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Courtroom Tips from the Top

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We asked five renowned lawyers from the Faculty of the Houston Family Trial Institute to share some of their insights on courtroom skills and strategies.

Raising Proper Evidentiary Objections Can Win the Day
Charles Fox Miller

Proper objections can take away the foundations of your opponent's case, decimate your opponent's confidence, increase the fact-finder's estimation of your authority, cement your client's confidence in your abilities, and give you a basis for appeal.

By contrast, raising improper evidentiary objections or failing to anticipate or overcome your opponent's objections can be humiliating and result in a loss. Failing to raise an important objection can also be the basis of a malpractice suit.

In short, knowing how and when to raise evidentiary objections is arguably the most important technical skill within trial advocacy.

Here are a few quick tips:

- Read the evidence code, thoroughly and often.
- For each important piece of evidence you think the opposition will offer, think of the objections you can raise against it, how your opposition will try to overcome those objections, and what counterargument to use.
- For every important piece of evidence you plan to offer, think of what objections could be raised against it and plan your arguments to overcome them.
- For the most important evidence—on both sides—think about writing pocket briefs and have copies of the authorities upon which you rely.
- Choose when to object carefully, state your objection precisely, and make your record respectfully.

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On Handling Trial Exhibits
Stephen Kolodny

I like to use the acronym MIAO, which stands for Mark, Identify, Authenticate and Offer.

Internally number each page of a multi-page exhibit for ease of reference during testimony. As a general proposition, you should offer the exhibit into evidence as soon as the witness authenticates it. Have your exhibits in binders, organized in numeric order by issue, and consider using special binders for each

witness. Binders make the process simpler and smoother for the witness and the judge, and will show that you have really prepared for the trial.

One of the jobs of the attorney should be to make life easier for the judge. Taking time to present exhibits in a clear, technically proper fashion not only makes the process go smoothly and leaves a positive impression with the judge, it also shows that you know what you're doing, that you've planned out the presentation of your case, and you're not wasting the court's time.

Don't underestimate the simple act of properly preparing exhibits and presenting evidence. In some cases you will find the judge more appreciative of the time and effort you have put into the case, and more considerate of that professionalism when it comes to your request for attorney fees or your position in opposing fees when requested by the other side.

The easier you make it for the judge to follow the presentation of your evidence, the easier it is for them to understand your case and theories, and the higher your chance for success.

MIAO:

MARK your exhibit with its intended number.

IDENTIFY the exhibit. Number every page of a multi-page exhibit for ease of reference when the witness is testifying. If you're using a projector, ensure that you provide the judge with a copy of the exhibits on a disc or a USB device.

AUTHENTICATE. Have your witness provide the evidentiary foundation for the document.

OFFER the document into evidence after authentication. Once the witness is gone you may have a problem if a question arises. Having evidence authenticated by a witness in the presence of the judge also adds weight.

Follow these steps--they never fail.

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Extract the Most Meaningful Admissions in a Time-Efficient Manner
Roger Dodd

Family lawyers often ask how they can fully develop the facts in a temporary hearing when the judge permits such a short time to present a case. It's a fair question. The world of family lawyers and of judges is imperfect, and a major factor is lack of time.

In securing admissions, it is more effective and efficient to cross-examine the opposing party than to direct your own client. It's also more effective to present fewer but better-developed chapters (an organizational form of asking questions) than to hurry through multiple chapters that are not heard by the judge.

When you embrace the dual concepts above, there is one common theme that enhances both: *focus*. In preparation, you must focus on your cross of the opposing party, not on preparing your client for a direct examination. This focus requires the commitment and the courage to do it.

Many lawyers mistakenly think the client wants to testify. Doing a good cross and obtaining the admissions will satisfy the client far more than having had the opportunity to "tell their story."

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Offers of Proof
Dorene Marcus

One of a trial lawyer's most important responsibilities is making a record. When a trial court sustains an objection to the relevance or admissibility of any evidence, whether in a line of questioning or in the presentation of physical evidence, the lawyer must make an offer of proof, if not to overcome the objection at the trial level then to preserve the issue for appeal. Because the evidence has been excluded, without the offer of proof the appellate court will have no evidentiary record on which to decide whether the trial court has committed reversible error. Failure of a judge to allow an offer of proof affecting a substantial right of a party is a denial of due process.

Federal Rule 103, on which many states' rules are now based, governs an offer of proof.

The relevant parts of Rule 103 are as follows:

- **Preserving a Claim of Error**. A party may claim error in a ruling to **. . .** exclude evidence only if the error affects a substantial right of the party and:

- **If the ruling excludes evidence**, a party informs the court of its substance by an offer of proof, unless the substance was apparent from the context.

- **Not Needing to Renew an Objection or Offer of Proof**. Once the court rules definitively on the record—either before or at trial—a party need not renew an objection or offer of proof to preserve a claim of error for appeal

- **Court's Statement about the Ruling**: Directing an Offer of Proof. The court may make any statement about the character or form of the evidence, the objection made, and the ruling. The court may direct that an offer of proof be made in question and answer form.

Assuming the court's approval, an offer of proof may be made by statement of the lawyer of the anticipated content of the excluded testimony, by direct or cross-examination of the witness, or by affidavit of the witness setting forth the excluded testimony. Physical evidence, such as an exhibit, should be marked for identification and included with the record on appeal.

An offer of proof can be as elaborate as needed.

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The Theory and Theme of Closing Arguments
Lynne Z. Gold-Bikin

The closing argument is really the starting point in your case. When you know what you want to achieve, it becomes the roadmap to the entire case. It should be brief and to the point: *Here is what we want; here is why we want it; here is what we proved for Your Honor to rule in our favor; here is the evidence that we presented to support our case; here are the weaknesses in our case which we overcame by the other evidence we provided. Please give us what we want.*

In many courts, you cannot make a closing argument. That does not mean you should not prepare one.

Start with a theme in your case. The theme should be carried throughout the trial, from the very beginning to the very end. Pick up the theme again in the close. It keeps the judge interested.

Always have a theory of why you should win, and utilize it from opening statement to closing argument. *This is why we should win and this is how we proved it.*

Remember it is called a closing "argument"--you are arguing your case. You will argue who the witnesses were that provided evidence. You will argue the evidence that you presented. You will argue why you should win. You should win because the law on which your case is brought is supported by the evidence you presented, and the witnesses that you called.

Always deal with the weaknesses in your case during closing argument, explaining why that testimony or evidence should not change the result that you want.

Closing arguments begin with theory and theme and end with theory and theme. That's the winning way.

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