

Trial Advocacy for the Child Welfare Lawyer

Telling the Story of the Family



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Traditional Trial Advocacy for Child Welfare Court?

- The art of trial advocacy is the art of persuasion in the courtroom
- Persuasion is a duty of every lawyer, including the child welfare lawyer
- Blending of the traditional art into the context of modern child welfare court
- Be part of the evolution of child welfare court from relaxed informal advocacy to a constitutional court

Bench vs. Juries

Judges and Persuasion

New Research shows judges process information similarly to lay people on juries

- Approximately 80% of judges want lawyers to formulate evidence into more cohesive “stories”
- Approximately 80% of judges want lawyers to simplify technical issues
- The lawyer must “package the case” for the judge
- WY has Jury Option at Adjudication

“Are Judges Becoming More Like Jurors?”
Persuasion Strategies National Surveys 2008

Skill Training Topics

- 1 Case Analysis
- 2 Direct Examination*
- 3 Closing Argument
- 4 Cross Examination
- 5 Expert Witnesses
- 6 Difficult Witnesses
- 7 Exhibits
- 8 Objections
- 9 Opening Statement
- 10 Courtroom Ethics and Professionalism

*The essential and primary source of trial evidence



TRIAL ADVOCACY FOR THE CHILD WELFARE LAWYER

TELLING THE STORY OF THE FAMILY

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Skill 1



Case Analysis

The Story of the Family

Trial Advocacy Chapter 1

Pages 1-11

Trials are Stories

- Lawyers must be storytellers
- Storytelling is the art of portraying events through words and images
 - Words and Images = Testimony and Exhibits
- We learn best from stories: Context
- “Let the judge sort it out” is not acceptable
- Judge to Counsel: “help me do my job”

The Story of the Case

The Story of the Family

- Every child welfare case is a unique case
- With a unique child
- Existing in the context of a unique “family”
- Our job is to find and tell our client’s view of
 - *The Story of the Family*

The Case Analysis

“Finding” the Story

- CA is the development of
 - the facts into the story of the family
 - applying it to the law of the case
 - to achieve the desired outcome
- CA Formula
 - Legal Theory
 - + Persuasive Theme
 - = Case Story
 - + Law
 - = Outcome

3 Parts of the Story

- The Theory is the Legal Theory
 - The elements of the case
 - Primary and necessary, but not enough
- The Theme is the Explanation
 - Why it makes sense to accept or reject the legal theory / elements of the case
 - “Why should I believe your recitation of the facts?”
 - “Oh, Now I see what happened!”
- The Device is the Storytelling **Touchstone**
 - “Anger Kills” “Poor is not Abuse”

Theory

- The theory of the case is the legal elements of the case (derived from the law of the case: statute, case law, jury instruction)
 - Criminal: the defendant, on July 1, 2011, in Fremont County , WY, with intent to injure, shot Jane Doe, killing her.
 - Child Welfare Adjudication: LME, a minor, in the care of mother, on July 1, 2011, in Fremont County, WY, incurred a broken her collar bone, caused by her mother pushing her down the stairs.

Theme (Explanation)

- Theory alone is insufficient
- Theme persuades the listener to believe the theory
- How is it that this makes sense
- **“Now I get it; I see how this happened; yep, that makes sense.”**

Theme

- Criminal
 - John Doe, a veteran of the Afghan war, recently returned home.... (p6)
- Child Welfare
 - Ms. Evans is a young, single mother of a difficult child.... (p9)

Theme Consistency

- There is only one per “case”
 - Nuanced only slightly to child welfare
 - Permanence and Timeliness promote fit with theme consistency
- Pick a horse and ride it to the finish
- Be guided in ALL your case decisions by your theme
 - Open, Close, Direct, Cross, Introduction of Evidence, Objections
 - If it fits your theme – use it or let it in
 - If not, exclude it
 - Example:
 - “Accident” and “Cruelty” are inconsistent themes

The Story of The Goat*

- I have no goat, but
- If I had a goat he would not eat cabbages, and
- If he ate cabbages he would not eat yours, and
- If he did eat yours it was an accident, and
- If it wasn't an accident the goat must have gone crazy.

*Robert Hanley used this fable when he represented MCI against AT&T in that landmark antitrust case. MCI prevailed.

Phases of a CW Case Matter

- Dependency cases can be seen as lots of little cases
- Know where you are: Temporary Custody, Adjudication, Disposition
 - Best Interests is not a relevant part of the legal theory at adjudication
 - Still, a theme can run through all phases

Device

The Touchstone

- The device is the touchstone to your story
- Make it the touchstone for the jury or judge as well

- Criminal
 - *The war followed John Doe home*
- Child Welfare
 - *Life is a pressure cooker for Ms. Evans*

Case Analysis Process

3 Tools

- Case Analysis Summary (CAS)
- Good Facts / Bad Facts (GFBF)
- Proof Chart (PC)

Case Analysis Summary (CAS)

Case: _____

Stage: _____

Issue: _____

Standard of Proof: _ Probable Cause _ Preponderance _ Clear and Convincing

Legal Theory / Elements:

1. _____

2. _____

3. _____

4. _____

Theme

Theme Devices / Analogies for the Story

Example: p9

Good Facts / Bad Facts (GFBF)

Good Facts

/

Bad Facts

1.

1.

2.

2.

3.

3.

4.

4.

5.

5.

Example p 9

Proof Chart (PC)

Fact (Element) / Proved By / Where / With (Ex / AV) / Theme

1. _____ / _____ / _____ / _____ / _____

2. _____ / _____ / _____ / _____ / _____

3. _____ / _____ / _____ / _____ / _____

4. _____ / _____ / _____ / _____ / _____

5. _____ / _____ / _____ / _____ / _____

Example p 10

Getting to the PC is the goal of Case Analysis

Case Analysis Order

1. Basic File Review
2. State the Issue
3. Prepare an Initial CAS
4. Complete GFBF (why after CAS?)
5. Review and Adjust CAS Theme
6. Complete the PC
7. Review and Finalize CAS

Case Prep Order

1. Case Analysis
2. Direct
3. Closing (why after Direct?)
4. Cross
5. Objections
6. Opening

Skill 2

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Direct Examination

The Words of the Story

Trial Advocacy Chapter 2

Pages 13-32

Derivation of Direct

- Start with your Proof Chart
 - It should prove your case
- Then all the rest is derivative of direct exam
 - Open
 - Close
 - Cross
 - Objections

Rule of Sensory Perception

The Basis of Direct Testimony

- The Rule of Sensory Perception of Facts
- What did the witness
 - See, hear, feel, smell
 - And do and say
- Focus on the physiological methods of human perception
- Not the interpretation thereof
 - No Opinions or Conclusions

Just the Facts

Not Opinions or Conclusions

- The father was uncooperative is a conclusion / opinion
- The facts are that he
 - Missed appointments, used abusive language, refused to attend classes....
- Both correct and persuasive
- Save conclusion for closing argument because it is argument based on facts
- Lay witness opinion
 - Rationally based on perception

Focus on the Witness

- Preparation
 - Do Prep
 - Don't "coach"
- The Rule and Reason against Leading
 - Its objectionable (witness recollection is required)
 - Its not persuasive

3 Levels of “Suggestion”

- Leading
 - *The house was filthy, correct?*
 - *Yes*
- Suggestive
 - *Was the house filthy?*
 - *Yes*
- Open
 - *What was the house like?*
 - *It was filthy, really horrible....*

Questioning Techniques

- 6 Honest Words
 - *Who, What, Where, When, How, Why*
- Short, 1 Fact, and Sequential
 - *Where did you go?*
 - *What did you see?*
- Headlines
 - *Let's talk about your job*
- Loopbacks
 - *You said she was yelling; what did she yell?*

The Clothing Drill



✓ Use the 6 Honest Words

Who, What, Where, When, How, Why

✓ Use Headnotes

✓ Use Loopbacks

✓ Limited *“Please describe or explain”*

3 Parts of Direct

- 1 Introduction and Accreditation
 - Who are you and why are you here
- 2 Set the Scene
 - Foundation for the action
- 3 Describe the Action
 - What happened
 - What is your contribution to the story of the family

Techniques

- Use Exhibits
 - Stories have words AND pictures
- Sequence within the Topical
- Primacy and Recency
- Engage
- Include some defensive direct

Test Your Testimony

- 5 Part Test
 - 1. Is it relevant?
 - 2. Is it theme consistent?
 - 2. Is this the best witness for these facts?
 - 3. Is there adequate foundation?
 - 5. Is there a hearsay problem?

Sample Direct Exam

- Text pages 21 -29

Comments

- Questions?
- Later:

8 Steps to Persuasive Expert Witness Exam

Skill 3

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Closing Argument

Story + Law

= Verdict

Trial Advocacy Chapter 3

Pages 33-39

Argument

- Argue!
- It is not called Closing “Statement”
- Summation is just a part of it
- Insert the law now
- Argue that $1 + 1 = 2$
 - 1 (evidence) + 1 (the law) = 2 (the verdict / finding)
 - Even though no one said so
 - Now, you get to say so

Preparation

- Draft a Closing following Case Analysis
 - Before or right after direct exam prep
- Early in the process because
 - It is our destination
 - We can't be surprised when we get there
 - Forces us to account for all the evidence
 - I must be able to say / argue this in the end
- Test: Can I argue everything I need to

Closing Principles

Brevity

- A well crafted argument can be delivered in 5 minutes

Credibility

- Argument includes
 - Credibility of your witnesses
 - Lack of credibility of opposition witnesses

Bookend

- Bookend the closing to the opening
- Conform closing to opening via
 - theme and
 - theme devices

Promises

- We kept ours
- They did not

Exhibits and AV

- Evidence
 - Pick it up
 - Wave it around
 - Emphasize the visually impactful
- Jury Instruction and Findings
 - Project them
 - Check them off

Emotion

- Be real
- Engage
 - Eye contact
 - No barriers
 - Cash in your credibility now
- Match the situation
 - Neither flat
 - Nor dramatic

Absolute Don'ts

- Do not
 - State or argue facts not in evidence
 - Misstate a fact
 - Misstate the law
 - Express a personal opinion (No “I”)
 - Argue the Golden Rule
 - Appeal to prejudice
 - Exceed scope on rebuttal

Closing Organization

5 Parts

- 1 The Grabber and Theme Return
- 2 The Facts
- 3 The Factual Argument
- 4 The Legal Argument
- 5 The Ruling

1 Grabber and Theme

- *A mother's love. That's right, this case is about a mother's love. A love so profound that it could penetrate the vice grip that crack-cocaine held on her. A love so profound that when every instinct cried out for more drugs, she resisted. Somehow, this mother fought the withdrawal, the shame, the ridicule, and now the resistance of the government, so that she could care for her child. Yes, opposing counsel is right, this case is about a mother's love, a love without which she wouldn't be here fighting for her child's life.*

2 The Facts

- *We promised you at the outset of this trial that we would show you that what happened to this child was an accident, a terrible, unfortunate accident. And that is what we have done. Let us review what we now know:
....*

3 The Factual Argument

- *Burns of this nature and degree on a small child are not accidental. We know this from the testimony of the emergency room pediatric burn doctors who explained that this child had to have been placed in the scalding tub by another person. We know this because the caseworker, an expert in child development, explained to us that this child was incapable of pulling himself up and falling into the tub. We also know this because the father's explanation is not consistent with the injury. The lack of splash marks tells us that the child did not fall in the tub and struggle until he was found.*

4 The Legal Argument

- *Your honor, the law is unequivocal in our that once basic safety is assured, preservation of the family is the goal. Section 1-1-1 of our child welfare code states that all reasonable efforts must be made to provide appropriate reunification services to a family. These parents are imperfect but want desperately to parent their children. Their testimony and admissions by the caseworker showed that. And the law says they have a right to parent their children and that their children have a right to be parented by them. The court's dispositional order must include a legitimate opportunity and adequate time for both parents to complete drug and alcohol treatment and regain the custody of their children.*

5 The Ruling

- Ask and you shall receive
- Lawyers frequently fail to make a specific ask for the relief they are seeking. This is a mistake. A clear and concise request for the specific relief sought must be made. This is typically the last statement made
 - *Your honor, please issue your Order terminating the parental rights of John Doe and freeing Peter Doe for adoption.*

Rebuttal

- Petitioner Only
- Restricted to Scope of Respondent Closing
 - *The Respondent just asked you for yet another chance. The evidence showed so many chances the department gave this parent. When is enough enough? When Janie is killed by her mother's boyfriend? Now is the time to give Janie a chance at a happy and healthy life. Please return the Verdict Form terminating the parent child legal relationship.*
 - *Consider a preemptive rebuttal in child welfare cases*

Skill 4



Cross Examination

Minimizing and Marginalizing the Witness Impact

Trial Advocacy Chapter 4

Pages 41-51

Nature of Cross

Reasonable Expectations

- To minimize damage or impact
- To marginalize the witness
- To establish an affirmative fact (less often)
- You can't win your case on cross; "you can lose it"
- It is inherently dangerous
- Make expectations reasonable

Scope of Cross (611b)

- Limited to direct under federal rule
 - (and in WY: “subject matter of direct and credibility”)
 - Liberal interpretation
- Many jurisdictions allow anything that is relevant
- A “Defendant's” right to full cross of an “accuser” is a fundamental principle of justice
- Credibility and bias are always allowed

Strategy

- 2 Questions
 1. Did I get hurt relevant to theme and theory?
 2. Is there anything I can do about it?
- If no to 1 or 2, waive cross

Cross Topics

- Discredit the witness him/herself
 - Credibility and bias
- Discredit the testimony with more facts, the rest of the story
- Elicit new information that is harmful to opposition
- Elicit affirmative facts for your case
 - Least likely

3 Topics is a lot!

Form of the Question

- Focus on the lawyer
- Purely leading; suggestive not enough!
- Really a declarative statement
- *You missed 10 appointments, correct!”?”*
- Use voice inflection rather than taglines as a rule

Organization

- By topic
- Use headlines on cross too
- Build incrementally with short 1 fact sequential questions

Witness Control

- You must know the answer
- Establish pace with short, easy questions
- Be firm
- Maintain authority through
 - Demeanor
 - Authoritative tone
 - Directive inflection
 - Eye Contact

Cross Answer Outline

- Dr. Kylie
 - Diagnosis of Injury Opinion
 - Previous visits
- Impeachment Source
 - Treatment notes p 3, line 22
 - Deposition p 26, line 4

The Clothing Drill



- ✓ Use headnotes
- ✓ *Lead with*
 - ✓ *short*
 - ✓ *Declarative*
 - ✓ *1 fact statements*



"We have testimony that you walk like a duck and you quack like a duck. Tell the court—are you a duck?"

Cross: Use The Duck Technique

Headnote: *I'd like to talk to you about what kind of animal you are*

- You can fly
- You can swim
- You have feathers
- You waddle when you walk
- Water runs right off your back
- You get shot at in bird hunting season
- You quack
- **Admit it, you're a duck. NO!! This is one question too many.**

Final Argument:

Your honor, if it looks like a duck and it quacks like a duck, it's a duck!

Recross

- Limited to scope of redirect
- Same analysis as cross
 - Did I get hurt?
 - Can I do anything about it?

Sample Cross Exam

- Text page 48-49

Skill 5



Expert Witnesses

Moving from Perception to Belief

Trial Advocacy Chapter 5

Pages 53-75

Perception vs. Belief

- Perception of fact witness
 - The fact is known via the senses
- Belief of expert witness
 - The belief is formed via expertise

Experts in CW

- Critical to assessment of
 - Dependency / Adjudication
 - Disposition / Best Interests
 - Termination
- Medicine, mental health, social work, education, addiction....
- Courts want to know what is best for kids and will rely heavily on expert opinion

Admissibility

- Federal Rule 702 2-part test
 - Qualification Rule
 - Does the witness have scientific, technical, or other specialized knowledge, based on knowledge, skill, experience, training, or education
 - Helpfulness Rule
 - Will technical info help fact finder understand evidence

Not that difficult of a standard as was the old *Frye* Test
Adopted in WY in *Rivera v. State*, 840 P.2d 933 (1992)
and *Springfield v. State*, 860 P.2d 435 (1993)

Daubert

1993

- Adds a 3rd test sometimes
 - Is the information reliable and trustworthy in an evidentiary sense
 - For novel areas or methods
 - parent alienation “syndrome” perhaps
 - A *Daubert* challenge is made
 - A Pre-trial hearing is held

Basis of Expert Opinion

- Experts may base opinions on a wide variety of information including first hand knowledge or merely a records review
- Experts can base information on otherwise inadmissible information, such as hearsay.
 - e.g., neighbors' statements about what they heard
 - Does not mean it comes in as evidence (703)

Certainty Standard

- General
 - Reasonable degree of professional certainty
- Specific
 - Reasonable degree of _____ certainty

Court Appointed Experts

Rule 706

- Sua sponte or by motion
- Parties may nominate or stipulate
- Any party may call an appointed expert
- Any party may cross examine the expert

Expert Direct Basics

- Remember the rules of lay witness direct
- Open ended, non leading, 6 honest words
- Focus on the witness!
- Establish specific and superior expertise
- Humanize the witness
- Let the witness “teach us”
- Above all, get the “opinion”

Expert Direct

Federal Rules 702, 703, 704, 705, 706; *Daubert, Kumho*
WY Rule 702, *Rivera and Springfield*

8 Part Exam

- Introduction
- Context / Foreshadowing
- Qualifications / Accreditation
- Tender
- Opinion (s)
- Assignment
- Basis / Methodology
- Persuasion

1. Introduction

- Please tell us your name.
- What is your profession?
- What kind of doctor are you?
- What is a pediatric neurologist?

2. Context / Foreshadowing

- Are you here today to give your opinion as to _____.?
- Are you prepared to give that opinion?
- Before I ask you for that, let's discuss your qualifications to give such an opinion

3. Accreditation

- Education
- Training
- License, Certification
- Experience
- Teaching
- Publications (Peer Reviewed?)
- Prior Testimony

Link all the above to the specific opinion

4. Tender

- I tender Dr. Welby as an expert in the field of pediatric neurology
 - “Tender Specificity” is persuasive
- Court asks for objection
- Opposing counsel may voir dire

5. Opinion

- Do you have an opinion as to the cause of the brain trauma?
- What is it?
- Do you hold this opinion to a reasonable degree of medical or professional certainty?

6. Assignment

- What were you hired to do?
- Did you do those things?
- How are you being compensated?

7. Basis and Methodology

- What information did you use?
- Why?
- Is this typical?
- What methods used?
- Why?
- Is this typical?

8. Persuasion

- Why did you conclude as you did?
- Please explain.
- Please demonstrate.
- Please show us on the CT Scan.
- What about Dr. Burns opinion?
- Why is it flawed?

Expert Cross Exam

- Inherently dangerous
- Do not fence with Zorro!
- Recall the rule of lay witness cross
- Control with leading questions
- Be precise

- Do not attack the opinion
- Focus on **assumptions and methodology**

4 Areas of Expert Cross

- 1. Credibility and Bias
- 2. Cross Expert Validation
- 3. Limitations of Assignment and Scope
- 4. Assumptions and Methodology

1. Credibility and Bias

- Fees
- Ideology
- Credentials

2. Cross Expert Validation

- Have the expert validate your expert
 - My expert is an authority
 - You reviewed her report and opinion
 - You do not dispute her methodology

3. Limitation of Assignment and Scope

- You were hired to do X.
- You were not hired to do Y.
- You do not have an opinion as to Y.

4. Assumptions and Methods

- You used a certain method
- You relied on certain assumptions
- You accept these assumptions as true
- If false, your opinion would be different.

Sample Expert Exam

- Text pages 57 – 75
- Expert Direct Exam: It's so easy even a....



Skill 6



Difficult Witnesses ***Managing the Challenge***

Trial Advocacy Chapter 6

Pages 77-88

Difficult Witnesses

- A question of when, not if witness are difficult
- So don't be surprised or unprepared
- Don't personalize
 - “How dare you do this to me”

Avoid Problems with Good Questions

- Good questions get good answers
- Test all your questions
 - Does it call for a single piece of information
 - Is it relevant and tied to theme
 - It is a fact, not a conclusion
 - For which there is foundation
 - It is not otherwise objectionable

Adverse Witness

Direct Exam

- Adverse Witness
 - Opposing party and those “identified” with opposing party
 - “Identified” include employees, relatives, business partners where there is a “community of interest”
 - Up to the court whether sufficiently identified
- Rule 611 (c) allows leading
- Alert the court you are calling an adverse witness
- Opposing lawyer can cross his/her own witness

Hostile Witness

- While not technically adverse, the witness displays actual hostility to you or your client
- As shown by
 - Expressed antagonism
 - Reluctance to testify
- You may ask the court to declare the witness hostile so that you can lead

Impeachment

by prior inconsistent statement FR 613(a)

- Powerful tool when used selectively
- Best when there is a clear prior inconsistent statement
- Make sure it is truly inconsistent
- Make sure it matters – you will lose credibility impeaching on an insignificant matter or where the inconsistency is not clear

Impeachment Technique

- Clear and Efficient (but don't race)
- Make sure everyone sees the 3 parts of impeachment – the 3 Cs
- Distinguish them with your tone of voice and inflection
 - Confirm (It's your testimony that...)
 - Tone: Incredulous
 - Credit / Close off (You remember...)
 - Tone: Technical
 - Confront (It says...)
 - Tone: Stern, Authoritative, Confining

Impeachment by Omission

Refreshing Recollection

Federal Rule 612

- Establish lack of memory
- Establish that something would help
- Provide refreshing document
- Ask if memory is refreshed
- Remove document
- Re-ask the question

Recorded Recollection

a/k/a Past Recollection Recorded

Federal Rule 803 (5)

- Think of it as a failed Refreshing Recollection
- Then ask:
 - 1. You knew at one time?
 - 2. You prepared the report?
 - 3. You did it when it was fresh?
 - 4. And it was accurate when you recorded it?

At this point, the witness can **read** it

Non Responsive and Self Serving Answers “The Yeahbuts”

- The “Your Answer is” Technique
- The “Re-ask” Technique
- The “Reason with the Witness” Technique
- The “Hand of God” “Stop Sign” Technique
- The “Ask Mom for Help” Technique
- Move to strike nonresponsive answers

Interruption

- Avoid it
- Be careful
- Don't talk over the witness
- Consider a passive response
 - at least at first
 - Let the witness look foolish
- Use a “measured and proportional” response
- Do not argue with a witness

Special Witness Rule

- Fed. R. Evid 611 (c) allows leading
 - “as may be necessary in order to develop the witness’s testimony.”
- Advisory Committee Note exceptions for
 - “the witness who is hostile, unwilling, or biased; the **child witness**, or the **adult with communication problems....**”

Personal Style

- Handling witnesses is largely a style issue
- The technique has to work for you
- Find your voice
 - It takes time
 - Practice
 - Self awareness

Skill 7



Exhibits

Picture This!

Trial Advocacy Chapter 7

Pages 89-105

Pictures

- We tell stories with words and pictures
- “A picture is worth a thousand words”
- Witnesses talk of their perceptions; an exhibit allows the fact finder to
 - Experience the evidence, and
 - Form his or her own perception as part of the telling of the story

Foundation

- The foundation of an exhibit is the prerequisite to admission that ensures it is relevant and authentic
- Generally, evidence must be F.A.R.
 - Familiar
 - Authentic
 - Relevant
- Foundation is the process to show F.A.R.

HARPO and OPRAH

- Hearsay (801)
 - Out of Court Statement to prove truth
- Authentic (901)
 - Is it what it purports to be
- Relevance (401)
 - Tend to make a fact more or less likely
- Personal Knowledge (602)
 - How does the witness know
- Original (1001)
 - Is the original writing rule satisfied

Introduction Steps

- Preliminary Foundation
 - The same for all evidence
- Substantive Foundation
 - Unique to the particular evidence

Preliminary Foundation Steps

- 1. Foreshadow the evidence
 - 2. Mark it
 - 3. Show (and indicate for the record)
 - 4. Approach (with permission)
 - 5. Hand Over with explanation
 - 6. Ask the witness if he/she recognizes
 - 7. Ask the witness what it is
-
- Say: “What has been marked for ID as Petitioner’s Exhibit A”

3 Types of Evidence

- Real
 - Tangible and played a part in the case - belt
- Demonstrative
 - Lawyer generated to aid testimony - chart
- Documentary / Writings
 - Reports, letters

Also
- Illustrative
 - Similar to demonstrative but not introduced – not accurate representation like demonstrative

Substantive Foundation

- Carry a cheat sheet for the various and typical real, demonstrative, and documentary exhibits
 - Weapons, belts, clothing, toys
 - Photos
 - Charts and Diagrams
 - Reports and letters
 - Especially business and public records
 - Audio and Video Recordings

Samples: Text pages 97-105

After Foundation Laid

- Offer
- Handle Any Objection (Voir Dire)
- Publish / Show
- Use!
 - Little point if not used
 - Incorporate into testimony
 - Get the witness up and demonstrating if possible

Photo Demo

- Did you photo the kitchen
- Showing opposing counsel
- May I approach?
- Handing you...
- Do you recognize?
- What is it?

- How do you know
- Fair and Accurate depiction at the time
- Would it help you explain... (optional)
- I offer...
- May I publish?

Skill 8

- **Making and Meeting Objections**
The Rules of the Trial

Trial Advocacy Chapter 8
Pages 107-123

Should I Object?

- Yes: You have duty to make appropriate objections
- Don't be deterred by relaxed court processes
- Objections preserve the integrity and reliability of evidence
- Objections are central to the culture change of formalizing CW Court

3 Key Reasons to Object

- To Exclude Prejudicial Evidence
 - Tie your objections to case theme and theory
- To Protect Your Witness from Inappropriate Behavior
 - Usually “argumentative”

Reasons to Object

- To Protect the Record (FRE 103)

Failure to object waives any right to appellate consideration of the error in admission of the evidence. The only exception is “plain error” which has very limited application. Objections must state the specific ground unless it is obvious. Objections must be timely, such that they are made as soon as the objectionable nature of the question becomes apparent.

Protocol

Uhm, Objection, I Think?



Lionel Hutz, Esq.
Counsel for Mr. Bart Simpson

Protocol for Objecting

- Stand up completely
- State the objection to the court forcefully and concisely (no rambling objections): "Objection! - Hearsay"
- Listen to the opposing attorney's response if given
- Be prepared to argue the objection once recognized by the court. If opposing counsel has given a response to which you would like to respond, ask the judge for permission to respond: "may I respond" or "may I be heard"
- Argue to the court, not to opposing counsel
- Receive the court's ruling with professionalism
- Move to strike where necessary

Protocol...

- Voir Dire
 - Counsel has the right to voir dire opposing witnesses as to adequacy of foundation for offered testimony
 - Not just expert qualification
 - Good time to show inadequate or weak foundation
 - Distinguish weight from foundation

Protocol for Meeting the Objection

- Stop and allow the objection to proceed
- Do not act as if you are offended
- Ask the judge for the opportunity to respond, tactfully, but quickly before a ruling. Do not assume the court wants argument and just begin speaking
- Argue to the court, not counsel, by explaining why the objection is not valid
- With the exceptions of rephrasing leading, compound or vague questions, do not abandon your question just because there is an objection
- If the objection is sustained, consider making a conditional offer or offer of proof

Objecting Before Trial

Fed R Evid 402, 103

Motion in Limine

- The tool to exclude evidence before trial. It is generally not granted unless the evidence is not only subject to a sustainable objection at trial, but is so damaging that once mentioned, its impact cannot be managed by a sustained objection. Unfair Prejudice is key.

The 2 Categories of Objections

- Objections as to Form
 - The question is improperly phrased such that the answer is not reliable.
 - The objections must be timely – made before the answer is given
- Evidentiary Objections

Focus on theme and theory – does making the objection promote my theme and theory

8 Essential Objections as to Form

- 1. Leading (611)

The question suggests the answer and is objectionable on direct.

Response: Foundational / Special witness (young, old, infirm, hostile) / Rephrase.

- “3 Levels of Suggestion”

- It was red! = Leading
- What color was it? = Not Leading
- Was it Red? = Suggestive and often considered leading

...Form

- 2. Compound
 - 2 separate questions not susceptible to one answer
 - Response
 - Seeks to establish the relationship between 2 facts

...Form

- 3. Vague

The question is likely to get an ambiguous answer because it is confusing or incomplete

Response: Rephrase.

...Form

- 4. Argumentative

Asks the witness to accept questioner's conclusion / interpretation rather than provide a fact.

Response: If it's not argumentative, explain how it calls for a fact.

“You just can't stand this mother, isn't that right”

...Form

- 5. Narrative

- Questions AND Answers
- May not ask a question that requires a narrative response
- May not engage in a narrative answer

Response: OK if responsive. Long does not equal non-responsive

...Form

- 6. Asked and Answered
 - Cannot repeat the same question to the same witness

Response: Variation or Clarification OK

...Form

- **7. Facts Not in Evidence**
 - You may not include, as a predicate to a question, a fact that is not proven. To do so is unfair because it requires the witness to admit an unproven assumption in order to answer the question.

Response

If accurate establish the fact not in evidence by a question (i.e., foundation)

“You were in such a hurry Dr. that you only did a 5 minute exam”

...Form

- 8. Non-responsive
 - You may move to strike an answer that does not respond to the question in whole or part.

Response: Explain how the answer was in fact responsive.

Evidentiary Objections

The Big 3

- Relevance (FRE 401, 402)
 - Does the testimony make a fact at issue more or less likely?
- Foundation
 - Does this witness have the basis to talk about this?
 - Includes 4
 - Foundation, Speculation, Improper Lay Opinion (FRE 701) & Lack of Personal Knowledge (FRE 602)
- Hearsay (FRE 801 c)
 - Is this an out of court statement offered to prove the truth of the matter asserted?

12 Essential Evidentiary Objections

- 1. Relevance (401, 402)
 - Does not make a fact at issue more or less likely
 - Response
 - It tends to prove....; It shows....;
 - It goes to credibility or bias.

Post filing parent conduct at adjudication

...Evidentiary

- 2. Foundation
 - The information sought lacks a predicate of information to ensure reliability
 - Consider voir dire here
 - Response
 - describe predicate foundation or lay further foundation

Outside Dr.'s expertise

...Evidentiary

- 3. Lack of Personal Knowledge (602)
 - Witnesses may testify from sensory perceptions of what they observed or did
 - Response
 - Describe personal knowledge basis

...Evidentiary

- 4. Improper Lay Opinion (701)
 - A lay witness cannot give an expert opinion or one not rationally based on perception
 - Response
 - Explain rational perception basis

SWs get too much leeway here?

...Evidentiary

- 5. Speculation
 - A witness may not speculate
 - Other's feelings, state of mind, motive

Response

Explain rational sensory perception

...Evidentiary

- 6. Unfair Prejudice
 - Probative value substantially outweighed by danger of unfair prejudice; fact finder won't be able to fairly evaluate
 - Response
 - Describe significant probative value in the context of relevance

...Evidentiary

- 7. Privilege (501)
 - The witness, as the holder of the privilege, has a right to decline to answer
 - Attorney client, doctor patient, marital....

Response

Waiver or nonexistence

...Evidentiary

- 8. Confidentiality
 - May not ethically disclose another's confidence
 - Response
 - Waiver or nonexistence

Child's statement to therapist

Not so for lay GAL!

...Evidentiary

- 9. Settlement Offers (408)
 - Settlement offers and offers made during settlement negotiations are inadmissible
 - Mandatory ADR
 - Response
 - Non mandatory ADR offers may be admissible

...Evidentiary

- 10. Improper Judicial Notice (201)
 - Improper if the fact is not generally known, is subject to dispute, or is not readily ascertainable
 - Response
 - Is generally known, is not disputable, is readily ascertainable

...Evidentiary

- 11. Improper Character Evidence (404)
 - Cannot be used to prove conformity (propensity)
 - Response
 - Cite exceptions
 - Truthfulness & untruthfulness (608), some criminal convictions (609), 404(b) motive, opportunity, intent....

...Evidentiary

- 12. Hearsay
 - Cannot offer an out of court statement, oral or written, to prove its truth

Responses:

1. Not Hearsay because:
 - Not offered for truth 801(c)
 - Admission by party opponent 801 (d) (2)
2. Hearsay but falls under an exception

See text page 121

Opening Statement Objections

- Arguing Facts
- Arguing Law
- Arguing Credibility
- Reference the Inadmissible
- Addressing Jurors by Name
- Expressing a Personal Opinion

Closing Argument Objections

- Referencing facts not in evidence
- Misstating facts
- Misstating law
- Expressing a personal opinion
- Arguing the golden rule
- Appealing to prejudice
- Exceeding the scope of rebuttal

Special “Offers”

- **Offer of Proof (FRE 103)**

It may be necessary to make an offer of proof when evidence is excluded by objection. In order for an appellate court to rule on whether the exclusion was reversible error, there must be record of the excluded evidence. Ask the court for an opportunity to make an offer of proof and either have the witness testify or make a statement of what the evidence would have been. The offer may also educate the court into reversing its prior ruling.

Special “Offers”

- **Conditional Offer (FRE 104)**

To the extent that the admissibility of testimony you are eliciting is tied to later testimony, you may need to make a conditional offer to get it in. Ask the court for permission to make a conditional offer and either promise to "tie it up" later or state (outside the presence of the jury) the nature of the evidence which will be introduced later.

Avoid Objections

Good Questions Get Good Answers

- Avoid leading on direct with 6 honest words
 - Who, what, where, when, how, and why
- Ask for facts, not conclusions or interpretations
 - Focus on witness sensory perception
- Ask short, 1 fact questions
- Be certain of evidentiary issues especially
 - Foundation, relevance, and hearsay

Skill 9



Opening Statement ***Imprinting the Story of the Case***

Trial Advocacy Chapter 9
Pages 125-131

Imprinting the Story

- Imprint the story early
 - Principle of Primacy
- Opening is
 - An abstract of what will happen
 - Told persuasively as a story
- Engage with the fact finder
 - Talk to the judge with meaning and eye contact
- Be brief
 - Well organized 5 minutes

No Argument!

- Argument of facts or law is prohibited and subject to objection
 - And loss of credibility
- Not argument if
 - A witness will say it
- Additional Tests
 - Verification (a fact can be verified in record)
 - Link (requires a rhetorical link to evidence)
- Can mention the law for context only

Use Exhibits

- Use exhibits that you are certain will come in
- Consider pre-admission
- Advise counsel in advance and stipulate if possible

5 Part Opening

- 1. Introduction with Grabber
- 2. The Issues
- 3. The Evidence / The Story
- 4. The Other Side
- 5. The Relief

1. Introduction with Grabber

- Capture the fact finder with a grabber that incorporates your theme. Follow with a short abstract of the case story
- *This case is about a mother's love, her love for alcohol and cocaine....*

2. The Issues

- Describe the issues
- Introduce the standard of proof
- Define the parties' contentions
- Mention the law briefly and only to give context
- *The issue is whether Tina is a neglected child under our law. We will prove she is by a preponderance (MN = Clear and Convincing) of the evidence. Tina's mother will claim she is not. We disagree and will show a course of action that establishes neglect.*

3. Evidence / Story

- Tell the story with detail using case theme and theme devices. Consider present tense.
- *It is 6 pm on the evening of July 15, 2011. Tina is 2 days old. She is alone in her crib. She is hungry and scared....*

4. The Other Side

- Briefly address the opposition's key evidence that the fact finder will have to reconcile, so that it is clear it can be reconciled.
- *It is no easy matter to be a single mother living in poverty. But the evidence will show that Ms. Watson did not work to support the children as she says she did....*

5. The Relief

- Be clear, precise, and confident as to your request
- The Department asks you to declare....

Relief from Order and Appeal

- Order is issued
- Now what?
 - Seek relief from Order
 - Appeal the order
 - WY App Rule 2.01 Gives 30 Days

Skill 10



Ethics and Professionalism

Integrity in Court

Trial Advocacy Chapter 8

Pages 107-123

Ethical Duties

- State version of the ABA Model Rules
 - WY Rules of Professional Conduct
- State statutes, case law, ethics opinions, and court rules
 - WY GAL Program Rules
- ABA Standards of Practice for Lawyers Who Represent Child in Abuse and Neglect Cases (1996)
- ABA Standards of Practice for Lawyers Representing State Agencies (2004)
- ABA Standards of Practice for Attorneys Representing Parents in Abuse and Neglect Cases (2006)

Competence

- Model Rule 1.1
 - A lawyer may not handle a matter that he or she is not competent to handle
 - Competence includes knowledge, skill, thoroughness, and preparation
- *Kenny A. v. Purdue*, 532 F.3d 1209 (11th Cir. 2006)
 - Attorney caseloads impact competence

Loyalty

- Model Rule 1.2
 - A lawyer must abide by the clients directives regarding the objectives of representation
 - Children?
 - Parents?
 - Agencies
 - Prosecutorial Model = The People as client
 - Agency Model = The Agency as client
 - MN is a Hybrid

Diminished Capacity

- Model Rule 1.14 (same in WY)
 - Diminished Capacity vs. Disability
 - Presumption of full Capacity
 - Maintain normal attorney / client relationship
 - Assess capacity (not just disagreement)
 - Comment 6 factors (can client articulate consequence)
 - Last resort actions of part (b) and comment 5
 - Substitute judgment., delay, GAL, withdraw

Communicating with Parties

- Model Rule 4.2
 - Counsel is prohibited from communicating with represented “parties” without opposing counsel’s consent
 - Child?
 - Attorney?
 - Lay GAL?
 - Party

Trial Publicity

- Model Rule 3.6
- MN is unique with Open Records and Proceedings
- Can't make out of court statements that:
 - Have a substantial likelihood of materially prejudicing adjudicative proceedings

Cross Examination

- Model Rule 3.4 (e)
- May not refer to a matter that is not both relevant and admissible
 - “Oops, I withdraw the question” is an ethical breach

Objections

- Rule 3.4 Fairness to Opposing Party and Counsel
- There is no authority to object to mess up the other side

Introducing Evidence

- Model Rule 3.4 (e)
- A lawyer may not allude to evidence that he/she does not reasonably believe is both relevant and admissible
- Does this mean you can't sneak in evidence when opposing counsel is new / incompetent?
 - Yes

Lawyer as Witness

- Model Rule 3.7
 - A lawyer may not be called to testify in a case to which he/she is a party
- What about Child's Counsel
- Where counsel for child is also a GAL?
 - *In re J.E.B.*, 845 P.2d 1372 (1993)

Witness Prep

- Court convention and basic duty of competence promote preparation
- Preparation vs. “Coaching”
- Prep
 - Helping a witness communicate effectively
- Coaching
 - Telling a witness what the testimony should be

Ex Parte Contact

- Model Rule 3.5
 - Lawyers prohibited
- Code of Judicial Conduct 3 (A) (4)
 - Judges prohibited

Distinguish administrative contact from substantive case information

What about Parent Counsel to Caseworker?

Confidentiality

Model Rule 1.6

- Cannot reveal a confidence without client's consent
- Exceptions
 - Compliance with court order
 - Preventing reasonably certain death or substantial bodily harm to self or others
 - Getting compliance advice
 - Preventing substantial financial injuries to others
 - Best Interests Attorneys?

Conflict of Interest

Model Rule 1.7

- Representation of one client compromises the duty to another client
 - Can't represent where interests are “directly adverse”
 - Can't represent where there is a significant risk that the representation will be “materially limited” by responsibility to another client
 - Siblings
 - Parents

Candor to the Tribunal

- Model Rules 3.3 and 1.16
- A lawyer may not lie to a court or introduce evidence known to be false
- Non client witness
 - Recess and counsel the witness to correct
 - Advise the court if client fails to correct
- Client witness
 - Recess and advise client to correct
 - Move to withdraw if client refuses
 - Advise the court of the lie if not allowed to withdraw

Integrity in the Courtroom

- Judges can be intolerant of our duty and best efforts
- Counsel can confuse advocacy with belligerence
- Children and parents can be difficult clients
- State agencies can be rigid and short sighted
- We are underpaid and overworked
- If it were easy, anybody could do it

Integrity exists because it is tested

Thank You!



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