

Washington State Office of Public Defense

Trial Advocacy Training Manual 2019

Acknowledgments

For many years, Ira Mickenburg has taught lawyers how to be effective advocates. If any of the material in this manual appears familiar, it is because just about everything successful trial lawyers have done for indigent clients relies on his fundamental principles of advocacy. These materials rely heavily on his teachings.

TABLE OF CONTENTS

TABLE OF CONTENTS	iii
INTRODUCTION.....	1
A. Trial advocacy is client-focused	1
B. Client-centered advocacy is a creative process.....	1
BRAINSTORMING	2
A. What is brainstorming?.....	2
B. How to brainstorm.....	3
C. The brainstorming session.....	4
DEVELOPING A TRIAL THEORY	5
A. What is a theory?.....	6
B. How to draft a theory.....	9
STORYTELLING	11
A. Crafting a story.....	11
B. Tell your story persuasively.....	13
DISCOVERY AND INVESTIGATION	15
A. Investigation tools.....	15
B. What to Investigate.....	16
VOIR DIRE.....	21
A. Voir dire is about deselection.....	21
B. The deselection method.....	23
OPENING STATEMENTS	30
A. Preparing an opening statement.....	30
B. Delivering your opening statement.....	32
CROSS EXAMINATION	33
A. Structuring your cross-examination.....	33

B. Leading questions.....	34
C. Maintaining control.....	35
D. Discrediting a witness.....	36
DIRECT EXAMINATION.....	38
A. Purpose of Direct Examination.....	38
B. Guidelines for effective direct examination.	38
CLOSING ARGUMENT	40
A. Jury Instructions.....	40
B. Effective Communication.....	40
C. Strategic Considerations.....	41
D. Organizing Your Closing Argument.....	42
OBJECTIONS	44

INTRODUCTION

Juries and judges acquit when they believe it is the right thing to do. To win a trial, you must develop an emotionally compelling story your fact finder believes. To do this, you need a theory that helps the factfinder identify the injustice in finding your client guilty.

Good advocacy requires preparation. With every case you try, you must develop a theory that can result in your client's acquittal. This requires investigation, effective pre-trial motion practice, and good client communication.

Ultimately, every case is decided on how the fact-finder perceives the evidence. Your job is to help your factfinder see the evidence in a way that is favorable to your client. By doing this, you give your client the best chance that your client will have in being found not guilty.

A. Trial advocacy is client-focused

Our greatest asset is our client. Our clients drive the goals of our advocacy and are an enormous resource. Include your client in your trial preparation and engage in participatory defense.

There are times when you will raise issues because they are important to your client. Many times, you can prevail on these issues. Even when you cannot, arguing the issues that matter to your client achieves the purpose of client-centered representation and will leave a client who did not prevail at trial satisfied with their process.

B. Client-centered advocacy is a creative process.

Start with the facts and work towards the law. Identify what bothers you about the case. Think about what you feel is wrong more than what is illegal. Once you have identified what you want changed, find the legal or factual support for your argument.

If you do not like a rule, argue against it. The only way we make change is by challenging the status quo. While a trial judge may feel bound by the law, the only way to change a law is to challenge it in the trial court. When you make arguments based on what you think the law should be, you create the opportunity for change.

BRAINSTORMING

One of the greatest obstacles to winning a case is the tendency to accept the prosecution's version of the facts. This is a bad place to start. To win your case, you must develop a different factual narrative from the one the prosecutor used to charge your client. You must change the narrative if you hope to change the results for your client.

Developing a better factual narrative is only possible when you have first explored and analyzed your facts in depth. This allows you to develop your theory of appeal on the facts of your case and to find compelling reasons for why you should win.

Change the narrative

A. What is brainstorming?

Brainstorming is a formal process for developing and analyzing the facts and for gaining new, creative perspectives on your case. It is fact-based and intended to avoid conclusions. It is a way to make decisions on what will work in your case and the first step to developing a successful theory.

Brainstorming is about developing a different way of looking at the facts that those that have been presented to you by the prosecution. It is a way of stripping the conclusions the prosecution adopted from the facts and allows you to examine them in a non-judgmental way.

It is also a way to be realistic about what kind of a case that you have. The process requires you to look at all of the facts in the case, and not just those that you want to look at and that might support your theory. It allows you to not only develop a good theory but one that is consistent with all of the facts.

When you brainstorm, you should try to do it with others. It is not important that you do this solely with other attorneys, but rather with a group of people who are going to be interested in preparing your case. Include your assistants, investigators, attorneys from outside your office and anyone else who might be interested in participating. You may find

that some of the best sessions that you have do not include any lawyers and the best advice that you get are from people with little experience in the law.

It is not impossible to brainstorm by yourself when no one else is available. You should try to follow much of the same procedure as you would when working with a group.

B. How to brainstorm.

Brainstorming is a formal process where you meet with your colleagues to develop and analyze the facts of your case. Start by identifying what bothers you about the case and be prepared to share it with your brainstorming group.

Remember that brainstorming is fact-based. Focus on what you think happened in your case that was wrong and worry about the legal support for it after you have brainstormed your issues.

1. Be inclusive with your facts.

As you start your brainstorming process, you want to include as many facts as possible. As you process your case, you will decide which facts matter and which do not. When sharing your case during a brainstorm session, tell the participants as much as possible.

2. Do not be judgmental.

As you brainstorm your case, do not divide your facts between those you consider “good” or “bad” facts. The purpose of brainstorming is to determine which facts are helpful to your theory of appeal. Often, our initial judgment about which facts are important turns out to be wrong.

3. Be associative.

Once you begin the process of brainstorming, you begin to associate the facts generated with ideas to include in your brief. This formulates better arguments. You may also discard arguments you believed were very strong in favor of better ones. You will certainly be able to better frame the arguments you are making.

C. The brainstorming session.

Brainstorming works best as a formalized process intentionally planned. Create a group to brainstorm with and include non-lawyers if they are available. Set aside enough time for a complete discussion. Provide everyone with essential documents and then tell the story of your case. While it is fine to define issues, do not close off discussion of issues you have not considered. Allow time for questions and let your group think through your case. Try to stand back during this period so that your group has the space to develop stronger ways to argue issues you identified and to construct arguments you had not considered.

Create your brainstorming group

- Try to include three people to facilitate a real exchange of ideas
- Include non-lawyers to provide real perspective

Set aside enough time for a full discussion

Provide everyone with essential documents

Start with a short summary of your case

- It is ok to define your problem
- Do not restrict the conversation about other issues

Allow time for questions from the group

Allow the group to brainstorm

- Try to stay quiet
- Do not defend your issues

Write down everything people said

DEVELOPING A TRIAL THEORY

Once you have effectively brainstormed your case, you are in a position to produce an effective theory, which is the next step in the process.

Ask what is unfair?

A strong theory summarizes the factual, emotional, and legal reasons why the judge or jury should return a favorable verdict in your case. It tells your client's story of innocence, reduced culpability or unfairness, provides a roadmap for you for all phases of the trial, and resolves problems or questions the judge or jury may have about returning the verdict that you want.

A trial theory:

- Is short and simple.
- Satisfies the legal requirements for acquittal.
- Is consistent with the facts.
- Is emotionally appealing.
- Explains motive.
- Tells a story.
- Uses impact words and phrases.
- Is generally only one issue.
- It is something you believe.

Developing a theory requires careful consideration of your facts and a determination of the genre that your facts fit into. Once you have a theory, your next step is to develop your theory into a clear statement that explains your case and can help guide your preparation for trial. This will

allow you to draw out your themes, develop your characters, and ultimately lead to your trial success.

When thinking about this, realize we are talking about developing a theory of the case and not a theory of defense. A theory of defense says to the fact finder that we understand there are two sides to a story and the defense is obligated to present one of them. A theory of the case is a positive and affirmative statement of what really happened. It provides direction for the fact finder to understand why they need to acquit.

A. What is a theory?

There are six general theories of a case. The following chart shows them in their order of effectiveness. Your case will usually fall into one of these general genres.

Theories of a case (genres)

- The burden of proof was not met: “I didn’t do it”.
- The client was misidentified as the perpetrator: “A crime occurred, but I didn’t do it”.
- The acts don’t constitute a crime: “It happened, I did it, but it wasn’t a crime”.
- The acts don’t constitute the crime charged: “It happened, I did it, but it wasn’t the crime charged”.
- The acts were justified: “A crime happened, I did it, but I’m not responsible”.
- Nullification: “A crime happened, I did it, I’m responsible, but you should feel sorry for me”.

Follow these steps to determine which genre your case falls into and to develop an effective theory.

1. Base your theory on the facts.

We win our cases on the facts. A good theory takes in all of the facts of the case and deals with them in a way that moves your defense forward. Your theory must deal with both good and bad facts.

A theory of the case is not the legal basis for acquittal. Terms such as “proof beyond a reasonable doubt” and “self-defense” are not theories. A

theory is the factual reason why your client should be acquitted and not the legal basis behind the theory.

2. Make it emotional.

A theory must have an emotional basis because fact finders want to do the right thing, regardless of what the law says. You need to make the fact-finder decide they are doing the right thing by acquitting your client. Try to find a theory that makes your jurors feel that finding your client not guilty leads to a just and fair resolution of the case.

3. Be consistent with the law.

A theory of the case must be consistent with the law. If you put forward a theory that does not give the fact finder a legal basis for acquittal, it is unlikely to result in a not guilty verdict.

4. Tell a story.

Effective persuasion requires you to tell a story that is compelling to the listener. A good story keeps the fact-finder engaged and on your side. Telling an effective story guides the facts and the evidence that you need to put together your defense.

To develop your story, ask:

- What is my general theory?
- Who are the characters in my story?
- Where does the most important part of my story take place?
- What is the sequence of events that I want to tell my story in?
- From whose perspective do I tell the story?

The characters in your story are your witnesses or the other people who may have been involved in the incident.

The place where the incident occurred or where your client was arrested may not be the most important place in your story. Instead, look to the story you are telling to decide what is important and where to place your story. Do not rely on the prosecution's version of events.

Likewise, you do not need to make the events of your story sequential or match up somehow with the prosecution's version of events. To be effective, place the events in your story in a sequence that develops your theory.

Determining the best storyteller to develop your theory is also important. Changing the storyteller can have a dramatic effect on how the story is perceived and ultimately, may help your client be acquitted.

5. Resolve difficulties the fact finder may have

An effective theory includes all the facts in your case. You cannot ignore facts when developing a theory and hope the fact finder will be persuaded only by the facts you focus on. You can be sure the prosecutor will notice those facts. When they do, the fact finder will wonder why you did not address them.

Instead, accept all of the facts you expect to come out and figure out a way to deal with them. In developing a theory, there are no "bad" facts. Figure out a way to deal with all of them and incorporate them into your theory. You may find that if you work to accept all of the facts, those you originally assumed were bad are actually facts that support your theory.

6. Write it down

Your theory will shape the way you develop your case. It is important to be able to articulate your theory. Oftentimes, the best way to do this is to write a short paragraph that captures the ideas you have developed. Writing your theory down will also force you to think about what your theory really is.

This statement is for your purposes only. It will not become part of a legal document or briefing to the court. It should be kept in your file as a guide to how you prepare your case.

7. Make it dynamic

Having a theory helps you shape the way you prepare your case. The theory you adopt when you start a case does not have to remain your

theory at trial. As you investigate, you may find your theory changes. Expect that as you work your case, your theory will become more refined and may even change markedly. Do not worry when your theory changes.

B. How to draft a theory.

1. *Brainstorm your case.*

Brainstorming is the process of examining all of the facts and questions in your case in a non-judgmental manner so you can develop your theory. You should do this, whenever possible, with a group of persons.

2. *Determine your genre.*

Most criminal matters fall into six genres. The strongest is where you are able to deny the facts that make your client guilty. The least powerful is where you are asking the fact finder to nullify. You should fit your case into the strongest genre the facts allow.

3. *Come up with a theme.*

You want to be able to describe your case in simple terms to the fact finder. The theme allows you to explain your case and gives the fact finder the hook they need to acquit your client.

There are several methods to develop the theme of your case.

Some people use the *headline method*, which is to attempt to write the theory in a headline. The headline grabs the attention of the fact finder and makes them interested in the case.

Another way to develop a theme is to use the *bar stool method*. When using this method, you want to be able to explain the theory of your case to a friend or someone that you meet at a party. It is a more casual way of telling the story, but one that keeps the listener involved.

You should not be using legal conclusions for either of these methods. Instead, you want to write a fact-based theme, incorporating all of the facts of your case.

4. *Draw your theory out.*

After you have a theory, write the paragraph that describes your case. This paragraph should address all of the important facts in your case. The reader of this paragraph should be convinced your theory is correct.

5. Develop your story.

The theory you developed allows you to create the story of your client's innocence or reduced culpability. It addresses all of the facts in your case and deals with ones that do not necessarily support your theory. It places all of the characters in your case into the story and sets the times that are critical to important events.

Settling on a theory and theme allows you to pursue the evidence you need to support your theory. It helps you determine the right motions to make. It structures your argument and what you will say at trial. Ultimately, it shapes the way you prepare your case and hopefully leads to better trial results.

STORYTELLING

Let the facts move us

To be an effective trial lawyer, you must learn to be a storyteller. A trial is essentially a story presented to the fact finders to get them to act on a particular belief. Fact finders are influenced by the scope and content of the story and how the storyteller delivers it. The trial story is how you convince your fact finder to agree with your theory.

A good trial story must be a shared experience between you and your listener. You must tell in a way that involves your fact finder and keeps them audience interested.

Gripping trial stories are about facts and inferences, but they are also about matters close to the heart. You will not win your case solely on the law but on the facts that capture the fact-finders emotions and make them want to believe in your story and your client.

1. Organize.

The first step towards becoming a good storyteller is to become a proficient story organizer. You must learn to bundle the facts in a way that is consistent with your theory while remembering the prosecutor will be spending the trial doing the opposite.

2. Understand storytelling.

Every story has a plot, place, and characters. There should be conflict between a protagonist (hero) and an antagonist (villain), a victim, interesting characters, obstacles, goals, mood, and a proposed final resolution. Tell your story in a way that moves your fact finders and makes them want to acquit.

A. Crafting a story.

The first step in telling your story is to decide what it is going to be about. While the crime must be a part of your story, it does not have to be the

main focus. You should not tell your story the same way the prosecutor tells theirs. Instead, refocus the facts to support your theory.

Your story needs to be compelling. Approach it the same way you would if you were writing a book or screenplay. Make a conscious effort to make the story as persuasive as possible.

An effective story will have all these elements:

- Characters
 - Who are they and what role do they play in your story?
- Scene
 - Where do the most important parts of your story take place?
- Sequence
 - What order should your story be told to make it effective?
- Emotion
 - Why should the fact finders want to believe your story?

The story you tell should not be the same story the prosecution tells. The story the prosecution wants to tell is the one that will result in your client being found guilty.

In order to change this outcome, you need to tell the story of your client's innocence or reduced culpability. While your story is based on the same set of facts as the prosecutions, your decision to emphasize and explain particular facts will make the difference in how the story is told.

B. Tell your story persuasively.

Persuasive stories focus on:

- Your client's innocence or reduced culpability
- The injustice of your client's arrest and prosecution

1. *Everything matters.*

Your trial preparation begins the day you get your case. When you speak to the court and prosecutors in pre-trial hearings or informally, you should be persuading them your theory is more credible than the prosecution's theory. The same is true for how you treat your client and how you behave in front of anyone related to the case. Remember that everyone watches your relationships with the various parties to a case. Effective storytelling incorporates all of your actions and should control the way you behave whenever you are handling a particular case.

2. *Language.*

The impact of word choice cannot be overstated and the battle you have with the prosecution over the use of terminology will go a long way in determining how your case resolves.

When you concede word choice to the prosecution, you have lost the battle of persuasion. When your fact finder begins to think of your client as "the defendant" and the prosecution's witness as "the victim", they will have an easy time finding your client guilty. When they think of your client as a person wrongfully arrested for a crime they did not commit and the prosecution's witness as just a witness, the fact-finders will be open to finding your client not guilty.

Avoid using legalese and "cop talk." Jurors do not speak in those terms and are generally put off by lawyers who do. Again, choosing to use the police and the prosecution's words must be a calculated decision that fits with your theory. Remember that the other people in the courtroom are

trying to put your client in jail. You should not adopt their words just because they have.

Instead, your language should be natural to you and respectful of your client's place in the courtroom. Speak as you would to your friends and family. Choose language that is colorful and graphic and that presents an image. Generally, use shorter words and sentences, as this works better in keeping the fact finder's attention.

3. Multimedia.

It is accepted theory that different types of people learn in different ways and limiting yourself to one way of telling your story limits its effectiveness.

To reach everyone, prepare charts, maps, and other graphic evidence that jurors can focus on while you tell your client's story. Presenting this story in a different way is more effective and reaches more people.

It may also be effective to use PowerPoint or some other slide program. This format has limitations and you should not wed yourself to it. PowerPoint may diminish your ability to tell a story effectively. If you find you are just reading slides, rather than using it to enhance your presentation, stop using PowerPoint. Consider other very effective tools instead, like charts, flip boards, or simple drawings. These can be even more effective when you become comfortable with them.

4. Practice

As you develop your story, think about whether it is still effective. Tell your story to others and listen to their feedback. A theory that began as very strong may look less effective after you have worked on your case and considered other factors. Be prepared to adjust your story accordingly.

Your story will also become stronger as you tell it. Work out details and determine which facts and characters are the strongest. Ultimately, a well-rehearsed and thought out story will continue to become more effective as it continues to be developed.

DISCOVERY AND INVESTIGATION

Effective advocacy requires thorough investigation

A. Investigation tools.

1. *The client interview.*

Effective advocacy requires a good client-attorney relationship. This requires listening to your client and your client's wishes about how they want their case handled. It also requires being able to give good advice on their legal situation. Thorough

Your client is the most important source of information you have. Your client can help you determine the strengths of their case. Ultimately, your clients decide how their cases will go forward. Your sound advice and counsel will help your client reach the right decisions in their case.

The first steps you must take when you get a new case is to meet with your client. Use this time to develop your theory. Your client can assist you in deciding what is worth investigating and where you should look for relevant evidence. Most importantly, involving your client in their case helps them understand the difficulties going forward and makes them a partner in their trial. This always makes your case stronger.

2. *Discovery.*

Washington's discovery rules favor open discovery. The rule obligates the prosecution to provide "any written or recorded statements and the substance of any oral statements" of any person that the prosecution intends to call. CrR 4.7. The prosecution is also obligated to provide "any reports or statements of experts made in connection with the particular case." CrR 4.7. Together with the obligation to provide any evidence that may lead to exculpatory evidence, this means that you should have a clear indication of all the evidence the prosecution may possess.

Nevertheless, diligent practice requires you to make sure you have received all discoverable evidence. Frequently, the reports reference

photographs and videos that you have not been provided with. You can get these from the prosecution by written request.

There may be other information the prosecution has in their possession to which you are entitled. In all cases, diligent discovery requests will make it more likely the court will order the prosecution to provide you with the information that you have requested.

Also, watch out for what you believe may be *Brady* material. The prosecution has an obligation to provide you with anything that may exculpate your client. This duty is more far reaching than the obligations under discovery. When you believe the prosecution may be withholding or delaying the production of *Brady* evidence, request it from the court.

3. Investigation.

Once you have sufficient information to look independently at the facts in your case, you should start your investigation. As your investigation is likely to be focused by the information you have, in most cases you should have reviewed your discovery and talked with your client before beginning your investigation.

The purpose of the investigation is to determine the strength of your case. When investigating a case, try to remain objective. Be skeptical of any information provided, no matter the source. This objectivity will help you to better evaluate the evidence and determine its worth.

Every case is worth investigating. It is the rare case where an investigation will make the case worse than it was before you began your investigation. Especially where credibility or opportunity to observe is at issue, an investigation may turn what appeared to be a bad case into one with issues that make your case litigable.

B. What to Investigate.

1. The prosecution's chief witnesses.

There is almost no case where finding out as much information as you can about the prosecution's chief witnesses will not be helpful. With time and work, you may be able to discover basic personal facts about the complainant, including sex, race, age, marital status, personal appearance, education, socioeconomic level, residence, vehicle, and prior criminal record. You may also be able to develop a reasonably accurate

profile of a complainant's childhood history, lifestyle, intelligence, and personality.

2. Social media.

One of the most effective investigation tools is social media, including Facebook, Instagram, and Twitter. Most of this information is public and does not require anything other than a search for the witnesses name. Do not discount the effectiveness of searching these sites and others like them for information about the complainant and your case. The amount of information that people make available on the internet is remarkable and may sway the outcome of your case.

When conducting a social media search, however, do not engage in deception by creating a false profile to view restricted material. This may be unethical. It is also a bad trial strategy, as you will either have to admit to the deception or allow the prosecutor to ask questions about it when the rehabilitate the witness.

3. 911 Calls, video recordings, and body cameras

Video and other live feeds recorded during an incident or when your client was arrested have changed the way cases are tried. In preparing for trial, you must review these to see whether your client's arrest was lawful and how the police treated your client. This interaction may become the central theme of your trial theory.

Know how long the agencies in your jurisdiction keep recorded information. If your case involves a 911 call that may be helpful to your case, make sure it is preserved. Many agencies will destroy recordings quickly after the incident. You may need to subpoena the agency to ensure the recordings are preserved.

During your investigation, make sure you have contacted all of the companies that may have video records. This will include department stores, banks, bars, and other places that record their premises. It is very likely these types of recordings will be destroyed shortly after their creation.

You must act quickly in order to guarantee recordings are preserved. Send a letter to the business asking them to preserve the recordings, along with a notice to the government. If you are worried the recordings are going to

be destroyed anyway, the most effective way to do ensure preservation is to subpoena the recordings to court.

4. Witnesses

You are a more effective advocate when you know as much as you can about your case. In Washington, where we have the right to interview witnesses, there is no reason why you should not interview all of the prosecution's witnesses before trial.

Before interviewing a witness, you should have a theory for your case. This helps you decide what questions you should ask the witness and what you expect the tone of the interview to be like. Since this witness is also likely to testify at trial, it is important to determine what kind of relationship you want to establish with that witness prior to the investigation.

If you are going to have an investigator conduct the interview, discuss thoroughly with the investigator what you want to get out of the interview and what questions you need to ask. Where you conduct the interview yourself, make sure that you bring along someone so the witness you examine can be impeached at trial.

You must prepare for your interview. You should conduct as much of the investigation as possible before you conduct witness interviews. You may want to visit the scene, complete your online research, and conduct background checks before the interview. This is especially important where you know you will only have one opportunity to interview the witness.

5. Experts

Experts can be extremely effective in explaining the theory of your case to the fact finder. An expert can explain the proper procedures that were not followed in your particular case or why evidence that would otherwise seem persuasive is not proof of your client's culpability.

Experts testimony is used to

- Explain scientific principles,
- Question the reliability of the prosecution's scientific evidence,
- Furnish the fact finder with facts and data underlying expert opinion;
- Provide expert opinion testimony based on underlying facts and data;
- Explain scientific principles;
- Testify about test procedures and results;
- Clarify the meaning of real evidence;
- Impeach the other sides's experts with contrary testimony;and
- Establish the predicate for the introduction of probative and impeachment evidence from learned treatises

You expert can also help you prepare for trial, even if they do not testify. Frequently, an expert can help you prepare an argument and cross-examination, even where they do not testify.

Do not make the mistake of hiring an expert who you factfinder will dislike or who is not qualified. Make sure the expert testimony is consistent with your theory and is not just participating in your case to advance their own agenda.

6. Scene Visit

Preparing a case for trial requires you to visit the places where important events in your case happened. This may include the scene of the crime and where the police arrested your client. Before going to the scene, make a map or diagram to writ on while you are there. Use a camera or your phone to take photos of everything and note the location of as much as you can. As you reflect on your case, something may become important you did not initially consider, so it is important to have everything memorialized.

7. The Internet

The internet changed the way we conduct investigations. Not only can you find information about the witnesses in your case, but you can also discover protocols and other information that relates to how your investigation should proceed. Most state and federal agencies publish information relating to their work and many law enforcement agencies post their protocols.

The internet can make your cases rich and alive. You can find information relating to the weather on the day of your incident, maps and directions to various scenes, aerial photos, geography, counties, measurements, conversions, new footage, translators, public records, sex offender registries, people, neighborhood demographics, reverse phone number lookup, addresses and zip codes, medical information, expert witnesses, census information, licensed occupations, world facts, and encyclopedias. Take advantage of all these resources.

8. Public Records Act

RCW 42.56 provides that all records maintained by state and local agencies shall be available for public inspection unless the law specifically exempts them. A public record is any state or local record relating to the conduct of government; or the performance of a governmental function and which is prepared, used, or retained by any state or local agency. The record may be in a variety of forms such as writing, a recording, a picture, an electronic disk, a magnetic tape, or an e-mail. The act favors disclosure, so unless there is a specific limitation against the information you are seeking, the prosecution is obligated to provide it to you.

Some records may be exempt, including personal information, investigations, employment and licensing, real estate appraisals, and research data. Other statutes, including the Criminal Records Privacy Act, limit the information you can get through a request.

To make a request, contact the agency you believe has the records you are seeking. Make your request as specific as possible. The agency holding the records must respond to you within five business days with the records or an explanation about why they will not turn them over. A denial to view records or a delay in making them available can be reviewed in the superior court.

9. The News

Anytime you handle a sensational case, be sure to check the news. You may find your case is reported outside your local area, so look on the internet for news as well. The editorial pages and comment sections of the papers are a trove of information so you can gauge how the community feels about your case. Witnesses may also comment on cases they are involved in. These comments can be invaluable to your case preparation

VOIR DIRE

Select jurors based on the theory of your case

A. Voir dire is about deselection.

One of the most dramatic changes in trying cases has occurred with the way in which jurors are selected. Traditional jury selection was based on the theory that an effective advocate could educate jurors about their theory and the basic principles of law. Through this education method, an effective advocate could select a jury that would be fair to the defense case.

Colorado defense attorneys created a method of “deselection” based on the principle that people come into the criminal justice system with values and core beliefs. These values are never going to change. The defense attorney must discover those biases and then remove the jurors who are unable to see past them. This method has resulted in enormous success for attorneys who have integrated deselection into their practice and is a method that should be integrated into your practice. Keep in mind that while many of the principles of jury selection are similar to the traditional method of selection, deselection is a fundamental change in the way jurors are selected because it rejects the notion that you are going to change someone’s mind about an issue that is part of their core beliefs.

The core principle of deselection is that you create a jury based only on the theory of your case. Reject the idea you can get jurors to like you or that you shouldn’t place jurors on your panel who don’t like you.

Likewise, this method is not based on demographics. You should not select a jury based on race, sex, religion, education or occupation. You also must presume impairment and expect that qualified jurors will demonstrate they do not have an impairment that disqualifies them for your case.

When selecting a jury based on deselection principles, you must recognize that you are not trying to educate the jury. Likewise, you are not there to be entertaining, charming or impressive. While this may make you feel

good and connecting with the jury is important, this method of selection is based on the principle that people have core values and beliefs that are never going to change, no matter how good you are at presenting your argument.

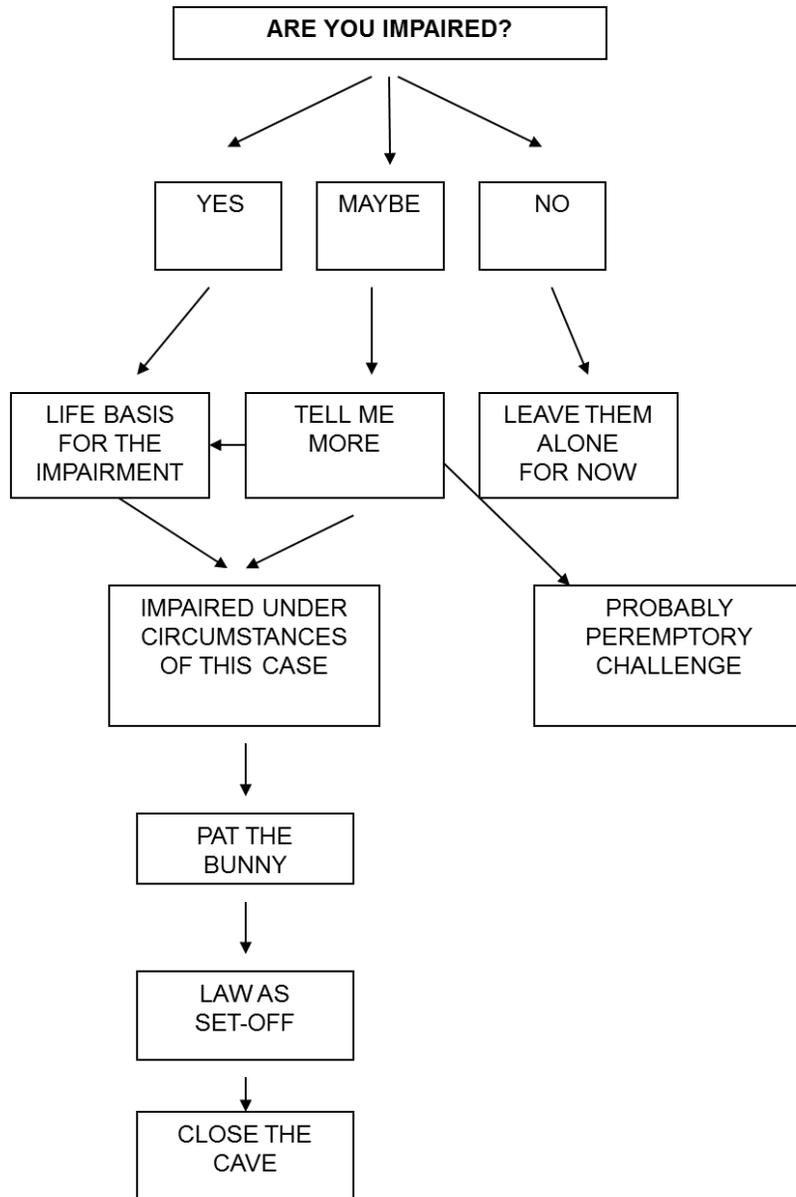
It is also important not to trick the jury. Part of this method is to identify your core issues and have a discussion about whether they create a disqualifying impairment for your jurors. As such, it is important to treat each juror with respect and not demean their values. By respecting their values, you enable them and others to identify their impairments.

As with every other critical part of a trial, the most important part of selecting a jury is to be prepared. Deselection requires you to prepare questions in advance based on your theory. You should put the same effort into creating jury questions as you do into your cross-examination, understanding that carefully crafting your questions will provide you with better answers from jurors, that better identify their impairments.

In preparing for voir dire, it is also important for you to decide that you will not accept equivocating jurors. This method is based on the principle that jurors are going to tell you the truth and that you are not expected to divine what they are really saying. You must reject your own attempts to intuit what a juror might think in the jury room, but you must also expect each juror to answer you both honestly and completely. Jurors who cannot answer your questions completely identify an impairment and should be removed from the panel.

B. The deselection method.

When you begin your voir dire, you will have identified the issues that matter in your case. You must know what the impairment is that will prevent the jury from voting to acquit. This is where you will spend your time in voir dire. The graph below is an illustration of how you should approach each juror using this method.



1. *Create the Can-Opener*

The first step in jury selection is to create the question that you will ask the jury that is critical to your case. This is the question you think the jury is going to wrestle with during their deliberations and what the jurors will have to accept in order to find your client not guilty.

This method requires you to think carefully about what this question will be and to prepare for it in advance. It requires you to be honest about the weakness of your case and to determine what the worst facts in your case are. In creating the potential can-openers in your case, prioritize the questions you will ask the jury. You may have more than one can-opener, in which case you should put the non-negotiable questions first and then have your others in descending order of relevance.

Common can openers can focus on the presumption of innocence, the burden of proof or the right to remain silent.

Examples of can opener questions include:

- “A person who was really innocent would choose to remain silent about these allegations”
- “I don’t think police could lie about something like that”
- “A child would never come to court and testify about something like that without it being true”

The can opener is a natural way to make challenges for cause. In creating your can-opener, you identify constitutional impairments you can move the jurors to. This will allow you to identify the reason why a juror should be stricken and allow you to remove them for cause.

- Set the tone

One of the critical moments in jury selection is in how you set the stage for your voir dire. In your brief introduction, you must create a safe place where you let jurors know you expect them to answer your questions truthfully. It is important to emphasize there is no such thing as a bad answer. You want jurors to answer you honestly. Let them know you will be asking specific questions to specific people and the only thing you want from them is their honest answers.

In fact, there is no such thing as a bad answer. The life experiences of the venire are an effective means to identify impairments and strike jurors for cause. Let them know you value their opinions because these are part of their core personality. Letting them know disqualification does not mean they are bad people and that you and the court value their honesty help you create your credibility and get better answers.

- Fishing

Once you have introduced your method of selection, you should employ your can-opener. You should ask this question of the panel and then look for responses.

There are three ways the jurors will respond to you can-opener. Leave those who agree with your theory alone and help the rest identify their constitutional impairment to remaining on the jury.

The Good

- Jurors who agree with your theory.
- Ignore these jurors in selection and hope they remain on your panel.

The Bad

- Jurors who identify an impairment.
- Get these jurors to agree their impairment is constitutional
- Remove them from the panel for cause

The Ugly

- Jurors who are not honest about their impairment.
- Try to get them to agree that their impairment is constitutional.
- If you are unable to do this, you may need to exercise a preemptory challenge.
- They should not remain on the panel.

After you have asked your can-opener, follow up with those jurors who have identified the impairment. At this point, **ask open-ended questions** that allow them to explain why they feel the way they do. Examples of how to ask this type of question, include “tell me more about that...” or “help me to understand why you feel that way...”

As you are asking these questions, listen carefully and watch how the rest of the panel reacts. If you see jurors who agree with the identified impairment by nodding their head or otherwise affirming what was said, it is important to follow up with them as well.

- Mirror what the juror said.

As you get responses to the can opener, mirror your questions with what the potential juror says. This is critically important because you want the juror to adopt the language of impairment. It is equally important to avoid paraphrasing. You don’t want to open the door to rehabilitation by mischaracterizing what a juror said. Instead, you want to use their exact words in identifying the impairment.

- Believe what the jurors tell you.

Believe what jurors say. This can be difficult because we are trained to be critical and to question whether someone is really telling the truth. Remember that you are not selecting jurors based on what you think they might do, but what it is they identify is possible for them to do. If a juror says they cannot be fair, you should strike them from the jury.

- Don’t be tricky.

It is equally important for you to avoid tricking jurors. You should identify from the beginning what your role is in the selection and why you are asking your questions. Once a juror feels you have tricked them, they will not respond honestly. Worse, you will have created a panel that does not trust you and who will not be honest with you about their impairments.

2. Tie the Impairment to the case

Once jurors to identify their impairment, you need them to tie their impairment to this case. This is a one sentence statement you ask them to affirm that identifies the impairment based on the can open and relates it to the jurors stated bias.

3. Pat the Bunny

The next step in deselection is to affirm the impairment identified by the potential juror. This is done to avoid rehabilitation by the prosecution and the court and to empower other jurors to be truthful with you. Primarily it is done so the juror will hold true to their core values and beliefs.

Empower the juror's impairment by stating:

- "What you are doing is what this system about: telling us what you really feel instead of what you think we want to hear."
- "We understand that talking about these subjects in a room full of strangers can be uncomfortable. But in here, everyone's views are respected and no one will try to get you to change your mind about your fundamental beliefs."
- "I think a lot of people share your feelings."

Avoid language that makes them feel like their honesty isn't appreciated, including phrases like, "thank you for your honesty" which sends the message that this potential juror wasn't a very good liar or disclosed too much.

As you are complete this process, remember that it is a good time to ask you can-opener again to find out if anyone agrees with the statements made by the potential juror.

4. Closing the Cave

Once you have affirmed the impairment identified by the juror, your next step is to lock them into their impairment.

Unlike earlier, you should now ask **direct questions** and develop a standard progression where the juror agrees they will remain true to their core beliefs and values, no matter what they here.

Question to ask to close the case

- “Imagine a conversation with a person who hold in the highest esteem...would you change your mind just because they told you to?”
- “Even if you could change your mind, it would be a process, it wouldn’t happen immediately.”
- “You don’t know me, the prosecutor or the judge, but you are not going to change your mind just because we tell you to.”
- “These are your personal beliefs, they are respected in this courtroom, and you are not going to change them just because someone tells you to.”

Once you have locked the juror into their core position and affirm that they will not change their opinions, move on to another juror who has identified an impairment.

5. Push Back Resistant Courts and Prosecutors

It is important to prepare for resistance to this method from the court. If a court attempts to restrict your use of deselection, present them with cases like *State v. Fire*, 100 Wn. App. 722 (2000) In *Fire*, the challenged juror stated: “I consider him a baby raper, and it should just be severely punished[,]” going on to say, “I’m very opinionated when it comes to this kind of crime.” The prosecutor attempted to rehabilitate the potential juror by asking him whether he would follow the court’s instructions despite his strong feelings, and the potential juror responded affirmatively in one-word responses. *Id.* At 728. The trial court refused to excuse the challenged juror for cause, focusing on these affirmative responses without recognizing that the potential juror’s initial responses demonstrated actual bias. *Id.* The appellate court held “We find nothing in the potential juror’s one-word affirmative responses to the mantra of rehabilitative questions that indicates he had come to understand that he must lay his preconceived notions aside, in order to serve as a fair and impartial juror.” *Id.* at 729.

If you are restricted, make sure you preserve the issue for appeal. Challenge the juror for cause and then exhaust your peremptory

challenges. Further, the challenged juror must be on your jury. Remember that denials are reviewed for manifest abuse of discretion and that the use of a peremptory challenge cures any error *State v. Rupe*, 108 Wn.2d 734, 743 P.2d 210 (1987).

6. Conclusions

Trying deselection for the first time can feel a little like jumping off a cliff. Remember that this is not a difficult method; just a different one. Once you begin using this method, you will find it is both more efficient and effective. It allows you to frontload your worst problems and to desensitize your potential jurors to the problems of the case. It allows you to exercise your challenges more intelligently and, even if you are unsuccessful in your challenges for cause, it allows you to create appellate issues.

OPENING STATEMENTS

Your first opportunity to tell your story

Other than voir dire, an opening statement is the first opportunity you have to tell the fact-finder your story. In your opening, you will introduce the jurors to the plot, the place and the characters in your case.

By the end of your opening, the jurors should understand the theory of your case and have an idea of what they need to pay attention to throughout the case.

A. Preparing an opening statement.

- *Always deliver an opening statement.*

Giving up an opportunity to speak to the jurors and explain your theory to them is a mistake. Jurors want guidance on what to do on the case. If you do not give it to them, they will seek it from the prosecution. Choosing to waive the opportunity to speak to them about your theory will not help your case. If you have developed a theory of your case and you are able to explain it, use this opportunity to do so. Not opening gives an advantage to the prosecution you may not be able to overcome.

- *Use your theory*

Most of what you say in your opening statement is the same as what you have been working on since you started to develop your case. Take the story you developed and translate it directly into your opening statement.

- *Tell your story*

You can captivate jurors with the story of your client's innocence. The opening is your chance to tell this story and to let them know what to look for. This is your chance to tell your story in an effective way that will have the jurors wanting to hear your ending.

- *Keep it short and direct*

Make your position clear from the start. Jurors should know what your position is within the first few sentences of your opening statement. Do

not waste the jurors time by thanking them for their service or by talking about the theories of proof beyond a reasonable doubt and the presumption of innocence. By the time you have finished your opening, the fact finder should know what you want them to do and why they should acquit your client.

- *Use prepared visuals*

We all learn in different ways. Using visual aids helps you to connect to the entire panel and people who learn visually to understand your case. When using a visual aid in the opening, be sure to get the court's approval beforehand, as you do not want to interrupt the flow of your story over a state's objection.

- *Organize your opening*

An effective opening begins with a statement of your case and a declaration of what you would like to see the jurors do. The method in which you do this will depend on how you tell your story. Whatever method you choose, make sure your opening is easy to follow and understandable.

- *Do not overstate your case*

Do not overstate your case or make promises you cannot deliver. Jurors will remember what you said would happen in your opening statement. When it does not, the jurors will hold it against your client in deliberations.

- *Confront harmful evidence directly*

Deal with problems in your case from the beginning. Jurors appreciate honesty and are more willing to accept your explanations on harmful evidence when you have spoken about them from the beginning.

Do not feel like you have to concede too much to the prosecution. Do not expect the evidence the prosecution is going to present to be exactly what you discovered during your investigation. Dealing with bad evidence does not mean you have to concede anything. Limit your concessions during openings and wait to see how the evidence develops.

B. Delivering your opening statement.

- *Keep it brief*

An opening statement should be brief.

A brief statement will keep the attention of the jurors and want them to hear more from you. They will appreciate the fact you did not waste their time.

Too much detail may lock you into facts that are never admitted into trial or promises you cannot keep. While it is important to tell your story, do it in a way that does not tie you to facts that you cannot deliver on.

Brevity will also help the jurors to focus. Understanding you intend to focus your case on particular issues will let the jurors understand they should do the same thing.

- *Make it Emotional and Focus on the Facts*

Jurors vote for the side they believe in. The best opening statement is one that gets the jurors to want to find your client not guilty. You succeed with this objective when you focus your opening on the facts of the case and provide the jurors with the emotional hook necessary to find your client not guilty. Spending time discussing legal principals with the fact-finder during opening is not effective. Jurors don't need to be told what the law is, but what you should do in your case.

- *Tell the jurors what you want them to do*

Be sure to tell the jurors what it is you want to see happen. They should understand what your client's goals are with going to trial and why it is they should make a particular decision. They should know if you are seeking an acquittal or some other result, so they can focus their attention appropriately.

Remember that while an opening statement is not an argument, this does not mean it cannot be persuasive. This is your chance to tell the jurors the story of your case. Use it to your full advantage.

CROSS-EXAMINATION

Have a purpose for every question

In a defense case, the majority of the work you do will be cross-examination. Cross-examination is a skill you must develop in order to be successful as a defense lawyer.

The keys to a good cross-examination are being able to direct the witness and remaining focused on the issues important to your closing argument.

Keys to cross examination

- Always ask leading questions.
- Know the answers to your questions.
- Only take risks that will not hurt you.
- Do not ask a witness about their opinion.
- Remember the reason for cross-examination is to prepare for your closing argument.

A. Structuring your cross-examination.

When you are preparing the structure of your cross-examination, remember these points.

- Establish as few points as possible and make each point clear.

When you prepare your cross-examination, think about what points you want to make with a particular witness. Establish clear points with each witness so the jurors know what you are doing.

- Chapter your cross-examination

Each time you begin a new point, make it a new chapter. Let the jury know you are moving to a new point by telling the jury you have moved on. You can also make this clear by moving back to your desk or speaking with your client about one of your points so that jurors who are more tactile will also see you have moved on.

- Keep your strongest points at the beginning and the end of your cross-examination.

Primacy and recency are key memory tools. Always front and end load your main points, leaving those that matter less to the middle of your cross-examination. Jurors pay most attention to the beginning and end of cross-examination, so use this time wisely.

- Vary the order of your examination to keep the witness off track.

Once you have established control over your witness, vary your cross-examination. Where a witness is difficult, this will keep them off track and help you control the questioning.

- Don't repeat what was said in the direct examination.

If the prosecution has asked questions you intended to ask, don't ask them again. Not only is there a danger that the witness modifies the answer in a way that hurts you, but it also affirms the prosecution's case. There is no reason to ask questions a witness has already answered.

- You don't need to cross every witness.

Some witnesses provide nothing to your case and you have nothing to gain by questioning them.

B. Leading questions.

You should always ask the witness leading questions. Leading questions help you maintain control and to make the points you want to make.

A leading question is a question that suggests the answer. This is the opposite of an open question, which allows a witness to answer the question with their own opinion.

Each question should develop the story a small amount. Keep them short. Do not allow the witness to provide a narrative during your cross-examination unless there is a reason for it.

After you asked the question, make the witness agree to the answer and commit to it.

Always appear confident in your questions. When a witness does not answer the question directly return to it until you get an answer. Do not tolerate witnesses who try to get out of answering a question.

Examples of leading questions

- You walked down the street.
- It is true that you walked down the street.
- You walked down the street, correct?

C. Maintaining control.

In order to have a successful cross-examination, you must maintain control of the witness. This is important so that you get the answers that you need and so that you demonstrate the confidence that you have in your case to the fact finder.

- Start out with a question. There is no need to introduce yourself or explain things to the witness.
- Know the answers to the questions that you are going to ask or be prepared for the answer.
- Listen to answers that the witness has given you and do not remain wedded to your prepared questions.
- Don't let the witness explain answers. Try to keep the answers as limited as possible.
- Ask only direct, leading questions.
- Never ask the ultimate question, because you never want the witness to explain it. It is much better for you to save this answer for your closing argument when the witness will not have the opportunity to explain the answer.

- Stop when you are finished.

D. Discrediting a witness.

There are two points to a cross-examination. The first is to elicit favorable testimony that is helpful to your case. This can be evidence that corroborates your case or highlights weaknesses in the prosecution's case. The other is to elicit unfavorable testimony. This can be done by discrediting what the witness said and through impeachment.

In discrediting a witness's testimony, focus on these issues:

- Perception

The witness' ability to perceive what it is that they think that they saw, including lighting, noise, other conditions.

- Ability to recall

The witness' ability to recall, like drinking that night or the shock of the event.

- Ability to communicate

The witness' ability to communicate what they saw, by showing that they are bad at distances or time.

- Inconsistent testimony

That the witness' conduct is inconsistent with their testimony (that they were very upset with the incident, but did not tell their spouse, call the police or otherwise report it for several days).

- Impeachment

When you impeach a witness, you are demonstrating to the fact finder that the witness is unreliable.

Standard ways to impeach

Bias and interest

- That the witness have a stake in the outcome of the case
- Can be because of their relationship to a side or result
- Examples: Boyfriend or parent of the complainant

Prior convictions

- These must show the witness puts their own interests above that of society and a propensity for not telling the truth
- Convictions must be for crimes of dishonesty in the last ten years

Prior inconsistent statements

Contradictory facts

Bad reputation for truthfulness

- Must be supported through independent testimony

All impeachment testimony that you elicit must be able to be proved up if called for.

Finally, remember to develop your own style. In order to be effective in cross-examination, your cross must reflect who you are. You will remain credible with the fact-finder so long as you are true to your character.

DIRECT EXAMINATION

A. Purpose of Direct Examination.

Not all trials require you to put on a case. Many cases can be put to the test through the prosecution's evidence. When deciding whether to put on direct evidence, consider both how it will advance your theory and how it will create problems for you. With the exception of the decision to testify, you make strategic decisions about what evidence you should present.

While direct evidence is supposed to be the witness's statement that does not mean you cannot know and direct what the witness will say.

Remember you are trying to get the witness to tell a relevant story the jurors will believe. Focus on your theory and do not spend time on irrelevant issues. Keep in mind jurors, like everyone else, have short attention spans.

Do not be afraid to put on a case or have your client testify. Jurors want to hear from your client and many clients want to testify in their trials. Hearing from a client can be very powerful for your jury and can be the key to an acquittal.

B. Guidelines for effective direct examination.

Guidelines for an effective direct examination

- Keep it Simple.
- Organize Logically.
- Use transitions questions in order to emphasize points for the fact finder.
- Introduce witnesses and develop background.
- Elicit scene description and then action.
- Elicit general flowing descriptions.
- Use pace in describing action.
- Use simple language.
- Use non-leading open-ended questions.
- Have the witness explain their answers
- Volunteer weaknesses
- Use exhibits to highlight and summarize facts

Unlike cross-examination, direct questions are open-ended. To prepare, keep your direct examination organized and straightforward. Ask questions that promote your story and give your witness credibility. Make sure you prepare your witness, for not only the questions you will ask but also the questions the prosecutor will also ask on cross-examination.

Always listen to the witnesses answers. Be prepared that even when you have thoroughly prepared a witness, what they say on the stand may not be what you expected. Make sure you are able to restructure your direct examination based on what a witness says.

Always practice direct examination with your witness. Make sure your witness understands the importance of what they are doing when they testify.

A witness should be instructed to:

- Always tell the truth
- Only answer questions they know the answers to
- Always address the fact finder
- Try not to explain things on cross-examination

After the prosecution has cross-examined a witness, you will have an opportunity for re-direct. This is your opportunity to make issues that are relevant to your case clear again for the fact finder. It is not necessary to re-direct a witness on immaterial issues.

CLOSING ARGUMENT

Your last chance to make your case

The closing argument is the last opportunity for you to communicate your theory to the fact finder. All other preparation is focused on this argument.

A. Jury Instructions.

An effective closing argument incorporates jury instructions. Washington has pattern jury instructions, but this does not mean that you should not request an instruction that differs from the pattern instruction. A good instruction on an issue relating to your theory can make the difference in your case.

Where you submit an instruction to the court, make them clear and easy to understand. Avoid legalese and anything else that makes your instructions difficult to understand.

B. Effective Communication.

When preparing your argument, look at it from the fact finder's perspective. Remember that they are going to be tired, but also informed, opinionated, and ready to make a decision. Your job is to convince them to decide in your favor.

To keep the fact-finder involved in your argument, follow these rules.

- *Primacy and Recency.*

Jurors remember the first and last thing you say more than any other part of your argument. Incorporate your themes into the beginning of your argument. Do not waste time thanking the fact finder or arguing obscure concepts. Get right to the point.

- *Argue.*

A closing argument is not a summation of the evidence. No one wants to hear a recitation of the evidence. An effective argument takes the theme of the case, applies the law, and molds it into a persuasive argument. Your

argument should be logical and emotional and should make the jurors feel that they are doing the right thing by acquitting your client.

- *Efficient.*

Jurors have limited attention spans. At the end of a trial their attention span is, if anything, shorter. Do not overload them. Instead, focus on your themes, stripping away everything else.

Make a clear argument and keep it short. Most closing arguments should take 20 to 40 minutes. Using more time will be counterproductive as jurors will be overwhelmed by the details and will respond by shutting you out.

C. Strategic Considerations

In your closing, everything you do must be strategic. Take advantage of tools that make it easier for jurors to understand what you are saying as this will make it easier to understand your theory and find your client not guilty.

- *Themes and Labels*

Your theme and keywords should be the same as those you used in your opening statement.

- *Argue Your Theory*

This is the theory you have been developing since voir dire. Now is the time to demonstrate why the evidence supports it.

- *Argue the Facts*

Understand that jurors are perceptive and informed. They are going to follow the law to the best of their ability. Use the facts to persuade them the law is on your side. This does not involve a recitation of the evidence, but an analysis of how the facts apply to your theory. An effective argument will emphasize the facts that apply to your theory and create a reason for why you should win.

- *Use Exhibits*

Use the exhibits evidence entered into evidence and demonstrations used at trial to make it easier for jurors to understand your argument. Many jurors are more inclined to understand your argument if it is presented in

many different forms. The use of pictures, diagrams, and multi-media presentations can be extremely effective.

- *Argue Your Strengths and Deal Candidly With Your Weaknesses.*

Successful arguments are those that have a positive approach and concentrate on the evidence that affirmatively supports your case. Do not ignore weaknesses. Jurors want to hear you address them and will respect your candor when you address the weaknesses that your case has honestly.

- *Force your opponent to Argue Weaknesses.*

By putting the prosecution on the defensive, you will take them off their argument and force them instead to merely respond to what you have presented as the winning argument.

D. Organizing Your Closing Argument

There is no right way to make a closing argument, but the use of a common approach – arguing your theory – is an effective tool for getting an acquittal for your client.

When you prepare your closing argument, make sure everything you say is intentional. Follow an order that makes sense to your fact finder and tells your story. This is the time for you to tell the story of your client's innocence. Use your storytelling skills and allow the jury to understand why they should vote in your client's favor.

Closing argument structure

Introduction

- Get immediately to the point
- Avoiding traditional introductory comments

Issues

- Tell the jurors where they should focus
- Let them know which issues are not contested

What really happened

- Do not review the evidence, but instead focus on critical facts
- Get the jurors to accept your version of what happened

Refute the Other Side

- And address the weaknesses in your theory

Apply the Facts to the Law

- Incorporate jury instructions
- Refute what the prosecution will argue

Conclusion

- Refocus on your theory
- End crisply and dramatically
- Do not be afraid of emotion

OBJECTIONS

Used to shape your case
and preserve issues for appeal

Whenever possible, you should make objections prior to trial. If you expect the prosecution to introduce evidence or take other actions that you find objectionable, you should make a record prior to the start of the trial.

The best time to make an objection is before the trial starts. Use your motions in limine to shape the evidence and detail why the court should exclude evidence. Remember to object again when the evidence is introduced.

When you cannot anticipate an issue prior to trial, object immediately. Jurors expect to see you object and will wonder why you did not object during a trial. There is nothing wrong with objecting. When you get a break in the trial, expand your record on why the court erred in allowing the jury to hear objected to evidence.

When to object

- When the evidence is damaging to your case
- Determine whether you have a strong legal basis for your objection.
- To protect the record for appeal.
- As a tactical device to disrupt the prosecution.

To make a successful objection at trial, must make sure that you are objecting in a way that will preserve a record for appeal.

- Timeliness

An objection must timely and made immediately on the perceived error.

If you fail to make an objection immediately, make it later. It is always better for your appeal that you made a record, even if it was not perfect.

Renew your objection when necessary. When you argue an issue pre-trial, object when the jury actually hears or sees the evidence.

- Legal Basis

In order to preserve the record, you must state the legal basis for your objection.

Always be aware of what your court will tolerate. Follow the court's procedure for objections, but also be sure the procedure is one that will preserve your record. Make it clear when the court will not let you make a record.