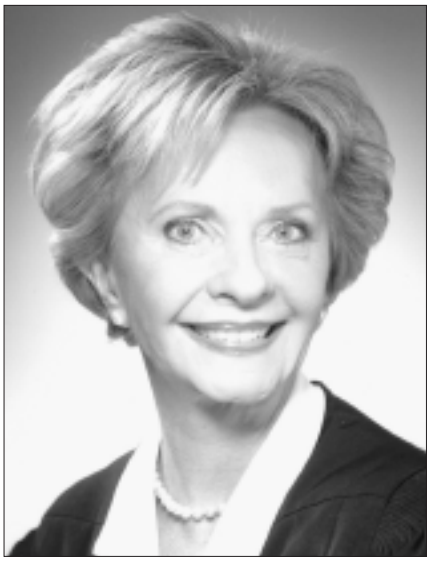
One Judge's Trial Tips



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Oakland County Probate Court

The elevator to success is out of order. You'll have to use the steps one at a time.
–Harvey MacKay

In this article, I address some of my thoughts about how a lawyer can persuade the trier of fact to adopt her version of the case. Many of these practices are routine to most lawyers although I observe that some lawyers think they can "wing it."

Planning for Trial

Remember the first rule of winning: prepare. As Woody Hayes said, "Even the best team, without a sound plan, can't score."

Before trial, you should prepare an outline of the proofs or "story" that must be presented at trial. This may seem obvious, but I have noticed that some lawyers lose track of what proofs must be presented to establish their cases. After outlining the proofs, draft the opening statement. It should be a road map so that the judge or jury knows what will be presented. Also, outline your opponent's probable proofs and arguments.

You should compile a trial notebook with an outline of each witness's direct testimony and cross examination as well as your cross examination of the opposing witnesses, your exhibits and any evidentiary issues you anticipate. Make sure that all of the anticipated objections and responses are in your trial notebook. Include copies of any cases that you intend to rely upon in objecting to or responding to objections. Never appear at a hearing without the Michigan Court Rules and Rules of Evidence.

Objections

Anticipate your objections to the other party's proffered testimony, exhibits and other evidence. Also predict any objections to the testimony or evidence in your case and be ready with your responses.

When you object, stand and give the legal basis for your objection – do not start with a speech. When your opponent objects to your evidence, stand and request an opportunity to respond. If you have prepared properly, you should not be surprised by opposing counsel's objections.

Do not object just because you can – evaluate whether the objectionable evidence is harmful to your client's case. If not, let it come in. Especially abstain from peppering opposing counsel with objections to leading questions on background or routine information that is merely proffered to move the case along. Some lawyers try to object frequently and vehemently in order to impede their opponent's train of thought; however, that tactic generally serves only to annoy the trier of fact.

The most overused objection that I hear is "lack of foundation" – often lawyers use it when they are stymied as to the proper objection. An example of proper use of lack of foundation would be an offer of a recorded recollection under MRE 803(5) without the witness showing failure of memory.

Often attorneys withdraw the question or fail to respond when opposing counsel propounds a hearsay objection. You need to be familiar with the definition of hearsay and the exceptions – don't just give up!

Direct Examination

On direct examination, be sure that you elicit all of the testimony needed to prove your case and organize the presentation so that the judge or jury has a clear picture of your case.

Often a lawyer opts to call the opposing party as an adverse witness in her case-in-chief. Consider carefully whether to do so – the witness may present convincing testimony upon your examination as well as on opposing counsel's examination. Then the judge has heard it twice and may be convinced. Further, some judges (I do) allow a party's attorney to cross-examine her own witness using leading questions after being examined as an adverse witness.

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On the other hand, your strategy may be to pre-empt opposing counsel's direct examination by calling her client before she has a chance to have her client explain unfavorable facts.

The point is, don't automatically call an adverse party – think it through.

Cross Examination

Please read Irving Younger's "The Ten Commandments of Cross-Examination."[1] You can find it on the Internet, or you can purchase any of Younger's excellent books on trial practice. Here are just a few of his points, rephrased:

- Do not allow the witness to repeat what he said on direct examination. If you repeat the direct examination questions, the judge or jury will have heard his version of facts twice and will be likely to believe it.
- Be brief. If you have a few good points or effective impeachment, then cross examine. If you do not, just say, "No cross" and sit down!
- Never ask a question you do not know the answer to. Surprises at trial are not fun.
- Do not ask the one question too many – save the ultimate point for your closing.

Closing and Post-Trial

Be ready to argue the facts and law at closing. You must tell a compelling and interesting story to summarize your case. Use plain English and do not read.

If the judge requests findings of fact and conclusions of law after a bench trial, be delighted. That is your chance to have the judge adopt your theory of the case. Be organized, concise, and cite to transcripts if possible. Never, ever include a fact as proven that has not been proven. Do not forget to apply the law to your set of facts.

Finally, enjoy the trial experience. It is the best part of lawyering.

Footnote

1 Summarized from "The Art of Cross-Examination," by Irving Younger. The Section of Litigation Monograph Series, No. 1, published by the American Bar Association Section on Litigation, from a speech given by Irving Younger at the ABA Annual Meeting in Montreal, Canada, in August 1975.