Shoot for the Easy Points: General Advice from a Scoring Juror

Game Face

The day of the competition is almost upon us. Teams are preparing their opening statements, reviewing rules of evidence, and deciding which outfit would best suit their characters.

But it seems like all the preparation in the world will do no good if a team forgets the basics. It does not matter that they know Federal Rule of Evidence 602 by heart. It makes no difference that they have nicely-colored exhibits. At the end of the day, what will decide the overall winner of the competition are the points assigned to a particular team from a scoring juror and judge.

Game Day

I do not consider myself an expert. Nor do I consider myself a professor. I am just an attorney who shows up to observe both sides of a good argument. In 2009, I was given the opportunity to be a scoring juror for the Wade Edwards Mock Trial Competition. The event was hosted in Greenville, North Carolina, with teams from all across the state competing for the title of top litigators.

The experience was not something new to me. Throughout law school, I had been a witness for countless mock trials and was even a judge at Campbell University's undergraduate mock trial competition, the Whichard Invitational.

However, walking through the biting wind and into the warm courthouse, I did not know what to expect from the high school students. All I knew was that on that cold February day, they were trial lawyers.

Game Plan

Fortunately, I was pleasantly shocked with the performance from all schools involved. The teams knew their rules of evidence, justifying objections with ease. Most teams understood the purpose of direct examinations, focusing on distinctive points the jury was to ponder upon deliberation. The teams even had a firm grasp on hearsay, a concept that still baffles even the most seasoned of trial lawyers.

However, there was always room for improvement. There were a number of attributes that separated the higher-ranking teams from the teams that needed improvement. To be sure, the margins are usually tight in deciding which schools

advance to the next round. Therefore, it is always a good strategy to accumulate the easy points where possible.

Note that this is not to imply that what I will lay out is the final say on what to do. In fact, many of my fellow jurors (and team coaches) may completely disagree with these strategies and tips. Nevertheless, I believe I will cover general areas of weakness – concepts most teams overlook and most jurors keep in mind when scoring.

Game Time

1. Theme ("The record player is stuck on the same song.")

In many rounds, the attorney would stand up for the opening argument and recite the facts of the case. The opposing counsel would then stand up and tell us the same facts of the case. Thus, the jury was left with two identical fact patterns and the opening statements have essentially been wasted.

This is where the power of persuasion comes into play. You want to persuade the jury that the facts happened the way your client alleges. Therefore, it is important to always keep your theme in the forefront of your mind. Think of it like a song you want the jury to hear over and over. Take this opening argument, for example:

> Attorney Smith: "Good morning. You are going to hear from Witness 1, who will tell you she saw what happened. You are then going to hear from Witness 2, who will tell you he saw what happened. Ergo, because these two witnesses say it happened like that, my client did not shoot the clerk."

What is primarily wrong with this opening argument, besides the fact the witnesses will probably have names? There does not appear to be a concise theme to the opening statement! Sure, we are told that two witnesses will testify that the attorney's client is innocent. But what would be the best way to make a jury remember this? Perhaps a better example:

> Attorney Smith: "Something just doesn't add up. You are going to hear from Witness 1, who will tell you she saw what *really* happened. You are then going to hear from Witness 2, who will also tell you he saw what *really* happened. I urge you to pay attention to these two witnesses who were actually there. Just remember their testimony and you will see why the prosecution's case just doesn't add up."

Notice how the theme of the case was the *first* and *last* thing out of the attorney's mouth ("something just doesn't add up"). Notice, too, how the theme was alluded to throughout the argument.

What makes for a good theme to one's case? Keep your theme memorable, short, and consistent with your case. You do not have to wax philosophical, nor should you quote a television commercial. Just model your theme to a short and memorable phrase the jury will take with them when deliberating.

Make no mistake, this is crucial territory to impress the jurors and garner some points. When they see you are focusing on an overarching premise, they are going to see you as organized, succinct, and believable. So be a DJ – let the record keep going and play the same song over and over and over.

Pretty soon, the jury will be humming along with you.

2. Objection ("Say Em' Loud, Say Em' Proud.")

Remember to always be confident in your objections! It is frustrating to see an attorney stand up to raise an objection and the objection is either timid or incomplete. Take the scenario below:

Defense Attorney: "Objection."
Judge: "On what grounds, counselor?"
Defense Attorney: "Um, it was um, well, – he was just hurting my case!"

While that may be true, both the judge and jury are going to need something more in which to sink their teeth. Even if you are not sure your objection will hold water with the judge or jury, make sure to state your reasoning with confidence. For example:

Defense Attorney: "Objection, speculation."
Judge: "I hardly see how the witness is speculating, counselor."
Defense Attorney: "Your honor, the question asked what my client thought someone else would do. She can't know that. That's speculation."

Note in this scenario the objection was immediately followed by the grounds ("speculation"). Also notice that when the judge inquired further, the attorney was ready to explain the objection without having to quote the Federal Rules of Evidence. The attorney just used common sense and was bold in her explanation.

Now, I know there are times when you are listening to questioning by opposing counsel and something just does not sound right, but you simply cannot remember the proper objection. When in doubt, use a "relevance" objection. Through common sense, explain to the judge how the line of questioning simply does not further the case, and she may be inclined to agree.

3. Cross Examination ("Keep em' on a short leash.")

The primary goal of a witness being cross-examined is to "explain away" everything that was just said on direct examination. Therefore, the primary goal of the attorney conducting the cross-examination is to control what the witness says. Take this scenario:

> Defense Attorney: "Wasn't the sun in your eyes as you were crossing the street?"
> Witness: "*I* always wear sunglasses and it was not bright out that day. *Your* client wasn't wearing sunglasses! What a crazy statement for you to make! You don't know what you're doing, do you?"
> Defense Attorney: "Also, wasn't it true that the light was green when you crossed the street?"
> Witness: "Where did you get that statement from? I never said that. The light was red. Your client ran me down!"
> Defense Attorney: "No further questions."

What good was done in the above situation? The witness was allowed to ramble off line after line that had nothing to do with the question. Then, rather than address the wild answer, the attorney just focused on the next question on his list. Keep in mind, in order to control the witness, you have to *listen* to what the witness is saying!

To be sure, the antics of the ramblin' witness could cause them to be non-believable in the eyes of a jury. However, it is best for the attorney to nip the situation in the bud. Ask about only one fact at a time. Never ask "why." Do not repeat direct examination. And most importantly, listen. Here is that situation replayed:

> Defense Attorney: "Wasn't the sun in your eyes as you were crossing the street?"
> Witness: "*I* always wear sunglasses – "
> Defense Attorney: "Objection, non-responsive. Will the court please instruct the witness to respond?"
> Judge: "Answer Mr. Smith's question."
> Witness: "Yes, but – "
> Defense Attorney: "Thank you. And isn't it true the light was green when you crossed the street?"
> Witness: "Where did you get – "
> Defense Attorney: "Your Honor, the witness is again non-responsive."
> Judge: "Answer Mr. Smith's question."
> Witness: "Yes, the light was green."
> Defense Attorney: "Thank you, no more questions for this witness."

Again, I cannot speak for other jurors, but for me, this is definitely one way to rack up points. Do not let the witness frazzle you, the attorney. Do not let the witness stray from the question. Simply put: keep the witness on a short leash.

4. Believable Witnesses ("Think on your feet while sitting in your chair.")

Something unique to these competitions is that the attorneys turn into witnesses, witnesses turn into attorneys, and a colorful cast of characters is presented throughout the different rounds. Witnesses are interesting in the mock trial competitions in that there are usually two extremes: really good or really bad.

The really good witnesses share a common element – they can think on their feet without going overboard. Conversely, the bad witnesses have a tendency to over-exaggerate on the spot, which causes a slip of the lip. Take this scenario:

> Defense Attorney: "And how long have you been a crime lab technician?"
> [*Note that this fact had not been established in the fact pattern, so the witness will have to make up something*.]
> Witness: "I have been doing this job for fifty long years! Yes, long years in the crime lab, with the highest accolades in my field! Graduated at the top of my forensics class and saved the President's dog from a runaway apple cart!"
> Defense Attorney: "So, why did you miss the latent fingerprint on the gun?"

Oops. While witnesses will regularly be asked about facts not in their fact patterns, it is important to remember not to go too far in improvising on the spot. Remember, the more you say, the more the attorney will have to work with. Thus, if you have to make something up, keep the answers short, sweet, and to-the-point. The situation again:

> Defense Attorney: "And how long have you been a crime lab technician?"
> [*Note that this fact had not been established in the fact pattern, so the witness will have to make up something*.]
> Witness: "I have been doing this job for many years."
> Defense Attorney: "So, why did you miss the latent fingerprint on the gun?"

Now the attorney has to work harder in making the argument. She is reaching for something that is not there – mainly that the witness testified to be highly experienced. While the question may still hold some validity, a jury is going to be better persuaded by someone who did not lose credibility by zealous and unbelievable improvisation.

Another way witnesses tend to gain the most points is when they stay calm and focused. The opposing attorney will try to rattle your cage, but do not let her do it! Sure, you are going to be nervous and want to remember every nuance of your character, but

do not get so caught up in your memorized character that you let an attorney make up your testimony for you.

In sum, witnesses should be like the Fonz in that they need to be cool and collected. However, they should never "jump the shark" with an over-the-top character.

5. Closing Argument ("Organization, your friend is.")

Unfortunately, I have been a juror on cases that were going great, but points were lost because of a poor closing argument. What made them poor? Reading from notecards was one instance (*hint*: never write your closing argument word-for-word; and even if you do, certainly do not get up and read it verbatim). But overall, what makes for a poor closing argument is simply a lack of organization. For instance:

> Prosecuting Attorney: "You heard the evidence today. Witness 1 told you it happened like that. Witness 3 told you it happened like that, too. There are elements we have to meet, and we have met them. Even Witness 3 told you that. Remember how Witness 2 described the events? That's an element. Again, you've heard the evidence and it's obvious Mr. Jones is guilty. Thank you."

What? Huh? What was that? What did the attorney want the jurors to take away from that argument? Where was the theme? Where was the organization? Time and time again, closing arguments akin to the one above are presenting before a jury.

Here are some closing argument hints that are going to get some big points on the big day. First, start off with your theme. Second, lay out the elements. Third, lay out a chronology of what happened during the trial testimonies, using specific points from your witnesses. Fourth, end with your theme, asking what you want the jury to do. Instant replay:

> Prosecuting Attorney: "Motive and opportunity. Motive. And Opportunity. Ladies and gentlemen of the jury, the elements of the crime are *x*, *y*, and *z*. You were here in court and heard the evidence today. Witness 1 told you about x. Witness 2 told you about *y*. Even Witness 3 told you about *z*. Again, you've heard the evidence. But additionally, I would just like you to remember, motive and opportunity. Mr. Jones had both the motive and the opportunity. Therefore, you should find Mr. Jones guilty. Thank you."

Notice the difference in this closing argument? The attorney started with theme ("motive and opportunity"). She then laid out the elements for the crime and told how each of her witnesses supported each element. There was not a rehash of everything that was said throughout the testimony. The attorney methodically tackled one element at a

time. Notice, too, how the attorney ended with a theme before asking the jury for a specific verdict.

Simply put, jurors like to see organization. If they see theme, elements, evidence, theme – they see organization. And the team, in turn, will see points.

Game Over

There you have it. The goal of this commentary was to hopefully point out some ways whereby points can be easily attained. Just keep the following in mind, and you will do fine:

a) Decide what your theme will be before entering the courtroom. Write this theme down on a sheet of paper and keep it on your table at all times.

b) Be confident in your objections. You are not supposed to be an expert on the law, but you are also not supposed to be timid when making arguments.

c) Keep your witness under control on cross examination. You may have to be a little curt, but do so in a calm and professional way.

d) If you are a witness, be believable. Curve balls will be tossed your way, but do not wildly swing at every ball that comes across the plate.

e) Maintain an organized closing argument. A jumbled argument that tries to touch on every little thing that occurred during the trial will only confuse the jury.

Remember these simple tips throughout your hours of preparation, and you will be confident and primed when February 20th arrives.

Now go out there and score; the points are all yours.

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