8 Trial Techniques in Business and Commercial Cases

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I. [8.1] INTRODUCTION

Those commercial cases that are tried (and if you are reading this chapter, obviously your case) have traveled full circle from the first client meeting to the trial itself. At that first meeting, the client presents a need, usually urgent, in simple understandable words: "The supplier delivered defective parts and shut down the factory."; "Competitors are conspiring to shut our company out of important markets."; "We need insurance coverage for a flood of injury claims."; "We were sued for hiring a competitor's salespeople, but we did not steal any information."; and so forth. During the course of the case, this first urgent need is, if not lost, hidden or at least partially obscured in the litigation as the parties file motions and engage in discovery.

At trial, however, this first need, maybe modified but still vital and straightforward, needs to be brought out again with the same simple urgency that first resulted in the client seeking your services. This is, of course, a difficult task, subject to the regular attention of a variety of brilliant and engaging legal thinkers. James McElhaney, Robert Hunter, Thomas Mauet, Robert Wells, and others have written often on the challenges of a trial. This chapter does not seek to replicate these thinkers but instead provides an introduction to the process of presenting the client's position to the court and the jury, while encouraging, with references, the reading of the many great writers on trying commercial cases. What the authors try to accomplish is to present the basics of a commercial trial including the governing standards and recent developments, along with additional source material and common issues. Additionally, commercial trials, as with every other aspect of society, are changing as technology changes, and this chapter emphasizes these issues as well. Even subsequent to the first edition of this chapter, many courts have moved from allowing the use of electronic evidence to requiring the use of such evidence.

More particularly, §§8.2 – 8.15 below address the general characteristics of commercial litigation trials. The remainder of the chapter then addresses the specific components of each phase of commercial litigation trials. In doing so, the authors hope to provide the reader with the basic information necessary to try a commercial litigation trial in Illinois, from start to finish. For each component and phase of the trial, the relevant law, practical tips, and noteworthy issues of persuasiveness and uses of technology are addressed. Please note that while they relate to trials, experts and posttrial motions are addressed in Chapters 10 and 12 of this handbook.

II. [8.2] SIGNIFICANT CHARACTERISTICS OF COMMERCIAL LITIGATION TRIALS AND THE WIDELY ACCEPTED SOLUTIONS

Commercial litigation trials differ in content from other trials and thus require a distinctive skill set and trial strategy. Sections 8.3 – 8.15 below discuss both the significant characteristics of commercial litigation trials and the widely accepted solutions to the challenges of these trials.

A. [8.3] The Need To Motivate the Jury

The standard lore is that commercial litigation trials raise a plague of issues, including the fact that the subject matter is boring and complex and the parties are usually unsympathetic, all of which requires the lawyer to motivate the jury (or the judge) to listen at trial generally and, more

specifically, listen at trial with open ears to counsel's client. See, *e.g.,* 3 Robert L. Haig, ed., BUSINESS AND COMMERCIAL LITIGATION IN FEDERAL COURTS §33.24 (2d ed. 2005). To some extent, this lore is misleading as the parties are not inherently unsympathetic and the subject matter is not inherently boring. The client certainly cares about the case and has real reasons for the trial. Hopefully, counsel cares as well. The issue is conveying this urgency to the decision maker.

Lawyers have broad agreement on basic forensic solutions to these challenges. To draw out the basic urgency of the client's case, counsel should humanize the material with easily digestible themes, such as "evil monopolies" and the "American spirit of entrepreneurship." *Id.* In addition to humanizing the issues, counsel should humanize the client by having a person from the corporation sit at the trial table. *Id.* This individual need not — and, indeed, often should not — be the legal corporate representative. For example, counsel may want the working-class salesperson of a corporation to sit at counsel's table. See James W. McElhaney, MCELHANEY'S TRIAL NOTEBOOK, pp. 160 – 161 (4th ed. 2006).

As to the material, a trial lawyer should present the information in a dramatic, catchy manner through technology, storytelling techniques, and themes. Thomas A. Mauet, TRIAL TECHNIQUES §11.8 (6th ed. 2002). While an engaging presentation has always been important, it is increasingly more so as more and more people receive information at home and at work in catchy, electronic form and expect a trial to mirror an entertainment experience. See Daniel Wolfe, *The Use of Technology in Complex Cases: Courtroom Tools for a Visual Culture,* 18 Jury Expert, No. 2, 1 (Feb. 2006). Thus, to serve the client well in today's world, counsel generally must incorporate and embrace technology. See §§8.10 – 8.15 below (discussing the central role of technology in trials).

B. [8.4] How the Complexity and Amount of Evidence Act as a Barrier

The challenge in achieving the goals mentioned in §8.3 above arises from the fact that commercial litigation trials usually are based on voluminous evidence and legal theories that are complex and unfamiliar to the decision maker. 3 Robert L. Haig, ed., BUSINESS AND COMMERCIAL LITIGATION IN FEDERAL COURTS §§32.25 – 32.26 (2d ed. 2005). To identify that initial urgent need and to humanize the case, counsel should continuously simplify, organize, and summarize the evidence and legal theories throughout trial and especially during opening and closing statements. Using technology is likely critical to these goals. *Id.* See also Daniel Wolfe, *The Use of Technology in Complex Cases: Courtroom Tools for a Visual Culture,* 18 Jury Expert, No. 2, 1 (Feb. 2006). Further, counsel should spend substantial time drafting clear jury instructions and verdict forms as the instructions and forms may enable the jury to recollect and understand the complex issues and evidence better. 3 Haig, *supra,* §32.26.

C. [8.5] Central Role of Documents

One of the main reasons that commercial litigation trials are deemed "complex" is that they usually revolve around documents and these documents are often long and complex. 3 Robert L. Haig, ed., BUSINESS AND COMMERCIAL LITIGATION IN FEDERAL COURTS §32.27 (2d ed. 2005). To the extent that the documents are not individually complex, they are complex in

bulk and in their variety (*e.g.,* e-mails, memos, calendars, and handwritten notes). Documents need to be simplified, organized, and summarized. Also, the documents should be cross-referenced in a chart. Moreover, counsel should keep in mind that electronic documents, particularly e-mails, may be fragmented and difficult to read in isolation and may instead need to be read backwards or in composite form. Above all else, counsel should focus the jury's (or the judge's) attention on key provisions of documents through either traditional techniques, blowups, or new techniques.

D. [8.6] Multiple Parties

Commercial relationships impact many persons. This leads to commercial trials that contain multiple parties, many of which have separate representation. The sheer number of these parties and lawyers often confuses the jury and wrongfully leads them to assumptions of liability by association. 3 Robert L. Haig, ed., BUSINESS AND COMMERCIAL LITIGATION IN FEDERAL COURTS §32.28 (2d ed. 2005).

1. [8.7] Presentation

Due to the complexity stemming from multiple parties, counsel should carefully consider his or her client's relationship to coparties and convey the right message accordingly to avoid a guilt-by-association ruling. Counsel also should consider the client's theme when working with cocounsel to ensure that he or she is conveying the right message throughout the trial. For example, if counsel claims that his or her client was merely an innocent employee forced to follow company guidelines, perhaps counsel, as an attorney, should not conduct a harsh and long cross-examination of the plaintiff and instead have the company conduct these examinations. Moreover, counsel should coordinate with the attorneys of coparties to reduce expense to the client and prevent the duplication of argument as duplication will lose the jury's interest. Indeed, often judges will require counsel to coordinate with cocounsel to prevent duplication. 3 Robert L. Haig, ed., BUSINESS AND COMMERCIAL LITIGATION IN FEDERAL COURTS §32.28 (2d ed. 2005).

2. [8.8] Cross-Claims

As the trial approaches, counsel's client may have outstanding claims against other defendants or parties, or they may have claims against counsel's client. Before proceeding further with these claims, counsel needs to consider the consequences because even if a client's claim against a coparty has survived all the way to trial, it may be good strategy to settle, or even abandon, this claim prior to trial if the claim will destroy alliances with minimal benefit. For example, cross-claims for indemnity may result in defendants' blaming each other in front of the jury, doing the work for the plaintiff. By the same measure, the plaintiff should consider the consequence of not settling. It may be worthwhile to remove a strong and capable defendant. See generally 18 AM.JUR.2d *Contribution* §1 (2004).

E. [8.9] Terminology

Commercial litigation trials usually revolve around technical or industry-specific terminology that the jury does not know or understand. Among other solutions, counsel must train his or her witnesses to speak in plain English rather than the terminology. When the use of terminology is unavoidable at trial, counsel should define and explain the terminology clearly and in a non-condescending matter. This can be done by providing the jury with examples to which they can relate. Also, the use of demonstrative exhibits such as glossaries will help. Finally, counsel should pay particular attention to the terminology in jury instructions and verdict forms. 3 Robert L. Haig, ed., BUSINESS AND COMMERCIAL LITIGATION IN FEDERAL COURTS §32.29 (2d ed. 2005).

F. [8.10] Technology

Technology advances bear on all the characteristics and challenges of commercial litigation trials. It is a mistake, frankly, to attempt a commercial trial without at least considering the use of technology in organizing, simplifying, and presenting one's case. See generally 71 AM.JUR. Trials, *Computer Technology in Civil Litigation,* pp. 111, 129 (1999); 44 AM.JUR. Trials, *Judicial Technology in the Courts,* p. 10 (1992). While some tools are quite expensive, basic useful software and presentation devices are of modest cost and, if all else fails, can be rented with rental cost charged to the client or shared with cocounsel. See 71 AM.JUR. Trials, *Computer Technology in Civil Litigation,* pp. 111, 193 (1999) (computer-aided graphic displays are relatively simple and inexpensive to produce). Moreover, because trial support is a highly competitive field, counsel may be able to obtain acceptable prices by having the providers fight for his or her business or by using different providers for different types of services. Most of the providers will meet with counsel, without charge, to discuss the case and make helpful suggestions. Technology in the courtroom breaks down into roughly four categories: (1) the hardware available for presentation of evidence; (2) software and related tools for presenting the evidence; (3) software and related tools for creating demonstrative exhibits; and (4) tools not seen by the decision maker that assist with organization of trial materials.

1. [8.11] Presentation Hardware

Courts today are receptive to a variety of ways to present evidence to the decision maker. Many courtrooms have multiple monitors that project exhibits to the jury. Virtually every courtroom will let counsel set up a screen for either a projector or an ELMO device that lets counsel work with an exhibit face up. An ELMO device allows the user to point to or even write directly on the exhibit. See generally www.elmousa.com. More and more courtrooms are open to a virtual invasion of monitors, computers, wires, and support personnel. Some, for example, even are wired with touch-screen monitors at the judge's desk, witness stands, and counsels' tables that enable one to "draw" on the screen with his or her finger and to circle or highlight evidence with ease. The drawback of such a system is that use of the monitors will be "live," meaning that someone could accidentally draw on a monitor during trial. However, this type of system may hold the jury's interest longer. Other courtrooms permit the use of iPads during trials. Counsel needs a wireless connection or must connect directly to a projector/monitor for iPad use. iPads can be very useful when showing a witness an electronic document such as a spreadsheet that

requires manipulation of columns or rows. Also, iPads are useful for presenting a document to a witness or the judge without showing it to the jury at the same time. Therefore, while preparing for trial, counsel should be sure to examine the courtroom and consult with the court clerk regarding the room's hardware capabilities. In the authors' experience, moreover, a significant percentage of courtrooms are pre-equipped with hardware and, even absent such an installation, require the use of electronic evidence.

2. [8.12] Presentation Software

In order to use the hardware, counsel needs appropriate software. While an ELMO device needs no software, other devices do. Virtually every attorney has access to PowerPoint, which allows a slide show. However, PowerPoint slides are organized in a linear manner and do not allow for jumping from one slide to another. Therefore, if the judge admits only certain slides within a presentation, counsel will need to disconnect the laptop from the monitor to jump over the excluded PowerPoint slide during the middle of trial. In contrast, more sophisticated software, such as Sanction (see www.verdictsystems.com/software) and TrialDirector (see www.indatacorp.com/products/trial/trialdirector.aspx), allows users to call up documents, videos, pages, and transcripts, in any order, rather than requiring linear organization. Of course, such software comes at a higher price. Nevertheless, trial software such as Sanction and TrialDirector can be critical in a complex commercial case. If counsel wants to portray the relationships between the parties of a contract or the evolution of language through contract drafts, he or she can highlight and enlarge this language in real time. See 71 AM.JUR. Trials, *Computer Technology in Civil Litigation,* pp. 111, 192 (1999). Counsel even can use a computer-operated pen to write over the contract on the computer screen for a chalkboard effect. See Daniel Wolfe, *The Use of Technology in Complex Cases: Courtroom Tools for a Visual Culture,* 18 Jury Expert, No. 2, 2 (Feb. 2006). Also, e-mail exchanges may be presented in composite form.

Additionally, advanced trial software allows counsel to manage video, documents, and demonstrative exhibits. If cross-examining a witness, rather than impeaching the witness by reading the deposition, counsel can show the jury what was said. The available software allows counsel to catalogue the deposition video clips for a one-touch recall. See generally 58 AM.JUR. Trials, *Video Technology,* p. 481 (1996). Often, the user can pull up a clip by a bar code that is assigned for each clip. One simply waives the bar code reader at the bar code label, and the clip pops up. Also, the user can pull up a clip by designating it with call numbers typed into the system. See Wolfe, *supra.* Counsel is, of course, not limited to video depositions as he or she can also show video of any topic. See, *e.g.,* 39 AM.JUR. Trials, *Planning and Producing A "Day-in-the-Life" Videotape in a Personal Injury Lawsuit,* p. 261 (1989). Thus, in a case involving the alleged failure of a complex machine, counsel can show video of the machine operating to rebut the claim of failure. The same category of software also allows counsel to interpose video with documents and demonstrative exhibits. When counsel cannot show the key evidence by videotape, as in the case of a machine operating or a video deposition, two-dimensional or three-dimensional animation presents an interesting alternative. *Id.* See generally *Annot.,* 111 A.L.R.5th 529 (2003); 71 AM.JUR. Trials, *Computer Technology in Civil Litigation,* pp. 111, 169 – 192 (1999). This technology is becoming increasing popular as it enables the user to recreate a series of events and present these events to the jury.

3. [8.13] Creation of Demonstrative Exhibits

Computer software enhances and eases the process of creating demonstrative exhibits. See the discussion of specific software in §8.12 above. Almost all trial lawyers love chronologies, and software allows counsel to create immaculate color-coded chronologies. If counsel can create a real-time chronology, he or she can input evidence during the trial and also avoid making unnecessary commitments. Other software allows the user to create pie charts or graphs that change and adjust as the evidence comes in.

4. [8.14] Organizational Technology

Technology has a central role in organizing materials for a trial. See generally 75 AM.JUR.2D *Trial* §57 (1991) (discussing organizational benefits of litigation support systems). Certainly, it is possible to have all the raw material for a trial — the exhibits, depositions, pleadings, witness outlines, jury research material, and jury instructions — loaded on a laptop so that the attorney carries just a few ounces into the courtroom rather than the iconic blowups and boxes of paper. Products like Concordance (see http://concordance.lexisnexis.com) and Summation (see www.accessdata.com/products/ediscovery-litigation-support/summation) make it possible to store and search through the case's entire universe of documents and transcripts on any laptop. The exhibits can be projected on monitors with no paper required. Some attorneys are comfortable in such a paperless environment; others still require paper.

But technology can do more than condense material. If trying a case is a relentless process of simplifying complex data into an understandable theme, the trial lawyer must track and analyze this data on an ongoing and real-time basis. Instead of plain lists, attorneys can use relational databases to track all exhibits. A relational database, such as Microsoft Access, allows the user to correlate a number of factors. See generally http://office.microsoft.com/en-us/access/ha102133061033.aspx. For example, with regard to documents, counsel could create a table listing documents by author, recipient, date, topic, witnesses who reviewed the documents, type (letter, memo, etc.), degree of importance, the fact of whether it contains handwriting, and any other number of characteristics. The database can then create tables with one or more of these characteristics. Similarly, a case strategy management product like CaseMap (see www.casemap.com) can enable counsel to link up key issues, objects, and facts of the case to documents stored using the document and transcript repository software like Concordance.

5. [8.15] Downside of the Use of Technology

What is the downside of technology? First, the more options for success, the greater possibility for failure. Each technology option requires additional concentration and organizational effort. If trying a case by himself or herself, counsel may only need an ELMO device and a screen. One option is to have full-time tech support personnel, a routine practice for a large trial. However, while that relieves counsel of learning the technology, he or she still needs to practice with the supporting technology personnel. Second, technology must assist in simplifying and explaining the case. It may be that an easel and a monitor are appropriate for a case. Accordingly, case-by-case analysis really is necessary when contemplating the use of technology.

III. PRETRIAL MATTERS

A. [8.16] Pretrial Conference

The process of trying a case arguably begins at the pretrial conference. A pretrial conference is a conference between the parties and judge designed to assist participants in formulating a plan for trial and facilitating the admission of evidence. See Fed.R.Civ.P. 16(e). *See also Correa v. Hospital San Francisco,* 69 F.3d 1184, 1195 (1st Cir. 1995) (stating that conference's purpose is to assist court in formulating issues, including eliminating frivolous claims and defenses); *Sander v. Dow Chemical Co.,* 166 Ill.2d 48, 651 N.E.2d 1071, 1079, 209 Ill.Dec. 623 (1995) (noting that purpose of pretrial conferences is "to clarify issues and guide discovery to expeditiously reach trial or settlement"); *American Society of Lubrication Engineers v. Roetheli,* 249 Ill.App.3d 1038, 621 N.E.2d 30, 33 – 34, 190 Ill.Dec. 161 (1st Dist. 1993) ("One purpose of a pre-trial conference is to expedite the prosecution of a case, either by hastening a settlement agreement between the parties, or by clarifying the issues and evidence so that a trial on the merits may occur more swiftly."); *Conover v. Smith,* 20 Ill.App.3d 258, 314 N.E.2d 638, 640 (3d Dist. 1974) ("The pre-trial conference is a technique to promote the disposition of litigation by cooperation and agreement.").

1. [8.17] Law

The Code of Civil Procedure, 735 ILCS 5/1-101, *et seq.,* requires pretrial conferences to "be in accordance with rules" but does not delineate the requirements. 735 ILCS 5/2-1004. See generally Jeffrey A. Parness and Lance C. Cagle, *Guiding Civil Case Settlement Conferences and Their Aftermath: The Need To Amend Illinois Supreme Court Rule 218,* 35 Loy.U.Chi.L.J. 779, 781 – 787 (2004) (discussing history of written pretrial conference rules in Illinois). S.Ct. Rule 218 provides some guidance as it discusses case management conferences generally; however, in reality, the nature of pretrial conferences in Illinois is a matter of the court's discretion, so counsel must check the local rules and the judge's standing orders to determine the specifics.

Similarly, the formality and requirements of conferences in federal court are also a matter of discretion. In fact, Fed.R.Civ.P. 16 does not require courts even to have pretrial conferences; they are instead required only through local rules. Nevertheless, pretrial conferences in federal court are generally held anywhere from five to thirty days before trial. 3 Robert L. Haig, ed., BUSINESS AND COMMERCIAL LITIGATION IN FEDERAL COURTS §29.23 (2d ed. 2005).

2. [8.18] Practical Tips

Because courts have wide discretion in conducting a pretrial conference, counsel should be prepared for the court to address practically anything relating to the trial, such as encouraging factual and legal stipulations, ruling on motions in limine, excluding evidence, inquiring as to whether the parties still want a jury trial, receiving exhibits into the record, ruling on matters relating to the order of proof, determining how complex evidence will be presented to enhance jury comprehension, bifurcating potentially dispositive issues, imposing limits on the number of witnesses and the length of direct and cross-examinations and opening and closing statements, controlling the volume of exhibits, requiring the presentation of deposition designations, and

determining other procedural matters. 3 Robert L. Haig, ed., BUSINESS AND COMMERCIAL LITIGATION IN FEDERAL COURTS §29.24 (2d ed. 2005). This long list makes it clear that preparation for pretrial conferences is essential. Indeed, carelessness in the pretrial process can be disastrous, as the conference can decide many key issues in trial, and the pretrial order usually supersedes all prior pleadings. See §§8.21 – 8.28 below, discussing pretrial orders.

The pretrial conference is also a good time to learn the logistics of the courtroom and the judge's preferences. If counsel has not already done so, he or she should use the pretrial conference as an opportunity to examine the exact courtroom size and layout, the facility of technology such as ELMO devices and computer monitors within the courtroom, and space for the storage of documents. In addition, counsel should use the pretrial conference to learn the judge's preferences on all trial procedural matters, such as ruling on evidentiary issues, jury selection, use of sidebars, speaking objections, and even the attorney's movement in the courtroom. Finally, counsel should determine how the judge schedules trials in his or her courtroom (*e.g.* half days, full days, or by blocks of hours, such as 10:00 a.m. – 11:45 a.m. and 1:00 p.m. – 4:00 p.m.).

3. [8.19] Issues of Persuasiveness

Because pretrial conferences often shape the trials that succeed them, counsel must not take the conference lightly and must keep in mind that a persuasive, successful pretrial conference can bring parties closer to a settlement.

4. [8.20] Role of Technology

By the time counsel is preparing the pretrial material, he or she should have determined what technology he or she is going to use and should have developed an appropriate database.

B. [8.21] Pretrial Order

Pretrial orders "[measure] the dimensions of the lawsuit" (*American Home Assurance Co. v. Cessna Aircraft Co.,* 551 F.2d 804, 806 (10th Cir. 1977)) and "define, simplify, and limit the issues to be decided, reduce error, prevent surprise, promote judicial economy, and encourage settlement" (*Roland M. v. Concord School Committee,* 910 F.2d 983, 999 (1st Cir. 1990)). *See also Correa v. Hospital San Francisco,* 69 F.3d 1184, 1195 (1st Cir. 1995); *SNA Nut Co. v. Haagen-Dazs Co.,* 302 F.3d 725, 732 (7th Cir. 2002) ("the whole purpose of pretrial conferences and orders 'is to clarify the real nature of the dispute at issue' "), quoting *Gorlikowski v. Tolbert,* 52 F.3d 1439, 1444 (7th Cir. 1995). Typically, pretrial orders list witnesses, exhibits, issues, stipulated and contested facts, motions in limine, and proposed jury instructions.

1. [8.22] Law

Under state law, no rule even mentions a pretrial order. Thus, whether one is necessary and what its contents should be is entirely within the judge's prerogative. In contrast, under federal law, Fed.R.Civ.P. 16(d) provides, "After any conference under this rule, the court shall issue an order reciting the action taken. This order controls the subsequent course of the action unless the

court modifies it." As one can see, Rule 16(d) does not indicate what must be included in the order. Instead, local rules and judges' standing orders define the requirements of the order, and counsel must check these documents. See N.D.Ill. Local Rule 16.1(a); C.D.Ill. Local Gen. & Civ. Rule 16.1(F); S.D.Ill. Local Rule 16.2(b)(3).

2. Practical Tips

a. [8.23] The Contents

Because the rules for both federal and state courts often do not spell out the contents of a pretrial order, counsel should be prepared to include in the order anything that is necessary to try a case. See N.D.Ill. Local Rule 16.1(a); C.D.Ill. Local Gen. & Civ. Rule 16.1(F); S.D.Ill. Local Rule 16.2(b)(3). The order generally includes such things as a brief description of the parties; a statement of the nature of the case and jurisdiction; a listing of all pending motions; a statement of the stipulated facts; a statement of the relief sought; a statement of the legal issues in dispute; a statement concerning the current status of settlement negotiations; the names of all witnesses whom the parties intend to call, including experts; a list of all exhibits and objections to the opponent's exhibits; a list of all materials for use during opening and closing statements; designations of deposition testimony that the parties may use in the event that a witness is unavailable and objections to the opponent's deposition designations; and the estimated number of trial days. 3 Robert L. Haig, ed., BUSINESS AND COMMERCIAL LITIGATION IN FEDERAL COURTS §29.27 (2d ed. 2005). What if there is no rule requiring a pretrial order or setting forth its contents? It still may benefit both parties and counsel's client to address many of the issues listed above in an organized way.

b. [8.24] Time and Cost

Given the long list in §8.23 above of things to include in a pretrial order, these orders in any type of case take a fair amount of time. In a commercial litigation case, the amount of time needed to draft a pretrial order increases substantially due to the large amount of documents and witnesses. That said, counsel must not wait until the last minute to begin working on the order. Moreover, given the time (and cost to the client), counsel should consider revisiting settlement prior to beginning work on the pretrial order.

c. [8.25] Waiver and Ambush

The failure to address a claim, defense, or issue in the pretrial order may constitute a waiver. *Youren v. Tintic School District,* 343 F.3d 1296, 1304 – 1305 (10th Cir. 2003); *SNA Nut Co. v. Haagen-Dazs Co.,* 302 F.3d 725, 732 (7th Cir. 2002) (stating that issue "not raised in a pretrial order is deemed waived"); *Gregory v. Shelby County, Tennessee,* 220 F.3d 433, 442 – 443 (6th Cir. 2000); *Gorlikowski v. Tolbert,* 52 F.3d 1439, 1444 (7th Cir. 1995); *Roland M. v. Concord School Committee,* 910 F.2d 983, 999 (1st Dist. 1990). As such (and particularly in federal court), counsel must be sure to include all information necessary to try his or her case as the pretrial order in essence requires counsel to present his or her case in advance. Similarly, counsel should study the other side's submission carefully and hold them to it during the course of the trial. If they fail to include appropriate material or proposed exhibits, counsel can seek to limit the scope

of the trial. Also, counsel should study the pretrial order to see if the opponent is seeking to ambush him or her by eliminating or avoiding difficult issues. As the pretrial order supersedes other pleadings, the inclusion or omission of witnesses or issues may well change what would have been mistakes into benefits. *See SNA Nut, supra,* 302 F.2d at 732 ("[A] pretrial order supersedes the pleadings and a defense not raised in a pretrial order is deemed waived."); *Fillmore v. Page,* No. 97-844-CJP, 2006 WL 741388 at *2 (S.D.Ill. Mar. 20, 2006); *McDonald's Corp. v. American Motorists Insurance Co.,* 321 Ill.App.3d 972, 748 N.E.2d 771, 777, 255 Ill.Dec. 67 (2d Dist. 2001). By reserving the right to supplement the information within the pretrial order, counsel may prevent waiver issues. For instance, some common reservation language for the defendant includes the following:

Defendants reserve the right to add to, subtract from, or otherwise change or modify the attached list because, until Plaintiffs present their cases-in-chief at trial, and until the Court rules on various pretrial and evidentiary issues, it is impossible for Defendant to know exactly which exhibits to introduce or use at trial. Subject to and without limiting the foregoing, Defendants specifically reserve the right to add any exhibits to their Exhibit List to rebut Plaintiffs' evidence or to introduce or use in Defendants' surrebuttal case.

While the inclusion of similar language does not guarantee protection against waiver, the inclusion of reservation language certainly helps in later waiver battles.

d. [8.26] Strategy on Stipulations

A significant aspect of a pretrial order is the factual stipulations. Factual stipulations are a list of facts that no party disputes. By obtaining the opponent's consent to certain facts, counsel can eliminate entire debates from the trial. This can save significant time and money in the long run, while it may make the pretrial order process more onerous. Of course, the opponent is going to want to obtain counsel's consent to his or her facts, and, thus, counsel can expect a certain amount of horse trading. Once again, in approaching this issue, counsel should focus on the facts and themes that are central to prevailing. With those thoughts in mind, it is less painful to compromise on the factual stipulations, accepting some of the opposing parties' proposals, reducing costs, and streamlining the case for the decision maker.

3. [8.27] Issues of Persuasiveness

The pretrial order is an important document because it controls the trial in many respects. First, the pretrial order clues the judge in to the contentious issues between the parties, making it more likely that the judge will understand and rule in counsel's favor on a contentious issue at trial. Second, because it supersedes other pleadings, the pretrial order is a tool for counsel to use at trial to prevent any attempted ambushes by the opponent. *See SNA Nut Co. v. Haagen-Dazs Co.,* 302 F.3d 725, 732 (7th 2002); *Fillmore v. Page,* No. 97-844-CJP, 2006 WL 741388 at *2 (S.D.Ill. Mar. 20, 2006); *McDonald's Corp. v. American Motorists Insurance Co.,* 321 Ill.App.3d 972, 748 N.E.2d 771, 777, 255 Ill.Dec. 67 (2d Dist. 2001). Finally, the pretrial order likely will control counsel's case simply because the process of preparing the pretrial order requires counsel to revisit the basic theories of the case and understand the opponent's theory.

4. [8.28] Technology

Pretrial orders require the parties to identify all exhibits and issues. Counsel should identify (or at least describe) the demonstrative exhibits he or she is going to use. As for technology in the courtrooms, any issues should be flagged in the pretrial order. One subtlety is the treatment of on-the-fly demonstrative exhibits. If counsel intends to create exhibits at trial, or modify existing exhibits, such as a chronology, he or she should be sure to preserve that right in the pretrial submissions.

C. Trial Subpoena

1. [8.29] Law

A trial subpoena is a subpoena compelling the attendance of a witness at trial. See generally 37 I.L.P. *Witnesses* §4 (2009) (discussing trial subpoenas under Illinois law). Under Illinois law, state courts of general jurisdiction have the ability to compel the attendance at trial of any witness who is a resident of Illinois, regardless of whether the witness is a resident of the county where the action is taking place. 735 ILCS 5/2-1101; S.Ct. Rule 237. *See also Bradbury v. St. Mary's Hospital of Kankakee, Illinois,* 273 Ill.App.3d 555, 652 N.E.2d 1228, 1232, 210 Ill.Dec. 252 (1st Dist. 1995) (process is available "to compel the attendance of any unwilling Illinois resident witnesses pursuant to Supreme Court Rule 237"); *Baker v. Burlington Northern R.R.,* 149 Ill.App.3d 674, 500 N.E.2d 1113, 1119, 103 Ill.Dec. 42 (5th Dist. 1986) ("All of the witnesses who reside in Illinois, including those who are from Marion and Franklin Counties and the areas nearby can, of course, be subpoenaed to testify at trial in Madison County."). A trial subpoena may be used to compel a witness at trial "even if the witness had been within the [opposing party's] control and disclosed by the [opposing party] in discovery." *Lisowski v. MacNeal Memorial Hospital Ass'n,* 381 Ill.App.3d 275, 885 N.E.2d 1120, 1132, 319 Ill.Dec. 440 (1st Dist. 2008). Indeed, the failure to do so may be detrimental to one's case, for at least one Illinois appellate court ruled that the trial court did not abuse its discretion by refusing to give an adverse-inference instruction relating to a missing witness when the plaintiff had failed to issue a trial subpoena to the missing witness who was in the defendant's control and disclosed by the defendant during discovery. 885 N.E.2d at 1131 – 1132. Under federal law, Fed.R.Civ.P. 45(b)(2) permits service of a subpoena to three types of locations: (a) anyplace within the court district; (b) anyplace outside the court district that is within 100 miles of the place of testimony or production; and (c) anyplace "within the state of the issuing court if a state statute or court rule allows service at that place of a subpoena issued by a state court of general jurisdiction sitting in the place specified for the deposition, hearing, trial, production, or inspection."

2. [8.30] Practical Tips

Counsel should issue a trial subpoena even for the witnesses considered "friendly" if these witnesses are truly necessary for counsel's case, since whether the witnesses are friendly may change during the course of litigation and trial. Moreover, if a friendly witness does not show up, counsel will not receive any sympathy or relief from the court unless he or she issued a subpoena. In addition, counsel should not rely on the opponent to issue a trial subpoena for witnesses counsel considers necessary. If the opponent serves a subpoena, counsel should simply serve an

identical subpoena. Finally, after service of the trial subpoena, counsel should receive a commitment from the witnesses that they will be available to testify during trial. If a witness is friendly, counsel also should take the necessary steps to ensure that the witness is comfortable at trial, such as describing the examination procedure, directing the witness to the courtroom, assisting the witness with hotel accommodations if needed, and assigning a lawyer or legal assistant to facilitate transportation of the witness to trial.

3. [8.31] Issues of Persuasiveness

When determining whether to issue a trial subpoena, counsel should consider the extent that the issuance of trial subpoenas reveals his or her trial strategy. However, counsel may lessen the extent that the issuance reveals trial strategy by issuing subpoenas to any conceivable witness, and counsel may do this inexpensively by certified or registered mail under Illinois law. S.Ct. Rule 237.

D. [8.32] Bifurcation

Bifurcation is the process of separating the adjudication of particular issues from the remainder of the trial for purposes of judicial economy and the avoidance of prejudice. *See, e.g., DeWitt, Porter, Huggett, Schumacher & Morgan, S.C. v. Kovalic,* 991 F.2d 1243, 1245 (7th Cir. 1993). It is a common procedural device for all cases and especially in commercial litigation cases due to the complexity of issues. *See Hydrite Chemical Co. v. Calumet Lubricants Co.,* 47 F.3d 887, 890 (7th Cir. 1995).

1. [8.33] Law

In both state and federal court proceedings, courts have considerable discretion to order bifurcation. *Krocka v. City of Chicago,* 203 F.3d 507, 516 (7th Cir. 2000); *Mount v. Dusing,* 414 Ill. 361, 111 N.E.2d 502, 505 (1953); *Pickering v. Owens-Corning Fiberglas Corp.,* 265 Ill.App.3d 806, 638 N.E.2d 1127, 1131, 203 Ill.Dec. 1 (5th Dist. 1994). But the legal requirements are defined by law. Pursuant to 735 ILCS 5/2-1006, an action may be severed, and actions pending in the same court may be consolidated as an aid to convenience whenever it can be done without prejudice to a substantial right. *See Pickering, supra,* 638 N.E.2d at 1131. Similarly, Fed.R.Civ.P. 42(b) provides:

> **For convenience, to avoid prejudice, or to expedite and economize, the court may order a separate trial of one or more separate issues, claims, crossclaims, counterclaims, or third-party claims. When ordering a separate trial, the court must preserve any federal right to a jury trial.**

Under Rule 42(b), the separation of claims or issues for trial is appropriate with a showing of either one of the following criteria: (a) to avoid prejudice to a party; or (b) to promote judicial economy. *See, e.g., Treece v. Hochstetler,* 213 F.3d 360, 365 (7th Cir.), *cert. denied,* 121 S.Ct. 381 (2000); *Berry v. Deloney,* 28 F.3d 604, 610 (7th Cir. 1994). The court may then order bifurcation if doing so does not unfairly prejudice the nonmovant or violate the nonmovant's Seventh Amendment right to a jury trial in civil proceedings. *Chlopek v. Federal Insurance Co.,* 499 F.3d 692, 700 (7th Cir. 2007); *Krocka, supra,* 203 F.3d at 516.

2. [8.34] Practical Tips

Common topics on which to seek bifurcation include damages, punitive damages, contribution, and alter-ego issues. Evidence of damages and respondeat superior are not intertwined with liability, so they are easily severable generally. 3 Robert L. Haig, ed., BUSINESS AND COMMERCIAL LITIGATION IN FEDERAL COURTS §33.32 (2d ed. 2005). The usual way to request bifurcation is through a motion in limine. See §§8.35 – 8.41 below, discussing motions in limine. Also, bifurcating issues is an effective way to eliminate prejudicial matters. If counsel thinks it may benefit the client, counsel should bring the appropriate motion as this motion will almost certainly be well-founded.

E. [8.35] Motion in Limine

The United State Supreme Court defines a "motion in limine" as "any motion, whether made before or during trial, to exclude anticipated prejudicial evidence before the evidence is actually offered." *Luce v. United States,* 469 U.S. 38, 83 L.Ed.2d 443, 105 S.Ct. 460, 462 n.2 (1984). See also BLACK'S LAW DICTIONARY, p. 1109 (9th ed. 2009) ("pretrial request that certain inadmissible evidence not be referred to or offered at trial"). Illinois courts follow the Supreme Court's definition. *See Hawkes v. Casino Queen, Inc.,* 336 Ill.App.3d 994, 785 N.E.2d 507, 516, 271 Ill.Dec. 575 (5th Dist. 2003) ("The purpose of the motion [in limine] is to promote a trial free of prejudicial material and to avoid highlighting the evidence to the jury through objection.").

1. [8.36] Law

There is no explicit authority under Illinois or federal law authorizing parties to bring motions in limine. The "[a]uthority lies in the inherent power of the court to manage trial and pretrial proceedings and its general authority to decide evidentiary questions." 3 Robert L. Haig, ed., BUSINESS AND COMMERCIAL LITIGATION IN FEDERAL COURTS §32.7 (2d ed. 2005). *See also Hare v. Zitek,* No. 02 C 3973, 2006 WL 2088427 at *1 (N.D.Ill. July 24, 2006) ("Generally speaking, district courts have the power to exclude evidence in limine as part of their inherent authority to manage trials."); *Pease v. Production Workers of Chicago & Vicinity Local 707,* No. 02 C 6756, 2003 WL 22012678 at *3 (N.D.Ill. Aug. 22, 2003); *Anglin v. Sears, Roebuck & Co.,* 139 F.Supp. 2d 914, 916 (N.D.Ill. 2001); *People v. Jenkins,* 383 Ill.App.3d 978, 891 N.E.2d 536, 546, 322 Ill.Dec. 521 (1st Dist. 2008); *City of Quincy v. Diamond Construction Co.,* 327 Ill.App.3d 338, 762 N.E.2d 710, 714, 261 Ill.Dec. 141 (4th Dist. 2002). And both the Federal Rules of Evidence and Illinois Rules of Evidence specifically enable the court to rule on admissibility of evidence. See, *e.g.,* Fed.R.Evid. 104; Ill.R.Evid. 104. Courts of review therefore will not reverse the trial court's decision to grant a motion in limine absent clear abuse of discretion. *Hawkes v. Casino Queen, Inc.,* 336 Ill.App.3d 994, 785 N.E.2d 507, 516, 271 Ill.Dec. 575 (5th Dist. 2003).

2. Practical Tips

a. [8.37] The Contents

A motion in limine could be filed on any number of topics, including a party's financial condition, experts, identification of codefendants collectively, exclusion of witnesses from the

courtroom, a party's bankruptcy or termination of business, evidence not produced before trial, discovery disputes, a party's criminal past, questions of law, prior settlement negotiations, insurance coverage, medical conditions, the specific amount of damages, confidential information, trade secrets, corporate representatives, lost profits, and punitive damages. *See Norman v. CP Rail Systems,* No. 99 C 2823, 2000 WL 1700137 (N.D.Ill. Nov. 13, 2000) (financial condition); *Heyman v. Beatrice Co.,* No. 89 C 7381, 1995 WL 579475 (N.D.Ill. Sept. 28, 1995) (same); *Hickey v. Chicago Transit Authority,* 52 Ill.App.2d 132, 201 N.E.2d 742, 746 (1st Dist. 1964) (same); *Gebhardt v. Mentor Corp.,* 15 Fed.Appx. 540, 542 (9th Cir. 2001) (experts); *Rutkowski v. Occidental Chemical Corp.,* No. 83 C 2339, 1989 WL 32030 (N.D.Ill. Feb. 16, 1989) (same); *Tannenbaum v. Clark,* No. 88 C 7312, 1996 WL 147970 (N.D.Ill. Mar. 28, 1996) (codefendants); *Beck v. Koppers, Inc.,* No. 3:03CV60-P-D, 2006 WL 2228911 (N.D.Miss. Apr. 7, 2006) (same); *Bumblauskas v. South Suburban Safeway Lines, Inc.,* 110 Ill.App.2d 52, 249 N.E.2d 143, 146 – 147 (1st Dist. 1969) (witnesses in courtroom); Fed.R.Evid. 615 (same); Ill.R.Evid. 615 (same); *Friedman v. Park District of Highland Park,* 151 Ill.App.3d 374, 502 N.E.2d 826, 838, 104 Ill.Dec. 329 (2d Dist. 1986) (same); *United States v. Olano,* 62 F.3d 1180, 1205 (9th Cir. 1995) (party's termination of business); Fed.R.Civ.P. 37(c)(1) (undisclosed evidence); S.Ct. Rule 219(c) (same); *Industrial Hard Chrome, Ltd. v. Hetran, Inc.,* 92 F.Supp.2d 786, 789 (N.D.Ill. 2000) (criminal past); *Empire Gas Corp. v. American Bakeries Co.,* 646 F.Supp. 269, 274 (N.D.Ill. 1986) (discovery disputes); *Waters v. Genesis Health Ventures, Inc.,* 400 F.Supp.2d 814, 818 (E.D.Pa. 2005) (same); *United States v. Gleason,* 980 F.2d 1183, 1185 (8th Cir. 1992) (questions of law); *United States Fire Insurance Co. v. Stricklin,* 556 S.W.2d 575, 579 (Tex.App. 1977) (same); *Barkei v. Delnor Hospital,* 176 Ill.App.3d 681, 531 N.E.2d 413, 421, 126 Ill.Dec. 118 (2d Dist. 1988) (settlement negotiations); *Fenberg v. Rosenthal,* 348 Ill.App. 510, 109 N.E.2d 402, 404 (1st Dist. 1952) (same); *Guardado v. Navarro,* 47 Ill.App.2d 92, 197 N.E.2d 469, 474 (1st Dist. 1964) (insurance coverage); *Burns v. Michelotti,* 237 Ill.App.3d 923, 604 N.E.2d 1144, 1154 – 1155, 178 Ill.Dec. 621 (2d Dist. 1992) (medical condition); *Juarez v. Commonwealth Medical Associates,* 318 Ill.App.3d 380, 742 N.E.2d 386, 392, 252 Ill.Dec. 136 (1st Dist. 2000) (specific amount of damages); *People v. Murphy,* 241 Ill.App.3d 918, 609 N.E.2d 755, 760, 182 Ill.Dec. 221 (1st Dist. 1992) (confidential information); *MBL (USA) Corp. v. Diekman,* 112 Ill.App.3d 229, 445 N.E.2d 418, 427, 67 Ill.Dec. 938 (1st Dist. 1983) (trade secrets); *W.R. Grace & Co. v. Viskase Corp.,* No. 90 C 5383, 1991 WL 211647 at *2 (N.D.Ill. Oct. 15, 1991) (corporate representatives); *Villalba v. Consolidated Freightways Corporation of Delaware,* No. 98 C 5347, 2000 WL 1154073 (N.D.Ill. Aug. 14, 2000) (lost profits); *Werderman v. Liberty Ventures, LLC,* 368 Ill.App.3d 78, 857 N.E.2d 320, 306 Ill.Dec. 227 (2d Dist. 2006) (punitive damages). Moreover, to the extent that the court has already addressed an issue, counsel should file appropriate motions barring relitigation of the issue though the "law of the case" doctrine. *See Anglin v. Sears, Roebuck & Co.,* 139 F.Supp.2d 914, 926 (N.D.Ill. 2001).

When considering motions in limine, counsel should be sure to consider the opponent's pleadings, discovery obligations, discovery responses, and claims of privilege. For example, if the opponent has answered a complaint regarding a contract by stating that "the document speaks for itself," counsel can bring a motion in limine barring extrinsic evidence to interpret the contract. Similarly, if the opponent has claimed privilege with regard to the action of certain in-house counsel, then counsel should consider bringing a motion in limine barring all testimony from or relating to this in-house counsel.

b. [8.38] Almost No Limits to a Good-Faith Argument

As a motion in limine could be about any subject at all, counsel should not be afraid to bring any motion that he or she believes, in good faith, is appropriate. The rules of evidence grant considerable discretion to the trial court to exclude evidence, and, thus, a motion seeking to invoke this discretion could cover a virtually infinite variety of subjects. While commonly defined as a means to exclude certain evidence, in reality, motions in limine may be used to confirm the admissibility of evidence, narrow the scope of the admissibility of evidence, or merely to alert the trial judge to important evidentiary issues. 3 Robert L. Haig, ed., BUSINESS AND COMMERCIAL LITIGATION IN FEDERAL COURTS §32.1 (2d ed. 2005). *Cf. Compton v. Ubilluz,* 353 Ill.App.3d 863, 819 N.E.2d 767, 776, 289 Ill.Dec. 271 (2d Dist. 2004) (stating that purpose of motions in limine is "to exclude inadmissible evidence"). Motions in limine can even echo summary judgment motions. Even though the judge denied a summary motion, it may be worth revisiting the subject. While counsel should never file frivolous motions, topics can be reusable from different perspectives and presented again. Of course, persuasive advocates pick and choose their issues, and the many possible motions in limine do not mean that they all should be brought, the good, bad, and the indifferent alike.

c. [8.39] Timing

Motions in limine generally are filed in conjunction with the pretrial order, although the deadline may fall any time before trial. It is not unusual, however, for judges to refrain from ruling on the motions until trial. Thus, counsel needs an appropriate organizational system for seeking resolution of the motions during trial. Also, counsel can (and should) push for decisions on motions in limine before voir dire; otherwise, opposing counsel could try to bring in improper information at the point of jury selection and taint the jury.

3. [8.40] Issues of Persuasiveness

A successful ruling on a motion in limine can bring about a settlement or even resolve the case on the merits. For instance, if a motion highlights a difficult aspect of the opponent's case or the admissibility of a key document, a favorable ruling could prevent the opponent from proving the elements of the case. Thus, counsel should not underestimate the importance of motions in limine by failing to give himself or herself enough time to analyze and draft these motions.

4. [8.41] Technology

Technology has an important role in motions in limine. In a complex commercial case, a particular motion in limine may impact hundreds or even thousands of documents. For example, if counsel seeks to exclude a certain category of documents on the grounds that they do not constitute business records, counsel needs to be sure that he or she can identify all of these records and do so in a quick manner. An appropriate database will allow counsel to identify the precise records at issue within a short amount of time.

F. [8.42] Trial Notebook

A trial notebook is a "system of trial preparation that actually uses a notebook to organize everything in trial." James W. McElhaney, MCELHANEY'S TRIAL NOTEBOOK, p. 126 (4th ed. 2006). This notebook is organized in a way that parallels how the materials will be used during the course of trial. Thomas A. Mauet, TRIAL TECHNIQUES, p. 502 (6th ed. 2002). The contents of the trial notebook depend on the case and on what counsel, as a lawyer, believes would be useful at trial. McElhaney, *supra,* p. 127; Mauet, *supra,* pp. 502 – 503.

1. [8.43] Practical Tips

A common way to organize a trial notebook is by (a) facts, (b) pleadings, (c) discovery, (d) motions, (e) charts, (f) jury, (g) openings, (h) plaintiff, (i) defendant, (j) closings, (k) instructions, and (*l*) law. Thomas A. Mauet, TRIAL TECHNIQUES, p. 503 (6th ed. 2002). Due to the amount and complex nature of the evidence in commercial litigation cases however, several notebooks centered on discrete topics (*e.g.,* damages) may be necessary. It is also important to cross-reference both by witness, document, and topic, among other areas. But counsel should remember to keep the system simple enough that he or she is still able to use it. And no matter what counsel includes in his or her trial notebook, counsel should still bring certain supplies to the courtroom during trial. For instance, counsel should have a laptop; office supplies, including tools to mark significant portions of exhibits; backup material for technology (*i.e.,* cords, batteries, extra copies of DVDs); the pleadings; copies of discovery; the judge's standing orders; and other relevant rules and authority.

2. [8.44] Issues of Persuasiveness

"Nothing so undermines the confidence of a court or jury in a lawyer as his constant groping and fumbling." John Alan Appleman et al., SUCCESSFUL JURY TRIALS, p. 100 (1952). The trial notebook seeks to prevent this groping and fumbling by organizing all trial materials in a clear and easy manner. The key is that the trial lawyer must learn and understand the organizational system and not simply rely on the young associate or paralegal to know the system.

3. [8.45] Technology

While previously a trial notebook was always a notebook, today the concept of a trial notebook is influenced by technology. All the data, for all but the largest cases, can be stored on one laptop computer. As such, a trial notebook contained in or augmented by a computer can contain all exhibits, all depositions including video clips, and demonstrative exhibits. See §§8.10 – 8.15 above, discussing technology use at trials. It also can contain databases that allow for the immediate search for relevant exhibits or deposition excerpts. Indeed, with regard to cross-referencing, one of the best tools is a relational database, such as CaseMap or Access. See §8.14 above. Further, the trial notebook/computer will allow the creation or modification of demonstrative exhibits. Also, the use of laptops will enable the commercial trial attorney to gather and organize the contents of the trial notebook before the trial itself, and this exercise undoubtedly will better prepare the lawyer for trial.

G. [8.46] Shadow Jury

A shadow or phantom jury is a group of individuals selected by a jury consultant on the basis of their resemblance to the actual jurors who observe the trial daily to provide information to the party by which they were hired. 3 Robert L. Haig, ed., BUSINESS AND COMMERCIAL LITIGATION IN FEDERAL COURTS §33.44 (2d ed. 2005); Robert V. Wells, SUCCESSFUL TRIAL TECHNIQUES OF EXPERT PRACTITIONERS §4.21 (rev. ed. 2005). In particular, the shadow jury will provide information concerning the impact of evidence, theories, and attorney presentation. The shadow jurors do not know who hired them, as they report to the jury consultant and not a particular party or attorney. But the shadow jurors may guess at who retained them when there is a disparity in the parties' resources.

1. [8.47] Practical Tips

Shadow juries are very expensive, so their use is recommended only with a long and high-stakes commercial litigation trial. With a long trial, the attorney can adjust his or her case presentation based on the shadow jury's reaction to the early presentation. Moreover, during a long trial, counsel is better able to use the shadow jury to determine whether the jury is understanding particular themes and what the jurors' feelings are regarding the trial attorney's demeanor.

2. [8.48] Issues of Persuasiveness

Counsel must not rely on a shadow jury too much as it is merely a tool to assist in the trial, and counsel still must convince the real jury. Counsel must make sure that the client understands this as well, for the client easily may get his or her hopes up based on the shadow jury. Also, when determining whether to use a shadow jury, counsel should be aware that the real jury will notice the shadow jury sitting in the courtroom. Their presence may emphasize the disparity in resources between the parties if a disparity does exist. Counsel must consider whether he or she wants this emphasis.

H. [8.49] The Theory of the Case and Theme

While counsel may understand the ins and outs of the case, the jury comes to the courtroom with absolutely no knowledge of the case and little understanding of the law. As the trial attorney, therefore, counsel must educate the jury on the case. But, because the jury receives so much new information during the trial, counsel must educate the jury in a memorable way. On the most basic level, this requires the use of a theory for the case and accompanying themes.

"The theory of the case is a basic, underlying idea that explains not only the legal theory and factual background, but also ties as much of the evidence as possible into a coherent and credible whole. [It] is the basic idea around which everything else revolves." James W. McElhaney, MCELHANEY'S TRIAL NOTEBOOK, p. 18 (4th ed. 2006). In other words, it is a "[c]lear, simple story of 'what really happened from your point of view." Thomas A. Mauet, TRIAL TECHNIQUES, p. 24 (6th ed. 2002). "The theme is a memorable phrase that expresses the basic concept of what the dispute is about from your client's perspective" to persuade the jury. 3 Robert L. Haig, ed., BUSINESS AND COMMERCIAL LITIGATION IN FEDERAL COURTS §33.18

(2d ed. 2005). Counsel may have multiple themes, but they must all emphasize the theory of the case and serve to anchor the jury into accepting and adopting counsel's view of the case. Counsel must think of the theory of the case as a "plot outline" or "executive summary" and the theme as "the moral of the story" or "headline." 3 Haig, *supra,* §33.18.

1. [8.50] Practical Tips

Obviously, counsel should develop the theory of the case and accompanying themes long before trial approaches. 3 Robert L. Haig, ed., BUSINESS AND COMMERCIAL LITIGATION IN FEDERAL COURTS §33.17 (2d ed. 2005). Indeed, from the first meeting with the client, counsel should attempt to learn the client's original need, and this should form the foundation for counsel's theory of the case. The theory and themes then should lead counsel through discovery, directing his or her document requests and deposition examinations. But, at the very least, counsel must finalize his or her theory of case and any accompanying themes prior to the start of trial.

Once counsel develops the theory of the case and accompanying themes, they should guide counsel in each step of the trial. Counsel should present them to the jury during the opening statement to shape its understanding of the case from the outset, should question witnesses according to counsel's theory and themes only, and should use the closing argument to pound them home once again. James W. McElhaney, MCELHANEY'S TRIAL NOTEBOOK. p. 22 (4th ed. 2006). At trial, moreover, the theory and themes should be cross-checked against any developments and the legal principles.

Often, the best themes come from "time-honored sources that contain universal truths about life, such as the Bible, Aesop's Fables, or Americana sayings." Thomas A. Mauet, TRIAL TECHNIQUES, p. 25 (6th ed. 2002). It may be helpful for counsel to find readings that inspire him or her or to search through great quotations. A simple Google search will lead to thousands of famous quotations. Among other interesting readings, trial lawyers also should read the essays, books, and quotations of Clarence Darrow. In addition, counsel can develop his or her themes by reading the opening and closing statements of great trial lawyers.

2. [8.51] Issues of Persuasiveness

Because they summarize and express the client's whole story, counsel must believe in the theory and themes of his or her case in order for the jury to believe. James W. McElhaney, MCELHANEY'S TRIAL NOTEBOOK, p. 18 (4th ed. 2006). Furthermore, counsel must commit to one theory of the case because if he or she presents too many different ideas and concepts, the jury will not trust any of these ideas and concepts. McElhaney, *supra,* p. 22. Similarly, having inconsistent theories or themes is likely to be counterproductive for purposes of persuading the jury because counsel is arguing against himself or herself. 3 Robert L. Haig, ed., BUSINESS AND COMMERCIAL LITIGATION IN FEDERAL COURTS §33.19 (2d ed. 2005).

Counsel should realize that the opponent has his or her own theory of the case and themes. During the trial, therefore, counsel should determine the adversary's theory and themes and then exploit facts and law that are inconsistent with the adversary's theory and themes. 3 Haig, *supra,* §33.22. By doing so, the jury will second-guess the opponent and more likely will reconsider counsel's theory of the case.

IV. JURY SELECTION

A. Obtaining Jury Trial

1. [8.52] Law

Under Illinois law, the plaintiff must file a jury demand at the time of the complaint filing, and the defendant must file a jury demand no later than the filing of the answer. 735 ILCS 5/2-1105(a). In contrast, under federal law, any party may demand a jury trial on any issue in writing after the commencement of the action and not later than 14 days after service of the last pleading on the issue. Fed.R.Civ.P. 38(b). In both state and federal proceedings, however, there are some types of actions for which counsel cannot obtain a jury, such as bankruptcy proceedings and many administrative remedy matters. In other words, the filing of a jury demand does not entitle a party to a jury trial. In fact, the Illinois Supreme Court specifically has held that the Code of Civil Procedure "merely provides the process by which a party may advise the court of its desire for a jury trial. . . . and says nothing about whether a party is entitled to a jury trial in any given action." [Citation omitted.] *Bowman v. American River Transportation Co.,* 217 Ill. 2d 75, 838 N.E.2d 949, 960, 298 Ill.Dec. 56 (2005).

2. Practical Tips

a. [8.53] Time

Usually one may obtain a bench trial faster than a jury trial. *See Hernandez v. Power Construction Co.,* 73 Ill.2d 90, 382 N.E.2d 1201, 1204, 22 Ill.Dec. 503 (1978) ("Plaintiff points out, and we take judicial notice of the fact, that a plaintiff who desires a jury trial in the circuit court of Cook County must wait approximately two years longer than those willing to have a bench trial."); *Washington v. Chicago Transit Authority,* 179 Ill.App.3d 113, 534 N.E.2d 423, 424, 128 Ill.Dec. 241 (1st Dist. 1989). In deciding between a bench or a jury trial, counsel should consider the judge assigned to the case (*i.e.,* the judge's track record on similar issues or similar parties) and whether the case has jury appeal. Thomas A. Mauet, TRIAL TECHNIQUES, pp. 31 – 32 (6th ed. 2002).

b. [8.54] Reliance on the Jury Demand

Even if counsel changes his or her mind regarding whether the jury should be the tribunal of the case, it is unlikely that counsel can change course close to trial. Each side may be able to rely on the other party's jury demand. In state court, if the defendant withdraws its jury demand, the plaintiff probably still can obtain a jury trial even though he or she did not file a jury demand at the time of commencement of the action and had waived his or her right. *Hernandez v. Power Construction Co.,* 73 Ill.2d 90, 382 N.E.2d 1201, 1204, 22 Ill.Dec. 503 (1978); *Washington v. Chicago Transit Authority,* 179 Ill.App.3d 113, 534 N.E.2d 423, 128 Ill.Dec. 241 (1st Dist. 1989); *Paul H. Schwenderner, Inc. v. Larrabee Commons Partners,* 338 Ill.App.3d 19, 787 N.E.2d 192, 200 – 201, 272 Ill.Dec. 377 (1st Dist. 2003). The reason is simply fairness because the plaintiff has already lost the benefit of a quick adjudication of the case due to the defendant's prior jury demand. *Hernandez, supra.* If the plaintiff withdraws a jury demand, the defendant

"shall be granted a jury trial upon demand therefor made promptly after being advised of the waiver." 735 ILCS 5/2-1105(a). The law in federal court is clear. Fed.R.Civ.P. 38(d) permits a party to withdraw its jury demand only with the consent of all other parties.

B. [8.55] Voir Dire

BLACK'S LAW DICTIONARY defines "voir dire" as "[a] preliminary examination of a prospective juror by a judge or lawyer to decide whether the prospect is qualified and suitable to serve on a jury." BLACK'S LAW DICTIONARY, p. 1710 (9th ed. 2009). Illinois courts have described the purpose of voir dire as to "(1) enable the trial court to select jurors who are free from bias or prejudice, and (2) ensure that attorneys have an informed and intelligent basis on which to exercise their peremptory challenges." *Village of Plainfield v. Nowicki,* 367 Ill.App.3d 522, 854 N.E.2d 791, 794, 305 Ill.Dec. 199 (3d Dist. 2006). *See also People v. Gregg,* 315 Ill.App.3d 59, 732 N.E.2d 1152, 1157, 247 Ill.Dec. 820 (1st Dist. 2000). Courts often conduct voir dire on the first scheduled day for trial. If conducted earlier, however, trial attorneys have more time to adjust their trial strategies accordingly to the exact composition of the jury.

1. [8.56] Law

To serve on a jury, the juror must have the "ability to perceive and appreciate the evidence." 735 ILCS 5/2-1105.1. But a person may be deaf and still serve on the jury as Illinois law requires an interpreter to be provided and paid for by the general county fund. 735 ILCS 5/8-1402. The questioning during voir dire ensures that the potential jurors have the ability to perceive and appreciate the evidence.

Furthermore, the voir dire examination enables all parties to prevent potential jurors from serving on the jury through "for cause" and peremptory challenges. Each side has an unlimited amount of "for cause" challenges. The grounds to excuse a juror for cause are the juror's failure to meet statutory requirements or the inability to be fair and impartial, usually due to a juror's fixed opinion on an issue or a close relationship to a party. 28 U.S.C. §1870 (conferring the right to make "challenges for cause or favor"); Thomas A. Mauet, TRIAL TECHNIQUES, pp. 37 – 38 (6th ed. 2002); 3 Robert L. Haig, ed., BUSINESS AND COMMERCIAL LITIGATION IN FEDERAL COURTS §31.41 (2d ed. 2005). Each side is entitled to five peremptory challenges, unless there is more than one party to each side, in which case the court may allow each side an equal amount of additional peremptory challenges, not to exceed three. 735 ILCS 5/2-1106(a).

Finally, voir dire examination enables the parties to select alternate jurors. The impaneling of alternates is not required, however. The court does have discretion, though, to direct that one or two jurors be impaneled to serve as alternate jurors. 735 ILCS 5/2-1106(b). "Alternate jurors, in the sequence in which they are ordered into the jury box, shall replace jurors who, prior to the time the jury retires to consider its verdict, become unable to perform their duties." *Id.* They are drawn in the same manner as regular jurors during voir dire and take the same oath. If the alternate does not replace a principal juror, he or she will be discharged at the time the jury retires to consider verdict. If the court permits the selection of alternates, each side will receive one additional peremptory challenge for use during the selection of alternates, regardless of the number of alternates selected. Each side may use this additional challenge as well as its unexercised peremptory challenges during selection of the alternates, but the additional challenge may not be used during selection of the regular jurors. *Id.*

2. Practical Tips

a. [8.57] Process

The voir dire process is largely within the court's discretion. Thus, counsel should determine the judge's rules on jury selection prior to conducting voir dire and perhaps even attend a voir dire session. The practice may vary greatly from courtroom to courtroom regarding the number of jurors and alternates that will be selected, whether the judge or a lawyer or both ask questions, the number of questions, the extent that case fact discussion is permitted, whether questionnaires are used, and whether jurors are questioned individually or in the presence of other prospective jurors. See Thomas A. Mauet, TRIAL TECHNIQUES, pp. 33 – 34 (6th ed. 2002). The trial judge has broad discretion in determining what questions may be posed. *See Chlopek v. Federal Insurance Co.*, 499 F.3d 692, 702 (7th Cir. 2007) ("The trial court has broad discretion over the selection of questions to potential jury members, and the parties have no right to have a particular question posed."); S.Ct. Rule 237. Many judges have informal rules that one can learn about through conversations with other counsel, and in federal court in particular, the judge controls voir dire. See generally Fed.R.Civ.P. 47(a); *United States v. Cutler,* 806 F.2d 933, 937 (9th Cir. 1986). See also 47 AM.JUR.2D *Jury* §177 (2006).

The Seventh Circuit has published a helpful guide entitled the *Seventh Circuit American Jury Project,* which addresses a number of jury-related topics, including the use of jury selection questionnaires. See *Seventh Circuit American Jury Project: Final Report,* pp. 36 – 38, 54 – 56 (Sept. 2008), www.7thcircuitbar.org/associations/1507/files/7th Circuit American Jury Project Final Report.pdf.

b. [8.58] Panel vs. Strike System

There are two organizational systems for selecting the jury — the panel system and strike system. As with other elements of voir dire, it is within the court's discretion to select the type of system. The panel system is the traditional jury selection system. Thomas A. Mauet, TRIAL TECHNIQUES, pp. 36 – 37 (6th ed. 2002). With this system, only the number of prospective jurors necessary to fill the jury are brought into the courtroom for questioning, and the plaintiff's lawyer exercises his or her "for cause" and peremptory challenges on an ongoing basis while questioning. This process continues until the plaintiff's lawyer accepts the jurors and tenders the panel to the defense for the defense lawyer to undergo the same process. *Id.;* 3 Robert L. Haig, ed., BUSINESS AND COMMERCIAL LITIGATION IN FEDERAL COURTS §31.56 (2d ed. 2005) (labeling this method as "jury box" method). The advantage to the panel system is that only the prospective jurors brought into the courtroom need to be questioned. The disadvantages are that it permits more gamesmanship, forces lawyers to exercise peremptory challenges without knowing the backgrounds of the remaining jurors, and identifies jurors as alternates because they are the last selected. Mauet, *supra,* pp. 36 – 37; 3 Haig, *supra,* §31.56.

In contrast, with the strike system, every juror in the entire pool of prospective jurors is brought into the courtroom for questioning, and when the questioning of all prospective jurors is complete and the judge rules on for-cause challenges, lawyers then designate their peremptory challenges. Mauet, *supra,* pp. 36 – 37; 3 Haig, *supra,* §31.55 (labeling this method as "struck

jury" method). This system is gaining in popularity because of its many advantages. See Mauet, *supra,* pp. 36 – 37. In particular, the strike system avoids the gamesmanship of the panel system and prevents jurors from knowing which side excused them or other prospective jurors. Lawyers learn the background of the entire venire before using challenges, and alternate jurors do not know that they are alternates. But the disadvantage of the strike system may outweigh its benefits, for the strike system does require the questioning of every juror in venire. *Id.*

c. [8.59] How To Determine the Jurors You Want

Once counsel determines the court's general practices for voir dire, counsel should begin considering the types of people that he or she would like on the jury and the questions he or she will use to locate these people. In reality, there is no easy way to determine what prospective jurors counsel wants impaneled. Nevertheless, lawyers and scholars alike have written at length on the subject, usually pointing to psychological profiles and body language as possible solutions. As James W. McElhaney explains, the "psychological profile is based on the notion that people will decide issues based on fundamental aspects in their own backgrounds. It is a supposition that trial lawyers have had for a long time. There is, in fact, a well-developed courthouse lore about types of jurors, and it is based almost entirely on superficial stereotypes relating to sex, race, ethnic background, economic class and education." MCELHANEY'S TRIAL NOTEBOOK, Ch. 8, pp. 4 – 5 (2d ed. 1987). See also John B. McConahay, Courtney J. Mullin, and Jeffrey Frederick, *The Uses of Social Sciences in Trials with Political and Racial Overtones: The Trial of Joan Little,* 41 Law & Contemp.Prob. 205 (1977). See generally Robert V. Wells, SUCCESSFUL TRIAL TECHNIQUES OF EXPERT PRACTITIONERS §4 (rev. ed. 2005). Scholars also suggest studying the juror's body language to see how the juror responds to counsel, as the trial lawyer, and to counsel's client. McElhaney, *supra.* For more on how to read body language, see Julius Fast, BODY LANGUAGE (1970). Finally, a whole profession has been created to help determine what potential jurors counsel wants impaneled — the jury consultant. Wells, *supra,* §4.27. These consultants spend considerable amounts of time studying the psychological literature and conducting experiments to determine how types of jurors will vote in generalized cases. Wells, *supra,* §4.1. Therefore, in high-stakes commercial litigation cases, it may make sense (logically and in terms of money) to hire a jury consultant to help with voir dire. But counsel should not rely wholly on the consultant and should resist temptation to believe that he or she is "being truly scientific," as the consultant's work should only supplement, not substitute for, counsel's instinct and judgment. McElhaney, *supra,* p. 75.

d. [8.60] Questioning

After considering the types of people that he or she would like impaneled on the jury, counsel has the difficult task of formulating questions to find these people. In general, counsel will learn the most about jurors' attitudes and experiences by asking open-ended questions. But pointed questions may give counsel the pointed answer that he or she needs to raise a challenge. For a more in-depth explanation of questioning techniques, see Thomas A. Mauet, TRIAL TECHNIQUES, pp. 50 – 59 (6th ed. 2002). Regardless of the technique, some suggested lines of questioning are education, marital status, children, residence, employment history, employment of spouse and children, organizations, reading and television, hobbies, participation in other lawsuits, prior jury experience, and willingness to apply the law as instructed by the court. In

addition, if the trial is expected to be long, counsel should notify the jurors of this and elicit their travel plans and general availability. Counsel should keep in mind that opposing counsel may object to his or her questions and should be prepared to ask alternate questions. The most common objections made during voir dire are (1) discussing the applicable law, (2) discussing the facts of the case, and (3) discussing the party's insurance. Mauet, *supra,* pp. 492 – 493. Also, if counsel knows that a particular line of questioning may be objectionable, counsel should research the issue ahead of time and bring the caselaw to court. While what is permissible and what are possible objections are beyond of the scope of this chapter, note that Illinois courts generally permit counsel to ask a prospective juror whether he or she has fixed ideas about an award of a specific sum. *Saad v. Shimano American Corp.,* No. 98 C 1204, 2000 WL 1036253 (N.D.Ill. July 24, 2000); *DeYoung v. Alpha Construction Co.,* 186 Ill.App.3d 758, 542 N.E.2d 859, 863, 134 Ill.Dec. 513 (1st Dist. 1989). *But see Juarez v. Commonwealth Medical Associates,* 318 Ill.App.3d 380, 742 N.E.2d 386, 387 –388, 252 Ill.Dec. 136 (1st Dist. 2000).

3. [8.61] Issues of Persuasiveness

At the same time that counsel is studying the jury through voir dire, the jury starts studying counsel. In fact, the jury forms its opinion about many trial lawyers at this point. See 3 Robert L. Haig, ed., BUSINESS AND COMMERCIAL LITIGATION IN FEDERAL COURTS §31.31 (2d ed. 2005); Mark R. Kosieradzki, *Voir dire in the age of juror bias,* 37 Trial, No. 10, 65, 65 – 66 (Oct. 2001) ("Voir dire is more than a lawyer selecting a jury; the jurors are selecting a lawyer."). Therefore, counsel should exercise tact when asking questions. Also, counsel should keep in mind that selected jurors may identify with a rejected juror and therefore have negative feelings toward the trial attorney who made the challenge.

During voir dire, the jury also starts to form its opinion about the case. Thus, counsel should utilize voir dire to begin to present his or her case. Robert A. Wells explains:

> **[H]ighly successful lawyers** [use voir dire to] **(1) set the tone for trial, (2) introduce concepts and evidence and condition the jurors for things to follow in the trial, (3) obtain public commitments from jurors favorable to their cases, (4) use language that places their clients, their witnesses, and other relevant facets of their case in a favorable light, (5) rehearse the arguments they will use in trial, (6) refute opposition arguments, (7) enhance their credibility, and (8) create jury purpose.** SUCCESSFUL TRIAL TECHNIQUES OF EXPERT PRACTITIONERS §5.1 (rev. ed. 2005).

This is especially important in commercial litigation trials, given the complex nature of the applicable law and facts and, if counsel is representing a corporate defendant, the likelihood that the jurors will not sympathize with the corporation. For example, to show the corporate client in the best light, counsel should ask voir dire questions that reveal a positive background fact of the corporation, like whether the juror is familiar with the corporation's cancer charity. See 3 Haig, *supra,* §31.32. In contrast, if counsel is fighting a large corporation, counsel should make every effort to dehumanize the opponent.

V. [8.62] OPENING STATEMENT

The opening statement generally is the first opportunity for counsel to inform and persuade the jury as to why his or her client should win. But see §8.61 above, noting that voir dire presents counsel an opportunity to convince the jury of the case. S.Ct. Rule 235 expressly provides this opportunity, stating that the plaintiff will make an opening statement "[a]s soon as the jury is empaneled," and the defendant will "immediately follow." Because they often dictate the outcome of the case, opening statements are extremely important and require extensive preparation and work.

A. [8.63] Law

Given their importance, the law places many restrictions on opening statements. See generally 34A I.L.P. *Trial* §85 (2001). It is well-established law that "[c]ounsel may not argue the case during the opening, but is restricted to offering a preview of the anticipated testimony, exhibits, and other evidence." Steven Lubet, MODERN TRIAL ADVOCACY: ANALYSIS & PRACTICE, p. 389 (2d ed. 1997) ("The courts and commentators are virtually unanimous that opening statements may only be used to inform the jury of 'what the evidence will show.' "). *See also United States v. Dinitz,* 424 U.S. 600, 47 L.Ed.2d 267, 96 S.Ct. 1075, 1082 (1976) (Burger, C.J., concurring) ("An opening statement has a narrow purpose and scope. It is to state what evidence will be presented, to make it easier for the jurors to understand what is to follow, and to relate parts of the evidence and testimony to the whole; *it is not an occasion for argument.*" [Emphasis added.]); *United States v. Addo,* 989 F.2d 238, 241 (7th Cir. 1993) (quoting district court's statement that "you are not supposed to argue in opening statements"). To avoid arguing the case, counsel should use phrases such as "the evidence will show," "you will hear," "you will learn," "a witness will tell you," and "I will prove to you." 3 Robert L. Haig, ed., BUSINESS AND COMMERCIAL LITIGATION IN FEDERAL COURTS §34.9 (2d ed. 2005).

This terminology, however, is not magical. When discussing what the evidence will show, counsel may not make a statement about the evidence that he or she does not plan to prove or cannot prove. *People v. Garcia,* 407 Ill.App.3d 195, 942 N.E.2d 700, 710, 347 Ill.Dec. 497 (1st Dist. 2011); *Lambie v. Schneider,* 305 Ill.App.3d 421, 713 N.E.2d 603, 609, 239 Ill.Dec. 72 (4th Dist. 1999); *Selby v. Danville Pepsi-Cola Bottling Co.,* 169 Ill.App.3d 427, 523 N.E.2d 697, 703, 119 Ill.Dec. 941 (4th Dist. 1988); *Schwedler v. Galvan,* 46 Ill.App.3d 630, 360 N.E.2d 1324, 1331, 4 Ill.Dec. 891 (1st Dist. 1977). In other words, counsel cannot mischaracterize the facts in an attempt to persuade the jury as to his or her theory of the case. *McPheeters v. Black & Veatch Corp.,* 427 F.3d 1095, 1102 (8th Cir. 2005) (district court properly instructed plaintiff's counsel during its opening statement "not to characterize the facts as a company-wide reduction-in-force until the evidence indicated something more than a departmental reduction-in-force"). But if the proof that counsel intends to present to the jury is later ruled inadmissible, a statement made during the opening about this proof is not improper as long as counsel made the statement in good faith and with a reasonable belief that the evidence was admissible. *Dowd & Dowd, Ltd. v. Gleason,* 352 Ill.App.3d 365, 816 N.E.2d 754, 774, 287 Ill.Dec. 787 (1st Dist. 2004); *Nassar v. County of Cook,* 333 Ill.App.3d 289, 775 N.E.2d 154, 167, 266 Ill.Dec. 592 (1st Dist. 2002); *Hilgenberg v. Kazan,* 305 Ill.App.3d 197, 711 N.E.2d 1160, 1169, 238 Ill.Dec. 499 (1st Dist. 1999); *Yedor v. Centre Properties, Inc.,* 173 Ill.App.3d 132, 527 N.E.2d 414, 421, 122 Ill.Dec. 916 (1st Dist. 1988). However, if counsel purposefully discusses inadmissible evidence in the

opening statement, it is reversible error. *Gillson v. Gulf, Mobile & Ohio R.R.,* 42 Ill.2d 193, 246 N.E.2d 269 (1969); *Charpentier v. City of Chicago,* 150 Ill.App.3d 988, 502 N.E.2d 385, 104 Ill.Dec. 122 (1st Dist. 1986); *Northern Trust Co. v. St. Francis Hospital,* 168 Ill.App.3d 270, 522 N.E.2d 699, 119 Ill.Dec. 37 (1st Dist. 1988). Illinois courts have not explained clearly what constitutes a good-faith discussion versus a purposeful one but have noted that if an attorney argues a "position with regard to an issue or comment on matters which are clearly inadmissible, such as an offer of compromise," this conduct is improper. *Gill v. Foster,* 232 Ill.App.3d 768, 597 N.E.2d 776, 796, 173 Ill.Dec. 802 (4th Dist. 1992). Remember, though, that comments made during the opening statement are irrelevant if they do not create any prejudice. *See Surestaff, Inc. v. Open Kitchens, Inc.,* 384 Ill.App.3d 172, 892 N.E.2d 1137, 1140, 323 Ill.Dec. 145 (1st Dist. 2008).

Moreover, counsel may not instruct the jury on the pertinent law; counsel may only give a general analysis as it relates to his or her case theory. *Schwartz v. System Software Associates, Inc.,* 32 F.3d 284, 288 (7th Cir. 1994) (judge "properly instructed the jury that counsel should not argue what he believed to be the applicable law" during opening statement); *Northern Trust, supra,* 522 N.E.2d at 705; *Zelinski v. Security Lumber Company of Kankakee,* 133 Ill.App.3d 927, 479 N.E.2d 1091, 1096, 89 Ill.Dec. 85 (3d Dist. 1985). See also 3 Haig, *supra,* §34.7. Finally, opening statements cannot be inflammatory. *Schwedler, supra,* 360 N.E.2d at 1331.

B. [8.64] Practical Tips

The opening statement must clearly present counsel's theory of the case and any accompanying themes. See §§8.49 – 8.51 above, discussing the theory of the case and themes. In fact, all facts presented should further counsel's theory and themes. In doing so, counsel should utilize storytelling principles by (1) focusing on the people in the case and not the problem, as jurors are usually more interested emotionally in matters affecting people; (2) recreating the facts for the jury in a vivid manner; (3) organizing information in a simple, logical manner; and (4) alerting the jurors of what to expect during the next phases of the trial to keep their attention. Thomas A. Mauet, TRIAL TECHNIQUES, pp. 64 – 67 (6th ed. 2002). See also 3 Roxanne Barton Conlin and Gregory S. Cusimano, eds., ATLA'S LITIGATING TORT CASES §37:23 (2003) (discussing principles of storytelling). This is especially important for commercial litigation trials, given the boring subject matter. Moreover, counsel should understand the line between the permissible discussion of facts and the impermissible use of argument and go to that limit. Note, though, that the opponent can object during the opening statement, and the most common objections are that the opening statement (1) is argumentative, (2) discusses the law or the jury instructions, (3) discusses inadmissible evidence, (4) discusses unprovable evidence, (5) gives personal opinions, or (6) discusses what evidence counsel expects the other side to present during trial. Mauet, *supra,* pp. 493 – 495.

Additionally, the quality of the opening statement may relate back to the factual stipulations and pretrial order. If those documents conclusively establish that certain video testimony is admissible, then counsel may certainly play that material during opening statements. Thus, thinking back to the "horse-trading" in the pretrial stipulations, it is important to consider what facts, videos, or exhibits you may want to present during opening without objection.

C. [8.65] Issues of Persuasiveness

The jury is more open-minded and attentive during opening statements than almost any other point in trial, so counsel should capitalize on this by preparing and delivering a great opening. As mentioned in §8.64 above, counsel should focus on his or her theory of the case and themes during the opening. The opening statement also enables counsel to introduce the jury to "bad" facts and paint these facts in a more favorable manner. Lawyers disagree on whether this is the best approach. Some believe that one should never mention "bad" facts because doing so highlights a negative aspect of one's case or makes the opponent's job easier. Others find it critical to introduce the jury to "bad" facts because these facts do not disappear during trial, the opponent surely will direct the jury to them, and the opening statement offers a unique situation in which the trial lawyer can control how the facts are presented. The trial lawyer is not subject to the whims of a witness during the opening; instead, he or she can plan, craft, and present the best explanation for bad facts. In reality, whether counsel should introduce the jury to bad facts is probably a case-by-case, fact-by-fact decision and one that counsel should engage in.

When giving an opening statement, counsel must not forget this statement's relationship with the rest of the case. The opening statement must serve as a guidebook to the trial. Therefore, counsel must not inform the jury that he or she will talk about certain issues or examine certain witnesses if counsel is uncertain about whether he or she will. The jury will realize that the evidence did not show what counsel suggested and resent counsel and his or her client for the misrepresentation or failure to present the evidence to which counsel alluded. Thomas A. Mauet, TRIAL TECHNIQUES, p. 69 (6th ed. 2002). For instance, the jury may draw a negative inference from counsel's failure to call a particular witness during his or her case-in-chief if counsel mentions this witness multiple times during the opening.

D. [8.66] Technology

Counsel should use exhibits and technology to emphasize issues and keep the jury's attention, especially when counsel's opening is lengthy. See §§8.10 – 8.15 above.

VI. PRESENTATION OF THE CASE-IN-CHIEF

A. [8.67] Case-in-Chief

A party's "case-in-chief" is generally defined as its direct case or affirmative presentation of its own witnesses and evidence. 3 Robert L. Haig, ed., BUSINESS AND COMMERCIAL LITIGATION IN FEDERAL COURTS §35.2 (2d ed. 2005). S.Ct. Rule 233 requires the parties to proceed with their cases-in-chief and through all stages of the trial in the order that the parties are listed on the caption, unless otherwise agreed by the parties or ordered by the court.

1. [8.68] Law

While a party does not need to present all of its evidence during the case-in-chief, the presentation of evidence must be sufficient to withstand a dismissal via a directed verdict. "[A] directed verdict is a complete removal of an issue from the province of the jury." *Mohn v.*

Posegate, 184 Ill.2d 540, 705 N.E.2d 78, 81, 235 Ill.Dec. 465 (1998). *See also Seldin v. Babendir,* 325 Ill.App.3d 1058, 759 N.E.2d 28, 32, 259 Ill.Dec. 548 (1st Dist. 2001). As a practical matter, motions for directed verdicts are rarely granted because the court already has devoted substantial time and effort into the jury trial and would prefer a jury verdict for purposes of preventing a reverse on appeal.

Under Illinois law, the governing statute for directed verdicts is 735 ILCS 5/2-1202. Pursuant to §2-1202, a motion for directed verdict will be granted only if all of the evidence, when viewed in its aspect most favorable to the opponent, so overwhelmingly favors the movant that no contrary verdict based on the evidence could ever stand. *See Pedrick v. Peoria & Eastern R.R.,* 37 Ill.2d 494, 229 N.E.2d 504, 510 (1967); *Seldin, supra,* 759 N.E.2d at 32; *Cates v. Kinnard,* 255 Ill.App.3d 952, 626 N.E.2d 770, 772, 193 Ill.Dec. 460 (3d Dist. 1994); *Poelker v. Warrensburg Latham Community Unit School District No. 11,* 251 Ill.App.3d 270, 621 N.E.2d 940, 946, 190 Ill.Dec. 487 (4th Dist. 1993).

A federal court can grant judgment as a matter of law under Fed.R.Civ.P. 50 if, given the "totality of the evidence" presented, a reasonable jury could not find in favor of the plaintiffs. *Learning Curve Toys, Inc. v. PlayWood Toys, Inc.,* 342 F.3d 714, 721 (7th Cir. 2003). In assessing the evidence, "[t]he question is not whether there is literally no evidence supporting the party against whom the motion is directed but whether there is evidence upon which the jury might reasonably find a verdict for that party." 9B Charles Alan Wright and Arthur R. Miller, FEDERAL PRACTICE AND PROCEDURE: CIVIL §2524, pp. 250 – 257 (3d ed. 2008). *See also Walker v. Board of Regents of University of Wisconsin System,* 410 F.3d 387, 393 (7th Cir. 2005).

2. Practical Tips

a. [8.69] Determining What Evidence To Present

Commercial litigation trials usually have multiple parties, which affects the presentation of evidence. Counsel should consider the client's role in the case as a whole and the client's relationship to the coparties when determining what evidence to present in the case-in-chief. For instance, as the plaintiff, if counsel knows that the defendant must present certain witnesses for his or her defense, counsel easily may forgo calling them in his or her case-in-chief. 3 Robert L. Haig, ed., BUSINESS AND COMMERCIAL LITIGATION IN FEDERAL COURTS §35.2 (2d ed. 2005). Refraining from calling certain witnesses indeed may be necessary if the court has imposed rigid limits on the length of counsel's case-in-chief. While the trial lawyer generally can control what and how much evidence to present, the court also controls the evidence by imposing time limits. But if counsel needs more time, he or she should fight for it.

Moreover, counsel should not be intimidated by either the judge or opposing counsel. At regular times during the trial, counsel will be pushed to shorten an exam, omit a witness, refrain from objecting, and generally sit tight. While it is important to be efficient and respectful, agreeing to an issue is a waiver. Thus, if counsel believes a witness is critical, he or she should insist on this witness and force the judge to admit the witness or deny the request. Counsel may find that the court was just testing him or her to see if in fact counsel believed the issue was important.

b. [8.70] Objections

One way that the opposition may attempt to intimidate counsel is through objections. The rules of evidence govern an objection's propriety. While the rules of evidence and the intricacies of objections are beyond the scope of this chapter, counsel should be familiar with the wide array of possible objections.

The most common objections to a trial attorney's questions are calls for irrelevant answer, calls for immaterial answer, witness is incompetent, violates the best-evidence rule, calls for a privileged communication, calls for a conclusions, calls for a narrative answer, calls for a hearsay answer, leading, asked and answered, beyond the scope, assumes facts not in evidence, confusing or vague, speculative, compound question, argumentative, improper characterization, misstates the evidence, cumulative, and improper impeachment. Thomas A. Mauet, TRIAL TECHNIQUES, p. 472 (6th ed. 2002).

The most common objections to a witness' answers are irrelevant, immaterial, privileged, conclusion, opinion, hearsay, narrative, improper characterization, violates parol-evidence rule, and nonresponsive. *Id.*

Finally, the most common objections to exhibits are irrelevant, immaterial, no foundation, no authentication, violates best-evidence rule, contains hearsay, prejudice outweighs the probative value, and contains inadmissible matters. *Id.* For a thorough discussion of the referenced objections and rules of evidence, see Mauet, *supra,* pp. 472 – 492. See also Ralph Ruebner and Timothy Scahill, Crawford v. Washington, *The Confrontation Clause, and Hearsay: A New Paradigm for Illinois Evidence Law,* 36 Loy.U.Chi.L.J. 703 (2005).

c. [8.71] Offer of Proof

If the court grants the opponent's objection, counsel generally must make an offer of proof. *In re Nicholls,* 2011 IL App (4th) 100871, ¶36, 960 N.E.2d 78, 355 Ill.Dec. 635 ("Failure to make an offer of proof in response to a motion in limine forfeits review of the trial court granting the motion."); *Sekerez v. Rush University Medical Center,* 2011 IL App (1st) 090889, ¶68, 954 N.E.2d 383, 352 Ill.Dec. 523 ("An offer of proof is generally required to preserve for review a question as to whether evidence was properly excluded."). Only if the "record clearly shows that the trial court already has before it all of the evidence necessary to make an assessment regarding admissibility and possible prejudice from the exclusion" is an offer of proof not necessary. *Id.* Through the offer of proof, counsel both requests the court to reconsider its ruling and creates a record for appeal of his or her excluded evidence and the reason counsel believes the exclusion was improper. See *id.* ("The purpose of an offer of proof is to disclose the nature of the offered evidence to which objection is interposed, for the information of the trial judge and opposing counsel, and to enable the reviewing court to determine whether the exclusion was erroneous and harmful."). There are two ways to make an offer of proof. Both occur outside the jury's ears so that it is not tainted by the arguments presented or any comments by the judge. This is accomplished by excusing the jury from the courtroom for a brief period of time or conducting a sidebar, which is a "position at the side of a judge's bench where counsel can confer with the judge beyond the jury's earshot." BLACK'S LAW DICTIONARY, p. 1506 (9th ed. 2009). With the first method, the trial attorney informs the court what the proposed testimony will be in a

narrative format. With the second method, the attorney continues his or her examination of the witness so that the court hears and the transcript reflects the exact testimony offered and excluded. If the court grants the opponent's objection to a proposed exhibit, counsel must make sure that the exhibit still is made part of the record by offering it into evidence. See also §§8.89 – 8.93 below, discussing documentary evidence.

B. [8.72] Direct Examination

A "direct examination" is the first questioning of a witness that is conducted by the attorney that called that witness. BLACK'S LAW DICTIONARY, p. 526 (9th ed. 2009). Through preparation, the attorney conducting the direct examination has the ability to control the content, continuity, speed, and accuracy of the witness' testimony. And this in turn enables the attorney to present his or her client's theory of the case and themes.

1. [8.73] Law

Generally, counsel cannot ask leading questions to a friendly witness on direct. Counsel, however, can ask leading questions to a friendly witness on direct if the questions relate to preliminary matters or if the witness is very young or old in age. *See McDonnell v. McPartlin,* 192 Ill.2d 505, 736 N.E.2d 1074, 1092, 249 Ill.Dec. 636 (2000) (preliminary matters); *People v. Calusinski,* 314 Ill.App.3d 955, 733 N.E.2d 420, 424, 247 Ill.Dec. 956 (2d Dist. 2000) (age); Fed.R.Evid. 611(c); Ill.R.Evid. 611(c). Counsel also may ask leading questions on direct if the witness is hostile. S.Ct. Rule 238(b); Fed.R.Evid. 611(c); Ill.R.Evid. 611(c). Counsel may impeach any witness on direct. S.Ct. Rule 238(a); Fed.R.Evid. 607; Ill.R.Evid. 607. Thus, counsel can impeach his or her own friendly witness if the witness starts lying on the stand. Finally, counsel may not ask a lay witness for opinion testimony, and these questions will result in an objection. Fed.R.Evid. 701; Ill.R.Evid. 701. See also 31A AM.JUR.2d *Expert and Opinion Evidence* §17 (2002).

2. [8.74] Practical Tips

Witness preparation is key to successful direct examination. As mentioned in §8.72 above, the trial attorney has the ability to control the content, continuity, speed, and accuracy of the witness' testimony, but this is possible only through preparation. Therefore, counsel must make sure that the witness understands the theory of the case and how he or she fits into the theory before trial.

When the witness is on the stand, counsel must not hesitate to ask follow-up questions if the witness states something confusing, unclear, or full of terminology. Thomas A. Mauet, TRIAL TECHNIQUES, p. 111 (6th ed. 2002). Counsel, however, must do so in a manner that is neither embarrassing nor demeaning to the jury. *Id.* Moreover, counsel should remember to listen to the witness' answers so that he or she does not appear bored to the jury and the direct examination does not appear scripted. Finally, the witness, not the lawyer, should be the center of attention during the direct examination, as the witness will be believed and remembered based on the content and manner of his or her responses. Mauet, *supra,* p. 95.

3. [8.75] Issues of Persuasiveness

If several witnesses can testify to the same information, counsel should consider calling to the stand only the one witness that the jury will find the most appealing and pleasing and omit the duplication. For instance, a corporate representative may not be the best witness in a commercial litigation case because the jury will be unsympathetic to him or her. Thus, counsel should consider calling different witnesses to the stand who can testify to some or all of the same information.

During the direct examination, counsel should prepare for the opposing party's attorney to make objections simply to break counsel's train of questioning when he or she is on a roll. Thomas A. Mauet, TRIAL TECHNIQUES, p. 466 (6th ed. 2002). These objections may work in counsel's favor, however, for they may draw the jury's attention to the testimony. Counsel should keep in mind also that the opponent may not need to state his or her basis for the objection. In fact, Fed.R.Evid. 103 and Ill.R.Evid. 103 only require counsel to state the specific ground for the objection if it is not apparent from the question or answer. Thus, whether one must state the specific ground is a matter within the court's discretion and preference. Counsel should, however, check the local rules and the court's standing orders on the issue.

C. [8.76] Presentation of a Witness by Deposition

The presentation of a witness by deposition is a method of presenting facts during a party's case-in-chief without having the witness testify live at trial. If counsel videotaped the deposition, portions of the deposition are played on screen for the jury to view and hear. If not, portions of the deposition transcript are read out loud to the jury through use of a stand-in who takes the witness stand and reads the witness' testimony while the attorney reads the questions asked during the deposition. The rule of completeness, however, prohibits the use of deposition testimony if the portions selected do not fairly and accurately portray the deponent's statements. See Fed.R.Civ.P. 32(a)(6) (noting that when a party utilizes deposition testimony at trial, "an adverse party may require the offeror to introduce other parts that in fairness should be considered with the part introduced"). This "prevents misleading impressions created by taking a statement out of context." *Cameo Convalescent Center, Inc. v. Senn,* 738 F.2d 836, 844 (7th Cir. 1984).

1. [8.77] Law

Illinois law permits the use of deposition testimony at trial, and the circumstances under which this testimony may be used vary depending on whether the deposition was designated as a "discovery deposition" or "evidence deposition." "The distinction [between discovery and evidence depositions] is meaningful to practicing attorneys, because the discovery format provides a great deal of exploratory freedom. The trade-off for that freedom is the supreme court's limitations on the use of discovery depositions at a trial." *Longstreet v. Cottrell, Inc.,* 374 Ill.App.3d 549, 871 N.E.2d 72, 77, 312 Ill.Dec. 672 (5th Dist. 2007) (reiterating that deposition notice or order must specify type of deposition intended, and in absence of specification, deposition is to be treated solely as discovery deposition). Indeed, there is almost a "complete prohibition against the use of a party's discovery deposition as evidence at a trial." *Berry v. American Standard, Inc.,* 382 Ill.App.3d 895, 888 N.E.2d 740, 747, 321 Ill.Dec. 221 (5th Dist.

2008). See S.Ct. Rule 202 (requiring parties to specify whether deposition testimony of any person is being taken for purposes of discovery or evidence); S.Ct. Rule 212 (outlining when discovery and evidence depositions may be used at trial). A discovery deposition may be used at trial (a) for impeachment purposes; (b) when the deponent makes an admission and is an adverse party; (c) if it is otherwise admissible as an exception to hearsay; (d) for any purpose for which an affidavit may be used; and (e) if the deponent is neither a controlled expert or a party, an evidence deposition has not been taken, and the deponent is unable to testify at trial due to death or illness. S.Ct. Rule 212(a). An evidence deposition may be used at trial (a) anytime that a discovery deposition may be used; (b) if the deponent is dead or unable to testify at trial because of age, illness, or imprisonment; (c) if the deponent is out of the county of the trial, unless the absence was secured by the party seeking to use the deposition, except that a party who is not a resident of Illinois may present his or her own deposition if out of the county; (d) if the party offering the deposition was unable to procure the attendance of the witness by subpoena or finds, upon motion in advance of trial, that exceptional circumstances make it desirable in the interest of justice and with due regard for the preference to live witness testimony to present the witness by deposition. S.Ct. Rule 212(b). On a side note, S.Ct. Rule 206(g)(6) expressly notes that a videotaped deposition may be presented at trial instead of reading the transcript. *See also Healy v. Bearco Management, Inc.*, 216 Ill.App.3d 945, 576 N.E.2d 1195, 1204, 160 Ill.Dec. 241 (2d Dist. 1991) ("It is within the discretion of the trial court to permit the use of videotaped, as opposed to transcribed, deposition."). However, if a party plans to take a deposition by videotape, the face of the deposition notice and subpoena must expressly note that it will be taken by videotape. S.Ct. Rule 206(a)(2).

Federal law permits the use of deposition testimony at trial (a) when the deponent is an adverse party; (b) for impeachment purposes; (c) if the party offering the deposition was unable to procure the attendance of the witness by subpoena; (d) if the deponent is dead; (e) if the deponent "is more than 100 miles from the place of hearing or trial or is outside the United States, unless it appears that the witness's absence was procured by the party offering the deposition"; (f) if the deponent is unable to attend due to age, illness, or imprisonment; or (g) if exceptional circumstances make it desirable in the interest of justice and with due regard for the preference for live witness testimony to present the witness by deposition. Fed.R.Civ.P. 32(a). If a party plans to take the deposition by videotape, the face of the deposition notice and subpoena must so provide this fact. Fed.R.Civ.P. 30(b)(3).

Because the Code of Civil Procedure and the Federal Rules of Civil Procedure enable parties to present witnesses by deposition, there is no worry of a hearsay objection based solely on the deponent's absence from court. However, the rules do not eliminate hearsay objections "based, not on the contents of deponent's testimony, but on his absence from court." Advisory Committee Notes, 1970 Amendment, Fed.R.Civ.P. 32. *See Cameo Convalescent Center, Inc. v. Senn,* 738 F.2d 836, 844 (7th Cir. 1984). As a result, the contents of the deposition testimony may be used at trial only "to the extent it would be admissible under the Federal Rules of Evidence if the deponent were present and testifying." Fed.R.Civ.P. 32(a). The rules of evidence are beyond the scope of this chapter.

2. Practical Tips

a. [8.78] Planning Ahead

If there is any chance that counsel or the opponent will present a witness at trial by deposition, counsel must take the deposition with this in mind, making sure to elicit all testimony potentially necessary at trial and considering what the opponent would use at trial. Thus, even if counsel generally does not ask his or her witness questions during a deposition, counsel should consider whether he or she would want the jury to hear the deposition at trial without his or her questions included. For instance, opposing counsel may present the witness by deposition, and if counsel does not ask any questions, counsel's cross-examination of the witness is limited to questions asked by opposing counsel only. Similarly, if the pretrial order requires parties to designate deposition testimony in the event that a witness is unavailable to testify at trial, counsel should designate the testimony prior to trial. In fact, the failure to designate testimony usually results in a waiver. Prior to trial (usually in conjunction with the pretrial conference or pretrial order), the court should rule on the objections to the deposition designations. Counsel should not hesitate to request a ruling from the court on the objections prior to trial, as it will make trial preparation much easier.

b. [8.79] Transcript vs. Videotape

The main determining factor for whether to use a videotaped deposition over a transcript deposition at trial is cost. Videotaping depositions is much more expensive than having a court reporter record the deposition. But through a videotaped deposition, the jury can see and hear the actual witness at trial, which better enables the jury to assess the witness' credibility. Also, watching videotaped depositions is generally less boring than merely listening to deposition transcript read in court. The use of videotaped depositions is very common in commercial litigation trials as expense is usually of no concern, the number of witnesses is large, and corporate witnesses often live outside the court's subpoena power. Also, many courts now require videotaped depositions. Additionally, in the authors' own subjective experience, impeaching a witness with a videotape is extraordinarily effective, as the witness must see himself or herself speaking impeaching material. After seeing such a presentation, most witnesses try everything possible to avoid that happening again.

c. [8.80] What Exactly Will the Jury Hear?

Because the deposition testimony must not be presented in a misleading manner and opposing counsel is entitled to a cross-examination of the witness, the jury generally will hear and see more of the deposition than the testimony that counsel initially selected. Usually, opposing counsel may select portions of a deposition necessary to make the presentation complete and not misleading. See Fed.R.Civ.P. 32(a)(6); *Cameo Convalescent Center, Inc. v. Senn,* 738 F.2d 836, 844 (7th Cir. 1984). These selections are generally described as counter-designations. At times, opposing counsel also may select different portions of the deposition, unrelated to counsel's selections, that opposing counsel would like to play as his or her cross-examination of the witness. These selections may be labeled as affirmative designations. The presentation of all these selections may then occur in one of two ways. The court may require all testimony (counsel's initially selected testimony, the counter-designations, and the affirmative designations) to be

presented in one session. Alternatively, the court may permit the presentation of counsel's initially selected testimony and the counter-designations in one session and opposing counsel's affirmative designations in another session. The decision to permit the presentation of these various types of testimony and the manner of the presentation are, of course, within the court's discretion.

3. [8.81] Issues of Persuasiveness

The presentation of a witness by deposition (whether by transcript or videotape) is potentially boring for the jury, so it should be done sparingly. Also, counsel should avoid presenting too many witnesses by deposition in a row. In other words, a sure way to put the jury to sleep is by playing four hours of videotaped deposition in a row after lunch. Finally, when determining whether to present a witness by deposition, counsel should consider the effect that opposing counsel's selections have on counsel's presentation, as opposing counsel will receive the chance to cross-examine the witness by selecting different portions of the deposition to present to the jury.

VII. [8.82] CROSS-EXAMINATION

A cross-examination is the questioning of a witness that is not conducted by the attorney of the party who called the witness but is conducted by the attorney of the opposing party. BLACK'S LAW DICTIONARY, p. 433 (9th ed. 2009). The three purposes of cross-examination are (a) to elicit favorable facts that support the party's theory of case and theme, (b) to discredit the credibility of the witness, and (c) to controvert negative testimony presented by the witness during direct. Robert V. Wells, SUCCESSFUL TRIAL TECHNIQUES OF EXPERT PRACTITIONERS §8.3 (rev. ed. 2005). Cf. Thomas A. Mauet, TRIAL TECHNIQUES, p. 250 (6th ed. 2002).

A. [8.83] Law

Under both Illinois and federal law, cross-examination generally should not go beyond the subject matter of the direct examination and matters affecting the credibility of the witness, but the court, in its discretion, may permit inquiry into additional matters. Fed.R.Evid. 611(b); Ill.R.Evid. 611(b). Additionally, Ill.S.Ct. Rule 238 does expressly note the ability to attack the credibility of witnesses.

B. Practical Tips

1. [8.84] Determining Whether To Cross

As Thomas A. Mauet discusses in TRIAL TECHNIQUES, pp. 248 – 249 (6th ed. 2002), there are several considerations when deciding whether to cross-examine a witness.

a. Counsel should consider whether the witness hurt his or her case or merely testified to general, technical, or background information. If the witness testimony has not damaged counsel's position, cross-examination may not be necessary.

b. Counsel should consider whether the witness is important. If so, the jury will expect and want counsel to cross.

c. Counsel should consider whether the witness' testimony is credible. If not, perhaps the damage is already done, and there is no need for counsel to cross.

d. Counsel should consider whether the witness testified about less than expected. If so, cross-examination may bring out this negative information or open the door to the opponent's conducting a redirect to pull out this information.

e. Counsel should examine whether he or she has "real ammunition" for the cross or whether he or she would be forced to cross a credible witness with weak information. If counsel does not realistically believe that he or she will score points, then perhaps counsel should forgo the cross or should cross on a peripheral point.

f. Counsel should determine how likely he or she is to win the case, as the number and extent of risks counsel should take depend on his or her likelihood for success. If the case is solid, counsel should keep risks at a minimum and perhaps forgo cross-examinations that are unlikely to produce a good result. On the other hand, if the case is a loser, counsel should take the risky cross-examination in search of the testimony that could turn the case around.

2. [8.85] Cross-Examination Questioning

Throughout the cross-examination, counsel should use leading questions that require the witness to provide yes or no answers, rather than have the witness explain himself or herself through self-serving speeches. That said, counsel should not ask the witness questions like "Why?," "What happened?," or "What do you mean by that?" Moreover, counsel should make sure to listen to the witness' answers, as a witness can and will surprise during a cross-examination. In addition, counsel should refrain from asking unnecessary questions, both to avoid boredom by the jury and to avoid receiving a bad response. Lawyers are tempted to ask questions to get a clarification from the witness or simply to get the witness to repeat a good point. But so often the witness' response modifies or lessens the good point. 3 Robert L. Haig, ed., BUSINESS AND COMMERCIAL LITIGATION IN FEDERAL COURTS §§36.10 – 36.11 (2d ed. 2005). Finally, counsel should try not to question the witness with "an overbearing, aggressive, or hostile demeanor" because juries generally dislike these tactics. 3 Haig, *supra,* §36.3. The topic of cross is, however, infinitely complex, and good cross-examination is often the result of a career's worth of effort. Anyone planning on trying cases should seek out writers, speakers, and colleagues with thoughts and analyses of this important topic.

3. [8.86] Preparation

While counsel will not know the witness' exact testimony on direct until trial, he or she still can (and should) prepare for the cross-examination. Proper preparation includes reviewing what the witness has testified to during his or her deposition, what documents the witness had received, and what others have stated about the witness. In addition, counsel can outline possible questions prior to trial.

4. [8.87] Impeachment

Impeachment is a method of cross-examination that discredits the witness or his or her testimony. The goal, quite simply, is to convince the jury not to believe the witness. When done right, impeachment can produce dramatic, trial-altering effects. On the other hand, impeachment requires use of a more harsh or demeaning manner of questioning that juries disfavor, so the trial attorney must impeach selectively. The rules of evidence govern impeachment. And, while the specifics of these rules are beyond the scope of this chapter, the rules generally permit the following methods of impeachment: (a) bias, interest, and motive; (b) prior convictions; (c) prior bad acts; (d) prior inconsistent statements; (e) contradictory facts; and (f) bad character for truthfulness. See Thomas A. Mauet, TRIAL TECHNIQUES, p. 273 (6th ed. 2002). For a more thorough discussion of each of these methods, see Mauet, *supra,* pp. 275 – 306. See also 33A FEDERAL PROCEDURE, LAWYER'S EDITION *Witnesses* §80:128 (2003).

C. [8.88] Issues of Persuasiveness

As with a direct examination, counsel should prepare for opposing counsel to make objections simply to break his or her train of questioning when he or she is on a roll. These objections may work in counsel's favor, however, for they may draw the jury's attention to the testimony. The objections most likely to be sustained during a cross-examination are (1) the subject-matter of the cross is beyond the scope of the direct, (2) the question assumes a fact or condition that the cross-examiner cannot establish, (3) the protracted examination includes repetition and harassment, and (4) the question addresses character issues or specific instances of conduct. 3 Robert L. Haig, ed., BUSINESS AND COMMERCIAL LITIGATION IN FEDERAL COURTS §36.2 (2d ed. 2005).

VIII. DOCUMENTARY EVIDENCE

A. [8.89] Law

Documents used at trial and offered into evidence as exhibits are documentary evidence. But before a document may be used at trial as an exhibit, a witness must lay the foundation for the document. To lay the foundation, the witness must be competent, the exhibit must be reliable and relevant, and the exhibit must be authenticated. Thomas A. Mauet, TRIAL TECHNIQUES, p. 176 (6th ed. 2002). If counsel would like to submit a summary of voluminous documents, he or she may do so, but the summary must be a fair representation of the underlying documents. Fed.R.Evid. 1006; Ill.R.Evid. 1006; *Veco Corp. v. Babcock,* 243 Ill.App.3d 153, 611 N.E.2d 1054, 1062 – 1063, 183 Ill.Dec. 406 (1st Dist. 1993). Trial attorneys often find that these summaries are very useful in commercial litigation trials given the frequent need to discuss large documents in commercial litigation disputes.

The prohibition against hearsay bars use of an out-of-court statement offered for the truth of the matter asserted. Because documents are always out-of-court statements, the prohibition against hearsay may bar counsel from using the document. The business records exception to hearsay, however, is the commercial trial attorney's best friend. Through this exception, any writings routinely made as a regular part of the business are admissible. See S.Ct. Rule 236(a); Fed.R.Evid. 803(6); Ill.R.Evid. 803(6). In particular, S.Ct. Rule 236(a) provides:

Any writing or record, whether in the form of any entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of the act, transaction, occurrence, or event, if made in the regular course of any business, and if it was the regular course of the business to make such a memorandum or record at the time of such an act, transaction, occurrence, or event or within a reasonable time thereafter.

To lay the foundation for the business document, anyone with knowledge about the operating procedures for creating the document is sufficient. *Lecroy v. Miller,* 272 Ill.App.3d 925, 651 N.E.2d 617, 623 – 624, 209 Ill.Dec. 439 (1st Dist. 1995); *Ford Motor Credit Co. v. Neiser,* 196 Ill.App.3d 515, 554 N.E.2d 322, 327 – 328, 143 Ill.Dec. 387 (1st Dist. 1990). In other words, counsel does not need the actual author of the document. Moreover, Illinois courts have permitted use of the business records exception even though the document was created by the business only once. *See Technology Solutions Co. v. Northrop Grumman Corp.,* 356 Ill.App.3d 380, 826 N.E.2d 1220, 292 Ill.Dec. 784 (1st Dist. 2005); *In re Estate of Weiland,* 338 Ill.App.3d 585, 788 N.E.2d 811, 825, 273 Ill.Dec. 220 (2d Dist. 2003); *TIE Systems, Inc., Illinois v. Telcom Midwest, Inc.,* 203 Ill.App.3d 142, 560 N.E.2d 1080, 1086, 148 Ill.Dec. 483 (1st Dist. 1999) ("The fact that a record was made in response to a singular occurrence . . . does not require a conclusion that it was not made in the regular course of business."). Finally, a document created by a third party may be admissible through the business records exception if the party to the lawsuit ordered the third party to create the document during the regular course of its business. *Apa v. National Bank of Commerce,* 374 Ill.App.3d 1082, 872 N.E.2d 490, 494 – 495, 313 Ill.Dec. 507 (1st Dist. 2007); *Kimble v. Earle M. Jorgenson Co.,* 358 Ill.App.3d 400, 830 N.E.2d 814, 827, 294 Ill.Dec. 402 (1st Dist. 2005); *Argueta v. Baltimore & Ohio Chicago Terminal R.R.,* 224 Ill.App.3d 11, 586 N.E.2d 386, 392, 166 Ill.Dec. 428 (1st Dist. 1991).

Counsel, however, should keep in mind that the opponent still may object to the documents for other evidentiary reasons. While the rules of evidence and the intricacies of evidentiary objections are beyond the scope of this chapter, the most common objections to documents are irrelevant, immaterial, no foundation, no authentication, violates best-evidence rule, contains hearsay, prejudice outweighs the probative value, and contains inadmissible matters. Mauet, *supra,* p. 472. If the court grants the opponent's objection to a proposed exhibit, counsel should make sure that the exhibit still is made part of the record by offering it into evidence. See §8.90 below, discussing how to get a document into evidence.

B. Practical Tips

1. [8.90] How To Get a Document into Evidence

The process for getting documents into evidence is decided by the court. As with all other particulars of trial procedure, counsel should check local rules and standing orders and ask the court clerk and judge directly regarding the court's preference. Generally, though, counsel may get a document into evidence by taking the following steps: (a) have the exhibit marked (and perhaps noted in the pretrial order); (b) show the exhibit to opposing counsel so that he or she may raise any objections; (c) ask the court's permission to approach the witness and show the witness the exhibit; (d) lay a foundation for the exhibit; and (e) offer the exhibit into evidence. Thomas A. Mauet, TRIAL TECHNIQUES, pp. 169 – 171 (6th ed. 2002). Counsel may then publish the exhibit to the jury with the court's permission. Mauet, *supra,* p. 173.

2. [8.91] Organization Is the Key

Counsel should remember that commercial litigation trials usually revolve around documents, and these documents are often long and complex. 3 Robert L. Haig, ed., BUSINESS AND COMMERCIAL LITIGATION IN FEDERAL COURTS §32.27 (2d ed. 2005). That said, counsel should not wait until the last minute to learn and organize his or her documents. One aspect of this organization is finding a method for presenting e-mails to the jury since e-mail chains need to be read in reverse order to understand them, but counsel needs to maintain the integrity of the document. Regardless of the method of organization and presentation, counsel must consider how to deal with e-mails, as well as other documents, early and must prepare accordingly.

3. [8.92] Other Particular Concerns

Documents present several concerns for commercial litigation trial attorneys. For instance, counsel risks waiving the use of the document if the document is not listed in the pretrial order. Thus, counsel should prevent problems of wavier by listing in the pretrial order all documents that may potentially be used as trial exhibits. Similarly, counsel probably will not be able to use a document at trial if it was not produced during discovery. In fact, a court is likely to sanction counsel for attempting to use such a document. Therefore, counsel should remember his or her ongoing discovery obligations and supplement document productions as often as possible during the course of the litigation. Finally, to save time and headaches, counsel should consider stipulating to the admissibility of documents prior to reaching trial. Counsel can use stipulations strategically. For instance, if counsel is concerned about a critical document, counsel should see if he or she can include it in a group stipulation. By the same token, the opponent may seek counsel's stipulation to inadmissible documents.

C. [8.93] Use of Technology

Juries tend to trust documents more than a witness' testimony. The reason is obvious — at the time of the document's creation, the document contained particular notations, and the subsequent trial cannot change the contents of the document. It is what it is. As a result, documents play a key role at trial, no matter the type of trial. That said, counsel must capitalize on this and emphasize his or her important documents through technology, such as highlighting and enlarging techniques.

IX. JURY INSTRUCTIONS AND VERDICT FORMS

A. [8.94] Jury Instructions

Jury instructions are instructions stating the relevant law that are drafted by one or more parties or the court, approved by the court, and then provided to the jury by the court possibly orally and in written form. The Illinois Supreme Court has explained that the purpose of jury instructions "is to convey to the jury the correct principles of law applicable to the submitted evidence." *Dillon v. Evanston Hospital,* 199 Ill.2d 483, 771 N.E.2d 357, 372, 264 Ill.Dec. 653 (2002).

1. [8.95] Law

The court has the responsibility for instructing the jury regarding the law, and the specific procedure for so instructing is set forth by state and federal law. See 735 ILCS 5/2-1107; Ill.S.Ct. Rule 239; Fed.R.Civ.P. 51. In all proceedings, the trial court has the discretion to determine which instruction shall be given, and the exercise of this discretion generally will not be disturbed on review. *O'Neil v. Continental Bank, N.A.,* 278 Ill.App.3d 327, 662 N.E.2d 489, 499, 214 Ill.Dec. 923 (1st Dist. 1996). Moreover, "jury instructions must state the law fairly and distinctly and must not mislead the jury or prejudice a party." [Emphasis omitted.] *Dillon v. Evanston Hospital,* 199 Ill.2d 483, 771 N.E.2d 357, 372, 264 Ill.Dec. 653 (2002). *See also Ono v. Chicago Park District,* 235 Ill.App.3d 383, 601 N.E.2d 1172, 176 Ill.Dec. 474 (1st Dist. 1992); *Pry v. Alton & Southern Ry.,* 233 Ill.App.3d 197, 598 N.E.2d 484, 174 Ill.Dec. 287 (5th Dist. 1992).

Under Illinois law, the standard for determining the adequacy of jury instructions is "whether they were sufficiently clear to avoid misleading the jury, while at the same time, fairly and correctly stating the law." *Valentino v. Hilquist,* 337 Ill.App.3d 461, 785 N.E.2d 891, 904, 271 Ill.Dec. 697 (1st Dist. 2003). *See also Schultz v. Northeast Illinois Regional Commuter R.R.,* 201 Ill.2d 260, 775 N.E.2d 964, 972 – 973, 266 Ill.Dec. 892 (2002); *O'Neil, supra,* 662 N.E.2d at 499. "A reviewing court ordinarily will not reverse a trial court for giving faulty instructions unless they clearly misled the jury and resulted in prejudice to the appellant." *Schultz, supra,* 775 N.E.2d at 973. Illinois has a preference for the parties to use the Illinois Pattern Jury Instructions as much as possible. *See Schultz, supra,* 775 N.E.2d at 972; *Spiegelman v. Victory Memorial Hospital,* 392 Ill.App.3d 826, 911 N.E.2d 1022, 1041, 331 Ill.Dec. 792 (1st Dist. 2009) ("Once a trial court determines an instruction is to be given, Supreme Court Rule 239(a) . . . creates a presumption that the pattern instructions are to be used."). [Citation omitted.] S.Ct. Rule 239(a) states, "Whenever Illinois Pattern Jury Instructions (IPI) contains an instruction applicable in a civil case, giving due consideration to the facts and the prevailing law, and the court determines that the jury should be instructed on the subject, the IPI instruction shall be used, unless the court determines that it does not accurately state the law."

Under federal law, if the instructions approved by the court and provided to the jury misstate the law, the jury verdict may be set aside. When a jury could have based its verdict on either correct or incorrect statements of the law, its "verdict must be set aside even if the verdict may have been based on a theory on which the jury was properly instructed." *Dawson v. New York Life Insurance Co.,* 135 F.3d 1158, 1165 (7th Cir. 1998), quoting *Saturday Evening Post Co. v. Rumbleseat Press, Inc.,* 816 F.2d 1191, 1197 (7th Cir. 1987). *See also Byrd v. Illinois Department of Public Health,* 423 F.3d 696, 705 (7th Cir. 2005) (stating that new trial is required if jury instructions failed to "convey the relevant legal principles in full"). When determining whether the verdict must be set aside based on the jury instructions, the appellate court is deferential to the district court's instructions and analyzes them "as a whole to determine if they accurately state the law and do not confuse the jury." *Aliotta v. National Railroad Passenger Corp.,* 315 F.3d 756, 764 (7th Cir. 2003). *See also Maltby v. Winston,* 36 F.3d 548, 560 (7th Cir. 1994). "In this analysis, we first must determine whether the instructions misstate the law or fail to state it fully. If this requirement is met, we then determine whether the inadequate statements confused or misled the jury causing prejudice to a litigant." *Aliotta, supra,* 315 F.3d at 759, citing *Maltby, supra,* 36 F.3d at 560.

2. [8.96] Practical Tips

Jury instructions play an important role in commercial litigation trials because these trials generally relate to legal principles that are unfamiliar and complex to the jury. As a result, counsel must remember to draft the instructions in a clear manner that avoids legalese, uses the parties' specific names rather than generic labels, avoids double and triple negatives, provides definitions for technical terms, and are organized in a logical manner. 4 Robert L. Haig, ed., BUSINESS AND COMMERCIAL LITIGATION IN FEDERAL COURTS §40.13 (2d ed. 2005). Also, counsel must review the form and pattern jury instructions when drafting the instructions, especially because Illinois law favors the pattern instructions.

Jury instructions often are finalized in a pretrial conference. Counsel should make sure that a record is being made of any pretrial conferences that discuss the jury instructions (via a court reporter or otherwise), as jury instruction errors form a great basis for a motion for new trial or judgment notwithstanding the verdict. Likewise, counsel should make objections to jury instructions during the pretrial conferences as specific as possible because specific objections are more likely to prevent waiver and provide better grounds for posttrial motions.

3. [8.97] Issues of Persuasiveness

Because the wording of jury instructions can influence the outcome greatly, it is essential to take care in drafting and seeking jury instructions that accurately reflect counsel's analysis of the law. While counsel should draft jury instructions that accurately reflect his or her analysis of the law, counsel must also realize that the court may reject these instructions as too one-sided. Therefore, counsel should be prepared and draft alternative instructions with a more middle-ground analysis of the law. If not, counsel may be left with opposing counsel's one-sided instructions. 4 Robert L. Haig, ed., BUSINESS AND COMMERCIAL LITIGATION IN FEDERAL COURTS §40.13 (2d ed. 2005).

B. [8.98] Verdict Forms

There are three types of verdict forms: (1) general verdict forms; (2) general verdict forms with interrogatories; and (3) special verdict forms. A general verdict form is a verdict form by which the jury finds in favor of a party or parties and does not resolve specific factual questions. A general verdict form with interrogatories is a verdict form by which the jury finds in favor of a party or parties and is accompanied by interrogatories addressing specific factual questions that the jury resolves as well. Finally, a special verdict form is a verdict form by which the jury resolves specific factual questions and does not find in favor of a party or parties, which form is submitted to the judge, who then decides the legal effect of the jury's resolutions.

1. [8.99] Law

Illinois law provides that "[u]nless the nature of the case requires otherwise, the jury shall render a general verdict." 735 ILCS 5/2-1108. However, upon request of any party or if the court so desires, the jury also must answer interrogatories in conjunction with the general verdict form. *Id.* In contrast, federal law and specifically Fed.R.Civ.P. 49 state no preference regarding the use of general verdict forms, general verdict forms with interrogatories, or special verdict forms.

2. [8.100] Practical Tips

There are both advantages and disadvantages to requiring the jury to decide factual questions through interrogatories or special verdict forms. The main advantage is that the "jury's attention is directed to individual issues requiring a more structured evidentiary analysis, and that adherence to individual instructions is enhanced." 4 Robert L. Haig, ed., BUSINESS AND COMMERCIAL LITIGATION IN FEDERAL COURTS §40.26 (2d ed. 2005). In other words, the jury feels more compelled to examine and follow all of the evidence. The main disadvantage is that the potential for inconsistent findings increases, and thus the potential for challenges to the jury verdict form increases. However, this may be considered an advantage for the defense in commercial litigation trial. Also, the use of specialized verdict forms or interrogatories has the disadvantage of creating a whole other reason for challenging a jury verdict: the omission of a needed issue from the form. *Id.*

Because the use of special verdict forms or special interrogatories inherently creates the chance for inconsistent findings, counsel must preserve all objections to the potential inconsistencies prior to submission of the form to the jury. 4 Haig, *supra,* §40.27. Careful drafting and coordination with opposing counsel also can prevent the chances of inconsistent findings. *Id.*

3. [8.101] Issues of Persuasiveness

Like jury instructions, the type of verdict form and the contents of the verdict form can have a substantial effect on the trial's outcome. Thus, counsel must take care in selecting the type of form and its contents.

X. CLOSING ARGUMENT

A. [8.102] Law

The closing argument is the final opportunity to convince the jury to believe in counsel's theory of the case and themes and to find in favor of counsel's client. Unlike the opening statement, counsel can (and should) argue during the closing statement. *Koonce v. Pacilio,* 307 Ill.App.3d 449, 718 N.E.2d 628, 634 – 635, 241 Ill.Dec. 57 (1st Dist. 1999) (stating that "counsel is entitled to vigorously argue his client's case"). And counsel should urge the jury to draw its own inferences from the evidence presented. *Thornhill v. Midwest Physician Center of Orland Park,* 337 Ill.App.3d 1034, 787 N.E.2d 247, 262, 272 Ill.Dec. 432 (1st Dist. 2003); *Sloan v. O'Dell,* 159 Ill.App.3d 268, 512 N.E.2d 105, 109, 111 Ill.Dec. 201 (2d Dist. 1987). Counsel may not, however, state his or her personal beliefs during the closing argument. See ABA Model Code of Professional Responsibility EC 7-24; *Koonce, supra,* 718 N.E.2d at 635.

One common argument presented, which is completely proper, is to comment on a party's failure to call a particular witness within his or her control. *Moore v. Bellamy,* 183 Ill.App.3d 110, 538 N.E.2d 1214, 1220, 131 Ill.Dec. 658 (5th Dist. 1989); *Tonarelli v. Gibbons,* 121 Ill.App.3d 1042, 460 N.E.2d 464, 469, 77 Ill.Dec. 408 (1st Dist. 1984); *Nakis v. Amabile,* 103 Ill.App.3d 840, 431 N.E.2d 1255, 1260, 59 Ill.Dec. 498 (1st Dist. 1981). Another common argument is to discredit a witness or impugn the veracity of a witness. But counsel can make this argument only

if it is supported by the evidence. *Lewis v. Cotton Belt Route — St. Louis Southwestern Ry.,* 217 Ill.App.3d 94, 576 N.E.2d 918, 938, 159 Ill.Dec. 995 (5th Dist. 1991); *Poltrock v. Chicago & North Western Transportation Co.,* 151 Ill.App.3d 250, 502 N.E.2d 1200, 1204, 104 Ill.Dec. 540 (1st Dist. 1986) ("When the record affords a reasonable basis for charges of dishonesty, bad faith, or insincerity, comments thereon are permissible."). Finally, trial attorneys often seek to make arguments discussing wealth. Yet unless punitive damages are at issue, it is generally improper to refer to the poverty or wealth of the parties. *McMahon v. Richard Gorazd, Inc.,* 135 Ill.App.3d 211, 481 N.E.2d 787, 795, 89 Ill.Dec. 944 (5th Dist. 1985). And emphasis on a corporate defendant's wealth is particularly problematic as it tends to evoke preexisting prejudice that jurors have against corporations and distracts the jury from the real issues of the case. *Babcock v. Chesapeake & Ohio Ry.,* 83 Ill.App.3d 919, 404 N.E.2d 265, 276, 38 Ill.Dec. 841 (1st Dist. 1979). *Cf. Cox v. Doctor's Associates, Inc.,* 245 Ill.App.3d 186, 613 N.E.2d 1306, 1320, 184 Ill.Dec. 714 (5th Dist. 1993). Reference to corporate wealth will not result in the verdict being set aside if no actual prejudice results. *Lagoni v. Holiday Inn Midway,* 262 Ill.App.3d 1020, 635 N.E.2d 622, 631, 200 Ill.Dec. 283 (1st Dist. 1994); *Dupay v. New York Central R.R.,* 110 Ill.App.2d 146, 249 N.E.2d 179, 183 (1st Dist. 1969).

B. [8.103] Practical Tips

During the closing argument, counsel should argue his or her theory of the case and themes once again. When doing so, counsel must remember to tie the closing argument to his or her opening statement. This means discussing the same theories and themes, as well as proving consistency to the jury. The jury is sure to notice inconsistencies between the opening and closing and will judge counsel by these inconsistencies. 3 Robert L. Haig, ed., BUSINESS AND COMMERCIAL LITIGATION IN FEDERAL COURTS §39.18 (2d ed. 2005). The flipside of this is to remember to challenge the opponent's theory of the case and themes and to point out any inconsistencies. Counsel also should anticipate the jury's unanswered questions and address them through use of rhetorical questions. Thomas A. Mauet, TRIAL TECHNIQUES, p. 411 (6th ed. 2002). Finally, counsel should discuss the jury instructions and verdict forms with the jury and discuss how the law relates to counsel's theory of the case. The jury will find counsel's arguments concerning the facts even more convincing if they believe the law is on counsel's side. Mauet, *supra,* p. 410. However, counsel must be sure to comply with the judge's rules concerning the extent that he or she can discuss the jury instructions and verdict forms with the jury. Moreover, counsel must remember that the jurors are human and thus have limited attention spans, so the closing argument must be an efficient use of time to be successful. Also, counsel must be aware that the opponent may raise objections during counsel's closing. The most common objections are (1) misstating the evidence; (2) misstating the law and jury instructions; (3) using an impermissible per diem damages argument; (4) giving personal objections; (5) appealing to the jury's bias, prejudice, and pecuniary interest; (6) making personal attacks on parties and counsel; and (7) making prejudicial arguments. Mauet, *supra,* pp. 495 – 497.

C. [8.104] Use of Technology

Because of the importance of the closing argument, counsel should consider using visual aids and technology to highlight the main points of his or her argument. Timelines listing previously seen evidence are often helpful in closing arguments for commercial litigation cases, given the large amount of evidence at issue. See also §§8.10 – 8.15 above.

XI. APPENDIX — BIBLIOGRAPHY OF TRIAL RESOURCES

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B. [8.106] Other Resources

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