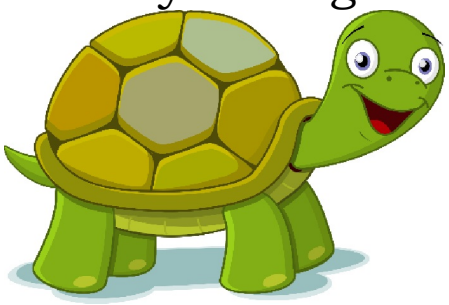
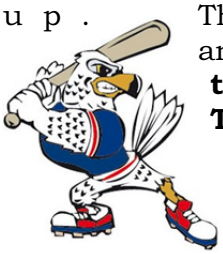
A Fun-Filled Handbook on Trial Techniques for AFC's – (The Art of Story Telling for Turtles)[1]



Let's face it –Some AFCs (not you, of course) can be lulled into thinking that their job at trial must be "easier" than Petitioner's or Respondent's counsel since they "go last." **This is a fatal flaw in thinking.** The AFC is actually the attorney who is uniquely situated to **"drive the case"** by virtue of their order of appointment, they have immediate access the child – and both parties – no other lawyer has this power.

AFCs are like clean-up hitters. In baseball, a **cleanup hitter** is the fourth hitter in the line-up. They are the ones with **the most power** on the team. Their job is to bring in the runs and win games. The same can be said for the ever-powerful Attorneys for Children. **At trial, you are batting cleanup – THAT MEANS YOU ARE THE POWERHOUSE IN THE LINE UP.**



An AFC who is reactive (rather than proactive) at trial is an AFC who is failing his/her client.

BE THE LEADER of the case by knowing all the relevant facts and the law that applies – avoid the common mistake of allowing the case, the court or opposing counsel to manage or lead you.

Your job is to ensure that the most important story of the family – **the story that serves the best interests of your clients** – gets told zealously, clearly and effectively. To do so, you must take an active role in the proceedings. When you react to the case, rather than drive it, you fail in this most important duty.

- ***See :*** Matter of Payne, 166 A.D.3d 1342, 1345, 88 N.Y.S.3d 630, 634 (3rd Dept. 2018) where a **case was reversed for AFC's ineffective assistance of counsel at trial.** To effectively represent and protect a child's interests, the attorney for the child's role is twofold: (1) help the child express his or her wishes to the court, and (2) take an active role in the proceedings (*see Matter of Mark T. v. Joyanna U.,* 64 A.D.3d at 1093, 882 N.Y.S.2d 773; *Matter of Carballeira v. Shumway,* 273 A.D.2d at 755, 710 N.Y.S.2d 149).

So how do I  become a proactive, awesome trial ad

Let's start at the very beginning – a very good place to start…

A. THE BASICS OF BUILDING YOUR CASE

"Trial prep begins with trust."

- *Treasured AFC, Thomas A. Deuschle, Esq.*
- *Hon Michael F. Dillon Award Winner, 2004*

(1) Build rapport with your clients
(2) Set boundaries with opposing counsel & the parties.

a. Be firm with counsel and parties on meeting with your clients before an initial appearance – it is your ethical obligation to get to work as soon as practical. – ***see*** Section 7.2 of The Rules of The Chief Judge - Summary of Responsibilities of AFC.

b. At your initial meeting with clients, stress the confidentiality of your role. Document what the client wants you to disclose or keep confidential and do not get it twisted. ***See,*** Ethics For AFC's Handbook: "The attorney for the child should avoid attributing to the child any statements or recommendations regarding the ultimate disposition of the case, unless the child has specifically authorized the attorney for the child to do so **and** understands the possible implications."

i. **BEST PRACTICE TIPS:**
   1. Meet privately with your clients – out of eye/ear shot of parents/parties.
   2. Avoid meeting with parents/parties on the same day as your clients.
   3. Avoid text messaging with your clients – communicate in person (preferably) or by phone/Facetime (in between personal meetings). Refuse to text message or email about substantive issues.

c. Educate parents/parties on your role and advise that your cell number is for the child to communicate with you – NOT the parties. The parties should go through their own lawyers or your office number if they request to speak with you.

d. Two words about meeting with parents outside of the presence of their counsel:
Be Cautious. If you decide to do it – get permission in writing and document your file. See AFC Ethics Handbook again listing as an **example of an improper practice:** […] "**communicating with the parties in the absence of their counsel**."

e. Be mindful of clients' developmental stage and any special needs and how it may impact your representation.

f. Meet with clients in close proximity to court appearances and most especially before trial – Let your mantra be: *"you have a voice, but you don't make the final choice."*

"You can't plug this into a computer and get the answer. Trial preparation is an art which takes thinking, focus and work ... a lot of work."

- *Accomplished AFC, Cheryl McFadden Zak, Esq.*
- *Hon Michael F. Dillon Award Winner, 2008*

(1) **FILE ORGANIZATION** – Whatever you do, keep it tight and organized. This is the foundation from which you build your entire case; treat it well.

a. **PRO TIP** - **Have a protocol** – do the same thing every time you open a new AFC case.

i. Review Order of Appointment & Petition(s)

ii. Open a File (section out folders for Notes, Correspondence, Pleadings, Discovery Demands, Social Media Investigations, Applicable Case Law etc.)

iii. Send out Initial Letters to Parties and Counsel

iv. Diary First Court Appearance & tickle a "meet by" date

v. Document EVERYTHING – have a system to track all emails, annotate all calls, conversations and court appearances. Keep of running list of what "to do" next – (i.e. – is it on you to draft that order? Make sure diary & keep track of it).

vi. Print any applicable case law/statutes and keep it right in the file. **INSIDER PRO TIP!** – At the AFC websi[illegible]4/AFC you will find a wonderful compilation of case [illegible]ur practice, no matter what the type of case – there is [illegible]ere for you.

Once you've done your due diliger[illegible]ll the facts; you can begin to develop your trial strate[illegible]

A. ORGANIZING YOUR ARGUMENT – THEORY, THEME, ANALYSIS

"No judge or juror should be relied on to take a disorganized set of facts, sort them out and reach a conclusion. [...] It is a mistake and an abrogation of duty to assume that the judge will sort it all out without the benefit of persuasive packaging in the form of the case as a story."

oMarvin Ventrell, Trial Advocacy for the Child Welfare Lawyer, Telling the Story of the Family *(Preach, Marvin!)*

Judges are people too. They like stories as much as you do. What you learned in law school is true – judges do not have much time to "figure out" what you are trying to say. **Package every case into an easy to follow, cohesive story and you will win over the Judge.** Your goal ultimately is to have the Judge adopt your story as the most persuasive, logical one presented. Whenever you try a case, you want the judge to make your position the basis of the final decision.

"I go into every case prepared to run the trial."

Tenacious AFC, David Frech, Esq.
Hon Michael F. Dillon Award Winner, 2016

(1) **CASE THEORY** - Develop the theory of the case as soon as practical and start building your trial preparation. Begin by drafting a working outline of what you know and edit it every step of the way as you add in more and more information.

Case Theory

Straight Facts of the Case + Applicable Case Law = Outcome

Judges rely on precedent to make their decisions. **This is something that we care deeply about.** Know the law that applies to your case at the outset – is it a de novo custody case, a modification, a relocation, violation, custody concerning non-parents, child welfare? Is there a new case that is right on point? Be ready to share that with the court and counsel – it might change the trajectory of the case. Once you are clear about what theory you are advancing, you can begin to develop case themes.

(2) **CASE THEME** – Here is where your skill in the art of persuasion can make a difference in the outcome – where your "story telling" skills take flight. Judges are looking for an explanation – the "how" and "why" of the case. **The explanation or persuasion is the theme of the case.**

a. **PRO TIP -** Use your theme consistently and try to stick with just one – not an either/or. Alternative themes can backfire. Marvin Ventrell, the author of Trial Advocacy for the Child Welfare Lawyer uses this fable about a farmer who raised cabbages and his neighbor's goat who ate cabbages to discredit the opposition's use of

"multiple themes" at trial. He said if the other side were defending the case they would argue –

1. I have no goat.
2. But if I had a goat, he would not eat cabbages.
3. But if he ate cabbages, he would not eat yours.
4. But if he did eat yours, it was an accident.
5. If it wasn't an accident, the goat must have been mentally ill.

b. If the evidence supports your theme, present it. If the evidence does not support your theme, exclude it as irrelevant or bring it forward in an effort to minimize it.

c. **Do not HIDE from bad facts.** Oftentimes, it assists a witness's credibility to be forthright about the weaknesses in the case, rather than deny that they exist. **Decide before trial how you will reckon with the facts that might undermine your position.** Think about creating a good fact/bad fact chart to help you reckon with potential weaknesses.

(1) **INSIDER TIP** – Judges like when you are forthright about your case's weaknesses. It actually improves the witness's character and credibility assessment when he/he is up front about "bad facts." More on this "defensive direct" technique later.

d. Never lie about the facts or change them, your credibility and reputation as an attorney will be <u>forever</u> ruined. ***Whoever is careless with the truth in small matters, cannot be trusted with important matters.*** – *Albert Einstein.* Instead, learn to present facts in such a way that you strengthen and advance your client's story – remember what Bing Crosby taught us…

You've got to accentuate the positive
Eliminate the negative
Latch on to the affirmative
Don't mess with Mister In-Between…

"Ready? Set? Let's practice our case analysis/ trial prep!"

- *Hon. Mary G. Carney, JFC*
- *Elma Volunteer Fire Department Coloring Contest Runner Up, 1977*

FACT PATTERN:
You are appointed to represent Johnny (11) d.o.b. 8/14/2008.

Parties have a prior order from 2010 – joint with Mom as primary. Dad has e/o Friday 4pm to Sunday 8pm and Wednesdays 4pm-8pm. Parties are to refrain from disparaging the other parent in presence of Johnny.

Father files a violation petition & a modification petition because he has not had parenting time with Johnny in nearly two months per the court order. He alleges that he has tried but Mother sent him texts calling him a "deadbeat" and that she "did not care what the court says, no one can make her send her son anywhere." He alleges that Mother discourages Johnny's relationship with him, that Johnny is maturing and needs more time with Dad, that he has a employment and a loving home and can better foster a relationship between Johnny and Mother.

Mother filed a modification petition too alleging that since their last order Father moved in with his girlfriend, Nancy, her 3 kids and 2 cats. He also took a job as an over-the-road trucker. She believes is job takes him away for long periods of time. She states he abuses marijuana. She admits, Johnny has not seen Father in several months. She wants sole custody and supervised access for Dad.

You meet with your 11 y.o. client. He tells you Mom always calls Dad a "deadbeat" and says he doesn't pay enough child support. Mom calls Dad and Nancy "trashy" and says she is going to "win at court" because they are "losers." This makes him sad – he sees the school counselor every day at lunch. Johnny says Nancy is nice and she's a school teacher. He likes playing with her kids and the kitties too. He tells you one time the police came because Dad and Nancy had a loud fight. He and Dad had to sleep at the neighbor's house together. The neighbor (Sheila) provides child care for Johnny and knows Mom, Dad and Nancy. Johnny loves spending time with his Dad and wants to live with him. He would like to see Mom on Saturdays but not overnight. He tells you not to tell anyone because Mom will get really mad and punish him. When she punishes him he sometimes gets spanked or locked in his room, but usually only if she has been drinking. At his mom's house he tells you there's a a lock on the outside of his bedreoom door. Johnny sees a counselor for anxiety. He says his Mom sees a counselor there too.

Medical records show Johnny has asthma and pet allergies. Registry check shows there's an expired #2 OP between Dad and Nancy from a town court. No conviction. CPS has been involved with the family in the past.

You have not met with Mom. You met with Dad and Nancy. They had a reasonable explanation for their fight. Dad says that even though he has to leave for work at 5:30am

he is usually home by 5:30pm most nights to be with Johnny. He only works 4 days per week.

(1) **CASE ANALYSIS** - Instictively, you begin case analysis the moment you review the petitions and begin due diligence. Before you ever ask a question in court, you are looking for facts that when applied to the law promote your client's position. In this case – your client wants to live with his Father, and see his Mother during the daytime only. You do not believe there is a reason to substitute judgment – what do you do as part of your **PRE-TRIAL PREPARATION**?

a. **Perform a basic file review** –

(1) What do the petitions say?

(2) What due diligence has been completed?

(3) What physical do you have/still need/what will you use at trial?

(4) What witnesses have you identified – have you sent letters of inquiry?

(5) What assessments are needed – home studies, substance abuse, mental health, Children Come First Assessment?

b. Determine what are the **LEGAL ISSUES & STANDARD THAT APPLIES**?

(1) VIOLATION - to sustain a finding of civil contempt based upon a violation of a court order, it is necessary to (1) establish that a lawful court order clearly expressing an unequivocal mandate was in effect and the person alleged to have violated the order had actual knowledge of its terms; (2) it must be demonstrated by ***clear and convincing evidence*** that there was a willful violation of a prior court order, (3) it must be demonstrated that the violation "defeated, impaired, impeded, or prejudiced the rights of a party." *Formosa v. Litt,* 91 A.D.3d 644 (2nd Dept. 2012); see also Judiciary Law § 753; *Howell v. Lovell*, 103 A.D.3d 1229 (4th Dept. 2013). **What will you do to advance your client's position? [BONUS POINT – WHY IS THIS IMPORTANT?]**

(2) MODIFICATION- An existing custody and visitation order will be modified only if the applicant demonstrates a change in circumstances that reflects a genuine need for the modification so as to ensure the best interests of the child". *Frisbie v. Stone*, 118 A.D.3d 1471 (4th Dept. 2014); *Horn v. Horn*, 74 A.D.3d 1848 (4th Dept. 2010); *Di Fiore v. Scott*, 2 A.D.3d 1417 (4th Dept. 2003); *Chrysler v. Fabian*, 66 A.D.3d 1446 (4th Dept. 2009), *lv. denied* 13 NY3d 715 (2010). Once the door to the issue of custody has been opened by a sufficient showing of a change in circumstances, the Court must determine the best interests of the child by a review of the totality of the circumstances. *O'Connell v. OConnell,* 105 A.D.3d 1367 (4th Dept. 2013) *citing Maher v. Maher,* 1 A.D.3d 987 (4th Dept. 2003). **What will you do to advance your client's position? [BONUS POINT – BURDEN OF PROOF]**

a. CASE ANALYSIS:

(1) Good Facts/Bad Facts Chart – **How will you reckon with the facts that might undermine your client's position?**

(2) Preliminary theme (story) – **What theme will you advance here? What story do you want the Judge to hear about the family to persuade him/her to change custody?**

(3) Create a Proof Chart – what witnesses, evidence, and documents support your clients' position: As you are preparing for trial - ask yourself these questions:

1. Is the testimony I plan to elicit CONSISTENT with the theory and theme?
2. Is this the BEST witness from whom to elicit this information?
3. Is the information RELEVANT to proving the theory and theme?
4. Does the witness possess the requisite LEGAL FOUNDATION to testify about this information?
5. Will the testimony elicit HEARSAY and if so, is there an EXCEPTION to allow the testimony?

(4) Prepare witnesses for what testimony you will be eliciting. To further advance your client's theme – prepare your witnesses for the rigors of direct at trial – do not rely on petitioner and respondent's counsel to do this step. You have every right (duty) to meet with witnesses and prepare them for questions that you will want answered at trial.

A FEW HELPFUL TRIAL PREP HINTS FOR THE TRIAL AVOIDANT

- Watch experienced and respected litigators practice their craft. Or ask them if they have any trial transcripts they would share with you for educational purposes.

  Lawyers - have they tried a case before that judge/CAR. What was the judge/CAR like? If possible - go watch that judge/CAR try another case. Take note of what that process is like – chances are – this will minimize your anxiety at trial.

(1) Finalize Case Analysis Summary – know the law & facts; consider roughing out a **PRE-TRIAL SUBMISSION/STATEMENT OF PROPOSED**

DISPOSITION NYCRR 202.16 to present to the court and counsel before trial. This will have the double effect of helping you organize your theme/arguments and make you look like a bright, shiny super star.

"You are all the child has. Be ready to take a risk for him or her."

- *Beloved CAR Tracey Kassman, Esq.*
- *Hon Michael F. Dillon Award Winner, 1991* ***(an OG!)***

QUESTIONING TECHNIQUES

DIRECT **EXAMINATION** - Direct examination is the foundation of a case from which all other parts flow. Eliciting direct testimony from a witness, even as an AFC, (rather than only employing cross techniques) is one of the best ways to get your theme across to the court.

Direct tells the story of the case in the witnesses own words. (HINT:JUDGES WANT TO HEAR THIS!) Sometimes, their story is enhanced by moving in physical evidence – documents, photographs, audio recordings meant to corroborate and emphasize the witnesses testimony.

"Defensive direct" – your chance to bring forward factual shortcomings or weaknesses before opposing counsel has a chance to "make hay" with them. When weaknesses are handled in this fashion – they seem less important to the factfinder and the witness scores a credibility point for forthrightness. (Johnny's dad – deal with the dv incident).

The substance/topics should consist primarily of the witnesses immediate perceptions and actions. In eliciting this type of testimony – you are guiding a witness through his or her narrative, without leading questions. Avoid objections to leading during your direct by employing these "six honset words" : who, what, where,when, why and how. — **Rudyard Kipling,** **The Elephant's Child**:

I keep six honest serving-men
(They taught me all I knew);
Their names are What and Why and When
And Who.

- **PRESENTATION OF EVIDENCE** – How you organize your proof matters – consider whether you want evidence to be brought forth chronologically or in order of events relative to their priority. It is a good idea to finish strong and end strong – be it with your order of questioning or witnesses. Fact finders retain best focus on what they hear first and last. Call your strongest witness first and second strongest last – fill in the middle with weaker witnesses.

    - **Introduce and accredit the witness** – To persuade the fact finder that the witness should be believed, the fact finder must have an appreciation of who the witness is, why the witness is here, what information the witness knows, and why should this witness be believed or trusted. **THIS IS AN IMPORTANT (AND OFTEN MISSED) STEP!** – Take the time without belaboring the obvious or getting off track to accredit the witness.

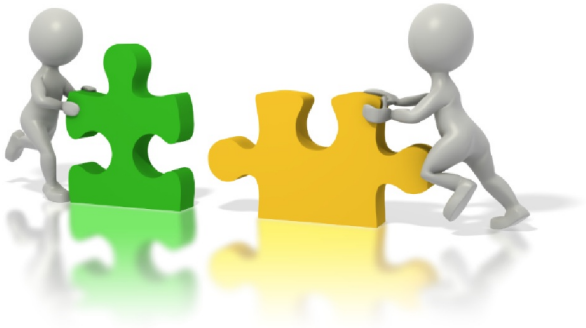
    - **Set the scene** – In between eliciting direct testimony, it can be helpful to utilize **"headlines"** and **"loopbacks"** to help you organize without leading a witness – in order to set the scene:
        - **Headline** - Sheila, I'd like to direct your attention to the evening of Monday April 1, 2019 – do you rememer that evening?

        - **Headline** – Before we talk about what happened after Johnny and his Dad came over, I want to talk about what kind of relationship you have with Johnny.

        - **Loopback** -Sheila, I want to return now and talk to you about what you saw and what you did once Johnny and his Dad came to your house the evening of April 1, 2019.

    - **Wrap it up** - Ask the witness to describe what action was taken (if any) and conclude.

- **PRO TIP** - **Engage the witness!** *The Judge focusses on what you focus on*. Be present and connected with the witness. You will draw the judge's attention to the importance of that testimony. Take all the time you need to do what you have to do to engage and connect. If you find yourself totally flummoxed - ask for a short recess, and regroup.



CROSS EXAMINATION: Prepare your cross by asking yourself 2 questions:

(1) Did the direct examination negatively impact my case story? And if so,
(2) Is there anything I can do about it?

- **Topic selection for cross is critical.** Credibility is generally a good place to start – but do not dive in with unfocused attack on credibility. Arm yourself with a few specific examples that show the fact finder (effectively and clearly) that the witness's credibility is faulty.

- **Be specific in your cross** – do not just rehash what was elicited on direct. Be realstic & cautious – your point is to get your "closing facts" and get out.

- **Focus on facts – not conclusions**: A properly formed leading question takes a fact at issue, states its existence to the witness and instructs the witness to agree with the stated fact. For example, think of the **"Duck Technique"**[1]

  Sir, I'd like to talk to you about your direct testimony where you denied being a duck.
  You live next to a lake? Yes.
  You swim in that lake? Yes.
  You float on top of the water? Yes.
  You paddle under the water with your feet? Yes.
  You have webbed feet? Yes.
  You have feathers? Yes.
  You can fly? Yes.
  But you can also walk? Yes.
  You waddle when you walk? Yes.
  You have a beak, don't you? Yes.
  And when you open your beak you quack? Yes.
  Thank you – no further questions. ***When you get to **closing argument**, you can draw inferences and conclusions for the factfinder.

- Cross is the antithesis of direct – on direct you want the fact finder to indentify with the witness and hear his/her story as so guided by your thoughtful, openended questions. On cross, you want to limit responses by asking confining, leading questions.
  - Direct: How many appointments did you miss?
  - Cross: You missed six appointments, correct?

[1] **Marvin Ventrell, Trial Advocacy for the Child Welfare Lawyer, Telling the Story of the Family (WHICH WE EMPLOYED LIBERALLY IN DEVELOPING THIS OUTLINE*** NO – REALLY. WE USED IT A LOT, A REAL LOT.)**

- **Witness control** – FACT: Witnesses will be difficult. When a witness is difficult, remain composed and manage the challenge. Be prepared. Be organized. Keep a firm and direct tone and make eye contact. Pace your questions starting with agreeable facts and build with clipped, quick questions. You may have to "get tough" with a difficult witness – do so only when necessary, and do not get "angry". Heated exchanges are inapprpriate, uncomfortable and diminish effectiveness of cross.

THE TEN COMMANDMENTS OF CROSS EXAMINATION

From: "Foundation, Evidence, Questions and Courtroom Protocols, Fourth Edition" By Hon Edward M. Davidowitz and Dobert L. Dreher, Esq.

1) **Be brief.** Meandering, unplanned cross accomplishes nothing.

2) **Ask short questions, use plain words.** Almost every cross exam question should make a point or set up the next questions that will also make points. One fact per question – avoid compound or long winded questions.

3) **Always ask leading questions.** When asked properly leading questions are not questions at all, but rather a series of declarative statements

4) **Don't ask as question the answer to which you do not know in advance**. If you do, make sure it is a risk worth taking.

5) **Listen to the witness's answers.** Engage the witness, rather than planning the next question – listen and flow.

6) **Don't argue with the witness**. If a witness is being argumentative, non-responsive, sarcastic or rude – do not take the bait. Refrain from expressing emotion or irritation with a witness who is behaving inapproprtiately – exercise self discipline, stay measured and controlled. Ask the court politely to admonish the witness or answer the question and save your argument for your credibity assessment at closing.

7) **Don't allow the witness to repeat his/her direct testimony**. Don't ask – *"I'd like to clear up several things you said on direct"* – impeach or emphasize and get out.

8) **Don't permit the witness to explain their answers**. Effective cross, taken in short, simple, "one fact per question" questions should prevent this type of "what I meant to say .." response. If the witness persists, calmly object and ask the court to instruct the witness to simply respond to the question.

9) **Don't ask one question too many.** Know what you are after. Make your point and get out – do not let cross wander.

10) **Save the ultimate point of cross-examination for summation**. Just the facts – conclusions are for closing.

11) BONUS CARNEY COMMANDMENT - **Be firm, not rude**. Cross examination should never be cross. Boorishness is unprofessional. Be calm, unflappable and measured at all times – this is your solemn duty. To the best of your ability, channel Gayle King. Keep calm & cross on.

TRIAL TIME!

Review the rules of evidence and have a courtroom evidence book with you at trial to which you can refer! *(Good resource: NYSBA's Foundation, Evidence, Questions and Courtroom Protocols By Hon Edward M. Davidowitz and Dobert L. Dreher, Esq.* **Available for purchase at https://www.nysba.org!!**

- **Lay a Foundation**
  - For any documentary evidence you wish to introduce – need to establish **relevance**, **personal knowledge**, and **authenticity**.
  - For your witnesses—who is the witness? why the witness is here? what information does the witness know? why should the judge find them credible to testify about the facts?
  - How to use/introduce exhibits: **(you can have a cheat sheet with you)**
    - Ask stenographer to make exhibit for identification.
    - Show to all counsel (**PRO TIP:** Really smart step of trial prep is to have an original and 3 copies of each document you wish to enter – a copy for each opposing counsel and one for yourself.)
    - Approach witness and hand him/her/them the exhibit, then ask if he/she/they recognizes the document. If yes, have him/her/them identify what it is. How is it that they know what it is?

- If it's a photo/diagram, ask if it is a fair and accurate representation of the subject matter as it appeared on the relevant date. If it is a transcript, ask if it is the sworn testimony that he/she gave on that date.

- Once foundation is laid, offer the exhibit into evidence.

- After exhibit is entered into evidence, the witness can now testify to the contents of the exhibit.

- Don't forget that **you can object to a document being offered into evidence** (see objections as to substance below)

- **Know your Objections (and use them! Objections preserve issues for appellate review!)**

  - Object to form and substance to support your case story.
  - m eet objections with precision and professionalism. Stand up and state your business – i.e - "Objection. Leading."
  - When in doubt – focus on the BIG THREE – RELEVANCE, FOUNDATION, HEARSAY)

  - The purpose of objecting should be based on the theory or theme of the case. Do not object simply because there is a ground for the objection. You should object if excluding the evidence serves your story of the family. You should object to protect a witness from improper questioning – argumentative, assumes facts not in evidence, leading.

  - **Two categories of objections**:

    (1) <u>FORM</u> – Question as formed will elicit evidence improperly, even though the substance of the evidence may be admissible.

    Here are some examples of ***<u>OBJECTIONS TO FORM</u>***

    - **Leading**—The question suggests the answer and is objectionable on direct. Leading questions are allowed on cross and to lay a foundation.

      - Example: Leading questions are permissible if foundational or related to issues not in dispute.
      - **OKAY -** *(You have a son, Johnny, with the Respondent?)*
      - **NOT OKAY (IF ON DIRECT) –** *(The police were called to Johnny's Father's house because of a domestic incident on April 1, 2019, right?)*
        - **<u>Objection</u> – Leading. (Sustained)**

    - Compound — The question is really two questions (or more) and needs to be re-stated/broken up into separate questions

    - **Ambiguous/Confusing/Misleading/Vague**—objection to the form of a question

- **Argumentative**—Objection to be used when counsel is not attempting to elicit information but to make an argument or "badger the witness" (Q. Mom, your hatred of Father causes poor decision making doesn't it?)
    - **<u>Objection</u> – Argumentative. (Sustained)**

- Narrative—Witnesses are required to answer specific questions so that opposing counsel can defend against improper information through objections. It is difficult to predict what is coming next in a narrative – however long (but responsive) answers are not narrative. Definitely object when witness is rambling.

- **Asked & answered**—it is unfair to allow counsel to emphasize evidence through repetition – you can't ask the same witness the same question twice.

- **Assumes facts not in evidence** – Don't let counsel sneak facts in questions.

- Nonresponsive—the answer includes testimony not called for in the question

(1) SUBSTANCE – An objection to substance is one that maintains that the information sought is inadmissible under the law.

Here are some examples of ***<u>OBJECTIONS TO SUBSTANCE</u>***

- **Relevance –** The substance of a question and its answer are irrelevant if they concern extraneous issues having no relation to any material issue of fact raised during trial. **Q.** Do you think this trial is confusing? **<u>Objection</u> – Relevance. (Sustained)**

- **Foundation –** Counsel needs to lay proper foundation for question asked. Foundation is the indicia of reliability that makes the evidence admissible. These objections usually relate to admissibility of exhibits or foundation for expert opinion.

    - **Lack of foundation/authentication**—insufficient evidence that an exhibit is what it purports to be

- Beyond the scope of direct or redirect examination—questions asked on cross/re-cross must relate to testimony from direct or redirect. Questions on

redirect can't go beyond scope of cross and questions asked during re-cross cannot go beyond the scope of redirect.

- ***HOWEVER,** if the court finds that the witnesses have important, relevant evidence on material issues, they may be permitted to be questioned even if it was not elicited on direct. Meaning – sometimes cross examination can exceed the scope of direct.

- **Speculation**—The witness may not speculate, particularly about someone's feelings, state of mind, or motivation – or comment of another witnesses credibility.

- **Hearsay**—*but know when your exceptions are available****
  - Present sense impression
  - Excited utterance
  - State of mind
  - Statements made for medical diagnoses
  - Business records
  - Statements against interest

- **Best evidence not offered**—use when a copy of a document or exhibit is proffered instead of the original. (Copies are often allowed if there is no dispute as to their authenticity; or if original is lost, and its absence is accounted for to the court's satisfaction.)

- **Bolstering**—when counsel tries to introduce evidence that is inadmissible character testimony to bolster a witness's credibility even though the witness has not been impeached or questioned about that issue

- **Completeness**—when only a portion of a document is offered, the objection may be that the whole document should be admitted contemporaneously, to avoid a misleading impression

- Cumulative testimony—when testimony is needlessly and improperly repetitious and repetitive

- Immaterial/irrelevant—when a question has no bearing or consequence to any issue or question involved

- **Witness lacking personal knowledge of the events**—when a witness testifies about events that he/she/they has not seen, experienced or witnessed

- **Improper offer into evidence of a prior inconsistent statement**—to be used when a proper foundation for the prior inconsistent statement has not been laid

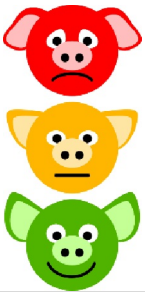
- **Privileged communications**—statutorily protected conversations: atty/client, doctor/patient, husband/wife etc.

- **Prejudicial impact outweighs probative value**—evidence which could unfairly prejudice/inflame the trier of fact

SOME *brief* WORDS ABOUT OPENING STATEMENTS & CLOSING ARGUMENTS

OPENING – NOT A TIME FOR ARGUMENT/INFERENCE/CONCLUSION

1. Foreshadow what will be elicited from witnesses.
2. State what law applies to the facts of the case.
3. State what your client is seeking from the court.
4. The End.



CLOSING – TIME FOR ARGUMENT/INFERENCE/CONCLUSION!

1. Describe the evidence and argue what it means.
    a. If exhibits were moved in – highlight what's important *__**HINT**__ – you can read from an exhibit that you want the judge to pay attention to!
    b. Assess credibility – but never "vouch" for witnesses
        i. Do NOT misstate facts or state facts not in evidence
        ii. Do NOT get the law wrong
        iii. Do NOT express a personal opinion or make insulting characterizations of the other party or counsel – this is improper.
2. Explain/argue that when the law is applied – there is only one certain outcome – the one that favors your client's position.
3. Ask the court to render a decision in your client's favor

ME 

Do not be afraid to make mistakes. We are all practicing our craft. Every single time we step into the courtroom – it is an opportunity for growth and a chance to do better. Every trial sharpens your skills and teaches you something new. Keep up the hard work!

[1]

Hey AFC's – Remember, channel your spirit animal! Being a "turtle" can help you navigate through the challenges of trial preparation and trial like a well-seasoned pro.

Turtles reminds us of: Determination. Serenity. Persistence. Slowing down. Understanding.

Advance through obstacles with serenity: The Turtle is a very determined and serene creature that teaches persistence despite distractions and obstacles.

Slowing down does not mean losing your edge: The Turtle has a peaceful nature, so that it can slow down and take a more grounded stance to position itself in life. In stillness comes a deeper understanding of what makes your strength.