FUNDAMENTALS OF TRIAL ADVOCACY COURSE

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CROSS EXAMINATION

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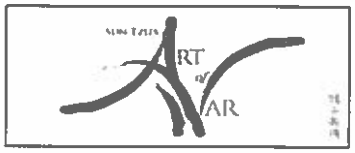
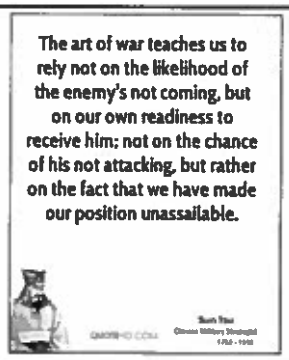


The Art of Cross Examination

A.K.A. "HOW TO BE A COURTROOM NINJA"



The Art of Cross Examination

- Cross Examination is the principle means by which believability of a witness is tested
- Your job is to cast doubt on the witness' testimony, credibility, and believability by utilizing surgical strikes. It is NOT to argue, showboat, or antagonize
- This requires preparation, technique, and strategy

Cross Examination

Why is it so difficult?

- Television
- Law School
- Practical - Prosecutors don't get a lot of practice
- Lack of Preparation
- Lack of Technique
- **Lack of Strategy**

Cross Examination: Objectives

- Use Defense witnesses and evidence to corroborate, strengthen, or confirm your theory of the case
- Avoid elaborating on irrelevant defense-raised issues or reiterations of damaging testimony
- Utilize controlled escalation of force to demonstrate how damaging testimony is wrong
- Lay a foundation for eviscerating the Defense's case in closing argument

Phase 1: Preparation

"Every battle is won before it is fought"

- Sun Tzu, The Art of War

Preparation for Cross Examination

Preparation for Cross Examination

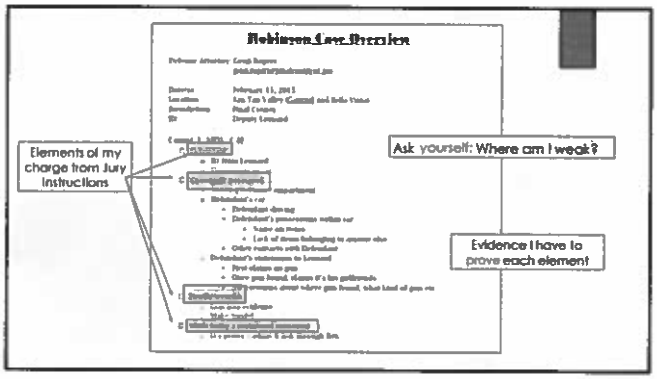
1. Know Yourself: Theme, Theory, Proof of Elements
   - You must advance your theme and theory through cross
   - You must know where your strengths and weaknesses lie
2. Highlight portions of your case which are most susceptible to attack
3. Identify elements or points of your case which the Defense MUST concede
4. Know Your Enemy:
   - Who are the Defense witnesses?
   - What Defenses are they testifying to?
   - How are they going to try to beat me?
5. Arm Yourself

"If you know the enemy and know yourself, you need not fear the result of a hundred battles"

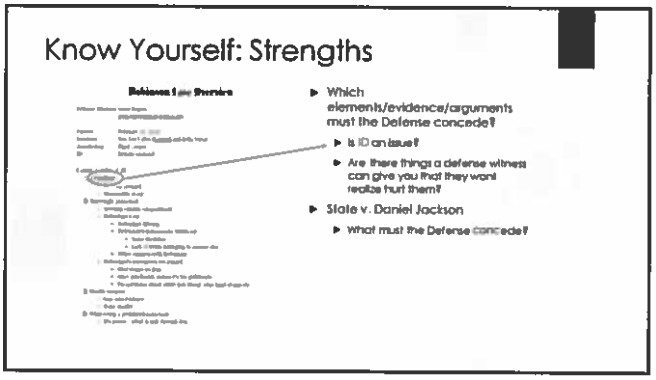
- Sun Tzu, The Art of War

Know Yourself – Case Preparation

- Knowing yourself starts with knowing your case
- Force yourself to write out each piece of evidence you have to support each element of your offenses
- This will immediately help you identify where you are vulnerable, including things you haven't realized yet

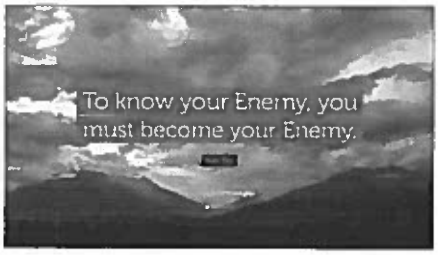


Know Yourself: Strengths



- Which elements/evidence/arguments must the Defense concede?
  - Is ID an issue?
  - Are there things a defense witness can give you that they won't realize hurt them?
- State v. Daniel Jackson
  - What must the Defense concede?

Know Your Enemy



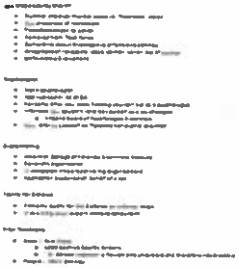
Know Your Enemy

Anticipating Defenses

- 15.2
- Interview Defense Witnesses
- Deviation Requests
- Settlement Conferences

Create an Outline

- Concessions
  - Think elements of your case
- Attack points grouped by subject matter
  - Relationship with Victim
  - Drinking on night of offense
  - Cooperation with Police
- Headings for each new subject that utilize signposts



Phase 2: Approach

"The opportunity to secure ourselves against defeat lies in our own hands, but the opportunity of defeating the enemy is provided by the enemy himself."

- Sun Tzu, The Art of War

Characterize the Witness

- What does this witness plan to testify to?
- Does this hurt me?
- What can I elicit from this witness that they aren't planning on offering?
- If the witness hurts me, how can I damage their credibility
  - (Impeach)
- If the witness doesn't hurt me, how can I make them my witness
  - (Flip)

YOU CANNOT DO BOTH!!!

Different Kinds of Witnesses

- High Credibility

- Low Credibility

State v. Jackson: Characterize Your Witnesses

"He who can modify his tactics in relation to his opponents, and thereby succeed in winning, may be called a heaven-born captain"

- Sun Tzu, The Art of War

Approach

- How you choose to approach a witness on cross-examination is the most important decision you make
- You must always be conscious of your own credibility—if you attack a witness inappropriately, the jury will punish you for it
- Correctly characterizing a witness and knowing whether their testimony affects your case and how is critical to cross

Phase 3: Execution

"Thus, what is of supreme importance in war is to attack the enemy's strategy"

- Sun Tzu, The Art of War

Questioning the Witness

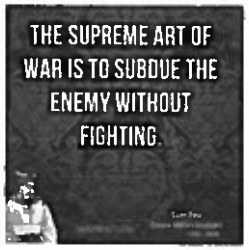
- Keep Characterization of the witness in mind: before beginning cross, always ask yourself "Did they hurt me?"
- Start with Concessions
- Move forward with Direct Attack
- Finish strong
- Avoid "one question too many"

"You can be sure of succeeding in your attacks if you only attack the places that are undefended"

- Sun Tzu, The Art of War

Concessions: The Undefended

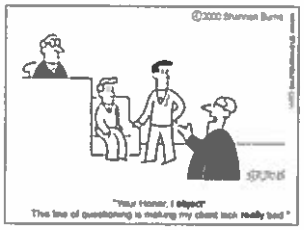
- Nearly every cross examination should begin with concessions. Concessions are points the witness MUST agree with you on (or lose credibility if they don't)
  - Works regardless of witness classification
  - Witness is expecting a fight and may be caught off-guard
  - You will be far less likely to get them after you attack
- **If you get nothing else on cross examination of a Defense witness, get concessions**



Concessions: The Undefended

- Do not limit yourself to the topic the witness came to testify about
- Arizona Rule of Evidence 611(b): "A witness may be cross-examined on any relevant matter"
- Ask yourself: given the nature of this witness' relationship with the Defendant, what things are they in a position to help me with?

State v. Jackson: What info might you get from the Defendant's wife (victim)?



Cross: Direct Attack

Let your plans be dark
and impenetrable as night,
and when you move
fall like a thunderbolt

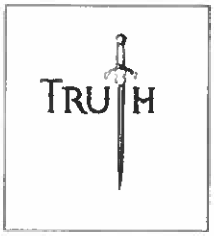
Sun Tzu

- Once you have gained concessions, it is time to attack the Defense's case directly
- You must do this through carefully crafted questions and using all available tools
- Jumping around between areas of your cross may make it difficult for the witness to follow you, but it makes it difficult for the jury to follow you as well.

Cross: Direct Attack

- Follow your outline and have your Impeachment Cheat Sheet ready to go if needed
- Listen carefully and be prepared to go where the witness takes you
- Choose a question type that provides the best tool for you to discredit the witness. You should be leading most of the time
- Maintain control over the witness and yourself

Weapons of War



- Sword of Truth
- Impeachment Ammunition
- Knifes (Leading Questions)
- Hanging Rope (Open-ended Questions)
- Smoke Signals (Signposting)

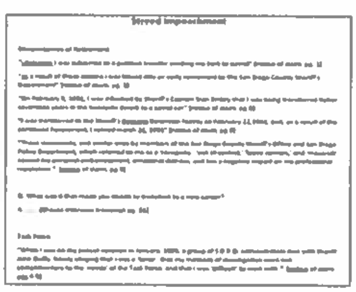
You must master them all!

Truth

Ask yourself:

- what's true about this witness' statement?
- What's true about their character?
- Is there any truth about the witness' perspective that can be useful to you?
- If not.....you must expose them

Impeachment Ammo



- Go through every statement the witness made
- Document each statement that may be helpful to you
- Note the page, line reference, and document the statement came from
- Group by SUBJECT
- Have impeachment documents, recordings, etc. ready to go

Impeachment: Know Your Rules

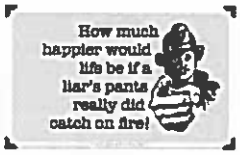
- RULE 608:
- EVIDENCE OF CHARACTER AND CONDUCT OF WITNESS
- RULE 609:
- IMPEACHMENT BY EVIDENCE OF CONVICTION OF CRIME
- RULE 613:
- PRIOR STATEMENTS OF WITNESSES
- RULE 404(a) & (c) :
- PERTINENT CHARACTER EVIDENCE OF VICTIM OR ACCUSED
- RULE 405:
- METHODS OF PROVING CHARACTER
- INFORMATION RELATING TO THE WITNESSES ABILITY TO SEE, HEAR, PERCEIVE THE EVENT

Impeachment Ammo

- Rule 607, Arizona Rules of Evidence
  - "The credibility of a witness may be attacked by ANY party, including the party calling the witness."

Translated: yes, you can impeach your own witness

Impeach Based on:



- Bias
- Perception
- Experience
- 609 Priors
- Prior Inconsistent Statement

Impeachment does NOT mean

- Using an aggressive tone
- Yelling, berating, or being sarcastic with the witness
- Arguing with the witness about unimportant details

Making the Decision to Impeach

- 2 requirements:
  - Better be something that's good for me
  - Better be able to win
    - So obviously true that the witness can't deny it
    - I have a prior inconsistent statement that I am ready to impeach witness on

Impeachment With a Prior Inconsistent Statement

1. Identify the inconsistent statement
2. Decide whether the witness' new statement hurts your case
3. Lock the witness into the new statement
4. Confront the witness with the prior statement
5. Ask them 1st if they made it; follow up with tran audio, video, addition witness if needed
6. ~~Ask the witness to explain the discrepancy bet two statements~~

Impeachment: Example

- *Mr. Smith, if I understand your testimony on direct correctly, you claim that you were driving the car when the collision occurred and not your brother?*
- *But you would agree with me that at the scene of the collision you told Officer Wood that "Bill was driving when another car cut us off and he hit the median"*

Types of Questioning

- Leading Questions
  - You told the officer you had 2 drinks?
- Directed Questions
  - Did you tell the officer you had 2 drinks?
- Open-Ended Questions
  - How many drinks did you tell the officer you had?

Did she say open-ended questions???

Rules for Questions on Cross

Leading Questions

- Who is Testifying?
- YOUR credibility is at issue
- Watch use of "correct," "right," "Isn't it true"

Open-Ended Questions

- Only when the answer CAN'T hurt you!
- LYING WITNESS
- Allowing a witness to lie in narrative fashion before a jury can provide you with a lot to work with, but you must listen and be prepared to go where the witness takes you

Signposting

- Signal the jury as to what you are about to address with the witness
- Signal the witness to what you want them to talk about
- Examples:
  - I'd like to talk about your claim that you didn't know the car was stolen
  - I'd like to ask you some questions about your statements to the police
  - Let's talk about the amount of time you spent preparing for this case

Expert Witnesses

RULES:

- Do your homework
  - BECOME AN EXPERT!!!
- Pre-Trial Motions
  - Limit Testimony
  - Force Opinions, Interviews, Disclosure
- Have a plan
  - Are they vulnerable? Where?
  - Can you make them your witness?

Expert Witnesses

- Pre-trial interviews: do them
  - What is your understanding of why you're being called to testify?
  - Do you have an opinion about ____ in this case?
  - What is that opinion based on?
  - This is not the time for confrontation or cross examination; get them talking!
- Consult your own expert for ideas about how to deal with Defense expert

Don't Do This:

- https://www.youtube.com/watch?v=1JZKYBffkxI
  - @ 2:35:40

Witness Control

- Repeat the Question
- Juxtaposition Technique
- Object as non-responsive
  - Never answer a witness' question
  - Tone should be firm, but NEVER lose your cool

The Art of Cross Examination

Questions?

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