

HOW TO TRY ANY CASE AND WIN

*Unlocking your inner Perry Mason
(Gen-Xers: Ben Matlock; Millennials: Saul Goodman)*

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Introduction

- CA Bar in 2005, ID Bar in 2019
- Over 40 cases to verdict (over 30 jury trials), mostly as a public defender, but a couple as civil attorney.
- Over 100 felony preliminary hearings
- Over 100 pre-trial, trial (*in limine*), and post-trial motions
- Direct or cross-examined somewhere between 700 and 1,000 witnesses
- Numerous types of experts: forensic accounting, DNA analysis, fingerprint analysis, bodily fluids, gangs and culture, sexually violent predators, drugs, accident reconstruction, intoxication, mental health and other DSM-IV/V psychological disorders, witness misidentification, memory, and other general forensics areas.

Today's Topics

- 1. Theme development (an incorporation into your entire trial)
- 2. Trial preparation
- 3. Impeaching a witness during cross-examination

General thoughts

- Preparation is more important than being the “best” trial attorney.
 - *Experience cannot substitute poor preparation in many cases.*
 - *Preparation can substitute poor experience in many cases.*
 - *Preparation is not limited to what you expect the evidence to be (the probable), but rather about preparing for all that is possible.*
- Go to trial
 - *Gerry Spence: “I’ve never lost a case” is nonsense.*

Theme Development

- Trial themes are critical to success.
- “This case is about _____.”
 - *Johnny Cochran - “If the glove doesn’t fit, you must acquit.”*
- Sort of like an elevator pitch
- Repeating and enforcing theme concept from voir dire through closing argument.
- Methods: Pitch your case to family and colleagues. See what is most persuasive.
- Concepts: Greed, trust, loyalty, honor, duty, responsibility, choices, power, revenge, love, hate, fear, etc. Aesop’s fables, bible verses, children’s stories, tales, etc.
- Focus: Impact it had on someone’s life. Don’t think like a lawyer!

Theme Development

- Examples
 - *Breach of restrictive covenants & trade secrets in employment agreement*
 - *Confronting damages*
- Thinking about theme in terms and sub-concepts while conducting witness examinations, voir dire, closing, etc.

Theme Development: Voir Dire

- Voir dire is the first chance you get to ingratiate the jury with your theme.
- Do:
 - *Ask open ended questions – you NEED them to talk*
 - *Craft questions so that the jury comes to their own conclusion to agree with your theme*
 - *Confront hard issues*
- Don't:
 - *Argue with a juror or try to change their minds – disagreeable jurors are GREAT for you!*
 - *Ask questions unrelated to your theme; i.e., what movies, hobbies, etc.*
 - *Regurgitate what the judge already asked*

Trial Preparation

- Need to have an absolute mastery of case materials
- Golden rule: Knowledge is power, power is control.
- Need to have the ability to access specific witness statements
 - *Why is this important?*
 - *Impeachment and rehabilitation*
- Witness credibility is critical to all trials
 - *Extract facts from witnesses that support our theme*
 - *Counteract facts from witnesses that don't support our theme*

Trial Preparation: Method

- Step 1: Create a master timeline
- Step 2: Index these witness statements by concept or chronologically (however you like)
 - *First – what facts or statements do we want from this witness the help or hurt our case?*
 - *Second – when has this witness made a statement regarding these facts?*
 - To whom said
 - What said
 - When said
 - Context of statement
 - *Third – study your indexes repeatedly; practice accessing statements*
 - *Sources: Depositions, interviews, reports, expert statements, emails, letters, etc.*

Trial Preparation: Process

- Create several binders with tabs
 - *Depositions binder*
 - *Other statements or evidence binder (accident reports, investigator reports, etc.)*
 - *Witness index binder*
- The actual witness index
 - *Sheet of paper (Word docx)*
 - *Two columns*
 - *Left side: core concepts and bullet pointed important statements supporting concepts*
 - *Right side: index where statements is recorded (depo page, line number, tab number, etc.)*

General rules of cross

- Two basic rules when cross-examining a witness:
 - *1. What do I need to get from a witness?*
 - *2. What is the easiest, most effective way to get it?*

Developing a strategy

- You're not Perry Mason – you'll never hear “ok, you got me.”
- If theory is witness is lying:
 - *Make or break goal should not be to get nothing less than for the witness to admit they're lying.*
 - *They'll never say, “ok, you got me.”*
- If theory is witness is wrong:
 - *Make or break goal should not be to get them to back away from their “110% positive” position.*
 - *They'll never (or almost never) back down from their certainty.*
- Never ask the magical question – “So you're lying now, right?”
- Overall strategy:
 - *1. Realize you don't need someone to admit they're lying or that they're mistaken.*
 - *2. Develop the facts that prove that they are.*

Impeaching a witness

- Undermining a witness or their testimony
- All kinds of ways:
 - *Ability to perceive*
 - *Ability to recall and recount*
 - *Contradiction*
 - *Bias*
 - *Character and reputation*
 - *Prior criminal convictions*

Prior Inconsistent Statements

- Idaho Rules of Evidence – must memorize (or create cheat sheet) before trial
- Rule 607 – Any party may attack the witness’s credibility
 - *You can attach your own witness or opposing witness*
- Rule 613 – Witness’s prior statement
 - *This is the heart of our discussion.*
 - *613(a) – Witness’s prior inconsistent statement doesn’t need to be shown to witness.*
 - BUT it might be more effective if you do show it!
 - *613(b) – Witness’s prior inconsistent statement is admissible as extrinsic evidence if you give the witness the opportunity to explain it, and opposing counsel has opportunity to examine witness about it.*
- Rule 801(d) – Prior inconsistent statement is non-hearsay
 - *Can be used to impeach or rehabilitate!*
- Rule 806

Impeachment: PIS

- Only rule: **MUST** be able to use the *witness's own words* to impeach!
- DO NOT DO THIS: “Isn’t it true you said ‘X’ during your deposition?”
- Classical method:
 - *Commit*
 - What did they say?
 - *Credit*
 - Giving grandeur to the prior statement
 - *Confront*
 - Closing the trap on the witness
- Modern method:
 - *Credit*
 - *Commit*
 - *Confront*

Bad dog!

- Punishing the witness for messing with you.
- Turning the witness into Pavlov's dog.
- They will salivate every time you move towards counsel table.



THANK YOU

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