

North Carolina Defender Trial School
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Workshop Aids

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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.

A Template/Worksheet for Developing a Persuasive Story/Theory of Defense

1. In factual terms, identify why your client is innocent in one or at most two sentences—in other words, what really happened in this case?
2. Decide which genre of factual defense applies to your client's innocence.
 - a. The criminal incident never happened.
 - b. The criminal incident happened, but I didn't do it.
 - c. The incident happened, I did it, but it wasn't a crime.
 - d. The criminal incident happened, I did it, it was a crime, but not the crime charged.
 - e. The criminal incident happened, I did it, it was the crime charged, but I'm not responsible.
 - f. The criminal incident happened, I did it, it was the crime charged, I'm responsible, but who cares?
3. Craft the story that shows why your client is innocent.
 - a. Who are the three main characters in the story of innocence?
 - b. What are the three main scenes in the story of innocence?
 - c. When and where does the story of innocence start?
4. What emotions do you want the jury (and/or judge) to feel when they hear your story?
5. Write out a paragraph distilling your client's story/theory of defense. Incorporate the key aspects of your responses to the above questions.

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
 - o 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.]
 - o 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