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MacCarthy's Rules of Trial Advocacy

For: Leah, Donal, Jude, Deidre, Dori, Catherine, Terence and Patrick.

1) The most important and necessary quality for a trial lawyer is the ability to communicate.

2) Although there have been and are many excellent evidence teachers, many of their colleagues have been a detriment to trial advocacy.

3) Always have three things. "I have said it trice: What I tell you three times is true". Lewis Carroll: "The Hurting of the Snark".

4) You never get a second chance to make a first impression.

5) If the jury dislikes you, it is time to fold your tent.

6) Maintaining your credibility is essential.

7) Everything you do or say during a trial is important.

8) Prepare your case backwards, starting with the jury instructions.

9) In voir dire it is less your picking the jury, than it is the jury picking a lawyer.

10) Body language is essential to effective communications.

11) Speak in a courtroom the way you would speak in a bar. You speak in a bar to practice speaking in a courtroom.

12) Salutations should be the exception not the rule.

13) Trial advocacy lends itself to a varieties of approaches, but make sure the one you choose works.

14) Using the rhetorical forms of speech will improve your ability to communicate.

15) Trial advocacy breakout sessions should concentrate on technique, how to do what you are doing, and not facts.

16) As the salesman or preacher your job is to persuade.

17) Your character (ethos) is critical - stress fair play and some self-deprecation.

18) Rhetorical questions, but not on cross, are most helpful; they elevate your prose and your presentation.

19) Always use an analogy in closing: see specifically R. Eugene Pincham's "sugar story".

20) The chiastic alliteration is exceptionally powerful.

21) You must "point with pride and view with alarm".

22) When the enemy is in the process of destroying itself, do not interfere.

23) The importance of eye contact and a smile.

24) Should you start (primacy) with weather?

25) Adjectives, as distinct from verbs, are wonderful on direct examination.

26) Do no use intensifiers – ie "very", "so", "really".

27) Do not use fillers – i.e. "and", "like", "ah".

28) A trial lawyer can learn much from actors, but should not be one.

29) Tell stories – at all cost avoid law school briefs.

30) Your stories should paint pictures.

31) Say to yourself “once upon a time” to get your stories started.

32) Appeal initially to emotions – a granular reaction.

33) Your jury may forget the message but will not forget you.

34) Articulate.

35) Voice modulation.

36) Movement only with a purpose.

37) If possible use the “present tense”.

38) Active rather than passive verbs.

39) Primacy - start on a high note.

40) Recency - end on a high note.

41) No legalize. (Again see Rule 11.)

42) No powerless words – hedges, qualifies.

43) Carefully select the right word – and use it.

44) Find ways to identify with the jurors.

45) Milk the good.

46) Repetition (looping) helps.

47) Using a rising inflection demands an answer.

48) Never get in the cage with an expert.

49) “One fact per question” makes no sense in cross.

50) Do not “publish” an exhibit untill you have finished, and then do not use the term “publish”.

51) Do not agree the witness is an “expert”, but merely that he can give opinions.

52) Look for “puffing” if not “mendacity” in an experts qualifications and curriculum vita.

53) Criminal defense and plaintiffs, lawyers are not well served by “gatekeepers”.

54) The “Learned Treaties” is a great tool to impeach an expert.

55) Usually the theory of the case is less important that the themes.

56) The transition is a wonderful tool to use in Direct and Cross-Examination: it is extremely helpful on direct and essential on cross.

57) A blackboard is usually better than “powerpoint”.

58) Argument in Opening Statements is both wrong and of questionable value.

59) The trial judge is usually without the necessary information to rule on an “argumentative objections” during Opening Statement,.

60) Simply mentioning a “white bear” does not paint the picture or do the job.

61) Label all persons and important things.

62) Pause at the beginning and at the end of all presentations.

63) Never move to “strike” something – it can and will not be done.

64) Cross-Examination is not an “Art” but rather a science.

65) If the witness is telling the story on cross-examination, you have goofed.

66) Control during cross is a good thing but not necessarily the only or even the best thing.

67) Cross that involves arguing, bickering and quibbling is terrible.

68) Today’s trial lawyers are much more skilled than their predecessors.

69) Cross and Direct are the most difficult to do.

70) Wellman "The Art of Cross-Examination" is not a good source to learn how to cross-examine.

71) Try as you may, you will seldom, if indeed ever, do a Perry Mason cross where the witness "confesses" on the stand.

72) On cross never let a witness "slip your punch".

73) Punish, is a mild way, the witness who denies you control during cross.

74) The "Looping Tool" is both proper and most helpful.

75) With few exceptions questions have no place in cross – this is not the time for the discovery channel or to find out what the case is all about. ("What was Barney Quill to you?")

76) The "no questions" exception could apply if you want to make someone "short" or "tall" or if you want something "close" or "far" away.

77) The "traditional leading question" need not and should not be used in cross.

78) Your story on cross should be presented with short statements.

79) On cross get the witness into the "yes" mode and you can do wonderful things.

80) Many witnesses will say something that is wrong, stupid or deceptive, something the jury will recognize as such. You use "plausibility" cross to "milk" this.

81) Your source material on cross, in addition to what the witness said on direct and possible impeachment, will consist of the witness statements, verisimilitude and plausibility.

82) On cross, dominate the witness but do so without appearing domineering.

83) If you screw-up leave and go to a safe haven.

84) Impeachment is not limited to matters of credibility.

85) Trial lawyers and judges know less about impeachment than any other aspect of the trial.

86) There are at least 16 and not merely 5 ways to impeach a witness.

87) Impeachment with inconsistent statements is the most used and most important method of impeachment.

88) Most trial lawyers know little about how to impeach with an inconsistent statement.

89) There are times, when it is not collateral, when you should not "recommit" an impeaching statement.

90) You must extol the original impeaching statement.

91) You must close possible escape hatches when impeaching with an inconsistent statement.

92) Notwithstanding the Federal Rules of Evidence, show the witness the impeachment statement.

93) Anytime the Federal Rules of Evidence say you no longer have to do it the old way, continue to do it the old way.

94) Who reads the inconsistent statement – you or the witness?

95) Do both – have the witness read the statement and you also read (use the "looping tool") the statement.

96) Inconsistent statement may or may not be collateral.

97) Motivation Impeachment is never collateral.

98) Truthfulness Impeachment is always collateral.

99) When something good happens on direct or more particularly on cross, "Milk it".

100) Avoid adjectives on cross – i.e "large clock".

101) Ethics is not only important but exceptionally difficulty.

102) Lord Carson's cross-examination of Oscar Wilde was not very good.

103) Use motions in liminie.

104) Defending a criminal case always submit "theory of the case" instructions.

105) Defend a criminal case always consider the use of character testimony.

106) If selecting a "pertinent" character trait never use "law abiding".

107) If a defendant testifies the "Truthfulness" character trait has little downside.

108) The other sides witnesses "tell their version" or their "story": your witnesses "testify".

109) It is usually easier to get forgiveness than permission.

110) The commandment to not ask the "one question too many" makes no sense.

111) The commandment to not "repeat the direct" usually makes sense – but not always: what if the witness says something good on direct?

112) On cross-examination it is better (with one exception when "tweaking") not to call the witness by name or make mention of a witness's "honorfic".

113) In opening statement you do not suggest the evidence will show: rather you will prove whatever it is.

114) When faced with an evidence objection, look at the judge and with your head nodding up and down, start with "as your honor well knows", hopefully followed by a legal citation.

115) Do not assume a burden you do not have.

116) When faced with "facts beyond change", do not fight them.

117) Be yourself, as Oscar Wilde observed, "everybody else is taken".

118) You do the "bragging" for your expert witness.

119) If the defendant will testify, you tell his story in the opening statement.

120) Avoid the stupid direct examination questions: “state your full name for the record and spell your last name for the court reporter”; “directing attention . . .what, if anything, unusual occurred?”; “did there come a time. . ?”

121) Primacy helps direct: “why are you hear testifying?”

122) When you get something good in cross or direct “loop it” by repeating it (three times) and writing it on the blackboard.

123) Maintaining control during cross-examination is important, but if the witness looks bad in denying your control, you will gain more than maintaining control.

124) Do not walk and talk at the same time.

125) Anger and arrogance are desirable in their witness but not in yours.

126) A Theory of the Case is important and usually easy to figure out: your story line will come from the themes in your case, both good and bad.

129) Get rid of the salutations in opening statement – start with primacy.

130) Never waive an opening statement.

131) The lectern is for putting things on not for standing behind.

132) Do not hold a writing instrument (unless you are using it on a blackboard) in your hand while talking.

133) In a criminal case the prosecutor has to convince 12 jurors. The defense need only “confuse” one.

134) Three things can happen after a criminal jury trial. Two of them favor the defendant.

135) When you find yourself in a deep hole, quit digging.