



PARTNERS
for Democratic Change
SERBIA

TRIAL ADVOCACY IN CRIMINAL PROCEEDINGS

Manual for Attorneys



Criminal Defense Capacity Program



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October 2013

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Published by:

American Bar Association Rule of Law Initiative (ABA ROLI)

Partners for Democratic Change Serbia

For the Publisher:

Blažo Nedić

Translation:

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Introduction

The new Criminal Procedure Code (CPC) was adopted on 26 November 2011. For criminal offenses of organized crime and war crimes, its implementation commenced on 15 January 2012, while for all other cases, implementation began on 1 October 2013. The new CPC brings a number of changes, and some of the most significant are related to the replacement of the current inquisitorial model with a more adversarial one, including direct and cross-examination of witnesses. The new CPC changes the role of the judge, and introduces prosecutorial investigation, “equality of arms” at trial, and the potential for plea bargaining agreements.

In order to prepare defense attorneys and trainees for implementation of the new Criminal Procedure Code, the American Bar Association Rule of Law Initiative (ABA ROLI) and Partners for Democratic Change Serbia (Partners Serbia), in cooperation with the Bar Association of Serbia, and with support from the U.S. Department of State/Bureau of International Narcotics and Law Enforcement (INL), are implementing the *Serbia Criminal Defense Capacity Program (CDCP)*.

As a part of the CDCP Project, ABA ROLI and Partners Serbia are organizing a number of seminars for defense attorneys and trainees to improve their trial advocacy skills, and also several conferences, panel discussions and mock trials, that will bring together defense attorneys, judges and prosecutors to exchange experiences and enable them to better understand their roles under the new CPC. A detailed analysis about pre-trial detention in Serbia and measures to secure the presence of the defendant will also be conducted, as well as an assessment of the use of plea bargaining between the prosecution and defense.

As an innovative educational tool, Partners Serbia and ABA ROLI, in cooperation with the Bar Association of Serbia and regional bar associations, have developed the E-learning Program for attorneys and trainees from all parts of Serbia. E-learning is free for all users and available at www.partners-serbia.org/elearning, and also via official web sites of the Bar Association of Serbia and regional bar associations. It is anticipated that in 2013 and 2014 all activities of the CDCP Project will include more than 1,000 participants, and the E-learning program will have registered over 2,000 attorneys and trainees from all parts of Serbia.

The “Trial Advocacy in Criminal Proceedings” manual for defense attorneys is also one of the results of this Project. It is not a detailed analysis of the new CPC, but instead, it was developed with the aim of helping attorneys and trainees in improving their trial advocacy skills, such as developing a theory of the case, negotiations and plea agreements, direct and cross-examination, and effective opening and closing arguments.

ABA ROLI and Partners Serbia would like to thank Daniel Lindhardt for his work on the Trial Advocacy Basic Skills Handbook for Macedonia, which represents the basis of this manual, as well as Erik Nils Larson of the ABA/CEELI program in Bosnia and Herzegovina, who prepared a Guidebook for Defense Attorneys in response to changes in the criminal procedure code in Bosnia and Herzegovina. We also would like to thank Dejan Ukropina and Darja Koturovic for their work and insights into plea bargaining that has taken place thus far in Serbia. Finally, we would like to thank the Bar Association of Serbia and the Program Council of the CDCP Project, and in particular to attorneys Veljko Delibasic, Jugoslav Tintor and Vladimir Beljanski, who reviewed the Serbian version, and Justice Denise R. Johnson, ABA/ROLI legal expert, who reviewed the English version of this manual.

1. INTRODUCTION TO THE IDEA OF TRIAL ADVOCACY

With its new Criminal Procedure Code (CPC)¹, Serbia has introduced novel procedural concepts into its system of investigations, trials and appeals. While most of the innovations are based upon the civil law tradition, some are similar to procedures used in common law countries. Serbia has thus joined the ranks of the many countries that are attempting to make use of the best of both legal traditions in order to make its legal system more efficient, fair and transparent.

But these changes represent a challenge for advocates. No longer will judges be presenting evidence and questioning witnesses at trial. It is now up to the advocates to do this by examining witnesses and submitting evidence that supports their case. It is also their job to keep out all evidence that should not be considered. For this reason it is critically important for criminal advocates to understand and master the new rules.

This manual is concerned with the process of trial advocacy, or how to present a case using the new procedures in order to be successful at trial. Under the new rules, the trial will be broken down into four essential phases: Opening Statement, Direct Examination, Cross Examination and Closing Argument. Understanding how to conduct each one of these phases is essential to becoming an effective advocate. This manual also includes material about plea bargaining, which if successful, obviates the need for a trial and is thus an essential skill for a trial advocate.

As with any skill, the readers of this manual are encouraged to seek out other sources to help them become successful trial advocates. This publication is not intended to be a detailed commentary on the new code. Instead, it is designed to be a practical guidebook for Serbian defense attorneys to use at trial and does not address preliminary investigations and investigations, or appeals.

Trial advocacy is a creative process. The rules provide parameters and direction. But within those rules the successful advocate has to craft his presentation in a way that fits his personality, the facts of the case and the applicable law.

1 *“Official Gazzette of RS”* No. 72/2011, 101/2011, 121/2012, 32/2013 and 45/2013.

One final note: rather than saying “his” or “hers”, the masculine or feminine pronoun will be used interchangeably and there is no significance as to which one is being employed. Likewise, references will be made interchangeably to trials with only one judge, as well to trials with panels.

2. PLEA BARGAINING²

Plea bargaining refers to the resolution of a criminal case through negotiation between the prosecutor, the defense attorney and the defendant. In exchange for a plea of guilty to a charge and the waiver of the right to trial and to appeal, the defendant receives concessions from the prosecutor, which can result in a reduced sentence.

In Serbia, plea bargaining was introduced in 2009, along with significant amendments to the Criminal Procedure Code to combat organized crime, and strengthen enforcement against narcotics trafficking and corruption. Pursuant to Articles 282a-282d of the 2009 law, plea bargain agreements could be concluded only for offenses punishable by up to twelve years imprisonment, and criminal sanctions could not fall below the minimum statutory penalty. They were not really utilized, even in organized crime and corruption cases in the Special Court where, in 2011, 10 cases were resolved by agreement. The new Criminal Procedure Code was adopted in 2011 and, among other reform measures, shifted responsibility for the conduct of criminal investigations to the prosecutor’s office, and created new procedures intended to reduce the number of lengthy trials. Under the 2011 Code, plea bargaining is available for any offense, and the prosecutor has more discretion to agree to any penalty consistent with law.

The concept of plea bargaining is controversial even in countries that historically have used it to resolve cases. Those who favor plea bargaining note that it is an efficient and fair way to dispose of cases without the expense associated with trial. They also emphasize that plea bargains

2 This section was drafted by Mr Dejan Ukropina, attorney-at-law, and Ms Darja Koturovic, PhD Candidate at the South-East European Research Centre as a part of the Survey on implementation of Plea Bargaining in Serbia, conducted from October 2012 to August 2013 within the Criminal Defense Capacity Program.

provide certainty, since the parties, rather than the judge, have control over the charges and what the sentence will be. Plea bargaining is also valued because it relieves overcrowded court dockets, and allows busy practitioners to manage increased caseloads when not every case is expected to go to trial. Those who are opposed to plea bargaining contend that innocent people feel pressured to plead guilty because they fear they will receive a worse sentence if they go to trial. They also argue that testimony given in return for a plea bargain is not reliable. Whatever the merits of the arguments, the new Code formally recognizes and regulates the practice of plea bargaining.

The new CPC sets forth the requirements for plea bargaining for all criminal offenses in Articles 313 -319. The prosecutor, defense attorney, or defendant may initiate negotiations, but the defendant must have defense counsel to conclude the agreement. The agreement is essentially a contract between the parties, but with the specifics of the agreement mandated by law. To ensure a complete resolution of the charges, the plea agreement must include the indictment, the resolution of any claim for state costs, restitution to the victim, if applicable, and the defendant's full confession. The parties must agree on the type and length of any criminal sanction. The plea bargain must reflect substantially the allegations in the indictment. If the prosecutor has agreed to forego prosecution of certain charges, the indictment must be adjusted. Similarly, if the prosecution has agreed to desist from criminal prosecution of other, unrelated charges against the defendant, it must be specified in the agreement. The parties may enter into a plea agreement as soon as the order to begin an investigation is issued, but once the defendant states his position in relation to the charges at trial, a plea agreement is no longer available.

Once a plea agreement is concluded, the parties submit the agreement to the court for approval. The court examines the defendant as to whether he understands the terms and consequences of the plea, whether his confession to the indictment is voluntary, and that he knowingly and voluntarily waives his right to trial and an appeal. But the court also decides whether the defendant's confession is in line with other existing evidence, and reviews the sentence or other criminal sanction for consistency with law. After its examination, the court issues a written decision accepting or rejecting the agreement. If the court has accepted the plea, it enters a judgment of guilty.

The court may dismiss the agreement if it does not contain the mandatory provisions, or duly summoned defendant has not appeared at the hearing and failed to justify his absence.

An important practice pointer is that prior to the hearing on acceptance of the plea, the defense attorney must ensure that the defendant is ready to demonstrate to the court that he understands the plea, the sentence and the rights he is giving up. In practice, defendants will often backtrack or equivocate when it is time to affirm their guilt to a judge in open court. The defense attorney must anticipate this and ensure that when the time comes, the defendant is ready to take responsibility at the plea hearing and that he fully understands the bargain he has made.

To ensure that clients understand the relative advantages and disadvantages of accepting a plea bargain, defense attorneys may give the client different scenarios of what will likely happen if he accepts a plea bargain or goes to trial. This will require the attorney to fully understand the case and to have evaluated the anticipated evidence and applicable law. The defense attorney should use her judgment, training and experience to advise the defendant what the chances are of a guilty verdict and the nature and length of any resulting sentence. The client can then compare this to any plea offer in the case and make a decision whether to accept the offer. Ultimately, the decision about whether to accept a plea bargain is the client's. In the United States, a defense attorney has an obligation to communicate the prosecutor's plea offers and ensure that a client understands the variables and risks of his decision. It is fair to assume that the same obligation can be inferred from the new CPC, although it is not specifically stated.

From the defendant's point of view, there are many advantages to entering into a plea agreement apart from the important one of receiving a lighter sentence or pleading to a less severe charge. If a defendant has been in detention for many months, an agreement may release him with time served. Even if the agreement does not release him, it may move him to a permanent facility that is less onerous than an over-crowded pre-trial detention facility. There can be a considerable emotional value to having the criminal matter concluded with certainty, rather than facing a long and uncertain result through trial. It goes without saying that, for a defendant with little money, a plea agreement saves attorney's fees.

Not all of the benefits of plea bargains accrue solely to the defendant. Prosecutors have just as much to gain from plea agreements as defendants. It is wise to keep in mind that each side has an interest to protect. The prosecutor will be concerned for the public interest and whether that will be vindicated if he enters an agreement with the defendant. Defense attorneys should be ready to understand that and reach an agreement that furthers both sides' interests. Consider what will motivate the prosecutor to agree or disagree with an offer. Some of these motivations are the same for the prosecution and the defense, such as the sheer inability to try every case, and the desirability of a certain result. After all, a plea agreement is a win for the prosecutor; it may be on terms different from those originally proposed, but it is still a guilty plea and not an acquittal. At the same time, a good plea agreement will be a better deal for the defendant. It can even be beneficial to crime victims who do not want to re-live their experience in court, and who also desire emotional closure, a criminal sanction, and a vindication of their criminal complaint. Prosecutors will be interested in protecting vulnerable victims from the rigors of trial, and this may open a window to a possible agreement in the right case. Again, just as a defense lawyer has to fully evaluate the likely outcome of the trial before any meaningful plea negotiations can take place, she must also consider where each party's interests lie.

Despite mutual advantages, there will be prosecutors who will not bargain, or who will bargain in a "take it or leave it" style, leaving no meaningful room for negotiation. There is little defense attorneys can do in this situation except break off negotiations and force the trial. And there may be prosecutors who overcharge defendants, simply to persuade them to plead guilty. This might involve charging a defendant with crimes that carry more serious sentencing ranges but for which there is little evidence. In that case, a defendant has little to lose by going to trial rather than accepting a plea bargain that offers only to dismiss serious but spurious charges.

All cases will not be appropriate for plea agreements. When the prosecutor has overwhelming evidence and the chances of conviction at trial are good, a plea bargain is something that the defense attorney may strongly recommend to the client. On the other hand, if the prosecutor's evidence is

weak, or the plea offer is the same as what the attorney thinks will be the outcome after trial, the attorney may recommend to his client that he has little to lose by going to trial and that he reject the prosecutor's offer. In any event, it is the client who makes the final decision.

Although the institution of plea bargaining is not well established in Serbia, it holds promise for resolving many more cases without trial now that it is expressly sanctioned for all criminal offenses. Given the backlog of criminal cases and the prosecutor's new responsibilities, there may be more incentive to enter into plea agreements because of workload considerations. On the part of the defense, lack of resources to conduct parallel investigations, fear of sentencing penalties, and a desire for certainty in consequences will continue to motivate defendants and their counsel to seek more advantageous outcomes.

3. THEORY (STRATEGY) OF THE CASE

Defense attorneys have an obligation to develop a trial strategy for every case that is set for trial. That strategy should be based on a single theory of the case. A theory of the case is the defense attorney's short and simple explanation for what happened.

A good theory of the case must be logical, consistent with the evidence and lead to a conclusion of innocence. It should also be brief – only a few sentences for most criminal cases. Developing a viable, cohesive theory of the case will focus the lawyer and allow her to then develop effective and coherent trial strategies and tactics, including an opening statement, direct and cross examinations and a closing argument. It will incorporate the law and the facts into a single plan for success.

A good theory of the case is usually based upon universal truths, such as jealousy, rage, or greed. An example of a theory of the case in a murder prosecution might be:

“The victim's girlfriend, not the defendant, shot the victim. She did so because she was angry at the victim, who was about to break up with her.”

Using this theory of the case, the defense attorney might then develop a strategy for trial that highlights certain evidence, such as evidence that neighbors had heard the victim and his girlfriend yelling at each other in the days before the shooting, or that the murder weapon had been found in the girlfriend's room after the shooting. In support of this theory, the defense attorney might also consider whether the defendant has a believable alibi that would place him in a different location at the time of the murder.

Before developing the case theory, the attorney must first ensure she has all the information in the possession of the prosecutor, has conducted an investigation of her own, has read and understood all the reports and witness statements, understands the physical evidence and expert testimony and understands her client's circumstances and wishes. The attorney must then apply her judgment based on her training and experience, as well as her knowledge of the law, to the facts of the case to formulate a theory of the case that is believable and likely to result in a favorable verdict.

A good theory of the case will require the attorney to make decisions about how certain testimony and evidence will be received by the judge or panel. For example, will the judge believe certain witnesses, be receptive to certain arguments and accept certain physical evidence? Using the example above, the lawyer may determine that the judge will not find the victim's girlfriend credible, which might make arguing that she was the real killer more viable. Making these decisions is partly an intuitive process and a skill that separates great lawyers from the rest.

A theory of the case should be based upon a general proposition related to legal provisions of criminal culpability. The three most common general propositions are: 1) that a crime was committed but the defendant did not commit it; or 2) that a crime was committed but the defendant is not guilty because he was justified in acting the way he did; or 3) that no crime was committed by anyone.

The defense attorney should also take into account an important novelty in the new code – that the prosecutor is the one initiating the allegation and thus bears the burden of proving the crime. This new general proposition should be used by the attorney in thinking about her strategy and in implementing it at trial. If the prosecutor has not proved the case, the judge

must find the defendant not guilty. Another way of saying this is that the burden is not on the defendant to prove anything – it is the prosecutor that has this burden under the new Code.

An example of a theory of the case based on the first general proposition – that a crime was committed but the defendant did not commit the crime – is the theory used above, asserting that a murder did occur, but that the victim’s girlfriend was the actual killer. Using this theory of the case, the defense lawyer might develop a trial strategy that includes having neighbors testify who heard the victim and his girlfriend arguing in the days before the murder. The strategy might also include an alibi and in support of this, the defense attorney might have friends or family testify that the defendant was far away from the scene of the crime when the murder took place.

A possible theory of the case based on the second general proposition – that the defendant is not guilty because he was justified in acting the way he did – might be as follows:

“My client, Mr. Nikolic, was the target of a bully and was only defending himself on 27 July 2013. On that evening, Marko Zivkovic approached Mr. Nikolic, threatened him and his family and tried to hit Mr. Nikolic, who struck back only in self-defense and defense of his family.”

If this were the theory of the case, the defense attorney might develop a trial strategy that would include not disputing that the defendant struck the alleged victim. But the defense attorney might highlight prosecution evidence or present evidence of her own and argue that the defendant reasonably believed at the time that the alleged victim was about to unlawfully murder or assault him and that he had no reasonable alternative to his actions. A second example of a strategy based on this general proposition might include the defense lawyer whose strategy is to assert that while illegal drugs were present in his client’s car or home, they did not belong to his client and his client had no idea that they were there and is thus not guilty.

The third proposition – that no crime was committed – would require the defense attorney to deny that any crime had been committed at all. An example of a theory of the case might be:

“No sexual assault occurred in this case because the alleged victim consented to the acts that the prosecutor claims were forced upon her.”

This theory of the case will likely require the defense attorney to develop a trial strategy that will include attacking the credibility of certain prosecution witnesses.

The general propositions are based upon theories of legal culpability. The theory of the case should rest upon one of them. But a good theory of the case should be based not only on these general propositions, but also upon universal truths, such as greed, the right to self-defense or defense of family, jealousy, envy, fear, etc. Each trial will require the defense attorney to create an individual theory based on the particular evidence, witnesses and judges of the individual case before him. That theory will then guide him as he prepares his opening statement, cross examinations, direct examinations and closing arguments.

4. OPENING STATEMENT

There is a rule of trial advocacy followed by many experienced lawyers called the rule of primacy and recency. It asserts that people remember what was said first and what was said last.

The rule acknowledges that first impressions are lasting impressions. A good opening statement that starts with a believable theory of the case will stay in the mind of a judge for the rest of the trial. That theory of the case will also be repeated by the advocate in the closing argument so that it remains in the judge’s mind when he is deciding the case.

In your opening statement you will introduce the judge to your theory of the case and to the relevant facts that support it and entitle your party to a favorable verdict. The opening statement is like the preview to a movie; it will give the judge an understanding of the overall case to aid him in placing each witness’s testimony or piece of evidence into the larger picture. Most opening statements will consist of three parts: the theory of the case, the story and the request for a verdict.

A. The Theory of the Case

As noted above, the theory of the case is simply your version of what happened but stated in a very condensed and compelling form. It must be simple, logical and fit the facts and legal requirements of the case. It is essentially a short statement that sums up what a case is about. The theory gives the judge a “psychological anchor” that summarizes the entire case. The advocate will return to it throughout the trial. It will first be mentioned in the opening, will be supported by the testimony of the witnesses and then will be the focus of the closing argument, tying the whole trial together. An example of a theory of the case used in opening statement might be:

“Your Honor, this case is about the right of self-defense and defense of family. The prosecutor is correct when he says the crime of assault was committed on 27 July 2013. But the actual victim of that crime was my client, Mr. Nikolic, who was only acting to defend himself against the alleged victim.”

The opening statement should be delivered in a forceful, energetic manner that lets everyone know that not only is the advocate’s position the accurate one, but he also believes in his position. Even the best facts and theory will not convince a judge if the advocate does not demonstrate belief in his case. Good advocates project the sense that they expect to win because they are right.

B. The Story

During most trials, no single witness will state all the facts of the case. Instead, each witness will testify only to the facts that he knows about. So the opening statement is the defense attorney’s chance to state his version of the entire story in a way that ties together all the little stories that will likely be presented by the witnesses during the upcoming trial. The opening statement allows the judge to understand the overall picture and place each of the little stories from each witness in a context articulated by the defense attorney. Calling this portion of the opening statement a story does not mean it is not true. It simply means the advocate is telling what happened as he believes will be conveyed by the witnesses during the trial.

It is not much different from any other story, where a person tells what they saw or heard in a way that is interesting to the listener. The advocate delivering an opening statement does essentially the same thing. In fact, when presenting an opening statement, it might be helpful for the advocate to imagine that he is telling his friends about something that truly interests him and that he wants to convince his friends is true and believable.

Like other people, judges tend to give credibility to those they find to be empathetic. The advocate should therefore try to make his client and witnesses worthy of empathy and credibility. Here is an example:

“There had been problems between Mr. Nikolic and Marko Zivkovic for a long time. On the evening of 27 July 2013, Mr. Nikolic was going to the market to buy a birthday present for his wife. Mr. Nikolic left the apartment and Zivkovic came up to him on the street in front of his apartment building. Zivkovic threatened Mr. Nikolic’s family and kept moving closer and closer to Mr. Nikolic. He was cursing and continuing to threaten Mr. Nikolic and his family. Finally Mr. Nikolic pushed Zivkovic away. Zivkovic then threw a punch at Mr. Nikolic, who ducked and then simply tried to defend himself. Yet now Mr. Nikolic is here in court as a defendant accused of assaulting Zivkovic.”

Be careful about overdoing it. In many cases, judges do not like lawyers to overemphasize empathy for their clients. The advocate should try to learn something about what sorts of presentations the judge or panel like or dislike and tailor the presentation accordingly.

A successful story should be organized in a simple and logical manner. Probably the best way to organize a presentation is chronologically, since most people are familiar with hearing a story in that manner. It is easy for the advocate to deliver and easy for the listener to understand.

An opening statement story should alert the judge what to watch for in the upcoming trial. Giving the judge a preview of what the advocate believes to be important testimony will heighten the judge’s anticipation and will focus the judge’s attention on that area during the trial. An example is the following:

“The prosecutor will call Mira Krstic; listen very carefully to her testimony identifying my client Mr. Nedic as the bank robber. Pay close attention to the time of day it was and where she was standing.”

In this example, the lawyer is alerting the judge that there is going to be a problem with the eyewitness identification of the defendant as the bank robber. Note also in these examples that the advocate did not refer to his client as “the defendant” but by his name. The defense attorney should humanize his client by always referring to him by his name. But remember not to oversell what the witnesses will say or how much you think you will impeach the testimony of the other side’s witnesses. An advocate’s credibility is his most precious tool. When an advocate informs the judge, in his opening statement, that there will be evidence which later does not materialize at trial, he loses credibility with the judge. He can also expect that his opposing counsel will remind the judge in closing argument about the difference between what was promised during opening statement and what was delivered during the trial, which will further damage his credibility. Therefore it is better to understate the evidence during opening statement than to overstate it.

A good opening statement is one that is not too long but includes all the essential elements. A typical opening statement should be no longer than ten to thirty minutes. Most people, including judges, stop listening to stories that last longer than that. As you plan your opening statement, imagine you are telling the story to your friends. Most stories people tell their friends do not last longer than 30 minutes. If they do, anyone still listening has lost interest and is likely getting annoyed. However, some cases may require variations. For example, cases that are very complex will require longer opening statements.

Opening statements are statements of what the case is about, they are not arguments. Closing arguments assert conclusions and inferences based upon the evidence that came out at the trial. The opening statement should be limited to evidence that counsel thinks will be testified to by witnesses and exhibits that will be introduced in the case.

It is improper to state a personal opinion in an opening statement. Avoid phrases such as “*I believe*”, “*I think*”, “*I know*”, or “*We believe*” in

opening statements and in every part of the trial. The advocate's personal belief is not relevant in a trial. The judge will decide the case based on the evidence and the law, not what the advocate believes.

Advocates might consider using an exhibit during an opening statement to make a point. It may be a diagram, a photo, or even a map that provides context to the opening statement. In some cases, the use of a chart or diagram is essential to explaining the advocate's case. The use of an exhibit to make such a point bolsters the opening statement and makes it even more memorable to the judge and will allow her to better follow the testimony during the trial. However, make sure that your exhibit is accurate.

Whether an advocate volunteers weaknesses in his case is ultimately a strategic decision, based upon the advocate's knowledge, training and experience. It is necessary to at least consider this option. In doing so, the advocate should consider whether the weaknesses will come to light during the trial no matter what he does. If the evidence is likely to come to light whether the advocate admits them or not, he should seriously consider admitting it in his opening statement. This gives the defense attorney credibility with the panel and allows him to minimize the weakness's impact by putting it into context. For example:

“There is no dispute that Mr. Aleksandar was driving the 2009 BMW and that the car had 50 kilos of heroin in the trunk. But you will hear no evidence that Mr. Aleksandar was aware that the drugs were in the trunk.”

Failing to mention a crucial weakness might cause the judge to think the advocate is prone to hiding matters or that the advocate does not see his case in the proper context. This may lead the judge to think the advocate is not trustworthy.

Remember the rule of primacy and recency. If the advocate decides to admit a weakness in a case, it should be buried somewhere in the middle of his opening statement. Beginning with a weakness or ending with a weakness only makes it more likely that the judge will remember it, while sticking the weakness in the middle of an advocate's opening statement shows that he is honest while lessening the impact.

The following is a possible model for the construction of an opening statement:

- i. Introduction: theory of the case
- ii. Introduce the parties to the case
- iii. Set the scene for the case
 1. Where it happened
 2. When it happened
 3. Brief description of the scene
- iv. Tell the story
- v. The issue to be decided by the judge
- vi. The basis for finding the defendant not guilty

Using this outline will help the advocate create an opening statement that will effectively convey the facts and introduce the judge to the evidence.

5. DIRECT EXAMINATION

The fundamental point of a trial is to teach the judge or panel about your theory of the case. The advocate, from opening statement through closing argument, is teaching them the facts from his perspective in a way that will cause the judge or panel to agree with the advocate's theory of the case.

Effective direct examinations require the advocate to be thoroughly prepared and to have formulated an effective theory of the case. On this basis, the advocate will determine what she wants her witnesses to testify to. That will then allow her to select lines of questioning that allow the witness to tell a story in support of the theory of the case.

During the direct examination it should be the witness, not the advocate, who is the center of attention. The advocate must conduct the examination of her witnesses in such a manner that the judge's attention is focused on the witness. Evidence comes from the mouths of sworn witnesses, not from the advocates, so you must ensure that the panel is listening and absorbing all that your witness has to say. Your witness will be believed and remembered not because of how brilliant you were but on the manner and content of the witness's answers. It is for this reason that you need to spend time preparing each witness for their testimony at trial.

A. The Elements

Direct examination of a witness is more than simply asking him *“Please tell the judge what happened.”* You, the advocate, must decide what parts of the witness’s testimony are important; then make sure your questions highlight those and skim over the rest. The advocate should think of herself like a writer: how can she convey the story to the listener, in this case the judge or panel, in the manner best calculated to let them feel and see what happened?

Effective direct examination has certain aspects that will be common for all witnesses. The first is: try to keep it simple. Keep this in mind throughout all of your presentations at trial. A witness knows many things but only some of them are important. You should focus the witness’s testimony on the important things and omit issues that are not important. If you have the witness telling everything they know the judge will get bored, or worse, confused, about what is important. For example, in a case involving fraud, it probably will not make any difference whether one of the people had a white shirt or a blue shirt on, or whether it was a sunny day or rainy. The same applies to dates and times: some are important, some are not. So concentrate only on those that are important to support your theory of the case. This will also make the testimony less confusing to the panel and shorter.

Judges appreciate presentations that are brief and to the point. Studies have shown that peoples’ attention spans start to drop after about 20 minutes. As a result, most judges have the same thought at least once during a trial when listening to a witness or a lawyer – just get to the point. When preparing your witness it is your job to weed out the irrelevant material and focus your questions so that only the important information is testified to.

When you have a number of witnesses who will testify in support of your theory of the case, it is a good practice to call them so that their testimony develops the story you are trying to tell chronologically. And that general rule should be applied as well to each individual witness who testifies. So consider asking questions of each witness that allows them to give testimony that develops the story chronologically. People are used to hearing explanations of past events related to them chronologically, so presenting witnesses and their testimony this way will make it easier for the

panel to understand and to remember your theory of the case. Remember that your job is to educate the judge or panel as to your theory of the case.

When presenting the witness's testimony, the most common and logical order is as follows. First, develop the personal background of the witness. In other words, lay a foundation for why this person's testimony is important. This should be done quickly. For example, in a bank robbery case, an eye-witness should answer questions that establish where she was and when at the point she saw the robbers. For a witness who is simply relating what she saw, it is probably completely irrelevant whether she is married, has children and how they are doing in school. If the witness is an expert witness, you should ask her about her qualifications. For example, if the witness is a fingerprint expert, you should ask her about her training and experience in that field.

Introduction of the witness actually begins before she takes the witness stand. People form impressions of other people as soon as they look at them. If a witness comes to court with dirty clothes, looking like she just got out of bed, she will not have the same credibility as someone who arrives looking better. The witness should be dressed appropriately for her occupation. Remember that this applies to the defendant, as well.

The witness should describe the scene. This should include testimony making it clear that the witness was in a position to observe what she is testifying about. Follow up questions to an eye-witness might include: "*Was there anything blocking your vision?*" or "*Could you see the events clearly?*" The witness should describe the scene without going into unnecessary detail, such as exact distances, times and so forth; this will slow down the flow of the story and the attention of the judge or panel will wane. Some advocates will use photographs or other exhibits to help explain the scene; others feel it detracts from the flow of the testimony and save them as a way of recapitulating the witness's testimony near the end of her testimony. The purpose of setting the scene is to give the judge an image of the location before moving into the action portion of the testimony. If you use photographs, consider having the witness interact with them. For example, by pointing out in the photograph where events took place as she describes each one. This makes the exhibit more understandable and more interesting.

The witness should then get to the heart of her testimony. For the following example, imagine that you have established the witness's location in the description, and now may proceed as follows:

Q: "You said you were at the corner of Boulevard K. Misirkov and Boulevard Goce Delcev at 10:00 on the 14 July, and was there anything that caught your attention that day?"

A: "Yes."

Q: "What was it that first caught your attention?"

A: "I heard gunshots."

Q: "Did you look to see where they were coming from?"

A: "Yes, they were coming from the bank."

Q: "After hearing the shots, what did you see?"

A: "I saw two men running from the bank waiving their pistols in the air."

The advocate can give the judge a feeling for what was happening by regulating the pace of the examination. This is the segment of the witness's testimony that the advocate wants to emphasize, so he will accomplish that by taking the testimony in small segments. The critical action of the witness seeing the bank robbers in action may have only taken a few seconds, but the advocate will want the testimony to develop so that the situation unfolds as if in controlled slow motion. The advocate wants the judge to absorb every detail and stress the exciting part of the case. Accordingly, the advocate would then ask questions requiring the witness to describe each man, whether each had a weapon, whether the witness actually saw either of the men fire the weapon, which way they ran, whether they got into a car, which direction the car traveled, etc. In other words the advocate wants to give the judge the full flavor of what happened.

To ensure the testimony is effective, remind each witness you call to listen to the questions asked and answer only the question that is being asked.

Try to use simple language. This admonition is particularly important when trying a case in front of lay judges. You want them to understand your questions and the witness's answers. Some advocates and witnesses think they are impressing people by using complicated words or phrases instead of simple direct ones. Using complex terminology risks confusing the panel and diminishing the impact of the testimony. The advocate should consider

advising the witness before the trial to use words that are common. This is especially true if the witness is an expert witness or police officer. If the witness must use technical terms to describe, for example, the results of scientific testing, make sure that the terms are explained as soon as they are used. This will ensure that the judge or panel understands the significance of the testimony. Also, no judge wants to feel stupid because she does not know what the witness is talking about and this will irritate her.

Here are some examples of how to simplify the testimony:

Rather than ask *“Did you have an occasion to converse with him?”* ask *“Did you ever talk with him?”*

Rather than ask *“How long have you been so employed?”* ask *“How long have you been an auto mechanic?”*

Caution witnesses to avoid statements such as *“Mr. Zivkovic, not the defendant, debited the credit account.”* It would be better to say *“Mr. Zivkovic, not the defendant, withdrew the money from the checking account.”*

If a witness says something which makes no sense, or uses a technical term which you think the judge may not know, you should have him explain his answer. This should be done in a manner that will not embarrass the witness or make it appear that he does not know what he is talking about and thereby hurt his credibility. For example, in response to a confusing answer, you could say: *“I missed your answer. Could you please explain it?”* Or if the witness uses a technical term: *“You used the term Mitochondrial DNA. Can you explain what that is?”* The judge will appreciate you clearing up any ambiguity.

Leading questions are not permitted during the direct examination of witnesses. A leading question is a question that suggests the proper answer. For example: *“Isn't it true that one of the bank robbers was 1 and ¾ meters tall?”* or *“The bank they ran out of was the Bank of Serbia, correct?”* Both of these questions suggest that the proper answer is *“Yes”* and are therefore leading questions. The proper way those questions should be asked are: *“How tall were the bank robbers?”* and *“What was the name of the bank that you saw them run out of?”*

Some lawyers seek to avoid asking leading questions on direct examination by constantly asking the witness: *“And then what happened?”* That question is acceptable if not used too often. When it is constantly used it makes the testimony seem dull. A way to avoid this is to build on the previous answer given by the witness. This also gives you a chance to repeat something that was significant. Using an example, you might ask: *“After you looked at the clock, saw that it was 19.00 hours, and your son walked into the apartment, what did you do next?”* The first part of the question serves to remind the judge that your client, the witness’s son, was at home and not at the scene of the crime when the crime occurred.

Use exhibits to summarize facts. The advocate should consider the use of exhibits and charts when dealing with large sets of numbers or names which can be confusing as well as boring. Similarly, when describing a scene it can be useful to have a diagram showing where the places are located. This will make the witness’s story more comprehensible. In our bank robbery example, a diagram showing the street where the bank was located, where the witness was standing, which way the robbers fled, and so forth would assist the judge. As noted earlier, when using exhibits, charts and diagrams, the witness should interact with the exhibit by pointing to the parts and explaining each aspect. When dealing with large numbers, for example in a major economic fraud case, you might consider having an exhibit which summarizes the numbers, such as total amounts of deposits or withdrawals from an account. But do so only if it supports your theory of the case.

Be sure to listen to the answers. Trial lawyers who become too absorbed in their notes often miss answers that might require clarification. The following is an embarrassing true example of what can happen when an advocate fails to listen to the witness’s answers.

Q: “How many children do you have?”

A: “Three.”

Q: “How many are boys?”

A: “None.”

Q: “So do you have any girls?”

Try to keep eye contact with the witnesses during their testimony. It will help you focus on the answers. It also shows the judge that you are interested in the answers and that interest will carry over to the judge. And it also gives the impression that the witness is not simply going over a script which was prepared in advance.

Prepare the witnesses. Many witnesses have never been in a courtroom and some will be scared. The advocate should explain the procedure regarding the witness's appearance. This includes verifying that the witness knows where the courtroom is, where the witness should wait until she is called to testify and what will happen once she comes into the courtroom. The advocate should explain where the witness stand is located, when the oath will be administered and so forth. Let the witness know that after you finish questioning her on direct examination, she will then be subject to cross examination. Explain what cross examination is and the potential questions that will be asked on cross examination. The witness should also be informed that there is nothing wrong with meeting with the advocate before trial and if she is asked on cross examination whether such a meeting took place she should acknowledge it.

The advocate should not try to tell the witness what she should say while testifying. Instead, the advocate should give the witness information that will make her feel more comfortable and ensure accurate testimony.

The advocate should tell the witness to tell the truth. This is probably the most important admonition of all. Witnesses must tell the truth even if the answer may be embarrassing.

If the witness does not hear a question, or understand it, the witness should ask to have it repeated. This is true even if the judge is the one who asked the question. If a witness is guessing what the question is, they may guess wrong. That can make them appear evasive when in fact they simply did not understand the question.

If a witness is asked a question and then the attorneys get into an argument over it, and during that argument the witness forgets the question, the witness should ask to have it repeated.

Tell the witness not to guess. If the witness does not know the answer, she should just say so.

If the witness has forgotten something, it is acceptable to inform the questioner of that fact. Everyone has forgotten some things they once knew.

The witness should be polite and respectful at all times. This includes with opposing counsel.

The witness should be instructed to listen to the questions and answer only the question that is asked. Witnesses who provide lengthy answers beyond what is asked of them appear to have a bias in the case or to be not smart enough to figure out what the question was. Judges will often stop listening to answers that are not responsive to the questions asked.

Witnesses should be prepared for the fact that on cross examination they may disagree with the prosecutor. If what the prosecutor says is incorrect, the witness may say so and give the correct information. However, the witness should try to do so politely.

The witness should not try to evade a question. This is easy to spot and the panel may assume the true answer is worse than it really is.

The witness should be allowed to see a document referred to in questions, especially if doing so will refresh his memory as to its contents. No witness should be expected to memorize documents.

If the witness is shown a document which he has not seen recently, or at all, he should take time to read and understand it before he answers any questions about it. If the witness is being questioned by the prosecutor about a document, the witness or the defense attorney should not be afraid to ask the prosecutor what portion of a long document contains the information the prosecutor is referring to in his questions.

A witness does not have to agree with a prosecutor's or anyone else's interpretation of a document. If the witness disagrees, she may say that it is not how she interprets it and may state what she thinks the particular portion means.

Before the trial, advocates should consider reviewing with the witness all prior statements the witness has given, as well as asking the witness if there is any other information that he or she knows about the case. The advocate may review with the witness the subjects of the questions that will likely be asked on direct examination, as well as on cross examination. It is not unusual for the advocate to come up with a question which the witness does not understand, so it is better to clear those up before the trial. Pretrial preparation is the time to find this out and rephrase the question so that during the trial the witness will understand what information the advocate is seeking to elicit.

In the pretrial preparation, defense attorneys should consider asking the witness if there is anything that might come up during the trial that could be embarrassing to the witness or to the lawyer's case. If there is, then the lawyer can ask the witness about it during direct examination and give the witness a chance to explain the potentially embarrassing material. If there is something in the witness's past that could damage the witness's credibility, the defense attorney is usually best served by bringing this out on direct examination through his own questions. This allows the defense attorney to put the problem in a favorable context, usually by asking the witness questions that allow her to explain the problem, and shows the judge or panel that the defense attorney is being honest and can be trusted, a perception that will be useful throughout the trial but especially in closing arguments. Failing to do so may lead to a conclusion that the lawyer is trying to hide things. However, as with an opening statement, whether to bring out potential weaknesses is a strategic question for the advocate. He has to determine whether the fact is something that the prosecutor or victim will bring out in cross examination. The advocate has to weigh the risk of bringing out something damaging to his case that the opposition does not know, versus dealing on his terms with something that is going to come out anyway on cross examination. An example of this follows:

Q: "Mr. Ivanov, were you running down Boulevard Nikola Lazarev on 14 July around 10 a.m.?"

A: "Yes."

Q: "Why were you doing that?"

A: "I was late for an appointment with my doctor."

If possible, any weakness in a witness's testimony should be placed in the middle of his testimony. Following the rule of primacy and recency, this will ensure that it will make less of an impression than in the beginning or conclusion of the testimony.

Finally, try to end the direct examination of a witness on a high point or one which sums up why the witness was on the stand. If the witness is the defendant then the final question might be:

Q: "Finally, Mr. Ivanov, did you commit the bank robbery that you are charged with?"

A: "Absolutely not!"

If the defendant is credible, this is a good way to end his direct examination.

6. CROSS EXAMINATION

Cross examination means questioning the witness after he or she has been asked questions during the direct examination. In the movies, cross examination is the most dramatic part of the trial. Movies depict the defense attorney or prosecutor brilliantly breaking the other side's key witness, who confesses that he has lied all along and admits the truth. But in reality, this almost never happens.

Cross examination is conducted for two purposes: to get helpful testimony for your theory of the case or to impeach the witness by discrediting him or his testimony. It is also a chance for the lawyer to make assertions through questions and have the witness agree with them. By getting the witness to agree with the lawyer's assertions, an effective cross examination is as close as the lawyer comes to actually testifying himself.

To take advantage of this opportunity, however, the advocate must be prepared. He must have carefully reviewed each witness's prior testimony or statements and be familiar with any documentary evidence. Without this pretrial work, the advocate will be unable to impeach the witness with prior inconsistent statements or with other evidence, such as business or bank records or reports of experts.

A. Whether to Cross Examine

The most fundamental question related to cross examination is whether to cross examine at all. Too many advocates engage in cross examination because they think they have to. This is wrong. There is no requirement that an advocate cross examine a witness, and improper cross examination can be harmful to the advocate's case, allowing the prosecution witness to explain or clarify earlier statements. In fact, telling the judge that you will not cross examine a witness may signal to the judge that the witness was not important, thereby doing more damage to the witness's credibility than any cross examination would. Before engaging in cross examination, every advocate should ask herself the following questions:

(1) Did the Witness Hurt My Case?

All witnesses are not of equal importance. Some witnesses may be called simply to establish a technical element or authenticate a document. Others may offer testimony that does not hurt your theory of the case. For example, in a narcotics case, if your theory of the case is that although there were illegal narcotics in the defendant's car, the defendant did not know about them and thus is not guilty, there is probably no point in cross examining a laboratory technician who tested the drugs for the presence of illegal substances, since you are not contesting that there were drugs in the car. Unless the witness hurts your theory of the case, there is usually no reason to cross examine them.

(2) Was the Witness's Testimony Believable?

Some witnesses called by the prosecution will not be believable. For example, a witness who testifies that he jumped over a three meter high fence to get away from robbers lacks credibility. At other times a witness's testimony will be contradicted by other witnesses who are more credible. In these situations, the witness may have so little credibility that asking him questions on cross examination may offer very little gain. And in such a situation, if you ask any questions on cross examination, they may offer the witness an opportunity to correct his testimony. For example, if the advocate were to ask whether the

fence was really three meters high, the witness may realize that sounded ridiculous and might correct his testimony to say he misspoke and that it was really only a meter and a half high. In other words, if the witness's testimony after direct examination helps you or at least does not hurt you, consider not asking any questions on cross examination. You can then underscore how unbelievable the witness was during your closing argument.

(3) Did the Witness Say Less than Expected on Direct Examination?

Sometimes through sloppy pretrial preparation or a mistake by the witness which the prosecutor did not notice, a witness will omit an important part of his testimony. If opposing counsel makes a mistake and leaves out important material, it might be best not to ask the witness any questions on cross examination, since doing so would allow the witness a chance to testify to these issues.

B. The Essentials of Cross Examination

Most of the witnesses you will cross-examine have already testified on direct examination and offered evidence that damages your case. Thus, most are in some sense adversaries. How can you elicit favorable testimony from a witness who is adversarial to your case?

What follows are some guidelines to use that will assist you to elicit helpful testimony, even from hostile witnesses. However, as with the other suggestions or rules in this manual other than the rule regarding pretrial preparation, they should not be slavishly followed. Each case is different and there may be good reasons to disregard some of these guidelines depending on the circumstances of the particular case. As you consider these guidelines, remember to set realistic expectations for the results of your cross examination. If the result of your cross examination is that you made one point in support of your theory of the case, you have conducted a successful cross examination. Two is outstanding. It is rare to get three or more.

(1) Be brief

Long cross examinations are rarely successful. Due to the limits of human attention, cross examinations that last longer than 30 minutes risk losing the attention of the judge or panel. Moreover, every question you ask carries the risk that the witness may say something that will hurt your case. The more questions you ask, the greater the risk. And remember that you do not have to ask any questions if the witness did not hurt your case and you have nothing to gain by the cross examination.

(2) Use short questions and plain words

Your cross examination questions should be designed to move the witness's testimony forward one frame at a time, like the individual pictures on a movie film. This will allow the testimony to develop clearly and logically. To do this, keep your questions short. Use plain words to discourage the witness from quibbling with you. Here is an example:

Q: "You went to work on April 26, 2013, correct?"

A: "Correct."

Q: "That was a Friday, wasn't it?"

A: "Yes, it was a Friday."

Q: "You left your house at about 9:00 a.m.?"

A: "Yes."

Q: "You then walked to work?"

A: "Yes."

Q: "You arrived at work at about 9:15 a.m.?"

A: "Yes."

Q: "When you arrived at your store you unlocked the door, correct?"

A: "Correct."

Q: "Then you entered and relocked the door?"

A: "Yes."

Q: "Then you counted the cash on hand?"

A: "Yes."

Q: "After that you restocked the shelves?"

A: "Yes."

Q: "Then you unlocked the doors, isn't that right?"

A: "Right."

Asking short questions will ensure short answers and will get the witness used to agreeing with you. These in turn will allow the story you want to tell to unfold logically and without interruptions. Long questions will invite hostile witnesses to ask for clarification or quibble with you, causing you to lose control of the witness and of the story. For example:

Q: "You arrived at work at 9:15 a.m. and then unlocked the door and counted the cash, correct?"

A: "No."

In this example, it is unclear which assertion the witness disagrees with – that he arrived at 9:15 a.m., or that he then unlocked the door or that he counted the cash. The advocate in this example will be forced to rephrase the question. Thus, the adversarial witness has gained control over the lawyer and broken up the flow of the questioning.

(3) Use leading questions

This is one of the most effective tools to use during cross examination. Using leading questions can force even hostile witnesses to agree with you. Leading questions are questions that suggest the answer. They usually, but not always, require the witness to respond with a "Yes" or "No" answer. Leading questions give you control over the answers, forcing the witness to agree with the point you are trying to make. Thus, for example, when trying to show that eye-witness identification may not be reliable, the questioning might go as follows:

Q: "Isn't it true that on the night of 14 July 2011 you went to the Belgrade Café?"

A: "Yes."

Q: "And while there you had 5 glasses of Vodka, isn't that true?"

A: "Four or five."

Q: "And you stayed at the Belgrade Café for 45 minutes?"

A: "About that, I think it may have been a little longer."

Q: “After you left, you walked down Boulevard Kralja Aleksandra?”

A: “Yes.”

Q: “During your walk, you saw the bank being robbed?”

A: “Yes, as I was walking.”

Q: “The bank is about a two minute walk from the Belgrade Café, isn’t it?”

A: “I guess so.”

Q: “You claim you saw Mr. Ivanov running out of the bank then?”

A: “Yes.”

In this example, the use of leading questions results in the facts coming from the lawyer and the witness more or less agrees with those facts. As noted, this is as close as the lawyer can get to actually testifying in the case. The use of short, plain, leading questions also narrows the judge’s attention to the theory that the advocate has set forth – in this case that the eyewitness was too drunk to make a reliable identification.

Notice that the lawyer in this example did not ask: “*You were too drunk to reliably observe the robbery and remember what you saw, weren’t you?*” If the lawyer had asked the question that way, the witness would likely have disagreed and offered an explanation or clarification to the contrary.

Do not ask questions on cross examination that call for the witness to explain. As a rule, do not use questions during cross examination that begin with “*Who*”, “*What*”, “*Where*”, “*When*”, “*Why*” or “*How*”. If you ask these questions, you surrender control of the form and content of the answers to the hostile witness and allow him to explain. Allowing a hostile witness to explain himself or his testimony is almost never helpful.

(4) You should not be surprised by the answer to your question

When you ask a question on cross examination, you should know what the answer will be. And you should ask only questions that you know will elicit answers that either provide support to your theory of the case or that will impeach the witness.

This guideline requires you to prepare. You must know what the witness has said previously by reading the police reports and conducting some pretrial investigation yourself. This will allow you to anticipate the

witness's answers to your questions and make an informed decision about whether you will ask the questions in the first place. It also will allow you to impeach the witness if she gives a different answer during cross examination than she did when talking to the police.

(5) Listen to the answers

As during direct examination, lawyers who do not listen to the witness risk appearing foolish or inattentive. They also miss opportunities, for example to impeach a witness who has just given an answer that is inconsistent with a previous statement he has made. It is fine to use notes during cross examination and to think about what your next question will be. But you must also focus on the replies to your questions. One way to do this is to maintain eye contact with the witness, rather than staring at your notes.

(6) Ask questions the witness cannot deny

Asking questions that force the witness to agree with you is one of best ways to control the outcome of the cross examination. To do this, make sure your questions are supported by common sense or the testimony the witness has just given on direct examination. They can also be based on a previous statement by the witness either to the police or to others. Here is an example of how to use such questions to impeach a witness who has damaged your case during direct examination by noting omissions he made to police.

Q: "You talked with the police after this incident, didn't you?"

A: "Yes."

Q: "You answered their questions, correct?"

A: "Correct."

Q: "You were completely honest with them?"

A: "Yes."

Q: "You told them all the important facts?"

A: "Yes."

Q: "Yet you failed to tell them that you had been drinking right before you claim to have witnessed the robbery, didn't you?"

These questions make the witness look bad no matter how he answers. For example, if he denies that he was completely honest with the police, he will appear to be a liar. So unless he wants to appear to the judge to be a liar, he will have to answer “*Yes*” to this question. Such a witness might respond to the last question by saying that he did in fact tell the police that he had been drinking, but that the police failed to note it in their reports. That is still a good answer for the defense attorney, since he can question the credibility and ability of the police for failing to note such an important fact in their reports. No matter how the witness responds, the outcome is a good one for the defense attorney.

As noted above, impeaching a witness means calling into question his credibility. Impeaching hostile witnesses effectively can be devastating to the case of the prosecution. But before impeaching a witness, the lawyer should first ask questions that elicit any testimony that is favorable to her theory of the case. Using the last example, the lawyer should first ask questions that secure the witness’s admission that he had 4-5 shots of vodka. Only after the lawyer has gained that admission from the witness should she ask him these questions related to whether the witness was trying to hide the fact that he had been drinking from the police. The reason for this is obvious: the witness, who is probably not willing to cooperate with you in the first place, will likely be even less cooperative with you after you have implied that he has something to hide.

(7) Do not repeat the questions asked of the witness on direct examination

Many advocates have witnesses repeat testimony they gave on direct examination on the theory that somehow the testimony will fall apart with the retelling. This almost never happens. If the testimony was bad for your theory of the case during direct examination, hearing it a second time only makes it worse.

(8) Know when to stop

No matter how well-considered and artfully phrased, every question on cross examination posed to a hostile witness carries with it the risk that the

answer will further damage your case. If you limit the number of questions you ask, you limit that risk.

Every question you ask should in some way support your theory of the case. Thus, if a witness's testimony did not damage your theory of the case at all, do not ask questions about it. Remember that almost all cross examinations result in you scoring only one or two points in support of your theory of the case. Do not try to overreach and win the case on a single cross examination. That usually leads to witnesses who give answers that hurt your case. Know your goal before you start your cross examination and stop once you have reached it.

(9) Save your argument for closing

Most lawyers who have conducted cross examinations have made the mistake of getting into arguments with the witness. Avoid this. You lose control of witnesses when you argue with them and lose the ability to have them affirm your statements. Even worse, arguing with the witness damages your credibility with the panel, bringing you down to the level of the witness and making you appear no better. You will appear to have lost control of the situation.

Avoid asking questions that attempt to get the witness to agree with your theory of the case. This invites them to argue with you. Here is an example:

Q: "Isn't it true that you were drinking on the night of 14 July 2011?"

A: "Yes."

Q: "And isn't it true that you got drunk?"

A: "No, I wasn't drunk."

Q: "How can you say you weren't drunk when you said earlier that you'd had 4-5 drinks in 45 minutes?"

*A: "I've had lots of practice." (Witness smiles at the judge, who laughs).
"Besides, I was eating. And they were small drinks."*

Q: "But 4-5 drinks would impact your ability to accurately perceive events, right?"

A: "Not at all, I was thinking and perceiving clearly that night."

In this exchange, the witness is getting the better of the lawyer. This is because the lawyer is not only ignoring some of the guidelines, above, but is also trying to get the witness to agree to one of the lawyer's arguments in support of his theory of the case – that the defendant did not rob the bank and that the witness was mistaken when he said he saw the defendant. The points the advocate is asking about should be saved for closing argument. In this example, the lawyer will probably never get the witness to agree that he was drunk. So instead, the lawyer should simply establish on cross examination that the witness had 4-5 drinks within 45 minutes right before the robbery. The lawyer can then argue during his closing argument that the witness was too drunk to perceive the situation correctly.

(10) Techniques for difficult witnesses

If a witness refuses to answer a question or wants to argue, consider asking the witness if he understood the question. Then ask the question again. If the witness still does not directly answer the question or insists on arguing, let him finish. Then ask him if he has anything else to add. Then ask the question again. If the witness still wants to argue, the lawyer can ask *“What about my question do you not understand?”* As a final resort, consider asking the judge to order the witness to answer the question. And remember that if a witness is too combative, the judge or panel will notice and will likely conclude that the witness is not credible. This is especially true if you have tried patiently to get them to answer your question.

C. Some Final Thoughts on Cross Examination

As in all other areas of the trial from the opening statement to the closing argument, try to start and end your cross examination on a high note. People remember best what happens first and last.

Witnesses, like most people, will probably think in chronological order. Also, they will probably be expecting you to ask them about events in chronological order. So consider asking a hostile witness to relate events out of chronological order. By not starting your cross examination at the

beginning of a story, you may surprise the witness and thereby disarm him. This technique also makes it likely that the hostile witness will not be able to anticipate your questions. He may also not be aware that you have established a point until you have made it. You should not jump around too much, however, since that could confuse the judge.

With some witnesses you may want to attack them at the onset to throw them off balance. But with many others it is better to lure them into a feeling of false security. You may start out your questioning with a couple of easy questions; you may even smile when you ask them. The witness will relax and be off his guard. Then you can become confrontational.

In planning a cross examination, always consider probing the witness's ability to see, hear, smell or use any of his other senses upon which his testimony is based. Was the witness drinking or using drugs? If so, this may affect his ability to perceive and remember. How far away was the witness from the scene of the action? Was it dark and the area was not well lighted?

When impeaching a witness with a prior inconsistent statement, you should first get the witness to confirm his testimony. Then confront him with the prior statement that is inconsistent with that testimony. He may not recall the exact time he made the prior inconsistent statement, but the advocate should be able to get him to acknowledge that he made a prior statement. Then read the prior inconsistent statement to him. The following is an example of this technique. Notice how the advocate gets the witness to commit to her testimony on direct examination, then to recall making a prior statement and then springs the trap.

Q: "In your testimony on direct examination you testified that you were 5 meters away from my client during the stabbing, correct?"

A: "Yes."

Q: "That testimony was accurate?"

A: "Of course."

Q: "And because you were so close that is why you are so sure of your identification, right?"

A: "Yes."

Q: "Isn't it true that on the day of the robbery you were interviewed by Officer Peric?"

A: "I do not remember the name of the officer; but yes, I talked with a police woman."

Q: "And that was shortly after the robbery?"

A: "Yes."

Q: "I am showing you a witness statement taken by Officer Peric; that is your name at the top of the report, is it not?"

A: "Yes."

Q: "And that is your signature at the bottom?"

A: "Yes."

Q: "Would you please read out loud the part of the statement that is highlighted in yellow?"

A: "I was standing about 15 meters from where the man was stabbed."

Q: "No further questions."

At this point, the lawyer should probably stop and either move to another line of questioning or cease the cross examination of this witness. The lawyer has made his point and can argue during closing argument that this witness is unreliable. The lawyer can also argue that the statement the witness gave right after the event was more reliable because her memory was better immediately after the event.

When the witness has made a plea bargain with the prosecutor for a reduced charge or sentence in exchange for cooperating with the prosecutor, the defense attorney should highlight this during cross examination. He can then argue during closing argument that the witness was not being entirely truthful because in order to obtain a favorable plea bargain, the witness had to testify to what the prosecutor wanted him to, rather than to the truth. The following is an example:

Q: "Mr. Danilovic, you were facing the possibility of being convicted for armed robbery 2 months ago, isn't that right?"

A: "Yes."

Q: "And as a result of that, you could have been sentenced to 5 years in prison?"

A: "Yes."

Q: "5 years is a long time, isn't it?"

A: "Not that long."

Q: "Long enough so that you made a deal that reduced that time to 3 years, isn't it?"

A: "I made a deal."

Q: "As part of that deal, you agreed to come to court today and say that my client, Mr. Lazarevski was a drug smuggler, correct?"

A: "My deal was that I would tell the truth about what I know about Mr. Lazarevski."

Q: "And by your testimony today you are going to serve 2 less years in jail, right?"

A: "Yes."

How and when to cross examine a witness is a skill that takes time and practice to develop. It also takes preparation. All lawyers have made mistakes during cross examination. But by following these guidelines, you can minimize the risks and increase the chances of bolstering your theory of the case.

7. RE-DIRECT EXAMINATION

Re-direct examination means asking your witness questions after the other lawyers have had a chance to cross-examine her. Two rules should be kept in mind regarding re-direct examination. The first is a rule you should follow both in direct and cross examination: only ask questions that elicit answers that bolster your theory of the case. Thus, if the prosecutor on cross examination has not damaged your theory of the case, you may consider not asking any questions on re-direct examination and get the witness off the witness stand. On the other hand, if the prosecutor has elicited answers that damage your theory of the case, then it is probably wise to conduct re-direct examination that rehabilitates the witness or clarifies the testimony. For example, in the robbery case we have been using:

Q: "Do you remember on cross examination that the prosecutor asked you whether anything was blocking your view of the two men who ran out of the bank?"

A: "Yes."

Q: "What was your answer?"

A: "That a light post blocked my view."

Q: "Did that light post prevent you from seeing what color shirts the men were wearing?"

A: "No."

Q: "Did it prevent you from seeing that they had guns?"

A: "No."

In this example, the defense attorney is showing that although the eye-witness admitted on cross examination that there was something blocking her view of the robbers, she was still able to see crucial details and therefore her testimony is valuable.

The second rule of re-direct examination is to ask only questions that address issues that were raised on cross examination. Judges may require you to do this as a formal rule in their court. The primary reason for this rule is an acknowledgement that issues not addressed during cross examination are usually not in dispute and thus the judge or panel will have little or no interest in them. You risk irritating or boring them if you ask questions of witnesses that have little or no bearing on the outcome of the trial. As with all rules, however, there are exceptions. For example, if you have made an oversight and not asked an important question on direct examination and the prosecutor has taken advantage of this by not raising it during his cross examination, you should try to ask the witness the question on re-direct examination.

8. CLOSING ARGUMENT

The closing argument is the last chance that the advocate has to influence the judge or panel. For that reason it is critical that the advocate present her arguments in a logical and forceful manner. The lawyer must explain to the judge why the evidence supports the verdict the advocate is seeking.

As with every other phase of the trial this one requires preparation. Indeed, if the lawyer has adequately prepared, she should have a good idea of her closing argument even before the trial has started. In fact, whether the closing argument the lawyer has formulated prior to trial has been

significantly modified after the evidence has been heard at trial is a litmus test for adequate pretrial preparation. Successful trial attorneys formulate their closing arguments before trial and only make minor modifications to them by the end of the trial. Trials usually do not unfold as planned, so some adjustments will be required to the closing argument. But the theory of the case and the broad outlines of the closing argument should stay the same.

In preparing a closing argument the advocate will, if things went well for her, repeat the themes that she first set forth in her opening statement.

1. The Hook

Take advantage of the first minute or two of the closing argument, when you have the judge's full attention, to remind the judge of your theory of the case. Here are some examples:

“Mistaken identity. This is a case about a witness who could not see clearly what happened on the night of 14 July, and as a result picked someone out of a lineup who now stands in jeopardy of going to prison for a crime he did not commit.”

Or another way of expressing the same theory:

“The wrong man. How many times have we seen someone we knew and waved at them only to find out it was not who we thought it was? But in this case, the witness mistakenly thought she saw someone, and did more than embarrass herself: she accused an innocent man.”

Do not waste time by thanking the judge or panel. The first few minutes are a golden opportunity. Take advantage of them.

2. Argue!

The closing argument is just that, an argument. The judge does not want to hear a flat recital of what each witness said. She has already heard that when the witnesses testified. The purpose of closing argument is to weave together the relevant testimony of all of the witnesses and admitted

exhibits to show that the judge should believe the advocate's theory of the case. You should mention the name of a witness when you point out a part of his testimony that supported your theory of the case. Explain how the pieces of testimony all come together to support your view. As defense counsel, since you do not have the burden of proof, you may simply want to show how the witnesses' testimony did not come together to support the prosecutor's theory of the case. Under the new CPC, that will require a not guilty verdict. This is not as strong as establishing that the defendant is not guilty, but it is often the only thing a defense attorney can do.

Some advocates have a tendency to deliver lengthy closing arguments. The only thing that accomplishes is to make the judge sleepy. And if the advocate eventually makes a good point in a tiresome monologue, it will be missed. Unless the case is complex, the closing argument in most criminal cases should not be longer than 45 minutes to one hour. This requires counsel to prepare her argument so that she addresses the important points. Do not overwhelm the judge with all the minor details of the case – you risk losing your most important arguments in a welter of unimportant facts.

Repeat words and themes you used in your opening statement. If part of your theory was misidentification of the defendant, you noted this in your opening statement, and your theory was supported by the evidence, repeat this in your closing argument. Indeed, you can even remind the judge that this is what you said the evidence would show in your opening statement. For example:

“As I noted in my opening statement, this is a case of misidentification. Mr. Bolnicki is the victim of sloppy police work, since it was obvious that there was an unreliable identification. Unfortunately the police were more concerned with getting the case over with, than getting it right.”

In your opening statement, you told the judge your theory. Now is when you explain to her why your theory is correct given the evidence that came out at trial. By making reference to specific testimony and/or exhibits, weave the story which demonstrates that the theory you explained in your opening statement has turned out to be correct in light of the evidence.

This means reminding the judge or panel of testimony and evidence from different witnesses to prove your point.

Remember that no one wants to hear your personal opinion. Your personal opinion is not evidence. The judge will decide the case on the evidence, not your personal opinion.

3. Use exhibits

Most of us obtain information through our eyes and ears. Studies have shown that people remember more than twice as much information if they receive it through both hearing and seeing, rather than through only hearing or seeing. You can use exhibits introduced into evidence during the trial or you can create some for use in your closing argument. Use them as a visual complement to your oral argument.

The use of visual evidence also provides a welcome break for the judge from just listening to the advocate talk about the case. Exhibits can be used to show the chronology of events, check lists for key facts, calculations showing money flows or other things that you might want to emphasize to the panel.

If you decide to use visual exhibits during your closing argument, make sure they are out of sight until it is time to present them. If they are visible to the judge or panel before you have discussed them, they will take attention away from what you are saying. Keep them covered before you use them and recover them when you are finished.

4. Use Rhetorical Questions

A rhetorical question is one which a person asks but does not expect an answer. The answer is clear to the hearer by the question. These types of questions can be used to highlight a major flaw in your opponent's case.

The judge cannot answer these questions during the trial but the advocate is trying to implant these in the judge's mind so that when she is deciding the case she will be troubled by them. The following is an example.

“Where is the murder weapon? If Mr. Joskovic really killed Anna as the prosecutor is claiming, wouldn’t the police have found the gun in his house, his car, on his person or anywhere he had been? Ask yourself how is it that the prosecutor has not presented one witness who has put Mr. Joskovic in the room with Anna when she was killed? When has simply being in the neighborhood of a crime a crime?”

5. Argue your strong points

The prosecutor has the burden of proof, so he must establish that his case proves the defendant guilty and not just that the defendant’s explanation does not make sense. But for the defense attorney, it is usually more persuasive to show why you are right rather than that the prosecutor failed to prove his case. When you concentrate solely on the other side’s weakness, you may create the impression that your side is weak. Given the available evidence, however, this may be the only thing that a defense attorney can do in a particular case. He should point out that the defendant need not prove anything and that the burden is on the prosecution to prove guilt.

6. Deal with weaknesses

Do not think you can avoid addressing weaknesses in your case by ignoring them; the prosecutor will certainly point them out. If you address your weaknesses yourself, rather than ignoring them, you create the impression that you are an honest person who can be trusted and believed. If the panel believes you can be trusted, they are probably more likely to accept your version of the events. For example:

“It is true that Mr. Jasmin was driving the car in which the drugs were found. But you heard him tell you that he is a generous man who often loans his car to others. The drugs were in the trunk of the car. Who knows how long they had been there? People don’t check their trunks before getting into their car. Someone else could have put them there and was then going to borrow Mr. Jasmin car later to make the delivery. In the meantime, that person knew he could not be caught with them.”

Remember the rule of primacy and recency. If your case has strengths, insert the explanation of your weaknesses in the middle of your closing argument. Like all the other aspects of the trial, in presenting your closing argument you should try to begin strong and end strong.

7. The Organization

The closing argument generally follows a certain organization, although this can vary depending on the circumstances.

- a. The theory of the case.
- b. The issue: what must be proven under the applicable law to convict the defendant.
- c. Your argument about what really happened and the evidence to support your theory. This should include testimony of witnesses, including admissions from prosecution witnesses, exhibits and appeals to common sense and probabilities.
- d. Explaining why the other side's case is weak. This will include attacking the prosecutor's witnesses' testimony, and possibly using rhetorical questions. At the beginning of this portion of your argument, consider discussing any weaknesses in your case. Remember that the burden is on the prosecutor to prove the case, and the defendant never has to prove anything.
- e. Discuss the burden of proof and how the prosecution failed to meet it. For example, in the drug case above, state that the prosecution by law had to prove that the defendant knowingly possessed the drugs and failed to do so.
- f. Ask for the verdict you are seeking. The prosecutor will ask for a finding of guilt on all counts. The defense attorney may ask for a finding of not guilty on all counts; however, the defense attorney has other options. He may seek a not guilty verdict only on the serious charges, or maybe a guilty verdict to a lesser offense than that charged by the prosecutor. For example, this might happen in a case where it is clear the defendant killed the victim, but the defendant is claiming it was an unpremeditated act of emotion when he caught the victim with the defendant's wife.

8. Final Thought

The closing argument is the last chance you will have to speak to the court. Spend the time to prepare a clear, concise and reasonable presentation. It may make the difference in whether you win or lose.

9. CONCLUSION

The rules in this manual are general and should be adapted to each individual case. The key to success is to prepare, practice and be creative. Try something new in each trial. For example, electronic media offers opportunities to highlight testimony and explain evidence if the judge will allow you to use it during trial. And remember that sometimes not saying anything is the best form of advocacy – know when to stop talking and sit down. But if you have strong arguments, make sure to start and end with them, inserting weaknesses in the middle.

The new CPC offers opportunities to those who want to learn how to use it. I wish you success and good luck.