THE NUTS AND BOLTS OF A JURY TRIAL – JANUARY 21, 2021

TEAM GARDINER POWER POINT

JUDGE JENNIFER GARDINER, JUDGE CHANNING BENNETT, JENNIFER GADDIS, MICAH MOSKOWITZ AND LEONARD WILLIAMSON

JURY SELECTION – MICAH MOSKOWITZ

- What is it?
  - The pre-trial examination of potential jurors as to their qualifications to serve
  - Jurors may be collectively and individually questioned by the court and by each party
- Why do we do it?
  - Examination of jurors serves two formal purposes:
    - Determine whether a cause for challenge exists, and
    - Determine whether the parties wish to exercise peremptory challenges
  - Jury selection also offers an opportunity for advocacy

CHALLENGES

Two Types:

1. For Cause
   - Cause challenges generally fall under the specific grounds set by ORCP 57D

2. Peremptory
   - "A peremptory challenge is an objection to a juror for which no reason need be given, but upon which the court shall exclude such juror."

CHALLENGES – FOR CAUSE

Typical for cause grounds include:

1. "Consanguinity or affinity within the fourth degree to any party." ORCP 57D(1)(c)
2. Interest in the outcome or principle questions. ORCP 57D(1)(f)
3. Actual Bias
   - "Actual bias is the existence of a state of mind on the part of a juror that satisfies the court, in the exercise of sound discretion, that the juror cannot try the issue impartially and without prejudice to the substantial rights of the party challenging the juror."

CHALLENGES - PEREMPTORY

Each party is entitled to excuse a certain number of potential jurors without demonstrating cause.

- Civil cases: ORCP 57D(2)
  - No more than two challenges each where the jury will have six members
  - No more than three challenges where the jury will have more than six members
- Criminal cases: ORS 136.230
  - Entitled to three each for a six person jury
  - Entitled to six each for a jury of more than six

STRATEGY FOR JURY SELECTION

What do you aim to accomplish?

- To identify jurors who may not look favorably on your case.
- To identify jurors who have an open mind, will not be influenced by prejudice.
- To establish rapport with the jury and communicate something meaningful about your case.

PRACTICE TIPS

- Certain questions will reveal relevant and useful information in most jury trials.
    - Prior knowledge or information about the case;
    - Relationship with any party, attorneys, or witnesses;
    - Prior litigation experience;
    - Specialized experience in law (medicine, education, etc.);
    - Ability to set aside personal feelings if necessary to apply the law.
- Tailor your examination to the dynamics of the case you are about to try.
- As you conduct your examination, develop a plan for your peremptory challenges
- Do not fixate on only a few members of the panel.

OPENING STATEMENTS – LEONARD WILLIAMSON

- Purpose of your opening statement is to get your client's story out in front of the jury (or judge in a court trial).
- Your goal is to tell a good story, weaving the evidence in with the trial theme of your case such that it will resonate with the jurors' common sense and their life experiences. The trick is connecting with a panel of complete strangers who can't talk back but will determine the fate of your case.
- Keep in mind however that a technique that works for one lawyer many not work for you. Your style as a trial lawyer must be a reflection of your own personality. Jurors can spot a fake a mile away. Find your own path. You need to develop a style in the courtroom that suits your demeanor and your personality. Your credibility can make the difference in the outcome.
- Be a professional. Know the facts cold.
- The key to successful opening is a compelling and coherent narrative that is built around a single, engaging and forceful presentation of the theme of your case.

THE INTRODUCTION

- Remember what your mom told you. You don't get a second chance to make a first impression.
- Introduce yourself, tell the jury who you are and who you represent. You want them left with the impression that they would hire you to represent them.
- Introduce any co-counsel or other legal support that you have with you. You want the jury focused on you and the story you are telling them.
- Don't dress or act in a way that detracts from the story you are trying to tell.
- Opening statements are likely the first time the jury will hear your client's story.

INTRODUCTION - CONTINUED

- Whomever you are representing, civil or a criminal, the jurors are watching how you physically interact with the defendant.
- What is your body language communicating about your relationship with your client?
- If you are representing a criminal defendant never say they will testify. You might have to change strategy mid trial and not be able to put them on the stand.
- Don't say nasty things about opposing counsel – nothing sells the car like the car itself.
- Don't OVERPROMISE!

THEORY/THEME/STORY

- Too many lawyers waste time talking about the standard of proof or some other dry topic.
- Get to the point, start telling the story, the jury wants to here why you think your client is right or should win.
- Whatever your main theme of the case is get to it quickly and make it memorable. Make sure your theme is clear, it needs to create a visual that jurors will be able to see in their mind and one you weave everything into.
- As trial proceeds, you will weave the theme of your case into your witness testimony and your closing argument.

THEORY/THEME/STORY - CONTINUED

- Keep in mind that jurors, like everyone, will rush to make sense of things and the information they are being given and formulate an opinion about the case.
- People make up their minds and draw conclusions quickly.
- They will spend the rest of the case seeing whether the evidence fits with what you have told them.

EXPLAIN CHARGES/DEFENSES

- Tell the jury what they will be asked to decide. Relate the facts you will prove with the law that will be applied. Weave your theme into your explanation.

INTRODUCE KEY WITNESSES/EVIDENCE

- Tell jurors about key evidence and witness testimony that ties in with your theme and why it will prove your case.
- This reinforces your them and establishes that you are the conductor. If appropriate use a visual aid to capture the evidence or testimony while highlighting the theme of your case.
- We live in a technology drive world and jurors will expect the use of a visual aid(s).
- If there is a bomb to drop then let it fly. If there is a negative to your case get it out right away and deal with it and put it in context and why your theme prevails.

INTRODUCE KEY WITNESSES/EVIDENCE - CONTINUED

- Too many lawyers run through a laundry list of all the evidence and witnesses' testimony. This is too much information to absorb.
- Highlight the weakness of your opponents case and tell the jury why the evidence supports your client's case (reinforce your theme).

CONCLUSION

- Tell the jurors what you are asking them to do – render a verdict for your client. Bring home your theme again in summing up the story.
- Let them know you will be talking to them at the end of the case. Be firm and gentle. Save pounding the table for closing argument.
- Your conclusion should be re-emphasizing the main points you will make throughout the trial and tie back to your theme.

PUTTING ON YOUR CASE - JENNIFER GADDIS

- 1. **Understand the elements that build your case and/or defenses**
  - Use the jury instructions
  - Strategize on the order of your witnesses and evidence to most effectively navigate your elements
- 2. **Witness Preparation**
  - Meet with your witnesses prior to trial
  - Give them the boiled-down basics on trial procedure (ie. First we'll deal with any last minute issues, then opening statements…); many of them may have never set foot in a courtroom

PUTTING ON YOUR CASE – WITNESS PREP CONTINUED

- Let them know which exhibits you will be introducing through them and that you need to lay a foundation to do so
- Instruct them to pause briefly after a question before answering, in case you need to make an objection
- Prep them on potential topics of cross-examination
- Discuss the importance of demeanor on cross-examination

PUTTING ON YOUR CASE

- 3. **Housekeeping the morning of trial**
  - Motions in Limine: Great synopsis and considerations from 02/2011 Team Batson Inns presentation:
    - A preliminary, advisory ruling by the court that certain evidence will, or will not, be allowed.
    - Usually filed in advance of trial, although can be made even during the course of trial.
    - Give strategic consideration to both the substance and the timing of a motions in limine.
    - If you have filed a motion in limine that is denied – still seek through a proffer or other means to introduce the excluded testimony so that it is preserved for the record on appeal.
    - If your motion is granted – it is still just advisory and you must object again if the movant tries to introduce testimony or exhibits referring to the excluded testimony.
  - Order of witnesses/extraneous unrelated court proceedings that affect the timing of your case presentation/unexpected conflict for attorney, judge or witness

PUTTING ON YOUR CASE

- **4. Exhibits**
  - Exchanged prior to trial (except for impeachment)
  - To the extent you can, stipulate ahead of time
  - Pre-mark your exhibits
  - Lay a proper foundation for the evidence
    - A proper foundation will differ depending on what type of evidence you're offering
      - Ex. If it's a document/photograph: "Is it a true and accurate depiction of…"
      - Ex. If it's a physical piece of evidence in a criminal case (a murder weapon/ID in a ID Theft case/etc.), you'll want to go through the chain of custody.
      - Make sure you know the proper foundation for what you're offering

PUTTING ON YOUR CASE – EXHIBITS CONTINUED

- Witness needs to be able to identify the evidence for the court
  - "I'm handing you what's been marked as Exhibit 101. What is it?"
- "Defense/the State/Plaintiff moves to admit Exhibit 101"
- The Court will ask if opposing counsel objects
- The Court will admit the exhibit or hear arguments about admission, if opposing counsel objects.
- Once the exhibit is admitted, it's in the record

PUTTING ON YOUR CASE

- **5. Direct Examination**
  - Ask clear and direct questions
  - "For purposes of the record…"
    - S/he/They – sometimes witnesses can start speaking about multiple people without clarifying exactly who they are referring to
  - Sometimes they may testify about measurements or distance in an unclear manner (ex. "the knife was about the length of this piece of paper"
    - Follow-up: "For purposes of the record, you stated it was 'about the length of this piece of paper' and I note you were referring to a standard sized 8½ x 11 piece of paper, is that correct?"
  - If your witness has a prior inconsistency/did something they shouldn't have/should have done something they didn't, deal with it on direct – don't let opposing counsel be the one to draw it out.

PUTTING ON YOUR CASE

- **6. Cross-Examination**
  - Use leading questions
  - Limit your questions to what you need
  - Don’t allow for long explanations during their answers, their attorney can do redirect
  - Don’t let them get away with not answering the question
  - Don’t get into an argument with the witness

PUTTING ON YOUR CASE

- **7. Experts**
  - Rule 702: "If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education may testify thereto in the form of an opinion or otherwise."
  - Factors considered in determining the admissibility of scientific evidence:
    - (1) The technique's general acceptance in the field;
    - (2) The expert's qualifications and stature;
    - (3) The use which has been made of the technique;
    - (4) The potential rate of error;
    - (5) The existence of specialized literature;
    - (6) The novelty of the invention if one is involved; and
    - (7) The extent to which the technique relies on the subjective interpretation of the expert. *State v. Brown*, 297 Or 404, 417 (1984).

CLOSING ARGUMENTS- JENNIFER GARDINER

"They provide the attorneys with their final opportunity to 'persuade the jury to adopt a particular view of the facts.' Ireland v. Mitchell, 226 Ore. 286, 295, 359 P.2d 894 (1961). It is through closing arguments that the attorneys are able to fully frame the issues and remind the jury of evidence that they may have heard days earlier. Further, arguments give the attorneys a chance to explain the evidence in narrative form. That narrative function of arguments — the opportunity to tell the story of the case — is essential to effective advocacy, and the ability to do so can alter the jury's understanding of the evidence and ultimately change the outcome of a given case."

Cler v. Providence Health Sys., 349 Ore 481 (2010)

- Or. Const. art. I, § 11 and the Sixth Amendment to the United States Constitution guarantee a defendant's right to make a closing argument. Generally, in presenting closing arguments to the jury, counsel have a large degree of freedom to comment on the evidence submitted and urge the jury to draw all legitimate inferences from that evidence. However, that freedom is not without limitations. For example, a trial court has the authority to prevent the parties from arguing about matters outside of the record, or based upon impermissible speculation. Evidence outside of the record may not be suggested to the jury by any means, including through closing argument. Counsel may not make statements of facts outside the range of evidence.

State v. Manning, 290 Ore. App. 846 (2018)

- Craft your closing in a way that makes you the truth teller
- Beware these pitfalls:
  - Do not introduce your argument with "I think" or "I believe"- improper argument and your opinion does not matter
  - Do not vouch for witness credibility
  - Do not attack opposing counsel
    - During the state's closing argument, the prosecutor had characterized defense counsel and defense expert witnesses as "pimps," the Court of Appeals reversed and remanded, concluding that the prosecutor's remarks were not only highly inappropriate in and of themselves, but highly likely to influence the jury. State v. Lundbom, 96 Ore. App. 458, 773 P.2d 11, 1989 Ore. App. LEXIS 567 (Or. Ct. App. 1989).
  - Do not invite the jury to stand in the shoes of the victim/defendant
  - Do not argue or allude to facts not in evidence – do not mislead the jury

- Limit your argument to the facts in evidence and permissible inferences from those facts.
  - Object or no?
    - YES: The integrity of closing arguments can only be ensured when the court requires the parties to limit their arguments to the facts in evidence and permissible inferences from those facts. See Kuehl v. Hamilton, 136 Ore. 240, 249, 297 P. 1043 (1931) (noting that "[e]very litigant is entitled to a fair trial, and this result cannot be achieved if counsel is permitted to make statements to the jury of facts not testified to by any witness nor admissible in evidence").

FIRST CLOSING ARGUMENT

- Be clear and concise – case specific facts will determine the load of your first close
- Highlight how you delivered on your promises in opening…because the truth does not change
- Common sense should guide your tone such that there is no other choice than the one in your favor
- Strategize: do not say something that can be turned against you by your opponent in their close

REBUTTAL CLOSE

- Emphasize why the opposing position does not make sense
- Highlight critical issues with opposing position
- Be efficient and effective
- You are entitled to rebut!
  - The denial of rebuttal argument substantially affected plaintiff's rights. Trial court gave defendant an advantage to which plaintiff had a right under ORCP 58B(6). Charles v. Palomo, 347 Or. 695, 227 P.3d 737, 2010 Ore. LEXIS 108 (2010).

DEFENDANT CLOSE

- Same rules apply: just the facts
- Explain the evidence so as to cast doubt: reasonable inferences are fair game!
- Strategize:
  - No ammunition for rebuttal
  - BUT if you know what HAS to be argued in rebuttal, undermine!
  - Criminal cases: Trial Court limiting defendant's closing argument to 20 minutes violated ORCP 58(5) (applicable to criminal trials). See State v. Doern, 156 Or. App. 566, 967 P.2d 1230 (1998), review denied, 328 Or. 666, 987 P.2d 515 (1999).

TRIAL PROCEDURE BY RULE

- ORCP 58: Trial Procedure
  - Annotations are incredibly helpful!
- Criminal Trials- Chapter 136
  - ORS 136.330: ORCP 58 B, C and D and 59 B through F and G(1), (3), (4) and (5), apply to and regulate the conduct of the trial of criminal actions.
  - See also State v. Taylor, 302 Ore. App. 313 (2020) for a current discussion regarding the importance of closing argument in a criminal case.