

**The Art of Trial Advocacy:  
Integrating Your Theme & Theory Into All Aspects of Your Trial**

**Saturday, November 5, 2011  
Mohawk Valley Community College  
9:00 – 12:00 p.m.**

**Chair:** Frank J. Nebush, Jr., Esq., *Oneida County Public Defender, Criminal Division*

**Speaker:** Dominic Trunfio, Esq., *First Chief Assistant District Attorney  
Onondaga County District Attorney's Office*

**Sponsored by:**

**Oneida County Bar Association  
Oneida County Assigned Counsel Program  
Oneida County Public Defender, Criminal Division  
Oneida County District Attorney  
New York State Defenders Association, Inc. (NYSDA)**

**CLE Credits: 3 Credits (Skills)**

# **Criminal Track Seminar Series Fall, 2011**

**Sponsored by:  
Oneida County Bar Association  
Oneida County Assigned Counsel Program  
Oneida County District Attorney  
Oneida County Public Defender, Criminal Division  
New York State Defenders Association, Inc. (NYSDA)**

Commencing in the spring of 2010, the sponsors have jointly developed and presented a series of criminal practice training seminars. These programs are offered to district attorneys, public defenders, assigned counsel and government attorneys at the reduced rate of \$25 per program with no geographic restrictions. Oneida County Bar Association members who hold a Sempass are entitled to attend these programs at no cost.

This fall, the sponsors presented the 2011 Criminal Law Academy offering two consecutive Saturdays of training in criminal trial practice and 14 total CLE credits including 2 ethics credits. Since the Academy was a success, the Criminal Track Development Committee is presently developing the curriculum for the 2012 Academy and the Spring, 2012 Criminal Track Programs. NYSDA does a great job announcing the programs and they are also posted on the Oneida County Bar Association website along with vast array of CLE programs in other areas. Check out their website at:

<http://www.oneidacountybar.org>

Reservations for all programs offered by the Oneida County Bar Association can be made by calling Diane Davis at the Bar Association office – 315-724-4901

All programs and program materials are posted on the website of the Oneida County Public Defender, Criminal Division: <http://ocgov.net/oneida/pdcriminal>

This is the last program in the Fall, 2011 Criminal Track Series. We want to thank you for attending and hope you enjoyed the programs we offered. As always we welcome your comments, criticisms, and especially your suggestions for new programs.

As they say in baseball, “See you in the spring!”

## RICK TRUNFIO

*First Chief Assistant District Attorney  
Onondaga County District Attorney's Office*

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Rick Trunfio is the First Chief Assistant District Attorney with the Onondaga County District Attorney's Office in Syracuse, NY where he runs the day-to-day operations of the office. He has served as chief of the Homicide Bureau, and co-prosecuted *People v. James Cahill*, Onondaga County's first death penalty case and personally prosecuted serial killer Nicholas Wiley, who was convicted of First Degree Murder and is currently serving a sentence of life without parole. Chief ADA Trunfio co-chairs the Cold Case Task Force, a team of detectives and forensic specialists, who investigate old homicide cases and suspicious deaths that were previously closed. He is also responsible for the investigation of all suspicious infant deaths and the prosecution of child homicide cases. He previously served as Bureau Chief of the Special Victims Bureau where he specialized in the investigation and prosecution of child sexual and physical abuse cases, sexual assaults against adults and domestic violence. He is a member of the Child Abuse Response Team, the Child Death Review Team and co-chairs the local Domestic Violence Coalition.

He has served on the NYS Division of Criminal Justice Services Commissioner's Committee on the Revision of Sexual Offense Laws which helped to re-write Article 130 and related portions of the NYS Penal Law and Criminal Procedure Law. He has testified before the United States Congress and the NYS Senate regarding the topic of protecting vulnerable victims and witnesses. He is an Adjunct Professor at Syracuse University teaching at both the School of Law and the Maxwell School of Citizenship and Public Affairs. He helped to re-write and edit a chapter in a national publication on prosecuting child abuse. Chief ADA Trunfio presents lectures and workshops at training conferences across the nation on the topics of ethics & professionalism, child abuse, sexual assault, homicide, cold case investigations & prosecutions and trial skills.

Currently, he coordinates Operation IMPACT, a collaborative initiative of local state and federal law enforcement, whose mission is to create and implement a comprehensive strategy to reduce gun and gang violence and narcotics trafficking. Chief ADA Trunfio currently serves on the NYS District Attorney's Association's *Committee on the Fair and Ethical Administration of Justice*, where he sits on both the Ethics and the Best Practices Subcommittees.

**The Art of Trial Advocacy:  
Integrating Your Theme & Theory Into All Aspects of Your Trial**

**Dominic Trunfio, Esq., *First Chief Assistant District Attorney*  
*Onondaga County District Attorney's Office***

**Saturday, November 5, 2011  
Mohawk Valley Community College  
9:00 – 12:00 p.m.**

- 9:00 a.m. – 10:30 a.m.**      **Part One: The Basics of Advocacy and Persuasion**
- Part Two: Case Analysis: Developing a Theme & Theory**
- Part Three: Using Legal issues & Motions to Develop Your Theme  
& Theory and Shape the Framework of Your Trial**
- 10:30 a.m. – 10:45 a.m.**      **BREAK**
- 10:45 a.m. – 12:00 a.m.**      **Part Four: Using Your Theme & Theory to Select Your Jury**
- Part Five: Witnesses and Evidence Presentation**
- Part Six: Opening Statements & Closing Arguments**

**The Art of Trial Advocacy:  
Integrating Your  
Theme & Theory into all Aspects  
of Your Trial**

Presented by  
First Chief Assistant District Attorney Rick Trunfio  
Onondaga County District Attorney's Office  
Syracuse, New York

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*“Excellence is never an accident;  
it is always the result of  
high intention, sincere effort,  
intelligent direction, skillful execution  
and the vision to see obstacles as  
opportunities.”*

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**6 Areas of Focus**

1. Basics of Advocacy and Persuasion
2. Case Analysis and Developing Your Theme & Theory
3. Legal Issues & Motions
4. Jury Selection
5. Witnesses and Evidence Presentation
6. Opening Statements & Closing Arguments

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**Part 1**  
**The Basics of**  
**Advocacy and**  
**Persuasion:**  
**Understanding Your Role as a**  
**Trial Advocate**

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**Your Role as a Trial Attorney**

- Impression Management
- Persuasion
- Advocacy
- Presence

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- Integrity
- Credibility
- Professional & Ethical Responsibilities

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**Impression Management**

- Attention span of jurors
- Educational level of jurors
- Sound bite society



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## The Science of Persuasion

- Primacy and recency
- Emotional chronology
- Dominant emotional theme
- Societal Issues
- 65% of all communication is body language



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## The Art of Persuasion

- Trust and credibility
- Demeanor
- Word choice and phrasing
- How does the testimony fit in the overall impression management of the trial?
- Advocacy

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## Trial Advocacy

*Using evidence, the law, courtroom presence and artful word choice to persuade and convince a jury that your version of the facts is the correct version of the facts*

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### Impression Management, Persuasion and Advocacy

- “A picture is worth a thousand words.”
- Humans learn better when they *see & hear*
- Visual aides assist learning and information retention
- Most jurors will expect to see some form of physical evidence or exhibits
- Make wise use of technology in creating and presenting trial exhibits
- Be a “wordsmith”

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### Word Choice & Phrasing

*Lawyers are trained to perform one basic skill:*

- **Using Words and Language,**
- **To Make Arguments in order to**
- **Convince someone that their position is correct**

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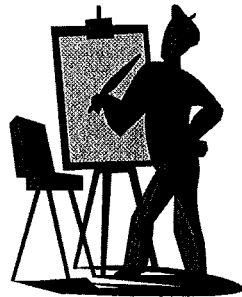
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### Paint a Picture with Words!



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### **Painting Word Pictures**

- Create compelling images for the jury
- Use “impact” words
- Be an effective story-teller

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### **Effective Story-Telling**

- Use “attention steps”
- Use dramatic pauses or silences
- Use powerful quotations
- Be creative in your word choice & phrasing
- Integrate your theme and theory

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What *should* you say?

What *must* you say?

*How* will you say it?

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### **Introspective Checklist**

- Am I clear in my mind about what I want to say?
- Am I using words and phrases to convey what is in my mind in such a way that my audience will get the same picture?
- Am I getting meaningful feedback that tells me where my message is and isn't getting across?
- Am I aware of how I might be distorting information to reinforce my positions?

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### **Introspective Checklist**

- Am I identifying my assumptions and opinions and keeping them separate from the facts?
- Am I remaining objective, or am I injecting too much of myself, my goals, my desires, etc.?
- Am I giving each point its due and helping my listener to understand it?
- Am I communicating in specific, observational terms and providing examples to illustrate what I mean?
- Am I keeping in mind the total impression I am creating, not just the words I am using?

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### **Tips to Improve Your Advocacy**

- Dress for success
- Maintain your natural style - no artificial gestures or movements
- Use humor and sarcasm if it comes naturally
- Use inflections in your voice to make a point
- Project confidence in your case
- Remember: your job as an advocate is to persuade, convince, simplify and make sense of your case using words

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## Part 2

### Case Analysis: Developing a Theme & Theory

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#### Review Case File

- Master the Facts and Circumstances
- First thoughts?
- Start to Formulate Your Closing Argument  
- Work "Backward"

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#### Assess the Facts and Circumstances

- Create a "Pros & Cons" Chart

+	Neutral	-
☑		☑
☑	←	☑
☑		☑
	☑	
☑		
☑		
	←	☑
	☑	

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### Think Out of The Box

- Be Objective
- Be Critical
- Any Themes?

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### Develop a **Theme** and **Theory** of Your Case

- **Theme:** A psychological anchor for the case
- **Theory:** A logical and persuasive explanation for the facts that is consistent with the admissible evidence and perceptions of the average juror

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### Theme Examples

- "This was a rush to judgment"
- "The wicked man conceives an evil plot, labors with its dark details and brings to birth his treachery; let him fall into his own trap."
- "He who helps the guilty shares the crime."
- "When a man points a finger at someone else, he should remember that four of his fingers are pointing at himself"
- "Our deeds determine us, as much as we determine our deeds"
- "Sloppy police work plus shoddy investigation equals the wrong defendant"
- "Judge a man only by his own deeds and words; the opinions of others can be false"

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### Theme Examples

- “Justice has but one form, evil has many”
- ““We should not investigate facts by the light of arguments, but arguments by the light of facts”
- “A courtroom is a place where Jesus Christ and Judas Iscariot would be equals, with the betting odds in favor of Judas”
- “The picture cannot be painted if the significant and the insignificant are given equal prominence. One must know how to select”
- “Arguments derived from possibilities are idle”

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### Theme Examples

- “We want the facts to fit the preconceptions. When they don’t it is easier to ignore the facts than to change the preconception”
- “Better a bad excuse than none”
- “Justice is truth in action”
- “Law is a pledge that citizens of a state will do justice to one another”
- “As citizens of this democracy, you are the rulers and the ruled, the law-givers and the law-abiding, the beginning and the end.”
- “Outward actions are a clue to hidden secrets”
- “Acts indicate the intention”

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### People v Telito Keller Murder 2<sup>nd</sup> Degree

- Defense theory: Self defense or lesser homicide charge (defendant lacked the intent to kill)
- Prosecution theory: Defendant intentionally killed the victim by shooting him in the chest with a rifle
- Prosecution theme: “Acts equal intent”

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**Defendant's Acts**

- |   |  |
|---|--|
| 1. Retreated in house                           | 7. Pointed the shotgun at the victim's chest         |
| 2. Located shotgun in downstairs hall           | 8. Took off the safety                               |
| 3. Walked upstairs                              | 9. Cocked the trigger mechanism                      |
| 4. Looked for and located ammunition            | 10. Pulled the trigger                               |
| 5. Walked back down the stairs and out to porch | 11. Kicked & struck the victim while on ground dying |
| 6. Loaded the shotgun                           | 12. Fled out of state                                |

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People v. Nicholas Wiley

Murder in the First Degree  
Murder in the Second Degree  
Criminal Possession of a Weapon  
Third Degree

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**Murder 1<sup>st</sup> § 125.27(1)(a)(xi)**

“the defendant intentionally caused the death of two or more additional persons within the state in separate criminal transactions within a period of twenty-four months when committed in a similar fashion or pursuant to a common scheme or plan”

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**“Similar Fashion or  
Common Scheme”**

1. Location
2. Opportunity: Victim traits, features & lifestyle
3. Use of knife or sharp instrument
4. Similarities of the wounds and injuries
5. Multiple stabbing
6. Slashed throats
7. Binding
8. Clean-up
9. Method of disposal
10. Motive: Rage

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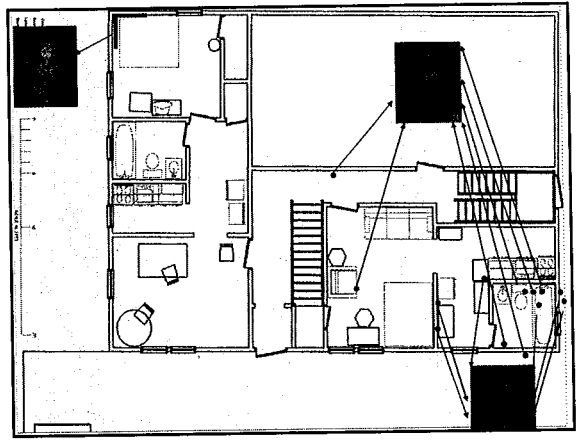
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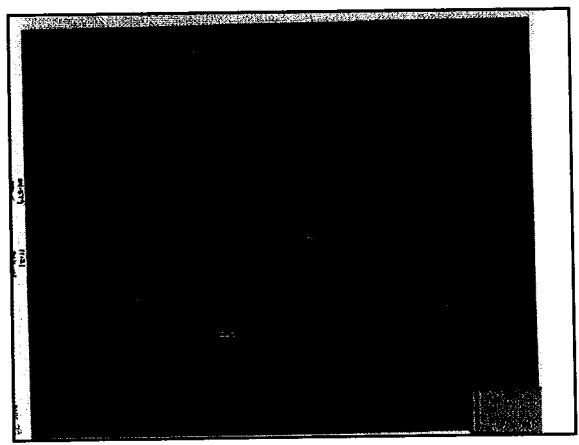
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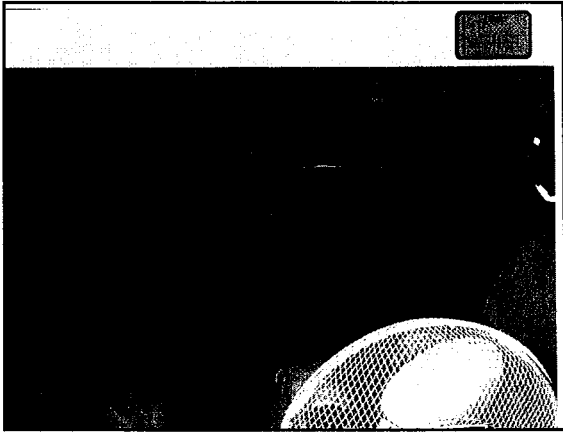
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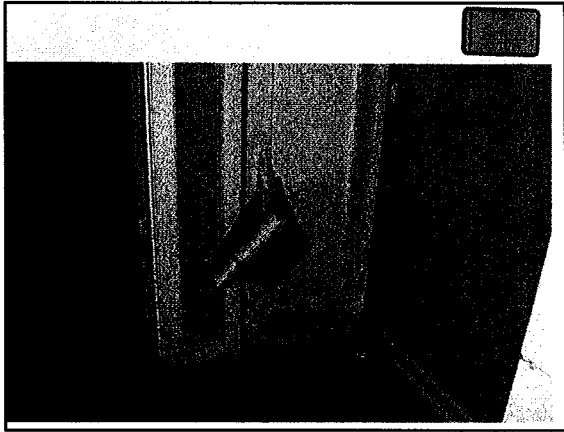
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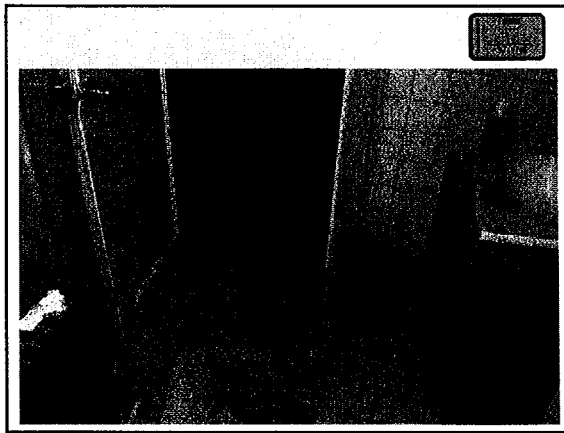
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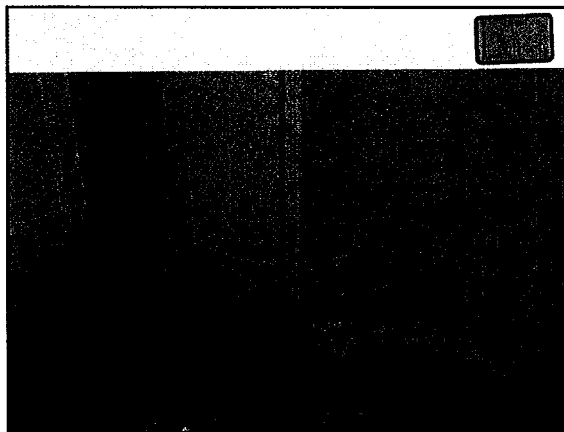
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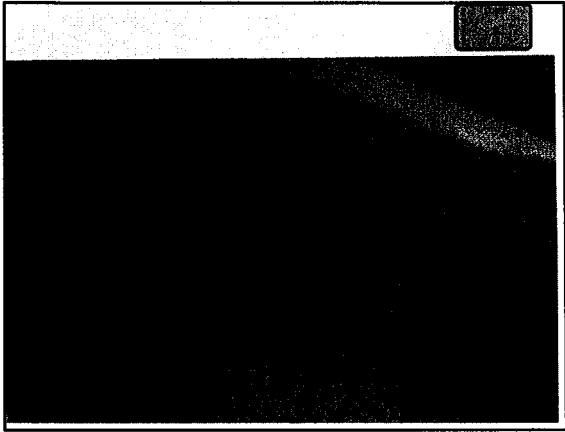
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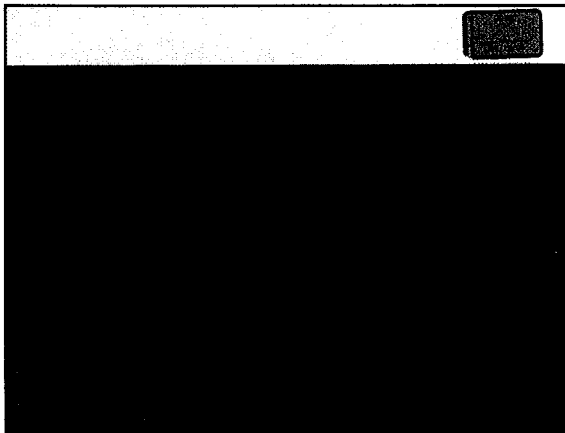
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**Review and Study Applicable Law  
and Potential Jury Instructions!!**

The language and elements in the legal instructions that will be given to the jury should be woven into and embedded in your trial presentation.

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**People v. Roger Stein  
Murder 2<sup>nd</sup> Degree**

- 81 year old man beaten to death
- Depraved indifference theory (§125.25 (2)):  
“under circumstances evincing a a depraved indifference to human life, he recklessly engages in conduct which creates a grave risk of death to another person, and thereby causes the death...”

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**CJI**

- “utter disregard for the value of human life”
- “grievous harm”
- “simply does not care”
- “wicked, evil or inhuman state of mind”
- “brutal, heinous and despicable acts”
- “deficient in moral sense of concern, devoid of regard for life...”
- “engages in a ...brutal, prolonged and ultimately fatal course of conduct against a particularly vulnerable victim”

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**Part 3**  
**Using Legal Issues &  
Motions to Develop  
Your Theme & Theory  
and Shape the  
Framework of Your  
Trial**

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- Identify legal issues and address early in filing and responding to motions
- Judge's rulings on motions and legal issues will set the framework for your trial
- Offensive use of motions can help you implement your theme and theory

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**Offensive Use of  
Pre-Trial Motions**

Objective of an offensive pre-trial motion is to attempt to pre-determine the conduct of all parties during the course of the trial.

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### Use of Offensive Motions

- Anticipate Obstruction Tactics
- Employ Special Trial Procedures
- Keep Trial Presentation Flowing Smoothly
- Limit Objections in Front of Jury
- Address a Specific Issue
- Educate the Judge
- Seek Admissibility of Certain Evidence
- Preclude the Admissibility of Certain Testimony or Evidence
- Expert Testimony

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### Part 3 Using Your Theme & Theory to Select Your Jury

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“The jury system puts a ban upon intelligence and honesty, and a premium upon ignorance, stupidity, and perjury.”  
Mark Twain - *Roughing It* (1872)

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## **“Jury De-Selection”**

Removing jurors that can hurt your case from the panel and choosing the best of what's left!

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**Never** Underestimate the Critical Importance of Having the “Right” 12 People Sitting in Your Case

- Use Persuasion & Advocacy
- Understand Your Case & Current Societal Dynamics
- Read Body Language
- Use Instinct
- Rely on Experience

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## **8 Objectives of Voir Dire**

1. **Build rapport**
2. **Establish credibility**
3. **Gather information**
4. **Stimulate Conversation**
5. **Educate**
6. **Advocate**
7. **Evaluate**
  - to understand juror's values
  - exercise peremptory challenges
8. **Pick a jury favorable to your case!**

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## 5 Steps to Selecting a Jury

1. Develop a strategy & jury profile
2. Establishing Rapport
3. Educate & Advocate (“Weed & Seed”)
4. Effective and efficient use of time
5. Intelligently exercising your challenges and opposing challenges

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### Step 1: Develop a Strategy & Jury Profile

- What kind of case do you have?
- What’s your Theme & Theory?
- What are the key issues?
- Strengths and weaknesses of case?

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### Jury Profile

- **What jurors would best identify with your theme and theory?**
- **Think of voir dire as an audition**

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## Use of Demographics

- **Demographics are a poor indicator, unless . . .**
  - Race in a case where race is at issue
  - Gender in a case where gender is at issue

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## Jury Self- Education Process

- **The process of jurors defusing the hard issues in the case & persuading their peers to their side**



- **May be 1 or 2 leaders, but individuals will learn and form opinions from each other**

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## Factors to Consider When Looking for Leaders

- **Often juror who was well-spoken and confident during voir dire**
- **Generally, older jurors**
- **Older females will often follow a man rather than another woman**
- **Younger males are willing to be led by older females**
- **Better educated generally lead less-educated unless they have an attitude**

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**Questions to Help Identify  
Your Leaders**

- Some individuals enjoy leadership positions and others do not . Which type of person do you see yourself as?
- Your occupation (job responsibilities) could make you an influential member of this jury. How do you feel about that?
- If you were chosen as a member of this jury, how would you go about making your position heard by others during deliberation?

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**Step 2:  
Establishing Rapport**

- Beware of pre-conceived notions of attorneys!
- People who like other people want to please them
- If jury sees you as one of them, they will want to help
- Make jurors feel comfortable
- The prospective jury is watching you
- Observe your potential jurors and their reactions carefully
- Use common vocabulary and language
- Listen!!!

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*“Knowledge speaks,  
but wisdom listens.”*



*-Jimi Hendrix*

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**Assessing Juror Attitudes**

- **Manner of response: what a juror says is not as important as how he/she says it**
- **Every “experience” question should be followed up with an “attitude” question**
- **Listen for jurors with strong opinions or attitudes that appear to favor either side**

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- **But, try to rehabilitate jurors with strong attitudes that may favor your case to avoid challenges for cause**

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**Step 3:  
Educate & Advocate  
 (“Weed & Seed”)**

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**Presenting Your Theme and Theory During  
Jury Selection**

- **Jurors need a story to put the case together**
- **Lay the foundation for the story in jury selection**
- **Weave the story into the voir dire questions**



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**Why a story?**

- **If no story is presented to jurors, they develop their own!**
- **Once jurors develop the story, it's very difficult to get them to change!**

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**3 Components to a Good  
Story**

- **Consistency**
- **Plausibility**
- **Completeness**

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## Educate & Advocate

- Design questions & dialogue that educate jurors about issues and facts in your case
- Design questions or dialogue that advocate or promote your theme & theory

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## Eliciting Information

- “Information gathering is the cornerstone of effective jury selection.”
  - Be conversational & avoid “legalese”
  - Personalize your delivery
  - Use open-ended questions: let juror talk, not you!
  - Question, probe & listen!

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## Step 4: Effective and Efficient Use of Time

- Be prepared
- Jury Questionnaires
- Supplemental Jury Questionnaires (SJQ's)
- Whenever court permits, consider using a supplemental jury questionnaire
  - work out the logistics
    - uses more time on the front end, less on the back
  - elicit much greater & more extensive information than usual voir dire
  - develop a rating system

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### Step 5: Exercising or Opposing Challenges

- Challenges for Cause
- Peremptory Challenges
- Hunches
- Experience
- Batson Issues

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### Time for Challenges

- Two suggested approaches for shaping your jury ...
  - The Dinner Party
  - The Audition

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### The Audition

- Imagine that you are the casting director for a production and you are casting individuals from the community
- The cast is dependent upon who gets the leading roles



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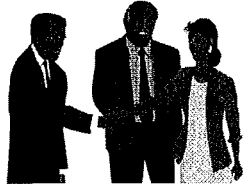
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## The Dinner Party

- Think of jury selection like planning a dinner party
- What 12 people would fit well together?



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## Part 5 Witnesses and Evidence Presentation

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### Witness Preparation

- Do not rely on phone conversations or interviews performed by investigators or third parties
- Never put a witness on the stand for trial whom you have never spoken to face to face
- Prepare witness for both direct and cross-examination
- Review statement or prior testimony with witness
  - Show witness copy of prior testimony before court
  - Advise witness that the other side most likely has copies of his/her prior testimony
  - Talk to the witness about "prior inconsistent statements"
- Show witness any exhibits you intend to use during witness direct examination

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### Tips for Witness Presentation

1. Finalize Order of Proof
  - Remember the rules of “primacy & recency”
  - Review order of proof for integration of theme and theory
2. Prepare a tentative trial schedule with witness blocks that are logical and make sense to your desired chronological presentation

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### Goals of Direct Examination

1. Provide facts and information to the jury
2. Clear & Concise Testimony
3. Credible and Persuasive Testimony
4. Keep the Jury’s Attention
5. Brevity

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### Direct Examination

1. What information does the witness contribute?
2. Risk/benefit Analysis of witness and his effectiveness as a witness
  - is he/she able to articulate the information without damaging your case?
3. How does the witness and his/her testimony fit into your trial strategy and theme and theory?
4. What points from the witness testimony do you need for your summation?
5. Know your witness
  - evaluate ability to recall and recollect
  - eye contact, demeanor, credibility
6. Prepare your witness
  - explain where he/she fits in the case
  - review prior statements or testimony
  - compare to what others say happened or other available evidence
  - develop details needed to establish your points
  - prepare for cross-examination

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**People v. Johnny Rogers  
Murder 2<sup>nd</sup> Degree**

**Weaknesses**

- “Cold” (old) Case (1991)
- Victim’s lifestyle
- Several suspects including her estranged husband and then-boyfriend
- No forensic evidence
- The “myth” of the Princess Thomas Case

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**How Princess Died**

1. Strangulation
2. Fetus removed
  - Highly Unlikely that that it was by an animal!!!
  - No evidence of animal activity
  - No disruption of garbage
  - Animal access to womb
  - Evidence of at least one gash
  - Abdomen/womb area completely gone
  - Location of fetal remains and how they were left in tact

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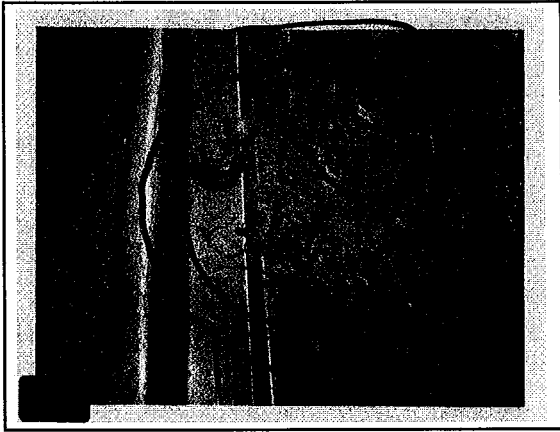
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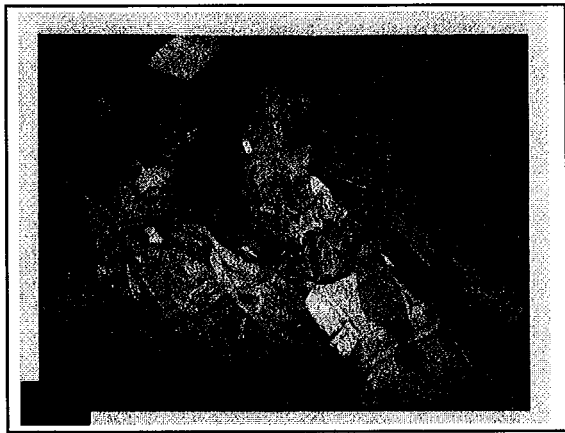
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### WHO KILLED HER?

- Who had the motive Princess Thomas?
- Who made threats to hurt and kill her?
- Who lied to Charles Manning about how she died?
- Who had an admitted history of violence against Princess?
- Who knew exactly how she was killed?
- Who made admissions that he killed her?

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### Motive

- Jealousy
- White Italian Boyfriend
- Loved her so much didn't want to see her with anyone else
- Pregnant with another man's baby
- "I took care of two birds with one stone"

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### GENERAL PRINCIPLES OF CROSS-EXAMINATION

- Preparation
- Strategy
- Approach
- Control

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### PREPARATION

- Master the facts of your case
- Interview all parties and potential witnesses
- Compare the stories/versions of all the witnesses
- Note any relationship, biases or prejudice of the witness
- Note personality/character traits and use them to your advantage (i.e., short temper, arrogance, nervousness, etc)
- Make yourself an expert on all issues in the case

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## STRATEGY

1. Assess the risks in cross-examining the witness:
2. What can you get from this witness that will enhance your theme and theory?
3. Decide on the Objectives of Your Cross-Examination
  - Can this witness be impeached or discredited?
  - Does the testimony contain inconsistencies?
  - Can you enhance or support the theme and theory of your case?

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## People v. Waneta Hoyt

Theory of case:

- That a woman had murdered 5 of her children decades ago
- Disprove that the babies died of S.I.D.S.
- Munchausen's Syndrome by Proxy

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## Sudden Infant Death Syndrome

“The sudden death of an infant under one year of age which remains unexplained after the performance of a complete postmortem investigation, including an autopsy, an examination of the scene of death and review of the case history.”

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## Sudden Infant Death Syndrome

- SIDS is the number one cause of death of children one month to one year.
- 95% of all SIDS deaths occur by the 6th month with a peak between the 2nd and 4th month.

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## Sudden Infant Death Syndrome

- **Diagnosis of exclusion**
- **Requires complete autopsy, review of history, and scene investigation**

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## POSSIBLE EXPLANATIONS

Some cases previously classified as SIDS, where death was unexplained, now can be classified under one of the following explanations:

- Brain Stem Abnormality
- Abnormal Heart Rhythm
- Fatty Acid Oxidation Disorder
- Viral Infections
- Environmental Hazards
- Homicide

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THE LYOT CHILDREN			
CHILD	BORN	DIED	CAUSE OF DEATH
Erik	10/17/54	1/28/55 Thurs. 3 months, 10 days old	"Congenital Anomalies of the heart" (no evidence to support this - (No autopsy))
Janet	6/21/55	9/26/55 Thurs. 9:30am 2 years, 4 months old	"Enlarged Thymus" (Not cause of death)
Julia	7/19/55	8/15/55 Thurs. 1 month, 17 days old	Strangulation due to choking on rice cereal
Molly	9/16/70	6/5/70 Fri. 10:28am 2 months, 18 days old	Pneumonia
Naah	5/27/71	7/28/71 Weds. 8:55am 2 months, 19 days old	"Acute Bronchitis" (Actually secondary to other causative factor such as suffocation)

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**PROLONGED APNEA AND THE SUDDEN INFANT DEATH SYNDROME: CLINICAL AND LABORATORY OBSERVATIONS**

Alfred Steinschneider, M.D., Ph.D.  
*From the Department of Pediatrics, State University Hospital of the Upstate Medical Center, Syracuse, New York*

**ABSTRACT.** Little is known of the final physiologic mechanisms resulting in SIDS. Five infants participated in this study, three of whom were referred at about 1 month of age because of cyanotic episodes of undetermined etiology. Respirations and eye movements were recorded during several sleep sessions on each patient. In addition, patients were observed on an apnea monitor and a record was kept of the incidence of prolonged apneic episodes ( $\geq 15$  seconds).

The laboratory sleep studies revealed frequent periods of apnea ( $\geq 2$  seconds) which (1) decreased in amount after a certain age and (2) were most frequent during REM sleep. All infants had a number of prolonged apneic and cyanotic episodes during sleep, some requiring vigorous resuscitative efforts. Prolonged apnea most often occurred in conjunction with an upper-respiratory tract infection or when frequent apnea was noted in the laboratory. Two of the infants subsequently died of SIDS.

These data support the hypothesis that prolonged apnea, a physiological component of sleep, is part of the final pathway resulting in sudden death. It is suggested also, that infants at risk might be identified prior to the final tragic event. *Pediatrics*, 50:646, 1972. **SUDDEN DEATH, INFANTS, APNEA, SLEEP, NASOPHARYNGITIS.**

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# APNEA MONITORS



## NO MORE

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### APPROACH

1. Use the Appropriate Style and Tone
2. Lay the Proper Foundation
  - Be patient:
    - Avoid the temptation to confront the witness immediately or make your point too soon
3. *Lead, Lock & Kill*
  - *Lead* the witness to a particular place
  - *Lock* the witness into a certain position
  - Move in for the "*kill*"

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### CONTROL

- Control the Witness by:
1. Using leading questions
  2. Knowing the answer to the question before you ask it
  3. Using short, clear questions

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## **CONTROL**

Control the Situation by:

1. Anticipating objections and be able to respond to them without losing the focus of your cross examination
2. Not letting your opponent or the judge interrupt your flow or focus

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## **CONTROL**

Control Yourself by:

1. Setting the tone of the cross-examination, but don't get carried away
2. Don't argue with the witness
3. Being patient

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## **Best Cross Examination Tip**

- Don't Ask the "One Question Too Many"
- Know when to sit down and shut up
- Make your point in closing argument

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### Trial Exhibits: The Basics

- Physical items;
- Photographs;
- Sketches or diagrams;
- Documents; or
- any tangible piece of proof intended for use as evidence to be considered by the jury
- Marked and shown to a witness during trial
- Proper foundation needed for admissibility
- Organize exhibits
- Make a proper record as you use, refer to, and handle exhibits in trial

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### Using Trial Exhibits to Establish Your Theme & Theory

- What items or exhibits will help you visually establish your theme and theory for the jury
- Compelling, powerful
- Exhibits that may have an immediate impact...
- ...or lay the ground work for your summation?

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### People v. James Cahill

- Murder 1<sup>st</sup> Degree
- April 1999 beating
- October 1999 murder
- Death Penalty Trial

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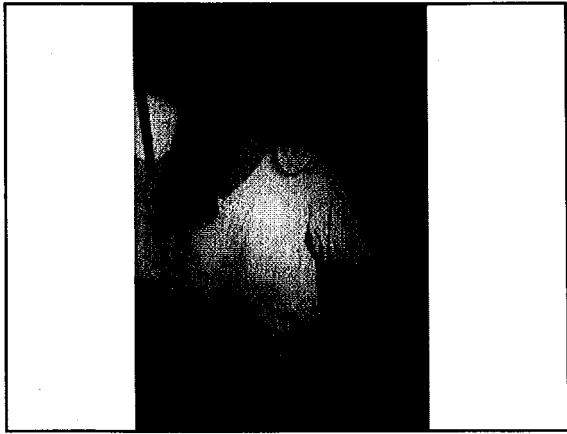
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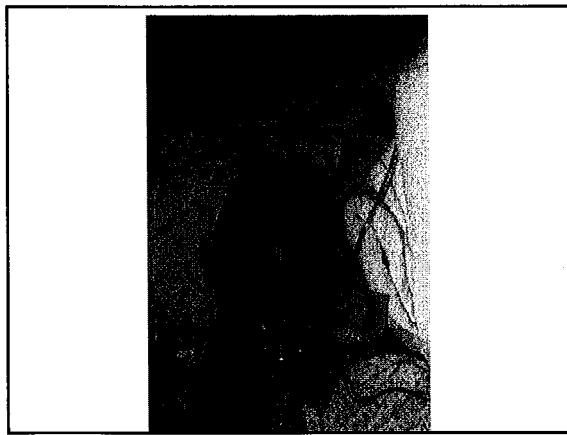
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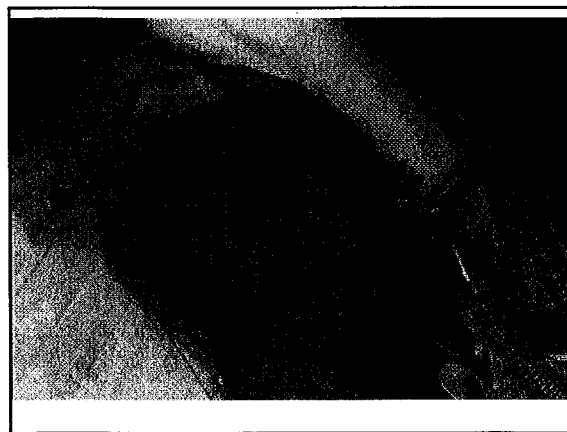
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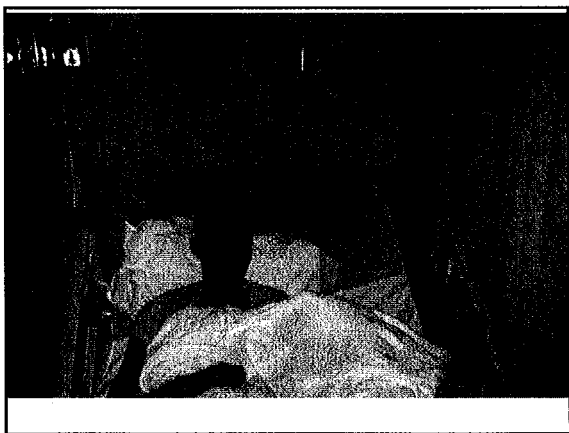
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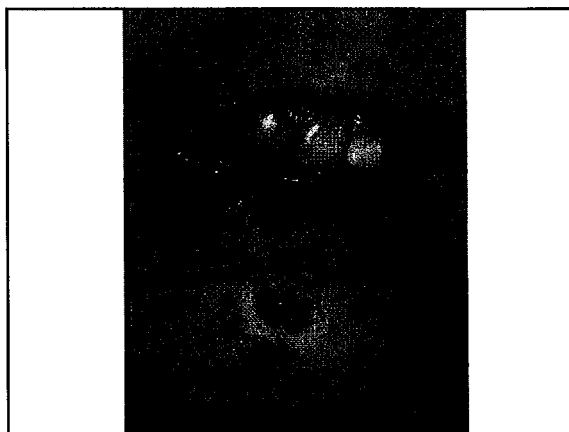
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**Part 6:  
Opening Statements  
&  
Closing Arguments**

Elevating Your Oral Advocacy

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**Keys to Effective  
Oral Advocacy**

- Use effective “attention steps”
- Use dramatic pauses or silences
- Integrate your theme and theory
- Use short, insightful quotations to drive home your theme
- Be creative in your word choice & phrasing
- Leave with a powerful “exit line”

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**Practical Considerations**

- Preparation
- Write out your opening statement and closing argument before trial begins
- Concentrate on its structure, organization and logical flow
- Make sure you use concise points to articulate a clear message
- Edit often, ensuring your theme and theory is woven through
- Tell a story
- Practice, practice, practice
- Look at and talk to the jury: Don't read it!
- Don't be long winded

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## Opening Statements

- The first opportunity to advocate your position logically and persuasively
- Outline general facts and concepts for jury
  - “Table of Contents”
  - “Road Map”
- Lay out the elements of the offenses
- Overtly re-introduce your theme & theory

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## Factors to Consider

- Most jurors make up their minds after the opening statements
- Principles of Primacy-Recency
- Tell try to tell your story chronologically
- Be brief
- Use active language

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## Word Phrasing

- “Opening Argument”
- Passive vs. Active Language

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### Word Phrasing

- **Passive:** *"I believe the evidence will show that the defendant did..."*
- **Less Passive:** *"The evidence will show that the defendant did..."*
- **Less Passive:** *"Jane Doe will tell you that the defendant did..."*
- **Active:** *"This defendant did..."*

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### Closing Arguments

- Your closing is your last and only opportunity to bring the case together for the jury in a compelling, powerful & dramatic fashion
- Tell a good story
- It should be powerful, emotional & compelling
- This is the time to showcase and hammer home your theme & theory

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### Practical Considerations

- **Maintain a Summation Folder**  
Keep a folder at your trial table and during the course of the trial make notes of key moments from the testimony or from the trial that will help you emphasize critical points in your closing
- Order key testimony from court reporter that you can read back to jurors, verbatim
- Weave this all into the first draft of your closing
- Re-edit for good structure, organization & logical flow

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### Practical Considerations

- Look carefully at the facts that came out at trial, especially little details that they may have overlooked and that you can point out for them and give them to tie the case together
- Acknowledge and address any weaknesses in your case, explain why they are not crucial points to your case and move on
- Explain what is relevant and why
- Make your points no matter how obvious you think they are
- Point out where the prosecution & defense agree
- Ask the jury to apply logic and common sense
- Remember, jurors like, want and need corroboration even when the law doesn't require it

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### Use Visuals

*Jurors retain more information going into the jury room if they hear it and see it!*

- Use & Display Exhibits/Evidence to Make Your Points
- Highlight Audio or Video Recordings
- Create Checklists of What You've Proven, as You Tell Them
- Use Technology and a PowerPoint Presentation

*but remember...*

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Technology should never be a substitute for convincing & persuasive oratory

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## Final Notes

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- Master the facts, know the legal issues and integrate your theme and theory
- Know your forum (judge) and your adversary
- Be prepared
- Be proactive
- Be creative
- Be confident
- Be an advocate
- Be professional & ethical

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***“Excellence is never an accident;  
it is always the result of  
high intention, sincere effort,  
intelligent direction, skillful execution  
and the vision to see obstacles as  
opportunities.”***

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## Thank You's, Credits, and Resources

- Karla Kerlin
- Sylvia Lafferty
- Paul DerOhannesian II
- Jo-Ellan Dimitrius, Ph.D. – Vinson & Dimitrius
- Paula Anderson
- Dan McCarthy

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## Resources

- Jo-Ellan Dimitrius & Mark Mazarella, *Reading People: How to Understand People and Predict their Behavior—Anytime, Anyplace*, (1999.)
- Cathy Bennett & Robert Hirschhorn, Esq. With Jo-Ellan Dimitrius, *Bennett's Guide to Jury Selection & Trial Dynamics*, (1994.)
- 1 DerOhannesian II, Paul, *Sexual Assault Trials*, Chapter 3, (2d ed. 1998.)
- Nancy Pennington & Reid Hastie, *A Cognitive Theory of Jury Decision Making: The Story Model*, 13 *Cardozo L. Rev.* 519-57 (1991.)

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