

A Judge's Perspective on Persuasive Advocacy

Hon. Douglas E. Hoffman

I. WHY IS THE JUDGE'S PERSPECTIVE IMPORTANT TO YOU AND YOUR CLIENT?

-Because the Judge will be deciding many issues that will impact your client's result in the litigation.

-Your presentation, both oral and written, should be designed to be persuasive as to the various contested matters of fact and\or law.

-Many of such issues are to be decided by the Court within the exercise of its reasonable discretion.

-Even in a jury trial, the Court is the gatekeeper of what evidence will be admitted into evidence, and instructs the jury as to the law governing your case.

-In the event of an appeal, other judges review the record; you want your record on appeal to be persuasive, as well.

II. WHAT IS THE JUDGE'S PERSPECTIVE?

-The Court is to be independent, impartial and fair. The Judge is a neutral arbiter of the facts and governing law, having no interest in the case other than to fairly determine the contested issues therein. See, SD Code of Judicial Conduct, Preamble.

-The Court is not swayed by partisan interests, public clamor, or fear of criticism. Id., Canon 3

-The Court is obliged to maintain order and decorum inside the courthouse. Id.

-The Court is to be patient, dignified and courteous to the litigants, jurors, witnesses, lawyers and other participants in judicial proceedings, and shall require similar conduct from the participants, including the lawyers. Id.

-In short, the Judge's perspective is to preside over a fair proceeding that is conducted with order and decorum, where the rules of evidence govern the admission of testimony and exhibits, and the law is correctly applied to the facts in order to reach a just result in the case.

III. IN WHAT SENSE DOES THE COURT LOOK TO COUNSEL FOR INPUT IN DETERMINING A JUST RESULT IN THE CASE?

-Attorneys are advocates for their clients, but they are also officers of the Court. "A lawyer... is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice." Rules of Professional Conduct, Preamble, Para. 1.

-A lawyer "zealously asserts a client's position under the rules of the adversary system." *Id.* at Para. 2.

-The lawyer's responsibilities as a zealous advocate and an officer of the Court are to be consistent. *Id.* at Para. 8. These responsibilities include only advocating for positions supported by a non-frivolous basis in law and fact (Rule 3.1); and showing candor toward the tribunal by refraining from any intentional presentation of false evidence, and disclosing all on-point, controlling authority, even if adverse (Rule 3.3.)

-In general, the Court expects that counsel will submit citation to all controlling authority along with cogent legal arguments supporting their positions on all significant contested issues. Further, the Court anticipates that counsel will present competent evidence that will assist in the elucidation of the truth.

IV. GUIDELINES FOR COUNSEL IN LITIGATION

-**Maintain your integrity.** It is the cornerstone of your professional credibility vis-à-vis the Court and opposing counsel.

-**Choose your battles.** Invest your capital stock of credibility wisely. Don't waste it by pursuing frivolous claims.

-**Take the high road.** Courts do not decide cases based upon scandal or muck-raking. All have feet of clay and it is the Court's responsibility to adjudicate claims based upon the probative evidence.

-**"Give it a rest," or "don't beat a dead horse,"** etc. Judges and jurors are awake, focused and taking stock of the case. If an evidentiary point is not forthcoming through a particular witness, rather than tortuously grappling with semantics, move on. Conversely, when you get a favorable response from a witness, it is now in the record, move on. It is not necessary to repeat the question and answer just to make sure that it was noted by the Court\jury. By the end of the day, those cumulative interrogatories may exclude time needed for other issues.

-**Don't be overly combative.** You do not need to get adverse witnesses to agree with all of your questions, or disavow all of their implausible claims on the stand. Arguing back and forth about the absurdity of a witness' opinion, answer or belief is tedious and frustrating for everyone. Let the absurd speak for itself.

-Don't demand that witnesses answer your question either "yes or no." These semantic games rarely prove anything, and are likely to convey desperation on counsel's part. A witness is entitled to choose his or her own words in responding to counsel's interrogatory. Counsel does not have the authority to demand that a witness render a monosyllabic response.

-Be reasonable. Conflicts often are the result of one side or the other being intractable, rigid or reactionary. Seek to reduce the emotions involved in the process. Judges often see a nexus between exaggerated emotions and exaggerated claims.

-Be prepared. Many cases go to trial because counsel are not fully prepared and their clients are accordingly not fully apprised of the likely risks, benefits and results of the process. Counsel should not be learning the salient facts of the case during trial, (particularly in a civil trial.) Good lawyering requires knowing your case before you get to the courtroom. You cannot be the best advocate if you are not in full command of the facts and law that relate to your case.

V. CONCLUSION

Judges are seeking concise and cogent presentations of salient facts and controlling legal authorities from counsel. Be credible. Be fair. Be thorough. Be prepared. Be a resource for legal controlling authority. Be an asset to the justice system.

Evidence Basics: Thoughts on Relevance, Opinion, Foundation and Hearsay

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I. WHAT ARE A JUDGE'S "THOUGHTS" AND HOW DO THEY RELATE TO EVIDENCE?

- Judges are not law professors, and trials are not law review articles. Evidentiary rulings in trial are often like shooting skeet. You know that issues will come up, but not exactly when, where or how. When they do, there is but little time to draw a bead and pull the trigger.
- Judges want to admit evidence at trial that is probative and reliable, to assist the trier of fact in determining the truth. This is to be done within the Rules of Evidence, so that the trial is fair and to avoid appealable error.
- Judges want to get cases resolved within the time allotted. They are impatient when time is wasted or inefficiently managed.

II RELEVANCE

Rule 401. "Relevant evidence" means evidence having **any** tendency to make the existence of **any** fact that is of consequence to the determination of the action more or less probable.

- Judges want to admit relevant evidence. By definition, relevant evidence assists in the trier of fact in determining truth. A Judge's predisposition is to admit evidence that assists it in accomplishing its adjudicative function.

Rule 403. Relevant evidence may be excluded if its probative value is **substantially outweighed** by the danger of **unfair prejudice, confusion of the issues, misleading the jury**, or by considerations of **undue delay, waste of time**, or needless presentation of **cumulative** evidence.

-Evidence that is prejudicial, confusing or misleading can undermine the integrity of the process and thwart the interests of justice. Where such danger is posed, the Court is to weigh the danger posed by such evidence on the record and determine whether it substantially outweighs the probative value of the same. Courts prefer to admit probative evidence and separate the wheat from chaff in a court trial, and in a jury trial similarly allow the jury to make the proper discernment. But, if there is a substantial outweighing of prejudice over probative value, the Court will exercise its discretion to exclude it.

Definitions: **Prejudice**= "bias, pre-conceived notions, unfavorable opinions held in disregard to facts." **Confusion**= "to mix up, to bring disorder upon, to perplex." **Mislead**= "to lead astray, to guide into error."

- As for time-wasting, cumulative presentations, the Court is reluctant to inject itself into counsel's trial strategies, but, when the "nail is already flush with the board," will often instruct counsel to move on to another topic in the interests of getting the case completed within allotted time constraints.

III OPINION AND FOUNDATION

Rule 701. Opinion testimony by **lay witness** is limited to opinions that are **rationaly based upon the witness' own perception, and are helpful to a clear understanding of the witness' testimony** or of a fact in issue. Further, a lay opinion cannot be based upon scientific, technical or specialized knowledge.

-Lay witness opinions\conclusions must be based upon witness' own observations: e.g.; witness testifies to observing predicate facts that Smith had flushed face, was sweating, acted "fidgety," was breathing heavy, kept glancing around, and eyebrow twitched; thereafter, Counsel asks witness if, in her opinion, Smith appeared "nervous."

-Rule recognizes that there is often a fine line between lay witness observation of fact and testimony as to a conclusion or opinion based upon such predicate facts. So long as the conclusion does appear to be linked to the perceived data, and is further deemed to be helpful to the finder of fact in understanding the witness' testimony or otherwise analyzing a disputed fact in issue in the case, such opinion or conclusion is admissible lay opinion.

-Conversely, if the proffered lay opinion conveys no information other than to advocate a particular conclusion as to a material issue that the jury can and should determine on its own, then such opinion will likely be excluded a "not helpful."

-If the witness purports to offer an opinion or conclusion that seems to be premised even in part upon scientific, technical or specialized knowledge, then the same is no longer a lay opinion, and the witness is being offered as an expert; accordingly, the opinion is not admissible under Rule 701, and can only be considered if expert foundation is established and the opinion is otherwise admissible under Rules 702 and 703. Further, proper discovery of such opinion must have been provided pursuant to Rule 26(b)(4) of the Rules of Civil Procedure, assuming the same has been requested and\or ordered produced in pretrial discovery.

Rules 702 and 703. **Expert testimony** is testimony in the form of an opinion or otherwise (premises or conclusions can require expert testimony) as to scientific, technical or other specialized matters by a witness who is qualified to render the same by virtue of his or her knowledge, skill, education, training, and\or experience in the applicable field.

-To be admitted, such testimony must be **(1) based upon facts or data that are deemed sufficient to support the same; (2) be the product of reliable principles and methods; and (3) said principles and methods must be shown to have been reliably applied to the facts of the case.** This is the Court's so-called "**gatekeeper function**" as articulated in the *Daubert* and *Kumho* cases.

-Further, expert evidence is allowed only if it will assist the trier of fact to understand the evidence or to determine a fact in issue.

Daubert Factors.

1. Whether an expert's theory is subject to **objective testing** for reliability.
2. Whether the theory has been **peer reviewed** in academic literature.
3. Whether the theory has a **quantifiable error rate** and, if so, the reliability shown thereby.

4. Whether there are applicable **recognized standards** and controls.
5. Whether the theory has been **generally accepted** in the scientific community.

-The Court is not to replace the adversary system via the “gate keeping function” and **cross-examination, presentation of contrary evidence, and careful instruction of the jury on burden of proof remain as the primary vehicles to challenge expert opinion**. Nevertheless, it is the Court’s responsibility to exclude purported expert testimony that is patently unreliable when subject to the above preliminary tests.

IV HEARSAY

Rule 801.

The definition of hearsay is “a statement, other than one made by the declarant while testifying at the trial or hearing, **offered** in evidence **to prove the truth of the matter asserted.**”

-Hearsay is not admissible in evidence (Rule 802) unless it falls within one of the accepted exceptions to the rule against hearsay as set forth in Rules 803-806. However, at trial, many hearsay objections to out-of-court statements can be resolved without resort to contemplation of the various exceptions, when consideration is first given to whether the statement is actually being offered to prove the literal truth of the challenged statement.

-Frequently, out-of-court statements are offered for purposes other than to prove their literal truth, such as:

- 1) To lay foundation for **the effect that the statement had upon the hearer** (usually the witness) such as to cause him or her to think, act or react in a certain way; (I heard Smith say that he intended to kill Jones; therefore I called the Police. (E.g., to refute a false report charge.)
- 2) To show **a cause for an effect that the statement would likely be responsible for producing** in third parties that heard it; (I heard Smith yell “fire!” and then everyone got out of their seats and ran to the exits.)
- 3) To show **that the statement was made irrespective of whether it was true or untrue**, such as a command; (Jones told me to “get out and never come back!”)
- 4) To show that the declarant was **deceptive or intended to misrepresent** a fact; (Jones told me not to worry, that he had “taken care of everything.”)

-That the statement was not offered to prove the matter asserted does not, however, end the analysis. If the context of the evidence is such that there is a danger that it could be considered by the finder of fact as probative of, among other things, the truth of the matter asserted in the out-of-court statement, the record should be made clear that it will not be so considered. In a Court trial the judge can so note on the record; in a jury trial a **limiting instruction** can be read to the jury. Notwithstanding such safeguards, if a danger that the evidence would nevertheless likely be utilized for such improper purpose substantially outweighs its probative value for the non-hearsay evidentiary value, then **an objection under Rule 403** may be sustained.

