

**LAWYERING SKILLS:
DEPOSITIONS & TRIAL**

BY

PETER B. KNAPP
Professor of Law
William Mitchell College of Law

ANN JUERGENS
Professor of Law
William Mitchell College of Law

ROGER S. HAYDOCK
Professor of Law
William Mitchell College of Law

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To our students at William Mitchell College of Law

"What we owe you is beyond evaluation."



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PREFACE

We can learn about lawyering by reading about it. We can learn much more when we watch it, too. These videotapes were created out of the realization that students *need* to observe lawyers practice law in order to learn fully the work of the lawyer. We produced these videotapes because we wanted to illustrate the skills we were teaching and writing about. These videotapes illustrate real lawyers interviewing and counseling clients; participating in negotiation, mediation, and arbitration; and trying a case to judge and jury.

In an age when over three-quarters of American homes have VCR's, it is possible to make these illustrations immediately available to students learning these skills. The three "homework" tapes can be watched before, during, or after students read about a particular lawyering skill. Professors can then use classroom time for discussion of the study questions posed in these transcripts or discussion of other issues and concerns related to a particular lawyering skill. In addition to the homework tape, a "classroom" tape is available. This classroom tape uses the same fact scenarios to illustrate related lawyering issues.

The lawyers in these tapes have a wide variety of practice experience, from solo practice to large firms, from in-house corporate offices to government offices. Some of these lawyers have been practicing for decades; some for only a few years. All were gracious and courageous enough to practice law in front of a camera. We believe that the videotapes are a realistic portrayal of the kind of work done everyday in law offices and courtrooms across the country. At times we asked the lawyers to do things differently than they normally would, so that these tapes would illustrate common mistakes in practice. If you meet one of the lawyers in the courtroom, the boardroom or the airport, don't take them to task for those mistakes. The errors and foibles you see on these tapes are largely ours. The good work and flashes of brilliance you see are theirs.

These videotapes are meant to be used with *Lawyering: Practice and Planning*, by Haydock, Knapp, Juergens, Herr & Stempel (West 1996) and with *Advocacy*, by Haydock & Sonsteng (West 1994). The study questions in these transcripts refer to relevant sections of *Lawyering* and *Advocacy*. These tapes can be used effectively with any other text that

teaches about a lawyer's work with clients, with opposing counsel, or with decision-makers.

These are scenes from the practice of law. Before we produce the sequel, we would appreciate hearing your ideas, suggestions, and comments about them. We believe that the tapes are the first of their kind to be used as "homework" videos, and your evaluation of them will be most helpful to us and West Publishing.

ACKNOWLEDGMENTS

These tapes could not have been made without the assistance of many people, and the Credits that follow these Acknowledgments are ample testimony to that fact. In addition to the people listed in those Credits, there are others we would like to thank.

Cindy Jesson, Jay Weiner, and Julie Antonson provided thoughtful support and nurturing good humor while we were working on this project. Sharon Fischlowitz served as a research assistant and general troubleshooter during the filming and editing of the videotapes and the preparation of these transcripts. Cheri Fenstermaker prepared the manuscripts for publication. In addition to the lawyers listed in the credits, we also want to thank David Hunt who appeared in the prototype for these videotapes.

We also thank the lawyers and clients we have worked with throughout our careers. You were examples to us, and without your inspiration these tapes would not have happened--and certainly would not have been as much fun to produce.

CREDITS

Producers: Peter B. Knapp, Ann Juergens, Roger Haydock

Director: Larry J. Lorence

Editor: John Guggisberg

Attorney Participants: Michael Baxter, Aimée Bissonette,

Jerry Blackwell, Ann Bray, Ty Bujold, Gary Cunningham, Louise Dobbe, Maya Howlett, Lucinda Jesson, Karen Kingsley, Paul Lukas, Tom Lyons, Arthur R. Martinez, Daniel B. O'Leary, Kathleen Flynn Peterson, Lawrence Purdy, John D. Tierney, Nancy Welsh

Judge Participants: Ann L. Alton, Harriet Lansing

Client Participants: Clem Birch, Beverly Carlson, Colleen Croal, Lyle Ferguson, Terry Hempleman, Barbara Humphrey, Brian Joyce

Research and Production Assistant: Sharon Fischlowitz

Support Staff: Renee Anderson, Jean Krause

Videographers: John Guggisberg, Jerry Wilson

Sound: Mark Gaddis

Make-Up: Clayton James

Research Specialist: Peg Hulbert

Creative Director: Joel Bode

Special Thanks: William Mitchell College of Law, Dean Harry J. Haynsworth, C. Paul Jones, Advanced Dispute Resolution ADR, Inc., The Honorable George Hoey, Judicial Law Clerk Shari Sterud, Dakota County District Court

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DEPOSITIONS

Lamar v. Cullen

You are about to observe attorneys conducting depositions, and trying a lawsuit. The case is Darren Lamar vs. Naomi Cullen. Mr. Lamar is suing Ms. Cullen for breach of a commercial lease and for personal injury damages suffered by him on the premises. Ms. Cullen is defending on the grounds that Mr. Lamar breached the lease and that she is not liable for any damages. Portions of depositions will be presented. The complete case would have taken a much longer period of time. The first segment is part of the deposition of Naomi Cullen taken by the plaintiff. The second segment is part of the deposition of Darren Lamar by the defendant. The complete depositions would have taken much longer and have been edited for your review. The attorneys demonstrate a variety of deposition strategies and approaches. As you listen and observe them, consider alternative tactics and techniques, and consider how you would have conducted or defended the deposition.

1. Before you watch the videotape of Naomi Cullen's deposition, make sure you have read Chapter 13 of Lawyering: Practice and Planning by Haydock, et al. (West 1996). If you were the lawyer representing Darren Lamar, what would you want to accomplish during your deposition of Naomi Cullen? What would you do to prepare for the deposition? What would your demeanor be during the deposition?

DEPOSITION OF NAOMI CULLEN

Ann Bray: Please swear the witness in.

Court Reporter: Raise your right hand. Do you swear to tell the truth, the whole truth and nothing but the truth, so help you God?

Naomi Cullen: I do.

Questioning by Ms. Bray:

Q: Okay, I guess we're ready to get started this morning. As you know, my name is Ms. Bray and I'm representing Darren Lamar in this lawsuit, and we're here to take your deposition today. It's an opportunity to ask you some questions about your version of what happened and what knowledge you have about what led up to this lawsuit. I'd like to begin by just giving you a few basic instructions. I'm sure that your attorney has already talked to you this morning about some of the instructions so it may be repetitious. First, I'd like to instruct you that I need to have you answer out loud or audibly with a "yes" or a "no." If I ask a question, it's difficult for the court reporter to record a shaking of the head or a nod or "uh huh," so I need to have you answer audibly — yes, no, or otherwise. Do you understand?

A: Yes.

Q: Secondly, if I ask a question and you don't understand the question or you would like me to rephrase the question, please let me know and I'll try to do that. Do you understand that?

A: Yes.

Q: I'd like to begin by asking you about your recollection of the first time that you visited the storefront property on Grand Avenue after July 2, when the flood occurred. Do you recall what date you went to the property?

A: It was the latter part of July. I'd say about the 28th of July.

Q: And do you recall specifically that it was July 28th?

A: I'm pretty sure it was, yes.

Q: So, July 28th was the date that you visited the property?

A: Yes.

2. Ms. Bray chooses to begin the deposition with questions about Ms. Cullen's visit to the property in July. Why doesn't she begin with the negotiation and signing of the lease? Are there advantages to this structure? Disadvantages?
3. Review Section 13.20 of the reading. If Ms. Bray decided to make a full inquiry into Ms. Cullen's visit to the store in July, what does she need to ask? As Ms. Bray asks her questions about this visit, check and see if there are questions she misses.

Q: And, can you tell me a little bit about what happened? Did you drive to the property?

A: Well, I had been notified by my manager, Tom

Henry, the day before that he'd seen a moving sale sign in the window which surprised me. So I drove past and stopped and went in and talked to one of the sales personnel and she told me that they were moving.

Q: Now let me just back up a minute to be sure I understand. You got a call from — which person?

A: Tom Henry, the manager of my apartment and these businesses that I have.

Q: And he explained to you that there appeared to be, there was a sign in the window?

A: Yes, a moving sale sign.

Q: Did you attempt to call the business when he talked to you?

A: Yes I did and he was not there.

Q: Who was not there?

A: Darren Lamar was not there, right.

Q: And then the following day you went over to the property?

A: Yes.

Q: About what time did you arrive?

A: Well it was in the morning, I'd say around 10:30.

Q: And who did you talk with?

A: I don't know her name but it was one of his sales clerks.

Q: Do you recall what she looked like?

A: Well, she was medium height, blonde and thin.

Q: Was there anyone else in the store at the time you were there?

A: I don't recall anyone else there, no.

Q: No customers?

A: No.

Q: And no other individuals working in the store?

A: No, I did not see anyone else.

Q: And what did you say to her?

A: Well, I just asked her if they were moving. Why they were moving? And she didn't really have a lot of information. She just said that because of the store being damaged by water that she understood that they were moving.

Q: Did you say you were looking for Mr. Lamar when you came into the store?

A: Well yes, I was looking for him too because I wanted to know what was going on.

Q: Then after talking with her what did you do next?

A: Well I went back to my car and I tried to reach him by my car phone, and he was not there.

Q: And where did you try to reach him?

A: I tried to reach him at his home.

Q: You had his home number and his business number?

A: Yes.

- Q: You mentioned you had a car phone. Did you give out that number to tenants in the building?
- A: No.
- Q: So the only number they had would be the number to your home?
- A: Yes, and they also have the number to Tom Henry, my manager.
- Q: And does Tom Henry have an answering machine?
- A: I don't believe he does, no.
- Q: Do you have an answering machine?
- A: Yes, I do.

4. Structure for a deposition needs to be ordered *and* flexible. Here, Ms. Bray has departed from her plan to ask follow-up questions about Ms. Cullen's car phone. Would she be better off leaving this issue for later in the deposition?

- Q: I want to move back to when you were at the store. What did you observe about the condition of the store while you were inside?
- A: Well, I could see that there was definitely some damage, part of the ceiling had fallen and there was debris from that on the storeroom floor and some down the stairway to the basement.
- Q: And how did you observe the damage? Did

- you have an opportunity to walk around and look throughout the store?
- A: No, no it's not that big a dwelling so I just was able to, in talking to her she was about in the middle of the store and the stairway is right there and so it was just easy to observe the damage that was there.
- Q: Did you happen to go downstairs to look downstairs?
- A: No, no I did not. I could just see down the steps that there was debris from the ceiling on the steps.
- Q: And what part of the store was affected by the debris?
- A: Just the middle of the store and down the stairway to the basement.
- Q: When you say debris, what do you mean debris?
- A: The residue from the ceiling, the pieces that had fallen from the ceiling and when it fell, it probably shattered or whatever. And there was just some dampness, not water, but dampness and just a messy look.
- Q: Did you observe any books there? Were there still any books on the shelves when you were in the store?
- A: Yes, there were some but they were being packed up.
- Q: Did you observe the condition of the books at all?
- A: Not to actually hold one. I certainly didn't notice

any visible damage to books, no.

Q: But you did still see debris on the floor?

A: Yes, from the ceiling.

Q: What was the first thing that struck you when you walked in and you saw the damage? What was the first thought you had?

A: Well, I was very surprised because I had informed Darren that if there was any problem that he should contact me immediately and I would see to it that it would be repaired because I said I would much rather nip problems in the bud, so to speak, and have much less expense by fixing things right away than to have it go this far.

Q: Were you surprised at all that the ceiling gave way and fell into the store?

A: Oh yes. I know it's an older building but I certainly didn't expect anything like that to happen.

Q: Have you ever had any prior problems with the roof in this part of the store?

A: Absolutely none.

Q: And how long have you owned the building?

A: Seven years.

FADE OUT

5. Go back to your checklist of questions for the July visit. Does Ms. Bray have a complete understanding of the July visit or did she miss helpful questions? Are there areas of information that need additional clarification? Did Ms. Bray reach "closure" or could Ms. Cullen later add to her testimony about this visit?
6. The next segment of the deposition illustrates Ms. Bray asking a series of leading questions. Review the discussion of this technique in Section 13.22. Does Ms. Bray use this approach effectively? Would another approach work better?

Q: I'd like to ask you about that May 4 phone call or contact that you had with the manager of your buildings regarding going over to the Grand Avenue property and examining the leak or trying to identify the source of the leak. Do you recall a conversation with your maintenance person?

A: Oh yes. I called him to ask him to go over and look at the Bookery, to see what might need to be done there. I mentioned to him that he should take his plumbing tools along in case there was something leaking.

Q: Now your maintenance person is Tom Henry, is that correct?

A: That's true.

Q: And you've had Tom Henry go over to your properties in the past and do minor repairs, is that true?

- A: Yes.
- Q: And in fact Tom Henry has a fair amount of experience. He's kind of a mechanical type person, would that be fair to say?
- A: Yes, I would say.
- Q: And on this occasion you called him and asked him to go over to the property and, can you tell me exactly what you told him to do? What was your recollection of what you told him to do?
- A: Well I couldn't tell him exactly because I didn't know what the problem was, so I just asked him to go and check and see what was wrong. And I mentioned that there might be a leaking pipe so he should take some plumbing tools along which is what he agreed to do.
- Q: Now, why did you think that there might have been a leaking pipe?
- A: I don't know. I don't know anything about plumbing but I just thought that could be a possibility.
- Q: You've never had anything to do with plumbing problems in the past?
- A: Well, no, I mean I don't know one wrench from another, so I assumed that it could be just a leaking trap or whatever, I didn't know.
- Q: So do I understand you correctly that in all the time you've owned this apartment building, you've had the five properties for the last seven years, that you've never had an opportunity to learn more about the plumbing, or the possibility of roof leaks, or water damage?

- A: Not really. I depend upon Tom to take care of all these problems, and I pay him for it, and no, it's not my thing to go and find out about plumbing. I hired him for that.
- Q: Well you mention you depend on Mr. Henry and I presume that's because you feel he's competent at what he does, isn't he?
- A: Absolutely, yes.
- Q: And you trust that he'll do a thorough job when he goes to make repairs, don't you?
- A: Yes.
- Q: And the time that you contacted him on May 4 regarding that, you wanted him to go over and evaluate the complaint of some water coming in over there at that Grand Avenue property. You stressed upon him the importance of locating the source of the problem, didn't you?
- A: I didn't really think that was necessary. He's very conscientious and competent and I rely upon that fact.
- Q: And so you never instructed him in any way. In fact you told me earlier that you instructed him to take his plumbing materials with him, is that correct?
- A: Yes, I did.
- Q: And so you sent him over with the expectation that he would do a very thorough evaluation of the problem, is that your understanding?
- A: Absolutely.
- Q: And in fact when he completes his repairs, isn't it his general practice to call you back and

report what he's found?

A: Not necessarily.

Q: So in all the time you've operated these properties you trust him completely and you never have communication regarding what he's determined to be the source of the problems with these properties?

A: No, we might in casual conversation but it isn't anything I drill him about.

7. Ms. Bray demonstrates the importance of listening closely to the deponent's answers. Ms. Cullen uses the words "casual conversation," and Ms. Bray picks up that term to bring closure to this area of inquiry. Are there other, more effective ways Ms. Bray could have asked her follow-up questions to complete, clarify, and close the witness' testimony?

Q: Well let's talk about casual conversation. Did you have any casual conversations with Mr. Henry regarding his conclusions about what the source of the problem was on the property?

A: No, we did not discuss that.

Q: So you trusted him completely to go over and locate whatever the problem was?

A: Yes.

8. Did Ms. Bray obtain any helpful admissions in the preceding section of the deposition? Does she in the following sequence? As you watch the tape, ask yourself whether you believe she is "pushing" the witness too hard, or not hard enough.

Q: Now of course, you understood that water damage would be a serious problem for someone who owned a bookstore, didn't you?

A: Oh, I suppose, sure.

Q: And certainly you wouldn't want to incur any unnecessary expense having to repair or compensate someone for damage done to their property as a result of a leak from a roof or a pipe, would you?

A: No.

Q: And in all the time that you've had these buildings, your properties, your apartment and the properties located on Grand Avenue, when you sent Mr. Henry, are you telling me that your general practice was not to communicate with him regarding his findings or the repairs that he did in the building?

A: Not really. Unless he thought there was a major issue which I haven't really encountered yet.

Q: So you left it totally up to Mr. Henry to decide whether or not there was a serious problem that needed attention of the property owner such as yourself.

A: Yes I did.

Q: And you never made any efforts to check up on Mr. Henry's work to be sure that he had done a thorough job, did you?

A: No I didn't. I received an invoice for the work that he'd done and I paid him for that. He spent about 45 minutes over there, and I didn't ask him what it was.

FADE OUT

9. Review the discussion in Sections 13.23 and 13.24 in Lawyering about use of documents at depositions. Does Ms. Bray do an effective job having the witness identify these documents? What does Ms. Bray hope to accomplish in asking these questions? Is she successful?

Q: Ms. Cullen, prior to coming here today did you have an opportunity to review any documents?

A: Yes.

Q: Do you specifically recall reviewing a document which I'm showing you which has been marked as Plaintiff's Deposition Exhibit Number 1? Do you recognize that document?

A: Yes.

Q: And what is that document?

A: That's the lease.

Q: And is that your signature here on the document?

A: Yes.

Q: I'd like to call your attention specifically to paragraph one of the lease agreement which states as follows, "owner agrees to maintain the building in a manner designed to keep them fit for the use intended." Do you recall that provision in the contract?

A: Yes.

Q: And by signing this agreement it was your intent to insure that the premises were fit for use as a bookstore?

A: Absolutely.

Q: And you understood that in order for it to be fit for use as a bookstore that certainly water would cause damage to the books on the property?

A: Yes.

Q: So you intended to provide a property that didn't have water leakage problems, is that correct?

A: Yes.

Q: And I'd like to call your attention to the next provision, paragraph B which states, "this includes, but is not limited to, responsibility for maintenance of external structures, plumbing, foundation, heating and cooling systems and wiring". Do you recall that provision in the contract?

A: Yes.

Q: And was it your intent by the use of the words "external structures" to provide a secure roof to insure that no leakage would incur on the property?

A: Absolutely.

Q: I'd like to show you what's been marked as Plaintiff's Deposition Exhibit Number 2. This is a copy of a document called an Answer with Affirmative Defenses. And I'd like to call your attention to paragraph three where it states that my client failed to "mitigate damages." Do you have any personal knowledge that my client failed to take steps to mitigate damages to his property located on Grand Avenue?

A: No.

10. Lawyers draft pleadings and clients frequently have little to say about the wording of those pleadings. Does Ms. Bray expect Ms. Cullen to answer her question about mitigation of damages? Why does she ask the question?

Q: Thank you. I'd like to show you what's been marked as Plaintiff's Deposition Exhibit Number 3, a Request for Documents. Specifically, I requested in Document Request Number Three, documents related to maintenance records for the property located on Grand

Avenue for the past five years. My understanding is that you provided me all documents related to maintenance for the property on Grand Avenue for the past five years. Is that correct?

A: Yes.

Q: And can you tell me, where did you look for those documents?

A: I have a file in my desk that I keep them.

Q: And is that the only place you looked for documents having to do with maintenance issues related to the Grand Avenue property?

A: Yes. Yep.

Q: Did you have any opportunity to talk with your maintenance person to ask if he retained any records, receipts, bills or phone messages related to maintenance issues at the Grand Avenue properties?

A: No.

Q: Counsel, I'd like to make a document request that you supplement that. I'd like to go back and find out if there are any additional documents that the maintenance person has. Are you agreeable to doing that or do you want a formal document request?

Mr. Lukas: Well, I believe the request is for any documents in her possession. I believe we have given you all documents that are in her possession.

Ms. Bray: Well I would agree with you there except that this maintenance person is an employee/agent. Therefore, as you know under the doctrine of

corporate discovery, those documents would be included in part of that document request. I would ask that you would go back and review those records because that his employer.

Mr. Lukas: Sure. We can discuss that later.

11. Should Ms. Bray demand an answer to her request on the record? Should Mr. Lukas simply agree to produce the requested documents?

By Ms. Bray:

Q: In reviewing those, you mentioned that you had a file with documents. Did you review those documents prior to coming to the deposition today?

A: I looked at them but I can't say that I read them word for word. No.

Q: Did you bring your file with you today?

A: No.

Q: And when you reviewed the file can you tell me what the file consisted of, as best as you can recollect? What documents were in the file?

A: Well, I have all the invoices that I paid to Tom for the work that he has done for me.

Q: Any other notes or informal... ?

A: Yes. I have some notes that were enclosed with the rent checks that I received from my

tenants.

Q: Any other informal notes you might have made to yourself to assist in keeping a record of events or anything of that nature?

A: No. My checks usually are my records.

12. Are there additional questions Ms. Bray needs to ask to determine if Ms. Cullen has other sources of information about this matter? What are those sources? What questions would you ask to uncover this information?

Q: Now you mentioned that you had some hand written notes regarding some maintenance issues that you received on the properties. I don't recall receiving a copy of those. Were those handwritten notes by tenants or by yourself regarding contacts for maintenance issues on that Grand Avenue property?

A: Well, there were some of each.

Q: When you reviewed these documents, did that refresh your recollection at all of any events having to do with maintenance issues or the events of this case?

A: No. Not really.

Q: Well, did you review those documents?

A: Oh, yes. I looked at them, yes.

- Q: And did they refresh your present recollection of any of the events that have occurred in this case?
- A: Not really. Not anything specific. No.
- Q: But they certainly assisted in bringing that to the forefront of your mind.
- A: I would say, yes.
- Q: Counselor, I would like to receive copies of those documents as well. It appears that they refreshed her recollection and I would like to have an opportunity to look at those documents.
- Mr. Lukas: I believe that we have produced all documents but I'll certainly look and make sure that you have everything.

13. Is Ms. Bray entitled to receive documents Ms. Cullen reviewed prior to her deposition? Review Federal Rule of Evidence 612 if you are uncertain.

- By Ms. Bray:
- Q: Thank you. Next, I'd like to have this document marked as Plaintiff's Deposition Exhibit Number 13.
- Court Reporter: Marking Plaintiff's Exhibit Number 13.
- By Ms. Bray: Thank you. I'm showing you what is a photograph including a diagram of the property

- located at Grand Avenue. I'm showing you Plaintiff's Deposition Exhibit Number 13. Does this appear to be a fair and accurate representation of the property that used to be called the Bookery?
- A: I would say so.

14. Is there anything more Ms. Bray needs to ask in order to use this exhibit during the deposition? During a trial? Should Mr. Lukas object?

- Q: I'd like for you to take this document and I'd like you to mark for me on this document with the blue colored pen. I would like for you to mark for me where, in your observation of the premises when you inspected the property in July, you observed the apparent water damage to the property. Can you use this blue pen and mark all areas of the property where you observed either debris, sagging ceiling or water damage, stains or other damage. Can you mark for me on the exhibit?
- A: Okay. It was right about here, the middle to the back of the store and . . .
- Q: And would you fill in the circle with the blue.

FADE OUT

By Ms. Bray:

Q: Ms. Cullen now that we've taken a short break I just have one more question, then we'll be done. As you know, this is your opportunity to tell me anything you'd like about the case and is there anything else you'd like to add to your testimony in thoughts or feelings you have about the case that you haven't already expressed to me?

By Mr. Lukas:

Q: I want to object. The question is vague. Go ahead and answer if you can.

A: No. Nothing more at this time.

Q: That's all that I have. Thank you.

By Mr. Lukas: I just have one question for clarification purposes. Ms. Cullen, you testified in regards to your vacation in April and I believe you testified it was a two week vacation. Do you recall exactly how many days the vacation was?

A: Well, actually I said two weeks but it was 12 days.

Q: I have nothing further.

15. Mr. Lukas chooses to ask only one question. Why does he ask this question? What are the advantages and disadvantages of further questioning?

By Ms. Bray:

Q: I just want to remind you while we are still on the record, if you think of anything additional, you do have a duty to supplement your information. If you should go home tonight and remember a document or remember a conversation that you didn't relate to me, please pass that information on to your attorney and then he'll have the obligation to contact me. Do you understand?

A: Certainly.

Mr. Lukas: We elect to exercise the right to read and sign.

DEPOSITION OF DARREN LAMAR

16. Before watching this segment of the tape, review the reading about questioning techniques, and in particular, the reading about the techniques of Completion, Clarity, and Closure in Section 13.20. As you watch the tape, look at the types of questions Paul Lukas uses to accomplish the goals of Completion, Clarity, and Closure. Review the list of questioning techniques set out in Section 13.20. Are there question techniques Mr. Lukas does not use that would be helpful? What additional questions could he ask?

By Mr. Lukas:

Now Mr. Lamar, I want to go to the May 4th conversation that you had with Mr. Tom Henry

that we spoke briefly about earlier. Do you remember that ... do you recall that conversation?

A: Yes sir.

Q: Do you recall where that conversation took place?

A: It was at the Bookery.

Q: Was there anyone else present during that conversation?

A: No, sir.

Q: Who was the first to speak?

A: I was explaining the problem.

Q: Okay. Why don't you tell me as best you can remember what you said to Mr. Henry?

A: I told him that it appeared there was a roof leak and during rain we were getting water into the shop. I told him that the first time I noticed it was middle of April and then this worse leak, the day before he arrived.

Q: Okay. How if at all did he respond to what you told him?

A: He just wanted to go down into the basement and check the pipes.

Q: What did he say specifically, if you can recall?

A: He said he wasn't really there to look at the roof. He had been told to check out the basement.

Q: Did you respond to him saying he had to go check out the basement?

A: I don't really recall.

17. Mr. Lukas is using a "What did he say/What did you say?" structure for this segment of the deposition. How effective is this structure? What are its disadvantages?

Q: Do you recall specifically him saying that he had to go down in the basement and check out the basement?

A: "Look at the pipes," I think is more correct.

Q: But you don't recall whether or not you responded to him saying he had to go check out the pipes in the basement.

A: Not specifically, no.

Q: Is there anything that could help you remember? Did you take any notes or is there someone you could speak to or any documents you could look at that could help you recall whether or not you responded to Mr. Henry, saying that he had to go down in the basement to check out the pipes?

A: Not that I can think of.

Q: What happened next, as far as the conversation went after Mr. Henry said that he had to go down in the basement to check out the pipes?

- A: He went and did what he was going to do. He went downstairs and looked around.
- Q: Did you go with him?
- A: Not at that point, no. I was picking up and still cleaning up a bit. I went down probably fifteen minutes later and he was working on a pipe.
- Q: Did you resume a conversation with him at that point?
- A: I just asked what he was doing.
- Q: And what did he say?
- A: He said that he had found some moisture on the pipe and it was above where water had puddled on the floor and so he said that he was resealing the pipe joint.
- Q: Did you say anything else to him that you can recall?
- A: When he was finished with that I said that that was fine whatever he did down there, but I was concerned still with the roof.
- Q: And what did he say about your concern with the roof?
- A: He said that that wasn't what he was there for. He was there to deal with the immediate problem and he felt he had done that.
- Q: Was that the term he used, the "immediate problem?"
- A: I believe so.
- Q: What if anything did you say to him after he said he was there to deal with the immediate problem?

- A: I just reiterated my belief that it was a roof problem and not a pipe problem.
- Q: And did he reply to that reiteration?
- A: Basically the same. That it wasn't something he was there to deal with.
- Q: Did you have any further conversation with Mr. Henry?
- A: Just that I told him that I wanted Naomi to have someone look at the roof.
- Q: Did he reply to that?
- A: I don't recall.
- Q: Do you recall whether he made any kind of statement about whether or not Naomi would have someone look at the roof?
- A: No I don't.
- Q: Do you recall what, if anything, was said next?
- A: That was pretty much the end of the conversation and he left.

18. Mr. Lukas makes a decision that this conversation is sufficiently important to warrant further questioning to insure the witness cannot change his testimony at a later time. Does Mr. Lukas accomplish the total closure that he is looking for?

- Q: Okay. Now is there anything else you can recall being said by either yourself or Mr. Henry

on May 4th?

A: No.

Q: Do you feel you've given me the most accurate description of the conversation that you can, as you remember it today?

A: Yes.

Q: Are there any documents or anything that you could look at which might give you a better opportunity or refresh your recollection and give us more specifics?

A: Not that I can think of at this time. No.

Q: Any people you could talk to who might help you in that regard?

A: No. There was just he and I there at the time.

19. Mr. Lukas asks Mr. Lamar about an alternative version of the May 4th conversation. Is this an appropriate technique? If Mr. Lukas knows that Mr. Henry's description of the conversation is the same as Mr. Lamar's, is it inappropriate to ask this question?

Q: Now Mr. Lamar, Mr. Henry said that he told you that you should contact Naomi about having the roof checked. Do you have any reason to dispute that?

A: Yes. I don't remember that taking place.

Q: So you don't recall him saying that?

A: No, sir.

Q: Could that have been said during one of these gaps that you don't recall, that you described for me, when you described the conversation?

A: Not that I can remember.

FADE OUT

Q: Now Mr. Lamar, as I understand it, the Bookery at the Grand location had stairs that would go down to the basement is that right?

A: That's correct.

Q: And in the four and a half months that you owned the Bookery and worked in the Bookery, how many times would you estimate you went up and down those stairs?

A: Several times daily.

Q: And how often did you work during an average week? How many days a week?

A: Usually six days.

Q: That would be true pretty much the full four and a half or four months that you had the store at that location, is that right?

A: About right, yeah.

Q: Now, let's go right to the occasion that you slipped on the stairs and injured your knee. Did anyone witness your fall?

- A: No. I was alone at that time.
- Q: Was there anyone else in the store?
- A: No.
- Q: Would it be fair to say that at the time that you slipped you were picking things up and trying to clean up the store and the damage that occurred to some of your things because of the water damage?
- A: Yes. I had cleaned up some books in the basement and I was carrying a box upstairs.
- Q: Would it be fair to say that you were angry and upset at the time?
- A: Yes.
- Q: Would it be fair to say that your mind was preoccupied with the water damage and so forth?
- A: Yes.

20. Mr. Lukas has just pressed Mr. Lamar for testimony that he was preoccupied when he slipped. His questions are designed to elicit that testimony. Would it be possible to design questions that would prompt this witness to say he was paying close attention while he was walking on the stairs? What questions would you ask to elicit this testimony?

- Q: And you certainly weren't planning on falling at that time, is that right?

- A: No.
- Q: And as I understand your testimony, it was wet plaster that you slipped on, is that right?
- A: To the best of my knowledge, yes.
- Q: Could it have been something else, sir?
- A: Not that I can think of, no.
- Q: And you're sure it was wet plaster?
- A: That's what I found on my hands when I crawled back up the stairs later.
- Q: You found wet plaster on your hands?
- A: Yes.
- Q: And how does that help us tell what you slipped on originally?
- A: That's what was on the stairs.

21. During the next segment, Ms. Bray objects to a number of the questions Mr. Lukas asks. Review the reading about making and responding to objections, Sections 13.32.2 and 13.29. Are Ms. Bray's objections appropriate? Does Mr. Lukas respond to the objections effectively?

- Q: Mr. Lamar, with regards to your move to the Grand location, when did you move there and why?
- By Ms. Bray: Objection. Multiple question.

By Mr. Lukas: Sure. Let me rephrase. Mr. Lamar, when did you move to the Grand location?

A: March first.

22. Why does Mr. Lukas choose to rephrase the question? What would have happened if he had refused?

Q: And why did you move to the Grand location?

By Ms. Bray: Objection. Relevancy.

By Mr. Lukas: I believe it's relevant. It goes to his motive for the move. I think it's important to this case.

By Ms. Bray: Well, motive is irrelevant to this case. My objection is noted. You can go on and answer.

A: I needed a bigger space.

By Mr. Lukas: I'm going to skip around a little bit here. Mr. Lamar, I want to go to Mr. Henry down in your basement on May 4th working on the pipes. You with me?

A: Yeah.

Q: Okay. Now do you think Mr. Henry fixed the problem?

By Ms. Bray: Objection. Lack of foundation. What problem are you referring to?

By Mr. Lukas:

Q: Let me rephrase. Mr. Lamar, did you

personally witness Mr. Henry working on a pipe down in the basement?

A: Yes. I did see him working on a pipe.

Q: Okay. Did that pipe have a leaking problem that you were aware of?

A: Not that I was aware of.

Q: So you don't know whether or not there was a problem or whether or not it was fixed, is that correct?

A: Yes. That is correct.

23. Ms. Bray made a foundation objection in the preceding section. Did she need to make the objection during the deposition, or could she have made the objection later at trial if Mr. Lukas had attempted to introduce this last portion of the deposition? What effect does the objection have on Mr. Lukas' questions and Mr. Henry's testimony?

TRIAL

Presenting a Case to a Judge and to a Jury

You are about to see the trial of Lamar v. Cullen. Portions of the trial will be presented. The complete trial would have taken a much longer period of time. You will see:

- Opening statement by plaintiff and defendant;
- Direct and cross-examination of Darren Lamar;
- Direct and cross-examination of Naomi Cullen;
- Summation by plaintiff and defendant.

The opening statement and summation will be presented to a judge, as if the case were a bench trial. The direct and cross-examination will be presented to a jury, as if the case were a jury trial. The attorneys use a variety of trial strategies and tactics. As you watch and observe them, consider alternative approaches and techniques they could have used, and consider how you would have tried this case.

OPENING

Lamar v. Cullen

1. Before you watch the videotape of the openings in this trial, make sure you have read Book 2, Chapter 2 of Advocacy, by Haydock & Sonsteng (West: 1994). As you watch these two openings, consider whether the lawyers accomplish the purposes of the opening statement:

- A. To explain the evidence to the fact finder.
 - B. To tell an interesting and compelling story.
 - C. To explain what the case is all about including theories, issues, claims, defenses, and positions.
 - D. To persuade the fact finder of the merits of the case.
 - E. To motivate the fact finder to want to render a favorable verdict.
2. As you watch these two openings, evaluate whether either lawyer does anything that is inappropriate or objectionable. Read over Section 2.61ff. of the text. Does either lawyer:
 - A. Make reference to inadmissible or unprovable evidence?
 - B. Explain the law?
 - C. Make argumentative statements?
 - D. State personal beliefs or opinions?
 - E. Put the fact finder in the place of the party?
 - F. Speculate about the other side's case?
 - G. Make disparaging remarks?
- Neither lawyer objects during opposing counsel's opening. Should objections have been made?

PLAINTIFF: BENCH TRIAL

Judge: Ms. Dobbe, you may proceed with the plaintiff's opening statement.

By Ms. Dobbe: Thank you, your Honor. May it please the court. Counsel, your Honor, I represent Darren Lamar, the plaintiff in this matter. This case is a civil action brought by Mr. Lamar against his absentee landlord, Naomi Cullen, for a breach of a contract that he had with her to lease premises for the purpose of a bookstore that he ran on Grand Avenue. The facts simply stated are that Mr. Lamar entered into a contract with Ms. Cullen in January of last year. He took occupancy of the premises and opened his bookstore on March 1st. Ms. Cullen came to congratulate him shortly after March 1st and they visited for a little while. That was the last time he saw Ms. Cullen until he left the premises at the end of July.

He had no problems in March, but in April, in mid-April, the ceiling started to leak during a rainstorm. He put a bucket under the drip and was able to maintain the premises by simply emptying the bucket once a day for a period of approximately two weeks. At the end of the month he sent a note to his landlord in compliance with the terms of the contract that he had with her to notify her of any conditions that needed repair on the premises. He sent her that note on May 1st. On May 4th there was a major storm, and as a result ceiling plaster fell onto his books, ruining several of his

books. There was water damage on the floor and on some of the books and he called Ms. Cullen. He left her a message. Actually he talked to her on this occasion, and told her that she needed to repair the water damage in his building or it would ruin his business and ruin her pocket book.

The next day, Ms. Cullen had a handyman that she employed at her apartment building in the neighborhood come over with his plumbing tools and he went to the basement and put epoxy on a pipe joint. Mr. Lamar said nothing to Ms. Cullen about the leak being from a pipe or it being in the basement. He simply notified her that there was water damage in the building. He did not determine the source of that damage, although it was apparent to him and to Ms. Cullen's handyman that the water damage — came from the ceiling above the first floor, not from a pipe in the basement. Ms. Cullen, however, did not take it upon herself to visit the premises. She did not visit the premises in May, or in June, or in July until the end of the month. Her visit then was the result of Mr. Lamar leaving the premises because of a major storm that occurred on the 2nd of July.

This major storm caused a massive amount of damage to his inventory. The ceiling plaster fell in great quantities from the roof. Large amounts of water came to the floor. Approximately all of his used books and one-third of his new books were damaged in his inventory and there was two inches of water in the basement. The books he had stored along the walls were also sustaining water damage. He called Ms. Cullen. He got her answering

machine. He left a message on her answering machine, "I need help right away, please send help." Ms. Cullen did not return the call. She did not visit the premises. She failed to respond in anyway.

The rainstorm was July 2nd. Mr. Lamar worked all day July 3rd. He worked all day on July 4th. After carrying boxes up the stairs from the basement of wet books, he unfortunately slipped on a piece of fallen plaster from the ceiling on the stairs to the basement, and perilously fell, grabbing himself on the side rail to prevent himself from falling to the basement floor, twisting his knee which resulted in severe damage to his knee joint. He was able to crawl up the steps, crawl out of the building, and get himself to the emergency room where he had to wait for hours and hours because of 4th of July injuries, only to find that this injury was severe and was going to take lots of therapy into the future.

Your Honor, this lawsuit alleges damages in two respects. First to the business: to the inventory, to the loss of business, to the loss of income, to the costs associated with being forced to move into habitable premises. And secondly, to the personal injuries sustained by Mr. Lamar: to his extraordinarily painful knee injury, and to the pain and suffering that he has endured as a result of the problems with his knee and his business. Your Honor, the plaintiff has a burden of proof by preponderance of the evidence, and it is clear after you hear the testimony and the evidence and see the exhibits in this case that you will find for plaintiff.

3. What type of structure does Ms. Dobbe use for her opening statement? What are the advantages and disadvantages of this structure? Review Section 2.17ff. in the Advocacy text and think about how Ms. Dobbe's opening would have sounded had she used the following structures:

- A. Flashback
- B. Parallel Events
- C. Claims, Defenses, Topics
- D. Order of Evidence

Contrast Ms. Dobbe's structure with the structure Mr. Martinez uses in the defendant's opening. How would you describe Mr. Martinez's structure?

OPENING

Lamar v. Cullen

DEFENDANT: BENCH TRIAL

Judge: Mr. Martinez, you may proceed with the defendant's opening statement.

By Mr. Martinez: Thank you judge. Your Honor, today I'm here representing Naomi Cullen, who is present in the courtroom, and I'm representing her over a case in which she has suffered some damages from the plaintiff in this case, Mr. Lamar. Naomi Cullen is a woman who is known in the

Grand Avenue business district by Macalester College in St. Paul, Minnesota. She has five buildings that are adjacent to each other, that are storefronts that she rents out as commercial property. Now Ms. Cullen is quite familiar with what type of neighborhood this is. The college is a very beautiful, expensive, private school and adjacent to it there are a community of professors and other professionals that live in the community. It's a beautiful residential area. There are some restaurants where you could eat and there's a nice coffee shop. Within this neighborhood, Ms. Cullen took it upon herself, as a responsible business person, to lease out this property for purposes of a bookstore. This is not a pornographic bookstore, this is a bookstore of classics which is a benefit to the community, which is a benefit to the college that's there.

Now, while she owns these five buildings, she also has someone there to take care of things, to take care of these buildings — her investments, her properties. She has a gentleman by the name of Tom Henry, who is a handyman. When there is an emergency or something has to be attended to, she can call on him and he can run over as soon as possible to take care of these matters. This is available to her tenants every day of the week.

What happens is, in April, well March, of last year my client Naomi Cullen enters into an agreement, into a lease contract with Mr. Lamar, the plaintiff here. In that

agreement Ms. Naomi Cullen is specific in saying, "I am happy to be responsible and take care of my property. This is my investment and I understand and appreciate the privacy of a tenant. As a result Mr. Lamar, we're writing a contract and in that contract it says that I am not going to invade your privacy. But what I need you to do is to communicate to me, in writing, specifically what any problems are with my building, so I can get over there as soon as possible and nip it in the bud — take care of it right away, so you don't have any problems with our relationship as landlord and tenant, and my investment doesn't go down the tubes."

I don't think you're going to find much of a dispute between the parties here whether or not that contract existed. What you're going to find in dispute is how this commitment was not effectively lived up to by the tenant, that being Mr. Lamar. The irony in this case is you're going to find that everything that caused disputes that brought us here to court has to do with communication. You're going to find that Mr. Lamar is a man who graduated from Macalester College with an English degree. That after he successfully did so he went out and taught English. You're going to find that after he taught people how to communicate, to write, that he himself didn't follow his discipline and, as a result, has caused many problems for my client and her property.

What ends up happening here is that there

is some form of water leakage and Mr. Lamar, the tenant, makes an observation of that and as a result gets a bucket and puts it underneath where the drippage is coming. A container to contain his problem. This happens in mid-April, approximately April 17th you'll hear, and he doesn't communicate this to my client when this first happens. You will hear testimony how he bails out gallons of water with this bucket before he even gets in contact with my client. He tries to explain that he makes some telephone communication. You'll find it really doesn't make sense. Because if he had made this telephone call he's going to tell you he had made, you'll find — through the testimony and the evidence in this case — that there was a message left for him if there was an emergency and something had to be taken care of. As the responsible person that my client is, she left a message that any tenant can get ahold of Mr. Henry. That was not done in this case.

Finally there is a communication when he sends his check for the monthly rent. You'll see how limited that communication is. As a result, my client — being the responsible landlord — sends Mr. Henry out and he goes out and does some repairs. Taking care of the emergencies, nipping

it in the bud. He then turns to the tenant and says, "Look I have taken care of this immediate problem. If there's anything else, you have to let Ms. Cullen know exactly what's going on." There will be no dispute about that happening. And you will find, as well, that Mr. Lamar did not communicate to Ms. Cullen any other potential problem with the property. Time passes on, and then substantial damage happens to the property. He doesn't have the courtesy to write her immediately and tell her about it. The person, Mr. Henry, that works for Ms. Cullen sees what's going on. She tries to communicate with him. She finds out what happens. She ends up sending someone out there. As a result, she has to pay all this money to get her investment back up to what it was due to the poor communication by Mr. Lamar.

It is those things we're going to be asking this court to look at for purposes of making my client whole and bringing her investment back to what she should have had. We're going to be asking this court to look at the difference — what she lost contractually with having this tenant. We're just going to ask you to look at the difference. We're not going to ask you for the whole thing. We're going to ask you to look at the cost of what she had to repair the property for versus what she would have paid if Mr. Lamar would have lived up to his contract and communicated this with her — it would have been a lot less expensive. And due to these negligent acts and all the risks that Mr. Lamar

assumed in causing his own injuries, we're going to ask this court for those damages to be awarded in behalf of my client. Thank you, Judge.

Judge: Thank you, Mr. Martinez.

4. Mr. Martinez and Ms. Dobbe have very different styles of delivery. Review the techniques of persuasion described in Sections 2.42 through 2.51 of the reading. Which of these techniques does Ms. Dobbe rely upon? Which techniques does Mr. Martinez use? Are there things the two attorneys could have done that would have made their opening more persuasive?
5. Sections 2.52 through 2.59 describe additional techniques that lawyers can use to make their delivery more effective. Review those Sections and then evaluate both attorneys on their movement, stance, and gestures. Why did these attorneys choose to deliver their openings as they did?

DIRECT EXAMINATION

Lamar v. Cullen

6. Before you watch the direct examination of Darren Lamar, review the reading in *Advocacy*, Book 3, Chapter 1. As you watch this direct examination, as well as the direct examination of the defendant, Naomi Cullen, evaluate how effectively the lawyers accomplish the purposes of direct examination. Ask yourself, does this direct examination present evidence:
 - A. That is legally sufficient to survive a motion to dismiss or a motion for a directed verdict?
 - B. That will be easily understood and readily remembered by the fact finder?
 - C. That will convince the fact finder of the truth of the story being told?
 - D. That will stand up to the test of cross-examination?
 - E. That will anticipate, counter, or contradict evidence submitted by the opposition?
7. Imagine that you are the lawyer representing plaintiff Darren Lamar. Compose your direct examination of Mr. Lamar. Ask yourself:
 - A. What are the key points that you will want Lamar to testify to during his direct examination?
 - B. How will you structure the examination?

- C. What will you do to emphasize the strong points of Mr. Lamar's testimony?
- D. Will your direct examination touch upon weaknesses in your case? How will those weaknesses be handled?
- E. What questions do you anticipate Darren Lamar will be asked on cross-examination? What will you do during direct examination to prepare for these questions?
8. As Mr. Lyons moves through the direct examination, identify the questions he uses to move from one event or issue to the next. What techniques does Mr. Lyons use to make these transitions? Are these transitions effective?

PLAINTIFF DARREN LAMAR

Judge: Mr. Lyons, you may proceed.

By Mr. Lyons: Thank you your Honor. Sir, please state your full name.

A: Darren Lamar.

Q: And what is your age?

A: Thirty-five.

Q: What is the extent of your education, sir?

A: I have a B.A. in English from Macalester College.

Q: And where do you currently live?

A: In St. Paul.

Q: Will you please tell the jury about your work and employment history since you received your degree from Macalester.

A: I taught English at private high schools in the area for a number of years. About eight years ago I was left a small inheritance and decided to open a bookstore — a used bookstore. I've been in the book selling business ever since.

Q: During your years as a teacher, did you win any awards?

A: I was voted best teacher at one of the high schools that I did work at, yes sir.

Q: And in your work as a proprietor of a small bookstore, do you do anything with the local publishers or local authors?

A: Yes sir, I specialize in carrying local authors.

Q: When did your interest in becoming a bookseller begin, and how did you develop it, sir?

A: Really my last year of college I worked as an assistant manager at a bookstore in town, an independent bookstore. And I continued through the next year — part of the next year — working in that profession.

Q: And so that the jury will have an idea of the nature of your work and what it takes to be successful, would you tell them what, in your opinion, makes for a successful small

bookstore operation?

A: I think being aware of your customers' needs and fulfilling those as best you can, carrying a good variety of books that will be of interest to them. Also, having a convenient location and being open during the hours necessary for your patrons to come in.

Q: And what about the presence of the bookstore owner on the premises, is that important or can you really use substitute help?

A: Well, as an independent it's more important that I'm there, to have that personal relationship with the customer.

Q: And in terms of interruption of service or non-interruption of service, does that have any significance in the success of a bookstore operation?

A: Well, especially if you're independent, as I said, if you're not there to service your customer they can always go to one of the larger chains. So we try to be open and be there for them when they need us.

9. At this point, Mr. Lyons moves from the beginning of Darren Lamar's direct examination to the first contacts Mr. Lamar had with Naomi Cullen. Review Section 1.22 of Advocacy, Book 3. Background questions in a direct examination should:

- A. Relieve the witness's anxiety.
- B. Build confidence in the witness to provide longer and more detailed answers.
- C. Help establish a witness' personality.
- D. Identify similarities between the witness and the fact finder.
- E. Establish a foundation to support the witness' statement.

How well did Mr. Lyons accomplish each of these purposes? Which of these purposes was the most important to him? What additional questions could you ask if you wanted to further establish Mr. Lamar's personality or identify similarities between Mr. Lamar and the jurors? Review Sections 1.30 through 1.34 for samples of these types of questions.

Q: And your first bookstore was located where?

A: On Snelling Avenue in St. Paul.

Q: And there came a time when you decided to move from that location?

A: Yes sir.

Q: And where did you move?

- A: Grand Avenue.
- Q: What about this Grand Avenue location appealed to you?
- A: Well, it was close enough to my old location that I wouldn't lose any of my customer base that I had at that time. It offered a storefront location. There were several shops and we would be able to draw from their customer base as well. It was slightly bigger than the space I had on Snelling and the owner, Ms. Cullen, was someone I knew.
- Q: And had you known her as a customer, or a business associate, or what was the nature of your relationship?
- A: She was a customer.
- Q: Well how did the Grand Avenue experience work out?
- A: It didn't.
- Q: What seemed to be the problem?
- A: The property was not conducive to running a bookstore.
- Q: And in what way was that, sir?
- A: It had some problems with leaking water.
- Q: So that the jury might understand better about the layout of the store, was the premises that you rented from Ms. Cullen all on one level, or was there more than one level?
- A: There was a main level and a basement storage area.

- Q: And in terms of basement storage in the operation of a bookstore, what is most important about basement storage for a bookseller?
- A: You really need a dry and controlled humidity environment.
- Q: Mr. Lamar, please turn your focus to the events of July 3rd and July 4th. Will you do that? You must say "yes."
- A: Yes sir.

10. Why does Mr. Lyons choose to move directly to the events of July 3rd? Review Sections 1.23 through 1.23.3 of Advocacy, Book 3. What structure is Mr. Lyons using? What are the advantages and disadvantages of this structure? Outline the principle parts of the direct examination using a structure different than the one Mr. Lyons has chosen.
11. If Mr. Lyons is going to ask Mr. Lamar about the events of July 3rd and July 4th, he will need to lay appropriate foundation. What questions should Mr. Lyons ask to lay this foundation? Remember, foundational questions are not only a prerequisite to admissibility (Federal Rule of Evidence 602), but also the basis of the witness' credibility. Consider what questions could be asked:
 - A. To establish and enhance Mr. Lamar's perception.
 - B. To set the scene for the events of that weekend.
 - C. To establish an overview of those events.

D. To bring out the details of the events on July 3rd and July 4th.

Reread Sections 1.35 through 1.44 of Advocacy, Book 3, for examples of these types of questions.

- Q: And sir, was the 3rd of July to be a business day?
- A: Yes, it was.
- Q: Will you please tell the jury what happened when you arrived at your shop on Grand Avenue to open for business on the 3rd of July.
- A: When I arrived I found that part of the ceiling had collapsed and there was water damage inside the store.
- Q: In terms of the contents of the store, was there any damage in that regard, sir?
- A: Quite a bit, yes sir.
- Q: And what of the contents was damaged?
- A: Books on the main floor were damaged by wet plaster and water. In the basement there was standing water and dripping water. The books that were in storage down there were badly damaged as well.

12. Mr. Lyons introduces two exhibits during this segment of the direct examination. Read over Advocacy, Book 4, Section 4.14 to refresh your recollection of the steps necessary to introduce an exhibit at trial. Does Mr. Lyons follow these steps? Are there additional questions he should have asked about the photograph or the book before offering those exhibits in evidence?

- Q: Sir, did you have an opportunity to photograph any of the damage in the store?
- A: Yes sir, I did.
- Q: Your Honor, may I approach the witness?
- Judge: Yes, you may.
- Q: Mr. Lamar, I would like you to take a look at what's been marked as Exhibit Number 7. Can you tell us what that Exhibit is?
- A: That's a picture of the way my shop looked the morning that I came to work.
- Q: And is that a photograph that you had taken? Your Honor, counsel, I'd like to introduce this exhibit.
- Ms. Jesson: No objection, your Honor.
- Judge: Exhibit is received.
- By Mr. Lyons:
- Q: Thank you, your Honor. Now Mr. Lamar, would you please take Exhibit 8 in your

hand and tell the jury if you can identify that.

A: Yes, this is one of the books that was in the basement of the Bookery.

Q: And what does that exhibit show with respect to that book?

A: The water damage that took place. The binding is ruined and the pages are mildewed and cannot be fixed.

Q: Would this be typical of the water damage that was done to the other volumes in the bookstore at that time?

A: Yes sir.

Q: Your Honor, we'd like to offer Exhibit Number 8.

Ms. Jesson: No objection, your Honor.

Q: Your Honor, I would also like at this time with the court's permission to hand Exhibits Nos. 7 and 8 to the jury for their inspection.

Judge: Exhibit No. 8 is received and you may pass them both to the jury.

By Mr. Lyons:

Q: Thank you, your Honor. Mr. Lamar, while the jury is reviewing those exhibits could you tell us the value of that book?

A: That particular book was \$100.

Q: And would that be typical of the quality and the value of the books that you had in the store on July 3rd?

A: Not necessarily typical, this was a signed first edition.

Q: And would the value then of the others range in that area somewhat below \$100 a volume?

A: Yes sir, usually \$50 and below.

Q: Thank you. Now did the clean up continue on July 4th, the holiday?

A: Yes sir, it did.

Q: And where were you focusing your clean up activities on July 4th?

A: I was trying to get as much of my stock out of the basement as possible.

Q: And were you working alone, sir?

A: Yes, I was.

Q: Could you tell the jury about how many trips you made during July 4th from the basement up to the main level?

A: A dozen or more at least.

Q: And in terms of the length of that day, how late did you work that day?

A: I worked from seven in the morning until seven in the evening.

Q: And what happened to terminate your working efforts that day at 7:00?

A: About 7:00 I was making a trip up the stairs with a large box of damaged books when I slipped and fell.

- Q: Now sir, you had crossed those same stairs many times that day before, is that correct?
- A: Yes sir.
- Q: What was the condition of the steps themselves as you both went up and went down those steps to the basement?
- A: They were dirty, slightly wet and I would clean them off from time to time.
- Q: You say you cleaned them off from time to time. Why would that be necessary sir?
- A: There was plaster that was still coming down from the ceiling.
- Q: And this occurred during the day of July 4th?
- A: That's correct, sir.

13. As you watch the next segment of the direct examination about the accident, focus on the questioning techniques Mr. Lyons uses.
- A. Mr. Lyons asks Mr. Lamar several questions concerning the accident on the stairs. Most of Mr. Lyons' questions call for short and specific answers. Why does Mr. Lyons choose to use these sorts of questions?

- B. As you watch this segment of direct, compose narrative questions that would elicit the same information. You may want to review Sections 1.45 through 1.49 for examples of different question types.
- C. Can you find examples of "double direct" during this segment of the examination? Review Section 1.51 for examples of this technique.
- D. Does Mr. Lyons use any "impact words" during this segment of the direct? Review Section 1.50 for examples of this technique.

- Q: Now, when this event occurred where you say you slipped and lost your balance, could you tell the jury in a little more detail what you remember about losing your balance on the stairs?
- A: I was coming up the stairs with a large box and all of a sudden my foot went out from under me, and in trying to catch myself I felt my knee twist, heard something snap, and felt a great deal of pain.
- Q: And were you able to tell what it was that your foot slipped on?
- A: Well, after I had fallen, I couldn't walk up the stairs. I had to crawl up the stairs and found a lot of wet plaster on my hands. So I'm assuming that's what I slipped on.

Q: When that wet plaster, when you felt it, what was its texture or consistency? Was it slippery?

14. Is this a leading question? (If you are uncertain, find your Evidence professor and ask.) Why doesn't Ms. Jesson object?

A: Yes, it was like you do if you work with plaster, when you put it on just kind of wet.

Q: After you heard your knee snap and felt the pain, how far did you move at that time?

A: I just sat where I fell for a little while and then in trying to rise, I realized that I couldn't put any weight on the leg at all.

Q: Which knee was that?

A: It was the left knee.

Q: What medical treatment, if any, did you receive for that sensation of pain you felt in your left knee?

A: That evening I went to the emergency room and sat for about five hours and was basically told there was nothing much they could do at that time. The leg was immobilized and I was given some pain killers.

Q: And that five hours, was that before you

were seen or after you were seen?

A: That was waiting pretty much to be seen. It was the 4th of July so there was quite a bit of activity.

Q: And as events progressed from the day of July 4th onward toward our trial here, did you have any more treatment on that knee other than the emergency room?

A: Yes sir, I had surgery to reconnect the ligament.

Q: And in addition to the surgery was there any other treatment?

A: Ongoing physical therapy.

Q: Has this physical therapy and condition of your knee interfered in any way with your ability to conduct your book business?

A: It has required that I hire a stock person during the days where I used to work alone, simply because I can't carry as much as I used to be able to.

Q: And are you still receiving treatment today in any form, either medication or physical therapy?

A: Some slight pain killers and continued physical therapy will probably go on for another two or three weeks, I'm told.

15. The videotape shows only a few questions about the damages Mr. Lamar suffered when he hurt his knee. Compose additional questions you might ask Mr. Lamar about this issue. In specific, consider what questions you could ask:

- A. To elicit a more complete description of pain from Mr. Lamar.
- B. To have Mr. Lamar quantify that pain.
- C. To obtain more details about the effect that the pain has had on Mr. Lamar's activities.
- D. To give the jury a sense of the change in Mr. Lamar's condition from the date of the accident to the date of trial.

CROSS-EXAMINATION

Lamar v. Cullen

16. Before watching this cross-examination, make sure that you have read Chapter 2 of Advocacy, Book 3. If you were the lawyer representing Naomi Cullen, would you cross-examine Darren Lamar? Do you have a choice? Assuming that you would cross-examine him, consider the following questions:

- A. How would you prepare for this cross-examination? What materials would you review to prepare the cross-examination?
- B. Review Section 2.01.1 concerning supportive cross-examination? What are the five most important points to develop during supportive cross-examination of Darren Lamar? In what order would you raise these points on cross-examination?
- C. Pick one of the points you wanted to raise during supportive cross-examination of this witness and compose a series of questions to develop that point.
- D. Review Section 2.01.2 concerning discrediting cross-examination? Is this witness vulnerable to discrediting cross-examination? What areas of his direct examination testimony could be discredited?

PLAINTIFF DARREN LAMAR

- Judge: Ms. Jesson, you may proceed with your cross-examination.
- By Ms. Jesson: Thank you, your Honor. Mr. Lamar, you negotiated the lease for the Bookery in January of last year with Naomi Cullen, didn't you?
- A: Yes.
- Q: Before you negotiated the terms of that lease you had worked as a small business person for more than seven years. Correct?
- A: That's right.
- Q: And even before those seven years you taught in a high school, taught English to students. Correct?
- A: Yes ma'am.
- Q: And before that you graduated from and attended Macalester College. Correct?
- A: Yes.
- Q: So when you received a copy of the lease from Naomi Cullen you were certain to read that lease before you signed it, weren't you, sir?
- A: Yes I did.
- Q: So when you signed that lease in January of last year, you knew there was a provision that stated that you the tenant agreed to give notice in writing to Ms. Cullen whenever you discovered any condition that needed repair. You were aware of that provision, weren't you?

- A: Yes, I was.
- Q: So when you moved into the Grand Avenue store in March of last year you knew it was your responsibility to notify Ms. Cullen in writing anytime you found a condition that needed repair. Correct?
- A: Yes.
- Q: You didn't expect, Mr. Lamar, Ms. Cullen to come by and do regular inspections of your property, did you?
- A: No.
- Q: You knew that was your responsibility?
- A: Yes.

17. Read back over this first segment of Ms. Jesson's cross-examination. Ask yourself the following questions:
- A. What point is Ms. Jesson trying to establish?
 - B. Could you make the same point in a single question? Why does she use nine questions?
 - C. Review Sections 2.17 through 2.23 on forming and composing questions. Which of these techniques does Ms. Jesson use?
 - D. Go back over these nine questions. Are there some that could have been more tightly phrased? Are there additional questions on this issue that Ms. Jesson should have asked?

- Q: And when you moved in in March of last year was the property generally in good condition?
- A: At that time it was.
- Q: Now at some point in mid-April you noticed that there was a leak in the roof of the Bookery, didn't you sir?
- A: That's correct.
- Q: Was it a pretty rainy month? April of last year, sir?
- A: Not overly rainy, but it had rained and there was a small leak.
- Q: You say "small leak." Isn't it true in April last year sometimes it leaked so much that you had to remove a bucket of water more than once a day from that leak?
- A: No, I usually didn't have to remove it more than once.
- Q: But sometimes you had to remove it more than once.
- A: I think on one occasion possibly.

18. Controlling a witness' responses is an important part of cross-examination. In this previous segment, Darren Lamar denies having had to remove more than one bucket of water a day. Consider these questions:
- A. Did Ms. Jesson make a mistake asking these questions? Did she fail to "avoid the prejudicial unknown"? See Section 2.29.
 - B. What techniques did she use to attempt to control Mr. Lamar's answers?
 - C. Read back over Sections 2.28 through 2.34 on controlling responses. Are there other techniques for controlling responses that would have worked better here?
 - D. What techniques does Ms. Jesson use to control responses in the remainder of the cross-examination?

- Q: The first day you noticed that leak, did you write Ms. Cullen a note to tell her about the leaky roof?
- A: Not at that time, no.
- Q: The next week, after you noticed the leak, did you write Ms. Cullen to tell her about the leaky roof?
- A: No.
- Q: I think we're at the end of April now. At anytime in April did you write Ms. Cullen a note to tell her about the leaky roof?
- A: No.

19. During this next segment of cross-examination, Ms. Jesson asks Mr. Lamar a series of questions about the note he wrote to Naomi Cullen in May. As you watch this cross-examination, think about the following issues:
- A. Is this supportive or discrediting cross-examination?
 - B. What techniques of witness control is Ms. Jesson using?
 - C. Review Section 2.64.5 about impeachment through omissions in a prior statement. Is Ms. Jesson using this method of impeachment?
 - D. Why does Ms. Jesson choose to end this line of cross-examination with a question about reference to a "specific problem"?

Q: Mr. Lamar, I'm showing what's already been marked Exhibit 10, which you earlier identified as a note which you sent with your May rent check to Ms. Cullen. Do you recognize that exhibit?

A: Yes, I do.

Q: Now Mr. Lamar, this note doesn't state to Ms. Cullen, "My roof is leaking," does it?

A: No.

Q: As a matter of fact, this note to Ms. Cullen doesn't even include the word "roof" in it, does it?

A: No.

Q: And this note doesn't even include the

word "leak" anywhere in it, does it?

A: No, it doesn't.

Q: Would you agree with me Mr. Lamar, that this note doesn't tell Ms. Cullen of the specific condition that needed repair?

A: It says there's a water problem.

Q: But would you agree with me that it does not tell Ms. Cullen of the specific problem that needs to be repaired?

A: That's correct.

Q: Mr. Lamar, after a phone conversation you had with Ms. Cullen, did Tom Henry come over to the Bookery?

A: Yes, he did.

Q: He came over the next day after your phone conversation?

A: That's correct.

Q: And that was on May 5th, wasn't it?

A: That's correct.

Q: And Mr. Henry repaired a pipe joint in the basement that day. Is that correct?

A: That's what it looked like he had done, yes.

Q: Now when Mr. Henry came over, the ceiling was pretty much dry, wasn't it?

A: Yes.

Q: But didn't Mr. Henry tell you that you should call Ms. Cullen and tell her about the roof problem, because he didn't believe she was aware that there was a problem with the roof?

A: We did have a discussion along those lines, yes.

- Q: So after you had that discussion did you pick up the phone and call Ms. Cullen?
- A: No, because I felt that at the end of our discussion, between Mr. Henry and I, that he was going to let her know what the problem was.
- Q: Mr. Lamar, my question is simply, after you had that conversation with Mr. Henry where he advised you to talk to Ms. Cullen, did you pick up the phone and call her?
- A: Not at that point, no.
- Q: So by May 5th, Mr. Lamar, you knew that there was a leak in your roof, right?
- A: Yes.
- Q: And you knew that it had not been repaired, right?
- A: Correct.
- Q: And you knew that the lease required you to give written notice of conditions needing repair to Ms. Cullen, correct?
- A: Yes.
- Q: And you even knew that Tom Henry requested that you inform Ms. Cullen about the roof, didn't you?
- A: Yes.
- Q: But on May 5th, you didn't write a note to Ms. Cullen that stated there's a leak in my roof, did you, sir?
- A: No, because I had already written her a note about the problem.
- Q: If you could just answer my question. On May 5th, after that conversation with Mr. Henry, you didn't write a note to Ms. Cullen

- that said "there's a leak in my roof," did you sir?
- A: No.
- Q: Well let's look at the next 10 days, May 5th to May 15th. In those next ten days were you generally at work at the Bookery?
- A: Yes.
- Q: During those 10 days did you write any notes to Ms. Cullen notifying her about the leak in the roof?
- A: No.
- Q: Let's look at the second two weeks of May. Were you generally at work during those two weeks?
- A: Yes, I was.
- Q: Were you busy in the store?
- A: Very.
- Q: I know I myself am someone who tends to walk down Grand Avenue in May and it's a busy time of year, isn't it?
- A: That's correct.
- Q: And during those two weeks at the end of May you didn't write Ms. Cullen a note notifying her of the leak in the roof, did you, sir?
- A: No, I did not.
- Q: Let's move on to June. The first two weeks of June of last year, were you generally at work at the Bookery?
- A: Yes, I was.
- Q: Once again, was that a busy time of year for you?

A: Very.

20. This is the third time that Ms. Jesson has mentioned Mr. Lamar being busy at the bookstore. Why is Ms. Jesson asking Mr. Lamar these questions?

Q: During those two weeks did you write a note to Ms. Cullen notifying her that there was a leak in the roof?

A: No, I did not.

Q: Now, you knew in the first two weeks of June that there was a leak in the roof still. Isn't that correct?

A: Hadn't thought about it since the time of the leak.

Q: You hadn't thought about it? Too busy and forgot about it?

A: That's correct.

Q: Let's talk about the last two weeks of June. During the last two weeks of June were you generally at the Bookery working?

A: Yes, I was.

Q: Once again, is that a busy time of year for you?

A: Yes, all through that time period.

Q: So busy that you forgot about the leak in the roof and didn't write or call Naomi Cullen about it, did you sir?

A: That's correct.

Q: So on July 1st of last year, you had known for two and a half months that the building had a leaky roof and despite this, you never gave Naomi Cullen a letter which said, "there's a leak in my roof." Did you sir?

A: No.

Q: Mr. Lamar, I'd like to turn your attention now to the events on July 4th. As I recall your testimony on direct, you discovered the collapsed ceiling on July 3rd.

A: That's correct.

Q: Did you get to the store earlier on the 4th?

A: I'm sorry?

Q: Did you get to the store early on the 4th?

A: About 7:00 a.m., yes.

Q: Did you pretty much work all day trying to get things in as best order as you could on July 4th?

A: Yes, I did.

Q: In your business are books about the most important tangible asset in your store?

A: About all there is.

Q: So wasn't it your first priority, in cleaning up the store, to retrieve as many of your books as you could out from under the plaster?

A: My main concern was the books in the basement. They were more heavily water damaged than those on the main floor.

Q: So it was retrieving the books in the basement that was your first priority in cleaning up the store?

- A: Yes, that's correct.
- Q: Did you spend most of the day on July 4th working in the basement and carrying up heavy loads of books from the basement?
- A: Yes, I did.
- Q: So you were pretty tired, weren't you sir, by 7:00 p.m. on the night of July 4th?
- A: Yes, you could say that.
- Q: Is it fair to say you were almost exhausted by then?
- A: I don't know that I'd go that far, but I was tired.

21. Ms. Jesson asked for "exhausted," and got "tired." If Ms. Jesson isn't satisfied with that response, what question can she ask next? Reread Sections 2.22 and 2.23 for suggestions.

- Q: And isn't it true sir, that you wanted so much to rescue those books in the basement that you didn't take time to periodically sweep the plaster or sweep water off the steps before you carried the books up, did you?
- A: I did on a few occasions during the day, periodically.
- Q: Well let me ask you this, sir. The heavy box of books that you were carrying up the steps about 7:00 p.m. on July 4th — do you remember that box of books?
- A: Yes, I do.

- Q: You didn't sweep the steps of any debris or water right before you carried that box of books up, did you sir?
- A: Not that I remember, no.
- Q: Isn't it true sir, that if you had taken the time to have swept those stairs you might not have fallen on the plaster?
- A: It's possible.

FADE OUT

DIRECT EXAMINATION

Lamar v. Cullen

22. Suppose that you are the lawyer representing Naomi Cullen in this lawsuit. How will you prepare Ms. Cullen for her direct examination? Review Sections 1.13 through 1.18 in chapter 1 of Advocacy, Book 3. Consider the following questions:
- A. What information will you have to help you prepare Ms. Cullen for her direct examination?
- B. What will you say to Ms. Cullen about the legal theory of the case? About the other side's legal theory?
- C. How good of a witness do you expect Ms. Cullen will be? How will you deal with her limitations and weaknesses? What will you say to her about those weaknesses?

- D. What structure will you use for Ms. Cullen's direct?
- E. Will you conduct a "dress rehearsal" of her testimony? How long before her testimony in court will this preparation take place? How much time do you expect it to take?
- F. How will you prepare Ms. Cullen for cross-examination?
23. The segment of the videotape you will watch begins with the portion of Ms. Cullen's direct concerning her first dealings with Mr. Lamar. You do not see Mr. Purdy ask Ms. Cullen many background questions. If you were conducting Ms. Cullen's direct, what background questions would you ask her? Since she is a landlord, what kinds of questions would you want to ask her to establish her personality? To identify similarities between Ms. Cullen and the jurors?

DEFENDANT NAOMI CULLEN

By Mr. Purdy:

- Q: Ms. Cullen, could you tell the court what you do for a living?
- A: I sell real estate and I manage an apartment building and I have five store fronts.
- Q: What type of businesses are located in your store front properties?

- A: Well they're mostly small businesses, things like floor shops, a coffee shop, bookstores, boutiques — that type of thing.
- Q: Do you own a property on Grand Avenue that previously housed a business known as the Bookery, which was owned by Mr. Lamar?
- A: Yes.
- Q: Now, you've heard Mr. Lamar's testimony in this case, have you not, while you've been sitting here in the court?
- A: Yes.
- Q: Did he sign a lease with you in January of last year?
- A: Yes, he did.
- Q: Your Honor, may I approach the witness?
- Judge: You may.
- Q: I'm showing you what's been previously marked as Exhibit 1. Is this a copy of the lease which you signed with Mr. Lamar?
- A: Yes.
- Q: Now I'm going to be asking you some questions about that lease later, but before I do that Ms. Cullen, I'd like you to tell us whether you were acquainted with Mr. Lamar prior to renting him property in your building?
- A: Yes, I was. He had a bookstore that I frequented, purchasing some fiction from him from time to time. And through those

purchases we became acquainted.

Q: Were you a customer of his?

A: Yes.

Q: When he first approached you about leasing property in your building what was your reaction?

A: Well, I thought that would be a very good idea.

Q: Can you explain why?

A: He seemed like a very aggressive young man, anxious to get ahead, and he was organized in his bookstore and I just thought that we would have a very nice relationship.

Q: And you ultimately entered into the contract which is before you, Exhibit number 1?

A: Yes.

Q: Now let's talk about that lease agreement which you and Mr. Lamar signed. First, is this a standard lease which you enter into with all of your tenants?

A: Yes, yes.

Q: Does it contain similar provisions, or provisions that are similar to the other contracts that you have with other tenants?

A: Except for the fact that I gave Mr. Lamar five years of lease as opposed to one or two which is normal. And I also gave him a little better price on the rent.

Q: Why did you offer him a little better price on the rent?

A: Well, I did because I felt that he would be a very fine tenant and I felt that I'd like to have someone in there that was going to stay longer than one or two years, which I expected him to do.

Q: Prior to the time that Mr. Lamar moved out of your space, had you ever been advised that the roof over the area occupied by his bookstore had been leaking water?

A: No.

Q: Had you been told about that fact at any time? Strike that. Had you been told about that fact any time before he moved out, what would you have done?

Ms. Dobbe: Objection, calls for speculation.

Judge: The objection is overruled. You may answer.

A: I would have had it fixed immediately.

24. The judge overrules Ms. Dobbe's objection and Ms. Cullen answers the question. If the judge had sustained the objection, are there additional questions you could ask to lay the necessary foundation to permit the witness to answer?

- Q: When did you first learn that Mr. Lamar was considering to move out of your space on Grand Avenue?
- A: It was in late July. My manager, Mr. Henry, had driven past and saw a moving sale sign in the window and he told me about it and I was very surprised.
- Q: What did you do after Mr. Henry told you about seeing the moving sign?
- A: I went over there. I went over to the bookstore to find out what was going on.
- Q: What did you learn?
- A: Well Mr. Lamar was not there that day, but I spoke to his store clerk. She didn't really seem to know much about what was going on either. And I could observe that part of the ceiling had collapsed and that there was some water damage. There was some water damage to perhaps some of his books.
- Q: Did you make any effort to contact Mr. Lamar after you walked through the store?
- A: Yes, I did.
- Q: Could you tell us again what day was it that you actually walked through and first learned about this?
- A: About the 28th of July, I believe.
- Q: Now you said that you made an effort to contact Mr. Lamar. Could you tell us what you did in that regard?
- A: I called, but he wasn't there, and then I

- Q: tried to reach him on the my car phone and was not able to reach him.
- Q: And when did you learn that Mr. Lamar had actually moved his store out of your property?
- A: We saw him moving on the weekend after the — let's see — it would have been about the 30th of July, the first of August.
- Q: Was this the very next day after you had attempted to talk with him?
- A: Yes, yes. He was in the process of moving at that time.

25. Mr. Purdy's direct examination shifts from Darren Lamar's decision to leave the store to Ms. Cullen's knowledge about water problems at the store.
- A. What structure is Mr. Purdy using for this direct examination? Why has he chosen this particular structure?
- B. What additional questions could Mr. Purdy have asked to elicit additional information about Ms. Cullen's visit to the bookstore in late July?

C. Mr. Purdy would like to establish that Ms. Cullen had little or no notice of the water problem at the store. It is a challenge to develop direct examination testimony about a witness' lack of knowledge or notice. Compose a series of questions you would ask to demonstrate that Ms. Cullen did not have adequate notice about the water problem. Can you develop this testimony without using leading questions?

Q: Ms. Cullen, I want to talk to you first about knowledge of water problems that you may have had or knowledge of water problems in his bookstore that you may have learned about. First, Mr. Lamar testified earlier in this case that he first notified you of a problem by leaving you a message on your telephone answering machine and in late April. Do you recall that testimony?

A: Yes.

Q: Did you ever receive such a message on your answering machine?

A: No.

Q: Where were you during the last two weeks of April?

A: I took a vacation.

Q: Now before you left on your vacation, what did you do, if anything, to deal with

complaints or problems which any of your tenants might experience while you were gone?

A: Well, before I left everything was in total order and there were no complaints. I also left a message on my answering machine that if there were any problems for any of my tenants, that I told them approximately when I would return and that if there were any problems they should contact Mr. Henry. And I left his phone number on the machine.

Q: And who is Mr. Henry?

A: My manager of my apartment, and he does lots and lots of odd jobs for me.

Q: To your knowledge Ms. Cullen, did Mr. Henry ever receive a complaint or a call from Mr. Lamar regarding water in his space while you were gone on vacation?

A: No, he did not.

Q: When did you first learn of a water problem of any nature occurring in the Bookery?

A: When I returned from my vacation. My mail had a rent check from Mr. Lamar and enclosed with the rent check was a note about some water problems in his store.

Q: Your Honor, may I approach the witness?

Judge: You may.

Q: Thank you. Ms. Cullen, I want to show you what's been previously marked and introduced into this trial as Exhibit 10. Is

this a copy of the note which you received with the rent check?

A: Yes.

Q: And you received that on what date? Do you recall?

A: Probably about March 3rd, I mean, excuse me, May 3rd.

Q: Does the note that Mr. Lamar sent you on May 3rd make any mention of water coming through the roof of the building?

A: No, no.

Q: Does it make any mention of water coming through the ceiling?

A: No.

Q: What did you do after you received Mr. Lamar's note on May 3?

A: I contacted my manager, Mr. Henry, and asked him to go over there and find out what the problem was. I did suggest that he take some plumbing tools along because I thought it could be a seeping pipe or something like that.

Q: Did you ever speak with Mr. Lamar personally about the problem, the water problem that he described in his note which is Exhibit 10?

A: Not at that time.

Q: When did you first speak to him about that?

A: Well, it must have been later in July.

26. In fact, Ms. Cullen did have a conversation with Mr. Lamar after receiving the note in May. What can Mr. Purdy do to correct her testimony? What kinds of questions can he ask to fix this mistake without damaging Ms. Cullen's credibility? Review Advocacy, Book 3, Section 1.53 for an example of how to deal with this sort of problem. Then watch the next segment of the tape and evaluate Mr. Purdy's approach to this issue.

Q: Let me just back up and ask you this Ms. Cullen, do you recall having a telephone conversation with Mr. Lamar the day after you received the note? Did he call you about this problem?

A: I think he did, yes, and that was the time he was very disgruntled about it and he seemed to be — he had some words about not being real satisfied.

Q: Do you recall anything else about that conversation? Do you recall what he said to you?

A: He mentioned something about "I better get this fixed or my bank account was going to suffer," or he was going to move or something. He was really quite disgruntled I would say.

Q: Did he make any other comments or threaten to ruin your business during that conversation?

- A: No, I couldn't say that, no.
- Q: Now after this conversation, what did you do?
- A: Well, I had Mr. Henry go over there and look into whatever was causing the water problem.
- Q: And I believe you told us earlier that you had suggested to Mr. Henry that he take his plumbing tools with him. Is that what you told us?
- A: Yes.
- Q: Did you have any other information? For example, did Mr. Lamar give you any information about what he believed may be causing the problem?
- A: No, no, he didn't.
- Q: To your knowledge did Mr. Henry respond to the problem?
- A: Yes.
- Q: Do you recall what date he responded?
- A: I think it was... He went over there on the morning of May 4th.
- Q: And did you ever talk to him later to determine whether or not he got the problem fixed?
- A: No. I received an invoice for his services. I believe he was there for about 45 minutes. And as I say, I have so much faith in what he does... I was busy, it was a very busy month for me in my real estate

- business, so I just assumed that problem was taken care of and that Mr. Henry had done it sufficiently.
- Q: And did Mr. Lamar ever tell you anything differently at any time before he moved out?
- A: Absolutely not.
- Q: Following May 5th, when Mr. Henry responded to the problem and did his work at the Bookery, did you receive any other complaints from Mr. Lamar during the month of May concerning water problems in his bookstore?
- A: No.
- Q: Did you receive any complaints from Mr. Lamar at any time during the month of June concerning water problems in his bookstore?
- A: No.
- Q: Prior to his moving his bookstore out of the space, had you ever received any information from Mr. Lamar indicating that he had a water problem in his space?
- A: No.
- Q: Ms. Cullen, you have Exhibit number 1 in front of you and you've already read for us paragraph nine, the language that says "tenant agrees to give notice in writing to owner whenever tenant discovers any condition needing repair on the premises." Other than the May 3 note which you've testified about, which is Exhibit 10, did you

ever receive any other written notice of water problems in Mr. Lamar's bookstore?

A: No.

Q: Did you believe that the problem had been corrected after Mr. Henry did his work in that space on May 5th?

A: Absolutely.

27. Compare this portion of Ms. Cullen's direct examination with the portion of Mr. Lamar's direct examination depicted on the videotape. Consider the following questions:

- A. If you were a juror or judge watching these direct examinations, which would have been more memorable? Why?
- B. Which witness seemed more credible to you? Why? Did either lawyer do anything to enhance or damage the witness' credibility during the direct examinations?
- C. Was one of the lawyers easier to watch or listen to? Why?
- D. Think back to the interviews and depositions of these two witnesses. Were either of these witnesses significantly better or worse than you would have predicted they would be on the basis of the interviews or depositions?

CROSS-EXAMINATION

Lamar v. Cullen

28. Assume that you are preparing the cross-examination of Naomi Cullen.
- A. List all the main points you would like to establish during the cross-examination.
 - B. Divide the points into supportive cross-examination and discrediting cross-examination.
 - C. Rank each point on both of those lists from the most important to the least important.
 - D. Decide which of the important points should begin the cross-examination and which should end it.
 - E. Organize the points into an effective sequence for cross-examination.
 - F. Structure any subtopics under the main points so that you have a complete outline of the subject matter of the cross-examination.
 - G. Review your outline to determine if your initial assessment of the rank and order of the cross-examination appears to be the most effective.
29. As you watch the segment of the cross-examination Ms. Dobbe conducts, compare and contrast it with Ms. Jesson's cross-examination of Darren Lamar. Ask yourself:

- A. Is there a difference between Ms. Dobbe's demeanor and Ms. Jesson's? Which seems to be the more effective to you? Why?
- B. Both lawyers used leading questions, but Ms. Dobbe has formed and composed her questions differently, hasn't she? How would you characterize the difference?
- C. What techniques does Ms. Dobbe use to control the witness' responses? Are these different techniques than the ones Ms. Jesson used? Which techniques seem more effective? Why?
- D. What techniques does Ms. Dobbe use to emphasize important points? What techniques did Ms. Jesson use? Review Advocacy, Book 3, sections 2.35 and 2.36 for an illustration of some of these techniques.

DEFENDANT NAOMI CULLEN

Judge: Ms. Dobbe, you may proceed.

Q: Thank you, your Honor. Ms. Cullen, my name is Louise Dobbe and I represent Mr. Lamar. I will be asking you some questions on what's called cross-examination. Do you presently live in Minnetonka?

A: That's true.

Q: And prior to that you lived in St. Paul?

A: Mmm, hmmm.

Q: I'm sorry you're going to have to answer "yes" or "no" so the court reporter can take down your responses.

A: I'm sorry, yes.

Q: You sell real estate for a living?

A: Yes.

Q: How long have you been doing that?

A: About twenty years.

Q: And you also manage an apartment building, is that right?

A: Yes.

Q: The five store fronts located on Grand Avenue are older properties, aren't they?

A: Yes.

Q: Would you say they're more than thirty years old?

A: I would say so, yes.

Q: More than forty years old?

A: I think about forty-three.

Q: And the Bookery was located in one of those properties that's over forty years old?

A: Yes.

Q: You've owned that property for several years, haven't you?

A: Yes.

- Q: You collect the rents?
- A: Yes.
- Q: You respond to the concerns the tenants have?
- A: Absolutely.
- Q: And you visit those stores?
- A: Yes.
- Q: You look at the properties —you inspect them visually?
- A: Yes.
- Q: And basically you manage those properties yourself, don't you?
- A: Yes.
- Q: When people have problems with those properties, you get someone to fix them?
- A: Yes.
- Q: You did not employ someone to regularly inspect those properties for you?
- A: No.
- Q: Tom Henry is not your property manager, is he?
- A: No.

30. In the next portion of the cross-examination, Ms. Dobbe impeaches Naomi Cullen with a prior inconsistent statement. Review Sections 2.56 through 2.64.1 on impeachment with a deposition. As you watch this impeachment, identify the questions Ms. Dobbe uses to:
- A. Reaffirm the direct examination testimony.
 - B. Describe the circumstances of the prior inconsistent statement.
 - C. Introduce the prior inconsistent statement.
 - D. Obtain Ms. Cullen's response to the inconsistent statement.

After watching this impeachment, ask yourself how this segment of the cross-examination would change your opinion of Ms. Cullen's credibility were you a juror.

- Q: Ms. Cullen, do you recall giving a deposition in this matter?
- A: Yes.
- Q: And do you recall in that deposition stating that Tom Henry is your property manager?
- A: Well, in a broad sense, yes.
- Q: Do you recall having made the statement that, "Tom Henry is my property manager"?
- A: I perhaps did. I could have.
- Q: Would it make you more comfortable to

look at your deposition?

A: All right.

Q: May I approach, your Honor.

Judge: You may.

Q: Ms. Cullen I'm handing you what has previously been marked as Exhibit number 5, and ask you to take a look at that and tell me, is that a copy of your deposition?

A: Yes.

Q: And on the last page does it contain your signature that says everything in it is true and correct?

A: Yes.

Q: I'd like to direct your attention to page 10, and ask you to read along silently. Does it not in fact say, "Tom is my property manager"?

A: Yes.

Q: Thank you Ms. Cullen. But Mr. Henry, in fact, is not the apartment building manager?

A: That's true.

Q: You do not have an employee who regularly inspects your properties?

A: No.

FADE OUT

Q: So the roof on the Bookery has not been inspected for over ten years?

A: That's true.

Q: And the building itself is forty-three years old?

A: That's true.

Q: Now you were a long time customer at the Bookery when it was on Snelling Avenue, weren't you?

A: Yes.

Q: And you came to visit Mr. Lamar after he opened the shop in March?

A: Yes, I did.

Q: A few days after the opening, March 2nd or 3rd, I believe you visited with him.

A: Yes.

Q: And in April you went on vacation, is that right?... I'm sorry, you have to answer out loud.

A: Yes.

Q: And you did not have an opportunity to stop into his shop in April, did you?

A: No.

Q: You didn't have a chance to visit with him?

A: No.

Q: And in May you received the note about the water problem, is that right?

A: Yes.

- Q: But you didn't stop over to see him then?
- A: No.
- Q: And in June you were busy listing properties, is that right?
- A: July also, yes, was a very, very busy month for me, two months for me.
- Q: So you didn't get a chance to see Mr. Lamar at the Bookery in June or July either, did you?
- A: No.
- Q: So between March 2nd and 3rd and the end of July you never inspected the property at all, did you?
- A: No. I really would see no reason to do that.

31. Ms. Cullen gives more than a "no" for her answer. Ms. Dobbe's question was leading, wasn't it? Ms. Dobbe chooses not to control Ms. Cullen with one of the techniques listed in Section 2.31. Why not? Is there a disadvantage to this choice? Watch the next several questions and then revisit this issue.

- Q: And you do not have a property manager that inspects properties for you, do you?
- A: No. Because in the lease, the minute there's a problem the tenant is supposed to let me know and I take care of it immediately.

- Q: When you received the notice in May with the May rent check, you did not inspect the property at that time, did you?
- A: No. I did not. I did not feel it was necessary, because I have full confidence in Tom Henry, the man that does all of the work for me. He's very conscientious and he's very very good at taking care of all these problems for me, so I would have no reason to question it.
- Q: Tom Henry is not your employee, is he?
- A: Well, I guess you might say he is.
- Q: He does not work exclusively for you, does he?
- A: No. He has, he does some carpenter work on the side.
- Q: And he has other carpentry jobs besides those jobs that you send him on, isn't that true?
- A: I believe he does, yes.
- Q: So when Tom Henry gets sent out on a job he addresses the immediate need, is that right?
- A: A job for me?
- Q: Yes.
- A: Absolutely.
- Q: But you don't employ him as a property manager?
- A: He is the manager for my apartment complex.

- Q: But you didn't stop over to see him then?
- A: No.
- Q: And in June you were busy listing properties, is that right?
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- A: I believe he does, yes.
- Q: So when Tom Henry gets sent out on a job he addresses the immediate need, is that right?
- A: A job for me?
- Q: Yes.
- A: Absolutely.
- Q: But you don't employ him as a property manager?
- A: He is the manager for my apartment complex.

- Q: But you do not pay him for inspecting your properties other than the apartment building?
- A: No.
- Q: When you sent him out in May, you told him to take his plumbing tools along, is that right?
- A: I suggested it.
- Q: But you did not personally inspect the premises?
- A: No.
- Q: And in fact, you told Mr. Henry that you believed it could be a leaky pump, pipe, excuse me, in the ceiling of the basement.
- A: Yes.
- Q: But you did not personally inspect the roof?
- A: No. I would have had no reason to whatsoever.
- Q: And you did not ask Mr. Henry to personally inspect the roof?
- A: No.

32. We see only a portion of Ms. Dobbe's cross-examination; we do not see the conclusion. Review Section 2.12 on concluding a cross-examination. What point could Lamar's counsel make that would serve as an effective end to this cross-examination? Design cross-examination questions that will establish this point and will also serve as an effective conclusion to the cross-examination.

TRIAL SUMMATION

Lamar v. Cullen

32. Before watching these summations, read over Advocacy, Book 2, Chapter 3. Then imagine that you are the lawyer preparing the summation for the plaintiff, and that you will be addressing the liability issues in your summation. Consider the following questions:
- A. What materials would you use to prepare your summation?
 - B. List the strong points of your case. How will you emphasize those points in your summation?
 - C. List the weak points of your case. How will you deal with these weaknesses?
 - D. This will be a summation to a judge. What questions do you anticipate she will ask you?
 - E. You will have to give your summation prior to the summation by the counsel for the defense. What do you think she will emphasize in her summation? How could you deal with these issues in your summation? What are the disadvantages to anticipating her argument in this fashion?
 - F. Think about how you will deliver the summation. Are there exhibits or visual aids that you would want to use during the summation?

33. Review the purposes of the summation listed in Section 3.02 of Advocacy, Book 2. As you watch both Mr. O'Leary's summation and Ms. Jesson's, evaluate how well each lawyer accomplishes these purposes:
- A. To summarize the factual theories and evidence of a case.
 - B. To explain persuasively the significance of the evidence presented.
 - C. To draw reasonable inferences, argue conclusions, comment on credibility, refer to common sense, and explain implications which the fact finder may not perceive.
 - D. To explain the legal theories, elements of the claims and defenses, instructions, and the law.
 - E. To highlight the rational and emotional dimensions of the case.
 - F. To answer questions from a judge or arbitrator.
 - G. To integrate the theories, evidence, and law into a cohesive and comprehensive presentation.

PLAINTIFF: BENCH TRIAL

Judge:

Mr. O'Leary, you may proceed with your plaintiff's closing argument.

By Mr. O'Leary:

Thank you, your Honor. Your Honor, this is a case about Naomi Cullen being too busy with her successful real estate business to pay attention to being a proper landlord. Her negligence in failing to repair the water problems at the Bookery last year caused severe damages to my client, Darren Lamar, both in property damages, which were significant, and in a very severe personal injury damage. Naomi Cullen is a 60 year old woman and has been in the real estate business for many, many years. She is knowledgeable and very astute in the real estate matter. She's been very successful in the real estate business. It was, in fact, her lawyer that drafted the commercial leases which she requires of all tenants to sign. Her own lease, your Honor, Clause 7, requires her to maintain the building in a manner fit for the use intended — which includes responsibility for maintenance of external structures such as the roof. Having been a long-term customer of the Bookery, prior to the lease arrangement between the two, Naomi certainly knew the number of very, very valuable used and new books that Darren had.

35. Since this is a bench trial, the judge may interrupt the summations to ask questions. Would you characterize the judge's first question as friendly or hostile? Do you believe that Mr. O'Leary answers this question fully and effectively? Is there another approach to the answer that would have worked better? At the end of the exchange, do you believe that the judge is satisfied with Mr. O'Leary's answer?

Judge: Excuse me, Mr. O'Leary, your client certainly knew that the lease called for him to give written notice to her if there was something that needed repair, didn't he?

O'Leary: Absolutely, your Honor. And he absolutely...

Judge: But your client didn't do it.

O'Leary: But he did, your Honor, in all due respect. And the evidence is clear, as was presented to you, that he fulfilled his obligations under the lease terms, specifically Clause 9, as your Honor has just pointed out, when he sent his written notice with the May 1st payment. And your Honor, that was an exhibit presented to you and what does it say? "Please attend to the water problem in my store A.S.A.P." He didn't know what the water problem was, nor should he — he's an English teacher. He's a book reader.

Judge: How can you contend that your client didn't have a further obligation, once the

plumbing joint was fixed, to let Ms. Cullen know when there was an additional problem, when that didn't take care of it?

O'Leary:

Because, your Honor, he has absolutely no experience in the construction industry or anything dealing with repair and maintenance. He relied, as we heard just a few minutes ago from Tom Henry, he relied on Mr. Henry to know what was going on. Mr. Henry went to him afterwards and said, "I fixed the real problem." He has to rely on that person to fix the real problem. The obligation is with the land owner. It's with Naomi Cullen to ensure it was done correctly.

Judge: But your client saw more water problems after Mr. Henry fixed the "real problem" and before the disaster in July.

O'Leary: Not correct, your Honor, I believe if you look back at your notes...

Judge: There was nothing else in between?

O'Leary: No your Honor. If you recall the evidence from the stand, in May and in June it was dry months — finally, in Minnesota. And we didn't have the water problem until, as the court recalls, July 2nd when they had the very bad storm on July 2nd. So between the time it was repaired, your Honor, and between July 2nd, there was no obligation for my client to give any type of notices.

Judge: Okay.

By Mr. O'Leary: Now last year on May 4th, as the evidence

showed your Honor, Tom Henry was told by Naomi to do whatever he needed to do to make the tenant happy. The least he should have done is to bring a ladder, to go up in the roof. He saw the problem with the plaster, he saw that there were water stains on the ceiling. He has the knowledge to have taken care of the problem. As your Honor, knows, he is an agent of Naomi Cullen, and as such, she is responsible for the acts of her agent or the failure to act on the part of her agent. Now Tom Henry assured Naomi that he would take care of things, but your Honor, he did not. The evidence is clear he did not.

The law in Minnesota clearly shows that when he does not do his job that is attributable to Naomi. But Naomi is not in the clear on this even from her own perspective. She took \$6,000 from my client, \$2,000 in May, \$2,000 in June, \$2,000 in July — what did he get for the \$6,000? He didn't get so much as a visit. He didn't get her to come over and say, "Hey what is wrong with the water problem, and did Tom take care of it?" She was too busy. She had, as she testified, a very busy, successful month and a very busy, successful time during that time of the year. Too successful, too busy, to do what her obligation was to do in order to fix the problem. For the grand sum of \$6,000 that he paid in rent, my client got no proper repairs. He got no visits, but Naomi was not too busy to take his money. She was not busy — too busy to take the rent.

What did she do for the rent? Nothing.

The defense that's being raised here, your Honor, is what I might call the ostrich defense. If Naomi sticks her head in the sand, she sees no evil, she hears no evil, she speaks no evil, then there mustn't be evil. But in fact, your Honor, she had an obligation under the terms of the lease that was drafted by her own lawyer. She had an obligation to ensure that that building was fit for the intended usage. And fit for the intended usage of a bookstore means you do not destroy vulnerable and valuable books with water.

Who, your Honor, was in the best position to know the age of the building? Naomi. Who, your Honor, was in the best position to know the age of the roof? Naomi. Who had the obligation under the terms of the lease to properly maintain the building? Again, Naomi. The water damage to the books is due to her negligence your Honor. It is due to her breach of the contract which her own lawyer drafted. The dangerous condition of the steps which was caused by the fallen plaster and the water damage that again she was responsible for, that, once more, is due to her negligence, and due to her breach of contract. And due to her negligence your Honor, and due to her breach of contract, we will be asking this court to award the very substantial property damages and personal damages that my client has sustained.

TRIAL SUMMATION

Lamar v. Cullen

36. Section 3.32 lists several different types of arguments that a lawyer can use during summation. Which of these types of arguments does Ms. Jesson use during her summation?

- A. Draw reasonable inferences from direct or circumstantial evidence.
- B. Suggest that certain evidence implies a reasonable conclusion.
- C. Present conclusions based upon the circumstances of the case.
- D. Suggest that decision makers apply common sense.
- E. Suggest that decision makers apply their common sense and life experience in determining a fact.

Are some of these types of arguments more appropriate for a judge, as opposed to a jury? Pick one of Ms. Jesson's contentions and see if you can recast it, using a different type of argument.

37. There are many different ways to begin a summation. Several possible techniques for "introducing the closing" are set out in Sections 3.22 to 3.30. Compare Ms. Jesson's introduction with Mr. O'Leary's. Which is more persuasive to you? Why?

DEFENDANT: BENCH TRIAL

Judge:

Ms. Jesson, you may proceed with your closing argument on behalf of the defense.

By Ms. Jesson:

Thank you, your Honor. Your Honor, this isn't a case where one side is evil and one side isn't. Neither of these people are evil. We're not talking about malicious conduct, I believe, on either side's part. What we're talking about here is a case of a business person, Darren Lamar, who got too wrapped up into trying to establish his new business — so wrapped up he forgot, or was too busy to write a note to his landlord, simply telling her about a leak in the roof. The unfortunate consequence is because he forgot to write her that note — required by his lease — about the leak in the roof, on July 2nd, when there was a big rainstorm, part of the ceiling fell in, water came in and a lot of his inventory was damaged. And after that, Darren Lamar looked for somebody else to blame.

Judge:

Well he did call her at least twice, didn't he?

Jesson:

That's clearly disputed. My client testifies that she never got either of those two phone messages that he says he did leave for her. Let me talk about that a little bit, your Honor. He does testify that in late April he believes he left her a phone message to call him back. But he also testified on cross-examination that he wasn't even listening to her voice mail

message on her answering machine, you know if it was hers, he was talking to a customer. He doesn't even remember what he said, the message he left. So I think it's questionable whether he left the message or whether it was even her number he called there. He admits he doesn't specifically remember. He was busy talking to someone else.

Judge: Even if that's true, she did receive the note that he sent with his May rent.

Jesson: Yes...

Judge: Didn't she have an obligation to check out what he said about the water problem, whatever the water problem was, to go and check it out?

Jesson: Yes. I think she did have that obligation and that's why she sent Mr. Henry over and he did look into it. He found a damp leaky joint with a pool of water below it and he fixed that joint.

Judge: But he also saw plaster falling off the ceiling.

Jesson: I think, your Honor, if you go back and look at your notes and think about the testimony, what the testimony is, is that actually the plaster was dry then, but you could see that there had been a leak at some point. There wasn't plaster falling off. He did notice that, and what he did was tell Mr. Lamar that he ought to talk to Naomi Cullen about that.

Judge: But in fact he's her agent.

By Ms. Jesson:

Well, your Honor, I don't think that. I think that he was working as a contract handyman when he was out there doing that work. So we don't agree that legally he was her agent. But I think the more important point here is the lease term in this case. The lease terms don't say that the tenant agrees to give notice in writing to the owner whenever the tenant discovers a condition needing repair or to happen to have a handyman over and hope he sees a problem on the ceiling. Even if he had pointed it out to Mr. Henry — instead of Mr. Henry just noticing it — that wouldn't have met his obligations under the lease. And as Mr. Lamar testified, he knew after Mr. Henry left that leak still hadn't been fixed. He knew that there was still a problem with the roof.

Even if he had somehow — which I don't believe your Honor — he had somehow by his May 1 note, put Ms. Cullen on notice, certainly after it wasn't fixed. He knew it wasn't fixed and Mr. Henry told him to talk to Ms. Cullen about it. He was legally obligated under the lease to tell her about that condition needing repair in writing and it's undisputed, your Honor, he never did that. He never did it in writing and he never did it even by picking up the phone and calling her after Mr. Henry was there.

Judge:

Well, he says that he did. But your client takes the position then, if I understand you correctly, that Mr. Henry's visit and repair of the pipe negated the effect of the tenant's note in May with his rent check?

So that if he had any further communication, he had to send her yet another written notice about the same water problem?

By Ms. Jesson:

I think he did have that obligation, but I also think, your Honor, that his notice on a May 1 note to come address a water problem didn't specifically tell her about the condition that needed to be fixed. He was the one, Mr. Lamar was the only one who knew that in April he had to take bucket after bucket of water out of his store. He didn't tell Mr. Henry that; Mr. Henry didn't know that. The specific problem and the real extent to that problem was something only Mr. Lamar knew. The tenant knew it was his obligation under the lease, just as a matter of common sense for him to tell Ms. Cullen about that. And it's undisputed, your Honor, that Mr. Lamar is an educated experienced businessman. He read his lease. He stood there and told us he understood it was his obligation to give written notice. He understood that in March when he started. He understood that in May. Now, his attorney is now trying to argue that somehow — because Tom Henry saw some damp plaster on the ceiling — that somehow negated that obligation. For some of the reasons I think we just talked about, I don't believe that's the case — because of the extensive knowledge Mr. Lamar had about the extent of the problem and because of the terms of the lease itself.

But more importantly, aside from those

legal arguments, that's not what Mr. Lamar testified to in this trial. In this trial Mr. Lamar didn't testify — and I remember asking him these questions on cross-examination — he didn't testify, "Well I didn't call or write her after May 5th because I thought I'd already done that." or, "I didn't call or write her a note about the leaky roof because I thought my May 1 note was effective." His testimony was clear: he forgot. He forgot about the leaky roof. He forgot about his obligation — which he admits — to provide that written notice to Ms. Cullen. He forgot because he got wrapped up in the busy season at his store. May and June are very busy months for him. He was trying to keep his old customers, market to new ones, expand his inventory and he simply got too busy and forgot.

Judge:

Ms. Jesson, what do you think I should do in this case? What do you want? What does your client want?

By Ms. Jesson:

Your Honor, this case should be dismissed. There's no legal liability against my client. Darren Lamar made a mistake. He knew two and a half months before the ceiling collapsed that there was a leak in his roof. He knew it was his responsibility to inform his landlord about that. He didn't do that. He made a mistake and sometimes when we make mistakes, we may want to look around for someone else to blame, but we have no one else to blame but ourselves. And here Mr. Lamar has no one else to blame but himself.

Thank you.

Judge:

Thank you.

37. Both sides in this lawsuit have weaknesses in their cases. How did the two lawyers explain these weaknesses in their summations? Review the suggestions for being positive about negatives that appear in Sections 3.51 to 3.58. Which of these techniques did Mr. O'Leary and Ms. Jesson use?

- A. Explain contradictions.
- B. Comment on case weaknesses.
- C. Attack the opposition's positions.
- D. Mention negative suggestions.
- E. Identify broken promises.
- F. Explain absent evidence/witnesses.
- G. Explain lies vs. mistake.
- H. Anticipate rebuttal argument.