Illinois Trial Lawyers Association
Education Fund

WINNING YOUR CASE BEFORE TRIAL SEMINAR

Friday, April 3, 1998
Marriott's Pavilion Hotel, St. Louis

FINAL PREPARATION

ERIC M. RHEIN
Eric M. Rhein, Attorney at Law
Belleville

© Copyright 1998 by Eric M. Rhein. All rights reserved.

FINAL PREPARATION FOR TRIAL

BY

ERIC RHEIN

Everything lawyers should do when they prepare for trial must be geared toward telling their client's story in opening statement, and arguing the case effectively in closing argument.

Whenever you think of an idea for closing argument (even if the idea turns out to be bad or unusable), jot it down, so you will remember it. If you are driving, and think of an argument, pull over and make a note of the argument. You'll be surprised how many of these ideas may turn out to be forceful arguments. This trial preparation method assumes that you have already conducted adequate discovery and have indexed or highlighted the most important parts of every deposition.

Vincent Bugliosi urges lawyers to prepare for trial by using his "yellow pad" method. He believes that no one can memorize everything that needs to be conveyed to a jury to win at trial. He does not advocate reading an opening statement or closing argument; nor does he advocate reading questions to witnesses. Bugliosi urges lawyers to write detailed outlines of openings

and closings and to be so familiar with the outline that one glance at a page will allow each argument to be delivered. This way, you won't ever say to yourself later "if only I had argued . . . ." "The Trial Masters," (Buglliosi article), at 12-34, Prentice Hall, 1994.

Marlon Brando does not memorize lines. He has crew members write on large cue cards, held off camera. The cards contain <u>ideas</u> for lines. He feels he can deliver a more natural performance by not memorizing someone else's words.

We can do the same thing.

Instead of preparing questions for witnesses, make an outline instead of anticipated <u>answers</u>. You will then have to formulate extemporaneous questions to <u>get</u> these answers.

Written arguments which are read to a jury are weak. You tell the jury, when you read a speech/argument, that you didn't care enough about your client or your case to speak to them as one human being to another. No juror, however, will ever hold it against you if they can tell - by the quality of your argument - that you are thoroughly prepared and organized. That is why a detailed outline (and written in LARGE handwriting, with as few words as is possible on a page) will never hurt you.

Gerry Spence says that lawyers and witnesses build credibility by telling the truth, even if it hurts. Spence, "How

to Argue and Win Every Time," St. Martin's Press, 1995, at 56. Bugliosi also advocates being first to tell the jury about problems with your case before the other side can (in voir dire or opening statement, or direct examination). He believes that practice shaves some of the decibels off the defendant's thunder. "The Trial Masters," (Bugliosi article), 19-20.

Spence also tells lawyers to be themselves. He contrasts the polished, machine like delivery and demeanor of some insurance defense lawyers with a lawyer who is herself in court: "I have seen a young, frightened woman wearing a plain dress stand before a jury, her hair pulled back, mostly to be out of the way. I have watched her painful search for the right words. I have witnessed her faltering, her face burning red. I have observed her stumbling, and courageously fighting back. And her argument, the faithful reflection of her uniqueness, out of her soul, became a winning argument. She had not graduated from a great university. She was not at the top of her class. When she walked down the street, no one looked at her. When she took her seat in the courtroom she blended in with the spectators. But her argument had <u>her</u> mark on it. There will never be another like it. It was hers, and because it was hers it became a winning argument." Spence, "How to Argue and Win Every Time," at 18.

Recently I heard ITLA member Bruce Cook deliver a winning closing argument in a railroad crossing case. The undisputed evidence had been that Mr. Cook's teenage client (a wonderful 17 year old girl, on her way to school at a very dangerous crossing, which had poor sight lines) had rolled through a stop sign (there were no crossing gates or arms) when the railroad killed her. When defense counsel argued (five times) that the railroad company wasn't liable because the plaintiff's decedent had not fully stopped, he seemed foolish, because Mr. Cook had already admitted that fact. In arguing damages, Mr. Cook told the jury how he felt. He had probably given, in his career, dozens of closing arguments about the loss of a child. This time, he told the jury that he could not - even as a veteran trial lawyer who had seen it all - talk with them about details concerning his clients' terrible loss. He let the jurors make his argument for him. A multi-million dollar verdict followed.

Spence teaches young lawyers to have a theme to their cases, articulated in opening statement. Your theme should be described (in only a few words) in the first words out of your mouth in opening statement. An example: "In November, 1996, my client's life was changed forever when she fell at the defendant's place of business, because the defendant hadn't ever bothered to

inspect it." In the Silkwood v. Kerr-McGee case, Gerry Spence's theme was "if the lion gets away, Kerr-McGee has to pay." The lion: plutonium. Spence proved that the defendant's plutonium - off site - contaminated his client, Karen Silkwood. Spence, "Gunning For Justice," 1982.

When Spence won a $52 million verdict in Chicago in the 1980's on behalf of a small ice cream concern, against McDonald's (based on breach of an oral contract), his simple, winning theme was "Let's put the honor back in the handshake." His message: "a handshake deal should be fully honored by honest business people. . . . [A] handshake deal should carry more honor, more weight than a contract reduced to writing by clever lawyers, for honor must become attached to the soul of American business." Spence is a trial lawyer who has a firm grasp of the obvious. Spence, "How to Argue and Win Every Time," at 126.

Plaintiff's lawyers should write and use a "proof list" in their case in chief. Simply - by looking at your complaint and/or the jury issues instruction - write down the elements of what you have to prove to get to the jury. This technique helps, especially in regard to elements of the plaintiff's damages. In a slip and fall case, for instance, even though you don't have to plead it, prove that the dangerous condition that caused the

plaintiff's fall was not open and obvious. Defeat affirmative defenses before the defendant has a chance to put them on.

Tell your witnesses before they hit the stand the simple rules of being a good witness: 1) listen to what is asked; 2) only answer what's asked; 3) if you don't understand a question, tell the questioner; witnesses have a right to understand the questions; 4) keep your answers short and to the point; 5) don't editorialize - just testify as to the facts; 6) don't be afraid to look at the jurors; 7) keep your hands down or folded (witnesses who rest their chin, for example, on their hand do not look truthful); 8) the jurors do not hate you. They want to like and sympathize with you; and 9) don't ever argue with or get mad at the opposing lawyer.

Pre-mark all your exhibits and draft an exhibit chart or list that you and the judge can use. This chart should have, at the top it, horizontally, categories such as these: exhibit number, which party has offered the exhibit, the nature of the exhibit (i.e., photo of rear of plaintiff's car) and whether the court has admitted it into evidence.

In accident or road construction cases, subpoena actual road signs into the courtroom and into evidence. These signs look huge in a courtroom. You can hold up a sign and say to the

defendant "what about this 'yield' [or 'wrong way'] sign didn't you understand?" On cross there is no good answer to such a question, especially if you've saved it for trial and have not asked it in the defendant's discovery deposition. This issue raises an important dichotomy: that of preparing a case in order to <u>settle</u> it, or preparing a case in order to <u>try</u> it. The advantages to the first method (ITLA member Tom Keefe - one of today's speakers - uses this method) are that you may settle more cases without a trial, and that you are also still fully prepared to try it. The defense, however - after discovery - may pretty much know how the plaintiff will be attacking defense witnesses. The advantage to the second method is that if the case does not settle, you may increase your odds of winning at trial, because of the element of surprise.

Mr. Bugliosi - under certain circumstances - does not object to the use of "how, what and why" type questions of adverse witnesses. He knows that philosophy violates this cliché: "don't ever ask a question of a witness to which you don't know the answer." However, if the witness is properly pinned down (i.e., asked detailed preliminary questions, designed to lead the witness [and jury] down a path of normally expected behavior), and if the witness gives a totally illogical or incredible answer

to the "why" question, the result can be devastating. Bugliosi writes: "If time after time a witness is unable to satisfactorily justify conduct of his which is incompatible with what would be expected of a reasonable person, the jury will usually conclude that his testimony is suspect." "The Trial Masters," at 22-27.

A couple of more points on cross examination: don't cross examine if the witness hasn't hurt you, and try to open and close each cross of each witness with "scoring" questions, i.e., questions you know - from discovery - will yield absolutely helpful answers.

TRIAL PREPARATION CHECKLIST

1. Have all opinion witnesses identified.
2. Index produced documents and exhibits.
3. Have all important witnesses deposed; index depositions.
4. Send final "tie up" Interrogatories, a Supplemental Request to Produce and Request to Admit Facts.
5. Try to get opposing counsel to stipulate to admission of extra exhibits.
6. Send a Rule 237(b) Notice to the defense.
7. Have all non-deposed witnesses interviewed by you and your investigator.

8. Notify and subpoena all of your witnesses two months before the trial date.

9. Prepare voir dire ideas.

10. Nail down demonstrative evidence.

11. File an extensive Motion in Limine and get it heard and ruled on before the trial begins (see discussion below).

12. Prepare direct and cross examinations of all witnesses (prepare likely "answers" not "questions").

13. Prepare a brief on likely critical evidentiary and instruction disputes.

14. Outline your opening statement.

15. Outline your closing argument ideas.

16. Meet with all friendly witnesses and your client (go over areas of questioning; do not try to have the witnesses memorize questions and answers).

MORE ON MOTIONS IN LIMINE

Motions in Limine can eliminate the possibility of your jury hearing evidence which is inadmissible and/or prejudicial.

Here are some examples of evidence or testimony which you can try to keep out in advance:

1. Evidence violative of the collateral source rule.

2. Evidence as to how the plaintiff hired or will pay his lawyer.

3. Improper use at criminal arrests or convictions.

4. Evidence that the defendant did not receive a traffic ticket, in an auto accident case.

5. Evidence that the defendant was not injured.

6. Evidence of the plaintiff's prior suits or settlements. Burger v. Van Sevenan, 188 N.E. 2d 373 (Ill. App. 1968).

See Cone and Lawyer, "The Complete Personal Injury Practice Manual," Prentice Hall, 1983, at 207-214.

RANDOM FINAL THOUGHTS

1) Get the court's permission before you display physical evidence or demonstrative exhibits in opening statement. That way, the defense cannot interrupt the flow of your talk to the jury by objecting to your use of those exhibits.

2) When you try to talk to all opposition lay witnesses (with your investigator present) you can't lose. Even if they won't consent to be interviewed, you win, because their bias will be evident to the jury. If they will talk you win, too.

3) Prepare an objective, one or two paragraph "pre-trial statement." This will be the first description of your case the jury ever hears.

4) Never begin preparation of your closing argument the night before you'll deliver it. Inconceivably, the two prosecutors in one of the biggest murder trials in modern history (Simpson) stayed up almost all night the night before closing argument, writing their argument. Marcia Clark, in fact, looked as if she had been up all night. They were not physically up the task. Their argument was regarded by most real commentators as weak. In the subsequent civil trial, the plaintiff's lawyer, Dan Petrocelli, delivered a classically good argument, and achieved a very different result.

5) Never say to the jurors "what I say is not evidence." Let the court do that.

6) As Gerry Spence says, always tell the jury what you want. Here is an excerpt from his book, "How to Argue and Win Every Time":

"Getting the big money by asking: Wherever I go, lawyers ask, 'How do you get those big-money verdicts?' I reply that I simply ask for the money. I tell the jury what I want. It seems that the more we want something, the more we are hesitant to ask

for it. Have you ever noticed how people who want to be with each other seem afraid to simply say, 'I'd like to be with you tonight,' but, instead, often talk about everything else and go home alone? The fear that inhibits is the looming, dreadful fear or rejection.

"People are afraid to tell others what their services are worth. They are afraid to ask the doctor what the doctor expects to be paid. In a civil money case, I tell the jury outright that I want them to give my client money, and how much. When the jury retires to reach its verdict, it knows exactly what I want. Such openness also serves my credibility. How can we feel comfortable with someone who we know wants something from us but who will never be honest about it?

"Money seems to be difficult to ask for. Although the legal system, reflecting our society, measures most things human in dollars, it still seems wrong for lawyers to talk about human life, human worth, human paid and suffering in terms of money. The idea seems to prostitute justice. How do jurors give money to parents whose little girl was smashed into a dead, bloody mangle of ripped flesh and broken bones? I might begin my argument to the jury by asking if the jury could return the dead child to her parents. That brings us to the truth. The jury

cannot return the child.

" 'We are here for justice. Well, their child was taken from them. Can you give her back?' I look at the jurors, each of them. I wait. 'So you cannot give me justice? You cannot return their child?' I let the silence underline my question. 'So what sort of justice can you give?' Again I wait for the jurors to think about it. 'The law says when we are injured by another we are entitled to be made whole again. How can we be made whole?' With all the power that a jury has, with all the power of the law, we are nearly powerless to do justice. Isn't that true?

" 'The court has instructed you that you may award damages. That is the only justice you can give. Damages! That means your power to do justice is limited to awarding money for a little dead girl. That is not much justice, is it? Mere money, mere dollars for a child? What parent could take money as justice? Yet in a case such as this it is all that any jury can give. It is all that you can give.'

"Then the argument builds on a simple truth. 'If you have only the power to give money for justice, if money is all that can stand for justice in this case, if only money stands for these parents' horror, their unspeakable loss, if money stands

for their child, then should these parents receive only part of what they are entitled to? Should they be further injured, this time by the law, this time by a jury that returns to them only part justice?' I still leave large quiet spaces in which the jury can weigh my words. 'Justice in this case is that which stands for the whole child, for these parents lost a whole child, not part of a child. I ask you for whole justice, not part justice. Do not give them back part of this little girl. Do not give them this child's small hand with her little chubby fingers. Do not return to them only that which stands for the sound of her darling, tiny voice. Do not give them just her smile or the velvet touch of her cheek when these parents kiss her good night. Do not give them just part of her. Give them back all of the child that justice can give.

" 'This was a million-dollar little girl. Give them all of her. I want it all for them!'

"How do I get the large money verdict? I get it because I tell the truth, because my clients are entitled to it, because it is just. I get it because I ask for it."

Spence, "How to Argue & Win Every Time," at 63-64.

SOURCES

Spence, "How to Argue and Win Every Time," St. Martin's Press, 1995.

"The Trial Masters," Prentice Hall, 1984 (Bugliosi article, at pages 12 - 34).

Cone & Lawyer, "The Complete Personal Injury Practice Manual," Prentice Hall, 1983.

Mauet, "Fundamentals of Trial Techniques," Little, Brown, 1980.

Iannuzzi, "Cross Examination: The Mosaic Art," Prentice-Hall, 1982.

Spence, "Gunning for Justice," 1982.