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Tips From The Bench:

How to Effectively Present To The Fact Finder

*Presented by Grant Dorfman
Government Law & Liability Conference
December 15, 2021*

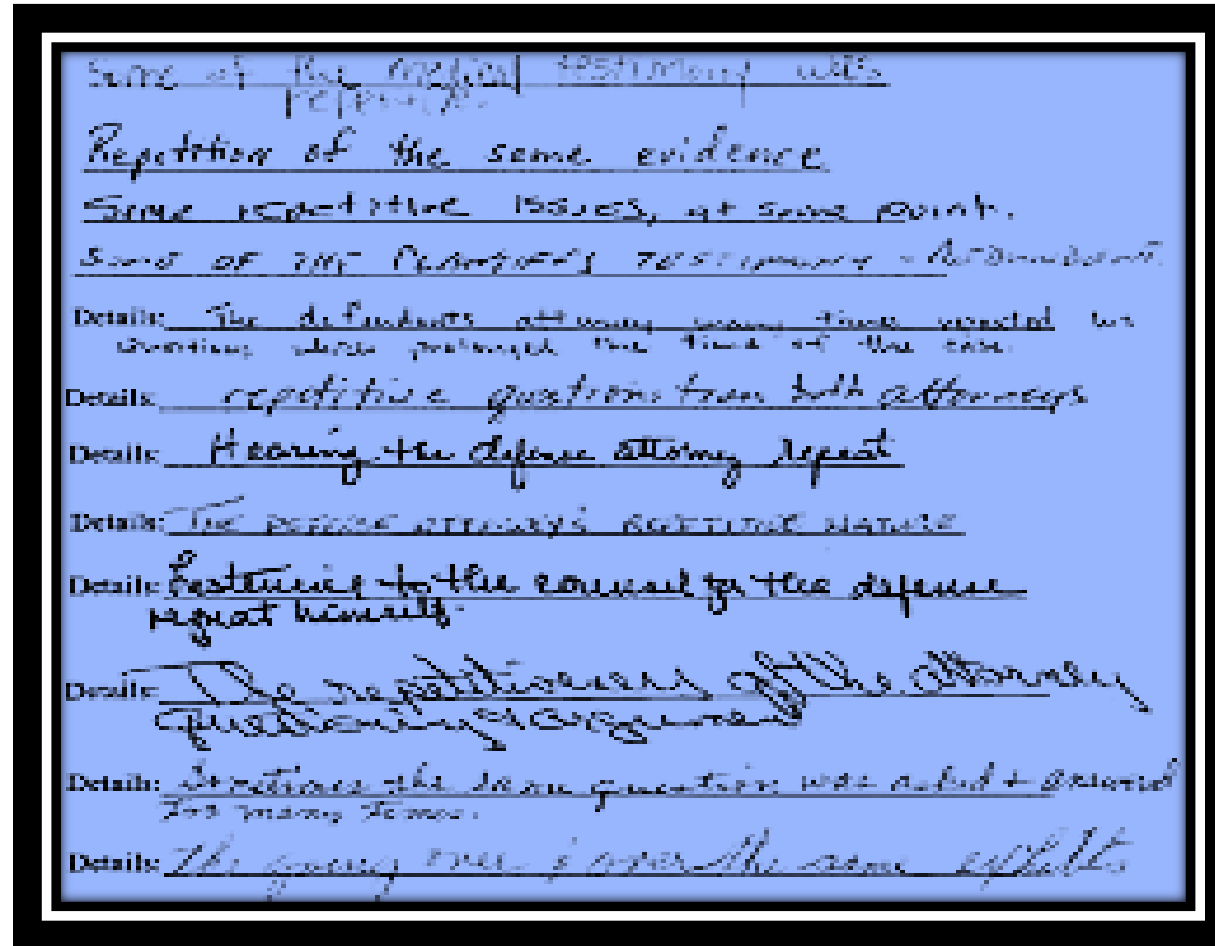
Objective & Purpose of Program

- To facilitate a discussion of best practices with respect to pretrial motion and trial practice in Texas courts and administrative forums
- To improve individual performance in presenting arguments, motions & testimony to judges and juries



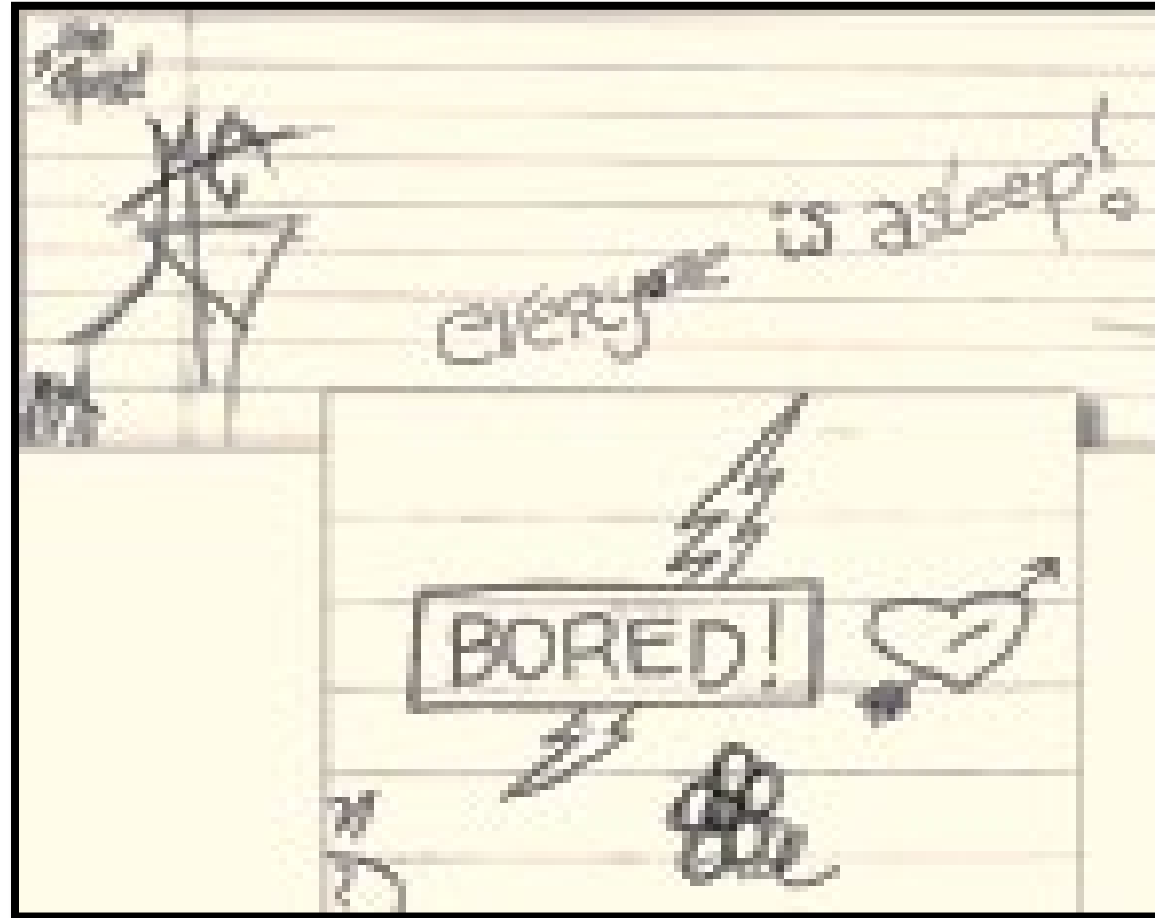
The Knock On Trial Lawyers

- REPETITION
- REDUNDANCY
- SUPERFLUITY



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REPETITION



REDUNDANCY



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SUPERFLUITY



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Talk about beating a dead horse!

- But there's A REASON why we feel the need to repeat ourselves –
 - Judges tune out
 - Juries get distracted
- It's not enough for us just to STOP BEING REPETITIVE –
- We must ENGAGE the audience



What Is To Be Done?

- My Suggestion: DRAMA



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And In Particular . . .

LAW &
ORDER



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Or perhaps this suits you better?



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Everybody has a favorite



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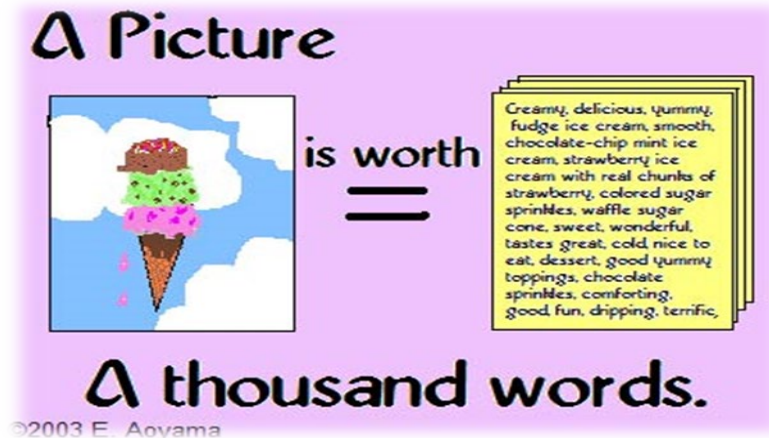
What Does This Mean in the Real World?



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Effective Advocacy: LESS is almost always **MORE**




- Begins with the WRITTEN WORD
- Recommendation: Start w/ the PowerPoint version
- A visual medium; fewer words



- Attributed to Napoleon Bonaparte: “A good sketch is better than a long speech”



Make Your Briefs “Graphic”

- Insert pictures: accident intersection/site, machine, damaged car, defective product
- Complex relationships/corporate structures?
 Add a chart
- Important dates?
 Chronology
- Boundary dispute/non-compete?
 Map



When Drafting Briefs: Think “Skeleton” – not “The Biggest Loser”

- Easier to add muscle than to cut weight
- You’ll be surprised how much is excess
- Ask yourself: “Where am I going with this?”
- Bryan Garner’s Advice: outline slowly, write fast
- Ask yourself: Does Judge REALLY NEED 2-3 pp. re: MSJ Std. of Review?
- ALWAYS “signpost” your arguments
- What is THE most important point(s)?
- 1-3 key legal principles? Best 1-2 cases?



Effective Advocacy (Cont'd):

- **START WITH THOSE CASES/LEGAL PRINCIPLES – Your “Core”**
- Conclusion(s) first – add details only as needed, or as Judge requests
- **Defense side:** confusion/lack of clarity is (usually) your enemy
- ***Write the way you talk (or vice versa)***
- ***Stick to your script*** (unless Judge asks Q's)
- **A note about Your Agenda [IF the Judge asks a question]** . . .
 - ***Please answer the Judge's question(s)!***
 - Try “No, but” or “Yes, and”



Individual Topics: A Lightning Round

Motions for Summary Judgment

- Pretrial-wise: the HEART of what we do
- Often the only chance to avoid trial (short of settlement)
- Organization & clarity are KEY
- I think of it like a *geometric proof*
- Always start with short intro/outline
- Recommendation: Hand Judge an outline or flowchart if the Motion is complex or involves multiple issues



Motions for Summary Judgment (Cont'd)

- If strictly a legal Q –
 - Cite undisputed facts & case law in favor
- If disputed facts, show them --
 - Quote or summarize & attach key evidence
- Have highlighted cases (keep it short!)
- **AFFIDAVITS: *NOT* an afterthought!**
- Use Handouts – Judge can keep if takes under advisement
- How does ruling for you simplify the case/the Judge's life?
- ***Have your Order ready!***



Motions for Summary Judgment (Cont'd)

- 1st Rule: **KNOW YOUR AUDIENCE**
- Is the Judge a reader?
- Or is Judge known for not reading a word before hearings?
- Ask around – or go watch a hearing docket if time permits
 - Zoom makes this easier!
- Worst case? Prepare for Plan A/B –
 - Assume no familiarity, but gauge by Judge's reaction & *be flexible*



DISCOVERY FIGHTS

- The KEY TAKEAWAY –
 - Judges just *LOVE 'EM!*
 - Work it out: this pox hits *both* houses

No, really. That's very
interesting.



Please. Go on.



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DISCOVERY DISPUTES (Cont'd)

- *If you can't work it out . . .*
- You just DON'T have the time to go through 17 interrogatory responses/objections and 23 RFP's
- **MUST SIMPLIFY**
- **Organize thematically/by category**
- **Select best 1-2 examples per category as guidance**
- **Get 2-3 rulings – & then offer to work out the rest**
- *A plan beats no plan, every time*



Voir Dire: *A Surprising Exception*

- We're always told the importance of **PRIMACY**
- But **AVOID** the temptation to drama here
- **Justice Randy Wilson**: "Too often, lawyers launch into voir dire by describing the good facts of their case and then asking the occasional question. I now appreciate that a good voir dire is exactly the opposite."
- Raise bad facts ("warts")/identify bad jurors
- Rehabilitate your good jurors: can they be "fair?"
- This IS jury selection, after all
- Above all else: **LET THEM TALK**



Some Thoughts on Juror Psychology

- ABA survey:
 - 75% believe jury service is important
 - 84% want their own dispute decided by a jury
- My experience: from Bataan to The Price Is Right
- Jurors take pride in service – want to believe doing something important
- Use this to your advantage –
 - Give jurors *a principle* – something larger than just P vs. D
 - Make their decision matter *beyond the parties*

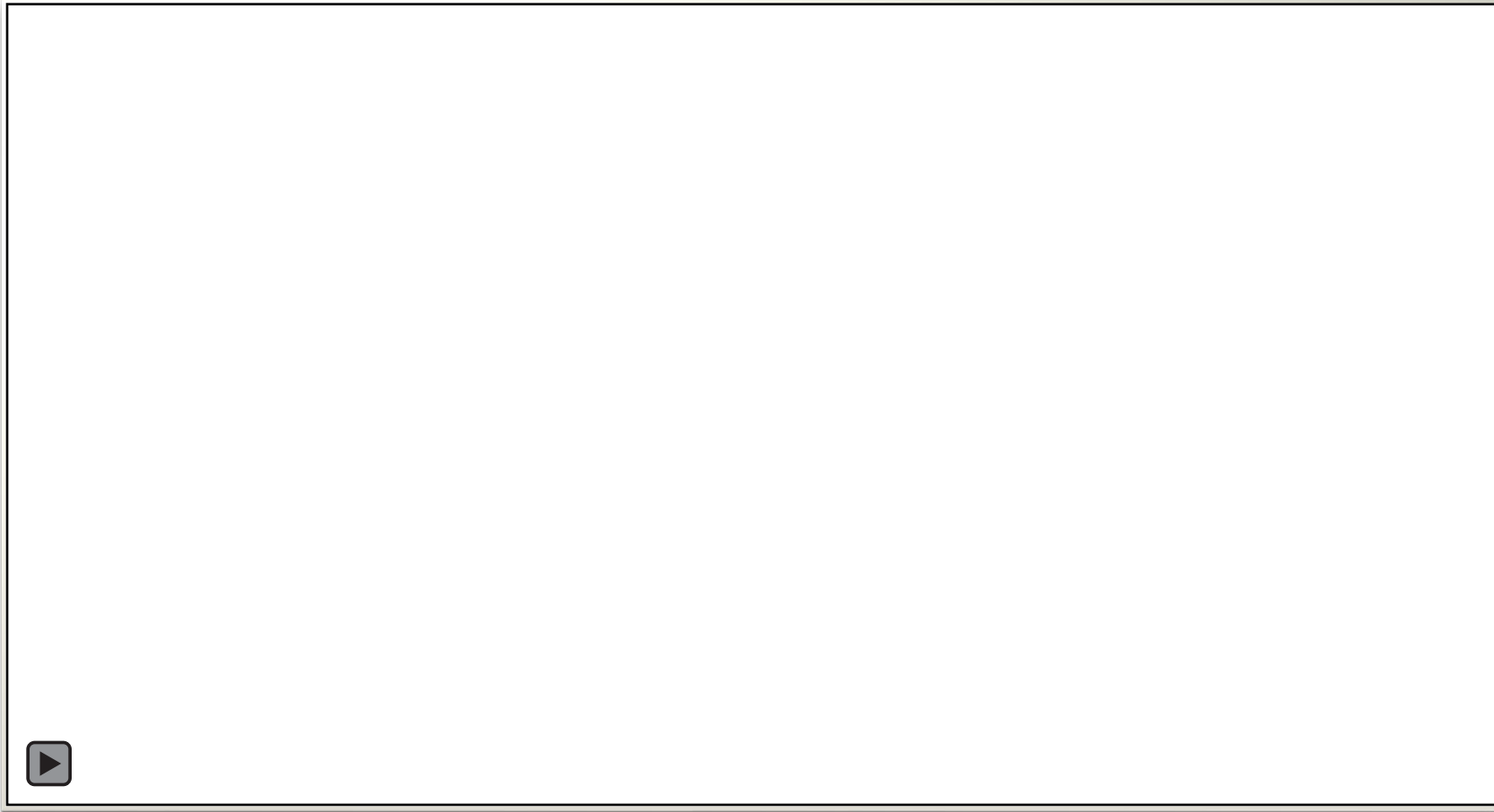


Thoughts on Juror Psychology (cont'd)

- They are **TRAPPED**: literally “in a box”
- **Not in control**: sit/rise when told; can’t talk, can’t ask questions, *shouldn’t* sleep
- **UNCOMFORTABLE & STRANGE**
- **AND IT’S BORING!!!**
- Be respectful of their role/time ➡ **BE EFFICIENT**
- Be professional & **competent**
- Above all else: *give them the info they need*
- ***It’s a great burden to make a decision***



Juror Psychology (cont'd)



Witness Examinations & Depos

- **Direct & Cross Exams –**
 - Too often unfocused, rambling, too long
 - **ASK YOURSELF: What does the witness offer?**
 - Why are you calling/cross-examining?
 - Get what you need. **Then: SIT DOWN**
- **Use signposting here too –**
 - “You’re here b/c you saw the wreck?”
 - “P said light was red. Is that what you saw?”
 - “Were you a witness to that negotiation?”
- **Signals jury where you’re going**
- **Ties in the evidence/its relevance *before* closing argument**



Witness Exams (cont'd)

- **Use dramatic techniques to alert jury**
 - Repeat favorable testimony
 - Raise/lower voice – change intonation
 - Hand gestures, movement around courtroom
 - How do you feel about this witness?
 - That signals the jury how *they* should feel too
- **Show documents, pictures to jury (!)**
- **Demonstratives/walk-thru's (OSHA case as example)**
- **Change pace & manner of presentation**
- ***Keep it moving***



And Then There's Trial Depos

- Don't quite know what to tell you --
- Videos are *DEATHLY DULL*
- Reading/acting a transcript: *even worse*
- *You can either:*
 - Take better video depositions (hard to do!)
 - But helps if you imagine the jury is sitting in with you
 - Or EDIT, EDIT, EDIT: put on ONLY what you NEED
 - Or consider stipulating to deposition testimony
- Here, too, signposting can help – but you've got to do it *in the depo*
- Also consider changing scenery –
e.g., take the slip & fall depo at the grocery store



Opening Statement & Closing Arguments

- If there's drama anywhere, it should be HERE
- ***On opening statements –***
 - BE CREATIVE
 - Don't use "the evidence will show" as a crutch
 - Make it work for you dramatically
 - *E.g., make* a "commitment" to the jury, w/accountability on your part
- But save big emotion for the closing argument
- Jury cannot trust/reciprocate a big emotional impact before the players are introduced, the facts are known



Closing Arguments

- Emotion is important -- *but it's not the most important thing*
- **You need the jury to answer the Charge Q's**
- **Use the Charge**: “core of your argument, the outline for your presentation”
- Tell jury what to answer, and why
- Fill in the blanks for them: *don't be shy!*
- Remind jury of their notes, the key testimony/evidence and Exhibit #'s
- Flip chart info/demos? Let them write down what you want them to remember
- Build with evidence/logic
- Close w/emotion & principle
- **IF P**: DO NOT bog down in rebuttal: ≠ Debate D. *This is your time.*



Some Quick Thoughts on Bench Trials

- **2 most common mistakes –**
 - Lawyers act as if Judge isn't even there
 - Lawyers rely upon Judge to give structure to the case



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Thoughts on Bench Trials (cont'd)

- **Recommendation:** Treat like a mediation –
 - True, it's more formal, with a taller table (bench)
 - But fundamentally, you want to show the Judge your evidence as clearly and succinctly as you can
- ***Be efficient, seriously***
- NOTE: this is NOT the time for theatrics!
- Lawyer tricks, etc., fall VERY flat in Bench Trials
- If citing law, state cases for record & hand highlighted cases to the Judge
- **Have FFCL's ready** – use them as your proof outline
- Unless a VERY simple case, Judge will likely take under advisement



POSTSCRIPT: TIME IS THE ENEMY

- Controversial take? Rocket Science?
- No, it's not
- Look, I get it. I'm a repeat offender myself
- **BUT CONSIDER:** time spent researching, writing, preparing for court appearances, etc., versus actual time in the Courtroom
- **Recommendation:** re-orient yourself – Try to back away & look at case with a fresh set of eyes
- MAKE TIME *before* sitting down to write & *before* going into Court
- See case from the Judge's/Jury's point of view





Q&A TIME