# TALES FROM THE DARK SIDE

by George M. Walker

As a career-long defense lawyer, I have found myself only rarely and sporadically on the plaintiff's side at trial. For the past two and a half years, however, I have been on temporary partial reassignment to the dark side, representing a number of plaintiffs in trials involving fraud in the sales of life insurance policies. I have now obtained my parole back to the defense bar full time, but as I reflected on my experiences as a dark sider, it occurred to me that it is easier to evaluate the things defense lawyers do when you are sitting at the other counsel table. And it also occurred to me that some of those things are unfavorable, and stand in the way of properly persuading the jury on the correctness of our cause.

For brevity's sake, I have identified five things that I observed from the dark side that I believe get in the way of, or actually obstruct, the proper presentation of the defense case. These are things that we all see in trials all the time, but perhaps we have not fully evaluated the jury effect of our conduct. That conduct is more easily evaluated from the other table, and having had the opportunity to view us from the other table, I felt constrained to pass along my observations.

The five areas of observation involve demonstrative evidence, language, speaking objections, references to opposing counsel in closing arguments, and use

of deposition testimony. My experiences at the table of plaintiff's counsel recently suggest to me that we could all benefit from more thought on these issues.

**Demonstrative Evidence.**

There has been a great amount of talk recently about demonstrative evidence. Continuing Legal Education Programs have extolled the virtues of demonstrative evidence, and exemplars of such evidence have been shipped around the country for review, comment and, of course, copying. Books and articles have been written on the subject, and companies have been formed whose only functions are to conceptualize and to produce demonstrative evidence. The conventional wisdom has been that such evidence can turn the tide of a case because jurors remember far better what they are shown than what they are told.

Unfortunately, such evidence is not tide-turning in every case, and can have quite the opposite effect if not carefully thought out, carefully created, and carefully used. This is particularly true of demonstrative evidence in cases involving individual plaintiffs against corporate defendants. Great care must be taken so that the demonstrative evidence does not reinforce in the eyes of the jury the economic disparity between plaintiff and defendant.

The risk of this was brought home to me recently in a trial in which plaintiffs contended that the defendant insurance carrier's agent had fraudulently suppressed material facts about the whole life insurance policies sold to plaintiffs. The

defendant insurance company had hired a demonstrative evidence firm to prepare blow-ups and it had created some very professional, and very large, exhibits. While the blow-ups were designed to, and did, accurately demonstrate that certain information had been conveyed to the plaintiffs in their policies and in other materials, the jury saw something quite different.

First, the fact that the defendant needed a large blow-up of the policy language dramatically undercut to its contention throughout the trial that the policy language was clear, understandable, and not misleading. Several jurors wondered why, if the information was so clear and so obvious, the defendant needed to blow it up to persuade them. Second, the obvious expense associated with the blow-ups reinforced for the jury the economic differences between the parties.

The lessons from this are that demonstrative evidence must be carefully thought out; it must be designed to make clear that which is not so clear; it must be designed to do so without raising additional questions in the minds of the jurors; it must be designed to do so without affording the opposition an opportunity to utilize the evidence against the defendant offering it; and it must be produced or presented in such a fashion that the jury is not too strongly reminded of the economic differences between plaintiff and defendant. The bottom line is that decisions regarding demonstrative evidence, like all other decisions made in the course of trial preparation, need to be made very carefully and very thoughtfully. Consultants are great to have, and their advice is extremely valuable, but it is your case, you have

to decide how the evidence is to be presented, and you and your client will be the ones paying the price for bad choices.

**Language.**

Lawyers are among the greatest expositors of careless language, and defense lawyers are not immune to the disease. It is not the blatantly erroneous statement of which I speak but, rather, the poor choice of words in statements or questions before the jury that erode the quality of the presentation. Some examples that I heard from across the courtroom are instructive.

*"My client".* How warm and ingratiating is that? Plaintiff's counsel has just spoken with the jury about the horrible fate that has befallen John or Sam or Betty, and the defense lawyer starts talking about his "client." It reinforces unwanted distinctions between the parties and it conjures up for the jury views of the defense lawyer as a hired gun, not there to pursue truth or justice but, instead, to represent a client. Humanize your client, or pay a serious price.

*"Did there come a time . . .?"* My last English course is too far behind me to explain exactly what is wrong with this question (or preface to a question), but I know it is bad. It is uttered in the passive voice, and it seeks to imbue time with a mobility that it is not known to possess. Yet, time and again (!), I have heard

defense lawyers start their questions with this preface.[1] The next time you feel the urge to do so, try these: "Did you ever . . .?", or "Did it ever . . .?", or "Was it ever . . .?", or even "Were you ever . . .?". The jury will be happy to return its focus to the answer, instead of trying to understand or decipher the question, and your examination will flow much more freely.

*"Is it my understanding . . .?"* I recognize this as a misworded effort to copy Perry Mason, who often prefaced his questions with the query "Is my understanding correct that . . .". The jury will likely not recognize it as such, and will wonder why the lawyer needs the witness to tell him what the lawyer's own understanding is or may be. As with the previous problem, sometimes lawyers' language suggests that the lawyer is being paid by the word. Spend some of your trial preparation time simplifying your language; your witnesses and your jury will appreciate it, and your stature in the eyes of the jury will likely be enhanced.

*"You must . . ."* The last item of defense lawyer language that I observed on my dark side odyssey consisted of defense lawyers telling the jurors, in opening statement or closing argument, what they "must" do. Besides being exceedingly presumptuous, it struck me as being horribly discourteous to the jurors. To tell a juror that he or she must return a verdict in favor of the defendant virtually begs that juror to try to come up with some reason not to do so. Instead of telling the jury

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[1]Plaintiff lawyers seem immune to this verbal phenomenon, but I have not yet convinced myself that it is not contagious.

what it "must" do, why not ask the jury to return a just verdict and spend your time emphasizing and explaining what a just verdict would be in your case. It is a small change in the language, but it may have a major effect on the perception of your jurors.

There are a number of other lawyer language items that I observed on my dark side tour, but the foregoing were the most prevalent and, in my view, the most harmful. I hope that I have not described any of your customary language in the preceding paragraphs. If I have, then I hope that you will give some thought to the role that lawyer language plays in the trial of a case, and that you will seek to upgrade your language for your future trials.

**Speaking objections.**

This problem is not so much indigenous to defense lawyers as it is to all lawyers who, for whatever reason, feel the need to seek some trial advantage to which they are not entitled. I include reference to it here because I observed much of it on my recent dark side tour. It really is simply a matter of resisting temptation. We are permitted -- indeed, required -- to lodge an objection to any question that seeks the introduction of illegal evidence. Other than during the opening statement and closing argument, this is the only time during the trial that a lawyer is permitted to say anything in other than the form of a question. The temptation, irresistible to many, is to use the opportunity furnished by the right to object to include references to favorable evidence, to favorable witnesses, and to any other matter that is wished

to be revisited upon or reinforced to the jury. This practice is palpably improper, and likely unethical, but it happens every day as lawyers rising to object to the introduction of illegal evidence are unable to resist the temptation. The goal, obviously, is to curry some favor with the jury by emphasizing favorable evidence or witnesses. Does it work? Probably not. Think about the effect of such conduct on the two primary recipients of the speaking objection - - the Judge and the jury.

I have not performed a survey, but I suspect that most trial court judges deeply resent speaking objections. Such objections amount to unauthorized argument, at a point in time when the Judge is obligated to make an evidentiary ruling. Such objections result in unauthorized and unfair emphasis upon the testimony referenced in the speaking objection, making more difficult the trial court's responsibility to insure that all parties receive a fair trial. It would be very difficult for a trial judge not to suspect some weakness in the case of a party whose counsel repeatedly engages in speaking objections, and I cannot help but believe that such a suspicion will translate into diminished credibility as the trial progresses. While the speaking objector may score some marginal points by reinforcing or reiterating evidence for the jury, he or she probably does so at great credibility expense with the trial judge.

And don't assume that such speaking objections will actually result in any jury benefit. Jurors are increasingly more sophisticated these days, and many recognize it when a lawyer engages in unfair conduct in an effort to obtain some undeserved

benefit. In such a case, the offending lawyer also loses credibility with the jury, and the loss of lawyer credibility is one problem from which there is generally no recovery at trial. If we remember that every time we open our mouths during trial we are placing our credibility on the line with the jury, we will all likely be a great deal more resistant to the urge to present speaking objections to try to improperly influence the jury.

**References to Opposing Counsel in Closing Argument.**

More and more recently, I have seen defense lawyers take it upon themselves to attack plaintiff's counsel during closing argument. This is not the sole province of the defense lawyer, but it is a much bigger mistake on the part of a defense lawyer than it is on the part of a plaintiff's lawyer.

When did this get to be a good idea? Why? What possible benefit can a defense lawyer hope to obtain by making personal attacks on plaintiff's counsel at any time during the trial? Think about it. The jury sees and hears the defense lawyer spend his time attacking or demeaning the other side's lawyer, instead of talking about the other side's evidence, his or her own evidence, or the law. The only rational conclusion, one sure to be reinforced by plaintiff's counsel in rebuttal, is that the defendant has the low side of the facts or the law, or both, and thus has resorted to a personal attack on plaintiff's counsel to distract the jury. The jury will not likely be distracted by such personal attacks, and the defense lawyer will suffer a substantial credibility loss because of this. You absolutely cannot win a defense

verdict by asking the jury to hate the plaintiff's attorney. If plaintiff's attorney has done that bad a job, or if the cause is that frivolous, let the jurors come to hate the attorney on their own.

Also, beware of resourceful plaintiff's attorneys who will seek to induce you into a personal attack against them in closing argument. They may do so by initiating an attack on you, but remember that they get the last word and resist the impulse to respond in kind. Instead, express regret that your opposition felt the need to personally attack you when the dispute is really between the parties, and explain to the jury that, if the facts and the law supported your opponent's case, he would have talked about those facts or that law instead of about you. Then tell the jury about those facts and the law, and they will be impressed with your ability to not respond in kind and with your ability to discuss the real issues of the case.

Zealous advocacy on the part of one's client does not require a defense lawyer to be anything less than courteous to plaintiff's counsel, and be very aware that the jury observes and reacts to how we treat one another. Again, the best way to increase your store of credibility with the jury is to consistently act in a professional manner and to consistently treat everyone in the courtroom professionally. If you have done that throughout the trial, then when you suggest to the jury what a just verdict would be in the case, your words will carry substantial weight with the jury.

**Misuse of Deposition Testimony.**

I thought that I knew how to use a deposition at trial until I had the opportunity to observe a couple of defense lawyers mystify the jury for about fifteen minutes. The mystery to the jury was what exactly it was that defense counsel was attempting to do. I am now more certain than ever that I am doing it right.

There is one way - - and one way alone - - to impeach a witness with a prior inconsistent statement in a deposition transcript. You establish the foundation for the introduction of the deposition testimony by having the witness confirm that his deposition was taken on the date in question, that he or she was under oath at the time, and that the transcript appears to be the transcript of such testimony. Then, and only then, you should read the question(s) and answer(s) with which you wish to impeach the witness, and ask the witness whether he/she gave those answers to those questions under oath: "Were you asked that question and did you give that answer in your deposition?" There is no wiggle room. If he admits it, you have impeached him. If he denies it, offer the portion of the deposition transcript into evidence, and he has impeached himself.

Do not ask the witness if he remembers testifying to certain facts in his deposition. In the first place, whether he remembers giving certain testimony in his deposition is probably irrelevant in your case, unless the witnesses' recall of such details is somehow in issue. In the second place, whether he answers yes or no, you haven't advanced your case. If he answers yes, you have weakly impeached

him, but the jury probably cannot tell. If he answers no, then you will have to impeach him with the deposition anyway, so you will have introduced an unnecessary step. Finally, jurors may well question your fairness in questioning the witness about something you are reading but he is not. So resist at all costs the impulse to impugn the witness' memory by such questioning.

Also, do not let the witness read any part of the deposition transcript aloud for the jury. He will read the wrong portion, he will read the right portion wrong, and/or he will add or delete emphasis that hurts your impeachment. Again, the jury may not recognize it as impeachment by the time he gets through. If you want the jury to be impressed with the impeachment, limit the witness' role to agreeing with you.

**Conclusion**

Make no mistake about it, the defense lawyers I encountered on my dark side tour were highly qualified, capable, and competent. That is why some of the items identified above struck me. If defense lawyers of this caliber are doing things that interfere with or obstruct the proper presentation of the defense case, then I cannot help but believe that some of these items may be infecting trial presentations of a multitude of defense lawyers. I hope that some of the foregoing thoughts cause you to ponder more deeply the manner in which you present your cases to juries. If we are to be successful in our role of persuading juries, then it is very important that we focus very carefully on what is persuasive and what is not.