RAMA UNIVERSITY

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FACULTY OF JURIDICAL SCIENCES

MOOT COURT EXERCISE AND INTERNSHIP

(CLINICAL)

Course : BALLB , 3rd Semester

Subject code : BAL903

Faculty Name : Ms Taruna Reni Singh

Moot Court Exercise and Internship

Objective: The objective of having moot courts is to give the students practical tanning how the proceedings of the court takes place.

The Paper will have following components

- Moot Court: Every student may be required to do at least one moot court in a year. The moot court work will be on assigned problem.
- Observance of Trial in one case, either Civil or Criminal.
    - Students may be required to attend one trial in the course of the last year of LL.B. studies. They will maintain a record and enter the various steps observed during their attendance on different days in the court assignment.
- Interviewing techniques and Pre-trial preparations and Internship diary.
    - Each student will observe one interviewing session of clients at the Lawyer's Office/Legal Aid Office and record the proceedings in a diary. Each student will further observe the preparation of documents and court papers by the Advocate and the procedure for the filing of the suit/petition.
- The fourth component of this paper will be Viva Voce examination on all the above three aspects.
- Student will be required to undertake legal awareness programme in association with N.S.S. and other authorities as directed by the Faculty.

LECTURE 22

THE TRIAL ADVOCATE

By

Roger Haydock and John Sonsteng, "Trial: Theories, Tactics, Techniques", West Publishing Co. St. Paut, Minn. 1990, pp. 38-60

I – THE TRIAL ATTORNEY

A. The Goal of the Trial Attorney

The goal of the trial attorney is to win. A case is tried because other alternative efforts at resolving the dispute-negotiation, mediation, arbitration, trial by jousting – have been unsuccessful. The client obviously expects to win, and counsel must make every reasonable effort to win. However, this goal of winning must be kept in perspective, for this end does not justify all means. Winning is not everything, and it is not the only thing unless the steps taken to win comply with ethical norms.

B. Roles of the Trial Attorney

The trial lawyer is an advocate. The trial advocate uses all reasonable tactics and techniques to present the case to the judge or jury to secure a favourable outcome. The advocate increases the chances of victory by adopting a winning attitude.

An all-out effort is governed by trial rules, ethics, and common sense. A process that involves acrimony or questionable approaches does not serve the client's interests or the system of justice. The belief that trial lawyers must be dominating, rude, and controlling is incorrect and significantly decreases the chances of winning. The effective trial lawyer must be firm, persistent, and compassionate. These approaches substantially increase the chances of winning.

The trial lawyer also has a number of additional roles during litigation. As a court officer, the attorney must follow the ethical norms of the system. As a counsellor, the attorney provides well reasoned advice to the client. As an investigator, the attorney gathers and preserves information. As a facilitator, the attorney considers alternative dispute resolution approaches to resolve the lawsuit before trial. As a negotiator, the attorney determines the possibilities of settlement and makes good faith efforts to resolve the dispute prior to and during litigation. As a litigator, the attorney drafts pleadings, conducts discovery, and brings and defends motions. As an appellate lawyer, the attorney brings or defends an appeal. As a dreamer, the trial lawyer believes this case is the case.

C. Other Functions of the Trial Lawyer

In addition to the trial lawyer functioning in the role of an advocate, the successful trial attorney also adopts functions performed by other professions. The trial lawyer must also, in part, be an artist, scientist, psychologist, historian, and theatre director employing the various approaches used by these and other professionals. As an artist, the trial lawyer must be creative, imaginative, and intuitive. As a scientist, the trial advocate must be rational, logical, and disciplined. As a psychologist, the trial attorney must understand human behaviour and decision-making and predict how the judges and jurors will react to the case or issues at hand.

Using the methods of the historian, trial advocates recreate the past in the courtroom. The facts are presented in a summary narrative during opening statement and closing argument. The evidence is presented to the judge in a way that will enable them to understand what happened.

Although trial advocates are not bound by the historian's need to be objective and impartial, they must still present the truth of their client's story.

As a director, the trial advocate also directs a play complete with actors and props. The courtroom is the theatre in which the trial lawyer directs and acts in this nonfiction play. The witnesses are the actors and the trial exhibits are the props. The judge and jury are the audience.

D. Character Traits

All trial attorneys have specific personality and character traits that influence their professional approach and behaviour. Some traits that all effective trial advocates possess include integrity, honesty, fairness, sensitivity, and respect for others. Successful trial lawyers make certain that these traits are displayed in every trial.

The judge must be able to trust the attorney. They rely upon the attorney's word and explanations. An untrustworthy trial attorney is an ineffective advocate. The attorney must also display a sincere belief in the merits of the client's case. The failure to appear sincere may cause the judge and jury to conclude that if the attorney does not believe in or care about the case, they need not either.

A trial lawyer must also appear fair before the judge and jury. A lawyer who seems to take advantage of the situation or who appears sneaky or underhanded will not establish the integrity needed to maintain an appearance of fairness. The attorney must also treat the judge and jurors with respect. Any other treatment will only insult and alienate these decision makers.

Additionally, trial attorneys encounter a full range of personality temperaments in dealing with opposing attorneys, witnesses, judges, and jurors. These individuals may be courteous or rude, cooperative or hostile, friendly or arrogant, pleasant or intimidating, trustworthy or untrustworthy. The trial attorney must adopt various approaches to deal with this broad spectrum of personalities. Occasionally, however, counting to ten and meditating may be the only viable approach.

E. Balanced Attitude

Trial attorneys suffer stress from one or more of the following sources: the pressure to win, unrealistic expectations, fear of failure money, ego, physical discomfort, fatigue, anxieties, tension, peer pre sure, neglect of personal and family matters, emotional withdrawal, preoccupation with a trial, and law school memories. Attorneys may take cases for financial rewards but may also take them to accept a difficult challenge, work with a specific client, obtain publicity, achieve fame, satisfy a legal fantasy, change the law, protect a client's rights, or promote justice. These motivations may result in added stress. To maintain a properly balanced attitude toward trial work, an attorney must cope with the stress of being an advocate. Suggestion that help lawyers deal with stress include:

- Before accepting a trial, reflect on the reasons why you are taking the case and your expectations.
- Maintain a proper relationship with the client. Involve the client in making decisions and avoid overly controlling the case.
- Do not worry about events or matters that cannot be altered Learn to let go and accept what cannot be changed.
- Expect that relationships with family, friends, and colleague will be disrupted. Advise them that problems may arise.
- Discuss your feelings and attitudes with family members and other caring listeners.
- Monitor the trial workload to avoid becoming overworked. Delegate appropriate responsibility and tasks to support staff. Learn not to interfere unnecessarily and second- guess decisions.
- Exercise your body as well as your mind.
- Avoid tobacco, alcohol, drugs, and other harmful sources of escape.
- Discuss the case with the client and colleagues after its conclusion.
- Celebrate the end of the trial. Enjoy the experience of trying the case, whether you win or lose. Plan a break after the trial.
- Become a law professor instead.

F. Client Relationships

Clients place their fate – or so it seems – in the hands of trial attorneys. This reliance places enormous responsibility on the trial attorney to justify the client's trust. The relationship between the client and the attorney varies depending upon the needs of the client, the client's familiarity with litigation, and the client's and attorney views of the appropriate relationship. Initially, the client and the attorney in consultation with each other should identify the interest and needs of the client that the attorney has to preserve or advance. Potential solutions should then be evaluated to determine how the client's views can best be achieved. Finally, a course of action must be implemented to achieve the goals of the client.

These decisions regarding the client's needs and goals, alternative solutions, and resulting actions involve both the client and the attorney. Clients must decide what their needs are. Clients and lawyers must evaluate alternative solutions. Lawyers must implement the decisions made. The more a decision has a substantial legal or non-legal impact on a client, the more critical it is to have the client involved in making that decision. The more a decision involves professional expertise and skills, the more likely it is that the attorney can make the decision. The key to effective client/attorney relationships is communication and the continuing involvement of the client in the pre-trial preparation and the trial itself.

II – ALTERNATIVES TO TRIAL

A. Settlement and Plea Bargains

Settlement is an important part of the pre-trial litigation process. Over ninety percent of civil and criminal cases are settled or plea bargained. The negotiation process, with its numerous strategies and tactics, comprises a substantial area of practice. One of the most important factors affecting both settlement and the results of negotiation is

the attorney's trial skills. The willingness of the attorney to try a case, the experience of that attorney, and the preparation of the case for trial all significantly influence the results of a negotiated settlement. Many judges take an active role in the settlement process. These judges encourage settlement and are directly involved in settlement conferences or discussions. Judicial approval or consent is not normally required for settlement of civil litigation unless the case involves a class action or an injury to a minor. In most cases, the parties may enter into any settlement they believe will serve their interests.

The type of settlement agreement depends upon the nature and circumstances of the civil case. One universal settlement document is a dismissal with prejudice which disposes of the

case. The dismissal may be a stipulation signed by the attorneys to the litigation which dismisses the case, or it may be an order signed by the judge based on a stipulation by the parties. The dismissal should specify whether the costs are to be borne by each of the parties or are to be paid by one of the parties.

In criminal cases, the judge usually needs to approve the plea bargain entered into by the prosecutor, victim, accused, and Investigative Officer (as per Criminal Procedure Code, 1974). The plea bargain may consist of a guilty plea, a plea to a less serious offense, *nolo contendere*, or another plea authorised in the jurisdiction, and may also include conditions of probation and sentencing. Pleas of guilty are taken in open court. The defense counsel, prosecutor, and judge all have an obligation to make sure that the defendant understands what is happening. They must also insure that the plea is complete and legally sufficient to support a conviction.

B. Arbitration

There are two types of arbitration. One is a private, voluntary process where a neutral third person, usually with specialized subject matter expertise, is selected by the parties and renders a binding decision. The other is a compulsory but non-binding process (often called court-annexed arbitration) which is required by some jurisdictions. In this non-binding pre-trial proceeding, the arbitrator, usually an attorney randomly selected from a panel of arbitrators, hears each party present proofs and arguments and renders a decision. If the decision is acceptable to both parties, the lawsuit is dismissed. If the decision is unacceptable, the case goes to trial.

C. Mediation

Mediation is an informal process where a neutral person assists the parties in reaching a mutually acceptable agreement. The mediator's primary role is to facilitate a negotiated settlement between the parties. The mediator does not decide any issues or make any decisions. In some jurisdictions, mediation is compulsory, and the parties must attempt to mediate a settlement in good faith before proceeding to trial.

D. Private Judging

Parties to a dispute may agree or be ordered by the court to submit their dispute to a private (usually former or retired) judge for resolution and the decision by the private judge may be binding or may be reviewable *de novo* by the presiding trial judge.

E. Court Ordered Procedures

A growing number of jurisdictions are using one or more of these alternatives to resolve disputes prior to trial. Judges by statute or rule have discretion to require parties to submit to a dispute resolution procedure. If the procedure is not successful in resolving the case, the trial is held.

F. Trial by Ordeal

III Primitive trial methods have been abolished in almost all Indian jurisdictions. For example, trial by water in which a guilty person would float and then be executed while an innocent person would sink and presumably drown made everyone a loser. And, trial by gagging in which, the credibility of a person depended on their not choking on some inedible morsel, such as a hairball, left too many parties with a bad taste in their mouths. Smart trial advocates check local rules for the availability of these alternative dispute proceedings. – FUNDAMENTAL APPROACHES OF PERSUASION

This section explains established methods of persuasion that significantly influence the presentation of a case and that apply to all phases of the trial. The trial lawyer should be familiar with and attempt to employ these approaches in trying a case.

A. Primacy and Recency

People remember best that which they hear first and last. The doctrines of primacy what a person hears first – and recency – what a person hears last – may dictate when evidence and statements ought to be made during a trial. These doctrines apply to the trial as a whole as well as to each stage of the trial, including the opening of the case by briefly stating the whole case, witness examinations, and the closing argument.

B. Reasonable Repetition

The more times individuals perceive something the more likely they will believe it and remember it. During trial, evidence can be repeated a reasonable number of times to increase the chances that the fact finders will recall and believe it. An unreasonable number of repetitions may cause the fact finder to tire of the evidence and result in sustained objections. What is reasonable depends on the facts and the circumstances of the case, how long the trial lasts, how much time passes between repetitions, and how the matter is repeated.

C. The Rule of Three

The trial lawyer's approach to a trial is based on the following format: Outline what happened (brief statement of the whole facts), explain what happened through witnesses and documents (evidence), and summarize what happened (summation). This format follows the rule of persuasion: "Tell them what you are going to tell them, tell them, and tell them what you have told them."

D. Visual Senses

Studies indicate that individuals remember a much larger percent of what they both see and hear compared to what they just hear. The use of visual aids and trial exhibits increases the likelihood that the fact finder will recall and understand specific

evidence.

E. Impact Words

Individuals react to words that are used to describe an event. Descriptive words emphasizing specific facts of a case create more vivid images of an event than non descriptive words. Descriptive language includes impact words that graphically describe a situation, such as "smashed" instead of "hit," "huge" instead of "large," "shrieked" instead of "yelled." These impact words affect the fact finder's perception of what happened and are usually more easily remembered by the fact finder.

For example, in an automobile accident case, when the accident is described merely as a "collision," this neutral term will not create a specific image of the accident and the extent of liability and significant damages may be less likely. When the accident is described as a "violent crash," there is created a more graphic image of the accident and liability and a greater likelihood of high damages.

Impact words should be selected to accurately convey what happened. Impact words should be factually descriptive, not exaggerated conclusions unsupported by the evidence.

Thesauruses, dictionaries, work of literature, and action comic books may serve as sources of such words and phrases.

F. Images

Individuals learn and understand by forming images in their minds. When fact finders hear a word or listen to a description of an event, they visualize images based on what they have heard. The goal of the attorney is to use words and descriptions that create images that accurately and vividly describe the story the attorney is telling.

For example, when an attorney says the word "chair" to a fact finder, the judge draws a mental image of a chair. That image might be of a wooden chair, a padded chair, a rocking chair, a desk chair, or a plastic chair. The trial attorney must make certain that the actual chair involved in the case is the image the fact finders picture in their minds. The more vital the details of this chair are to the case, the more precise the attorney must be in presenting details that give an accurate picture.

As another example, when an attorney asks Jude to assess damages for pain and suffering, the attorney must use words that make the judge feel the pain and suffering. Witnesses should not merely say they had a headache, but that it felt as if someone was inside their head pounding with a hammer. Witnesses should not merely say that their leg was cut by a saw, but that they felt the intense, burning pain of that hot metal slicing through their flesh.

G. Imagination

The images created in the fact finders' minds may be clear or hazy, complete or incomplete. An ideally communicated image should involve the senses, including sight, hearing, touch, and smell, and should focus on all details of an event. This, however, is impossible at trial because everything cannot be completely recreated. The fact finder must use imagination to fill in the details of what happened. The

attorney must make the critical images as realistic and complete as possible to enable the fact finder to imagine the event as vividly and accurately as possible.

H. Active Involvement of the Fact Finder

A fact finder who becomes mentally and emotionally involved in a case is more likely to be interested in the case and more likely to remember evidence. The goal of the trial attorney is to present the events in such a way that the fact finders think they are a part of the case, perceive they are observing what actually happened in the past, and feel the emotions of the situation. The more successfully the attorney can meet this goal, the more likely the fact finder will believe and accept what the witnesses tell them.

L. Storytelling Techniques

Effective storytelling techniques are useful to successful trial attorneys. Techniques employed in literature, from fairytales and cartoons to classic plays, may be adapted to the trial setting. One technique is the initial creation of an image to gain attention. Stories often begin with "It was a dark and stormy night" for a reason. Good story tellers immediately draw the reader into the story and maintain the reader's attention throughout. Another storytelling technique frequently used in trials is adapted from the theatre: the playwright first establishes the circumstances of time and place, introduces the protagonists, develops the problem, and then presents solutions to the problem. This technique may be useful in opening statements and final argument, and in deciding the order in which witnesses will testify.

J. Understandable Language

Clarity of expression is critical. The words an attorney chooses help or hinder the understanding of the fact finder. Simple and clear language is preferable to complex legalese. Large words used only to show off vocabulary skills turn off the jury. Overly simplistic words and explanations sound condescending. The attorney must balance the use of simple, understandable language with the depiction of a credible, memorable story. For example, extensive employment of multi- syllabic verbiage merely in an effort to flaunt superior linguistic proficiency serves only to alienate the recipients of such apparent arrogance.

K. Simple Explanations

The more straightforward and less convoluted an explanation, the more likely it will be accepted as true. The trial attorney should provide the fact finder with as simple and credible an explanation of what happened as possible. This type of presentation fulfils the need of many judges looking for a reasonable, straightforward answer to explain a case, even when the case is difficult and complex. A trial attorney who is unable to satisfy these expectations may be unsuccessful. Unfortunately, lawyers are not always trained to develop simple explanations, but are often taught in law school to present complicated explanations of both sides of a case. For example, in analyzing a criminal case, a criminal defense lawyer could argue that the defendant was not present at the armed robbery, or if the defendant was present, the defendant was not holding a gun, or if the defendant was holding a gun, it was used in self-defense. These possible explanations may generate a high grade in a law school

exam, but will only convince a fact finder of the defendant's guilt. The selection of a simple and reasonable explanation is usually more effective than the use of complicated, alternative explanations.

L. Avoiding Contradictions

The theory of a case must be explained in a cohesive and integral manner. The trial advocate must avoid presenting contradictory positions. The possible argument that the defendant was not at the scene of the crime, but if he was there he was acting in self-defense is contradictory and ineffective. No fact finder would believe either explanation. Who would? Some situations require a presentation of alternative explanations during the trial. These presentations are most effective if they are not described as contradictory positions. One way of avoiding making contradictory statements is to avoid using the words "but" or "however" or the phrase "even if." These terms may unintentionally concede the validity of the other side's explanation. It is better to affirmatively state a position and then add another explanation, using such terms as "moreover" or "further." For example, in an automobile accident case, the plaintiff may contend that she was hit in the crosswalk while the defendant contends that she was hit outside the crosswalk. There are various ways the plaintiff's attorney could explain this apparent contradiction to the jury. Plaintiff's counsel could argue that plaintiff was in the crosswalk when she was hit, or if she wasn't in the crosswalk, she was hit negligently by the defendant outside the crosswalk. A more effective explanation to avoid this contradictory statement would be: "The defendant negligently struck plaintiff where she was walking; moreover, we will prove that she was walking in the crosswalk."

M. Developing Interest

The presentation of a case must be made interesting by the trial attorney to hold the attention and mould the decision of the judge. Some cases are interesting by their very nature, and interesting

facts aid an attorney in maintaining attention. For example, a wrongful death or murder case is usually dramatic. Other cases, such as those involving commercial litigation and real estate are not nearly as exciting. The trial attorney's task in such cases is to make the evidence intriguing. For example, every commercial litigation case is about people making business decisions. The trial advocate must present these people and these decisions in as stimulating a way as possible. As another example, every real estate case involves a unique piece of property. The trial advocate might be able to establish the special value of this property to increase the interest level of the case.

However uninteresting the facts may initially seem, the trial advocate must create and develop as much interest as possible so the fact finder will be more likely to understand and remember the facts and less likely to be bored and unimpressed. Every case involves some matters that can be made interesting. The trial attorney who can develop interest in an otherwise unexciting case greatly increases the chances of winning.

N. Attention Span

Audiences, including judges, as well as the readers of this book, have limited attention spans. A case must be presented in a way to maximize the attention span of the fact finders and must avoid presenting information the fact finder cannot absorb. Attention spans can be increased if the presentation is interesting, dramatic, reasonably paced, and otherwise well presented. Judges and jurors take their duties seriously and attempt to pay close attention to everything that happens in the courtroom. The length of an opening statement, witness examination, or summation must be based not only on what must be said, but on the fact finder's likely attention span. Not all judges have the same attention span. The trial attorney must be sensitive and observe the judge and make certain that they are paying sufficient attention to what is going on.

0. Developing Emotions and Reactions

A trial attorney may be able to use the emotions inherent in a case as an actor relies on the emotions inherent in a play. An actor does not become the source of an emotional catharsis; it is the re-enactment of an event that creates cathartic reactions in the audience. A good actor leads the audience to the threshold of emotion, and the culmination of that emotion is felt by the audience.

In a trial setting, a good lawyer tries to create an atmosphere in which the judges are affected by emotions at the right time. In a wrongful death case, the plaintiff's lawyer wants the jurors to feel grief in such a way that their compassion favourably affects their judgment during deliberations. A good plaintiff's lawyer wants to see teardrop stains on the verdict form, not just tears in the courtroom.

P. Establishing Realism

A successful play or movie captures the audience so they forget they are at a play or watching a movie. A poorly presented dramatic act makes the audience aware of what they are watching and anxious for the end of the make-believe story. The goal of a trial lawyer parallels that of the playwright and director. The trial lawyer wants the fact finders to forget they are jurors and a judge at a trial, but instead believe they are observers at an event unfolding before them. If they remain aware that the event is only a trial and that the attorneys are acting like lawyers, then they may be more distracted by the process and less involved in the story.

Q. Identification with Fact Finder

Judges and jurors are more likely to believe a witness or favour a party if they can identify with that individual. Perceiving similarities between themselves and the witness or party helps form this identification. Fact finders may not consciously disbelieve a witness because they do not identify with that witness, but usually the more a witness or party has in common with a fact finder, the more likely the fact finder will identify with and believe that person. Background information that establishes similarities between the witness and the fact finders should be emphasized. Specific examples of similarities should be described during the direct examination of the witness. The questions should not be so numerous or obvious, however, that the fact finders perceive that the witness is artificially being portrayed to be like them.

IV – ELEMENTS OF ADVOCACY

There are a variety of approaches to trying a case. These variations reflect the difference in opinions among trial lawyers regarding aspects of the trial process. This section describes some of these approaches regarding important elements of a case presentation. Trial lawyers must form their own individual position regarding these varying approaches and apply them as needed or appropriate in each case.

A. The Persuasive Advocate

Many trial lawyers believe that advocacy requires them to convince the judge or jury of the correctness and righteousness of their client's position by attempting to "sell" the position to the judge or jury. Typically, these advocates ask the judge or jurors to find "in favour of" or "for" or "on behalf of their client. The underlying premise is that the advocate's client deserves a certain result because the advocate has convinced the judge the client is entitled to win. This approach places a burden on the advocate to convince the fact finders to believe and accept the arguments advanced by the advocate.

Another view of the advocate's role is that the advocate provides the judge and jury with information which would lead reasonable people to come to but one conclusion. This approach does not require that the attorney usurp the judge or jury's function by telling or convincing the judge or jurors how they must decide a case. The burden remains on the judge or jury to reach a decision based on the facts, the law, and justice. Rather than attempt to cajole, sell, or otherwise convince the fact finders, the attorney simply says "here are the facts, here is the law, and the result you should reach is clear."

These two approaches reflect opposing views of the advocate's role. An approach that combines the benefits of both approaches may be most effective. The benefit of the first adversarial approach is that it can result in a very persuasive and compelling presentation. The disadvantage of the first approach is that the trial attorney may appear to be inappropriately biased, partisan, and manipulative. The benefit of the second advocacy approach is that the fact finders reach their own conclusion based on the information the attorney presents to them. The disadvantage is that the attorney may appear to be uncertain and unsure. The trial attorney should assume the most effective approach for each case.

B. Involvement of Advocate

The degree to which advocates should involve themselves in cases is a matter of disagreement among trial lawyers. Some argue that attorneys should not emphasize their professional beliefs during the trial, while others argue that it is critical to establish this professional belief. Trial attorneys who suggest that the display of involvement is necessary say

things like "I will prove to you" and "I will introduce evidence to convince you of these facts." Trial lawyers who suggest that their involvement should be diminished use phrases during the trial before the judge, such as "you will hear evidence and you will conclude..."

These two positions do share common principles and may differ only in the

emphasis placed upon them. The judge must be given the impression that the advocate believes in the client and the case presented. The judge is unlikely to find in favour of a client whose lawyer expresses doubts about whether that client should win.

How lawyers express their belief in a case may be a matter of approach and style. Some lawyers may need to become more professionally involved in the presentation of the case to demonstrate this appearance. They may say things like: "We believe the evidence will show" and "We will prove." Other attorneys may be able to create this appearance by being less actively involved. They may tell a story which is of itself compelling and persuasive. Whichever approach is taken, trial advocates must be confident and sure of the validity of their clients' positions and not be equivocal or uncertain. Some jurors rely upon the attorney's judgment in deciding a case. These jurors will be adversely influenced by an attorney who does not appear to support the client's position.

C. The Objective Partisan

The trial attorney has a dual nature. A trial lawyer is both a partisan and an objective participant in the trial. The lawyer as a partisan needs to present selective evidence to the fact finder and zealously argue for the client's position. The attorney as an objective participant must appear to present evidence in an objective way and provide reasonable explanations. If the judge perceive that a lawyer is too partisan, they will be less likely to believe that lawyer. Likewise, if the judge and jurors perceive that a lawyer is too objective, then they may be less influenced because the lawyer does not advocate a position. Successful trial lawyers are aware of this dual role and attempt to balance their position and be an "objective partisan" during the trial.

D. The Trusting Appearance of the Advocate

The trial advocate must be perceived by the jurors as being sincere, honest, and trustworthy. Many trial advocates suggest that the attorneys forget they are lawyers during a trial. They advise not to sound or talk like a lawyer lest the jurors focus on the role as a "hired gun." Some jurors view the lawyer as biased from the outset and distrust anything that the lawyer says. But this is true for the lawyers on both sides. The attorney who appears most sincere, honest and trustworthy will have a greater chance for success in the trial.

E. Open-Mindedness of Jurors and Judge

It is difficult, if not impossible, for the judge to have a completely open mind at the beginning of or during a trial. Many trial advocates believe that no judge ever has a completely open mind and present their case based on this premise. All fact finders have some biases and prejudices, and some of the judges will be partial to one side or the other. The decision-making processes of judges and jurors parallel other decision-making processes in life. Many individuals make decisions without complete information. Many people form initial impressions or develop opinions and make decisions based on those initial impressions and opinions. Many people make up their minds early and are reluctant to change positions. The trial advocate must take these dynamics of human decision-making into account.

At the early stages of the trial, each juror and the judge begins forming impressions about the case, about the attorneys, and about the parties. The notion that judges and jurors impartially absorb information during a trial and then wait carefully to decide a case is largely inaccurate. Many fact finders selectively listen for evidence that supports their initial inclination or position. They listen for, believe, and remember evidence that supports their position. Evidence that does not support their position is rejected, disbelieved, rationalized, forgotten, or not even heard. Many judges and jurors make up their minds well before the closing argument and advance reasons during jury deliberations to justify their conclusions.

The degree to which these initial impressions develop into a firm opinion varies among fact finders. The impression may turn into an opinion, which may turn into a firm opinion, which may turn into a final position. The nature of the decision-making process also varies. Each judge forms some impressions, has some inclination, and develops a position; usually well before the end of the trial.

The lack of open-mindedness on the part of the fact finders affects the way a trial advocate presents a case. Because jurors and judges begin to form some impressions early in a case, the trial lawyer must provide them with information early enough in the case to shape their views and gain their support. It is much more difficult to change someone's mind once it is made up or to alter an opinion once it is formed. If there is any doubt about this truism, read Supreme Court decisions. The longer the time passes in a trial and the surer a judge becomes, the more difficult it is to change that individual's position. The goal of the trial advocate is to provide the information and reasons sufficient for the judge to want to find for the advocate's client early in a case, and then to continue to provide information and reasons to support that decision during the trial.

F. Memories of Witnesses

In preparing a case, a trial attorney must determine the degree to which each witness has an accurate recollection of an event. Regardless of what witnesses say they remember, the attorney must assess the credibility of witnesses and the plausibility of their stories. There exists a range of opinion among trial lawyers regarding people's ability to remember. Some advocates suggest that witnesses remember very little, if anything at all. These advocates suggest that witnesses draw on the few recollections they have, collect evidence from other sources (such as other individuals or documents) and use the law of probability to form a recollection. Other lawyers believe that witnesses are able to draw upon the resources of their memory and accurately recall things that happened in the past. All these advocates may be correct. The answer may depend upon the witness, the ability of that individual to perceive and remember the event, and the impact the event had upon the witness. The degree of accuracy often depends upon whether the witness had any reason or expectation to perceive or recall an event.

Cases which arise from situations that the parties did not expect to be litigated may result in less complete and less accurate recollections by witnesses. For example, in a typical automobile accident case, the parties do not expect or anticipate being involved in an accident and have little reason to focus on the events that occur

before an accident. Accordingly, there is no reason for them to concentrate on remembering their speed, distances, or the traffic situation. After the accident, however, witnesses to the event may pay close attention to what is said or how people act because they may expect to be called on to give a statement. Accordingly, it is more likely that the later part of their stories will be more complete and accurate. In a criminal

case, the victim of a crime may or may not have good reasons to be able to identify the defendant. Some victims are so scared or frightened during the crime that they are unable to look at the criminal, while other victims may want to get a good look so they can later help catch the criminal. All victims will be asked by the police for a description of the criminal, and the degree of accuracy of this description depends upon how the witness reacted during the crime.

Our adversarial system presumes that witnesses remember significant details and can describe them during their direct examination. The system relies on cross-examination as a means of testing the accuracy and reliability of a story. Psychology studies show that most witnesses add details that they did not perceive and that they do not actually recall. This "filling in the details" phenomenon is often done unconsciously and without the witness intending to exaggerate or lie. Some witnesses, however, intentionally add favourable information without the attorney's knowledge. Regardless of the psychological processes affecting the perception and recollection of a witness, and the hidden agenda of a witness, trial attorneys must nevertheless present witnesses along with their good faith stories to the fact finder and challenge adverse witnesses on cross-examination.

G. Displaying a Relationship with a Client

The nature of the case and the kind of client dictate what relationship should be displayed between an attorney and client during the trial. If the fact finder is likely to perceive the client as a credible or a good person, the trial advocate should display a close relationship with the client by being seen with the client, talking with the client, and appearing to like the client. In cases in which the fact finder may not identify with or like a client, trial lawyers disagree as to the relationship they should establish in front of the judge. Some lawyers believe that they should distance themselves from this kind of client as much as possible, fearing that the appearance of a close relationship with such a client will hurt the attorney's standing in the eyes of the fact finder. Other lawyers believe that such a client needs visible support from the attorney during a trial. They fear the opposite reaction from the judge, who may not support the client because it appears that the client's own attorney wants nothing to do with the client. An attorney must decide the kind of relationship with the client the attorney wants to display during the trial.

H. Personal Embarrassments

Inevitably, trial lawyers make mistakes and errors of judgment. The attorney's reactions to these situations increases or decreases the chances of winning. When we make mistakes, we are naturally inclined to think about ourselves first and what the judge will think about us and then find a scapegoat for our errors. When we learn about some surprise information at the beginning of a trial, we may want to blame

our client for not telling us about this information rather than ourselves for not properly discovering it. When we ask an awkward question during jury selection, we may want to blame the judge for refusing to ask such a question instead of blaming ourselves for not properly asking it. When the witness makes a misstatement on the stand, we may be inclined to shift the blame to the witness rather than have the judge think we did not properly prepare the witness. These reactions are natural and normal, but they must be avoided by the professional trial attorney.

There is no place for a trial attorney to be concerned about personal embarrassments during the trial. The trial advocate should not embarrass the client or undercut the client's position. The trial attorney should usually assume responsibility for the mistake or error, take the blame, and move on as quickly as possible. In other words, *mea culpa*.

V – METHODS OF EFFECTIVE PRESENTATION

Much is written and said about trial advocacy being an art dependent upon an advocate's intuition and talent. Some trial lawyers have substantial natural talent while other lawyers have less talent and need to work harder and rehearse more. All trial lawyers have some talent and capabilities that they can develop and enhance to make them effective advocates. There are techniques which can be employed to make a lawyer more effective and persuasive. Methodical planning, thorough preparation, and intense practice can make most any lawyer a competent and skilled advocate. This section describes some general principles of effective communication skills.

A. A Good Person

A principle of rhetoric is that an effective orator is a "good person who speaks well." Similarly, an effective trial advocate must be a person who displays good sense, good will, and good character and who presents the case well.

B. Confidence

The trial attorney must appear confident, in control of the case, and in command of the courtroom. Thorough preparation develops the necessary confidence, and an effective presentation allows the attorney to remain in control. Successful trial advocates view the courtroom as "their" courtroom, where they present their client's case. They understand the courtroom is a public place and not the provincial territory of either the judge or opposing counsel. Trial advocates must be as comfortable as possible in "their" courtroom surroundings.

C. Speaking

In preparing a speech, effective speakers do not focus on all of the specific words they are to deliver but on the ideas and images they wish to express and evoke. A speech which is simply read from a prepared text is rarely interesting. Similarly, a memorized speech, where the speaker merely recites words rather than explaining ideas or evoking images, is also unpersuasive. The most successful approach is to focus on the ideas that need to be expressed and explained, practice out loud, and then present the ideas using specific words when needed for impact.

D. Eye Contact

Eye contact is critical to establishing credibility and persuasion. Looking judges in the eyes while talking substantially increases the impact of what is being said. The lack of eye contact causes the judge to doubt the attorney's sincerity, or, at best, causes them to lose interest in what the attorney is saying. Although staring at a judge will undoubtedly make that person uncomfortable and adversely affect the attorney's rapport with the individual, the attorney must make periodic eye contact with the decision makers.

Advocates must speak with their heads up and avoid the extensive use of notes which prevent them from maintaining sufficient eye contact. Some advocates get nervous and lose their concentration while looking a judge directly in the eyes. An effective way to look at someone to prevent this reaction is to focus on the bridge of the person's nose rather than the pupils of the person's eyes. The speaker avoids the intensity of eye contact, while the listener perceives that the speaker is looking at the listener.

E. Body Language

Body language is a significant part of the trial attorney's communication process. The key to effective body language is congruence, that is, the body language of the attorney should match what the attorney says or communicates. An attorney whose body language evidences lack of confidence or uncertainty is unable to be persuasive. An attorney who stands in awkward positions or who slouches in a chair or whose posture appears indifferent may display an inattentive and uncaring attitude. Trial attorneys must be constantly conscious of how they stand and how they sit and the position of their bodies because they always are on view in front of the judge and jurors. Excessive body movement, crossed arms or ankles, or inappropriate movement may interfere with communication. Successful trial lawyers make sure that their body language is consistent with the message they are communicating.

F. Gestures

Good speakers employ gestures to make a presentation more effective. An attorney should incorporate appropriate gestures into a presentation. Steady hands and controlled arm movements help develop an appearance of confidence and make a presentation more interesting. The lack of any gestures, jerky hand movements, or wild waving of the arms need to be avoided. Gestures should be natural, firm, and purposeful.

G. Appearance

The attorney's appearance is an important consideration throughout the trial. A speaker's appearance often affects the listener's perceptions of that person. An attorney who is well- groomed usually appears more professional and credible to the judge. The attorney's appearance should be consistent with the personality and approach of the attorney. Counsel should dress comfortably, in a manner that suits their taste and that conforms that the customs or rules of decorum established or promulgated in a jurisdiction. Many attorneys dress according to a standard they believe is expected of them by the judge. Other attorneys dress according to the view they want the judge to have of them. Some attorneys prefer to wear a distinctive piece of clothing during a trial to help the judge remember and identify the attorney.

The dress of an attorney should not become an issue that detracts attention from the client's case. Attorneys may have to put aside personal tastes and conform their dress to the standards of a community or Judge so as to safeguard and promote the best interests of a client. If the Judge is bothered by or unnecessarily talk about an item of clothing or Jewellery worn by an attorney, then that item may be inappropriate.

H. Vocal Tone and Pace

The tone, volume, modulation, and pace of an attorney's deliver affect the listening capabilities of the judge. A dull, mono tone presentation is as ineffective as a loud, boisterous approach. A balanced and well-modulated approach is usually most effective. Sometimes the best thing an attorney can say is nothing. This technique comes in handy sometimes, especially when the attorney's mind goes blank. Silence can be an effective way to highlight a point, to gain attention, or to create a transition. A trial attorney must learn to tolerate appropriate silence in the courtroom and to use it constructively.

VI – ETHICS

The process of becoming a trial lawyer includes an understanding of and adherence to ethical norms. Trial lawyers must adopt and follow ethical standards. Each trial lawyer must reflect on, wrestle with, and come to an understanding of the values, norms, and ethics that should be

preserved and that shape the judgment and conduct of the advocate. All trial advocates are members of a community consisting of clients, colleagues, opponents, judicial officers, and the public. Each trial lawyer is not only a lawyer but also a person, guided not only by professional or legal ethics but also by individual and community concerns and values. This section specifically describes the shaping of ethical guidelines formed by decision makers within the adversary system, constraints within the system, and professional rules of conduct and behaviour.

A. Sources of Decision-Making Power

Attorneys do not have power to control the fates of parties, but attorneys can influence the source of such power. It is the ability of the attorney to persuade the jury and convince the judge to remedy a wrong that activates the power within the adversary system. A jury's verdict determines a criminal defendant's liberty and determines what money damages a civil plaintiff is entitled to. A judge's decision can enforce constitutionally protected rights, enjoin corporations from in- fringing on contractual rights of individuals, and order the government to spend millions of dollars. These enormous powers are unleashed depending upon an attorney's preparation and presentation of a case.

Attorneys influence the results of a case by selecting the theories to be advanced, the evidence to be introduced, and the law to be explained. Attorneys shape the evidence the jurors see and hear by presenting it in a certain perspective and by explaining its significance. Attorneys also shape the law that applies to the facts by choosing claims and defences to assert and by explaining the effect of these laws on the facts. Trial attorneys must wield such power only for good reasons, not

for evil purposes, and, of course, always to protect Gotham City.

B. Constraints

Clients have limited resources. The lack of sufficient funds makes it impossible to do everything that could be done in a case. Many cases do not justify significant monetary expenditures. The client, the case, or both, limit what should be done to completely prepare and present a case. The trial lawyer must work within these limitations to do the best possible job. Lawyers have only limited available time. Even now, imagine what you would rather be doing. Enough of that. The time that an attorney can devote to a case is limited by the fee charged, professional hours available, and the lawyer's life outside the practice of law. Trial attorneys must decide what takes priority in specific cases, in the law practice in general, and in their personal lives.

C. Professional Rules of Conduct

The rules of professional conduct and state ethical rules provide both a set of disciplinary rules and guidelines for advocates. Some of the rules deal with the external, objective conduct of an attorney. Many rules deal with internal, subjective thinking of the lawyer. It is often difficult to apply these rules and guidelines to litigation cases where there are two or more versions of what happened, to opponents who may dislike each other, and to trial advocates who are skilled at creating plausible explanations and portraying questionable behaviour as legitimate. Attorneys must develop an internal code of ethics and constantly monitor their own conduct to determine whether it complies with the norms of the profession and their own ethical norms.

Every state has rules that establish standards and impose restraints on a lawyer's behaviour. The Rules of Professional Conduct (Model Rules) have been adopted by about half of the states with major modifications in some states. The other states have rules based, to varying

degrees, on the Code of Professional Responsibility. These varying rules attempt to codify norms which reflect the collective views and values of lawyers. State rules of procedure, case law, and local customs and traditions also regulate the conduct of trial lawyers. In India, the professional ethics of the Advocates are governed by the Bar Council Acts/ Rules.