, organized crime infiltration of business and labor, and other sociological issues. This expertise does not rest on impartial and verifiable research. To the contrary, some of these opinions are avowedly based on the hearsay of countless and unnamed informers the witness has encountered over the years. The basis for the opinion cannot, courts have begun to say, be effectively cross-examined. The jurors have no way to evaluate the opinion.

For the advocate who must cross-examine, these new rules and new judicial attitudes pose challenges and opportunities. Once, I would have advised waiting to cross-examine most experts until the direct examination was finished. Today, I more carefully consider the prospects of inflicting substantial damage on my opponent's case by taking the expert on the voir dire and moving to exclude the testimony.

Because most admissibility decisions are made before trial, the parties will probably depose the experts. This process, once thought too wasteful, is now nearly universal in civil cases. The admissibility decision is also based on extrinsic evidence, including the work of other experts in the scientific or technical principles at issue and the qualifications of the proposed experts.

When taking an opposing expert's deposition, there are two goals. First, ask a few questions to make sure you really understand the expert's theory and the factual and theoretical research that underpins it. Second, try to lay the basis for a challenge to the expert's testimony. A challenge can involve a lack of qualifications, a theory not sufficiently recognized, testimony

that is not helpful to the jury because it simply replicates what fact witnesses are saying, or testimony that is unduly prejudicial because it is inflammatory or conclusory.

Even if the court holds the testimony admissible, you can seek to conduct voir dire at trial on qualifications, if only to help the jury put the evidence in perspective. However, it is probably better to do your work on cross-examination, then renew the motion to exclude. This is a matter of local practice. If you lose the case, be sure to raise the issue of expert testimony in a motion for new trial. The new judicial temperament about experts makes it worth your while to support and preserve your objections.

If you decide to voir dire at trial, you take a risk because the odds are that the judge will permit the expert to testify: "Interesting points. They go to weight, not to admissibility." In order not to lose on voir dire--in the jurors' eyes--make your goals modest enough that you are almost certain to achieve them.

"May I take Dr. Wilson on voir dire, Your Honor? He may be qualified, but I think Your Honor should have a full record." Your voir dire will have one or more subject matters: qualifications and scientific acceptance, for example. You must have a solid question to end inquiry into each subject matter, and this question must require the expert to agree with you in some way that limits the impact of his expertise or his conclusions. Then approach the bench and make whatever motions you want to make, out of the jury's hearing.

These ending questions need not be earth-shaking; they just need to cover a potential defeat on the main issue of admissibility. Examples: "So, doctor, you have never worked in a state prison hospital?" "The theory you are telling us about has been challenged by economists at MIT?"

So much for how to end. Here are some thoughts on what to do before that. Let us consider, first, the expert's qualifications to testify and then the subject matter as a permissible subject of expert testimony.

ARE YOU COMPETENT? ABOUT THIS SUBJECT?

Some experts have invented their subjects. For them, the questions of their qualifications and the reliability of their theory are bound together. For analysis, however, we must try to separate the issues, for the rules make qualification and reliability two hurdles for the proponent to cross. You can divide "qualification" in two: (1) competency and (2) competency for a particular issue, though the distinction erodes when you begin to cross-examine.

A business planner or financial consultant without extensive formal education, subject to no licensing requirements, and not tested in the alembic of academic discourse should face stiff opposition if called as an expert witness. In an air crash case in Louisiana, an economist projected that the decedent's income would have increased until his retirement at an 8 percent annual rate, undiscounted by the effect of interest rate fluctuations and the expiration of tax benefits that had added to cash flow in the years immediately before the decedent was killed. The Fifth Circuit held that the expert should not have been permitted to testify.

Such "economic" testimony can be demolished on cross-examination, but most judges will let you argue that it is not worth wasting the jury's time listening to it. First, identify the claimed expertise, in this case, income forecasts. Identify the relevant skills, and get a picture of the kind of person who could give a reliable opinion on that subject, e.g., an economist who is trained to watch trends and who in fact watches them. This person will teach the subject and will have published well-regarded work about it.

In the post-Daubert world, judges are more ready to hear challenges, even to experts and expertise that once went unchallenged. For years, federal and state law enforcement agents were

permitted to testify that a toolmark, for example from a drill or chisel, was in their expert opinion made by a particular chisel or drill bit. Professor James Starrs once remarked that toolmark identification is the very ash can of forensic analysis. Judges are beginning to agree, and are limiting the witness to presenting side-by-side photographs of the crime scene mark and the suspect tool, for the jury to draw its own conclusions. Handwriting analysis has also come under fire, as the cases will tell you, as has hair and fiber analysis.

Therefore, one should never lightly accept that a field of claimed expertise really exists, nor that its practitioners can be qualified to testify. Your suspicions should be greater when the field is a closed system, invented and perpetrated by its practitioners without outside evaluation. Read the cases, find a skeptical expert if you can, and consider making a challenge.

If the issue is forensic psychiatry, the ideal witness will surely have gone beyond general medical practice and even beyond general psychological, psychiatric, or counseling experience. The witness should have dealt with the kinds of disorders at issue and with people of the age and situation of this patient. Board certification in forensic psychiatry is a plus, though probably not essential to being recognized. The en banc Fifth Circuit said in a related context, however, that an M.D. degree "alone is not enough to qualify him to give an opinion on every conceivable medical question. . . . The trial judge rightly scrutinized lack of specialized experience and knowledge."

In choosing the ideal against which to cross-examine the opponent's witness, borrow heavily from the qualifications of a witness you have chosen to put on in your case. Your voir dire or cross-examination on qualifications takes this ideal and cross-examines against it. If the witness is too far from the ideal, the testimony is not admissible. Even if the testimony is ruled admissible, you will have set up your expert's qualifications as a model.

Be patient. The expert is ready to strut her stuff. She may become visibly impatient at your polite but determined questions directed at gaps in the résumé. Arraigning the witness against the ideal, your inquiry divides into (1) academic qualifications, (2) practical training, (3) state licensing (you'd be surprised how minimal the licensing requirements are for some professions), (4) experience, (5) specialization, (6) publications, (7) professional affiliations, and (8) relationship between expert witness work and other professional activity. Item 8 is designed for the expert who has no visible means of support, beyond preparing for and giving expert testimony. Such a person is always an advocate for some position, never pressing on the frontiers of a field solely for the love of knowledge.

Here is an edited sample of testimony from a research officer and economist at the Federal Reserve Bank, testifying in a bank fraud case:

Q. Is it proper for me to address you as Dr. Knight?

A. Yes, if you wish.

Q. Dr. Knight, I am Morton Susman, and I represent the Bank of the Southwest in this case.

A. Hi.

Q. We haven't met before, have we?

A. No.

Q. Now, I noticed that you got your Ph.D. in June of 1968?

A. Yes.

Q. And your Master's--when was that? What year was that?

A. 1965.

Q. And when did you get the B.A. degree?

A. 1963.
Q. Would you mind telling us your age?
A. Thirty-four, I believe.
Q. Well, then, you've got a lot crammed into the thirty-four years. Did you find some time in that period to work for a bank?
A. Yes. I have not spent, since I graduated from college, any time in a bank. However, my father has a small bank in western Nebraska, and I worked in that bank through high school and summers during college in various departments.
Q. Was that before you went to college?
A. That was before I went to college, all through high school, and it was also summers during the college vacations. When I needed money, I also worked during Christmas and Easter vacations.
Q. In working your dad's bank, did you make loans or pass on credit?
A. I did not do that.
Q. Actually, you have to be in the banking business for quite some time to get into that?
A. It is a specialized area.
Q. Yes, sir, because bankers would like to be sure they get their money back--
A. Of course.
Q. --if they loan it out? Is that right?
A. Correct.
Q. So it's a heavy responsibility, isn't it?
A. Yes.

This line of questioning is designed to undercut a claim that the expert knows anything about the decision to lend money and about management decisions on allocation of the bank's funds among different investment opportunities. The point is that such decisions require practical experience as well as formal training. The expert has written articles on this subject, and studied it in school and in his chosen profession, so it is unlikely that the testimony will be excluded. However, a motion to exclude is certainly in order, and the jurors have in the meantime heard some things that permit them to put the testimony in perspective.

The transcript is a partial sample. This style of inquiry lends itself to a review of all the elements listed above.

HOW DID YOU GET HERE?

Up to now, we have been talking about qualities that the expert possessed before she was retained in the case. We move on to case-specific bias issues. For example, the best doctor-witness is a treating physician or therapist. The worst is somebody who read the file, talked to the lawyers, and has a surefire opinion.

In a civil case, one proper use of discovery is to retrace the expert's steps on the way to a conclusion. Defending an antitrust case, you might ask the plaintiff's economist: "Doctor, when did you agree to be an expert witness for the plaintiff?" "How did you let Dr. Amboy know that you were willing?" "You had made up your mind by then that there was collusion in this market, right?" On this last question, you will probably run into some resistance. Don't let the witness slide. At least, he has to admit having agreed to testify: "You had made up your mind enough to be able to call Dr. Amboy and volunteer to be on the case, right?"

Now focus on how much time the expert put in before making that phone call, what work he had done, and how the fee was being calculated. In tracing the work done, you are looking for a document trail and for conversations with counsel. Often big-gun experts are brought in late to

bless the work of those who have gone before; they form their opinions based on predigested material absorbed from the experts who have been working the case.

Base your examination on the calendar. Ask, in order, for each time the expert spoke with counsel or counsel's representative. Identify all information provided at each stage, including oral presentations and documents. Then find out what opinions, conclusions, and impressions the expert communicated back to the lawyers. Were there any notes or other writings on this subject? Where are they now? What did they say? You are looking for the point at which the expert expressed an opinion; for your purposes, it looks best for your case if the expert expressed an opinion early, before deeply analyzing the facts, and was retained only after it was apparent that the opinion would be helpful to the person signing the checks.

Few witnesses, and fewer experts with any experience, will admit that they formed an opinion hastily and did so to earn a fee. Your patient examination builds the circumstantial evidence, to try and lay a basis on which to argue that inference in summation.

If the expert reached a conclusion after an insubstantial amount of research and factual analysis, all the later study and document analysis are less significant than otherwise. The expert was simply combing the evidence looking for material to support a conclusion already made.

The timeline of work, fees, and opinion--"How did you get here?"--lays the basis for challenging the expert's right to testify at all. An opinion formed by such a process is not the invocation of "scientific, technical or other specialized knowledge." It is vouching. In cross-examination, start with the earliest moment at which the witness expressed an opinion favorable to his or her sponsor. Then show how little inquiry the witness had made before agreeing to testify to that conclusion. Discovery of draft expert reports is often permitted, to help you set up this timeline.

If the challenge is unsuccessful, and the judge nonetheless permits the expert to testify, you still have a potent weapon. The timeline cross-examination empowers the jurors to tread the same path and reach an opposite conclusion. "Let's go back for a minute. The week of June 24, you called Dr. Amboy and said you would be a witness?" "At that time, you had looked at this stack of paper right here? We have marked that Defendant's 2502A, and it is in evidence. In addition, you had spoken to Dr. Amboy twice, and to Mr. Wilson a few times?" "The jurors can look at these documents, can they not?" "They can also look at these documents that I have shown you, Defendant's 2502B?" "You had not looked at any of these documents, had you?" "The jurors can also figure out whether Dr. Amboy, and his assistant Mr. Wilson, have a good theory?" "Since the week of June 24, you have read many more documents?" "You have talked to Dr. Amboy many times?" "You have talked to these lawyers?" "And, you have billed five hundred more hours at $400.00 an hour?"

Having dwelt on how swiftly the expert formed his opinion, you take up the rest of the expert's preparation. Here is another brief excerpt from the bank fraud prosecution mentioned above:

> Q. Now, sir, in preparation for your testimony in this case, did you study the bank examination reports for the Bank of the Southwest for '69, '70, '71, or '72?
> A. No. I have never seen a bank examination report on the Bank of the Southwest.
> Q. Did you study any bank examination reports of the First National Bank of Waco?
> A. No. I've never seen those either.
> Q. Did you study anything in this case other than [the prosecutor's] summary chart that you worked from?

A. I have studied nothing other than the various exhibits that were shown to me when I came here.

Q. And who showed them to you, sir?

A. The various lawyers for the prosecution.

Q. Okay. These gentlemen at the table here?

A. Yes.

Q. Did you ever ask to talk to me, or Mr. Tigar, or Mr. DeMoss, or any of these other gentlemen to get our side of it?

A. No.

In an antitrust case, the witness had consulted with his side's experts, read many depositions and deposition summaries, and waded through piles of documents. He was an eminent theoretical economist.

The case was about crude oil and the oil industry. Yet he had never spent time with people responsible for running integrated oil companies – those with interests in extraction, refining and marketing -- or even so-called independent oil companies. He had never visited an oil refinery. He had not talked to the people responsible for running refineries and making the day-to-day decisions about how much and what kind of crude oil to process into what kinds of products and at what prices.

Our side had access to a theoretical economist who could match this witness's qualifications, and we had made sure our expert had taken the time for hands-on experience. In addition, we had a witness who was not a theoretical economist but whose expertise had been built up from making technical and business decisions in this industry. Cross-examination of the opposing expert about lack of practical wisdom set the stage for our case.

In a highly publicized Florida case, a man who claimed permanent injury won a large damage award with the aid of expert medical witnesses. Later it was proved that he was faking. Some concluded that the legal system was at fault for allowing the scam to happen. I wondered whether more thorough pretrial investigation of the plaintiff and the experts would not have blown the story apart on cross-examination.

Cross-examination is an art best practiced with all the tools available. Research into prior publications and computer searches are only a beginning. Even if you are permitted deposition discovery, it must be used as an adjunct to, and not a substitute for, independent research. You have to get up from your office chair--or hire somebody to do the footwork. If an expert witness is a college teacher, I want the reading list from her courses. Most college bookstores sell books of capsule biographies and teaching evaluations of professors; I want a copy. If the professor's lectures have been memorialized in canned notes, I want those as well. In the Florida case mentioned above, I wonder if anybody thought to interview the plaintiff's neighbors.

These days, the internet is your friend. Almost every college and university has a website, with detailed information about professors and their work. Many institutions have their library catalog online, so you can even search out unpublished papers and monographs. After preliminary searching on the internet, send an investigator to the college to get more information, and use discovery devices to complete the picture.

Sometimes, you hit a home run. In a financial fraud prosecution, the government's principal expert had trouble preparing to testify. Maybe he and the prosecutor were short on time. So they wrote out all the questions and answers for the witness to memorize.

Q. Now, sir, one final question I have here. These were your questions and answers that [the prosecutor] prepared? Is that right, sir?

A. That's right.
Q. I noticed, in looking through this, that the questions are typed up, are they not?
A. Yes.
Q. And, on the other side, the answers are typed up, are they not?
A. Yes, sir.
Q. And I notice right up at the top your name is written in, in pen, is it not?
A. Yes, it is.
Q. How come they didn't type your name in like they typed all the others?
A. I wouldn't have any idea.
Q. Could it be that they didn't know you would be the expert until after you came down here?
A. No. I don't think that's true at all. They knew I was going to be the witness for these questions.
Q. Well, I notice the answers are typed in, too, aren't they?
A. Yes. Those are my answers on that particular page.
Q. Do you suppose that any expert they would have brought down would have the same answers?
A. Well, they certainly wouldn't have the same answers--[The prosecutor interjects:] Your Honor, the purpose that document was prepared for was explained to the court. Counsel is using a line of questioning that is calculated to--[The court interrupts:] I told you to stand up; make your objection, and I'll rule on it. [Defense counsel offers:] I'll withdraw the question. [The court:] I'll overrule the objection. [Defense counsel:] I withdrew it, anyway.

The jurors enjoyed the spectacle. They acquitted the defendants. I used to think that writing out the questions and answers was a rare exception, but I keep running into this unfortunate practice. Watch your opponent carefully; you can usually tell if he or she is using this technique. You can then make a motion to produce the questions and answers that were used to refresh the witness's recollection.

WILL IT ASSIST THE TRIER OF FACT?

The suggested line of questions is a bridge to the next subject. We turn from the expert's qualifications and reasoning process to the tests of the opinion itself. An opinion that the jurors can reach as easily themselves will not assist them. Nor will a statement that could as easily be made in the summation or by demonstrative evidence sponsored by a nonexpert. In addition to the expert witness evidence standard, evidence that is unfairly prejudicial or wastes time can be excluded under Federal Rule of Evidence 403.

Your cross-examination, however, has two goals. To be sure, you want to exclude the evidence if you can. You want in any case to show the jurors that the evidence does not in fact help them because the expert is claiming to perform a service they can more easily perform for themselves. That is, you want to show that the expert is trying to disempower the jury.

Several years ago, a public defender confronted a social worker who had been tendered as an expert in a family abuse case. The social worker was a county employee with an office in the district attorney's office suite. She testified only when called by the prosecution, and spent little time on each case. She was not an expert who really helped anybody.

The defender brought out all these facts on cross-examination. Then in summation, he asked the jurors:

Do you know why these prosecutors called Ms. X to be a witness. They did it because they think you are stupid, too stupid to figure out what really happened. Well, [the client] and I don't think you're stupid. We think you are here to decide this case and that you will do so.

Reduce the soft science expert's conclusions to their simplest form. Shorn of the jargon, what is this person saying? The psychiatrist is saying that people under stress act strangely. The economist testifies in fancy language that documents, statements, depositions, and market analysis point toward collusion; the issue in the case is whether a bunch of people agreed to fix prices, and he has never met any of them.

Yes, you are turning your opponents' preparation against them. They have struggled mightily to put the evidence in comprehensible form. Your further reductionism brings it to the point where a juror can say, "I can figure that out. I don't need that guy."

Consider the example of an expert on eyewitness identification who presents a list of factors that make the identification unreliable. The challenge goes something like this:

Q. Doctor, you have a list of things that affect the reliability of eyewitness identification?

A. A list of topics to consider, yes.

Q. Your list includes the amount of time the witness had to look at the robber, the lighting, whether the witness was afraid, the race of the witness and the robber, and so on?

A. Yes.

Q. Doctor, assume I am not a Ph.D.--because I'm not--and I just sat down and made a list of things that affected how well I could see and remember somebody. The lighting conditions could be on my list, right?

A. Yes, of course.

Q. That makes sense, doesn't it?

A. Yes.

Q. And the amount of time I had to look at the person who was robbing me?

A. Yes.

Reconstruct the list, or enough of it to make the point. Then finish it off.

Q. So Doctor, the judge, the members of the jury, even I can make a good list just by using our common sense?

A. You could make some kind of a list, yes.

Drive it home:

Q. Our list only lets us talk in generalities, right, about the kinds of things that could affect an identification?

A. Yes, the list deals with topics, not specific events.

Q. The only way to know if somebody can really identify a robber is to ask them to try, and then ask them some questions about their experience?

A. Well, to the extent they can interpret their experience.

Q. In a lawsuit like this one, the lawyers ask questions, the witness answers, and then the jurors are going to decide how to interpret what is said, right?

You have made your point that the testimony may not be helpful to jurors because any juror, with proper instructions, can perform the evaluation.

IS IT RELIABLE?

A good evidence treatise, such as you will find cited in the Bibliography, will tell you the law about expert reliability. Basic law and tactics are discussed above. This chapter is about

cross-examination, although the techniques described can be used during admissibility battles as well as before the jury, and in hard science and soft science cases.

You want to confront the expert with evidence that his opinion is unreliable. Your consulting expert should have assembled materials that fit the requirements of Federal Rule of Evidence 803(18):

> To the extent called to the attention of an expert witness upon cross-examination, or relied upon by the expert witness in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits.

In addition, the witness you are cross-examining may have read the depositions of your expert and be aware that the latter has a completely different basic theory. If you have deposed the witness, you establish the authority of some works on which you will cross-examine at trial.

Armed with these impeachment tools, you can safely ask questions like:

> Q. Doctor, you have told us that examining the prefrontal lobe of somebody's brain gives us valuable clues to their antisocial behavior?
>
> A. Yes, I have.
>
> Q. Do you know that there are medical doctors and professors who think that idea is bunk?
>
> A. I know there is some disagreement.

Have your stack of learned treatises and prior depositions at hand, as a visible expression of the cross-examination you are about to do. Pick up the first one. Ask the witness to acknowledge its authority. If he will not do so, have available the material on which you will seek judicial notice. Confront the witness with the adverse opinion. This process continues as long as there is adverse material available to you.

Sometimes, if you are not going to call an expert of your own, you must debunk the expert's opinion without reference to other authority. I cross-examined an expert on the hedonic value of life. The expert disavowed special training in philosophy or religion. He was an economist by trade, though he had not completed a doctorate. He developed his theory from reading economic literature.

In short, he was saying that had the decedent lived he would have enjoyed life--and that this enjoyment could be quantified. How does one enjoy life? This expert's calculations were primarily based on the goods and services that the decedent would have bought to enjoy life.

The cross-examination focused first on that list. Then I asked whether people make choices among things to enjoy. These choices are limited by what we can afford. Some people can afford more choices than others. For instance, an expert who gets paid for working on a big case can afford to take a nice vacation in the Caribbean, and somebody else has to make do with a long weekend at the campground.

Where does somebody get the money to make these choices? Working people get the money in wages. So the hedonic value is nothing more than a calculation based on how somebody might spend the money he would earn. If that's true, the entire theory duplicates the amounts listed under potential earnings, discounted to present value. If that is so, then there is arguably no separate amount due for enjoyment of life – the plaintiff is simply double-counting.

“WHO WAS NOT THERE”

Almost by definition, the expert was not present at the crucial event--did not see the shooting, attend the allegedly conspiratorial meeting, or watch the patient ingest a controlled substance. The expert is expressing an opinion based on facts found from investigation or furnished by others. The rule permits reliance even upon inadmissible evidence if it is of a type reasonably relied upon by experts in her field in forming their opinions.

Admissible or inadmissible, observed or provided, patent or inferred--the expert’s facts are simply the working assumptions of someone who was “not there.” And the jurors are final judges of the facts.

In limine, on voir dire, and in cross-examination, you must be alert to identify facts and data that are an impermissible basis for the expert’s opinion because they are not reasonably relied upon. Some testimonial experts have become such high-volume hacks that they don’t do their own homework, preferring to rely upon summaries furnished by litigation support staff. Expertise means specialization in some science or art outside the courtroom that is then brought to the jury. “Testifying about something” is not a form of independently admissible expertise. If no proper doctor in a medical office would rely on a litigation support person’s summary of a patient’s condition to make a diagnosis and treatment decision, then a testifying doctor should also be disqualified from doing so.

Be sure that in deposition, voir dire, or cross-examination, you follow the trail of the expert’s preparation. Make a list of the expert’s assumptions--those that she must make to express an opinion and those that are necessary to make the opinion relevant. This is a logical extension of the “How did you get here?” inquiry. Let’s take it further.

An economist was testifying about collusion. The plaintiffs had, during discovery, furnished a list of those they claimed were conspirators to fix prices. I read the names on the list and asked after each name whether the expert had ever met that person. He answered “no” to each name.

Q. Now, Doctor, you know that a corporation cannot conspire, can it?

A. Well, it is an inanimate object.

Q. A corporation cannot do anything except through the people who work for it, right?

A. That is right.

Q. So the question is going to be whether some real human beings conspired with each other, isn’t that right?

A. Yes.

Q. And who will answer that question in this case?

A. The jury.

Q. The jurors here are going to hear these people you have never met, and hear what they said under oath, right?

A. I assume so.

Q. And if they deny that they did anything wrong, the jurors are going to decide if they are telling the truth?

A. I suppose so.

Q. You don’t claim to be an expert on who is telling the truth and who is not, do you?

A. No.

Q. In the courtroom, that decision is for the jurors, right?

A. Sure.

A physician treats symptoms. Some are obvious, like a broken leg. At other times, the physician bases an opinion only on what the patient and perhaps others have said happened. Maybe the patient was hit with a two-by-four; the head wound is consistent with that. The wound is just as consistent with falling and hitting her head on a banister railing.

A patient develops cancer. The doctor must theorize about causes. But, in assessing probabilities, the doctor must rely heavily on the patient and her family for a truthful account of the many potential carcinogens to which the patient was exposed.

Soft subject psychiatrists and psychologists have even more difficulty because their diagnoses are based to an even greater extent on what their patients tell them. The doctor will assure you that he is trained to sift truth from imagination, but he must admit that is an imperfect process. Pick up a psychiatrist's report and go through it identifying every statement based on what the patient or a family member said. You will see that the doctor inevitably relies upon a series of subjective impressions, most of which are difficult if not impossible to verify through objective examination.

As you take an expert through the questionable factual assumptions, pause after each group of items and ask, "Who will decide this question?"

A theoretical economist makes models. The models are accompanied by phrases like "in competition" and "at the margin." These phrases represent key factual assumptions. There is no such thing as "competition" in the sense theoretical economists use the term. "At the margin" is another weasel-word that describes predicted behavior divorced from the myriad pressures and forces that actually affect economic decision makers. "At the margin" usually means outside the behavior that the economist's model predicts. The process of deconstruction is two-stepped. First, ask a series of questions like, "There is no such thing as perfect competition, is there?" "So when you talk about what you would expect to see 'in competition,' that is just a model you build to study, and it could not exist in the real world?"

Second, when the expert goes on to say what somebody "would have done at the margin to maximize return," you must make her concede that real world decisions are greatly more complicated than the model suggests. The model may be based on all elements of the factory running at capacity, on infinitely available transportation facilities, on infinitely elastic demand for products--or any number of things that in the real world of running a business do not all come true, and certainly not at the same time. Make the expert acknowledge the assumptions, which you must state in plain language and not in economic jargon, and focus on the ones that your fact witnesses can demolish.

Conclude by making her dignify your fact witnesses and by conceding the value of real world experience, as shown in the bank fraud example given above. Economic experts are fond of saying that they prefer to validate the decisions managers make; if such a concession is available in your case, extract it. In any case, you can ask, "Doctor, you and I have just agreed that there are a lot of practical factual matters that are very important to how real people make these decisions in the real world. Somebody who makes a living by going to work every day and running this factory could answer those factual questions for us, couldn't they?"

In this process, try to develop analogies that make your point. In one case, an economist took memoranda in which people in a company had talked about value, and using the economist's definition of value, spun a theory about the authors' objectives and intentions. Value can mean different things to different people--and even to the same person at different times. "Doctor, do you see this belt buckle I am wearing? I don't know what it cost, but say my mother paid $50 for it, so she could give it to me as a birthday present. What was the value of that

buckle to the artisan who made it and sold it?" You would then track the value of raw materials, the wholesale value, the retail price, what the buckle might be worth now, and the fact that to me it is priceless because I would not sell it for any amount of money. It is all right for us to use all or any of these ideas of value, and only by asking more questions or by careful attention to context would we know which use was meant. The best way, of course, is to ask the person who used the word what she meant. An economist reading a memo ten years later is probably not a good witness on that.

In Chapter One, there is an extensive excerpt from my cross-examination of an expert historian. I focused on the weaknesses in his underlying data, which was based on old multiple hearsay documents unreliably collected and stored. I recommend the approach I took there.

"BUT WHO FOR A FEE"

Many studies tell us that jurors think bought-and-paid experts are suspect. Verdict reports also say that some professional experts are very effective and persuasive. We recall the cross-examination of James McNeill Whistler about a painting for which he charged two hundred guineas, and completed in two days:

> Q. Oh, two days! The labor of two days, then, is that for which you ask two hundred guineas!
>
> A. No;--I ask it for the knowledge of a lifetime.

The court reporter recorded applause at this point.

It is not the fee itself that counts, although some fees may be large enough to shock the jurors without respect to the amount of work done. No, it is the amount when considered in connection with the expert's qualifications and what he was asked to do. In final argument, you want to tie the amount of the fee to some demonstrable defect in the expert's opinion.

A psychiatrist who is retained to examine the patient and prepare testimony, and whose hourly rate works out to double or triple the going rate for top treating psychiatrists, is suspect. The suspicion grows if the psychiatrist consistently supports one side of an issue.

Many theoretical economists build huge models of data and then run series of equations until they develop a theory of liability and damages. The fees mount swiftly. Tracking the fee and its basis on cross-examination could yield fodder for a theory that the experts were given a virtually unlimited budget to keep at it until they came up with a plausible sounding theory supported by a lot of fancy equations.

In final argument, I have borrowed from an old New Yorker cartoon to characterize that kind of economist number-crunching, where the numbers are compiled helter-skelter to reach a result that adds up but is essentially nonsensical. The cartoon showed the sign at the entrance of a small town

WELCOME TO SMITHVILLE	
Founded	1678
Population	5328
Elevation	675
TOTAL	7681

"WILL GLADLY IMAGINE WHAT IT MUST HAVE BEEN LIKE"

In a criminal trial, a noted law professor--let's call him Smith--was an expert witness. The prosecution had called him because he was an expert on injunctions. A judge was being tried for taking a bribe to influence a preliminary injunction hearing. One contention in defense was that the judge ruled as he did because the law gave him no choice.

On direct examination, Professor Smith described the process of balancing hardships in ruling on preliminary injunctions. Defense counsel had found cases holding that in certain situations there should be no balancing, and that the question was therefore cut-and-dried. Counsel wanted to confront Smith with this authority.

Defense counsel's attack on Smith's expertise failed because he failed to understand something that Gertrude Stein understood, even as she lay dying. Ms. Stein's longtime friend Alice B. Toklas asked, "Gertrude, what is the answer?" Ms. Stein intoned, "What is the question?" Counsel outsmarted himself because he wanted the jury to believe that he was one-up on the law professor and that the rule was not as the professor had portrayed it. In putting the contest on those terms, the cross-examiner risked too much, particularly with a savvy witness who just happened to know the line of authority the examiner was talking about and had written about it in his latest book.

Instead of showing off, the cross-examiner needed to define the question. He did not need to convince the jury that Professor Smith was completely wrong. His client's position was adequately served if Professor Smith conceded that a reasonable judge might think he was not supposed to balance hardships, or even that some case--albeit aberrant--could make a judge think so. This lesser concession does not make the issue a contest between the lawyer and the witness; it is easier to give and therefore to obtain. If the witness will not give it, the opposing expert will have an easier position to attack.

Moreover, jurors are mystified and even offended by a cross-examination which seems designed to strut the lawyer's claimed knowledge and which, for that purpose, becomes mired in technical lore.

How should Smith have been cross-examined? I admit that I have the advantages of knowing Smith and his work, and of talking to him about the issue.

Q. Professor Smith, you know the XYZ Transport case, don't you?

A. Yes, I do.

Q. It was decided by the appellate court right here in this state, right?

A. That's correct.

Q. Do you want to look at a copy of it, or can you remember it well enough?

You don't care what the answer is. Smith looks arrogant if he waves away your proffer of a copy, and you gain a point or two if he takes the case and is seen to be reading it in the presence of the jurors.

Q. Now, I am not going to ask you if you agree or disagree with that case.
A. All right.
Q. We are not here to find out what you think the law ought to be, are we?
A. No, I suppose not.
Q. The court in that case says, "Don't balance the hardships on these kind of injunctions"?
A. Yes, it does.
Q. Some other courts have said different, right?
A. Decidedly so.
Q. In your book, you say there is "confusion" among appellate judges in this area, right?
A. I said that, yes.
Q. Looking at XYZ Transport, and knowing there is confusion among appellate judges, wouldn't it be possible for a busy trial court judge reasonably to believe that he should not look to alleged hardship when irreparable injury was present?

This last question is risky. But you have the XYZ case, you have Smith's book, and therefore you have control. You have the ingredients for a searing rebuttal from your expert. Let's assume for the moment Smith said, "No, I don't think a reasonable judge could be mistaken about that." Take his book and show him some cases that come to the conclusion he labels unreasonable. Take him through the "other expert" cross discussed below.

If he will answer "yes," memorialize that answer. For example, walk to the large pad of drawing paper with a felt marker. Ask, "Professor, I want to get this right, 'A reasonable trial judge could believe that the law required him not to consider hardship, and to grant a preliminary injunction in this kind of case if irreparable injury was shown.' Is that right?"

When you get him to agree on a statement, write in big letters. Tear it off. Ask Smith to sign it. Put a sticker on it and offer it. If it is not admitted, save it, and use it in the summation.

Generalizing from this discussion, your cross-examination should focus on the minimum needed to achieve your goal. You must reduce the inquiry at the end to a set of principles that you can state clearly and to which the expert will agree. If possible, you should put these principles into a form that can be used again with other witnesses or in the closing argument. Even if the concessions you achieve are only given orally, you can get those portions of the transcript typed up and put on transparencies for an overhead projector. I particularly insist on this approach when cross-examining an expert whose side has the burden of persuasion. Your job is done if your opponents fail to meet their burden.

Suppose the expert simply will not yield substantive concessions. Her opinion on the merits is unshakable. She cannot imagine thinking otherwise. In the previous section, we have seen how to attack that witness by going back over her factual assumptions, as to which the jury is concededly the final arbiter.

You have to decide whether to shut down and wait for your case or do an "other expert" cross. I lean toward the latter alternative, particularly if I am going to call that other expert. I think that an expert who doggedly sticks to her position against all evidence and refuses to concede the possibility of a reasonably supported opposing view tends to look bad.

Of course, this judgment is case-specific. Cases in which your opponent's experts are impregnably right on a key issue probably should be settled and not tried.

THE "OTHER EXPERT" CROSS

An expert who refuses to admit the possibility that her theory, method, and conclusions can be criticized by someone as well qualified as she appears arrogant.

Each of the following sentences states a theme for cross-examination.

1. There are different theoretical paradigms for almost any subject.
2. There are well-qualified people who support any of several basic theories.
3. There are books and articles that support and oppose the different theories.
4. Even among those who have the same theoretical perspective, two qualified observers might honestly disagree.

Each of these themes can be developed with little or no risk, even with an expert who will not concede anything to the position you are taking in litigation.

Here are some sample questions. "Doctor, you are not a Freudian, are you?" You might get back, "Well, all of us have been influenced by the work of Sigmund Freud." To which the reply must be, "Doctor, you do not describe yourself as a Freudian, do you?" If she says, "No," fine. If she says, "Yes," you can say, "All right. You are not a Gestalt therapist, are you?" In your preparation, you have identified some major schools of thought about psychotherapy. You want the witness to admit that there are therapists out there who identify with some of these schools. Even a witness who declines to classify herself will concede that there are therapists who do self-classify.

The next step is to ask, "Would it be right to say there are these different schools of thought about psychotherapy?" Depending on your litigation position, you may want to bring in writers such as Dr. Thomas Szasz who doubt the validity of most psychiatric theory. Have the witness agree that such views are expressed by respectable physicians.

Now you take the witness through publications by people who adopt the different theories. Establish that people with different theoretical approaches who saw the same patient might come up with different explanations for that patient's behavior. Or at least they would have different ideas on how to treat that patient. In fact, two people who have the same theoretical outlook might come to different conclusions.

How do you know you can get something along this line? If the witness begins to balk, go back to process. If the witness is a reputable therapist, her training and her practice include "rounds" in clinical facilities and conferences with supervisors, at which diagnosis and treatment are debated. The very purpose of these sessions is to uncover disagreements among professionals and to resolve them. If your witness is not reputable or well-qualified enough to have participated in such events, that is itself a telling admission.

As Judge Higginbotham suggested in the Eymard case, this sort of peer group argument is not unique to therapeutic professions. Every discipline has some form of it. When you have brought this out, you can ask, "In these conferences about patients, who has the last word? I mean, who decides which one of you therapists is right?" It doesn't matter what the answer is. The next question is, "In this case, who is going to decide whether you or another therapist has made the right diagnosis of Mr. Wilson?" The answer is, "The jury."

This line of inquiry can be dispositive. For example, in a legal or medical malpractice case, the expert's concession that reasonable people could disagree as to either the standard of care or its observance in this case powerfully supports a motion for directed verdict.

One key element of post-Daubert law is peer review, which is often an essential part of verifying that principles or methods are valid and that the expert is applying them correctly. Most academics' work is reviewed by their peers. You can use this fact:

Q. Doctor, after you write a learned paper, do you sometimes go to a conference where you present the paper and then the people there discuss and criticize it?

A. Yes.

Q. For example, on your resume here, it says you presented a paper in Toronto in 1997. Were there comments on the paper at that conference?

A. Yes.

Q. And in 1999, you were a discussant in Seattle? Does that mean you discussed somebody else's paper?

A. Yes.

[You might ask what a discussant really does.]

Q. Now, these people who discuss your work at conferences, do they sometimes disagree with your conclusions?

A. Sure.

Q. These people who disagree, are some of them Ph.Ds, as you are?

A. Yes

Q. Are some of them just as smart as you are?

A. I suppose so.

Q. So somebody just as smart and qualified and well-educated as you could honestly disagree with you, right?

You can continue this line of inquiry, but you are setting up a battle of experts.

You may be able to interrogate your opponent's expert about your expert's views, even if you do not call your expert to testify. Because of liberal discovery rules, all experts will probably have been deposed. The expert you are cross-examining may well have read your expert's deposition. If you can establish, in deposition or by other research, that your opponent's expert has a good opinion of yours, you might ask, "You know Dr. James's work, don't you?" "He is a recognized expert, isn't he?" If the witness will admit to having read your expert's deposition, you can confront her with it, as with any other material consulted in preparing her opinion.

This sort of comparative examination can be played another way. In a criminal case, discovery told us that the government had consulted a particular expert, call him Dr. Day. The government's first expert witness confirmed that Dr. Day was in the courthouse helping with the prosecution. We asked that witness and every other one whether Dr. Day would testify. We asked them all whether Dr. Day was an expert. We were ready for Dr. Day. The government took the bait, and Dr. Day's cross-examination destroyed their case.

Notes to Chapter Thirteen

1. The James McNeill Whistler exchange is quoted in the Wellman book cited in the Bibliography, at p. 45.
2. 3.

Chapter Fourteen

Expert Witness: Hard Subjects--Choosing and Presenting Your Expert

At a dinner party for some lawyers and a noted trial consultant, we started discussing who jurors are most likely to believe. Without prompting, everybody agreed on a high school science teacher. Not just any teacher, but an exciting and challenging teacher who made the subject come alive and seem important.

Jurors today, like our population today, are better educated than some years ago. While the media's capsulized presentation of events has influenced styles of listening, jurors are still willing to follow a coherent story through to the end. The opening statement can give an overview, but you obviously will not win unless you prove what you claim.

Add to this the recognition that not every juror is paying attention at every moment. With twelve, or even six, people all concentrating on the same witness or exhibit, their impressions of what the witness said or the exhibit meant will differ.

These observations define your search for and presentation of the hard subject expert. You do not want simply to explain something, for the explanation itself can be misunderstood. You want to take the event apart and show how it happened. Along the way, you and your expert must concede that the facts and assumptions on which an opinion is based may be challenged--you and the expert claim wisdom, not perfection. Put another way, if you don't concede the imponderable, you weaken the indisputable.

Suppose you had a case involving a construction site accident. A worker has been seriously injured. You claim that the scaffolding was defective. The employer denies that claim and asserts that the worker was behaving improperly on the scaffold, slipped and fell, and missed the safety net underneath because he had been standing in the wrong place.

You can understand this accident in two ways. You could ask engineers and physicists to give you a report on the forces involved, and how they were most likely resolved at that time and place. If you took this approach, you would be more likely to pay for a computer-generated graphic recreation of the event.

The alternative--and in my view, better--approach is to search for people who know how to teach and who have practical skills and insights that they can make accessible to the jurors. So, a high school physics teacher might be the best person to teach about the forces involved. And a high school woodshop teacher with experience in construction might be able to help recreate the "reality" of the workplace. They would surely use visual aids, but these would consist of models and diagrams that the jurors could imagine themselves constructing.

In sum, you are looking for the witnesses who are most credible to jurors, and you are looking for presentation techniques that empower and involve jurors. You are suspicious of witnesses and techniques that distance themselves from the experiences and lives of the people who will be deciding the case.

THE SEARCH

Although someone who teaches for a living is your best choice, she need not wear the title "teacher." Many people's jobs involve explaining their conclusions to others. Inside a corporation, an actuary draws up numbers about potential changes to a benefit plan, and he must then describe and evaluate the options for management. The management people have no actuarial expertise; the actuary is teaching--about technique and how it leads to given results on the basis of assumed facts. That is what an expert does. Mechanics, engineers, accountants--any of these may be a teacher for your purposes. If your client is a business entity, look to its resources for an expert who really knows the business. One of the most effective experts with

whom I have worked was someone who had spent thirty years working in many responsible jobs in the oil industry. He was not an executive in a suit; he was someone who combined engineering training and hands-on experience.

A teacher is accustomed to putting information into a logical order--a story, if you will. A teacher maintains eye contact with the learners and adjusts the presentation to ensure that everybody is keeping up. A teacher learns not to take for granted the learners' prior knowledge and yet manages not to be condescending; a teacher knows where to pitch the information. A teacher knows how to move around in front of the class. A teacher knows how to use mnemonic devices--or demonstrative evidence--to spark interest and help learners remember.

Your expert must also have the right motivation, as seen by the jurors. Someone who teaches for a living is regarded with respect because teaching is a form of public service. If your witness is not a public servant in this way, she should have some other demonstrable commitment to the public good, such as pro bono work.

When I interview an expert, I do not ask her to read and prepare a lot about the case. I choose a subject about which the expert and I know something, and start asking questions. I say, "I'm sorry, I don't understand that. Can you explain?" I challenge, "I don't see how that can be. It doesn't make sense." I try to vary the facts, "Well, if it were a sixty-five-year-old man and not a sixty-year-old man, would that make a difference? Why?"

Is the expert maintaining eye contact with me? Is the expert staying cool and unthreatened? Is the expert not condescending to me, despite my best efforts to be worthy of condescension? Are we having a good time talking about something in which I am interested and that she is making interesting?

And, most of all, is the expert really listening to my questions and trying to make sense of them rather than trying to put them in a preformed matrix to produce a canned answer? You want to be sure that the expert will operate on your terms on direct examination. More important, you want the expert to answer the cross-examiner's questions as asked, not as the expert mentally reformulates them.

DO YOU NEED AN EXPERT?

If you are the proponent of a position that involves scientific or technical material, a testifying expert will usually help you. A good expert presentation is like an extra summation because you and the expert--and your demonstrative evidence--take the most intricate part of the case and make a clear statement about it.

There is a well-known test that illustrates how people perceive or fail to. The examiner puts a sentence on an overhead projector screen or monitor and asks people to count the number of times a certain letter appears in the sentence. The responses vary widely. People are far less able to perform that perceptual task than they think they are. Almost everybody will get the right answer if you draw a red circle around each letter you want people to count. Now they are counting red circles. That's easier.

The lesson of this test, which is used by trial consultant Hale Starr, applies strongly to hard subject expertise. You are not concerned only with explaining and teaching. You must make sure that every juror is receiving the message you are trying to send. You do that by the persuasive, "teaching" way you present the expert.

If you are opposing a hard subject position, you face a more complicated choice of whether to call an expert to testify. Calling a counterexpert invests your opponent's position with dignity; you are saying that it is troubling enough to require a detailed response. Not calling a counterexpert risks leaving the jury with no alternative except all or nothing.

To return to a topic introduced in Chapter Twelve, this point is clearest when you consider damages testimony. In Pennzoil v. Texaco, the lawsuit over Texaco's alleged interference with Pennzoil's contract to buy Getty Oil, Pennzoil presented a witness on damages, Thomas Barrow. In voir dire, Pennzoil counsel Irv Terrell set the stage for Barrow's appearance:

> Now, the man who will testify about this generally and who is Pennzoil's primary expert is a man who does not work for Pennzoil.
>
> He is a man who Pennzoil believes is a man with great experience, great skill in the oil business. He's an oil man. He's not from Wall Street. His name is Thomas Barrow.
>
> Mr. Barrow, until June of this year, was vice-chairman of Standard Oil Company of Ohio, also known as Sohio. Prior to becoming vice-chairman of Sohio, Mr. Barrow, for years, was the chairman of Kennecott Copper Company, the largest privately owned copper company in the world.
>
> Prior to that time, for about twenty-five years, Mr. Barrow was with Exxon . . . and had spent, I believe, five or six years on the board of directors of Exxon, and I'm talking about the parent company, Exxon Corporation.
>
> . . .
>
> Mr. Barrow has studied, made a great study of the Getty reserves. He had some personal knowledge of them before he began this study. He has been made available to Texaco. They have taken his deposition on two separate occasions.
>
> Mr. Barrow will testify that this measure of Pennzoil's loss of bargain, this replacement cost model is an appropriate way under the circumstances to measure Pennzoil's loss. He will testify to this $7.53 billion number.
>
> There's one other fact I need to tell you about Mr. Barrow. Mr. Barrow is not doing this for money. Mr. Barrow is not paid a cent. Mr. Barrow is not friends with Mr. Liedtke. Mr. Barrow is not friends with Mr. Kerr. He knows who they are. He has no personal relationship with either one of them, and you may judge for yourself why Mr. Barrow is testifying in this case.
>
> All I want to ask you now is, Do any of you know Tom Barrow?

Barrow was as good a witness as the advance publicity promised. He presented a model of lost opportunity that did indeed add up to about $8 billion. The jury agreed.

Texaco's cross-examination of Barrow focused a great deal on Barrow's alleged bias--with little effect. Texaco did not call a damages witness of its own.

The dramatic verdict in Pennzoil v. Texaco has quickened the debate over calling experts to battle experts. I do not believe it was essential that Texaco call its own damages expert. However, they then assumed the burden of completely negating Barrow's damages model or of convincing the jury on liability. Having done neither, the jurors had no stopping place short of $8 billion compensatory damages once they made the liability decision.

If you call an opposing damages expert, however, you risk the appearance that you have conceded liability. Your trial lawyer instinct tells you to stay focused on the main events and not to be diverted by a sideshow on damages. Faced with this kind of choice, your client will get very nervous. Repeat players in the system, such as corporate clients, will remind you that litigators always get pumped up about the chances of success and then sometimes lose big.

Barrow could have been confronted with several alternative damage theories, all supported by experts and publications in the field, and he would have had to concede these had some validity. He is an honest person.

Here, then, is how I parse the choice. If you can build an alternative model, and dignify it by cross-examining the opposing expert, or if you can show the opponent's theory is baseless, cross-examination alone can do the work. If the expert's conclusions can be attacked on fundamentals such as qualifications or a crazy theory, then an opposing expert will be helpful.

If you call an opposing expert, you must warn the jury in the opening statement, and invoke the "thirteenth stroke" theory. Many lawyers take credit for this metaphor; however, it was used by A. P. Herbert in one of the fictitious judicial opinions that grace his book Uncommon Law. The case is Rex v. Haddock: the defendant was charged with several offenses for having, on a bet, jumped into the Thames from the Hammersmith Bridge:

> But in addition to these particular answers, all of which in my judgment have substance, the appellant made the general answer that this was a free country and a man can do what he likes if he does nobody any harm. And with that observation the appellant's case takes on an entirely new aspect. If I may use an expression which I have used many times before in this Court, it is like the thirteenth stroke of a crazy clock, which not only is itself discredited but casts a shade of doubt over all previous assertions. For it would be idle to deny that a man capable of that remark would be capable of the grossest forms of licence and disorder. It cannot be too clearly understood that this is not a free country, and it will be an evil day for the legal profession when it is.

Your theory: The proponent's expert is not simply wrong; he is wrong in a way that casts doubt on the proponent's entire case. Someone who would make the kinds of claims the proponent's expert made is so reckless and extravagant as not to be believed. Why, even accepting the proponent's own theory, the damages would be at most 5 percent of what the proponent claims. The proponent's expert testimony is therefore like the thirteenth stroke of the clock.

In opening statement, you might say:

> From the time you came in, even in the first questions these other lawyers asked, there has been talk about money--the money they are going to ask you to write down at the end of the case and say we should pay the plaintiff. What is the evidence going to be? We are going to show, with witness after witness and with all these documents that you will have in the jury room, that the plaintiffs don't have a case, that they brought this lawsuit to break a fair deal they had with us. If they don't have a case, then we don't owe them any money.
>
> You have heard a little bit about an expert witness they are going to call, a Ph.D. economist, Dr. Larsen, who is going to present some figures. Now I will be allowed to cross-examine him. And he is going to admit to you that if the plaintiffs don't prove their case--don't prove to you that Mansfield Oil conspired--then we could not possibly owe the plaintiffs any money.
>
> After Dr. Larsen has admitted that to all of us, I will cross-examine him some more, because he will have charts and diagrams about barrels of oil and quantities of money. And we will show you that Dr. Larsen's evidence is not reliable and that it suffers from the same basic error as the liability testimony of the other expert, Dr. Winston.
>
> Dr. Larsen will even tell you that there is a respected economist in this field that Dr. Larsen studied with, Dr. Margaret Oakley. When it comes our turn to put on evidence, we are going to call Dr. Oakley and let her grade Dr. Larsen's paper for us. We are not doing this to quibble about $10 million versus $50 million. The evidence will

show that the right number is zero. Dr. Oakley is going to show that the plaintiff's side has no support in any evidence.

You can so confidently predict Dr. Larsen's concessions because you have taken his deposition. When you cross-examine him, make him admit that the jury will decide liability. Sprinkle your questions with the prefatory phrase, "Doctor, even if we assume liability, and even if we assume your basic numbers. . . ."

This approach can work because it can rob the other side of credibility with the jurors. You want the jurors to ask, "If they would exaggerate that much about that issue, what else are they trying to hide?"

Follow through on the metaphor when you call your expert. That expert's conclusions should be grouped into two parts. First, she will tell us what happens even if you accept the other side's theory but use proper data and analysis. Then use a transition: "Doctor, you have told us that these numbers are based on the assumption that the plaintiff's collusion theory makes sense. Does it make sense?" The expert says, "No, it doesn't make any sense." Asked to explain, she can begin by saying that one clue is that the numbers used by the other side's expert are so far-fetched that you have to question the underlying theory.

If the issues of damages and liability are so distinct that you cannot find an expert who can deal with both issues, you will have to settle for putting up a damages analysis and making clear that you do not concede liability. This expedient will seldom be necessary in commercial and antitrust litigation because your liability expert will have enough training to analyze the numbers as well. Given the Federal Rule of Evidence 703 provision that permits an expert to rely on the work of others, "number crunchers" can provide the data on which the combined no liability–no damages expert relies.

If you must present a stand-alone damages expert, you can nonetheless tie the testimony back to liability issues:

Q. Have you made a study of the way that Model 1600 corn shellers are designed?

A. No. That is not my field.

Q. You have read Dr. Winston's [the opposing damages expert's] report?

A. Yes.

Q. Is he an expert on corn sheller design?

A. No, he is an expert on lost income projections, just as I am.

Q. Do you agree or disagree with him?

A. I disagree.

Q. Tell us in a summary way why you disagree.

A. I have two basic reasons. First, he does not make clear the most important thing that an expert needs to emphasize: Calculations of lost income from an event are completely artificial and made up out of thin air, unless and until the jury finds that the plaintiff has proved--not just alleged, but proved--that the design was defective, and that the defect proximately caused the injuries that the expert uses to make the calculations. In this case, there are at least two reasons to question such an assumption. First, there is the design dispute, and second there is the question of other causes of Mr. Olson's injury. . . .

PRESENTATION

When you present a hard expert, you should be able to validate his methodology without much trouble. The potential problems lie in assumptions made before applying the method. A gas chromatograph indisputably tells you what was in the sample, provided you are operating the machine properly. If the sample is corrupted, the reading is wrong. This could happen in the lab

or in the field. If the sample was not gathered from the place and at the time assumed by the expert, the conclusion is irrelevant. The expert who claims too much for the conclusion, or who fails to admit the fallibility of assumptions, dramatically loses face and in the process draws into question even the precise measurements he is presenting.

A further observation. You empower jurors by letting them come to the expert's conclusion along the same path the expert took. To do that, you need demonstrative evidence because most hard expertise is opaque when described in mere words. MEGO, the acronym goes: Mine Eyes Glaze Over. The expert will not recreate the laboratory process in the courtroom, for the reasons discussed in Chapter Six. The demonstrative evidence will be a replica, perhaps a computer or video re-creation.

Once you have introduced the expert and qualified her, begin with the ultimate issue: "Doctor Wilson, this is government Exhibit 503. It is a check. Here it is on the overhead projector screen. Did Richard Koster sign that check?" She says confidently, "No." "Doctor, I want to ask you first, how you go about coming to that conclusion as an expert. Can you do that?" She says, "Yes," because she knows to answer only the question asked. You continue, "Then, Doctor, can you take us all through the steps you took to prove that Mr. Koster did not sign this particular check?" Again, she says, "Yes."

You return to background information. Document examination expertise lends itself to graphics that show the characteristics of handwriting. One can show what happens when somebody tries to imitate handwriting, how artificial the result appears. It may be relevant to talk about tracing signatures.

Handwriting experts often use a Tasco brand pocket magnifier with a light, where the telltale signs of forgery are obvious or where a particular typewriter leaves obvious signs. I once convinced a judge to stop proceedings and let the jurors use the Tasco magnifier to look at some handwriting, to see how the differences appeared when you magnified them. I had the text magnified on a chart so a juror could know "what you're supposed to see" upon looking through the magnifier. If you had a magnifier and a sample exhibit for each juror, the same exercise would go more quickly. You want the expert up off the witness chair and teaching now, working with charts or a separate copy for each juror.

In this kind of presentation, charts may be far better than more sophisticated images because they are more clearly an extension of the expert's presentation. They are a way to draw jurors into the interaction with your expert. Do not tarry overlong on technique. The judge grows visibly impatient. The jurors know that this is only the preliminary to the main event. They become restive.

The main event: The expert tells us how she found the truth in this case. Begin with candor about the method. "Were you there when that check was signed?" "No," she says. "How can you know that Mr. Koster didn't sign it?"

The expert tells the science of handwriting samples--the particular "knowns" for this exercise. We have already heard about "knowns." We ask again, "Can somebody fake their handwriting when they are being asked to give a 'known' or an 'exemplar'?" The expert is candid about fakery but tells us what was done in this case: She is using the same exemplar used by the other side, and she has also collected handwriting specimens from a period before the litigation, the authenticity of which cannot reasonably be questioned.

Now, we turn to the "questioned" document. If you truly are "questioning" the document, call it that. If not, call it what you claim it is--a check, a deed, a letter--and ask your expert to do so as well.

Again the charts come out, and we see the differences that are decisive. The expert is guiding us toward the conclusion. There should be one exhibit that summarizes the entire story. It should be in the form of a chart or overhead projector transparency. It can be made up of elements of other exhibits, including frames from video or computer evidence. It should be something you can use in summation and, if possible, admissible in evidence.

Put this item up. “Doctor, have you shared with us the essential things that lead you to find that somebody signed Mr. Koster’s name to this so-called check?” “Yes,” she says. “Does this chart summarize what you find?” “Yes,” she says. You ask one more question; she explains briefly. You pass the witness--and probably leave the chart up for your opponent to take down.

This example contains all the elements of any hard witness presentation: Who I am, how I figure things out, and how you and I can figure out what happened in this case.

Notes to Chapter Fourteen

1. For insight on the use of exhibits and testimony in the Pennzoil/Texaco litigation, see the book written by juror James Shannon, Texaco and the $10 Billion Jury (1988).

Chapter Fifteen

Expert Witness: Hard Subjects--Cross-Examination

In Chapter One, I rejected any rigid distinction between facts and values, and I argued for a holistic view of perception and understanding. It is possible to make rational choices among competing values. Jurors--which is to say people--do it all the time in their daily lives. In the fields of soft expertise, they will do so whether you want them to or not. Therefore, you must empower jurors with the means to make rational choices that support the story your expert is helping to tell.

Now we must apply this insight to cross-examining the hard expert. The knowledge--or expertise--of such an expert is difficult to confound or contradict unless you can have it ruled out under the Frye test as lacking scientific validity. More usually, your task will be to empower jurors to reject the expert's conclusion, even if they respect him and his field of knowledge.

Preparation is the key. This cliché, though valid, has led many lawyers astray. They have drunk deep at the spring of the expert's science and, besotted with their new-found knowledge, have sung and danced their way through a cross-examination that does one of two wrong things.

Perhaps the cross fails because the lawyer-as-novice-expert cannot keep up with the real expert on the stand. The lawyer is--to borrow from Samuel Johnson--like a dog dancing on its hind legs. It is not done well, but the wonder is supposed to be that it is done at all. I have read transcripts of trials in which the lawyer tried to be a greater expert than the witness and failed. Worse yet, I have read and heard lawyers who have advised trying such tactics--without warning of the danger.

Or the lawyer may succeed at all this "no-I-am-not-a-doctor-but-I-play-one-on-television" whizbang and leave the jurors in his dust. The display of erudition has distanced both the lawyer and the expert from the jurors, and the two of them have made the cross-examination into a spectator sport. Fans can root for their side, so the lawyer can seem to win in such a match. But this kind of victory can evaporate in the jury room because the lawyer's fans do not come away with solid arguments to convince the other jurors.

True, the second kind of cross can be saved by a solid, picture-oriented closing argument or by having one's own expert analyze the other side's conclusions and set out detailed responses. But such palliatives should be unnecessary.

The issues unique to cross-examining hard experts are relatively few.

IS IT A SPECIALTY?

Every form of hard expertise becomes judicially accepted at some point through the adversary process. When it does, stare decisis controls its use in future cases. Until that point, you must litigate scientific validity under whatever version of the Daubert test or its progeny holds sway in your jurisdiction. You litigate the issue through the motion in limine and voir dire techniques discussed in earlier chapters.

MAKE THE EXPERT'S CONCLUSIONS IRRELEVANT

The fingerprint expert is as reliable an expert as you can find, or so the saying goes. No two people's fingerprints are alike. Sometimes the expert has only a partial print to work with and must qualify the opinion. I deal with that case later in this chapter, when I discuss making the expert's conclusion doubtful. Some judges have questioned fingerprint analysis as not based on solid scientific footing, but for this illustration assume that the judge has rejected any such challenge. I am talking now about the full, indubitable fingerprint, with twelve or more points of coincidence to your client's known print. I could as well be talking about a typewriting sample, a tire tread, or a tool mark. You get nowhere by doubting that this expert can reliably match the

unknown sample to the known exemplar. You can cross-examine that expert only by empowering the jury to reject her factual premise.

For example, an expert testifies that an envelope carries the defendant's fingerprints. The expert received the envelope from the police or the FBI and has treated it with a solution of ninhydrin or some other chemical substance that makes latent fingerprints appear. This is the envelope, let us suppose, in which the letter bomb arrived. Your client will deny sending the bomb, but the defendant's credibility is always impaired by his obvious interest in the outcome. Here is a sample series of questions.

Q. Agent, there is no doubt in the world that Mr. Moss touched that envelope at some time, is there?

Q. That envelope is made from ordinary bond paper, isn't it?

Q. How did you learn how to make the fingermarks on a piece of paper like that become visible?

The expert is going to give you an explanation, of some sort, of how she learned. The questions from here on will vary depending on the answers you get. You need the following equipment for this experiment, the list of which can be adapted for cross-examining other kinds of hard experts: sample paper with fingerprints on it, treated and untreated; ninhydrin solution or other latent fingerprint revealer as prescribed by your expert; and some pictures of treated paper showing latent fingerprints.

Q. Agent, here is a book that has been sitting in my house for a few years. Could you spray this with your solution and make fingerprints appear?

Q. In fact, we might see fingerprints that have been on there for years?

Q. Did you do that kind of exercise in your courses?

The agent was probably asked during her course work at the FBI academy to bring a book from her home and do a fingerprint analysis of it as an exercise. You don't have to choose that example. Your own expert may suggest one. In the American Academy of Forensic Science literature, you may find papers and other materials that will suggest other avenues.

In one case, I confronted the government's expert with one of his own prior experiences. He had been able to identify a fingerprint left on a postcard sent in 1943. He had performed his tests nearly fifty years later.

You may want to have the agent develop some prints on a sample piece of paper. You might consider using a piece of paper that somebody connected with the government has touched. Maybe when you were in their office one day, you asked to borrow a piece of paper from somebody's memo pad, and you now describe it. The agent admits that if that is the paper you borrowed, some of your opponents' fingerprints could well be on it. It is all right to have an opposing expert perform a simple experiment of this kind because the risk of failure is low, and the consequences of it not working are minimal. In any case, her failure is not truly attributable to you.

Continuing:

Q. Agent, if many people handled this piece of paper, each of them might leave a full or partial fingerprint, right?

Q. And, in the case of partial fingerprints, you often do not get enough in order to be able to say who left that print, right?

Q. You told us you need a certain number of points of identity to make a match, right?

Q. How many was that?

Using the facts of your case, pin down the access to this envelope and how many people would have been able to touch it during the relevant time. If, for example, frame-up is your theory of the case, ask about that possibility.

Q. The fact that there are no two fingerprints alike is pretty well known, isn't it?

Q. Do you read detective fiction?

Q. In paperback novels and on television and in movies, the villain often wears gloves, right?

Q. If I wear rubber gloves when I handle this piece of paper, I am not going to leave a fingerprint, am I?

This type of cross-examination goes back to the basic principle of tangible evidence: An object has no more relevance than that attached to it by a credible testifier with personal knowledge. The expert's conclusion is indisputable but irrelevant if the object she tests has nothing to do with the case.

The fatal bullet may have been fired from that gun; this means nothing unless the evidence places the gun in your client's hands. The trajectory of an entrance and exit wound may cut against a self-defense theory but only if you assume the decedent was standing in a certain way and that the gun was aimed in a certain way; angles are relative, and you get quite a different picture by keeping the angle constant and hypothetically moving the figures around.

There are specialized publications and experts that can help with this kind of alternative crime scene reconstruction. Calculating, and then showing, the angles can become so complicated that you will need a series of charts and diagrams, or a set of model figures, so that the jurors can see exactly how to critique your opponent's expert.

Another example: The deceased indisputably died from lung cancer, but is it because he smoked two packs of cigarettes a day, worked near a toxic substance, or breathed unhealthy air? Your questions track each item of evidence showing exposure to toxic substances that are not made or discharged by the defendant.

This is the classic "So what?" cross-examination. It works. Do not assume, however, that because the expert must be telling the truth about the fingerprint--or the tire track, or whatever--that she is "neutral" on the case as a whole. The expert is an adversary; do not ask a question that assumes otherwise. Be prepared with a "Do you believe in America?" line of questions, as discussed in Chapter Nine, if the expert makes a gratuitous remark.

MAKE THE EXPERT'S CONCLUSION DOUBTFUL

Sometimes the hard expert is compelled to choose among alternative explanations for a result, and there is a fair argument over which alternative is correct. In that case, the expert's conclusion may not be attackable as irrelevant; you must play the probabilities. Remember, whenever possible, take the issue back to something the jurors must decide. Putting learned treatises or the views of other experts into play may be good tactics, but they are secondary lines of defense; these techniques are discussed in Chapter Nine.

For example, an expert looked at data about the reentry into Earth's atmosphere of a satellite containing radioactive material. He looked at background radiation levels in the area where the satellite returned to earth and concluded that it had disintegrated. He looked at engineering specifications and manufacturing records and concluded that the satellite's core system had been improperly manufactured, so that disintegration was a likely possibility under the stress of reentry and speedy trajectory through the atmosphere.

Every one of his measurements was right. Radiation measurements in the relevant area had shown increases. Manufacturing records had not been properly kept and did not show with certainty that an important manufacturing process was properly performed: the plaintiff would indeed argue persuasively that the absence of a notation in a regularly kept record can be evidence that a certain event did not occur.

This expert's conclusion is an instructive blend. The background radiation issue will require an opposing expert to say that variations are normal and that these variations do not establish that radioactive material from a disintegrating satellite was present. You may impeach with treatises and opposing views. Your purpose is to show that even if the satellite was improperly manufactured, it might not have disintegrated and caused an increase in background radiation levels.

This is a classic issue because the expert is talking about departures from normal. "Normal" is good cross-examination fodder because it is the middle of a range of data, calculated as mode, median, or mean. The data from which "normal" is calculated can be shown as a curve, the ends of which may show very disparate but nonetheless "normal" phenomena. This observation applies to many kinds of calculated values, including market value. In our hypothetical case, one would find dozens of recorded instances of surges in background radiation not attributable to any external or wrongful cause.

To make the point in another context, consider a market value case. An expert can testify about values but must usually rely on a database that contains values that include divergent numbers. Moreover, value in markets is usually a sum of transactions between willing buyers and willing sellers; immanent within a value calculation are many idiosyncratic personal judgments. An expert must not only acknowledge this but also admit that the value a person attaches to an item--as distinct from a perception of market price or exchange value--is a valid determinant of the price at which she will part with it.

In a bank fraud case, the government charged the defendant with conspiring to convert bank funds. The defendant bought majority control of a bank in Waco, Texas. He financed the purchase by borrowing from a large Houston bank, which loaned him the funds at three percent interest. As soon as he got control of the Waco bank, the defendant caused the Waco bank to establish a noninterest-bearing demand deposit account in the Houston bank in the exact amount of his loan. At that time, banks did not pay interest on demand deposits.

The government said it was not normal to have so large a demand deposit balance because it was well in excess of the amount necessary to induce the Houston bank to perform correspondent services for the Waco bank. The excess value of the demand deposit, over and above the amount necessary to fund correspondent bank services, was said to represent a theft of the Waco bank's assets.

It sounds a bit complicated, and it was. The bottom line is this, for all the nonbankers out there: It was important for the government to prove that the services the Houston bank did for the Waco bank were worth x dollars and no more. That is a value question. The government called a Ph.D. from a Federal Reserve Bank.

Unfortunately for the government, the Ph.D. had a colleague who had written an article about valuing services banks perform for customers. The article supported the Ph.D.'s basic point, which was that a norm for services pegged them at a certain level. However, the author had also said that banks set their fees for services on a number of bases, all of which were reasonable and permissible as a matter of management's judgment. Here are two keys. First, the Waco bank was well-run, so we could invoke management judgment. Second, a statistical study

of banks showed variations of as much as 2,000 percent among banks in the same market area in the pricing of some services, for example, processing checks, handling account inquiries, and so on.

The witness had to agree that these variations were a normal part of competition and that the main thing was that the correspondent relationship be beneficial to both sides, and perceived as such by their managements. I chose a series of services that large banks perform for smaller ones, and as to each one showed the range of charges the larger banks "normally" made. We also talked about the intangible values of a correspondent relationship. All of this was based on having read everything written and spoken by this witness that was available to us. The style of examination was to have the witness acknowledge favorable material in his writings and then see whether he would be drawn out on subjects where he seemed to be helping us. Other parts of the examination dealt with the witness's relative lack of practical experience.

Here are some excerpts from the cross-examination:

Q. Dr. Knight, you are the author, are you not, of a series of three articles on correspondent banking?

A. I am.

. . .

Q. I'm going to show you what's been marked as Defendant's Exhibit 9, Dr. Knight. Are these some computations that you did, sir?

A. Yes.

Q. All right. And these show, do they not, these figures, the various amounts that are charged by banks in your area for performing different services, isn't that right?

A. Yes. Actually, it is a national survey, and it covers all Federal Reserve Districts.

Q. Oh, it does? So it's fair to say, isn't it, sir, that the charges that are listed as for each item that the bank charges for are subject to wide fluctuation?

A. Oh, that is correct.

Q. We've got some fluctuations in here that run into up over 1,000, 2,000 percent, don't we, between the high and the low?

A. I don't think they're quite that large, but they're pretty large.

Q. Don't think they're quite that large. Well, what about this difference between 212.16 and 2,320.4 in that one? Is that about 1,000 percent?

A. Okay, yes.

Q. And I didn't have a chance to read all these numbers, but there's one, anyway?

A. Yes. That's certainly 1,000 percent.

Q. As a matter of fact, sir, in your article on correspondent banking that you wrote you had a little hypothetical about some group of bankers getting together and deciding what their bank should charge for their services, isn't that right?

A. [Nodding.] [The court:] You'll have to speak up, sir.

A. Yes, sir.

Q. And the first fellow that talked in your hypothetical said, well, we've got a lot of extra time on our computer, so let's try to get these people in here and we won't charge them very much, isn't that right?

A. That's right.

Q. And then the second fellow that spoke up was another accountant, and he said, well, let's try to recover some of the costs of running our whole operation--

A. That's right.

Q. --or clearing operation,
A. Variable operation.
Q. The third fellow that spoke up, he was the chairman of the board and he said, no, let's charge him for everything including the polish on the front door. Isn't that right?
A. That's correct.
Q. In other words, these figures here, they are kind of arbitrarily chosen, in a sense, aren't they, by the bank that's charging for services, isn't that right?
A. They are arbitrary to a certain extent in that there are a number of different ways to approach this. . . .
Q. Now . . . on the earnings allowance. That's another thing that banks kind of make up on their own, isn't it?
A. Well, there's wide variation . . . It can vary depending on the particular management philosophy of the bank.
Q. As a matter of fact, the last time you talked to some bankers about this subject out there in California--wasn't it?
A. Yes.
Q. --you said that it ranged from 3 percent up to 8.3 percent, didn't you?
A. That's correct.
Q. All right. And that was true, wasn't it?
A. Very wide range, yes.
Q. Sure. And the Bank of the Southwest, when they chose their figure, . . . do you know how they did it?
A. I don't know how they did it, no.
Q. You never talked to them over there about that?
A. No, not at the time that this--for the time period that this analysis pertains to.
Q. And, as a matter of fact, Doctor, you don't know how they figure their account analysis charges, do you?
A. Today?
Q. Yes.
A. No.
Q. Or as of the time you're talking about?
A. No.
Q. Oh, one more. As a matter of fact, don't bankers expect to make a profit on interbank balances?
A. Yes, of course. That's what they're in the business for. . . .
Q. And are you aware, sir, that a lot of aspects of the correspondent banking relationship can't be reduced to dollars and cents?
A. Yes.
Q. As a matter of fact, there are many services that a correspondent bank performs for the smaller respondent bank that can't be quantified, isn't that right?
A. Can't be easily quantified, I would agree with that.
Q. And, in point of fact, very few correspondent banks quantify many important services?
A. That's correct.
Q. So those services wouldn't appear on the account analysis, would they?
A. That's correct.
Q. That would include such things as account referrals, isn't that right?

A. Account referrals, loan participations, credit checks. The account analysis consists of standard activity-type services that are readily quantifiable.

Q. Oh, just the ones that are readily quantifiable?

A. In general. . . .

Q. Now, as a matter of fact, correspondent banks often perform a lot of services for the customers of their respondents that are just designed to keep the customers happy, isn't that so?

A. That's quite true, yes.

Q. You found one case, didn't you, where the correspondent bank went out, negotiated the purchase of an alligator for the customer of the respondent bank? Isn't that right?

A. That's correct. Well, it was an important alligator.

Q. Is that right? Well, we deny the allegations and despise the alligators in here.

The cross-examination of a value witness identifies the elements of his decision and makes him admit that these elements are subject to variation in the "natural" world, defined as "a world uninfluenced by your client's conduct." All the while, the techniques you use help the jury to perform the same calculations themselves.

Returning to our satellite hypothetical, we consider the expert's views on construction of the satellite. You want to establish that this expert's conclusion on the ultimate issue, an improperly made satellite that came apart, is less probable than the contrary conclusion. You cast doubt by showing a sensible alternative hypothesis and empowering the jury to adopt it. You are probably going to help by putting on an expert of your own, but you want more scope for jury argument than the battle of experts with equal qualifications.

In our hypothetical case, a witness who knows the manufacturing process first-hand would be a contradictory expert. In addition, witnesses would testify that they properly built and assembled the satellite. The expert we are cross-examining will say that the satellite could not have been properly built and that the manufacturing processes could not have been properly carried out. He goes on to say that a properly built satellite would not have disintegrated. The precise configuration of this evidence will depend on the legal standard being applied--negligence or strict liability, or some hybrid such as res ipsa loquitur.

On these facts, here is one approach to cross-examination:

Q. Doctor, how far was this satellite from where we are sitting right now when it entered the Earth's atmosphere?

A. Well, about 4,000 miles, give or take.

Q. We are in Houston, so that would be about as far as from here to Reykjavik, Iceland?

A. Right.

Q. Now, doctor, if there was an intersection collision in Reykjavik, Iceland, just offhand, who would be the better witness to call if we wanted to know what was going on--somebody who was at the intersection, or somebody who was sitting in Houston?

A. Well, the person in Iceland.

Q. Doctor, this satellite was manufactured in the San Francisco Bay area, in April 1985. What was the closest you ever got to it when it was being made?

A. Well, I am not sure. I never saw it being made, and never visited the factory, if that's what you were asking.

Q. I wasn't asking that. I asked how close you were. Do you remember?

A. Not really.

Q. I'll take your answer--you weren't there when it was being made?

A. Right.

We are not at this stage taking on the expert's conclusion, that an improperly built satellite might endure certain kinds of stresses that would blow it apart. We are instead moving the locus of relevance to the factory, from which witnesses will come to talk about how the actual object was made. We are returning the focus to matters within the jury's ken.

LIARS AND VERY BADLY MISTAKEN PEOPLE

Once in a while, you run into an expert who is lying for pay, who has faked the results. Or else you may find a good faith expert who has been misled by those who fed him information.

If you suspect fakery, your first task is to seek sufficient discovery to prove it. Next, you are going to need an expert of your own. Do not be afraid to believe your client who says that a certain expert conclusion is impossible. Do not be taken in by the asserted certainty of the expert's judgment. Although faked expert conclusions are not as frequent as celebrated exposés suggest -- or as clients think -- they occur often enough to make the search worth doing.

Remember that the scientific method requires that test results be repeatable. That is, no clinical or experimental study is accepted as valid unless its conclusions can be replicated by someone using the same techniques and samples. You can find many experts who will tell you this, particularly in the hard subjects. In soft subjects, conclusions are more impressionistic and intuitive, and may not be verifiable through repetition in the same way. If your expert cannot get the same results as the other side, then there is a risk of fakery.

The risk of fakery increases if the expert has done destructive testing or if the samples have been destroyed for some other reason. It will have been possible in most cases to test without so far destroying the object being tested that another expert is unable to replicate the experiment. And destruction of samples, at least when the expert knows litigation is planned or underway, is fodder for cross-examination and a jury instruction.

Have your expert find for you a set of recognized testing standards for the particular field, as well as some more general material. On cross-examination, use this material to establish either that the expert has departed from standards she agrees with or is unwilling to abide by standards that everybody else agrees with.

The expert whose results are false may be testifying truthfully. The mistake may have arisen from the misconduct of others. A sample may have been doctored, or even substituted. A report on which the testifying expert relies may have been faked. We have all read about this sort of thing, in and out of litigation.

The law gives you weapons against the honest but seriously mistaken expert, but they are notoriously ineffective. The system plays probabilities and establishes authenticity rules based on the chances for error. A chain of custody of a tested sample may be proven by a series of initials and dates, and you will not break the chain without some proof of wrongdoing with which to begin.

In some fields, there are special protections. For example, the electronic surveillance provisions of 18 U.S.C. §§ 2510-20 contain requirements for sealing and custody of original recordings. Violating these requirements may result in suppression of the recordings for use as evidence.

Most reputable laboratories have procedures for handling materials being tested, but, again, compliance with these is usually certified by a series of cryptic entries in a logbook.

You are entitled to cross-examine on the express and implied bias of those in charge of taking samples, making recordings, and doing tests. Without some proof that the bias resulted in them behaving in a certain provable way, cross-examination of the expert will not produce

dramatic results. The cross-examination, to be effective, must fit other parts of the story the evidence tells. To cross-examine effectively on bias, first discover. What oral and written directions and information did the expert receive? Was he told the "right" result? Was he impressed with the importance of a particular result? Was there time pressure? Was there a choice of test procedures? Who made the choice? Would a procedure other than that used yield greater reliability or a better chance for an opposing expert to check the results?

I usually begin this kind of cross-examination with a hunt for all the relevant documents and memoranda. In a civil case, I do the hunt in discovery. In a criminal case, discovery and Jencks Act production are usually inadequate; you will have to do the hunt in the early stages of cross-examination.

Take nothing on faith. I recall a case in which the defendant's fingerprint was allegedly on a fragment of wrapper from an exploded stick of dynamite. There could be no question that on that paper was an image of the defendant's fingerprint. The paper was the same color and type used to wrap dynamite. The obvious inference was that the defendant handled the dynamite stick before it was detonated.

We took the expert carefully over his technique for developing the latent fingerprint. He said he developed it with a water solution of a certain chemical. With a little research, we found that the dynamite wrapper for that brand was waxed. He told the jury that the paper he tested was not waxed. Had it been, he would have used an alcohol solution. We then subpoenaed paper samples from the dynamite manufacturer and found a fingerprint expert of our own.

We put together enough evidence to argue that the fingerprint was either faked or that somehow the defendant had come into contact with some unwaxed paper that resembled dynamite wrapper enough to pass inspection.

When you conduct this elaborate an inquiry, you leave a paper trail. If you find nothing wrong, your opponent may be able to claim that even the most diligent investigation has not shaken the expert's conclusions. Initial inquiry, to determine whether a full-scale investigation is warranted, should be done discreetly, by an investigator, and not by formal discovery.

"NO QUESTIONS"?

There will be a case in which the hard expert testimony is so compelling that you have no answers. Or perhaps you have a factual irrelevancy point, but the expert has put on such a polished show that you don't want to cross-examine at length. You want to wait until your own expert takes the stand.

If you have warned the jury that they are going to hear two sides of the issue from two different experts, you may be able safely to say, "No questions." Or you might ask one question designed to set up your expert's views. If the opposing expert is an experienced testifier and counterpuncher, and you doubt your ability to control her responses, this course will commend itself. The experienced testifier will be waiting for a line of inquiry that permits repeating the direct, perhaps with an extra argumentative spin.

The no questions choice is, however, a last resort. You should at least be able to set up the "peer review" comparative experts issue as discussed in the previous chapter. In that way, your cross-examination simply introduces the jurors to your expert and suggests that they wait for him or her to appear. If this is your plan, alert the jury in opening statement:

> The judge has talked about keeping an open mind throughout the case. That is just common sense. The other side gets to go first, and to present their evidence. You know, sometimes the very last thing you hear about something will be the most important. For example, if you are thinking of buying a new car, you test drive and read all the literature.

You are about to make your decision when you read that the very kind of car you were thinking of has a tendency for the wheels to fall off. That might be the last word you hear on the subject, but it sure would cause you to reconsider everything you had learned up to that point.

Chapter Sixteen

Closing Thoughts: Dignity--Yours and the Witness's

In the lore and literature of advocacy, there are many vignettes of bravery and dignity. Lord Brougham defended Queen Caroline in the House of Lords--her peers--against a charge of adultery, and defended his own conduct thus:

> I once before took leave to remind Your Lordships--which was unnecessary, but there are many whom it may be needful to remind--that an advocate by the sacred duty which he owes his client knows, in the discharge of that office, but one person in the world, that client and none other. To save that client by all expedient means, to protect that client at all hazards and all costs to all others, and among others to himself, is the highest and most unquestioned of his duties. And he must not regard the alarm, the suffering, the torment, the destruction which he may bring upon any other. Nay, separating the duties of a patriot from those of an advocate, and casting them if need be to the wind, he must go on reckless of the consequences, if his part it should unhappily be to involve his country in confusion for his client's protection.

There are few cases today that call up so stark an appeal to an advocate's duty. Lawyers in criminal cases come closest on a regular basis, for each criminal trial draws all over again the most important line the state can draw: between its power and the defendant presumed innocent.

Your client is entitled to your undivided loyalty and to your warm zeal in defense of her rights. You, in turn, are entitled zealously to maintain the defense even against the hostility of judges and the contumely of your opponents. The celebrated English advocate Erskine was defending a criminal libel case in 1783. The jurors returned a verdict of "guilty of publishing only," which amounted to their refusal to find the defendant guilty as charged, for they refused to find that the contents bore a libelous interpretation.

Mr. Justice Buller interrogated the jurors, who affirmed that they refused to decide if the pamphlet was a libel or not. Buller became agitated. Erskine insisted that the word "only" be recorded. Buller became angrier still:

> Buller: Sir, I will not be interrupted.
>
> Erskine: I stand here as an advocate for a brother citizen, and I desire that the word "only" may be recorded.
>
> Buller: Sit down, sir, or I shall be obliged to proceed in another manner.
>
> Erskine: Your lordship may proceed in what manner you think fit: I know my duty as well as your lordship knows yours. I shall not alter my conduct.

We celebrate the lawyers who stayed on their feet and spoke truth to power. The judges who heckled them are largely forgotten.

From this bit of legal lore comes a lesson for me and you, today, in our trials. Much has been written about Rambo litigation tactics and the professed need for civility among advocates. Courts and bar associations have adopted creeds and codes for lawyers to sign and obey.

At the same time, some clients urge their lawyers to adopt the junkyard dog tactics of which they have read--and that they see on television. Lawyers compete with each other for publicity. Some law firms boast of how aggressive they are, and of how obstructionist in discovery and motions battles.

Shielded by the harmless error rule, or by limits on federal habeas corpus review, prosecutors seem freer these days to step over the line between hard-hitting advocacy and inflammatory appeal to atavism.

To be a trial lawyer, you should read the speeches and study the lives of great advocates--Erskine, Andrew Hamilton, Darrow. You should carefully study the rules of professional responsibility, paying special attention to those dealing with litigation. Ignore other voices and claims.

You must answer the question the creature asked Alice, "Who are you?" The burden of this closing chapter is to show that the answer to that question moves you toward being an effective advocate. Moreover, from true rules of effective advocacy comes a commitment to dignified, ethical, and professional conduct. From this, I conclude that the dignified advocate who has a sense of self is persuasive. Rambo litigation tactics are impermissible; lawyers should not engage in them because they are wrong; judges should censure them and, by doing so, will motivate more lawyers to eschew them. Altruism and enforcement aside, such tactics harm you and your client.

AN ANECDOTE ABOUT DIGNITY

Some time ago, I sat with a plaintiff's lawyer who consistently wins large verdicts. I had successfully represented him on a charge of contempt, and we were musing about lawyers and judges. I had just celebrated my fiftieth birthday, and he was approaching his. In talking of his trial, we noted the number of times that I had been tempted as a lawyer, and he as a witness, to vent anger. We had both resisted the temptation. As a result, I tried the case hard, cross-examined diligently, and argued with conviction. I wanted the trier of fact and the onlookers--and the court of appeals, if it came to that--to know that I was committed to my client's cause and to be confident in that knowledge because I radiated a quiet and unshakable dignity.

I am not saying I reached that goal. But my friend-client and I remarked that as younger lawyers we had a hard time keeping in our seats. We were always up and worrying about something. We objected. We made sidebar remarks. We moved a lot. Maybe we thought it was advancing age that kept us in our seats, but we had both noticed having adopted a similar style. We stay in our chairs. When we get up, it usually takes a while to unfold ourselves and get to our feet. But we don't do that very often; the result is that when we do get up, jurors, the judge, and our opponents know that something important is going to happen.

Dignity has two sides: It ignores petty annoyances, but it does not tolerate unfairness. Dignity knows the most dangerous form of righteousness is self-righteousness. Dignity says, "I know who I am, and I am seeking justice at your hands." Dignity knows there is no snare set by the fiends for the mind of man more dangerous than the illusion that our enemies are also the enemies of God.

WHO ARE YOU? THE JURORS ANSWER

Informed students of trials will tell you that jurors have expectations about lawyers. These expectations are not flattering. Many jurors think criminal defense lawyers are sleazy, although most are willing to believe that they should observe and protect the defendant's legal rights. Jurors think defense lawyers in civil cases are, well, like they usually are: white, male, bland, wearing nice suits, and with a fairly neutral air. Beyond that, some trial consultants say, jurors who watch television expect most law firm lawyers to be slimmed down from frequent trips to an expensive health club and tan from frequent vacations or regular trips to the spa. Jurors know plaintiff's lawyers are getting a contingent fee, but they also identify more strongly with plaintiffs than with defendants in most civil litigation. This is especially so if the plaintiff is cast as an underdog against a powerful individual or corporation.

Despite these attitudes, sophisticated testing shows that the great majority of jurors asked to separate wishes from duty can do so--and hold the scales even.

What do these perceptions tell us about our own behavior? They tell me that if I show up and play to a juror stereotype, I forfeit my claim to have the jurors follow me on a voyage to discover the facts and the law of this case, involving as it does a unique claim for justice by a person or entity deserving of respect.

We have all seen how powerful stereotypes influence our response to people telling us things. The particular stereotypes we rely on may vary, but we all have them. With your family members, you are geared up to have a certain attitude to what your spouse, parent, child, worthless brother-in-law, or some other relative tells you--based on a set of perceptions built up over time. Republicans, Democrats, blacks, whites, people who whine--you get set to interpret the message based on the stereotype.

In this book, we have emphasized how to use positive stereotypes, for example, in selecting expert witnesses. For you, as a trial lawyer, it is important to see how you appear to others, so that you can act against type enough to focus on your message rather than yourself.

If your practice takes you to different places, you will perform this study over and over, for juror attitudes differ. My usual informal manner and sort of Southwestern look evoke different reactions in New York, Houston, Denver, and San Francisco. In each community, I need to listen to the radio, watch television, read the newspapers, and hang out in social gathering places to study the kinds of communication styles people use.

When you think about stereotypes, you are dealing with a form of prejudice. You must be brutally candid. If you are a woman, does your manner play into conservative ideas about shrill, hag-like conduct or tearful whining? Defending a corporation, do you play to type by harrumphing your way through the case in a superior manner?

It used to be easier to gain litigation experience by trying a number of smaller cases, to work toward a dignified and centered image of yourself. Today, you have to get the same training in mock trial courses, by reading about advocates and advocacy, and--when the case budget permits--by working with a good trial consultant.

In this context, Rambo litigation is another form of stereotypical behavior, in which lawyers let their conduct get in the way of their message. Jurors are spectators. Watching lawyers behaving petulantly, hostilely, even viciously, usually turns them off. Usually, the lawyer who answers that sort of conduct with personal dignity and a renewed attention to the facts will prevail.

If you can predict that such tactics will be used, you can begin to address them in the opening statement. You tell the story of the evidence, and then you empower the jurors by telling them that treading the path to truth will require a special commitment and effort.

You act against stereotype by making sure you are telling the story, and not "another one of those stories." Your themes must of course be powerful and resonant, but only by weaving them into a unique fabric can you rightly claim the jurors' full attention.

Jurors are more observant than many give them credit for--and both more tolerant and more judgmental than many assume. My friend Joe McLeod, a great trial lawyer who lives in North Carolina, told me a story of a trial he did when he was somewhat younger. His opponent was an older lawyer who was not doing a good job, but Joe thought to curry favor with the jury by complimenting his opponent in summation. After the verdict, a juror--a young woman--came up to him in court as he was packing up to leave.

"Mr. McLeod, can I talk to you?"

"Sure," Joe said. "I always like to hear from members of the jury."

"Well, we thought you did a good job, but there was one thing. Mr. McLeod, that humility stuff is not your bag."

Joe learned from that encounter and proclaims the lesson that jurors know how to spot game-playing, and they resent it.

Trial consultant Hale Starr tells of a test series of mock opening statements done to make a point to lawyers who thought that charm and its associated qualities triumph over trustworthiness. The issue was not framed quite that way, but the lesson that was taught was exactly that. Contrary to all expectations except Starr's, the lawyer who did best was the least flashy. He was prepared, sincere, and no-nonsense. He had the qualities we associate with our favorite teacher in high school--perhaps a teacher of science, which has some technical things that have to be mastered, just as a lawsuit usually does.

WITNESSES AND DIGNITY

Your witnesses look to you for guidance and strength. You want to insist that they be treated with dignity by your opponent and the judge. I do not think you can protect your witness if you are, figuratively, rolling around on the floor and trading punches with your adversary.

You restrain your adversary by setting an example that the jurors and maybe the judge will enforce by punishing your adversary's downward departures. You maintain your claim on the judge's intervention by yourself meeting certain standards.

Perhaps most important, witnesses who see the lawyer doing things that signal out of control are going to get in trouble. They may become fearful and timid, so their point doesn't get across. They may decide to join the fray and become recklessly combative. How, then, will you protect them?

LEVELS OF FORMALITY--SOME CAUTIONARY WORDS

None of this says that you must abandon vigorous advocacy, the vigor of Brougham, Erskine, and Darrow. Trials take place in a context--social, geographical, ideological, personal. Some courtrooms are naturally less formal than others, so dignity means something different.

David Berg, a Houston trial lawyer, once testified about the stylistic differences between state and federal court in Houston, Harris County, Texas. In state court, there is an informal air. You are more likely to see lawyers putting their feet on the tables, and in some courtrooms smoking may be permitted. In federal court, there is a more austere atmosphere.

It would be a mistake, however, to let the informality of the court lure you into informality that belies your commitment to your professionalism and your client. It would be a mistake to let informality become a license for your opponent to adopt Rambo tactics--and a worse mistake for you to follow suit.

In federal court, you have to ask yourself whether the atmosphere is too much a product of the judge's robe fever. If it is, your dignity must emphasize strength--the strength of your presentation and of your message.

SEVEN DEADLY SINS

"You mustn't let it make you conceited," says a character in Christopher Fry's play The Lady's Not for Burning. "Pride is one of the deadly sins."

"It's better to go for the lively ones," intones the hero, Thomas Mendip.

For ease of reference, here are the sins jurors find it hard to forgive:

1. Falsehood to yourself. Don't be what you are not. Learn from others, but do not just imitate their ways. Take insights, but make them yours. The analogy between trial lawyering and theater can help, but it is only an analogy.

2. Falsehood to the jury. No explanation necessary.

3. Condescension to jurors. Empower the jury.

4. Condescension to people jurors identify with. Don't be a bully, to witnesses, court personnel, or your colleagues.

5. Sharp practice and trickery, to the court and your opponents. Strike hard blows, not foul ones.

6. Wasting jurors' time. Five experts instead of one, heedless, needless repetition--violating the principle of parsimony. They resent your wasting their time, in a society increasingly conscious of time. You also do yourself in by repetition because two presentations of the same issue make it likely that there will be some contradiction, however minor, between the two.

7. Unpreparedness. Inexperience can be excused. Not being a performer can actually help you. But not knowing your case will do you in.

SPEAKER AND HEARER: CONTEXT

In Persuasion: The Litigator's Art, I discussed the context of communication. Earlier in this book, I spoke of the juror who resented the "innuendo" projected by lawyers while questioning witnesses. A long time ago, a journalist reporting on a case I tried wrote that I had "diffracted a wide range of emotions," ranging from skepticism to umbrage to sincerity.

When you are examining a witness, you must always be aware of context. You must think, "Who is my intended audience and how will they receive what I am doing with this witness?" Most of the time, you will want the jurors to grasp what you and the witness are saying, and to think well of you for putting the questions the jurors want to have answered.

The jurors' grasp, or refusal to grasp, owes as much to your manner as to what the witness is saying. Due to bias, some jurors will accept a male lawyer's strong and strident cross-examination, while if a female lawyer used the same demeanor they will tune out the aggressive woman. This is a socially-determined stereotype at work, but no less worthy of consideration for all of that. Communication is governed by a context made up of procedural rules and socially-determined attitudes. Your relationship to the witness, while being persuasive, must take place within the limits determined by those rules.

Sometimes, your audience is not the jurors. When laying a foundation to admit evidence, your questions and the witness's answers are for the judge's benefit. Sometimes, you will not be trying to communicate with jurors or other deciders. You may, like John Brown in his trial at Harper's Ferry, be trying to speak to a world outside, perhaps because you despair of winning in the courtroom at that particular moment.

CONCLUDING WORDS

Studies of our profession, and especially of the litigators, tell us conflicting stories. Many voices have decried the litigation explosion and have said there are far too many lawyers filing far too many lawsuits.

When you look at who is filing all this litigation, you find that people without substantial means do not have anything like equal access to justice in the courts. It is probably true that too much litigation is being filed; one study reported that more than half the time, lawyers did not even call up the other side and try to settle the case before filing suit. Most cases settle, and a lot of those could have been settled before filing. Some litigation is filed to create unwarranted costs for the opponent.

It can be demonstrated, however, that except where public assistance, fee-shifting, or the contingent fee work to make lawyers available, ordinary people with ordinary claims are left out.

So, in my view, a lot of the litigation we are seeing is the wrong kind. When we combine that with the fact that much litigation is conducted inefficiently, without attention to goals, we can see an important contradiction. Sure, many young lawyers self-identify as litigators. Almost all of them are involved in what is called litigation. Yet the kinds of litigation they do, and the kinds of tasks they are assigned in that litigation, hardly fulfill their own image of what trials and trial lawyers are about.

The result: Young litigators become cynical, or they go along with skewed views of the litigation process, or they change jobs within the profession, or leave the profession altogether.

I hold a unitary, holistic, view of the profession and the professional. Your commitment to the defense of rights, your view of litigation as storytelling within a certain principled framework, and your insistence on your and your client's and witnesses' dignity are all of a piece.

Surely you will not approach the ideal in every case. I am, however, arrogant enough to say this: If your work situation does not permit you to develop trial strategies that fulfill your professional standards and goals, you may want to look for another job.

If you cannot, in a particular case, develop a story that will appeal to jurors' sense of justice, that case should probably be settled unless your opponent leaves you no choice but to try it. You operate within personal as well as ethical constraints that counsel against going to trial on "smoke and mirrors."

I remember hearing comedian Don Adams aping a lawyer's opening: "Members of the jury, my opponent has told you that he will prove my client is a thief and a liar. That's easy for him to say. He has evidence. Me, I have to rely on guile and trickery."

Of course, great lawyers have prevailed against odds by finding a story where others said there wasn't one. In criminal cases particularly, there is often no choice but to go to trial, treading the honorable path of putting the state to its proof. In criminal cases, there is a tradition of jury independence that makes the story more important even than some narrow and technical view of legal obligation.

If you find your practice is making you litigate case after case in which there is not really a story to be told, that is a signal about you and the profession. Maybe you need to recharge. Maybe you need to practice in a different setting, where cases are chosen by different standards.

The more I read, study, teach, and exercise our profession, the more convinced I am that access to justice by adversary trial of grievances is a basic element of any fair system of governance. I find this faith reinforced as I talk to people who are fashioning and refashioning systems of justice in other countries. If, in a particular country, or among particular people, justice is demonstrably not being done by this means, that is not a criticism of the tools of our profession but of the manner in which they are being used, or the way in which the tools are rationed.

At the beginning of this book, I set out three precepts, which now repeat:

1. Deciders perceive whole stories.
2. The way you tell it makes all the difference.
3. You always navigate by dead reckoning.

To these, I add a fourth:

4. The dialectical process of investigating events is the one best calculated to reach a fair result.

The first three precepts, and almost the whole of this book, deal with methods of presenting your case at trial. This fourth precept deals with the way the world works, through

the continuing clash of opposites in an unending process of renewal and revitalization. Like John Steinbeck's friend Doc Ricketts, we must learn to see the difference between things as they are and things as they are being sold to us, beyond the "worded idealisms" that mask things as they are. If we understand the rhythm of life's movement, we can more clearly see how the clash of words and thoughts ought to work. Litigation is a construct, a set of rules based on an idea about conflict. If the two sides are not remotely equal, or if one wields a powerful and demagogic set of social constructs, the structure seeks to resemble its natural archetype and becomes instead hypocritical or perverted.

You can and should progress through understanding the mechanism of trial to the dialectical process itself. You can then refresh your understanding of so-called rules and learn when they must yield to your deeper understanding of the way things work.

So keep on learning. Don't confuse losing a case here and there with the utter failure of yourself or the bankruptcy of your situation. As Mark Twain reminded us in "Pudd'nhead Wilson's New Calendar":

> We should be careful to get out of an experience only the wisdom that is in it--and stop there; lest we be like the cat that sits down on a hot stove lid. She will never sit down on a hot stove lid again--and that is well; but she will never sit down on a cold one any more.

Notes to Chapter Sixteen

1. The Buller-Erskine exchange is quoted in J. F. Stephen, 1 A History of the Criminal Law of England 331 (1883).
2. The Pudd'nhead Wilson's New Calendar wisdom was quoted in Snell v. Tunnell, 920 F.2d 673, 675 (10th Cir. 1990).

Bibliography

What should you have on your shelf? Litigation, the quarterly publication of the eponymous ABA section, always has useful material. Past issues are in many libraries, and available online.

Throughout this book, many rules of evidence are cited and discussed. The best desktop reference is Steven Saltzburg, et al., Federal Rules of Evidence Manual. This work discusses principles, but is mainly a digest of relevant cases. It also includes the text of Advisory Committee Notes and citations to other sources. I always begin with this work. Because some of this law is moving so fast, and because the Saltzburg, et al. work is so compendious, I have not put in detailed citations to discussions of evidence principles. Many states have evidence law works that are valuable for state court practice.

The ABA Litigation Section has published:

The Litigation Manual: A Primer for Trial Lawyers, Second Edition (1989). This is a collection of articles that first appeared in the ABA Section of Litigation magazine Litigation. It is an invaluable reference on all phases of trial preparation and trial.

Expert Witnesses (1991) (Faust Rossi, ed.). This book was published by the Section of Litigation and contains chapters by many contributors. Professor Rossi's long introductory section ably summarizes the legal principles governing use of expert testimony. The remaining sections offer practical insights into particular kinds of expertise and strategies for preparation and examination of experts. Some of the material has been eclipsed by Daubert and its progeny, but the book remains a valuable resource.

Michael E. Tigar, Persuasion: The Litigator's Art (1999), a companion volume to this one.

In addition, keep abreast by looking at current Litigation Section offerings.

Other books on my shelf include: Francis Wellman, The Art of Cross-Examination (Collier, ed. 1962) [Wellman]. This classic book contains transcripts of exemplary cross-examinations, some of them classics. The social attitudes of Mr. Wellman, and of some of the lawyers whose work is portrayed, are reactionary, but the book is worth reading. A paperback edition is available. I also read a lot of legal history. I like Ephraim London's two-volume work, The Law As Literature and The Law In Literature. Many celebrated trials are available in various formats, to read and study. I also recommend Attorney for the Damned, a collection of Clarence Darrow's speeches; Darrow's The Story of My Life, and any of the biographies of Darrow.

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