

ASSOCIATION OF BUSINESS TRIAL LAWYERS

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REPORT

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FROM COURTROOM TO CLASSROOM: AN ALTERNATIVE APPROACH TO TRIAL ADVOCACY



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In law school, students are expected to develop the ability to advocate both sides of any legal question. The legal profession views such a skill as a virtue. Most laypeople do not—to them, this “skill” epitomizes insincerity. Lawyers are often maligned as hired guns, willing to sell their power of persuasion to the highest bidder. As unjustified as the perception may be, its existence is undeniable. To paraphrase author Terry Goodkind, “Perception is easily accomplished, requires little effort, and never has to stand the test of reality.”

Since the client’s fate often depends on how the jury perceives the client’s messenger, trial lawyers must strive to overcome this unspoken perception. The task is all the more challenging because of two equally unassailable truths—(i) most people put jury service on a par with a trip to the dentist; and (ii) T.V. shows and movies frequently portray lawyers as little more than educated used car salesmen, committed not to a just result but to winning no matter the cost.

My antidote for toxic perceptions of the legal system in general and lawyers in particular is simple. During the three trial phases in which you can directly address the jurors—voir dire, opening statement and closing argument—defy and redefine their expectations and preconceived notions by focusing on two principal goals: (1) motivating them to be engaged participants rather than passive listeners; and (2) changing their perception of you from biased advocate to passionate teacher.

A. Voir Dire: Welcoming Prospective Students

Far more than merely the phase where you select the jury, voir dire affords the opportunity to begin transforming your jurors’ perceptions by identifying parallels between the courtroom and the classroom. Explain how each trial phase bears a striking resemblance to attending school—voir dire is the admissions process, opening statement is a preview of the course syllabus, direct and cross-examination are akin to listening to guest speakers, and closing argument is like a final exam review before the jury takes its “test” (i.e., deliberates and answers the questions on the verdict form). Re-casting the proceedings in this manner creates a framework in which jurors can begin looking at you in a less suspicious light—as someone trying to teach rather than sell them something.

Enhance this new perspective with the following suggestions:

1. Lawyers tend to focus during voir dire on eliciting negative information upon which to exercise a peremptory challenge. Flip it. Be an admissions officer interviewing a prospective student and allow the applicant to accentuate the positive. “Tell us the single, strongest skill/character trait you possess and why you think it would make you a good member of this class.”
2. Ask each juror to identify someone famous, living or dead, whom he/she most admires. Their answers will provide invaluable insight into them as people—and, as discussed later, they set up a powerful technique for closing argument.
3. Don’t immediately exercise peremptory challenges unless absolutely necessary. The attorney using the fewest challenges sends this implicit but powerful

message: “My case is so strong, unlike my opponent, I don’t need to handpick the jury—any jury will do.”

B. Opening Statement: Course Overview

On the first day of class, professors typically provide a course overview. Since jurors generally rely on one of three prisms—emotion, curiosity, or suspicion—to process the information presented during trial, craft an opening statement that simultaneously previews in an organized manner what the jury will hear and that appeals most directly to the appropriate case prism.

Build on the concept of yourself as a teacher rather than a biased advocate with the following ideas:

1. Prepare a cast of characters chart with headshots, if available, of the major players in the case along with their title(s) and company affiliations. Prepare a similar chart describing the top five exhibits with their corresponding exhibit numbers. The sooner your students become acquainted with the guest speakers and course materials, the better.
2. Channel a favorite history teacher who brought the subject to life by putting you in the moment.
3. Teachers often use the first class session to outline what they expect from their students and what their students can expect from them. Tell the jurors you’re confident they will take their responsibility seriously by giving both sides their attention and considered judgment. Assure them that in return, they can and should expect from you a fair and efficient presentation of the information necessary to render that judgment.

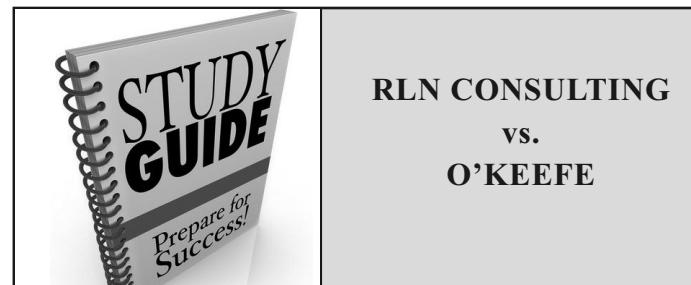
C. Closing Argument: Preparing for the Final Exam

Professors typically offer, and students generally appreciate, a class session dedicated to reviewing material likely to be tested on the final exam. Once both sides rest their case and the jury has been instructed on the applicable law, the judge will advise the jurors they will now hear the closing “arguments” of counsel.

Whether I’m representing the plaintiff or the defendant, I typically begin by confessing discomfort with the word “argument.” Arguments, by definition, have counter-

arguments. I like to tell jurors my goal is not to “argue” my client’s case but instead to hopefully show that after they review the evidence and consider the Court’s instructions, they will conclude there’s nothing to argue about.

The foundation of any effective summation is a thorough review of the verdict form. However, in keeping with our “lawyer as educator” mantra, consider the following slide that I used at the outset of my closing in a case where I represented the plaintiff in a trade secret misappropriation case:



REVIEW QUESTIONS

I reassured the jury that while they had to take a “test,” the good news was that there were no wrong answers and, unlike in school, they would get to review their actual “test” questions in advance. That set up the next slide:

I let the jury know that for each question on their “exam,” I would provide them a hopefully useful study guide compiling in one place the jury instruction(s), exhibit(s) and/or testimony that best answered the question. Notice the hyperlinks in the right column. This enabled me with the click of a button to show the critical excerpt from the relevant instruction, exhibit or testimony being referenced. You never saw more jurors feverishly scribbling notes in their steno pads!

Next came the time to put to use the “most admired people” our jury had identified during voir dire. Like most cases, this one involved the issue of witness credibility; more specifically, the defendant’s lack of credibility. Several of our jurors expressed admiration for Oprah Winfrey and famed UCLA basketball coach John Wooden. A simple Google search for images of Ms. Winfrey and Coach Wooden and quotes from each of them on the topics of integrity and character quickly provided the content of the next two slides:

<p>VERDICT QUESTION NO. 1</p> <p>Did RLN own a proprietary trade secret?</p>	<p>INSTRUCTIONS</p> <ol style="list-style-type: none"> 1. CACI 109 [LINK] 2. CACI 3341 [LINK] <p>EXHIBITS</p> <ol style="list-style-type: none"> 1. Exhibit 40 [LINK] 2. Exhibit 108 [LINK] <p>TESTIMONY</p> <ol style="list-style-type: none"> 1. Ms. O'Keefe [LINK] 2. Mr. Jorgenson [LINK]
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“Real integrity is doing the right thing, knowing that nobody’s going to know whether you did it or not.”

—Oprah Winfrey



“Ability may get you to the top, but it takes character to keep you there.”

—John Wooden

Then came the dagger.

**PHOTO OF
DEFENDANT
FROM DEPOSITION
VIDEO**

“If you decide that a witness did not tell the truth about something important, you may choose not to believe anything that witness said.”

—Judge Mary Jones

In case you don’t recognize the “quote” in this slide, it’s an excerpt from CACI Instruction No. 107. Juxtaposing that jury instruction side by side with the defendant’s photograph elicited laughter—and, more importantly, numerous affirmative head-nods from the jury box. And yes, the jury found for my client.

Embrace rather than fear jurors’ less-than-favorable perceptions of attorneys as an opportunity to distinguish yourself in the eyes of your factfinders. Your odds of securing a favorable verdict will improve if you follow the tried and true method for catching a pesky house fly. Something about a preference for honey over vinegar?

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The unbridled pride on the faces of the jurors who saw their most admired person integrated into my closing “argument” was unmistakable. Even more importantly, not only did this technique demonstrate that our side was paying attention to what the jurors said a week earlier during voir dire, we made the jurors’ champions our champions.

I next told the jury that while the final quote I wanted to share with them was from someone they had never met before the trial, it was nevertheless particularly instructive.