UNC SCHOOL OF GOVERNMENT

Contract Attorney Training: Trial Practice

January 28, 2015 / Greenville, NC

ELECTRONIC PROGRAM MATERIALS*

*This PDF file contains "bookmarks," which serve as a clickable table of contents that allows you to easily skip around and locate documents within the larger file. A bookmark panel should automatically appear on the left-hand side of this screen. If it does not, click the icon—located on the left-hand side of the open PDF document—that looks like a dog-eared page with a ribbon hanging from the top.

UNC SCHOOL OF GOVERNMENT

Contract Attorney Training: Trial Practice

January 28, 2015/Greenville, NC

Cosponsored by the UNC-Chapel Hill School of Government & Office of Indigent Defense Services

12:15 **Check In**

12:45 **Welcome, Introductions and Announcements**
Austine Long, Program Attorney
UNC School of Government, Chapel Hill, NC;

1:00 **Crafting a Winning Theory of Defense** [60 min.]
Fred Friedman, Retired Chief Public Defender, Duluth, MN

2:00 **Cross Examination Skills** [30min.]
Antoan Whidbee, Attorney
Smithfield and Garner, NC

2:30 **Break** (light snack provided)

2:45 **Cross Examination Workshops** [75 min.]

4:00 **Chaptering Your Direct Examination** [45 min.]
John Rubin, Professor
UNC School of Government, Chapel Hill, NC

4:45 **Adjourn**

CLE HOURS: 3.50 (general CLE)

North Carolina Defender Trial School
Sponsored by the UNC School of Government and
North Carolina Office of Indigent Defense Services
Chapel Hill, NC

STORYTELLING: PERSUADING THE JURY TO ACCEPT YOUR THEORY OF DEFENSE

Ira Mickenberg, Esq.
6 Saratoga Circle
Saratoga Springs, NY 12866
(518) 583-6730
FAX: (518) 583-6731
iramick@worldnet.att.net

What Does Telling a Story Have to Do With Our Theory of Defense?

Stories and storytelling are among the most common and popular features of all cultures. Humans have an innate ability to tell stories and an innate desire to be told stories. For thousands of years, religions have attracted adherents and passed down principles not by academic or theological analysis, but through stories, parables, and tales. The fables of Aesop, the epics of Homer, and the plays of Shakespeare have survived for centuries and become part of popular culture because they tell extraordinarily good stories. The modern disciplines of anthropology, sociology, and Jungian psychology have all demonstrated that storytelling is one of the most fundamental traits of human beings.

Unfortunately, courts and law schools are among the few places where storytelling is rarely practiced or honored. For three (often excruciating) years, fledgling lawyers are trained to believe that legal analysis is the key to becoming a good attorney. Upon graduation, law students often continue to believe that they can win cases simply by citing the appropriate legal principles and talking about reasonable doubt and the elements of crimes. Prisons are filled with victims of legal analysis and reasonable doubt arguments.

For public defenders, this approach is disastrous because it assumes that judges and jurors are persuaded by the same principles as law students. Unfortunately, this is not true. When they deal with criminal trials, lawyers spend a lot of time thinking about "reasonable doubt," "presumption of innocence," and "burden of proof." While these are certainly relevant considerations in an academic sense, the verdict handed down by a jury is usually based on more down-to-earth concerns:

1. "Did he do it?"

and

2. "Will he do it again if he gets out?"

A good story that addresses these questions will go much further towards persuading a jury than will the best-intentioned presentation about the burden of proof or presumption of innocence.

ETHICS NOTE: When we talk about storytelling, we are not talking about fiction. We are also not talking about hiding things, omitting bad facts, or making things up. Storytelling simply means taking the facts of your case and presenting them to the jury in the most persuasive possible way.

What Should the Story Be About?

A big mistake that many defenders make is to assume that the story of their case must be the story of the crime. While the events of the crime must be a part of your story, they do not have to be the main focus.

In order to persuade the jury to accept your theory of defense, your story must focus on one or more of the following:

Why your client is factually innocent of the charges against him.

Your client's lower culpability in this case.

The injustice of the prosecution.

How to Tell a Persuasive Story

I. Be aware that you are crafting a story with every action you take.

Any time you speak to someone about your case, you are telling a story. You may be telling it to your family at the kitchen table, to a friend at a party, or to a jury at trial, but it is always a story. Our task is to figure out how to make the story of our client's innocence persuasive to the jury. The best way to do this is to be aware that you are telling a story and make a conscious effort to make each element of your story as persuasive as possible. This requires you to approach the trial as if you were an author writing a book or a screenwriter creating a movie script. You should therefore begin to prepare your story by asking the following questions:

1. Who are the characters in this story of innocence, and what roles do they play?

2. Setting the scene -- Where does the most important part of the story take place?

3. In what sequence will I tell the events of this story?

4. From whose perspective will I tell the story?

5. What scenes must I include in order to make my story persuasive?

6. What emotions do I want the jury to feel when they are hearing my story? What character portrayals, scene settings, sequence, and perspective will help the jurors feel that emotion?

If you go through the exercise of answering all of these questions, your story will automatically become far more persuasive than if you just began to recite the events of the crime.

II. "But I Don't Have Enough Time to Write a Novel For Every Case"

We all have caseloads that are too heavy. A short way of making sure that you tell a persuasive story to the jurors is to make sure that you focus on at least three of the above elements:

1. Characters – before every trial, ask yourself, "Who are the characters in the story I am telling to the jury, and how do I want to portray them to the jurors?"

    a. Who is the hero and who is the villain?
    b. What role does my client play?
    c. What role does the complainant/victim play?
    d. What role do the police play?

2. Setting – Where does the story take place?

3. Sequence – In what order am I going to tell the story

    a. Decide what is most important for the jury to know
    b. Follow principles of primacy and recency:
        i. Front-load the strong stuff
        ii. Start on a high note and end on a high note

III. Once you have crafted a persuasive story, look for ways to tell it persuasively.

You will be telling your story to the jury through your witnesses, cross-examination of the State's witnesses, demonstrative evidence, and exhibits. When you design these parts of the trial, make sure that your tactics are tailored to the needs of your story.

A. The Language You Use to Communicate Your Story Is Crucial

1. Do not use pretentious "legalese" or "social worker-talk" You don't want to sound like a television social worker, lawyer, or cop.

2. Use graphic, colorful language.

3. Make sure your witnesses use clear, easy-to-follow, and lively language.

4. If your witnesses are experts, make sure they testify in language that laypeople can understand.

B. Don’t Just Tell the Jury What You Mean – Show Them

1. Don’t just state conclusions, such as “the officer was biased” or “my client is an honest man.” Instead, show the jury factual vignettes that will make the jurors reach those conclusions on their own.

2. Use demonstrative evidence to make your point.

3. Create and use charts, pictures, photographs, maps, diagrams, and other graphic evidence to help make things understandable to the jurors.

4. Visit the crime scene and any other places crucial to your theory of defense. That way when you are describing them to the jury, you will know exactly what you are talking about.

If You Build It, They Will Come: Creating and Utilizing a Meaningful Theory of Defense

by Stephen P. Lindsay

Stephen P. Lindsay is a senior partner in the law firm of Cloninger, Lindsay, Hensley & Searson, P.L.L.C, in Asheville. His firm specializes in all types of litigation. Lindsay focuses primarily on criminal defense in both state and federal courts. He graduated from Guilford College with a BS in Administration of Justice and earned his JD from the University of North Carolina School of Law. A faculty member of the National Criminal Defense College in Macon, Georgia, Lindsay dedicates between four and six weeks per year teaching and lecturing for various public defender organizations and criminal defense bar associations both within and outside of the United States.

So the file hits your desk. Before you open to the first page you hear the shrill noise of not just a single dog, but a pack of dogs. Wild dogs. Nipping at your pride. You think to yourself, "Why me? Why do I always get the dog cases? It must be fate." You calmly place the file on top of the stack of ever-growing canine files. Your reach for your cup of coffee and seriously consider upping your membership in the S.P.C.A. to "Angel" status. Just as you think a change in profession might be in order, your coworker steps in the door, new file in hand, lets out a piercing howl and says, "This one is the dog of all dogs. The mother of all dogs!" Alas. You are not alone.

Dog files bark because there does not appear to be any reasonable way to mount a successful defense. Put another way, winning the case is about as likely as a crowd of people coming to watch a baseball game at a ballpark in a cornfield in the middle of Iowa. According to the movie, *Field of Dreams,* "If you build it, they will come . . ." And they came. And they watched. And they enjoyed. Truth be known, they would come again, if invited —even if they were not invited.

Every dog case is like a field of dreams: nothing to lose and everything to gain. Believe it or not, out of each dog case can rise a meaningful, believable, and solid defense—a defense that can win. But as Kevin Costner's wife said in the movie, "[I]f all of these people are going to come, we have a lot of work to do." The key to building the ballpark is in designing a theory of defense supported by one or more meaningful themes.

What Is a Theory and Why Do I Need One?

Having listened over the last 20 years to some of the finest criminal defense attorneys lecture on theories and themes, it has become clear to me that there exists great confusion as to what constitutes a theory and how it differs from supporting themes. The words "theory" and "theme" are often used interchangeably. However, they are very different concepts. So what is a theory? Here are a few definitions:

- *That combination of facts (beyond change) and law which in a common sense and emotional way leads a jury to conclude a fellow citizen is wrongfully accused.*—Tony Natale
- *One central theory that organizes all facts, reasons, arguments and furnishes the basic position from which one determines every action in the trial.* —Mario Conte
- *A paragraph of one to three sentences which summarizes the facts, emotions and legal basis for the citizen accused's acquittal or conviction on a lesser charge while telling the defense's story of innocense or reduces culpability.* —Vince Aprile

Common Thread Theory Components

Although helpful, these definitions, without closer inspection, tend to leave the reader thinking "Huh?" Rather than try to decipher these various definitions, it is more helpful to compare them to find commonality. The common thread within these definitions is that each requires a theory of defense to have the same three essential elements:

1. a factual component (fact-crunching/ brainstorming);
2. a legal component (genre); and
3. an emotional component (themes/ archetypes).

In order to fully understand and appreciate how to develop each of these elements in the quest for a solid theory of defense, it

is helpful to have a set of facts with which to work. These facts can then be used to create possible theories of defense. The Kentucky Department of Public Advocacy developed the following fact problem:

State v. Barry Rock, 05 CRS 10621 (Buncombe County)

Betty Gooden is a "pretty, very intelligent young lady" as described by the social worker investigating her case. Last spring, Betty went to visit her school guidance counselor, introducing herself and commenting that she knew Ann Haines (a girl that the counselor had been working with due to a history of abuse by her uncle, and who had recently moved to a foster home in another school district).

Betty said that things were not going well at home. She said that her stepdad, Barry Rock, was very strict and would make her go to bed without dinner. Her mother would allow her and her brother (age 7) to play outside, but when Barry got home, he would send them to bed. She also stated that she got into trouble for bringing a boy home. Barry yelled at her for having sex with boys in their trailer. This morning, she said, Barry came to school and told her teacher that he caught her cheating—copying someone's homework. She denied having sex with the boy or cheating. She was very upset that she wasn't allowed to be a normal teenager like all her friends.

The counselor asked her whether Barry ever touched her in an uncomfortable way. She became very uncomfortable and began to cry. The counselor let her return to class, then met her again later in the day with a police officer present. At that time, Betty stated that since she was 10, Barry had told her if she did certain things, he would let her open presents. She explained how this led to Barry coming into her room in the middle of the night to do things with her. She stated that she would try to be loud enough to wake up her mother in the room next door in the small trailer, but her mother would never come in. Her mother is mentally retarded, and before marrying Barry, had quite a bit of contact with Social Services due to her weak parenting skills. She stated that this had been going on more and more frequently in the last month and estimated it had happened 10 times.

Betty is an A/B student who showed no sign of academic problems. After reporting the abuse, she has been placed in a foster home with her friend Ann. She has also attended extensive counseling sessions to help her cope. Medical exams show that she has been sexually active.

Kim Gooden is Betty's 35-year-old mentally retarded mother. She is a "very meek and introverted person" who is "very soft spoken and will not make eye contact." She told the investigator she had no idea Barry was doing this to Betty. She said Barry made frequent trips to the bathroom and had a number of stomach problems that caused diarrhea. She said that Betty always wanted to go places with Barry and would rather stay home with Barry than go to the store with her. She said that she thought Betty was having sex with a neighbor boy, and she was grounded for it. She said that Betty always complains that she doesn't have normal parents and can't do the things her friends do. She is very confused about why Betty was taken away and why Barry has to live in jail now. An investigation of the trailer revealed panties with semen that matches Barry. Betty says those are her panties. Kim says that Betty and her are the same size and share all of their clothes.

Barry Rock is a 39-year-old mentally retarded man who has been married to Kim for five years. They live together in a small trailer making do with the Social Security checks that they both get due to mental retardation.

Barry now adamantly denies that he ever had sex and says that Betty is just making this up because he figured out she was having sex with the neighbor boy. After Betty's report to the counselor, Barry was interviewed for six hours by a detective and local police officer. In this videotaped statement, Barry is very distant, not making eye contact, and answering with one or two words to each question. Throughout the tape, the officer reminds him just to say what they talked about before they turned the tape on. Barry does answer "yes" when asked if he had sex with Betty and "yes" to other leading questions based on Betty's story. At the end of the interview, Barry begins rambling that it was Betty that wanted sex with him, and he knew that it was wrong, but he did it anyway.

Barry has been tested with IQs of 55, 57, and 59 over the last three years. Following a competency hearing, the trial court found Barry to be competent to go to trial.

The Factual Component

The factual component of the theory of defense comes from brainstorming the facts. More recently referred to as "fact-busting," brainstorming is the essential process of setting forth facts that appear in discovery and arise through investigation.

It is critical to understand that facts are nothing more—and nothing less—than just facts during brainstorming. Each fact should be written down individually and without any spin. Non-judgmental recitation of the facts is the key. Do not draw conclusions as to what a fact or facts might mean. And do not make the common mistake of attributing the meaning to the facts that is given to them by the prosecution or its investigators. It is too early in the process to give value or meaning to any particular fact. At this point, the facts are simply the facts. As we work through the other steps of creating a theory of defense, we will begin to attribute meaning to the various facts.

Judgmental Facts (WRONG)	Non-Judgmental Facts (RIGHT)
Barry was retarded	Barry had an IQ of 70
Betty hated Barry	Barry went to Betty's school, went to her classroom, confronted her about lying, accused her of sexual misconduct, talked with her about cheating, dealt with her in front of her friends
Confession was coerced	Several officers questioned Barry, Barry was not free to leave the station, Barry had no family to call, questioning lasted six hours

The Legal Component

Now that the facts have been developed in a neutral, non-judgmental way, it is time to move to the second component of the theory of defense: the legal component. Experience, as well as basic notions of persuasion, reveal that stark statements such as "self-defense," "alibi," "reasonable doubt," and similar catch-phrases, although somewhat meaningful to lawyers, fail to accurately and completely convey to jurors the essence of the defense. "Alibi" is usually interpreted by jurors as "He did it, but he has some friends that will lie about where he was." "Reasonable doubt" is often interpreted as, "He did it, but they can't prove it."

Thus, the legal component must be more substantive and understandable in order to accomplish the goal of having a meaningful theory of defense. Look at Hollywood and the cinema; thousands of movies have been made that have as their focus some type of alleged crime or criminal behavior. According to Cathy Kelly, training director for the Missouri Pubic Defender's Office, when these types of movies are compared, the plots, in relation to the accused, tend to fall into one of the following genres:

1. It never happened (mistake, set-up);
2. It happened, but I didn't do it (mistaken identification, alibi, set-up, etc.);
3. It happened, I did it, but it wasn't a crime (self-defense, accident, claim or right, etc.);
4. It happened, I did it, it was a crime, but it wasn't this crime (lesser included offense);
5. It happened, I did it, it was the crime charged, but I'm not responsible (insanity, diminished capacity);
6. It happened, I did it, it was the crime charged, I am responsible, so what? (jury nullification).

The six genres are presented in this particular order for a reason. As you move down the list, the difficulty of persuading the jurors that the defendant should prevail increases. It is easier to defend a case based upon the legal genre "it never happened" (mistake, set-up) than it is on "the defendant is not responsible" (insanity).

Using the facts of the Barry Rock example as developed through non-judgmental brainstorming, try to determine which genre fits best. Occasionally, facts will fit into two or three genres. It is important to settle on one genre, and it should usually be the one closest to the top of the list; this decreases the level of defense difficulty. The Rock case fits nicely into the first genre (it never happened), but could also fit into the second category (it happened, but I didn't do it). The first genre should be the one selected.

But be warned. Selecting the genre is not the end of the process. The genre is only a bare bones skeleton. The genre is a legal theory, not your theory of defense. It is just the second element of the theory of defense, and there is more to come. Where most attorneys fail when developing a theory of defense is in stopping once the legal component (genre) is selected. As will be seen, until the emotional component is developed and incorporated, the theory of defense is incomplete.

It is now time to take your work product for a test drive. Assume that you are the editor for your local newspaper. You have the power and authority to write a headline about this case. Your goal is to write it from the perspective of the defense, being true to the facts as developed through brainstorming, and incorporating the legal genre that has been selected. An example might be:

Rock Wrongfully Tossed from Home by Troubled Stepdaughter

Word choice can modify, or entirely change, the thrust of the headline. Consider the headline with the following possible changes:

Rock →	***Barry, Innocent Man, Mentally Challenged Man***
Wrongfully Tossed →	***Removed, Ejected, Sent Packing, Calmly Asked To Leave***
Troubled →	***Vindictive, Wicked, Confused***
Stepdaughter →	***Brat, Tease, Teen, Houseguest, Manipulator***

Notice that the focus of this headline is on Barry Rock, the defendant. It is important to decide whether the headline could be more powerful if the focus were on someone or something other than the defendant. Headlines do not have to focus on the defendant in order for the eventual theory of defense to be successful. The focus does not even have to be on an animate object. Consider the following possible headline examples:

Troubled Teen Fabricates Story for Freedom

Overworked Guidance Counselor Unknowingly Fuels False Accusations

Marriage Destroyed When Mother Forced to Choose Between Husband and Troubled Daughter

Underappreciated Detective Tosses Rock at Superiors

Each of these headline examples can become a solid theory of defense and lead to a successful outcome for the accused.

The Emotional Component

The last element of a theory of defense is the emotional component. The factual element or the legal element, standing alone, are seldom capable of persuading jurors to side with the defense. It is the emotional component of the theory that brings life, viability, and believability to the facts and the law. The emotional component is generated from two sources: archetypes and themes.

Archetypes, as used herein, are basic, fundamental, corollaries of life that transcend age, ethnicity, gender and sex. They are truths that virtually all people in virtually all walks of life can agree upon. For example, few would disagree that when one's child is in danger, one protects the child at all costs. Thus, the archetype demonstrated would be a parent's love and dedication to his or her child. Other archetypes include love, hate, betrayal, despair, poverty, hunger, dishonesty and anger. Most cases lend themselves to one or more archetypes that can provide a source for emotion to drive the theory of defense. Archetypes in the Barry Rock case include:

- The difficulties of dealing with a stepchild
- Children will lie to gain a perceived advantage
- Maternity/paternity is more powerful than marriage
- Teenagers can be difficult to parent

Not only do these archetypes fit nicely into the facts of the Barry Rock case, each serves as a primary category of inquiry during jury selection.

In addition to providing emotion through archetypes, attorneys should use primary and secondary themes. A primary theme is a word, phrase, or simple sentence that captures the controlling or dominant emotion of the theory of defense. The theme must be brief and easily remembered by the jurors.

For instance, a primary theme developed in the theory of defense and advanced during the trial of the O.J. Simpson case was, "If it doesn't fit, you must acquit." Other examples of primary themes include:

- One for all and all for one
- Looking for love in all the wrong places
- Am I my brother's keeper?
- Stand by your man (or woman)
- Wrong place, wrong time, wrong person
- When you play with fire, you're going to get burned

Although originality can be successful, it is not necessary to redesign the wheel. Music, especially country/western music, is a wonderful resource for finding themes. Consider the following lines taken directly from the songbooks of Nashville (and assembled by Dale Cobb, an incredible criminal defense attorney from Charleston, South Carolina):

Top 10 Country/Western Lines (Themes?)

10. Get your tongue outta my mouth 'cause I'm kissin' you goodbye.
9. Her teeth was stained, but her heart was pure.
8. I bought a car from the guy who stole my girl, but it don't run so we're even.
7. I still miss you, baby, but my aim's gettin' better.
6. I wouldn't take her to a dog fight 'cause I'm afraid she'd win.
5. If I can't be number one in your life, then number two on you.
4. If I had shot you when I wanted to, I'd be out by now.
3. My wife ran off with my best friend, and I sure do miss him.
2. She got the ring and I got the finger.
1. She's actin' single and I'm drinkin' doubles.

Incorporating secondary themes can often strengthen primary themes. A secondary theme is a word or phrase used to identify, describe, or label an aspect of the case. Here are some examples: a person—"never his fault"; an action—"acting as a robot"; an attitude—"stung with lust"; an approach—"no stone unturned"; an omission—"not a rocket scientist"; a condition—"too drunk to fish."

There are many possible themes that could be used in the Barry Rock case. For example, "blood is thicker than water"; "Bitter Betty comes a calling"; "to the detectives, interrogating Barry should have been like shooting fish in a barrel"; "sex abuse is a serious problem in this country—in this case, it was just an answer"; "the extent to which a person will lie in order to feel accepted knows no bounds."

Creating the Theory of Defense Paragraph

Using the headline, the archetype(s) identified, and the theme(s) developed, it is time to write the "Theory of Defense Paragraph." Although there is no magical formula for structuring the paragraph, the following template can be useful:

Theory of Defense Paragraph
- Open with a theme
- Introduce protagonist/antagonist
- Introduce antagonist/protagonist
- Describe conflict
- Set forth desired resolution
- End with theme

Note that the protagonist/antagonist does not have to be an animate object.

The following examples of theory of defense paragraphs in the Barry Rock case are by no means first drafts. Rather, they have been modified and adjusted many times to get them to this level. They are not perfect, and they can be improved upon. However, they serve as good examples of what is meant by a solid, valid, and useful theory of defense.

Theory of Defense Paragraph One

The extent to which even good people will tell a lie in order to be accepted by others knows no limits. "Barry, if you just tell us you did it, this will be over and you can go home. It will be easier on everyone." Barry Rock is a very simple man. Not because of free choice, but because he was born mentally challenged. The word of choice at that time was "retarded." Despite these limitations, Barry met Kim Gooden, who was also mentally challenged, and the two got married. Betty, Kim's daughter, was young at that time. With the limited funds from Social Security Disability checks, Barry and Kim fed and clothed Betty, made sure she had a safe home in which to live, and provided for her many needs. Within a few years, Betty became a teenager, and with that came the difficulties all parents experience with teenagers: not wanting to do homework, cheating to get better grades, wanting to stay out too late, experimenting with sex. Mentally challenged, and only a stepparent, Barry tried to set some rules—rules Betty didn't want to obey. The lie that Betty told stunned him. Kim's trust in her daughter's word, despite Barry's denials, hurt him even more. Blood must be thicker

than water. All Barry wanted was for his family to be happy like it had been in years gone by. "Everything will be okay, Barry. Just say you did it and you can get out of here. It will be easier for everyone if you just admit it."

Theory of Defense Paragraph Two

The extent to which even good people will tell a lie in order to be accepted by others knows no limits. Full of despair and all alone, confused and troubled, Betty Gooden walked into the guidance counselor's office at her school. Betty was at what she believed to be the end of her rope. Her mother and stepfather were mentally retarded. She was ashamed to bring her friends to her house. Her parents couldn't even help her with homework. She couldn't go out as late as she wanted. Her stepfather punished her for trying to get ahead by cheating. He even came to her school and made a fool of himself. No—of her!!! She couldn't even have her boyfriend over and mess around with him without getting punished. Life would be so much simpler if her stepfather were gone. As she waited in the guidance counselor's office, *Bitter Betty* decided there was no other option—just tell a simple, not-so-little lie. *Sex abuse is a serious problem in this country.* In this case, it was not a problem at all—because it never happened. *Sex abuse was Betty's answer.*

The italicized portions in the above examples denote primary themes and secondary themes—the parts of the emotional component of the theory of defense. Attorneys can strengthen the emotional component by describing the case in ways that embrace an archetype or archetypes—desperation in the first example, and shame towards parents in the second. It is also important to note that even though each of these theories are strong and valid, the focus of each is from a different perspective. The first theory focuses on Barry, and the second on Betty.

The primary purpose of a theory of defense is to guide the lawyer in every action taken during trial. The theory will make trial preparation much easier. It will dictate how to select the jury, what to include in the opening, how to handle each witness on cross, how to decide which witnesses are necessary to call in the defense case, and what to include in and how to deliver the closing argument. The theory of defense might never be shared with the jurors word for word; but the essence of the theory will be delivered through each witness, so long as the attorney remains dedicated and devoted to the theory.

In the end, whether you choose to call them dog cases, or to view them, as I suggest you should, as fields of dreams, such cases are opportunities to build baseball fields in the middle of cornfields in the middle of Iowa. If you build them with a meaningful theory of defense, and if you believe in what you have created, the people will come. They will watch. They will listen. They will believe. "If you build it, they will come . . ." ▪

CROSS EXAMINATION MANUSCRIPT

Antoan Whidbee
Attorney at Law
amwhidbee@gmail.com

Cross examination MUST be conducted and crafted to advance your theory of the case. When preparing your cross examination have your theory of the case in front of you and stay true to it.

1. **DO I NEED TO ASK THIS PERSON ANYTHING????-** Common mistake is asking questions just to ask questions.
    a. If the witness doesn't add or take anything away from your theory of the case then why ask anything?
    b. This comes up in drug cases generally when the defense theory is Alibi, mistake, or it was theirs not mine, then why are you questioning the lab analyst? Whether or not it was meth may not have anything to do with the theory of your case
2. **ORGANIZATION**- Elicit facts to incorporate the factual, emotional and legal themes that support you theory.
    a. Gather facts that highlight your theory or in the alternative the facts that discredits the state's theory
    b. Make sure the facts you are attempting to elicit can come from the witness on the stand!!!!
    c. Organize your facts into chapters-Chapters are groups of questions centered around similar facts. Organize each chapter by:
        i. Starting general then moving to specific
        ii. Do not ask the ultimate question. (lead the horse to the water but don't try and drown the horse in it)
        iii. Example of a chapter in our fact pattern if you are cross x'ing Harland White would be "Harland's Deal with the State"-then group all the facts that relate to that issue
    d. ORGANIZE CHAPTERS –INTO A COMPELLING ORDER PRIMACY/RECENTCY
        i. Tell the story even through cross
        ii. Doesn't have to be in chronological order. Just because the state does that doesn't mean you have to.
    e. TRANSITION PHRASES BETWEEN CHAPTERS- "Now lets talk about…"
        i. Headlines focuses the juries attention
3. **CONTROL**- TELL THE WITNESS THE ANSWER IN YOUR "QUESTION" the witness only confirms what you asked them. "yes or no"
    a. LEADING QUESTIONS ONLY- no "how, what, who, when, did, "etc.
        i. Prosecutor's will try and argue to the judge that the witness be allowed to explain their answer…some judges will allow

this…but if your questions are tight enough there is not much explaining a witness can do
    ii. Then simply follow up "so the answer is no" etc
b. Use one fact per question-that allows less wiggle room for the witness and cuts out potential confusion by the jurors. It also helps with the cadence of your questions. The key is to hear a series of yes's and no's
c. Be ready to impeach a witness if they give you the wrong answer!!!! Always assume that a witness is going to deviate from what they may have said before. If it happens enough and you approach several times and the witness will get in line.
    i. Train a difficult witness just like you would train a puppy….they know when the paper is coming.
d. LISTEN AND LOOK AT THE WITNESS AND JURY/JUDGE-
    i. Too many times we are so busy looking down that the questions that we aren't listening to the witness or the jury to gage how the witness is coming across
    ii. Many times that will give you other things to cross on
e. TAG the questions if you have to
    i. State may say because the questions are leading that "that isn't question
    ii. Simply add a "wasn't it" "didn't you"
    iii. After a while go back to the questions as they were written.
    iv. Do not start every question with "and…"
f. LOOP when possible- repeat the good part of the previous answer in next question.
    i. "Mr. Harland you are awaiting sentencing on a misdemeanor b&e"
    ii. "because of the pending b&e you are willing to testify against Ronny"
    iii. "you want a PJC on that pending charge"
    iv. "A PJC keeps that pending charge off your record"
g. REGULAR LANGUAGE- no law words or law enforcement words
    i. Use words from your theory
h. DON'T ATTACK A WITNESS-until to feel the jury has given your permission
    i. Gage the juries response to a combative witness, if their frustration is evident then try and control the witness stronger
    ii. Never ask the judge for help to control the witness

4. PREPARE BEFORE AND FOR OBJECTIONS

5. OTHER NOTES

a. Remember you can review notes that a witnesses is using to testify from during cross examination
    i. Many times witnesses aren't as good answering questions without those notes
    ii. Look for discovery issues in those notes
    iii. Look for other things subject to cross

b. Ideas on how to organize
    i. Flow charts
    ii. Outlines
    iii. Sep sheets etc
c. Practice your questions with a witness or at least read them outloud

DIRECT EXAMINATION:

"ALLOWING OTHERS TO HELP TELL THE STORY"

Prepared by and reprinted with the permission of Phyllis Subin and Dan Shemer

I. A Few Key Concepts

A. Persuasive Storytelling: The Goal of direct examination is to persuasively have others tell your story or to discredit the prosecutor's case.

B. The SIX Ps: **"P**roper **P**reparation **P**revents **P**iss **P**oor **P**erformance**!"** (John Delgado, Esq.)

C. **Advances the Theory of Defense**

D. You must have an **"AURA"** about yourself:

A = **ATTENTION** Get and Keep Your Jurors' **ATTENTION**.
U = **UNDERSTAND** Make Sure The Jurors **UNDERSTAND** Your Witness' Testimony.
R = **REMEMBER** Make Sure The Jurors **REMEMBER** Your Witness' Testimony.
A = **ACCEPT** Make Sure The Jurors **ACCEPT** Your Witness' Testimony.

E. Keep the **Jury in Mind**

1. What you do must be considered from the perspective of the jury (or your trier of fact).

2. Try viewing your ideas through the eyes and minds of your potential jurors.

3. While delivering your direct, always consider the juror's ability to see, hear, understand, etc.

F. YOUR Witness: The witness is in your possession and it is your responsibility to do all you can to ensure that your witness' testimony is successful.

G. Persuasion

1. Communication is 65% non-verbal.

2. Use non-verbal communication (body language, key words, tone, pitch, pace, movement, gestures, etc.) to <u>reinforce</u> your message.

3. If you communicate one message with your words and a different one non-verbally, the trier of fact will believe the non-verbal message or not know which one to believe.

H. Your witness is the Attraction: On cross examination, the focus is on you. On direct, the focus must be on your witness

II. Do I Put <u>This</u> Witness On?

A. Does your theory of defense require you to put on this witness?

1. Test your theory of defense with this witness and without. Which is better? Why?

2. Benefits of calling this witness

    a. Directly supports your theory of defense
    b. Damage the prosecutor's version.
    c. Corroboration by witness supports theory.

3. Benefits of NOT calling this witness

    a. Good defense witnesses can help. Bad defense witnesses can destroy. Weigh the benefits against possible damage. Do you need it? Is it valuable enough?
    b. Keeps spotlight on the prosecution's case. Limits prosecutor's case and arguments.
    c. Even truthful witnesses may not be believed.
    d. Defense witnesses can fill or fix holes in the prosecutor's case.

B. Choose quality over quantity.

1. Put up the best evidence and witnesses to back up your theory of defense.

2. Having the body to say the words, does not make a defense. They must say it well!

III. INVESTIGATING For Direct Examination

A. Investigation concepts.

1. Investigation Fact finding

    a. What are the facts? What does the witness have to say?
    b. Does the witness seem credible? Will s/he be a good witness?
    c. Help decide theory of defense?

2. Investigation Fact development

    a. Find facts that support or enhance your theory of defense.
    b. Seek details that make the witness' testimony real and believable.
    c. Collect corroborating documentation and locate other supporting witnesses.

B. What do you need to know about your witness? **EVERYTHING.**

1. **History (background**) - educational, employment, military, family, criminal history, religious affiliations, health, vision problems, hearing problems, etc.

2. **Relations -** to client, other parties, witnesses, relatives of witnesses or parties

3. **Knowledge** - facts of the case, other witnesses or other parties, source of knowledge and reason for recollection

4. **Quality** - demeanor and attitudes, intelligence, willingness to cooperate, communication skills, ability to survive cross examination, etc.

5. **Actions** - With whom has this witness spoken about the case? police? prosecutor? written statements? contact with other witness? nature of that contact?

C. Is this witness essential to the theory of defense or case?

1. Is there a less dangerous means of presenting the evidence than through a witness who may be subject to cross examination? A document? A less "attackable" witness?

2. Is the witness' testimony cumulative, trivial or peripheral?

IV. PREPARING The Direct Examination: 13 STEPS

Once you have decided that your theory of defense allows and requires to call *this* witness, you must have an organized method of preparing. There are many methods of preparation. What follows is one method. It is one method of many, but it is one that may work for you. Whether you use this one or another is immaterial, so long as you develop one that works for you.

A. STEP 1: Review Everything

1. Read everything document in the file. Then re-read everything that you have about this witness.

2. **"Stream of consciousness note taking"** - anything that pops into your mind about this witness or this witness' testimony should be jotted down. By writing down these thoughts and ideas, you preserve your initial reactions, as well as those flashes of brilliance (that arrive invariably while you are in the shower!) about trial tactics and direct examination techniques that will be perfect for this case and/or this witness.

3. Brainstorm with others – including others who are not lawyers.

B. STEP 2: Juror Questions and Emotions Lists

1. **Anticipate the jurors thoughts about and reaction to your witness and your witness' testimony. (Assess your witness).** This includes the factual thoughts and the "gut" or emotional reactions.

2. **Juror Questions List**

   a. What questions will “normal” people i.e. non-lawyers ask about this witness? about the witness' testimony? What are the motives of the witness?
   b. **Write them down.**
   c. Which questions work for you? against you?

3. **Juror Emotions List**

   a. What will the jurors "feel" about your witness and his/her testimony?
   b. **Write them down.**
   c. Which emotions work for you? against you?

C. **STEP 3: Determine your Objectives**

1. How will this witness advance your theory of defense?

2. What are your **legal, factual, emotional and "believability enhancement" themes and objectives with this witness?**

3. **Factual Themes**

   a. What do you want the jurors to believe after hearing from this witness?
   b. Every objective must advance your theory.
   c. Develop objectives that appeal to people, not lawyer.

4. **Emotional Themes**

   a. How do you want the jurors to **feel** when the witness is finished testifying?
   b. What words would you like them to use to describe the witness?
   c. Emotional objectives must advance your theory.

5. **"Believability Enhancement" Objectives**

   a. Make the witness be and appear to be believable in the eyes of your jurors.
   b. What facts can you bring out? What things can you have the witness do? What can you do to make this witness more believable?
   c. Develop in the jury one of the following reactions: **Identification,** "The Witness is like me;" or **Understanding,** "The Witness is nothing like me, but I understand how s/he came out that way."
   d. Create a connection between the witness and juror i.e. “That’s what I would have done.”

6. **Legal objectives**

   a. Is this witness necessary to establish a legal point?
      - the absence of an element?
      - an affirmative defense?
      - to generate an issue?
      - to lay an evidentiary foundation?
   b. List the legal point(s) that must be established.
   c. List the legal point(s) that <u>this witness</u> must establish.
   d. List the facts that this witness must testify to, to satisfy the legal objective(s).

7. Re-evaluate and Reduce

   a. We all have limited attention spans. Re-evaluate your objectives, reducing them to the essentials. Discard any that you believe are not important.
   b. Select, from among all of the objectives lists, only those objectives that are critical for this witness.

D. **STEP 4: Marshal the facts**

1. Ask yourself, “what am I trying to achieve, and why?”

2. For EVERY THEME, list EVERY SUPPORTING FACT.

3. Consider every fact in the case in light of the particular theme. Repeat this process for each objective, going through the facts over and over, considering the next objective each time.

4. Don't settle for just the obvious facts. Develop reasonable and logical extrapolations.

5. Ask yourself: Which facts lead you to believe that the stated objective is true. Write those facts down. Then look for more!

6. Marshaling the facts develops depth and believability in your theory. It provides new facts that support your objectives that had not been identified before.

E. **STEP 5: Develop story(s), images and key words**

1. Identify and develop the **witness' story(s)** and develop **key words.**

2. Whatever information you want the witness to convey, put it in story form.

3. **Why Stories?**

   a. Stories create and maintain interest.
   b. Stories provide a context into which the jurors may understand and place the facts. It allows the jurors to discern which facts are important and which are insignificant.
   c. Stories enhance recall.
   d. Stories encourage empathy and increase believability.

4. **Identify the witness' story(s).**

   a. A single witness may have one or several relevant stories. Whatever the witness has to offer, be it short or long, consider how to present it in story form.
   b. Gives your jurors a better sense of the witness and makes the witness more "real".
   c. You work with the witness as they are the storyteller. The lawyer's role is that of facilitator.

5. **Develop key words**

   a. "Words Are Magic". Maximize the effectiveness of a witness' testimony e.g. "scared" or "in fear" is less compelling than "terrified," or "I knew I was about to die."
   b. Consider the best words and the worst words that the witness can use. The witness must use the best language to make their point and avoid the bad phrases.
   c. Develop word that **maximize or minimize** the desired impression.
   d. Develop descriptive, poetic language.

F. **STEP 6: Organize persuasively**

1. Organize your themes and your witness' story(s) persuasively and effectively. Organization is a key tool of persuasion.

2. Where To Begin Your Direct

   a. Traditional Organization**:** Ease-In
      - Allows the witness to get comfortable on the stand.
      - Allow the witness to ease into the testimony.
      - Allows the witness to get over the nervousness of being on the stand.
      - Allows better communication of the important points better.

   b. Modern Organization: Primacy and Recency
      - We remember best what we hear first and last.
      - Jurors will perceive the first and last points as most important.
      - Identify your best one or two points. This points should be the first and last points you have the witness make.
      - Consider starting with questions that establish the theme of the witness' testimony superficially, turning to background information and returning to the theme.

3. Other Organizational Issues

   a. Background / Scene / Action organization - This approach is logical and easy to follow.
      (1) Witness background
      (2) Event background
      (3) Scene of the action described
      (4) Action described
   b. Logical progression of your questions; from general to specific
   c. Complete a topic before moving to another.

4. Do you disclose weaknesses?

   a. The **"majority opinion**" recommends that you disclose weaknesses to maintain credibility and take the "sting" out of disclosure by the adversary. The disclose must be made in a way that reduces the impact of the weakness.
   b. The **"minority opinion**," sometimes referred to as the "sponsorship" theory, recommends that you do not disclose weaknesses because doing so increases, rather than reduces, the impact of the weaknesses. "If they are admitting that much, imagine how bad it really is" is representative of this view.
   c. **If you do plan to disclose weaknesses**, consider the following:
      - Place it in the middle where it is least likely to have a major impact and least likely to be remembered.
      - Only disclose weakness that you are sure will come out.
      - Present the **good stuff before the bad stuff.**
      - Present the weakness in the best possible light.
      - Attempt to reasonably minimize the weakness by using minimizing words and questioning about it briefly.

G. **STEP 7: Anticipate cross examination**

1. Anticipate the weaknesses in witness' attitude, testimony and history for cross examination.

2. What are the weaknesses of this witness?

    a. Easily riled?
    b. Have an "attitude?"
    c. Will s/he hold up on cross?
    d. Does s/he answer well, volunteer too much or shade the answers?

3. What are the weaknesses of this witness' testimony?

    a. Holes in the story
    b. Unbelievable story
    c. Absence of expected corroboration

4. What attitude/demeanor do you anticipate from the prosecutor during cross.

H. **STEP 8: Prepare re-direct examination**

1. Be very careful with re-direct. Use it to rehabilitate or introduce something that is necessary and failed to introduce during direct (if you can).

2. Re-direct can be dangerous. Because it is difficult to plan the result, often questions that are unartfully crafted, open doors, and permits re-cross providing the prosecutor with another chance to hurt your client and the witness.

3. If re-direct is necessary be brief. It is not necessary to refute or respond to every point made by the prosecutor on cross examination. Stick to the important ones.

I. **STEP 9: Prepare Your Trial Props**

1. Doing things and using things during the trial heighten interest, clarify facts, increase recall and promote acceptance.

2. Using slides, videos, pictures, etc., or moving around during the presentation usually is more interesting than just standing still and talking. Appeal to the jurors' senses.

3. Use actions and creations during trial

    a. Use re-enactments, demonstrations by the witness
    b. Create and use maps, diagrams, pictures, things written on flip charts
    c. Rebuild the interrogation room where your client confessed in the courtroom.
    d. Use clothing, toy guns, knives or weapons similar to the ones involved in the case. Use Sweet N' Low packets to show a gram of cocaine, or an ounce of oregano to show an ounce of marijuana. Such things help illustrate the witness' testimony.

J. **STEP 10: Prepare the other parts of the trial to aid your direct examination**

1. The trial is an "integrated whole." Each part of the trial should be used to support and advance the other parts of the trial and the theory of defense.

2. Think about how each part of the trial can be used to aid the testimony of this witness. The other part of the trial may be used to undercut anticipated cross, to minimize weaknesses, to corroborate strengths, etc.

    a. What **pre-trial motions** can/must be filed to aid the direct examination of this witness?
        - During a suppression motion, "lock down" a witness' testimony that will corroborate the direct of a defense witness.
        - File a Motion In Limine to determine whether a particular defense witness' prior conviction or an item of evidence will be admissible.
    b. What **voir dire questions** can be asked to aid the direct examination of this witness?
    c. What **types of jurors** are most desirable considering this witness and his/her testimony?
    d. What can/must be said in **opening statement** to aid the direct examination of this witness?
    e. What **cross examination** of state's witnesses can/must be conducted to aid the direct examination of this witness?
    f. What **jury instructions** can/must be requested/given to aid the direct examination of this witness?
    g. What must be said in **closing argument** to aid the direct examination of this witness?

K. **STEP 11: Prepare your <u>questions</u>**

1. Review your themes & objectives lists and marshal the facts sheet.

2. Should you write out your questions for each theme? It depends on your organizational style.

    a. Writing out your questions can be beneficial however it is time consuming and may prevent you from actually listening to the answers.
    b. It requires you to think about the best way to ask the question. It also encourages better use of good key words.
    c. If you don't write out your questions, write out the themes and facts that must be covered.
        - Use a separate page for each theme / objective (Posner and Dodd)
        - Easy to re-organize or discard.

3. Choreograph the direct

    a. Build movement into your direct. The absence of movement during the direct will add to the boredom potential substantially. Movement adds interest to the exam.
    b. Plan when, where and how YOU and YOUR WITNESS will move.
    c. Plan how to use your voice; loud, soft, when to use the appropriate tone of voice, etc.

L. **STEP 12: Practice**

1. Practice your questions and practice with props and demonstrations.

2. If you don't practice out loud, alone or in front of someone else, at least, go through the questions and movements in your head. Ideally, ask a friend, spouse, etc. for feedback. If not, a mirror will do.

3. Sometimes ideas that seem wonderful in your mind or on paper, don't work when given sound. Try it, and find out before you are standing before a jury.

4. Practice demonstrations and practice with demonstrative aids or items of tangible evidence. A great demonstration about the ease of misfiring a gun may fall flat if you can't get the gun open when standing before the jury.

M. **STEP 13: Tune-up**

Review and refine your direct examination. This is the time to tighten-up your examination, to add anything necessary, to discard anything unnecessary, etc.

V. PREPARING <u>Your Witness</u>:

N. General thoughts

1. **The witness stand is an alien environment.** It has strange rules, a foreign language and an odd Q & A style of communication. Keep this in mind when preparing the witness for testimony.

2. **Don't forget to ask your witness.** S/he may have good suggestions and insights about what will work.

3. **Explain why**. Your witness must understand why everything that s/he is to do or say is necessary. If your witness understands "why", s/he will respond better on direct and cross.

O. **STEP 1: The Basics**

1. **Logistics**

   a. The physical layout of the courtroom
   b. Courtroom location, number, directions, etc.
   c. Court reporters, sheriffs, bailiffs, jail guards, etc.
   d. Time to arrive, where to wait, what to do upon arrival, who will meet the witness
   e. How the witness will be called into the courtroom, the oath, etc.

2. Basics of law, procedure and evidence

P. **STEP 2: Explain Witness' Role**

1. Explain your **theory of defense**, the **witness' role** in that theory and it's **importance.**

   a. If the witness understands the **big picture,** this will help the witness to know what is important to tell you and tell the jury.
   b. **Beware** giving too much detail or explaining too much to a potentially hostile witness, as they may use this information against you or tell your adversary what they learned.
   c. Your explanation should clarify what information is required of the witness, how it fits in with the overall theory and why it is important.

Q. **STEP 3: Discuss Appearance and Communication Skills**

1. Refine the witness' appearance and communication skills.

2. Discuss how to dress for court

   a. Proper dress is about **respect** for the court, the trial process and the jury.
   b. Be **specific.** Don't merely say, "Dress nicely," or "Wear what you would wear to worship services."

3. **Discuss non-verbal communication and refine these skills**

   a. May require **Q & A sessions**
   b. **Explain** what non-verbal communication is and its **impact**
      - what the jurors believes
      - the jurors' impression of the witness
      - believability
   c. **Body language**
   d. **Voice and manner**
      - volume - loud enough for the farthest juror to hear
      - tone - should be conversational but congruent with the content of the testimony
      - polite, always polite
      - pause before answering to ensure that the question is completed; to ensure that witness understands the question and, on cross, to permit you to object
      - Nervousness is OK - Acknowledge witness' reality
   e. **Words Choice**
      - Encourage **Simple words** - "bar" talk, per Terry MacCarthy e.g. "Told me" rather than "indicated"
      - Encourage **Fact words** - not opinions, characterizations or conclusions; "6'2" and 240 lbs." rather than "big"; "Light blue button down shirt, khaki pants and docksiders" rather that "preppie attire"
      - Encourage **Power words** - Words that communicate certainty.
      - Avoid **Hedge words** (I think, probably, I submit, we contend, etc.)
      - Avoid **Unnecessary intensifiers** (really, very, extremely, etc.)
      - **Hesitations or filler words** (ah, ladies and gentlemen, well, etc.)
      - **Question intonation** (when your voice goes up at the end of a sentence)

R. **STEP 4: Review Prior Statements**

1. Review all of the witness' prior statements with your witness.

2. Let your witness read all of his/her prior statements, especially those given to the State.

S. **STEP 5: Practice Questions and Answers**

1. Practice and refine your questions and answers with the witness.

2. Encourage **NARRATIVE ANSWERS** by the witness

3. **Conduct a mock direct examination** session with your witness.

    a. **Ask the exact questions** and explain why you are asking those questions; don't merely talk about the topics you plan to ask about.
    b. **Get the exact answers the witness will give** - as they will answer in the courtroom.
        - Improve the quality of the answer - The answer may not be clear, may not bring out all of the facts, use poor language, include irrelevant information, etc. You must help the witness answer clearly and effectively.
        - You are not putting words into the witness' mouth. You are ensuring that the words that do come out are clear, complete and effectively communicate the information.

4. Tell the witness to look at the jury, where appropriate or at the questioning lawyer.

T. **STEP 6: Practice Cross and Re-direct**

1. Prepare your witness for **cross examination and re-direct** examination.

2. **Explain "typical" cross examination objectives and tactics**.

    a. Leading questions
    b. Attempts to limit the witness to "yes" or "no" answers
    c. Efforts to show that the witness is unsure, mistaken, biased or lying
    d. Efforts to show that the witness is not reliable or a believable person
    e. Efforts to get the witness upset or angry, in the hope that the witness will appear violent, rash, less believable, or will say something foolish or wrong.

3. **Explain "typical" cross examination techniques** that you expect will be used.
    a. Asking about the witness' recollection about other days around the time of the crime.
    b. Asking why didn't the witness tell this information to the police.
    c. Asking how does the witness recall this particular date.
    d. Exploiting the witness' relationship with the client to suggest that the witness is lying.
    e. Making big issues out of minor variations or inconsistencies with the testimony of others witnesses or with the witness' prior statements.
    f. Asking the "lying then or lying now" question.
    g. The old, "You say A. Witness X says B. Is Witness B lying or mistaken?" technique.
    h. You discussed this information with the defense attorney and others and were told what to say.

4. **Explain <u>this</u> prosecutor's anticipated cross examination objectives and why.**

5. **Practice cross Q & A session.**

    a. Have someone else play the prosecutor's role. Don't take it easy on the witness.
    b. Consider several different styles - an aggressive, fast paced, in-your-face style or a friendly disarming pleasant style cross.

6. **Explain the rules of re-direct and your objectives.**

    a. Explain your **objectives,** why and how they fit in with the theory

b. Conduct a **Q & A** session for the re-direct questions.

VI. DELIVERING Your Direct Examination.

U. Remember your **"AURA"** and being **jury centered**!

V. **Your Organization - Start Well**

1. **Traditional or modern "primacy" approach**

2. **Primacy** - You may start with the **ultimate question.**

3. **Traditional** - You may wish to **ease in** to the exam

W. **Your Movement, Body and Voice**

1. **Your movement**

a. Movement **adds interest.** Exciting movies aren't called "action" pictures for nothing!
b. Your movement should **not detract** or distract attention from the witness
c. Your movement should be intentional. **Limit** your movement.

2. **Your witness' movement**

a. **Build in** as much movement of this witness as is possible e.g. witness draw diagrams, show photos, demonstrate actions, handle exhibits, etc.
b. Good witness? Get him or her off the stand and as close to the jury as much as possible.

3. **Your Voice**

a. A lack of variety in the examination makes any direct **boring.**
b. Inflection in your voice will create interest. If your tone of voice is monotone, your witness will begin to answer in the same monotone. If you sound interested, your witness will sound interested and be more interesting to your jurors.
c. **Variety in your voice:** Pace, tone, volume, pitch
d. **Belief -** Your belief in your witness must come across. If you do not believe your witness, do not put the witness on the stand.

4. **Congruity**

a. You and your questions must be congruent. Your tone, volume, pace, word choice, etc. must be congruent with the content of the question and the content of the witness' testimony.
b. **Mirror the emotion**
c. Your pace, tone, etc. must be congruent with the message

X. **Basic Questioning Thoughts and Techniques**

1. **Main objective: Get THE WITNESS to speak**. The witness must be the focus of attention, not the attorney.

2. **LISTEN** to your witness and her answers.

3. **Avoid Prosecutorial techniques**

   a. The "What, if anything,..." questions.
   b. The "And then what happened?" or the "What happened next?" questions.
   c. These are examples of being unprepared

4. **Simple and short questions**

   a. **Single issue** or single point per question
      - Avoid compound, long questions
      - Simple questions are understood easily by your witness and your jurors.

5. **Open-ended questions**

   a. Ask questions that seek and solicit a **NARRATIVE** response.
   b. **Journalism questions** - Ask questions that begin with **who, what, when, where, why, how, tell us, describe, explain**, etc. These are the questions that will let the witness speak, the objective of direct examination.

6. **Leading questions? RARELY.**

   a. Leading questions reduce your and your witness' credibility and the impact of the witness' testimony because it appears that you are putting words into your witness' mouth.
   b. Leading <u>sometimes</u> is okay
      - Preliminary or inconsequential matters
      - Hostile witness

7. Avoid or clarify **"quibble"** words

   a. "Quibble" words are unhelpful qualifiers and words that are subject to interpretation. Unhelpful qualifiers are words like very, really, extremely, so, etc.
   b. Words that are subject to interpretation usually are adjectives, such as upset, big, fast.
   c. These words do not clearly define the testimony for the trier of fact. How upset is upset? Is really upset any clearer?
   d. Prepare your witness not to use these words. Prepare them to offer the facts instead. If they do use them, ask a clarifying question.

8. **Transitions**

   a. Transitions are used to let everyone know that you are changing the subject or to highlight an important question or answer.

b. **Pauses**

- Those golden moments of silence in the courtroom, the ones that terrify lawyers. Those moments of silence are powerful weapons and should be used.
- A moment of silence between topics signals a change in the subject matter of the questions to the witness and the trier of fact.
- Silence lets the good stuff sink in and lets the jurors think about and **feel the emotional impact** of the testimony

c. **Headlines**

- Use to **change topic or objectives**
- **Orient the jurors** and make the testimony easier to follow
- **Orient the witness** and make the questions easier to answer e.g. "I'd like to ask you about the lighting in the alley"; "Lets talk about the moment when you first saw Mr. Violent."; "Can I stop you right there. What was going through your mind at that moment.";"I have some questions about your relationship with Mr. Smith."

9. **Avoid "recollection stage" of questions and answers.**

a. The recollection stage, ("Do you recall seeing....") can lead to confusing and inefficient responses.
b. For example, if you ask "Do you recall if the person had a moustache?" and the witness says "No," does the witness mean that she didn't see a moustache or that she doesn't recall seeing a moustache or doesn't recall whether the person had a moustache or not. To avoid the problem, leave the "do you recall" part of the question out.
c. Further, including this stage in the question suggests uncertainty. If the question suggests uncertainty, the witness may become or appear uncertain.

Y. Advanced Questioning Thoughts and Techniques

1. **Present tense questions**
   a. Ask questions in the present tense, rather than the past tense.
   b. This techniques adds interest and immediacy to your witness' testimony. If you ask the questions in the present tense, the witness will begin to answer in the present tense.
   c. Q: Where were you on May 2, 1993 at 1 a.m.? A: I was in Red Alley.
      Q: Now Mr. Client, it <u>is</u> May 2, 1993 at 2 a.m. in Red Alley. What <u>are</u> you doing?
      A: I am standing there and this big guy is walking toward me.

2. **Sense questions**

a. Ask questions that seek answers that focus on the **senses**. These questions seek evocative answers to which the trier of fact will relate.
   - **Hear**
   - **See**
   - **Smell**
   - **Taste**
   - **Touch**
   - **Feel physically**
   - **Feel emotionally.**

b. Focusing on colors and familiar objects at the scene will make the scene come to life f or the jurors.

3. **Looping technique**

   a. Use the words of a question or answer in a succeeding question or questions.
   b. These can be planned and/or spontaneous.
      Q: How big was the man? A: He was 6'2" and weighed about 225.
      Q: What was the 6'2", 225 lb. man doing when you saw him? A: Hitting Mr. Client.
      Q: When the 6'2", 225 lb man was hitting Mr. Client, what was Mr. Client doing?

4. **Juror's Voice Technique**

   a. Ask the questions that are in the jurors' minds. (See your "juror questions list")
   b. Ask the questions using the same words and the same tone of voice that the juror would use if asking the question. Hear it in your head.
   c. You become the juror's representative. The jurors will come to rely on you to ask the things they want to know. This also takes the sting out of the prosecutor's points
   d. For example:
      Q: How could you have seen it wasn't Mr. Client when you were driving the car at the same time as you say you were watching the fight?
      Q: How could you possibly recall such details about a single day 14 months ago?
   e. A well prepared witness will knock these questions out of the ballpark!

5. **Jury instruction questions.** Use the language of the anticipated jury instructions in framing questions and refining answers.

6. **"What were you thinking / feeling" questions**

   a. Ask questions that disclose the witness' thoughts, feelings and motivations, particularly at the critical time for the witness.
   b. These question humanize the witness and help juror identification.
      Q: "As you saw the person being robbed, what were you thinking?"
      Q: "When you heard that your son was charged with shooting someone on Saturday, May 3, what went through your mind?"
      Q: "You told us that he came at you with a knife. What were you feeling at that moment?"

7. **Emphasis**

   a. Highlights, clarifies and adds interest
   b. Placing **emphasis** on a particular word in a sentence can change the meaning or focus of the question.
      Q: **WHERE** was Fred when you first saw him?
      Where **WAS** Fred when you first saw him?
      Where was **FRED** when you first saw him?
      Where was Fred **WHEN** you first saw him?
      Where was Fred when **YOU** first saw him?
      Where was Fred when you **FIRST** saw him? etc.

c. **Pausing** after a particular word in a sentence can change the meaning or focus of the question.
   Q: Where..... was Fred when you first saw him?
   Where was..... Fred when you first saw him?
   Where was Fred..... when you first saw him?

8. **Flagging** a question will give it emphasis.

Q: "Now, Mr. Witness, this question is very important, so please listen carefully before answering...."
Q: "What is the one thing that stands out most in your mind?"

9. **Stretch out / shrink down technique**

a. The **"stretch out"** technique seeks to maximize the impact of information by "stretching out" answers. It can be used to make something big seem bigger, something far seem farther, something slow seem slower, etc. For example:
   To show that the client stood <u>far</u> from the shooting and, therefore, was not involved;
   Q: You told us that Mr. Client was across the street from where the shooting took place. I'd like to ask you about how far away he was. First, is there a sidewalk?
   Q: How wide is it?
   Q: Is there a lane where cars park on the south side of the street?
   Q: How many lanes of traffic going south?
   Q: How many lanes of traffic going north?
   Q: Is there a lane where cars park on the north side of the street? etc.

b. The **"shrink down"** technique seeks to minimize the impact of information by "shrinking it down." It can be used to make something fast seem faster, something minor seem even more minor, something close seem closer, etc. For example:
   To show client stood <u>close</u> to the shooting and therefore, was not involved:
   Q: You told us that Mr. Client was across the street from where the shooting took place. How close was he to Mr. Decedent at the time the shots were fired?
   A: Pretty close. He was just across the street. He's lucky he didn't get hit himself.

10. **Influencing words**

a. The words included in the question can influence the answer.
b. Decide what answer you want and use the language of the desired answer to ask the question.
   - If you want something to seem far, ask "How far?"
   - If you want something to seem close, ask "How close?"
   - Short/tall; big/small; fast/slow. etc.
c. Your question may presuppose a desired fact. "Did you see <u>THE</u> gun?" versus "Did you see <u>A</u> gun?" This presumes the existence of the gun. The jurors and the witness are more likely to believe that a gun was involved and seen by the witness.

11. **Stop action or Freeze frame technique**

    a. Have the witness focus on a specific moment or part of an event and have her describe it in detail. For example:
       Q: "Let me stop you there. Please describe Mr. Aggressor at that moment."
       Q: "Where was the knife?"
       Q: "Where was his other hand?"
       Q: "What was he saying?"
    b. This technique brings a critical moment to life by presenting substantial detail.

Z. **Techniques for Problem Witnesses**

1. Non-responsive answers or who won't stay on the subject

    a. Take the blame - "I'm sorry, my question wasn't clear. Let me try again."
    b. Explain what you want - "Mr. Witness, I'm trying to find out about whether you got a look at the face of the attacker. Do you understand that? Now, did you see his face? Can you please tell us about it?"

2. Who has a bad attitude (occasionally, your client)

    a. Confront it.
    b. Your jurors are taking it in. "Mr. X, you seem upset. Would you like to tell the ladies and gentlemen of the jury why you are upset?"

3. Who repeatedly refer to **inadmissible evidence:** Explain the rules, but be nice!
   Q: "Mr. Witness, the law doesn't allow you to offer your opinion about Mr. Victim. When I ask you a question about him, please just tell us the facts that answer the question. OK?"
   Q: "Ms. Witness, the law doesn't permit you to tell us what you heard in the neighborhood. That is called hearsay. You can tell us only what <u>you</u> saw, <u>you</u> heard. Not what someone else told you. Do you understand what I mean by that?"

4. Who gives an **unexpected bad / fatal answer**

    a. Prevention, through preparation, is the best technique.
    b. There are no good ways to handle this. Seek the lesser of evils.
       - Ignore it and hope the jurors didn't hear it. At least you aren't making a big deal out of it for the jurors.
       - Claim surprise and cross examine the witness.
       - "You just said.... Is that what you meant to say?"
       - Refresh recollection with previous interview notes. Q: "You and I just spoke about this yesterday, didn't we?" Q: "Didn't you say X, not Y?" Q: "Can you explain that?"
       - **Fail-safe response** - Approach the bench and hope for a good plea!

5. Who is **forgetful**

    a. Refresh recollection
    b. Use a document as "past recollection recorded"
    c. Ask for a recess

d. Lead the witness - option of last resort

AA. **Storytelling and picture painting techniques**

1. **Scene Before Action.**

a. Before describing the action of a story, tell the jurors about the place where the events are happening. This gives context for the story; gives the jurors a place to put the people and events to follow.

b. Sometimes a **physical description** of the location is required.
Q: I'd like you to tell the ladies and gentlemen of the jury about Red Alley. Can you please describe it?
Q: If I were walking in it, what things would I see?
Q: What does it smell like?

c. Sometimes the **emotional landscape** must be described.
Q: What kind of place is Joe's Bar? A: It's a filthy biker's bar.
Q: Can you describe the people who have been there when you've been there in the past?
A: They're all biker's, big guys with tattoos who get drunk and like to mess with people.
Q: What activities have gone on there when you've been there? A: There are always fights, every night I was ever there.

d. Having set the scene, you can describe the action using any of the techniques described below.

2. **Flashback** or **flash forward** - Start the story at the point that is most critical for your theory. Then, flash back to something earlier or forward to something later. For example:
Q: Mr. Client, why did you hit Mr. Jones?
A: He threw a beer in my face and was reaching for a pool stick. I hit him before he got the stick and smacked me with it.
Q: Let's back up a moment, and please, tell us how this all started?
A: I was in the bar with a few friends and this guy was drunk and ....

3. **Parallel action development** - Present the story of different parties separately, a little at a time, until you bring them together at the critical moment. For example:
Q: Ms. Witness, what was Mr. Client doing at this time?
A: He was sitting there minding his own business, drinking a beer at the bar.
Q: While Mr. Client was minding his own business, what was Mr. Accuser doing?
A: He was shooting pool.
Q: How was he acting?
A: He was screaming at some guy, accusing him of taking his quarter. He was pretty drunk and pretty loud.
Q: How did Mr. Client come to fight with Mr. Accuser?
A: Mr. Accuser swung the pool stick at the guy he was playing pool with and missed. He hit Mr. Client. As Mr. Accuser was winding up again, that's when Mr. Client hit him.

4. **Freeze frame** - Select the critical moment in light of the specifics of your theory and paint it in minute detail so that your jurors see it exactly as it was. For example:

Q: Mr. Witness, you told us that you saw the whole thing. Can you tell us what you saw?
A: Yes, I saw Mr. Deceased running at Mr. Client with a table leg and Mr. Client shot him.
Q: I'd like you to tell us about Mr. Deceased and what he was doing. First, How big is he?
A: He is a big man, 6'2", maybe 225 lbs.
Q: How was he built?
A: He was real strong. Built kinda like a weightlifter. Big arms and all.
Q: Tell us about his clothes?
A: He had on a black tank top with something like "...Meanest SOB in the valley" on it.
Q: What else was he wearing?
A: Jean shorts, cutoffs, black combat boots....

5. The **Interview** or the **Investigation** - Tell the story by following the police investigation or the interview of an important witness.
   Q: Officer Jones you told us that you were the investigating officer? Was Mr. Witness on the scene when you got there? A: Yes
   Q: Did you talk to him? A: Yes.
   Q: Did he tell you he saw the guy who did it? A: Yes
   Q: Did you ask him whether he could describe the guy?
   A: Yes. He said he could.
   Q: Tell us about the questions that you asked him?

6. **Panorama to zoom** - Put the story into context. Question the witness about the big picture and move to questions about the specific important things. For example:
   Q: Can you tell us about the area?
   A: It's a nice neighborhood. There are row houses on both sides of the street. Cars park on both sides too. There's a little Ma & Pa grocery on the corner. It's nice.
   Q: What kind of day was it?
   A: It is a beautiful day. Real sunny, the sky was blue and it was real warm. In the street, some of the kids were playing stickball.
   Q: Did you see Mr. Violent in the area?
   A: Yeah, on the corner with a group of guys, wearing a blue coat and had a black steel revolver in his right hand.
   Q: Tell us about the gun?

7. **The walk through.** Directional comments are confusing and meaningless too often. Think about the homicide police report; "The body was lying in a northerly direction with the head facing in a westerly direction and the feet facing the southeast...." Not very helpful. Instead, select a place to start and question the witness about the things they see to their right, their left, in front, etc. as they walk through the scene. For example:
   Q: Officer Jones when you walked into the alley, what did you see?
   A: I saw a body.
   Q: Please describe the way the body was lying as you were looking at it?
   A: It was face down. The person's face was to the left...
   Q: Whose left?
   A: My left and his left. His face was facing kind of away from me.

8. **Chronological** - Easy to follow, but it's less interesting and harder to highlight the important stuff.

BB. **Objections**

1. **Your objections to the prosecutor's cross examination.**

   a. Can you object? Is the prosecutor doing something improper? Can you win? at what cost?
   b. Should you object?
      - Your objections must be consistent with your theory.
      - Does the question hurt the witness? damage your theory? If the answer is no, why object?
      - Jurors dislike objections. They feel excluded and believe that you are hiding something from them. So, even if the objection is proper, is it worth the price?
   c. Protect your witness. If your witness needs help, step in with a proper objection.
      - Harassment, too fast paced
      - Prosecutor won't let witness answer
      - Interrupting the witness
      - Remember, a good witness may be able to handle it.

2. **Objections by the prosecutor to your direct examination**

   a. Prevention; don't ask objectionable questions.
   b. Make 'em pay
      - Tell the jury that you won; "Thank you, your Honor. Mr. Witness the Judge has ruled that the question is proper. You may answer the question."
      - Repeat the question; "Let me state the question again. Why do you say that Mr. State's Witness is known to be a lying scumbag in the neighborhood?"
      - Summarize what the witness said; "Before the objection, you told us that Mr. Victim was drunk, had a large knife and was looking for my client. Had you finished the answer or is there more you'd like to add?"
   c. Don't apologize or withdraw the question. Rephrase the question so that the judge will allow it.
   d. Use proffers and other strategies to get the court to allow an important question.

CC. **FINISH STRONG:** You should save something with high impact and substance for your last point.

VII. Your Client in the Courtroom and on the Stand

A. **To Testify or Remain Silent**

1. There should be no set rule. Like any other witness, the decision to have a client testify depends on the quality of the client as a witness and the value and necessity of his/her testimony. Remember, this is the client's decision, but should be reached with the advice of counsel.

2. Recent research suggests that juror's expect the client to testify and held it against him or her when s/he didn't. However, the same study found that when the client did testify, the testimony did more harm than good far more often than not.

B. **Should the client show emotion?**

1. Traditional wisdom suggests that clients shouldn't show emotion in front of the trier of fact. However, a lack of emotion under the circumstances seems unnatural. Your call.

2. If the client will be emotional, be sure that the emotion is consistent with the theory of defense.

3. Anger and violence are not suggested, but frustration and righteous indignation may be fine.

C. **Over preparation? No such thing with your client**

1. Everything done to prepare a witness for direct, should be done to prepare your client.

2. Discuss how your client should behave in the courtroom. Remind her that someone on the jury will always be watching.

3. Practice denials: Just saying "no" may not have enough force. Tell your client to give the denial some verbal "ummph" and add something like "No, I didn't do it," "No, that is not true" or the like.

D. **References to your client**

1. **Physical reference.**

   a. Do not have witnesses point at your client. You shouldn't do it either.
   b. You and/or the witness become just another accusing finger. Clients have suggested that this makes them uncomfortable.
   c. If you must, gesture to your client using an open hand, palm up. Preferably, walk over to the client or ask the client to stand.

2. **Verbal reference**

   a. Have witnesses call your client by name, preferably a less formal name. John is better than Mr. Client. If a judge won't permit this, call him John Client. CAVEAT: If you are considerably younger than your client or circumstances suggest that it will appear disrespectful to use the client's first name alone, don't do it.
   b. Never use the dehumanizing phrase "the defendant." The only way to ensure that you do not use this phrase during the trial is not to use it at all. Calling your client by name will help you to see him or her as a person. Where a generic name is needed, such as in motions, substitute the word "accused" for defendant.

E. Beware of, and counsel against, **overly broad responses**

1. **Opens the door** to otherwise irrelevant and inadmissible testimony.

2. Avoid generalizations like:
   a. "I never have done...."
   b. "I wouldn't even know what that stuff looks like."

3. This is a good suggestion to discuss with all witnesses.

F. **Organization for the client's direct**

1. The beginning (The important stuff)

   a. Consider beginning with an absolute denial and brief explanation why. Client wants to say it and jurors want to hear it. The explanation orients the jurors. A simple "No" isn't enough. A little added punch is necessary.
   b. Q: "Mr. Client, did you do it?"
      A: "No, I didn't."
      Q: "If you didn't do it, where were you at the time of the shooting?"
      A: "I was home with my mother and girlfriend the whole night." .....(Pause)
      Q: "Can you tell us about yourself?"

2. The middle (The bad or less important stuff)
   a. Confront prior record, prior inconsistent statements and other bad stuff in the middle where they are more likely to be minimized or forgotten.

3. The end (More important stuff or the same important stuff from the beginning)
   a. Select a second strong point and question about it here. Alternatively, repeat the same point with which you began.
   b. Consider ending with a denial again, if asked in a slightly different way to avoid an objection.
   c. Consider closing with a trilogy.
      You may close with a trilogy
      Q: On June 1st did you point a gun at Mr. Jones? A: No, I didn't.
      Q: On June 1st did you shoot a gun at Mr. Jones? A: No, absolutely not.
      Q: On June 1st did you have a gun? A: No, I didn't have a gun at all.

      PAUSE
      Thank you. I don't have any other questions.

G. **Humanize the client.**

1. Lots of background information, whenever you can

2. All the good stuff and Even the bad stuff, playing up the rough upbringing angle to develop understanding or sympathy.

H. **Corroboration.** Seek as much corroboration of the client's testimony as is possible, but don't get bogged down in details.

VIII. Conclusion

Direct examination is too important to surrender to prosecutors. If you prepare yourself, your case and your witness well, direct examination and the techniques set forth here will help you win cases. Remember the "Six Ps" and always remember your "AURA."

Daniel Shemer

“I was an Assistant Public Defender in Maryland from 1980 until 1999. The material included in this handout was shamelessly stolen from numerous parties and publications. I have listed many of the subjects of my theft below. My thanks to the ingenious authors, actors and lawyers, particularly, the many other Maryland Public Defenders, for creating and sharing this wealth of ideas. May your creative juices continue to bubble up and ‘may justice flow down like the waters and mercy like an everflowing stream.’”

1. "Direct Examination: Strategic Planning, Preparation and Execution." by Phyllis H. Subin, Esq., Director Of Training and Recruitment, Defender Association Of Philadelphia.
2. The ABA Journal, Litigation Section, by James McElhaney, Esq.
3. "The Art Of Formulating Questions: Preparation Of Witnesses." by Neal R. Sonnett, Esq., 2 Biscayne Blvd., 1 Biscayne Tower, Ste.2600, Miami, Fla. 33131
4. "The Drama and Psychology of Persuasion in the Defendant's Opening Statement," by Jodie English, Esq. (I know this outline is about direct examination, but this is an exceptional article that explains the psychological bases for many of the techniques recommended in this outline.)
5. Joe Guastaferro, Actor, Director and Trial Consultant. 4170 N. Marine Drive, #19L, Chicago, Ill. 60613. Just about anything Joe has ever said or done!
6. "Jury Psychology" by Paul Lisnek, J.D., Ph.D., Trial Consultant. 612 N. Michigan Ave., Suite 217, Chicago, Ill. 60611.

Any thoughts, comments or suggestions to improve this outline? Share them, please. Write me at Office of the Public Defender, Training and Continuing Education Division, 6 St. Paul Street, Baltimore, Maryland 21202, call me at (410) 767-8466 or FAX to me at (410) 333-8496. Thank you.

North Carolina Defender Trial School
Sponsored by the UNC School of Government and
North Carolina Office of Indigent Defense Services
Chapel Hill, NC

Workshop Aids

Compiled by John Rubin, based on materials by Ira Mickenberg, Alyson Grine, Ann Roan, Susan Brooks, Jon Rapping, Fred Friedman, Kendall Hill, Mary Moriarty, and many other defenders

Brainstorming Basics

1. Be factual and specific

- Not law
- Not conclusions
- Not endless rounds of questions (although do keep a list of matters requiring more investigation)

2. Be Inclusive

- Crime facts, events, actions
- People (personalities, motivations, interrelationships, influences)
- Places, objects
- Investigative and other procedures

3. Be non-judgmental

- Facts are not good, bad, or beyond change . . . yet

4. Be associative

- Develop additional facts and ideas from facts that have been identified

5. Be literal

- Write down facts as close to verbatim as possible; don't paraphrase

6. Be ready to investigate further

- Keep a list of facts, ideas, possibilities that require further interviews, discovery, etc.

Creating a Theory of Defense

A theory of defense is a short written summary of the factual, emotional, and legal reasons why the jury (or judge) should return a favorable verdict. It gets at the essence of your client's story of innocence, reduced culpability, or unfairness; provides a roadmap for you for all phases of trial; and resolves problems or questions that the jury (or judge) may have about returning the verdict you want.

Steps in creating a theory of defense

Pick your genre

1. It never happened (mistake, setup)
2. It happened, but I didn't do it (mistaken id, alibi, setup, etc.)
3. It happened, I did it, but it wasn't a crime (self-defense, accident, elements lacking)
4. It happened, I did it, it was a crime, but it wasn't this crime (lesser offense)
5. It happened, I did it, it was the crime charged, but I'm not responsible (insanity)
6. It happened, I did it, it was the crime charged, I'm responsible, so what? (jury nullification)

Identify your three best facts and three worst facts

- Optional step to test the viability of your choice of genre

Come up with a headline

- Barstool or tabloid headline method

Write a theory paragraph

- Use your headline as your opening sentence
- Write three or four sentences describing the essential factual, emotional, and legal reasons why the jury (or judge) should return a verdict in your favor
- Conclude with a sentence describing the conclusion the jury (or judge) should reach

Develop recurring themes

- Come up with catch phrases or evocative language as a shorthand way to highlight the key themes in your theory of defense and move your audience

Storytelling

(by which we mean tell your client's story, not make stuff up)

1. Characters

Before every trial, ask yourself, "Who are the characters in the story I am telling to the jury (or judge), and how do I want to portray them to the jury (or judge)? What are their roles?"

- Who is the hero and who is the villain? Who are the other characters?
    - What role does my client play?
    - What role does the complainant/victim play?
    - What role do the police play?

2. Setting and Scenes

Where do the most important parts of YOUR story take place?

- What are the key scenes?
- What scenes must be included to make your story persuasive?

3. Sequence

In what sequence do you want to tell the events of YOUR story?

- Decide what is most important for the jury (or judge) to know
- Follow principles of primacy and recency:
    - Front-load the strong stuff
    - Start on a high note and end on a high note

4. From whose perspective do you want to tell the story?

5. What emotions do you want the jury (or judge) to feel when hearing your story? What character portrayals, scene settings, sequence, and perspective will help the jurors (or judge) feel that emotion?

Voir Dire

How to Ask Life Experience Questions on Voir Dire

A. Start with an **IMPERATIVE COMMAND**:

"Tell us about," "Share with us," "Describe for us"

The reason we start the question with an imperative command is to make sure that the juror feels it is proper and necessary to give a narrative answer, not just a "yes" or "no."

B. Use a **SUPERLATIVE** to describe the experience you want them to talk about:

"The best," "The worst," "The most serious"

The reason we ask the question in terms of a superlative is to make sure we do not get a trivial experience from the juror.

C. Ask for a **PERSONAL EXPERIENCE**

"That you saw," "That happened to you," "That you heard of," "That you know of"

This is the crucial part of the question where you ask the juror to relate a personal experience. Be sure to keep the question open-ended, not leading.

D. Or ask for an **EXPERIENCE OF A FAMILY MEMBER OR SOMEONE CLOSE** to the juror

"That you or someone close to you saw," "That happened to you or someone you know"

This gives the jurors the chance to relate an experience that had an effect on their perceptions but may not have directly happened to them. It also lets the jurors avoid embarrassment by attributing one of their experiences to someone else.

E. **PUTTING THE QUESTION TOGETHER**

See sample questions, below.

Some Sample Life Experience Voir Dire Questions

A. Race

1. Tell us about the most serious incident you ever saw where someone was treated badly because of his or her race (or gender, religion, etc.).

2. Tell us about the worst experience you or someone close to you ever had because someone stereotyped you or someone close to you because of your race (or gender, religion, etc.).

3. Tell us about the most significant interaction you have ever had with a person of a different race.

4. Tell us about the most difficult situation where you, or someone you know, stereotyped someone, or jumped to a conclusion about them because of his or her race (or gender, religion, etc.) and turned out to be wrong.

B. Alcohol/Alcoholism

1. Tell us about a person you know who is a wonderful guy when sober, but changes into a different person when drunk.

2. Share with us a situation where you or a person you know of was seriously affected because someone in the family was an alcoholic.

C. Self-Defense

1. Tell me about the most serious situation you have ever seen where someone had no choice but to use violence to defend himself or herself (or someone else).

2. Tell us about the most frightening experience you or someone close to you had when threatened by another person.

3. Tell us about the craziest thing you or someone close to you ever did out of fear.

4. Tell us about the bravest thing you ever saw someone do out of fear.

5. Tell us about the bravest thing you ever saw someone do to protect another person.

D. Jumping to Conclusions

1. Tell us about the most serious mistake you or someone you know has ever made because you jumped to a snap conclusion.

E. False Suspicion or Accusation

1. Tell us about the most serious time when you or someone close to you was accused of doing something bad that you had not done.

2. Tell us about the most difficult situation you were ever in, where it was your word against someone else's, and even though you were telling the truth, you were afraid that no one would believe you.

3. Tell us about the most serious incident where you or someone close to you mistakenly suspected someone else of wrongdoing.

F. Police Officers Lying/Being Abusive

1. Tell us about the worst encounter you or anyone close to you has ever had with a law enforcement officer.

2. Tell us about the most serious experience you or a family member or friend had with a public official who was abusing his authority.

3. Tell us about the most serious incident you know of where someone told a lie, not for personal gain, but because he or she thought it would ultimately bring about a fair result.

G. Lying

1. Tell us about the worst problem you ever had with someone who was a liar.

2. Tell us about the most serious time that you or someone you know told a lie to get out of trouble.

3. Tell us about the most serious time that you or someone you know told a lie out of fear.

4. Tell us about the most serious time that you or someone you know told a lie to protect someone else.

5. Tell us about the most serious time that you or someone you know told a lie out of greed.

6. Tell us about the most difficult situation you were ever in where you had to decide which of two people were telling the truth.

7. Tell us about the most serious incident where you really believed someone was telling the truth, and it turned out he or she was lying.

8. Tell us about the most serious incident where you really believed someone was lying, and it turned out he or she was telling the truth.

H. Prior Convictions/Reputation

1. Tell us about the most inspiring person you have known who had a bad history or reputation and really turned himself around.

2. Tell us about the most serious mistake you or someone close to you every made by judging someone by his or her reputation, when that reputation turned out to be wrong.

I. Persuasion/Gullibility/Human Nature

1. Tell us about the most important time when you were persuaded to believe that you were responsible for something you really weren't responsible for.

2. Tell us about the most important time when you or someone close to you was persuaded to believe something about a person that wasn't true.

3. Tell us about the most important time when you or someone close to you was persuaded to believe something about yourself that wasn't true.

J. Desperation

1. Tell us about the most dangerous thing you or someone you know did out of hopelessness or desperation.

2. Tell us about the most out-of-character thing you or someone you know ever did out of hopelessness or desperation.

3. Tell us about the worst thing you or someone you know did out of hopelessness or desperation.

How to Lock in a Challenge for Cause

Step #1. Mirror the juror's answer: "So you believe that . . . ."

a. Use the juror's exact language

b. Don't paraphrase

c. Don't argue

Step #2. Then ask an open-ended question inviting the juror to explain (no leading questions at this point):

> "Tell me more about that"
>
> "What experiences have you had that make you believe that?"
>
> "Can you explain that a little more?"

Step #3. Normalize the impairment

a. Get other jurors to acknowledge the same idea, impairment, bias, etc.

> "Ms. Smith feels that the police would not arrest a person if he were not guilty. Do you feel that way as well, Mr. Barnes?"

b. Don't be judgmental or condemn it.

> "I see. Thank you for sharing that, Ms. Smith."

Step #4. Now switch to leading questions to lock in the challenge for cause:

a. Reaffirm where the juror is:

> "So you would need the defendant to testify that he acted in self-defense before you could decide that this shooting was in self-defense"

b. If the juror tries to weasel out of his impairment, or tries to qualify his bias, you must strip away the qualifications and force him back into admitting his preconceived notion as it applies to this case:

> Q: "So you would need the defendant to testify that he acted in self-defense before you could

decide that this shooting was in self-defense."

A: "Well, if the victim said it might be self-defense, or if there was some scientific evidence that showed it was self-defense, I wouldn't need your client to testify."

Q: "How about where there was no scientific evidence at all, and where the supposed victim absolutely insisted that it was not self-defense. Is that the situation where you would need the defendant to testify before finding self-defense?"

c. Reaffirm where the juror is not (i.e., what the law requires).

"And it would be very difficult, if not impossible, for you to say this was self-defense unless the defendant testified that he acted in self-defense."

d. Get the juror to agree that there is a big difference between these two positions.

"And you would agree that there is a big difference between a case where someone testified that he acted in self-defense and one where the defendant didn't testify at all."

e. Immunize the juror from rehabilitation

"It sounds to me like you are the kind of person who thinks before they form an opinion, and then won't change that opinion just because someone might want you to agree with them. Is that correct?"

"You wouldn't change your opinion just to save a little time and move this process along?"

"You wouldn't let anyone intimidate you into changing your opinion just to save a little time and move the process along?"

"Are you comfortable swearing an oath to follow a rule 100% even though it's the opposite of the way you see the world?"

"Did you know that the law is always satisfied when a juror gives an honest opinion, even if that opinion might be different from that of the lawyers or even the judge? All the law asks is that you give your honest opinion and feelings."

A Rating System for Non-Capital Jurors

1. LEGALLY EXCLUDABLE AS BIASED FOR THE DEFENSE. This juror openly expresses the view that he will or cannot vote for conviction.

2. This juror overtly expresses views favorable to accused people in general ("I see the police shooting/framing too many people in my community"), or favorable to what your client is accused of doing ("I don't think anyone should go to jail for marijuana,"), but also says she will follow the judge's instructions and convict if the evidence warrants.

3. This juror comes across as truly open-minded. He is willing to convict, but is aware of and concerned with the effect of a conviction on the client's life. He may be an intelligent abstract thinker, or a less analytical but compassionate, person. He will be tolerant of and listen to the views of those he disagrees with.

4. Moderately pro-prosecution. This juror believes that crime is a serious problem and generally thinks the police do a good job. She does not, however, have any particular axe to grind concerning your client or the kind of crime your client is accused of committing. She wants to be sure of guilt before convicting and can recount experiences/stories of someone being falsely accused about a serious matter.

5. Pro-prosecution. This juror not only believes that crime is a serious problem, but has a personal experience, connection, or belief that gives him an axe to grind concerning your client or the kind of crime your client is accused of committing. Often, she will have had very little personal contact with members of your client's racial or ethnic group and, if she has had contact, she recalls it in the context of a negative experience. This juror is often afraid: afraid of crime, afraid of people of different races and backgrounds, afraid of poor people. It is important to get these jurors talking about their experiences. They will often say something that establishes a challenge for cause.

6. Very pro-prosecution. This juror is a version of #5 on steroids. She not only believes crime is a very serious problem, but talks aggressively about the need to do something about it. She speaks in cop-talk (as derived from television) and speaks in general terms about the importance of holding people responsible for their actions. These jurors may also associate themselves (at least figuratively, sometimes literally) with law-enforcement issues, institution, and people. They may get their news and information from right-wing talk radio and may blame specific classes of people (liberals, minorities) for problems of crime and lawlessness.

7. LEGALLY EXCLUDABLE AS BIASED FOR THE STATE. This juror either openly expresses the view that he will vote for conviction or will not follow the judge's instructions; or has some factual characteristic that makes him automatically disqualified (involved with the prosecution or police investigation of this case, etc.).

Drafting Your Opening Statement: A Short Template

The Hook -- Start with a thirty to sixty second statement that encapsulates your theory of defense and establishes the emotional themes that will make the jury feel it is right to accept your theory. The hook should tell the jurors in factual terms exactly why you should win. It should not be an argument.

> EXAMPLE: John Smith is not guilty of murder. Yes, he shot Bob Green. But only because Bob Green started the fight, pulled his own gun, and fired the first shot at John. John shot back because it was the only way to save his life. He is not guilty because he acted in lawful self-defense.

QUESTION: WHAT IF THE PROSECUTOR OR JUDGE OBJECTS, SAYING THAT THIS IS TOO ARGUMENTATIVE? (They would be wrong, but being wrong never stopped a judge or prosecutor in the past).

> ANSWER: RE-START YOUR OPENING LIKE THIS:
> John Smith is not guilty of murder. Yes, the evidence will show that he shot Bob Green. That same evidence will also show that the only reason he fired was that Bob Green started the fight, pulled his own gun, and fired the first shot at John. The evidence will conclusively show that John Smith is not guilty because he acted in lawful self-defense.

The Story -- The main part of your opening, in which you tell the jury the factual story of your client's innocence or reduced culpability. Your opening should not contain the entire story of the case, in all its detail. It should, however, hit the high points and tell the jury everything that is essential to acquitting.

> EXAMPLE: Five minutes before the shooting, John Smith was sitting quietly at the bar, drinking a beer and watching Monday night football. He was not drunk. He was not loud. He had never even heard of Bob Green. . . . etc.

The Conclusion -- In which you tell the jury what you want them to do.

> EXAMPLE: After hearing all the evidence, you will find that John Smith shot Bob Green only because Green pulled his gun and fired the first shot. You will find that John Smith acted in lawful self-defense. And you will find that the only fair verdict is not guilty.

After your hook, story, and conclusion, sit down. Don't waste your first opportunity to hold the jurors' attention by introducing yourself again, thanking them for doing their civic duty, or discussing legalities like burden of proof.

The Three P's of Direct Examination

1. PLAYERS

   - Select witnesses who advance your theory of the case

2. PREPARATION

   - Think about your questions
     - Open-ended
       - Who
       - What
       - When
       - Where
       - How
       - Why
       - Tell us about/Describe

       --Tap all of the senses. What did you do, think, feel, see, smell? Place your witness in important scenes to bring them to life.

       EXAMPLE: When Bob Green came up to you in the bar, what did you see? [He got right up on me, he glared at me, he had his hand in his jacket pocket, etc.] What did you smell? [He reeked of alcohol; it was on his breath, his clothes, etc.] What did you feel? [I was scared, the hair on the back of my neck stood up, etc.]
     - With a purpose and direction

       --Mix general and specific questions to direct your witness to the information you want to emphasize and to control the examination

       EXAMPLE: When Bob Green came up to you in the bar, what went through your mind? What did you do? NOT: When you arrived at the bar, what happened? And, what happened next? And, after that?

   - Prepare and practice with the witness

3. PRODUCTION

   - Remember primacy & recency. Start and end on a strong point.
   - Arrange your direct through "chapters" and "signposts"

     EXAMPLE: "Mr. Witness, now I want to ask you about the night Mr. Green came up to you in Smiley's bar." AND "Mr. Witness, now I want to go back to the last time you saw Mr. Green before the incident in the bar."
   - Elicit factual details of scenes you want to emphasize
   - Tap into your frustrated inner actor. You are a part of the scene.
   - Have a conversation with the witness
   - Listen. The witness may give you a gold nugget that you can expand on; you don't want to miss it because you are focused on your next question.

Cross-Examination

1. **Purpose** – cross-examination must advance the defense theory by eliciting answers that provide facts that either:
    a. Affirmatively advance your defense theory, or
    b. Undermine/discredit the prosecution's evidence that hurts your defense theory (not scattershot)

2. **Structure**
    a. Compile the facts that are the building blocks of the defense theory. For example, one block might be "the witness did not have a good chance to identify the defendant."
    b. Identify 3-5 important points you wish to make with these facts. For example, one point might be "the streetlight was broken."
    c. Write chapters
        i. each of the 3-5 points is a chapter
        ii. order the facts (for example, from general to specific) to lead logically to the conclusion you want the jury to draw
        iii. do not ask the ultimate question about the conclusion you want the jury to draw (you'll almost always be disappointed)
    d. Organize the chapters
        i. primacy and recency
        ii. tell a persuasive and coherent story
    e. Transition between chapters with headlines

3. **Control**
    a. Leading questions
    b. One fact per question
    c. Keep questions short and simple
    d. Never ask a question that calls for an answer you don't know
    e. Listen
    f. Each question must have a purpose

g. Avoid tags (e.g., saying “ok” after every answer or “and” at the beginning of every question)
h. Loop. For example, If your client didn’t have facial hair at time of offense, you might ask: “The man you saw had a beard?” “When the man with the beard came in the store, you were behind the cash register?” etc.
i. Consider language
    i. talk like a “regular” person
    ii. use words that advance your defense theory
j. Do not argue with/cut off the witness. If a witness gives a non-responsive answer, be sure you asked a leading question containing one fact and, if so, repeat the question. For example, “Thank you. But, my question is “The man you saw had a beard?”
k. Do not treat all witnesses the same. Do not beat up grandma (unless she is a villain in your story).

4. Preparation

a. Investigation (and other forms of fact gathering)
    i. Evidence of unreliability (perception, memory)
    ii. Evidence of lack of credibility (bias, prior inconsistent statements, prior convictions, character evidence)
b. Anticipate objections
c. Have impeachment ready

Formula for Impeachment by Prior Inconsistent Statement

1. **Recommit the witness to her testimony**

Get the witness to repeat the statement he just made at trial (for example, you testified on direct that the light was green, correct?).

2. **Validate the prior statement**

a. Ask the witness if she made a prior statement (don't ask about the substance of that prior statement, just about whether he made one – you will get to the substance in a minute).

b. Accredit the prior statement (e.g., ask about the importance of the prior statement, the witness's duty in making it, the opportunity to review/edit/sign it, the proximity in time between the events and prior statement, etc.).

3. **Confront the witness with the prior statement**

a. Mark the prior statement for identification (don't try to introduce it into evidence yet).

b. Confront the witness with the substance of the prior statement and ask the witness if he made that statement. You should read the statement aloud to the witness, rather than have the witness read the statement, to maintain control over the volume, emphasis, inflection, etc. of the statement.

i. If the witness admits making the prior statement, stop there. You have established the inconsistency and do not need to do anything else. (Under North Carolina law, you also may be able to offer the statement itself into evidence if it bears on a material fact in the case, but you are not required to do so.)

ii. If the witness denies making the prior statement, move to have the statement admitted into evidence as a prior inconsistent statement. Under North Carolina law, you are not bound by the witness's denial and may introduce extrinsic evidence of the statement (e.g., the statement itself or testimony by another witness about the statement) if the statement bears on a material fact in the case or goes to bias. You may need to call another witness to authenticate a written statement that is not self-authenticating—for example, a letter or other written statement by the witness may require additional testimony to authenticate it.

c. *Do NOT give the witness a chance to explain the inconsistency.* That's up to the prosecutor on redirect.

EXAMPLE: At a preliminary hearing, the witness testified that the light was green. At trial, he testified on direct examination that the light was red. Here's how to impeach.

NOTE: Which is better for your theory of defense, a green light or a red light? If a red light is better, DON'T IMPEACH. If, on the other hand, a green light is better, use the preliminary hearing transcript to impeach the witness.

1. **Recommit**

Q: You testified on direct examination that the light was red?

A: Yes.

2. **Validate**

Q: Do you remember testifying at a preliminary hearing on March 15th of this year?

A: Yes.

Q: Before testifying, you were asked to take an oath to tell the truth at the preliminary hearing?

A: Yes.

Q: You took that oath?

A: Yes

3. **Confront**

Defense counsel then marks the relevant lines of the preliminary hearing for identification and shows the exhibit to the prosecutor if the prosecutor has not already seen it.

Q: At that preliminary hearing, you were asked the following question and gave the following answer? "Question: 'What color was the light?' Answer: 'Green'"

A: Yes

Stop Here. The Witness Has Acknowledged the Inconsistency and Is Impeached

OR

A: No.

Now Offer the Relevant Lines of the Preliminary Hearing Transcript Into Evidence (the transcript is self-authenticating as an official record and no other witness is required to authenticate it)

NOTE: Do not offer the entire transcript into evidence: Everything except the inconsistent statement is both irrelevant and hearsay. And, it probably contains a lot of other stuff that you don't want the jury seeing.

Final Argument

Tips for Writing a Final Argument

FIND AN OPENING HOOK

START WITH A SCENE

AVOID LEGAL LANGUAGE

DO NOT WRITE AS IF YOU ARE GIVING A LECTURE. YOU ARE WRITING PERSUASIVELY TO DECISION MAKERS

BLOCK YOUR ARGUMENTS OFF OF YOUR THEORY

ORGANIZE YOUR ARGUMENTS OFF OF YOUR THEORY AND DETERMINE THE ORDER OF THE ARGUMENTS

DECIDE WHAT TESTIMONY CAME UP AT TRIAL THAT YOU WANT TO HIGHLIGHT IN FINAL. DECIDE WHEN IN FINAL YOU WANT TO INSERT IT.

USE DEMONSTRATIVE EVIDENCE/VISUAL AIDS

WORK ON CRAFTING YOUR LANGUAGE

USE TRILOGIES

REPEAT YOUR THEME

TELL TWO STORIES.

-Not about the case but about what really is

-Relate facts of the case but in story fashion

HAVE A BETTER STORY

BE A BETTER STORY TELLER

FIND A CLOSING HOOK

Tips for Delivering a Final Argument

ACKNOWLEDGE YOUR CLIENT

DEFINITELY USE VISUAL AIDS—PowerPoint, diagrams, maps, something . . . .

REFER TO AND HANDLE ALL ADMITTED EXHIBITS—either they help you or discard them because they are of no relevance or miss the point or do not go to guilt

1. ASSERT YOUR CLIENT'S INNOCENCE

2. THEME—say it once early and once late

3. THEORY—say nothing that is inconsistent with your THEORY

4. GENRE—one and only

5. WHAT IS NOT AT ISSUE?

6. WHAT IS AT ISSUE?

7. HUMANIZE YOUR CLIENT

8. HUMANIZE YOURSELF. BE CREDIBLE WITH THE JURY

9. CONSIDER TELLING TWO STORIES

    -A story with a moral
    -The story of innocence in this case

10. DECIDE WHAT FACTS YOU MUST MENTION

11. CONSIDER REFERENCE TO THE INSTRUCTIONS

12. POSE A QUESTION FOR THE PROSECUTOR THAT HE/SHE CANNOT POSSIBLY ANSWER

13. REMIND THE JURY THAT YOU GET ONE FINAL ARGUMENT AND THE GOVERNMENT GETS TWO IF YOU ARE IN A STATE WHERE THE GOVERNMENT GOES TWICE

14. BE TOTALLY HONEST

15. BE SINCERE

16. ARGUE WITH PASSION

17. LET EXPERIENCES IN EVERY PHASE OF YOUR LIFE ENRICH AND IMPROVE YOUR ARGUMENTS