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Sometimes Theatrics Are As Important As Evidence

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The following is based on an actual case. This writing is not intended to romanticize any particular trial techniques or tactics. But rather, to give some insight into how an actual trial sometimes works.

Within the instant writing, the reader will experience a criminal prosecution, as well as a criminal defense. In the first instance, the cogent point, is based on the concept of circumstantial evidence.

The case involved the daytime burglary of an elderly man, when he was not at home. As luck would have it, a State Trooper was on routine patrol. When he observed an individual with what appeared to him to be a television, on the individual's shoulder. When the Trooper turned his vehicle around and drove back down the highway, he confronted the individual and noticed that the television was no longer being carried on his shoulder. (1)

The Trooper dutifully took the identification information of the subject and released him. Upon further investigation and follow-up by the Trooper, he found the television in a ditch along the side of the road, between where he first saw the subject and where he stopped him for questioning.

Subsequently, the State Police Barrack received a report of a daytime burglary. In which personal items were stolen (taken without permission of the owner), from the home of our elderly victim. The television set recovered by the Trooper, was in fact, one of the stolen items, together with other personal items of value, including a medallion. Based on this information, a search and seizure warrant was issued for the suspect's residence.

Upon arrival, the police went to the front of the building and posted additional police in the rear of the building. When they announced their presence, the suspect exited the rear of the house, in his bare feet, and wearing only his underwear. He explained later, that he was simply taking the garbage out to the rear of the house, even though this was February in Maryland and there was snow on the ground.

After the police gained entry into the residence, they located the suspect in a clothes closet, still in his underwear. During a search of the house, the police found a medallion, which was later identified by the victim, as one of the items that had been stolen from his residence. As a result, the suspect was arrested and charged with various crimes. (3)

It should be noted that, cross-examination is where you want to put words in the mouth of the witness. In addition, you should treat it as if it were guerilla warfare. If you only need to make one or two points, make them and get out! Don't let the urge to ask that "one last question". It usually gets you in trouble. On direct examination of one of your witnesses, you should have a fairly wide latitude in their testimony, unless the opposing attorney or the Judge stops them. But make sure that they are properly prepared. Or as was said in the old days, taken to the "wood shed". And if the attorney for the other side asks if the witness has spoken to the attorney in anticipation of the trial, the witness should almost always reply in the affirmative. Without question, the opposing attorney will usually take the bait, and cannot help themselves from asking, "And what were you told to say?", and the answer should be (as I was told by an older and experienced trial attorney) "I was told to tell the truth!"

One question too many!

And so the theatrics begin. Prior to the trial starting, the victim was asked to sit in a particular section of the first bench. Which just happened to be directly behind the prosecutor. In addition, it was requested that no one was to be seated next to or near him.

In fact, the courtroom deputy was requested to have no one sit near the victim during the course of the entire trial. Apparently, the defense attorney didn't this arrangement was at all unusual or of any merit.

As was to be expected, the defendant did not take the witness stand to testify in his own defense. Nor did the defense attorney produce any witnesses or evidence on behalf of the defendant. The case then proceeded to the closing argument portion of the trial. This is where the second theatric event occurred. Rather than make some long winded legal argument, the issue of circumstantial evidence was confronted head on. Since circumstantial evidence can be as legally binding as actual eye witness testimony. (4) It was important for the jury members to understand this concept.

Subsequently, the accused requested a jury trial, to which a prosecutor was assigned. It should be noted, that the suspect made no incriminating statements. Nor did he elect to take the witness stand and testify in his own defense, in order to assert his innocence.This is where the theatrics come into play.

It goes without saying that the trial began and proceeded as most jury trials do. The prosecution put the elderly victim on the witness stand, and he testified that his home had been broken into, while he was away, and various personal items were stolen. He identified the television set as well as the medallion, as two such items. He then took a seat directly behind the prosecutor.

Enter Robinson Crusoe.

When the jury was prepared for the final argument, they were asked if they had read or knew about the story of Robinson Crusoe. Some nodded with acknowledgement. While others said or did nothing.

The story was presented to them in this fashion. Robinson Crusoe decided to take a walk on a part of the island, where he was stranded. Although he had never been on that apart of the island before. Just then, he became light headed and unsteady as he saw footprints, they were human footprints. At that point, he has never seen or talked with Friday, but he was convinced that another human being was on the deserted island with him. This is circumstantial evidence.

Finally, it came time to again recognize the elderly victim. As he had been sitting alone behind the prosecutor for the duration of the entire trial. The jury was instructed to look toward the victim. At the same time, they were told that he had no immediate family or friends to protect him.

In fact, he was "all alone"!

When the defense attorney began to argue circumstantial evidence, the trial conclusion and eventual verdict began to look up for the prosecution. Just a few minutes after retiring to deliberate, the jury returned with convictions on all counts.

So what's the point? Always be able to make your closing argument before you start the trial. Expect the unexpected. Stay the course, no matter what happens. And never try to out expert the expert. And by all means commit to memory Professor Irvin Youngers Ten Rules of Cross Examination. (5)

When a prospective jury pool enters the courtroom, try to see the magazines or books they are reading, this may give you some insight into their way of thinking. How they are dressed. What they do for employment and where they live, if this information is available to you. Try to make the best assessment possible. As it's a fact that you do not pick a jury. But rather, you unpick them. Since each side has strikes and will use them to eliminate any potential jurors that are considered by them as not being favorable to their arguments or theory of the case, or are at the extreme end of their potential arguments spectrum.

In doing so, the eventual outcome of the jury selection process should be a relatively fair and impartial jury. At least, one would hope.

Also be mindful of your interactions with the jurors. In one particular case, when an observation was made directly at a juror, she smiled in return, and so the attention of the attorney was directed to the other jurors, as it was "assumed" that the juror in question was favorable to the arguments being made on behalf of the client. However, when she retired to the jury room for deliberations, she was, to say the least, very negative. When she was approached after the trial concluded and the jury was excused, she explained that every time she was looked at, she would smile and so the other jurors then got the attention. Talk about Pavlov's dog! That's how you can easily misread a juror.

So what does the all of this mean? To paraphrase Professor Younger, a good trial lawyer needs extra training after completing law school. It should include: one year as a traveling preacher, one year as a used car salesman, and a final year as a Shakespearean actor. Then you should be ready to try your first trial. Best of luck!

FOOTNOTES

(1) Maryland Criminal Law Section 7-104

(2) Maryland Pattern Jury Instruction

(3) Larry Kenneth Brown vs, State of Maryland, No.139, September Term, 1969 Maryland Court of Special Appeals.

(4) Derez Deauntae Hunt us, State of Maryland, No. 1619, September Term, 2014 Maryland Court of Special Appeals.

(5) IRVING YOUNGER'S 10 COMMANDMENTS OF CROSS EXAMINATION

1. Be Brief
   Be brief, short and succinct. Why? Reason 1: chances are you are screwing up. The shorter the time spent, the less you will screw up. Reason 2: A simple cross that restates the important part of the story in your terms is more easily absorbed and understood by the jury. You should never try to make more than 3 points on cross-examination. Two points are better than three and one point is better than two.

2. Use Plain Words
   The jury can understand short questions and plain words. Drop the 50 dollar word in favor of the 2 dollar word. "Drive your car" instead of "operate your vehicle."

3. Use Only Leading Questions
   The law forbids questions on direct examination that suggest the answer. The lawyer is not competent to testify. On cross-examination the law permits questions that suggest the answer and allows the attorney to put his words in the witnesses' mouth. Cross-examination, therefore, specifically permits you to take control of the witness, take him where you want to go, and tell your important point to the jury through the witness. Not asking controlled leading questions leaves too much wiggle room. What happened next? I would like to clear up a couple of points you made on direct? These questions are the antithesis of an effective cross-examination. Any questions which permit the witness to restate, explain or clarify the direct examination is a mistake. You should put the witness on autopilot so that all of the answers are series of yes, yes, yes!

4. Be Prepared
   Never ask a question that you do not know the answer to. Cross is not a fishing expedition in which you uncover new facts or new surprises at the trial.

5. Listen
   Listen to the answer. For some, cross-examination of an important witness causes stage fright; it confuses the mind and panic sets in. You have a hard time just getting the first question out, and you're generally thinking about the next question and not listening to the answer.

6. Do Not Quarrel
   Do not quarrel with the witness on cross-examination. When the answer to your question is absurd, false, irrational contradictory or the like; Stop, sit down. Resist the temptation to respond with "how can you say that, or how dare you make such an outrageous claim?" The answer to the question often elicits a response, which explains away the absurdity and rehabilitates the witness.

7. Avoid Repetition
   Never allow a witness to repeat on cross-examination what he said on direct examination. Why? The more times it is repeated, the more likely the jury is to believe it. Cross-examination should involve questions that have nothing to do with the direct examination. The examination should not follow the script of the direct examination.

8. Disallow Witness Explanation
   Never permit the witness to explain anything on cross-examination. That is for your adversary to do.

9. Limit Questioning
   Don't ask the one question too many. Stop when you have made your point. Leave the argument for the jury.

10. Save for Summation
    Save the ultimate point for summation. A prepared, clear and simple leading cross-examination that does not argue the case can best be brought together in final summation.

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 of 1975