COURTROOM TECHNIQUES

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COURTROOM TECHNIQUES

I. OVERALL STRATEGY

A. The Art of Persuasion

1. Regardless of the subject matter, the law, the facts, or the amount involved, learning to be an effective trial lawyer requires mastery of the art of persuasion. That is the trial lawyer's job. We must take the facts as we find them and the applicable legal concepts and mold them in a way that convinces the trier of fact to rule in our favor.

2. Never lose sight of the fact that everything you do in the courtroom, every movement, argument, objection, etc., should have only one purpose -- to persuade.

3. We are all different, and therefore, each of us will have our own style of persuading others. Remember that whether the case is being tried before a judge or a jury, you are trying to persuade people by creating a favorable reaction to you. Whatever works for you in everyday life should work for you in the courtroom. Do not try to alter your personality - chances are you will do nothing but end up being self-conscious.

4. The single most important attribute to convey is trustworthiness. If the judge or jury comes to believe you are credible, you will be very persuasive. In part, this trustworthiness is built up over years of reputation-building. In any given case, however, it is achieved by always stating facts accurately, and citing cases correctly. You must never mislead the court or the jury. Aide from the fact that it is unethical if intentional, doing so may give you a temporary advantage but will almost always come back to haunt you.

5. There are many other factors which go into creating an image of trustworthiness and, therefore, persuasiveness. Without being exhaustive, some obvious considerations are:

a. Dress: The courtroom is not the place to display your individuality. Especially with a jury, you wish to appeal to the broadest range of people. Conservative, quiet dress is best.

b. Vocabulary: Speak in plain English. No matter how smart you are, if you cannot make your listener understand, it will do you no good. Whether you are talking to the court or a jury, avoid legalese. If you cannot say it in simple terms, don't say it at all.

c. Demeanor: Many trial lawyers believe blatant aggressiveness is the key to success. While it may sometimes intimidate your opponent, it is more often than not going to lose points with a judge or jury. Aggressiveness is really the ability to get things accomplished. One can be gentlemanly and courteous at all times and still be aggressive. Never engage in personality clashes with your opponent.

d. Body Language: Every moment you are in the courtroom you should think of yourself as being on stage. If you were an actor, you certainly would not want your audience to fall asleep. By the same token, you want to be interesting - not unusual, but interesting. Use gestures, expressions and movement to create interest. When you are on your feet, don't glue yourself to the lecture.

e. Preparation: This author subscribes to the theory that great trial lawyers are born, not created. True genius at this craft is a God-given gift. Good trial lawyers, however, can be created, and no matter what your natural persuasive abilities, thorough preparation will make you a good trial lawyer. Virtually noting that happens in a trial should be a surprise to you. If you are surprised, it's because you have not prepared. A trial is much like a play of which you are the director. You should know every actor's lines before he speaks them. Every document should be familiar to you. Every point of law that comes up should be prepared in advance. Nothing impresses a judge or jury more than a lawyer who is always one step ahead. Such a lawyer exudes confidence and competence.

B. Telling a Story

1. One of the biggest failings of commercial litigators is the inability to make a complex commercial case simple and interesting. You should approach a commercial case no differently than a good personal injury or criminal lawyer approaches a case -- as one involving people and their problems. Do not succumb to the temptation to believe that business problems will bore a judge or jury -- if you believe that, your presentation is likely to be dull and complicated.

2. From the very start of your preparation find the theme of your case. No matter how complicated the transactions involved, you should simplify your case to one, or at worst, a small number of overriding points that can be simply stated and persuasively sold. Commercial cases frequently involve hundreds of pieces of paper. Many commercial litigators assume it is necessary to place every one into evidence without any thought of why. Every piece of evidence, and every witness must be critically examined for a relationship to your main theme. If it doesn't materially advance your theme, don't use it. The more evidence you put on, the harder it is to keep your case simple. Some lawyers believe the defense should always obfuscate and confuse. I believe that to be a terrible mistake. It does not matter which side you are on, keep it simple.

3. Give your case a sense of drama. Breach of contract, antitrust conspiracy, securities fraud, or mortgage foreclosures can, if presented correctly, be just as interesting as any other type of case. Obviously, one does not want to be histrionic, but let your listener know you care and your clients care about this matter.

C. Bench Trials v. Jury Trials

1. The comments made in this outline are applicable to either bench or jury trials. I do not believe that a presentation should be significantly different for one trier of fact than the other. The principles of persuasiveness, trustworthiness, simplicity, and preparation apply with equal vigor to both.

2. It is important, however, as part of your overall strategy to decide - to the extent your opponent does not decide for you -- whether you want to try your case before a judge or a jury.

3. There are many "conventional wisdoms" floating around the commercial litigation bar that probably could not withstand critical examination. For example: the small plaintiff suing big companies always wants a jury, and the big defendants do not. The plaintiff with a very complex case wants a bench trial, the defendant wants to be able to confuse a jury. While these platitudes do raise legitimate considerations in making your decisions, they all seem to be based on one underlying assumption that simply may not be true -- that is, that a judge is "smarter" than a jury. I know of no empirical evidence to support that assumption. Not every judge is an expert in every field of law, nor does a judge necessarily have any better knowledge of a particular business or industry than would a group of six jurors. Most judges will, in fact, deny any special expertise in many business related matters. The principal study done in this area suggests a high correlation of results between judges and juries. See Kalven and Zeisel, The American Jury.

4. At the very least, I recommend waiting until after the case is assigned to a particular judge before making your decision whether to request a jury. Remember that with a judge, you have only one person whose biases may therefore be more important than when the predilections of six people are melted together. In making the determination, you should seriously consider who your witnesses will be, what you expect the equities of the situation will be and just how complicated the facts really need to be. you should not make your decision based on a fear of juries, but rather on the best reasoned guess you can make as to which trier of fact will be more advantageous for you.

II. SELECTING A JURY

A. The Purpose of Voir Dire

1. Assuming either you or your opponent has elected to try the case to a jury, obviously your first interaction with that jury will be the voir dire.

2. The common perception of the purpose of voir dire is to pick a jury that is favorable to your side of the case. I consider that both a misperception and probably an impossibility. The truth is we are not selecting a jury -- we are striking a jury. The difference is far more than semantics. With respect to the actual composition of the jury, the best one can hope is to strike from those presented to you in the jury pool, over which you have no control, those individuals whom you feel may be predisposed against your client, your position, or you. If you assume that your opponent is going to strike anyone who shows the slightest inclination to favor your side of the case, you can forget the notion of finding a favorable jury. What you are really trying to achieve is a neutral one.

3. Once you accept the notion that your choice is limited, you do, of course, want to consider what types of people you want on your jury. The overriding trait that I have found to be important in a commercial case is intelligence. Commercial cases probably have far more appeal to the rational side of a juror than the emotional -- since we tend to be representing supposedly rational businessmen. I want such people regardless of which side I am on because I cannot persuade anyone of the propriety of one side of a business transaction if they cannot understand it. Thus, look for the outward characteristics of education, economic status, articulateness and ability to reason. If you can find such people in your pool, you want them, if you are following the strategy of simplicity I have outlined above.

4. Despite much commentary to the contrary, there is some social psychological research that indicates that the composition of the jury is the least important factor in determining the outcome of a trial. See Saks and Hastie, Social Psychology in Court (1978). While that goes against the grain there is a certain logic to it. The conclusion is based on a perception which I share: namely, that jurors take their job more seriously than almost anything they have ever done, and in that very special setting achieve a degree of freedom from bias that none of us achieves in day to day life.

5. Over the past decade, however, the image of corporate America has taken a severe beating with a number of highly publicized scandals and collapses, engendering massive punitive damage awards. The current Enron story is the latest

chapter. If you represented such publicly “notorious” types of entities, or any similar, then the ability to find unbiased jurors or judges becomes both difficult and critical.

6. An equally if not more important purpose of voir dire is to begin the process of persuasion. You should begin trying your case at this time. From the moment you stand up, begin building the image of credibility and competence.

B. Methods of Voir Dire

1. The procedure of questioning jurors varies from court to court and judge to judge. Federal judges generally conduct voir dire themselves and require counsel to submit requested questions in advance. Under such a procedure, there is very little persuasive opportunity for the lawyers. Florida state court judges, to varying degrees, generally permit the lawyers to conduct voir dire--sometimes totally and sometimes after a round of judicially posed qualification questions. Make sure you know the court’s procedure before trial. Ask at the pre-trial conference, or any other opportune time.

2. As soon as the venire panel is seated, draw a chart of the box and record all the information you receive about each member of the panel in that box. Check with the court as to the availability of venire lists and what they contain in advance. Having someone with you to record and update this information as you go will keep you focused on the task.

3. Introduce yourself and your client, making sure the jury sees that your client is made up of people, regardless of how big a company it may be.

4. Use both group questions and individual questions. Alternating between the two will keep the panel interested. Use group questions for general background--”Anyone ever been a juror before?”; “Anyone ever been party to a suit?” When you receive a response, pursue it immediately with individual questions. It is the only way to get that juror talking and interacting with you, which is the key.

5. Never ask questions that would require an embarrassing answer. Human beings do not like to be made fools of in front of others. Such a question will either elicit a false response, and therefore, be worthless, or receive a true response accompanied by much unwanted hostility.

6. Avoid those old standby questions about “Are you biased against big companies?”

7. Always talk in a conversational tone. If you either talk down to a juror or appear overly and sickeningly solicitous, you will be asking for trouble.

8. In highly publicized cases where preconceived notions are likely to exist, try to convince the Court to permit individual voir dire.

9. No matter how clever you think you are, the more cases you try the more you will realize that you cannot learn very much about jurors in voir dire. You should consider the costs and potential benefits of using a sociologist or psychologist or jury consultant as an expert aide. Some trial lawyers swear by them, many others swear at them. There is very little evidence that their intuition is any better than an experienced trial lawyer's. See Saks and Hastie, supra.

10. Always determine before voir dire the judge's method of announcing strikes. These should be done outside the hearing of the jurors. Under Florida law, "back striking" is absolutely allowed, but make sure you understand in advance the judge's procedure.

III. PRE-TRIAL CONSIDERATIONS

A. Trial Brief

1. You should file a trial brief in any case that is going to last more than one or two days. Most judges welcome them. Such a brief should set forth your principal legal theories and should anticipate any evidentiary issues that will be important. The purpose of the trial brief is to educate the court as to your position and impress it with your preparation.

2. Do not hesitate to tie your trial brief to the facts you intend to show. This is a free opportunity to argue in advance of trial which is very helpful in a bench trial and can set the stage for a directed verdict motion in a jury trial.

B. Motions in Limine

1. Neither the Federal Rules nor the Florida Rules mention motions in limine. They are generally used only for a jury trial. However, most courts will recognize and hear such a motion.

2. The principal reason to make such a motion is to know in advance whether certain evidence will be admissible so that you can plan your strategy accordingly and avoid later embarrassment. These motions are a very useful tool.

3. Many judges, however, tend to defer motions in limine until the trial, so as not to have to rule "in a vacuum."

IV. OPENING STATEMENT

A. Importance

1. The opening statement is a critical part of your presentation of the case. According to the Kalven and Zeisel studies reported in "The American Jury," the verdict jurors would have returned after the opening statement was frequently the same as the verdict they actually returned in the cases. It is the first time that you can tell the jury or the court your story.

2. The opening statement is your opportunity to present your story, your trustworthiness and the personality of yourself and your client. You must capture the trier of fact's attention by instilling a sense of drama and importance to your case. There is much truth to the old saying about first impressions. If you do not leave a good first impression, you will never leave a lasting one.

B. Techniques for Opening Statement

1. Be Brief. No matter how complicated a case may be coming, your opening statement should succinctly tell the essentials of your story and no more.

2. Never apologize for taking too much of the jury or the court's time. If you feel compelled to do so, you probably have taken too much, but apologies only call attention to the fact.

3. One very effective device in an opening statement is to give the trier of fact an "assignment"--that is, something you ask them to watch for as they hear the evidence. That assignment should be directly tied to a major theme of your case. For example, suppose you represent the plaintiff in a business interference case and you are seeking punitive damages. While tortuous interference has several elements, you may be planning to prove a large part of your case through contradictions in testimony of your competitor's employees which you hope will add up to proof of actual malicious intent. Ask the trier to watch for those contradictions--give them that assignment if you will. Challenge the trier of fact to test your own credibility by testing if you in fact show those contradictions. If the judge or jury accepts the challenge and you later pass it, your entire case will become instantly credible.

4. The obvious caveat to the "assignment" technique and an absolutely fundamental principal of opening statements is never say one word that you are not absolutely certain will be proven by the evidence. If you do, your opponent will remind the trier of fact twelve times in his closing statement.

5. If at all possible, do not use notes of any kind. Nothing impresses a listener more than a lawyer who is thoroughly familiar with his case that he can deliver his entire opening without referring to a single piece of paper. If you must use notes, do so sparingly and never read them verbatim.

6. Listen carefully to your opponent's opening statement. Pay careful attention to what he says he is going to prove. If he does not prove every item, make sure to use that failure in your closing argument.

7. If your opponent has gone first, do not argue against his opening, since that is inappropriate. Do not hesitate, however, to point out where your opponent has failed to tell the whole story.

8. If there are weak spots in your case, admit them and deal with them. For example, if you know there is a bad document or witness coming, you can blunt a great deal of its impact by telling the trier of fact about it yourself first and providing the explanation.

9. Many lawyers tend to forget the rules about what constitutes permissible opening statement. It is a statement, not an argument. See Juhasz v. Barton, 146 Fla. 484, 1 So.2d 476 (1941). Overt argument in a jury trial could lead to an objection, and a successful objection, no matter how unimportant, makes you look bad.

V. PRESENTATION OF YOUR CASE

A. Witnesses

1. The preparation and effective presentation of witnesses in business litigation is covered in depth by another speaker. We will consider here only a few broad strategic and practice pointers.

2. When you are conducting direct examination, you are the director and your witness the performer. Direct examination must move like clockwork to be effective. Your witness must recognize his cues and respond with the correct story. Your own credibility will be severely diminished if your examination of your own witnesses does not go well.

3. Do not assume that business executives, even at the highest levels, will be any more relaxed in the courtroom than any other type of witness. It is not uncommon to see a corporate president totally freeze on the stand.

4. Prepare a separate witness file for every witness who will testify at the trial. Place in that file an outline of the questions you intend to ask, copies of any

statements or depositions of that witness, and any documents you wish to introduce through that witness or question him about.

5. Decide on a logical order of witnesses. Most of the time, a chronological order makes the most sense and will be the easiest for your audience to follow. If your case has several issues, it may be more logical to organize your witnesses by issue.

6. Always try to lead with a strong witness and conclude with a strong witness.

7. When conducting direct examination, be very careful to avoid leading questions. It is very embarrassing and disruptive to your flow to have your opponent interrupt with a successful objection.

8. Just as you are striving to always use simple English, it is imperative that you teach your business witness to do likewise. Corporate people frequently know their own industry so intimately that they talk in "jargon." They must be made to understand that a judge or jury may not have the faintest idea what they are talking about.

9. A very effective tactic for a plaintiff, if done right, is calling an adverse party or hostile witness as part of your case. This should be done only if you have the witness pinned down through prior deposition testimony or statements. Calling the witness as part of your case permits you to put on the opponent first, examine him with leading questions, and blunt his latter direct examination. If may also permit impeachment which, if serious, will destroy his credibility before he gives his direct testimony. If, however, you cannot conduct a crisp cross-examination, this technique can seriously backfire.

B. Documents

1. One of the major distinctions between business litigation and other types is the extent to which documentary evidence plays a role. It is absolutely essential for a corporate litigator to master the art of using documents effectively. Many otherwise admirable commercial trial efforts have fallen apart when the lawyer begins fumbling through hundreds of documents.

2. In order to use effectively any documents, they must be properly indexed and organized. Prepare a complete set of all documents that have been uncovered in the discovery and preparation process. If there are thousands of documents, you may want to consider whether the expense of placing them into a computer is justified. If not, the easiest method is to have all documents reduced to 8½" x 11" size and kept in loose-leaf binders indexed either by chronology or subject matter.

3. The easiest way to admit documents into evidence is obviously without objections. Meet with your opponent before trial to agree on a joint marking system for documents and notation of those for which objections will be raised. Most federal courts and many state judges require such steps as part of their standard pre-trial orders.

4. All documents which have been agreed to may be formally offered into evidence at the start of your case. They may then be freely used throughout your presentation and you will not forget to introduce them later. However, see number 8.

5. Prepare in advance your argument on admissibility of any documents of any documents your opponent raises objections to. If there are serious issues, use the motion in limine.

6. Once you have documents organized, marked and prepared for admission, you must decide what you want to use. Just because the particular transactions in dispute generated hundreds of pieces of paper does not mean they must all be admitted into evidence. Neither a judge nor a jury will be thrilled at the prospect of having to read exhibits 1 through 450. Before offering any document, examine it critically to decide whether it either forms an essential part of the transaction you are trying to prove or whether reading it will materially advance the reader's understanding of your side of the case. If not, why are you introducing it?

7. There are occasions when a legal issue may turn on a mere volume of documents. For example, in an antitrust trial, a "state action" defense may turn on the volume of regulation. In such a situation you may need to introduce a large volume of documents marked as a composite exhibit without expecting nor even caring if they are all read. Provide a document summary for the court in that case, or for the jury with the court's permission.

8. Even if there are no objections to your documents, it is more effective to use all important documents at the appropriate time in the case. The key to using documents in these commercial trials is to apprise your trier of fact as to the meaning and importance of a document without waiting for the time when it may or may not actually be read. The way to do this is to blend the admission of the document into a witness' testimony. Have the document ready for use during direct examination. (See V(a)(4)). Your questioning of the witness should elicit the background, description and importance of the transaction represented by the document and sufficient identification to make the document admissible. Providing this information as part of your witness' story and then admitting the document will give it far more importance than a bulk submission and will explain the document to your listener in a logical way. Example:

Q. Mr. Witness, did you negotiate this contract with XYZ Company?

A. Yes.

Q. How did XYZ advise you that they agreed to your offer?

A. Mr. Jones, their president, wrote me a letter.

Q. Let me show you plaintiff's Exhibit No. 10. Is this the letter Mr. Jones wrote to you in which he accepted the contract?

A. Yes.

Offer into evidence the letter.

Note that some lawyers might object to this line of questions that the "document speaks for itself." It does not matter since you have already accomplished your goal of explaining the document and calling attention to it.

9. Once a document is in evidence, courts vary as to their use, especially in jury trials. Some judges allow you to read the document to the jury at any time in your presentation. If so, read it at the logical time if the document is important. It is the only way to relate its contents to the testimony. Other judges follow a practice of not allowing documents to be read at all.

C. Real and Demonstrative Evidence

1. Real evidence seldom plays a role in commercial litigation although in such things as trademark, patent or other unfair competition cases, or product liability, it may well be crucial. If you have an opportunity, use it. It can generate a lot of interest.

2. Demonstrative evidence, on the other hand, can quite frequently be used to explain business relationships or damage theories. The use of charts is encouraged. Make sure they are well done, large and simple. A complex or visually poor chart makes matters worse.

3. The available computer technology today for use in a courtroom has, of course, advanced exponentially. An array of high tech gadgets – cdroms, computer projectors, Elmos, PowerPoint, etc., are now available and reasonably cost effective. However, just because they are there does not mean you have to use them. Overdoing the multimedia show can backfire, overloading the jury with sensori stimuli, leaving only the lasting impression that your client has money to burn. PowerPoint may have become the most overused technology in America. It is fine when a visual is helpful to explain a concept. However, many have begun to use PowerPoint to bullet-

point virtually every sentence of a presentation, which in my judgment is counter-productive. It appears to be nothing more than a witness or lawyer reading a script.

D. Business Records

1. This is not a course on evidence, per se, and it is assumed that you know the basic principles. However, there are certain recurring evidentiary issues in commercial litigation that should be mentioned. The first is business records.

2. Modern business record statutes have simplified admissibility predicates. Nevertheless, certain errors are repeatedly observed, mostly involving what does and does not constitute a business record. The definition does not include:

a. Business correspondence. Letters are not memoranda of events kept in the regular course of business (unless possibly a routine cover letter). Correspondence is itself an event--namely, the transmission of information. E.g., Mich Motors Corp. v. General Motors Corp., 181 F.2d 70 (7th Cir.), rev'd on other grounds, 340 U.S. 558 (1950).

b. Minutes of meetings are not business records if they contain statements by persons which themselves constitute hearsay. See United States v. Beasley, 513 F.2d 309 (5th Cir. 1975).

E. Hearsay

1. Remember that virtually every document--if offered to prove the truth of what it says--is hearsay. The document is a statement that was made out of court.

2. If there is a pre-trial objection to your document, make sure you know the evidentiary basis for admission. Many documents are not offered for the proof of the matter stated, but merely to prove it was sent and received--such as most correspondence.

3. Many lawyers and some judges still fundamentally misunderstand the hearsay rule. The following objection is frequently heard: "Objection, statement made outside the presence of my client." That objection has been known to be successful. If you have ever made that objection, or had it sustained against you, I suggest you study the hearsay rule. You will find it is absolutely irrelevant whether your client was present or not present during the statement.

4. A trial lawyer must understand all the rules of evidence and have them at his command instantaneously. Most issues should be anticipated and prepared in advance. Thorough knowledge of the rules will great enhance your image and persuasiveness.

VI. DEFENDING AGAINST YOUR OPPONENT'S CASE

A. Cross Examination

1. This is one of the most misused and misunderstood trial techniques. The real world is not like Perry Mason. It is almost impossible to reduce an opposing witness to tears and a confession of guilt, so you should rarely try. Skillful cross-examination, however, can be a devastating tool.

2. The first question is whether you should cross-examine an opponent's witness. Two basic rules govern. First, if the witness has said nothing harmful to your case, do not cross-examine him, unless you need to get some affirmatively helpful information for your case out of that person and the witness is not available to be called in your case. Second, unless you know you can get helpful information out of the witness or can impeach his testimony in a useful way, leave him alone. Nothing is gained by rambling, aimless cross-examination. It only serves to reinforce the credibility and testimony of the witness.

3. If you do cross-examine, follow these principles:

a. Never ask a question you do not know the answer to. You should know the answer from pre-trial discovery. If you do not, keep your mouth shut.

b. Only ask leading questions on crucial points. Some experts say never ask anything but leading questions. That can look too hostile. I suggest non-leading questions to build up to the crucial climax.

c. Make sure you have thoroughly indexed depositions or statements in front of you to impeach the witness if he does not give you the answer he is supposed to give, or if impeachment is the purpose of your cross-examination.

d. When impeaching a witness with a prior inconsistent statement, do it right:

Q. Mr. "X" were you present at the meeting of October 31, 1981?

A. No.

Q. Mr. "X" do you recall my taking your deposition on December 3, 1981 and asking you questions which you answered under oath?

A. Yes.

Q. Let me refer you and counsel to page 256 of that deposition. Do you recall the following question and giving the following answer:
Q. Were you present at the meeting of October 31, 1981? A. Yes."

A. Yes.

Do not say another word! Never ask the witness whether he is lying now or was he lying then because he will proceed to explain why he was not lying either time. When you have shown the inconsistency you have done your job. If you let the witness explain, you will commit trial lawyer's suicide.

4. Your cross-examination should be tactful, brief and non-argumentative. If the witness becomes hostile, let his hostility be in sharp contrast to your calm command of the situation.

5. Do not ever ask a question that repeats the direct examination: "Now you said on direct that you never conspired to defraud anyone, correct?" Why repeat your opponent's case? This is a nervous habit that lawyers use to get themselves going on cross-examination. Force yourself out of that habit.

6. When you have the information you want, stop. Save your arguments for closing.

B. Objections

1. Part of the necessity for mastering the rules of evidence is to be able to object quickly and accurately. If you cannot articulate the basis of an objection, you stand little chance of winning. Making wrong objections ruins credibility.

2. Objections must be used strategically. Neither a judge nor jury appreciates repeated interruptions. If it is a bench trial, judges are very lenient with the rules. If it is a jury trial, juries do not like lawyers who hide the truth. Juries, however, understand it is your job. Therefore, successful objections sparingly used make you look good.

3. Objections should only be made when necessary to prevent the admission of harmful evidence. If your opponent is asking leading questions on meaningless information, why do you care? Save your ammunition for when it counts. Remember, if you have properly prepared, you will know when harmful information is coming.

4. There are other strategic reasons for objections. An objection during cross-examination of your witness who is having difficulty can key your witness

back on the right track. It may simply serve to give your witness a breather if your opponent is "on a roll". It may breach your opponent's concentration. These uses of objections are judgment calls that come with experience.

5. Objections made purely to preserve a record should generally be handled by the motion in limine.

VII. JURY CHARGES

1. Unlike other tort cases, for many types of business litigation there are no official standard jury charges and very few sources of models. In Florida, there is a set of model jury charges maintained by the Academy of Florida Trial Lawyers applicable to some types of commercial cases. The ABA has a set of model instructions for business tort cases. See Model Jury Instructions for Business Tort Litigation (1980). The Commercial Litigation Committee of The Florida Bar's Section on Corporation, Business and Banking Law has created suggested commercial jury instructions.

2. Until more references are available, in commercial cases, you will have to draft jury charges from scratch. They should be drafted in plain English and be as short as possible. Some courts will allow you to draft charges tied directly to the evidence in the case rather than abstract principles. You should always try to sell the court on that approach since it is far simpler for the jury to follow a charge that reads:

> "If you find that defendant intentionally misstated the company's earnings to plaintiff B and B relied on that misstatement in making his decision to purchase the security, then you shall find . . . "

than one that abstractly defines fraud. Many judges resist this approach to charges as being too argumentative.

3. Many courts require early submission of jury charges. Even if not required, early preparation of the charges will help focus your own trial strategy.

4. The use of special interrogatories is very common in complex commercial cases. Defendants are especially anxious to require plaintiffs to have to cross a series of hurdles with a jury. In a complex case, special interrogatories can help simplify the jury's task.

VIII. CLOSING ARGUMENT

A. Purpose

1. Every trial lawyer should relish making his closing argument. If you do not, you should not be in this business.

2. The purpose of closing argument is to tell your whole story one more time and remove from the trier of fact any lingering doubts as to why you should win. If you have properly presented a simple, interesting and persuasive case up until this time, there should be no more than small doubts.

3. There is much debate over the importance of closing argument on the final outcome. Some lawyers believe it is everything, others believe it has little effect. While it is true that if the trier has not already been swayed to your side before your summation you are probably in trouble, nevertheless it is always important to leave a good last impression.

B. Technique

1. Closing argument is the time when your own personality should shine. The technique should be similar to opening statement. Do not use notes, move about the courtroom and demonstrate total command over the facts of the case. Instill a sense of drama. Talk English. All of these persuasive techniques are more important here than ever.

2. Take all of the facts and weave them into a simple coherent story. Spend only a minimum of your time pointing out the weakness of your opponent's cases--although a defendant will obviously do more of this than a plaintiff.

3. Do not take liberties with the evidence beyond rational inferences. Telling the trier of fact that the evidence proved the sky was red when it clearly was blue can destroy all of the work you have done in the trial. Misrepresenting evidence can also lead to a very embarrassing objection or court rebuke.

4. Try to tie your argument directly to the charges or special interrogatories in a jury case.

5. It is not necessary to thank the jury for their patience or for listening. They are taking their job seriously and if you have made your case interesting, you should not be guilty about having tried their patience. If you wish to offer a general thank you for doing their duty, do so on behalf of all counsel.

6. Always remember to ask proudly for the specific remedy you are seeking.

7. Do not object to your opponents closing argument unless it is really outrageous or if you need to support a motion for mistrial. Most courts allow a great deal of latitude in closing. It is far more effective to respond to an outrageous argument, if you have the chance, by pointing out the weaknesses.

8. Make sure your argument centers around the same theme you used in opening and throughout the trial. Every bit of evidence you use should be aimed at permitting you to advance this theme in closing.

9. If your opponent has failed to prove something he said he would prove, remind him and the trier of fact.

10. In a jury trial, remember that equities and impressions are more frequently important than legal subtleties. Make sure the jury knows why it should rule for your side.