Chapter 6: Trial Advocacy

Perspectives

"In the current highly competitive environment, a law school graduate needs every advantage to distinguish himself in the legal community. Trial advocacy gives you the competence and the confidence to step into a courtroom from day one of your career. Whether you become a trial lawyer or practice in any other field, trial advocacy teaches you the skills and the ability to persuade essential to representing your clients effectively."

Karen Lukin
In-house Counsel, Marathon Oil
Faculty, Kessler-Eidson Trial Techniques

The ability to present yourself, your client and your position with strength and confidence is an absolute requirement no matter what position you pursue after graduation. The transactional attorney, the trial attorney and the dispute resolution specialist are all tasked with mastering the art of persuasion. The trial advocacy course provides the foundation for learning and mastering the skills required for effective and ethical advocacy that is at the core of our justice system. Your proficiency in the skills acquired in trial advocacy will set you apart from other professionals and attorneys in the workplace at a time when in-person communication is at a premium.

Zelda Harris
Professor, Trial Advocacy
Loyola University Chicago Law School

The courtroom is a theatre where the stories of the litigants' lives are played out before judges or jurors who, themselves, become part of the play. It is a place where warriors wage fierce war using intellect and storytelling as their weapons. It is a place where the morality and meaning of human conduct is judged. It is a place where the

rules of right and wrong in our society are affirmed. It is a place where the souls and aspirations of both the judged and the judges are examined closely. It is a place of honor.

Dr. Richard Waites
CEO, The Advocates
Jury and Trial Sciences

Whether you represent clients in the courtroom or the boardroom, effective oral advocacy is essential. Trial advocacy programs hone these skills and give you the tools to confidently assess and respond to challenges so that you can successfully achieve your client's goals.

Judge George Hanks
Federal Magistrate
Southern District of Texas

Trial Advocacy - Overview

The art of advocacy is on full display during a trial. What makes trial advocacy different other aspects of advocacy is the number of audiences that an advocate encounters during the trial process. This is especially true during a jury trial. Those audiences include the judge, the jury, the opposing counsel, the witnesses, and the advocate's client. For each of those audiences, a different skill is required.

Trial advocacy unfortunately suffers from being the most public form of advocacy. The academic world writes about it.[1] The news media covers it.[2] The entertainment world embraces it as full-fledged entertainment.[3] The public nature of trial advocacy creates numerous expectations among its respective audiences. The external expectations create a subtle, and sometimes not-so-subtle, pressure on the advocate. Judges expect advocates to be articulate and legally grounded. Juries

expect advocates to be competent and skilled, and to a certain degree – entertaining. Opposing counsels expect advocates to be forceful and contrarian. Witnesses expect the advocate to be both a guide (on direct examination) and a warrior (on cross examination). The clients expect the advocate to carry the banner for their case, using the advocate's complete skill-set to achieve victory. Without a doubt, this set of expectations creates performance pressure at one of its highest levels.

The advocate must deal with the pressure and expectation through understanding and awareness. The understanding and awareness begins with the advocate knowing the expectations exist in the first place. This knowledge, or lack thereof, is generally overlooked in trial advocacy literature.[4] Because external expectations are not addressed in the literature, the student advocate is left to learn trial advocacy techniques under the influence of his/her own deep structure – or said another way, his/her internal expectations. Unfortunately, internal expectations are not addressed in trial advocacy literature either.[5] Student advocates are then left with learning trial techniques in an a-contextual vacuum.

Stages of a Trial

Trials follow a basic linear path. A very clinical separation creates the steps along the path. Teaching purposes dictate the need for this separation. However, it is important to remember that a trial is bigger than the sum of its parts and in practice, cannot be separated into distinct parts.

Stages of a Trial

1. Voir Dire

2. Opening Statements
3. Case for Plaintiff/Prosecution
    a. Direct Examination
    b. Cross Examination
    c. Experts
4. Case for Defendant
    a. Direct Examination
    b. Cross Examination
    c. Experts
5. Closing Arguments

Civil trials and criminal trials have basic foundational differences. The differences are important because of the external and internal expectations they create. The chart[6] below illustrates those differences.

	Civil	Criminal
Parties	Individuals or groups	Government and an alleged criminal
At issue	Court must determine whether one party has caused harm to another party; case deals with rights and duties between individuals	Court must determine whether one party has violated a statute that prohibits some type of activity
Type of Wrongdoing	Harm to private person or group	Transgression against society

Penalty or Remedy	Compensation for damages or loss	Punishment (fine, imprisonment, rehabilitation, etc.)
Burden of Proof	Preponderance of the evidence	Guilt beyond a reasonable doubt

The five stages of a trial transcend any differences between the civil and criminal trial process – and the stages are applicable to both the plaintiff's presentation and the defendant's presentation.

1. **Voir Dire.** Jury selection is both an art and a science. The "art" of voir dire is engaging the jury panel in a meaningful discussion that allows for selection of the best possible jurors for the case. The science of voir dire includes understanding how the matrix of group decision-making, voir dire responses, and the issues in the case all intersect to impact the selection process.

To a certain extent, voir dire is the least proscribed facet of the trial advocacy skill set. That may be due to a certain "each to his own" philosophy about voir dire. Less is written about the techniques to be used in voir dire than is written about the strategy of voir dire.[7] This treatment is not incorrect but does little to prepare a lawyer to conduct an effective voir dire.

The "art" of voir, engaging the jury panel, is best accomplished through creating an atmosphere of exchange – where the panel feels invited to share opinions and thoughts on the topic presented. This atmosphere is created through rapport-building and through the use of open-ended questions. To build rapport, an advocate has to be authentic and articulate. The use of open-ended questions is discussed at length in the section below on direct examination.

One psychological barrier to effective voir dire that an advocate needs to be aware of is the mindset of the typical juror. For the most part, panel members do not want to be there and do not want to be selected for jury service. These panel member attitudes can create a "false negative" and the advocate should consider this when preparing for voir dire.

2. **Opening Statement**. The main purpose of opening statement is to tell the decision-maker (judge or jury) your story of the case. The story aspect is important in opening statement because a straight, chronological recitation of the facts is neither persuasive nor engaging. To be persuasive and engaging, an advocate must create the Persuasion Triangle (Figure 1).

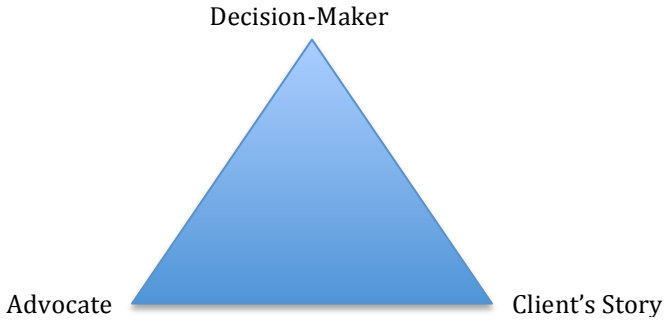

Figure 1. The Persuasion Triangle

This simplistic diagram illustrates how the advocate uses story in opening statement. In Chapter 1, the impact of the elements of storytelling was discussed. The impact of using story in opening statement is creating a deep structure connection between the decision-maker and the client's story. The advocate must make that connection and in doing so, creates the Persuasion Triangle.

Opening statements should be tailored to the audience. An opening statement presented to a judge will be different than an opening statement delivered to a jury. "Know your audience" is a popular and important adage in presentation instruction. However, preparing an opening for a judge can present a potential trap for the advocate. The trap is discounting the effectiveness of persuasion techniques because the judge uses a "legal filter" to decide the case. While the "legal filter" is admittedly a significant part of how

a judge encounters a case, the judge is still a listener. Listeners are more interested when the speaker engages them. A more interested listener pays closer attention to what's being said. Would any advocate NOT want the judge to pay closer attention to what he/she says?

The "know your audience" theme also applies to opening statements presented to a jury. The prevalence of television trial dramas creates an expectation in the jurors. The expectations are most prevalent in the cross-examination and closing argument stages of the trial process. However, juror expectations exist throughout the trial – and those expectations revolve around the concept of entertainment. Jurors have an expectation that a trial will be a form of entertainment and the challenge of the advocate is to meet those expectations without minimizing the importance of the justice process.

Meeting expectations for entertainment means engaging the jury panel. One simple way for an advocate to engage a jury panel is to use V-A-K as a foundation for trial preparation.[8] The "V" stands for visual, the "A" stands for auditory, and the "K" stands for kinesthetic. Listeners process information in one of these three ways and by including elements of V-A-K in the opening statement, the

advocate is assured of engaging each member of the jury panel.[9]

3. **Direct Examination**. The primary purpose of direct examination is to tell the decision-maker your case story through your witnesses. The basic proscription for direct examination is to make the witness the star. This task is easier said than done. The advocate has to understand his/her role – that of the director. The stage/film industry describes a director as "a storyteller who needs a lot of people, equipment, creativity and planning to bring his story to a movie audience. And in the process, the director has to hold on to the vision while dealing with temperamental artists, union contract requirements, uncooperative weather, studio time, budget demands and a handful of other uncontrollable uncertainties".[10]

The advocate, as trial director, has to lead the witnesses to tell the story, using open-ended questions rather than leading questions. The open-ended questions model – who, what, when, where, how, describe, and explain-type questions – is a conceptual theory that can be difficult to master. It is difficult to master because, in general, most of our conversations are cross-examinations. It is much easier to control the direction of a conversation through leading

questions, so the skill of using open-ended questions to direct a conversation is one that has to be learned and developed.

The reason that open-ended questions are effective on direct examination is they are designed to elicit information. The brain engages differently when it is asked to search for information. Here is a classic example:

Scenario One: At the end of a presentation, the presenter often asks, "do you have any questions?" The brain engages with a "yes" or a "no". If the answer is "yes", then the student must determine whether or not to ask the question, whether the professor actually wants questions, whether the question will potentially embarrass the student, whether the question is on point, and any number of other options. By the time this thought process has occurred, the time window for questions is typically closed.

Scenario Two: At the end of a presentation, instead of asking "do you have any questions", the presenter asks "what questions do you have?" The brain engages immediately by looking for questions without any of the pre-screening analysis that occurs in Scenario One.[11]

4. **Cross Examination**. The purpose of cross-examination is to bolster your story of the case and to poke holes in the other side's story. The basic proscription for cross-examination is the advocate is the star and controls the focus. Essentially, the advocate becomes the witness. Continuing the analogy of the advocate as trial director, on cross-examination, the advocate turns the focus of the audience away from the witness. The advocate controls the focus by limiting the amount of information the witness gives. The limiting effect is accomplished through using the technique of leading questions.

A leading question contains the answer in the question and presents the witness with the opportunity to agree, by saying "yes", or to disagree, by saying "no". However, there is a trap for advocates learning the technique of cross-examination because a leading question isn't really a question but a statement to which the advocate wants the witness to agree. The trap shows up through the use of tag words, placed at the end of the statement, in order to create the question effect. Typical tags on cross-examination are "correct", "isn't that right", "didn't you", etc.

Here is what a cross-examination about a trip to the grocery store might look like using tags words:

Q: You went to the grocery store, correct?

A: Yes.

Q: You bought some bread, correct?

A: Yes.

Q: You bought some milk, correct?

A: Yes.

Q: You bought some eggs, correct?

A: Yes.

There are two primary problems with using tag words. Frist, as Mark Caldwell from the National Institute of Trial Advocacy would say, they are clutter. They are just unnecessary. Second, they shift the focus of the listener to the tag word and away from the content of the question. The focus shift happens because the vocal emphasis ends up on the tag.

Here is the same cross-examination as above, only without the tag words.

Q: You went to the grocery store.

A: Yes.

Q: You bought some bread.

A: Yes.

Q: You bought some milk.

A: Yes.

Q: You bought some eggs.

A: Yes.

The general rule of thumb on cross-examination is to keep the questions short and to limit them to one fact per question. The more precise the question on cross, the more the advocate can limit the amount of information the witness gives.

5. **Closing Argument**. The purpose of closing argument is to connect all the "dots" for the decision-maker. Often, connecting the "dots" presents a problem for the advocate because closing becomes a recap of the evidence presented. What is lost in a recap-style closing are the inferences that can be drawn from the facts and the evidence. It seems counter-intuitive, but many times, openings look more like closings and closings look more like openings.[12] This counter-intuitive switch happens in part because the advocate loses sight of the case story by focusing too strongly on the evidence presented and not strongly enough on what the evidence means. The focus problem can usually be attributed to an over-reliance on the jury charge to create a structure for the closing.

Trial Advocacy – Applicable Law

Rules of Evidence – Federal, State

Trial Advocacy – The Story of the Case

The story of the case is usually developed around the case theme. What makes a good theme is its universality because it then transcends the varying experiences of the listener(s). When an advocate transcends the listeners experiences, the Persuasion Triangle has achieved its goal.

A story also creates imagery for the listener. Imagery is important because it is the gateway to a deep structure connection for the listener and that connection allows the advocate to be persuasive. A straight, chronological recitation of the facts does not open the gateway.

The two following passages illustrate the difference between straight, chronological recitation of the facts and a persuasive story. The Battle of the Alamo was a turning point in fight for Texas. The first passage describing that event is from Encyclopedia Britannica[13]:

> For 13 days the Alamo's defenders held out, but on the morning of March 6 the Mexicans stormed through a breach in the outer wall of the courtyard and overwhelmed the Texan forces. Santa Anna had ordered that no prisoners be taken, and virtually all the defenders were slain (only about 15 persons, mostly women and children, were spared). The Mexicans suffered heavy casualties as well; credible reports suggest between 600 and 1,600 were killed and perhaps 300 were wounded. Although the Texan defenders suffered defeat, the siege at the Alamo became for Texans a symbol of heroic resistance. On April 21, 1836, when Houston and a force of some 800 men routed 1,500 Mexicans under Santa Anna at San Jacinto (*see Battle of San Jacnito*), the Texan forces shouted, "Remember the Alamo!"

The second passage describing that event is from James Michner's *Texas*.

> By seven that Sunday morning the battle was over, as complete a victory as any general could have hoped for. The Tejas rebellion was crushed almost before it was fairly launched, and Santa Anna, joyous in his triumph, gave one last order: 'Burn them all". And the pyre was lit, and all but one were burned. By special dispensation of General Cos, the body of Gregorio Esparza was released to his brother for burial. Into an unmarked grave, unhonored and spat upon, were thrown the ashes of the Alamo heroes, but even before the acrid fumes from the fire died away, men in various parts of the world were beginning to utter the name with reverence, and anger, and hope, and determination. 'The Alamo!' screamed newspapers throughout America. 'The Alamo!' whispered men to their wives as they prepared to leave for greater battles in the future. And in the weeks ahead, when men from all parts of Texas and the United States began to muster to avenge this savagery, they voiced a threat, a blood oath that would bind them together: 'Remember the Alamo!'

Both passages are factually accurate but the second one creates a deep structure connection for the reader. The deep structure connection is particularly important in jury trials where studies show that most jurors have made up their minds about the case after opening statements.[14]

Trial Advocacy – Glasl's 9-Stage Model

Applying Glasl's Model in the trial stage means the conflict has moved on the dispute resolution continuum into a win-lose, or lose-lose, dynamic. Based on the chart (Appendix 1), the win-lose dynamic encompasses Stages 4-6 of Glasl's Model and the lose-lose dynamic encompasses Stages 7-9 of the Model. It is hard to disagree with the premise that there is a winner and a loser in the trial context. There are also trials in which both parties feel like the loser. More specific evaluation in the trial context helps determine in which of the six available Stages the presented conflict resides.

Trial Advocacy – Deep Structure

Deep structure elements are more easily discernable in the trial context than in some of the other advocacy sections. The trial context provides a direct connection to a story. It is through the story that an advocate connects to a case. The connection is facilitated because stories contain themes and those themes usually have an emotional element. Once the advocate makes the connection to the specific emotional element in the case, he/she can get insights into how the case may be impacting him/her.

As an example of how the deep structure connection occurs in the trial context, consider a case where the theme is "betrayal". It would rare for a person to reach adulthood without having experienced some sort of betrayal in his/her life. It is also important to note that even though the primary theme is "betrayal", and an advocate may make a deep structure connection to a secondary theme, a tertiary theme, or even to a seemingly innocuous fact. The important point for the advocate is to recognize the deep structure connection, and to understand how that connection might be impacting the advocate's experience of the case.

Trial Advocacy – Skill Development

Students should prepare and present a 5-minute closing argument of their "client's" case. For this exercise, the "client" is the same student in the class that the student worked with during the *client interviewing exercise* and the *story of the case exercise*. The goal is not to present a technically correct closing argument but to take facts, evidence, and law and weave them into an organized, persuasive presentation. Students may use notes for this presentation but should not be permitted to read a prepared closing.

[1] The note will include the number of texts available on the topic of trial advocacy, or some aspect of trial advocacy.
[2] The note will include the number of trials covered by national news outlets.
[3] The note will include a short over-view of some of the most popular courtroom dramas and movies.
[4] I need authority for this proposition.
[5] I need authority for this proposition as well.
[6] http://www.laits.utexas.edu/gov310/JU/civcrim/index.html
[7] Insert some concepts from Mauet/Lubet books.
[8] For more information on V-A-K, see _____.
[9] V-A-K elements should also be used when presenting information to a judge.
[10] http://entertainment.howstuffworks.com/movie-director1.htm
[11] For a more in-depth explanation of how open-ended questions trigger brain responses, see _____.
[12] I teach in the Emory Law School Kessler-Edison Trial Techniques Program and this problem is often addressed in our faculty meetings by Professor Paul Zwier.
[13] http://www.britannica.com/EBchecked/topic/12135/Alamo
[14] Insert what studies and where they can be found.