Trial Advocacy Fundamentals:

A (Very Short) Primer on the Basics of Trial Advocacy

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I. Case Planning

Effective trial advocacy begins with careful preparation before trial. Through discovery, you have assembled a large collection of information about the controversy. But your work has only begun. You now face the task of presenting that evidence to a jury in a manner that will (1) make sense to an audience that knows nothing about the case; (2) persuade that audience to accept your version of the events; and (3) do so in a very limited amount of time. The case that you have spent weeks to investigate may be tried in only a day or two. How can you do it?

1. **Develop a factual "theory of the case."** Trials involve disputes over facts. Participants in events may have very different views of "what happened." You need to find a version of "what happened" that is most favorable to your client, consistent with the evidence, and that a jury is most likely to accept as accurate. This is not always a simple matter. It may require you to make choices among several possible theories. (e.g. "My client didn't take the pig. But if he took the pig, it was actually a gift from the farmer. But if it wasn't a gift, he was so crazy he didn't know what he was doing."). Except in rare cases, avoid multiple or inconsistent theories.

2. **Develop a legal theory of the case.** You must understand the elements of your claims or defenses. (Standard jury instructions provide a useful source.) Your "factual theory" needs to fulfill those elements or demonstrate that the opponent has failed to fulfill those elements. In other words, your legal theory is "why you should win" if the jury accepts your version of the facts.

3. **Find a theme.** Trials are more than an academic exercise in proving facts to satisfy legal elements of a cause of action. Jurors are human beings who need to be persuaded. Give them a "theme" that will convince them not just that you DO win under the law, but that you SHOULD win. Examples:

-This is a case about greed. Acme is a company that puts profits before people.
-Mary Smith's only companion today is pain. This case is about the pain that she will wake up to every morning for the rest of her life.
-This case is about taking responsibility. Elco has dumped industrial waste in the Smith River for forty years and never taken responsibility for the results.

4. **Organize and Edit.** A trial is not an exercise in placing all possible witnesses before the jury and asking each to tell "everything." All audiences have limited attention spans and little patience with dull presentations of unimportant details. Juries are no exception. In preparing your case, identify the essential facts that you must prove to satisfy the elements of your case. Identify favorable "high impact" facts which will persuade the jury and contribute to your theme. Then choose your witnesses, exhibits and plan your examinations with the aim of proving those facts simply, directly and efficiently. Edit and re-edit your case to eliminate unnecessary evidence. Get to the point!

II. Opening Statement

A. Its importance. First impressions matter ... a lot! Studies show that 50 to 75% of jurors

make up their minds during opening statements and never change their view.

B. Its purpose(s). The "official" purpose of opening statement is to provide the jury with an outline or synopsis of the evidence that they will hear. ("Road map" and "sign post" analogies are common.) Remember, before they hear opening statement, the jurors know NOTHING about the case. Your opening should leave them in a position to understand the evidence and place it in the larger context of the overall case. Keep it simple, direct and organized. Do not leave them confused.

An equally important function of opening statement is to PERSUADE the jury to accept your version of the facts.

C. The rules. Closing argument is "argument." Opening statement is not "argument." If you "argue" during opening statement, your opponent may object and the court may instruct you not to "argue." What is "argument?" There is no simple rule, but a few examples may help. "Argument" includes explicit appeals to emotion ("The defendant's disdain for human life will disgust you, members of the jury."), direct comments on credibility ("Joe Smith will lie when he sits on that witness stand."), or suggestions to draw particular inferences from facts ("Mary's stumbling, slurred speech and blood-shot eyes lead to only one conclusion: she was legally drunk.").

If you can't "argue," can you still persuade? Absolutely! Just let the facts argue for you. Choose vivid details. Use "high impact" facts. ("It was her seventh birthday. A clear fall afternoon. Susie rode her new bike along the quiet streets of her neighborhood. As she waved at her friend, Henry Smith, she had no way of knowing that the defendant, Horace Jones, was racing through that same neighborhood, late for a business meeting he thought was more important than the 25 mile per hour speed limit in that residential neighborhood. The last thing she heard was the squeal of a skidding car behind her ...."). You will not have to tell the jury what to think if you assemble the facts in a convincing manner. (For example, instead of "Joe Smith will lie;" try "The state's only eye witness is Joe Smith. Now when the police first approached Smith, he told an entirely different story than the one you will hear from him. He sat across the table from Detective Jones, upstairs in this same courthouse, and said ....").

D. The technique (DOs and DON'Ts)

1. **Tell your story.** Present your factual "theory of the case." Tell the jury "what happened." Think of opening statement as story-telling. Make the "action" come alive with visual images. Bring the jury "into" the story. Help them to "see" the scene.

2. **Start strong.** Capture the jury's attention early. You don't have to start with the mundane details just because they come first chronologically. Pick a "high impact" moment for your beginning. A "flash back" technique may add interest. ("At noon on January 8, Joe lay face down in the middle of Main Street. Three bullets had pierced his lungs. How did it happen? Let me take you back about two weeks to Christmas ....")

3. **Sound your theme.** Scatter your chosen "theme" throughout your opening. You want the jury to remember it.

4. **Use simple, direct language.** Favor nouns and action verbs over adjectives. Avoid "lawyer words." (No: "The defendant's vehicle proceeded against the traffic control device

and was involved in a collision with the plaintiff's vehicle." Yes: "Mr. Smith drove his Mack truck through the red light and smashed into the side of Jenny Jones' Honda.")

5. **Take your time.** Adrenaline means you will talk faster than you think. The jury will get lost in a "machine-gun" presentation. Slow down.

6. **Tell the jury what you want.** Finish your opening by telling the jury what verdict you will seek. ("After you have heard all the evidence, I will ask you to give your verdict for Jim Smith, in the amount of $100,000." [Note: in some jurisdictions, you are not permitted to specify an amount in some types of cases. Check out the law before you create a mistrial.])

7. **Don't read it.** Limit your use of notes. Try using a few notes in BIG PRINT. That allows you maximum eye contact with the jury. Rehearsing your opening a few times with a spouse, friend, or just with the mirror will help free you from a "script."

8. **Don't say anything you can't prove.** Never, never, never make reference to inadmissible evidence. That's a quick route to a mistrial and probably to sanctions against you. Avoid mentioning evidence of uncertain admissibility. If it's important, try to get a pretrial ruling. Do not "oversell" your case, by taking a more extreme position than the evidence will support.

9. **Do not inject personal opinion.** Your personal belief is irrelevant. Ethical rules prohibit your expression of personal opinion to the jury. Nevertheless, always be aware that your sincerity and credibility will matter -- a lot -- to the jury. Don't try to "fake it." Don't ever make promises you can't keep. Find a theory of the case that you can believe in. The jury will "sense" your feelings. You won't have to tell them.

10. **Do not ignore weaknesses.** All cases have some "bad facts." The jury will hear them. You will lose credibility if you ignore them. Confront them. Put them in a favorable light or explain why they don't matter. You may even turn them to your advantage. (E.g. Defending a fraud case. "My client was just plain foolish. He was in a hurry. He didn't pay attention. But he is accused of deliberate fraud ....")

11. **Do not summarize the evidence witness by witness.** The best way to put the jury to sleep is to say, "Now Mr. Smith will testify to blah, blah, blah. Then Ms. Jones will tell you blah, blah blah. Then Mr. Peters will testify ...." When you are "telling the story," you can, and should, make occasional reference to witnesses who will be the source of information. That helps the jury to understand the context when a witness takes the stand.

III. Direct Examination

A. The Rules. As a general rule, you may not "lead" the witness on direct examination. A "leading" question is one which suggests an answer or impermissibly limits the range of possible answers. The most typical leading question is really an assertion of fact by a lawyer, to which the witness merely agrees. (Q: It was rainy that morning, wasn't it? A: Ahh, sure, if you say so.)

As a matter of discretion, most courts permit some leading questions on preliminary or noncontroversial matters, or with an inarticulate witness, because leading questions may save time.

B. The Technique.

1. **Let the witness communicate with the jury.** A good direct examination looks like a witness having a conversation with the jury (except, of course, the jury doesn't ask the questions). The lawyer serves to direct the conversation, to "nudge it along" from time to time. The witness, not the lawyer, should be the center of the jury's attention. The witness should do most of the talking. Ask simple questions that permit the witness to "tell the story." On occasion, it may help to "invite the jury into the conversation." Use gestures or (where the court permits) position yourself in a manner that will direct the witness to speak toward the jury when answering questions. Or simply ask the witness to "tell the jury what happened."

2. **Use simple, open-ended questions.** Try to frame questions that ask the witness "who, what, where, when, how or why" or to "explain" or "describe" events. Avoid complex questions, particularly those that use "lawyer words." Avoid the rather common tendency to answer your own questions, or to make them sound like a "multiple choice" exercise. (Q: How long have you been with the company; three or four years? Q: Why did you slow down; was it difficult to see or just slippery pavement?).

3. **Listen.** The witness is more nervous than you are. She will skip details, leave something out, or fail to give a responsive answer. You must listen and ask follow-up questions as necessary.

4. **Organize. And use "signals" to highlight your organization.** Your direct examination should make sense to the jury. Organize it by topic or chronologically. When you start a new topic or a new series of events, begin your questions in a manner that will "signal" both the witness and the jury that you are moving to something new. (Q: Now, Ms. Smith, I want to ask you about that night in the bar. What time did you arrive ....).

5. **Edit.** You don't have to ask the witness to tell everything he may know about the case. Remember the jury's attention will drift when your examination drifts into irrelevance, unnecessary detail or repetition. Get to the point early in your examination. Focus on important events and develop the kinds of details that will make your story come alive and ring true. But if you give the jury every detail about everything, the important gets lost in the trivial.

6. **Confront weaknesses.** If a weakness is likely to come out on cross-examination, find a way to explain or diffuse it on direct examination.

IV. Cross-examination

Cross examination is your opportunity to score persuasive "points" with witnesses called by your opponent. It often provides the highest drama of a trial. To the questioner, however, it also poses the highest risk. The witness does not want to help you. In fact, she is probably on the alert for any opportunity to send your case down in flames. A successful cross-examiner must limit that risk by (1) pursuing only specific, limited goals, and (2) using questioning

techniques that “control” the witness.

1. Set specific goals. “Recreational cross-examination” is a contact sport from which the questioner typically emerges with the black eye. Don’t just “wander in” and ask questions because you are curious. Don’t just rehash the direct examination. Have a plan. Execute that plan. Then sit down!

Typically, your goals in cross-examination will be (1) to elicit favorable facts which you can confidently predict that the witness will give you; (2) to obtain specific factual admissions that later will provide the “raw material” for points you will make in closing argument; and/or (3) to discredit or “impeach” the witness so that the jury disbelieves him.

2. Ask only leading questions! The rules permit leading questions on cross-examination. Good advocacy requires that you use virtually nothing but leading questions. They are your best tool for taking control of the dialogue with the witness. The best questions often are not really questions at all, but simple assertions of fact with a raising of the voice at the end. Q: You were not wearing your glasses? Q: It was dark outside?

3. Ask about facts. One new fact per question. Complex questions give witnesses room to “wiggle” or explain an answer. Questions asking for conclusions or opinions (e.g. the dreaded “Why” questions) give witnesses the opportunity to make speeches to the jury while you cringe. Pose a question that leaves the witness no choice but to admit or deny a simple fact (typically a fact which other evidence will compel the witness to admit). Break complex concepts or a series of events down into discrete facts. Force the witness to confront them one at a time.

4. Move “step by step” toward your goal. Don’t be greedy or in a hurry. “Build” your points one fact at a time. For example: DON’T ask Q: You really couldn’t see the accident very well, could you? DO ask Q: It was 11p.m.? A: Yes. Q: It was dark outside? A: Yes. Q: The closest light was at 10 th and Main? A: Yes. Q: That’s two blocks away, correct? A: Yes. ....

5. Ask questions for which you can predict or control the answer. Curiosity killed the cross-examiner .... Do not expect the witness to do you any favors in uncharted territory.

6. Have “ammunition” available to control the answers. Look at the witness’ prior statements (depositions, affidavits, statements described in police reports). Look at documents and other evidence which may establish a record that the witness cannot plausibly deny. Make yourself thoroughly familiar with those materials. Use them as a guide when you choose the facts to include in your questions. Follow them precisely!! Do not paraphrase or characterize. That leaves the witness room to “quibble” and qualify an answer. Have the “ammunition” at your fingertips so you can confront the witness if you get an unexpected answer.

7. Do not go “too far.” Avoid the “one question too many.” If you follow the rules, you will require the witness to admit a series of facts which will build nicely toward a point you wish to make in closing argument. As you sense imminent victory, you will be sorely tempted to close with a flourish by asking the BIG question. It usually begins with the words “and so ....” (For example, Q: And so, Ms. Witness, you really couldn’t see the accident, could you? A: Actually, I saw it quite well. You see, I was intently watching through my night vision, super

magnification telescope at the time....) Use cross-examination to assemble the facts, the raw material for your arguments. Save the argument for closing, when there's no witness who can contradict you.

Impeachment

Impeachment means eliciting facts to show that a witness should not be believed, either in whole or in part. There are many potential subject matters for impeachment. Here are a few.

1. *Prior inconsistent statements*. The witness gave a different version some other time.

2. *Bias or prejudice*. The witness is predisposed to favor one party over the other.

3. *Self-interest*. The witness has a personal stake in the outcome.

4. *Corruption.* The witness has been bribed, bought, improperly influenced.

5. *Prior convictions*. The witness has a criminal conviction that makes him appear less credible.

6. *Prior "bad acts*." The witness has engaged in fraudulent, dishonest, or otherwise disreputable activity that affects credibility.

7. *Memory.* The witness cannot remember accurately or in sufficient detail.

8. *Perception.* The witness could not see, hear or otherwise perceive accurately.

9. *Inconsistent facts.* The witness' version of events is inconsistent with other credible evidence, or is internally inconsistent.

Impeachment by prior inconsistent statement (or by omissions in prior statements) is a widely used technique. The classic technique follows:

1. **Commit** the witness to his latest version of the "truth." Usually, this means reminding the witness (precisely, accurately) of what he said on direct examination. (Q: Mr. Witness, you just told this jury that you despise Frosted Flakes? A: Yes, that's what I said.)

2. **Credit** the earlier inconsistent statement. Ask a series of questions designed to show that the earlier version (the one consistent with your theory of the case), is more worthy of belief than the "new" in-court version. (Q: You hired a personal chef, didn't you? A: Yes. Q: And you gave him a list of your favorite foods, right? A: Yes. Q: You wanted him to serve you the foods you listed? A: Right.)

3. **Confront** the witness with the prior inconsistent statement. (Q: Mr. Witness, I'm showing you the list that you wrote for your chef. Do you recognize it? A: Yes. Q: In that list, you wrote "I love Frosted Flakes. I eat them every day. I can't help myself." Did I read that correctly, Mr. Witness? A: Yea, you can read alright.)

A few tips on impeachment by prior inconsistent statements:

-Be tactful. Don't let the jury feel you are intimidating a witness or being unfair. Some witnesses will be easy targets for impeachment. The jury wants you to "go after" them (e.g. Joe, the con artist ax murderer). With others, you will need to appear polite, understanding, almost apologetic when you demonstrate that they may be "confused." (E.g. seven-year-old Cindy Lou Who).

-Impeach only in important areas. Don't let the jury feel you are "quibbling" over details that simply escaped recollection of an honest witness.

-Do not let it appear that you "buy into" the version that you are attempting to discredit. When you "commit" the witness to his latest version, use words like "you now claim ..." or "your testimony today is ..."

-When crediting the prior statement, shut off "avenues of escape" that would leave the witness "wiggle room." (Q: Nobody forced you to talk to the police? A: Right. Q: You appeared there voluntarily? A: Yes. Q: You had time to think about what you said? A: Yes Q: You even wrote it down? A: Yes. Q: And after you wrote it, you read it, didn't you? A: Yes. Q: And you had an opportunity to change anything that was inaccurate? A: Yes. ....)

-When impeaching by "omission," your "crediting" process must demonstrate that the subject matter of the omitted statement was important enough that it would be included if true. (Q: You wanted to help the police catch the guy who attacked you? A: Yes. Q: So you tried to give the police a complete description, correct? A: Yes. Q: You told them all that you remembered about his appearance? A: Yes. Q: You included a description of clothing? A: Yes. Q: You said your attacker wore "dark clothes." A: Yes. Q: That's all you said about his clothes, correct? A: Yes. Q: Now, take a look at your entire statement to the police. A: O.K. Q: It doesn't say that your attacker wore a dark purple kilt and high knee socks, does it? A: Well, I left that part out ....)

-When you confront the witness with the inconsistent statement, maintain control by reading the statement yourself. Your only question to the witness should be something like, "Did I read that correctly?" Or "That's what it says, right?"

-After you have demonstrated the inconsistency, move on to something else. Do not argue with the witness. That will only give her a chance to explain the inconsistency.

V. Redirect Examination

Following cross-examination, the party who called the witness may conduct (typically a brief) redirect examination. The basic purpose of redirect examination is to permit the witness to explain inconsistencies or problems that arose on cross-examination but which (because of the control asserted by the questioner) the witness did not have the opportunity to address during cross-examination.

Redirect examination is not an opportunity to question the witness on new topics. As a matter of law, redirect is limited to the matters raised on cross-examination.

If cross-examination has not substantially harmed your witness or left important matters unexplained, the best tactic is simply not to ask any questions.

If you do ask questions on redirect, you will typically start by turning the witness' attention to the part of cross-examination which you want the witness to explain. (Q: Ms. Witness, you recall that Mr. Smith asked you some questions about your glasses? A: Yes. Q: Please explain to the jury how you were able to see the collision without your glasses. A: Well, my glasses are only to help me read. I have perfect vision when it comes to anything more than ten feet away.)

Remember, on redirect examination you may not use leading questions.

VI. Introducing and Using Exhibits

Prepare. Before trial begins, you should decide what exhibits you plan to introduce, what witness(es) you will need to lay the necessary foundation, and how you plan to use the exhibit to persuade the jury. You should make copies of exhibits for the court, opposing counsel and yourself (assume that the witness will have the original while you're asking questions). You should mark the original exhibit with an exhibit sticker or number. In many courts, you can, and should, pre-number the exhibits and provide a list to the court and opposing counsel.

Edit. Do not introduce in evidence every document and thing that relates to the case. Choose the items that are necessary to prove your case or important in persuading the jury. Cut out the rest. A jury will have limited time to assess the case. Make their job easier by limiting the "junk" they must sift through in order to get to the important stuff.

Nuts and Bolts. Until an exhibit is "in evidence," it is not part of the information that the jury may consider in deciding the case. Here are the typical courtroom steps for introducing an exhibit into evidence. (In many courts, especially in civil cases, exhibits will be marked, copied, exchanged, and indexed before trial. Sometimes, courts will even require objections to be raised and ruled upon before trial. In those courts, many of the following steps will be omitted in the courtroom.)

1. Mark the exhibit. (Attach a sticker that says "Exhibit #1).

2. Identify the exhibit on the record. ("Your honor, I would like to show the witness a document which has been marked as Exhibit One for identification.) At this point, the exhibit has been marked "for identification only." It is not yet "in evidence."
3. Show the exhibit to opposing counsel. She needs to see it in order to formulate any objection.

4. Show the exhibit to the witness. Some courts will let you walk it to the witness. In others, you hand it to a clerk or bailiff who carries it to the witness. It is proper courtroom etiquette to ask the court's permission before approaching the witness. ("Your honor, may I approach the witness?")

5. Lay the foundation. Elicit from the witness the facts necessary for the introduction of the

exhibit. See “Foundations” below.

6. “Offer” the exhibit. “Your honor, I offer Exhibit One in evidence.”

** At this point, the opposing party may object. If the court has all the information needed to rule on the objection, the court will immediately either “sustain” the objection (i.e. agree with the objection and therefore refuse to admit the exhibit in evidence) or “overrule” the objection (i.e. disagree with the objection and admit the exhibit in evidence). If the opponent wishes to present other information relating to the admissibility of the exhibit, she may ask for permission to conduct a “voir dire” examination. If the court permits, the opponent will then ask questions of the witness in an effort to demonstrate that the exhibit is inadmissible. The court will then issue its ruling on the objection. **

7. The court will rule. The exhibit is admitted in evidence, or the objection is sustained..

8. Now, if the exhibit is in evidence, USE IT!!! You have gone to all of this trouble to get the exhibit in evidence, now you need to use it in a persuasive way. If it’s a photograph or diagram, show the jury. (Make sure it’s big enough for all to see.) If it’s a document, have the witness read the critical passage or, better yet, use an enlarged copy that the jury can read while the witness explains it. Or use presentation technology that will enable the jury to experience the exhibit along with the witness. (But, that’s the next course!)

Foundations

The court must determine whether an exhibit is admissible under the rules of evidence. In order to make that decision, the court must have some facts. The process of presenting those facts is called “laying the foundation” for introduction of the exhibit. This outline does not aim to teach the rules of evidence. Below are a few basic points which will demonstrate how to lay the foundation for the most common sorts of exhibits.

1. **Authenticity**. To admit an item in evidence, the court must find that it “is what its proponent claims.” Rule 901, F.R. Evid. In its simplest form, this requirement can be met by handing the item to a witness and asking simply, “What is it?” Of course, the witness must demonstrate that he has personal knowledge that renders him competent to identify the object. Again, most simply, that requirement may be met with the question, “How do you know?” A foundation to authenticate a document, therefore, could be this simple: Q: Mr. Witness, what is exhibit two? A: It’s a letter I received in my office mail. Q: How do you know that’s the letter? A: Because I kept the original in my file until I removed it to bring it here today. Another typical pattern would be: Q: Are you familiar with exhibit 3? A: Yes. Q: How? A: I wrote it. Q: Please tell us what it is. A: It is a letter I wrote to the chairman on June 3.

Typical means of authentication are:

-facts showing the item is unique. Q: Officer Candy, do you recognize exhibit one? A: Yes, this is the gun that I recovered from the crime scene. Q: How can you tell? A: I scratched my initials in the handle and I see them there right now.

-chain of custody. Facts showing how the item made it from the scene of relevant events to the courtroom. This typically requires the testimony of each witness who handled the exhibit along the way. You may have to call several witnesses to lay a foundation based on chain of custody. For example, Officer Candy testifies that she recovered a bag of white powder at the defendant's house and that she took it to Laboratory Technician Smith. Smith then testifies that he brought the same bag to court. Each witness testifies that the bag and contents are in the same condition as they were when first received by the witness. The chain is now complete. We know the same bag made it to the courtroom in the same condition..

2. **Photographs and Diagrams.** These items depict a real place or thing**.** Assuming that the place or thing itself is relevant to the case, the photo or diagram may be admitted if a witness familiar with the object or the scene testifies that the photo or diagram "accurately depicts" it. For example: Q: Officer, are you familiar with the intersection of Broad and 10th? A: Yes. Q: How? A: I pass through it every day. Q: I show you what has been marked as Exhibit one. Can you identify it? A: Yes, it is a diagram of that intersection. Q: Does it accurately depict the intersection? A: Yes. Q: Your honor, I offer exhibit one in evidence.

3. **Business records.** You may authenticate a business record, like any other exhibit, through the testimony of a witness who can say that it is in fact the record. Businesses often have clerks, bookkeepers or other "custodians of records" who can provide such testimony. Authenticity, however, may not be your only problem. In many instances, a document will be an inadmissible hearsay statement unless you can demonstrate that it meets a hearsay exception. Typically, you can do that by presenting facts sufficient to meet the requirements of the "business records" exception to the hearsay rule. Rule 803(6), F.R. Evid. The witness must testify that:

-the record was made at or near the time of the events it records
-from information provided by a person with knowledge of the event recorded
-the record was made in the course of a regularly conducted business
- it was the regular practice of the business to keep such records.

VII. Objections

You should object to your opponent's question when (1) you believe you have a valid legal basis and (2) you feel the question and/or the answer will hurt your case. You need not object to every objectionable question. As a tactical matter, it is often best to save your objections for things that really matter. The jury will tend to disfavor a lawyer who objects constantly with little reason.

1. What do I say? State your objection and the grounds succinctly. "Objection. Hearsay." "I object, your honor. That's irrelevant." Stand up as you object (in most courts).

2. When do I object? You should make your objection immediately upon your opponent's completion of the question. Do not wait for the answer. If a question is not objectionable, but an unresponsive answer includes objectionable material, then object as soon as the witness begins to stray into objectionable material. You can then move to "strike the answer."

3. What are the grounds for most objections? Here are a few typical grounds:

-relevance
-hearsay
-privilege
-calls for opinion or conclusion
-leading
-repetitive ("asked and answered")
-"beyond the scope" (of the direct or the cross-examination)
-assumes facts not in evidence
-misstates the evidence
-vague, ambiguous
-calls for speculation
-argumentative
-compound
-lack of foundation (typically dealing with a failure to authenticate an exhibit)

4. What do I do when the opponent objects? First, pause for a second. Many judges rule immediately upon objections and do not wish to hear argument. If the judge overrules the objection, then simply ask the witness to answer. If the judge does not rule immediately or rules against you, you must make a quick decision whether to argue the point. If you choose to make an argument, typically you should begin by asking the court's permission to argue the point. Try "May I be heard, your honor?" or "May I respond to that objection, your honor?" Address your argument to the court. Never, never argue directly with opposing counsel.

5. What do I do if the judge sustains the objection? If the judge sustains an objection based on the form of your question (leading, argumentative, compound, etc.), then take a moment to rephrase your question to avoid the objection. Then ask it correctly. If the objection goes to the substance of the evidence that you wish to introduce (e.g. hearsay, relevance), and there is no unobjectionable means of making the same point, then you must decide whether to make an "Offer of Proof." An offer of proof is a statement on the record to show what evidence you would have introduced if the court had permitted you. It is a necessary step to preserve for appeal the issue which arose when the court sustained your opponent's objection. Obviously, the offer must be made out of the jury's hearing. You should make an offer of proof where the court's ruling relates to a matter of significance.

VIII. Closing Argument

This is the last chance to tell your story to the jury. Now you can do so by making use of the evidence they have already heard. As in Opening Statement, however, do not simply summarize, "Witness X said blah, blah. Then Witness Y said blah, blah...." "Weave" the exhibits and testimony into your "story" to make it even more vivid.

The Rules. Now you can "argue" the case. You should address the legal elements of the cause of action or defense, and show how the facts do or do not satisfy those elements. You can ask the jury to draw inferences. You can comment on the strength of the evidence, on witnesses' credibility. You can tell fables, quote the Bible, even cry if you can't help yourself. There are still a few limits:

-Do not express your personal opinion.

-Do not mention facts not in evidence.
-Do not misstate the evidence.
-As prosecutor in a criminal case, do not comment upon the defendant's failure to testify.

A few tips:

1. Show and tell. You introduced all those exhibits for a purpose. Now use them!! Illustrate your closing by holding up photos, diagrams and exhibits. Use your voice and gestures to "act out" important testimony. You are on stage. Make it come alive!

2. Sound your theme. You did it in opening. Now return to your theme.

3. Appeal to reason (explicitly). Appeal to emotion (implicitly). Do not tell the jury what they should feel. Use facts and arguments that make them feel for themselves the emotions that support your theme. Marc Anthony's speech ("And Brutus is an honorable man ....") started a popular uprising against Brutus.

4. Refer to the judge's instructions. Help the jury make sense out of critical legal concepts. Put them in simple terms. Highlight and quote directly from a few key passages in the court's instructions. Choose the ones which you most want them to focus upon during deliberations.

5. Refer to your opening. Prove that you have kept your promises. ("Remember, in opening I told you that defendant was traveling 50 miles per hour in that residential neighborhood. Now you can see for yourselves. Here is the photo of the skid marks ....")

6. Don't overstate the evidence. Your credibility is key.

7. Deal with weaknesses in your case. You know your opponent will.

8. Avoid alternative arguments. Stick to one, consistent theory of the case.

9. "Send a message." Suggest that the verdict has broader significance than just this case.

10. Ask for your verdict. Before you sit down, tell the jury what verdict they should find.