

UNIVERSITY OF MIAMI LAW SCHOOL
CRIMINAL EVIDENCE WORKSHOP
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Class Manual

"IT'S NOT HOW GOOD YOU ARE, IT'S HOW GOOD YOU WANT TO BE"

This course is designed to teach you a set of principles that I have learned from over four decades of working in courtrooms. These rules are not step by step instructions, but basic building blocks which can be adapted to any set of problems a trial lawyer might face. There is no textbook for this course. I have read hundreds of trial advocacy books, attended numerous seminars and even listened to tapes, but didn't find what I was searching for. Most of that advice doesn't work. So I designed this course to teach principles which do. There is no textbook or casebook which discloses my ideas; they are contained only in this manual, your trial performances and our class discussions. Your learning experience depends on your own motivation and ability. I am a trial lawyer and will give you the benefit of my experience. This is a joint venture and your part of this contract is to fully engage in the process, and learn from it. Ask questions. There are no stupid questions so don't be afraid to ask. Don't remain silent when a question can get you the understanding you need.

Black's Law #1: Make it personal. The conventional wisdom is to never make it personal. If you want to win, make it personal. Work it as hard as you can, until exhausted, and then go further. Use anger to motivate yourself. It gives you an edge. Opponents become unnerved when they sense you are dangerous. It marks the difference between a serious player and a nobody. There will be those who dismiss you with the ultimate insult: "it's just politics," "it's just business," "it's a tough world out there," and "it's not personal." Well, screw them -- it is always personal.

Clarence Darrow said the only real lawyers are trial lawyers and trial lawyers try cases to juries. The purpose of this class is to make you into a real lawyer.

I created this manual not only for use during the course, but also as a primer for your career as a trial lawyer. Some of these materials are more advanced than you need for this class, but as you continue your self education as an advocate, these sources will be a useful guide. Your education doesn't terminate with your degree; in a real sense, it just begins. Law school is not a vocational school and little if anything you studied in law school will be used by you as a trial lawyer except for the tools to teach yourself. Great trial lawyers are those who continually and obsessively soak up knowledge from every possible source – literature, politics, culture. Once I recognize the essential issues of a case, I research every possible source for information about it: I used to start with published articles and books, but today, much of it can be done on the internet. You can find almost anything there.

For forty-plus years I have tried cases in federal and state courts in about half the states of this country. I learned the hard way; by doing it, analyzing what I did, and seeking a better way. It may be the only way to really master the skills. My purpose is to give you the tools, the format, the ideas to design your career. Only a small number of you will get this. My promise is that if you follow my ideas, you can be one of the best.

To reach the top of this profession you have to get involved; to stick your neck out; to set aside your pride and fear of failure. Ask yourself if you want to be mediocre or a star? Be honest. It takes a huge amount of work to be a star. This is not magic. It is doable.

THE MISSION

Black's Law #2: A trial is a dynamic process, an environment of imprecision, uncertainty, incompleteness of information, conflicting goals and partiality of truth, so absolute truth is not, in general, an achievable objective. Thus, the most persuasive story wins.

It is a fiercely held myth that gifted trial lawyers are born with special aptitudes for trial work and need little, if any, formal training. This springs from those nascent days of legal training when law schools were few in number and students were apprenticed to practitioners to learn the craft. None of this is true. Litigation, like other aspects of the law, has a theoretical body of knowledge, and academic training is required to master it. So forget the films and plays celebrating the apparently untrained country lawyer who triumphs over the slick urban opponent (classic example: Jimmy Stewart v. George C. Scott in "Anatomy of a Murder"). Trial skills, like basic skills of other professions, are capable of being taught and serious students can become outstanding advocates.

We often do things, just because it is the way it has always been done, without an idea why it was done that way to start with. To succeed in this business, you often have to depart from the conventional wisdom. For many people this will be difficult – especially those who did well in school. After all, we were taught in school what we had to do to be successful is to conform. Once you learn the basics, have little fear and respect for the past, not in a negative way, but in a positive one. Appreciate the classic lawyers, see how they did it, take what you need from it, but constantly look for a better way to do it. The true road to success is the will to continually improve. There is not one recipe, not one answer, to each problem. Consider an atypical approach, change the template, rewrite the formula, shatter perceptions, don't be handcuffed to a rigid playbook.

WHY STUDY EVIDENCE?

Black's Law #3: When you step on the playing field, you better know the rules. You are a professional. You must have mastery of every rule, every technique, and every detail of your case. Knowledge is the key, along with the ability to see and create patterns others miss. You don't leave things to chance. You pride yourself on being the best. You always know more than your opponent.

Why the emphasis on the rules of evidence? Evidence is the fuel that runs every trial, and in fact, every dispute resolved by an independent body. How could you expect to survive let alone win any contested matter without the ability to handle and shepherd evidence, the very things which prove the propositions you are advocating? Evidence has no meaning, no power, no persuasion, no connection to ideas or theories without a human being to analyze, organize, interpret and then sell them.

This course is designed to develop trial skills and force you to think critically about the rules of evidence; mastering evidence is more than just memorizing a set of rules. Evidence is many things: physical items like guns and knives that the lawyer turns into exhibits; the testimony of witnesses; but more than that, evidence also requires persuasion. It is advocacy that turns mundane objects into powerful and persuasive

exhibits. Advocacy is far broader than the law; trial presentation is a multi-disciplinary subject with elements of psychology, communication, art, law, philosophy, science, and technology, and none by themselves ensures victory. As you become more experienced as a trial lawyer you will master these disciplines. I teach many different types of seminars for trial lawyers describing how new technology can be adapted for courtroom use. These techniques are far beyond the scope of this course. As in sport, you need to focus on the basics before moving on to the specialized plays.

THE METHODOLOGY

Black's Law #4: The only effective method of teaching trial law is to allow the students to discover the principles for themselves. Learn by doing; no one learns how to ride a bicycle through a lecture. The concept of balance must be experienced. The key to mastery is practice, practice, practice.

Law school is designed to stuff students into large lecture hall seats and take the accepted truth from the lectern. No one can learn to be a trial lawyer by listening to lectures. Lectures are just information without participation. They are passive and indiscriminate; each student receives the identical lesson without adapting to individual skill, intellect, or interest. This course is more like coaching than teaching. More conversation than lecture. It is heuristic; you discover solutions on your own. Rather than teaching abstract theory, this course works concretely, making you do it, then showing you how things should work. We do mock trials to distinguish concrete examples. Our brains are hard wired to retain concrete images, it is hard to grasp concepts without concrete examples, so we will learn by doing.

This is not new: Socrates used dynamic dialectic process to teach, and Rousseau said students learn by doing rather than by receiving abstract principles. In this course, we put those principles into action. You will be doing most of the work, and I will be observing and commenting. In essence, we want to distinguish those elements which make up the great advocate. To distinguish means to take it out of the background and bring it into the foreground for examination.

In the class sessions, we conduct trials. These trials are your textbooks. These cases are just like cases that appear in court every day. They are problems with a full factual context, not just a pre-digested text from an old judicial opinion. We work with the facts as they play out in the trial. So there are no canned answers, no study guide; you must think out the problems and solve them.

The members of each team will take several parts in the trial. One lawyer does the voir dire, and another the opening statement. A member of the team will act as the first witness and another as the second. You take turns doing the directs and crosses, so everyone has multiple parts in each trial. You must perform your role well, either as a lawyer or a witness, to make the presentation a success. The class members who are not participating in the trial will be members of the jury. You must be an active listener in the jury box. Use your critical abilities to discern the successful and unsuccessful techniques used by the lawyers. I will ask you questions to help us see how jurors evaluate the case. You will be a better lawyer when you see the trial through the eyes of a juror. A lawyer must have a sense of his or her audience.

There is no excuse if a team member is absent. I don't cancel class due to one student's inability to attend class, so each member of the team must be prepared to jump in for the absent partner.

On the Class Problems page are the trial problems which you will be working with this semester, but the course calls for more than just mastering their singular issues. You will experience the preparation of an

entire case for trial. As I have patiently explained to you, lectures do not work, doing it does. You learn by undergoing the experience of a trial, struggling with the rules of evidence, seeking the best strategy, and wielding the tools of advocacy. There is no shortcut. This is the start of a long journey requiring extensive hours of study, the rigors of training and self discipline.

I will act as the judge and rule on all motions and objections, but this will not be exactly as a normal trial. I will interrupt the proceedings at times to discuss an evidentiary issue, a trial tactic, or ask the strategy behind an action. Most of these issues are based on concrete questions and answers for context and if we wait until the end of the trial they become hard to resurrect.

One persistent complaint I hear is the lack of personal contact in an on-campus office. Of course that will always be a problem with the adjunct staff. We have to make a living practicing law and that is what makes our teaching valuable. If you find that an insurmountable problem, do not take this class. Fortunately the internet solves this problem for most students. Since I am only at the campus on Mondays, and my law office is downtown, or I am off somewhere else in the world, the best way to communicate with me is through email. If you have any questions email me at rblack@royblack.com.

PREPARING YOUR CASE

Black's Law #5: Prepare relentlessly. There is no substitute for being prepared. Don't assume a damn thing. The biggest mistake that good lawyers make is assuming too much – that the jury would make inferences, that the opposing counsel would raise specific issues, that their own clients wouldn't say ludicrous things or behave in some ridiculous way. How well prepared are you for your trial? Have you read everything?

Have you examined all of the documents? Have you talked to all of the witnesses? Have you read the case law? Have you studied the judge? You may possess brilliance, extraordinary vision, even luck. Those help, but no one, no matter how gifted, can perform without careful preparation, thoughtful experiment, and determined follow-through. Strive to be the best-prepared lawyer in the courtroom, and you will dramatically improve your result.

The first step is preparing the case for trial. Your job is to take the raw materials you are handed and turn them into a persuasive case. The life of the law (for trial lawyers) is not logic but rather persuasion. Because of time restraints, you will not go out and investigate a case. Most of the facts will be found in the trial problem. You may, however, add facts to the problem so long as they are not inconsistent with the problem's facts. So for example if there is no confession by the defendant, you can't add one. But you can fill in other facts, like the witnesses' jobs, families. etc. – the type of detail that gives life to a case.

We will use the Federal Rules of Evidence, and I suggest you read Weinstein's Evidence for a complete history behind the rule and for case citations and summaries of the rule in action, and Graham's Federal Rules of Evidence, 6th Ed. for a good primer. You don't need to research beyond this set. The class is not designed for research, but for using the rules. We will also use the Federal Rules of Criminal Procedure, but with some amendments. Each side will have all its witnesses, with the exception of the defendant, write, sign and date a witness statement which accurately and completely summarizes their testimony. This must be an accurate and fair summary without any gamesmanship by holding back crucial bits to surprise your opponent. Discovery, including the viewing of all physical evidence, shall occur one week prior to the scheduled trial date. Violations of these rules may result in the exclusion of evidence or witnesses.

After you determine the facts, then you and your team members will brainstorm the trial strategy. The team will create a theory of the case and develop case themes along with your trial strategy and tactics. Strategy is an area I will question about during or after the trial to see how well you thought out the issues.

Each problem calls for the use of physical evidence such as charts, maps, guns, drugs, etc. You will create your own exhibits employing your native intelligence and vocational dexterity. Charts and maps are easy, other items can be found in your neighborhood hardware store.

You must master the rules of evidence applicable to your facts and to your opponent's case. The ability to analyze and argue the rules is a skill we will develop. As I explained above, our main purpose is not researching, but rather, using the rules. So you probably don't need more than Weinstein.

I will look at how you thought through the problem. How you executed the strategy and tactics. How you organized the arguments. Whether you used all possible facts, laws, inferences, rules, life experiences, common sense and logic.

STRATEGY

Black's Law #6: Think strategy, not planning. It's strategy-stupid. Create a detailed plan for the trial. Detailed drafts of opening and closing arguments. Exhibits. Charts. But once the trial begins, strategy takes over. Hope is desperation, not a strategy. Don't play for the fumble.

This is your overall plan for the case, which is constantly under review and subject to quick changes. Our profession is one of the few to actually use strategic thinking and planning. The reason for that is simple, you only engage in strategic planning if you have an enemy. When you confront an actual enemy, planning becomes more complex because you must factor in the reactions and counter arguments of your opponent. Strategic decisions are decisions contingent on the reaction of the enemy which in turn is contingent on our anticipated response. As generals in battle know, every predictable pattern you have analyzed goes to hell the moment you go operational. You need imagination, back-up plans, and an ability to improvise.

A crucial element to devising a strategic plan is intimate knowledge of the tools and weapons available to you and your opponent. Without full and working knowledge of these elements, no coherent strategy can be developed. Our tools are found in the witnesses, evidence, rules, statutes, regulations, expert opinions, and the full legal arsenal available to us.

Always develop case theories, then think of all your opponent's possible rebuttals. One classic method is to work backwards from the final argument. Since it has to be based on the evidence, you design your questions and exhibits for the specific purpose of supporting what you need to argue to win. Tactics and strategy is not just learning some cute trial techniques, or following a form book, but is unique to each case. There is no Trial 101. We will identify the principles of strategy and conduct detailed analysis of each strategy in the trial.

There can be many answers to a problem, and many methods of proving a fact. To get to the best answer, if there is one, requires not only rejecting the wrong one, but also rejecting the less persuasive solutions. In the end, I am looking for your thought process and the strategy and tactics underlying them.

THE TRIALS

Black's Law #7: Visualize your case and the story you want to tell. You, as producer, director, and moderator, will use the fact witnesses on direct to paint a series of word pictures of scenes that you want the jurors to visualize. One key to a successful direct is being able to tell your story in a way that enables the jurors to see, in their minds, each relevant prior occurrence that tells your story.

Law is not a science. It may be that the adversary system of justice in its theoretical composition is almost perfect. Yet it is a system run by human beings and has become more a cultural and sociological institution than one run by rigorous standards. This makes it highly imperfect and open to manipulation by the best lawyer. Thus: 1) Fight for every piece of evidence. Your job is to find a reason why it is admissible. 2) Don't blindly accept labels. Look behind the label for the rationale behind the rule. 3) Prepare for every evidentiary argument in advance. You have two seconds to lodge an objection. You either seize the moment, or you miss it. Everyone is a moron off the top of their heads. If you are not prepared for the issue, you will look foolish and lose. Opportunity favors the prepared mind.

The following are the areas of the trial that we will concentrate on. I have listed some of the issues that I deem important and will question you about. For those involved in the trial, they are points for you to consider while preparing. For those of you on the jury, you should bring these lists with you to class and use them in evaluating the performances. There will be no stipulations by the parties on the law or any of the evidence. Every point will be contested.

Storytelling

Themes

Voir Dire

Opening Argument

Direct Examination

Exhibits

Objections

Cross Examination

Rehabilitative Devices

Closing Argument

Black's Law # 8: In any case, you have a small universe of evidence available to you. Each piece counts. You must find a method, a rule, a statute, a case, or, as a last resort, beg to get the judge to admit it. Don't take no for an answer. Keep pushing new avenues. Best example: the Supreme Court threw out the hearsay rule to allow admission of critical evidence in *Chambers v. Mississippi*. Remember you are an advocate, not a judge. Find a way.

SITTING IN THE JURY BOX

Yogi Berra once famously said: "You can observe a lot by watching." Lawyers spend huge amounts of money on jury consultants to understand how jurors think. Through polling, focus groups and mock trials, we try to anticipate jurors' reactions to evidence and witnesses and how to frame the issues for them. What message do we want to communicate and how do we get it across? Identify the arguments, and then how to communicate them effectively.

So sitting in the jury box and observing and evaluating the lawyers' performances and the evidence is an important learning tool. As has been noted, stupid people never learn from their mistakes, smart people learn from their mistakes, but geniuses learn from other people's mistakes. Let's be geniuses. An important part of this class is watching and analyzing the performance of the lawyers, witnesses, and how the rules and strategy interact. At times I will question those of you in the jury box about specific matters in the trial, or give you a chance to try some trial technique at issue.

How are people persuaded? What mysterious process causes one mind to work on another? We can analyze how good or bad an argument is, but how do we determine how it worked on a juror's mind. One way is to see how your mind was made up and then changed. One method is to think of an issue you had made up your mind on and then changed it. What did you do and why? What was the process? Was it new facts, or perceiving new reasons? Did someone else's words do it? All good questions. One way of highlighting this is to sit on a mock jury and see how or not a lawyer persuaded you.

POST-TRIAL ANALYSIS

Black's Law #9: After every court appearance, a trial, an appeal, a motion, do a self-analysis of your performance. You know what you need to work on. Be brutal with yourself. Willingly risk the judgment of strangers. Embrace those who tell you the truth about your weaknesses. It is the only way to become the best. Be tougher on yourself than anyone else. Why be mediocre? Work to be the best. It is that last 5 to 10% which makes all the difference. When you lose, don't lose the message.

A famous lawyer was in the middle of his argument when court recessed for the day. As well-wishers were congratulating him, he said: "Please don't tell me what's good about it – tell me what's wrong, so I don't repeat any mistakes tomorrow." After each trial, we will discuss the presentation and analyze the triumphs and failures. We should embrace failure, not run from it. Without mistakes there is no learning. Risk is required for future success, and with risk, always comes the specter of failure. When you stop taking risks, you accept mediocrity. Just like a football team analyzes tape, or the military debriefs after every battle, we will evaluate, and re-evaluate, and make changes to avoid chronic failure and create success. So check your ego at the door and honestly evaluate your performance.

Black's Law #10: Mistakes will happen. Own up to your mistakes and learn from them. A loss at trial can be a very valuable tool. Do not pass it off on "the dumb jury." You picked them, it's your responsibility. Examine everything you did. If you do not learn something from each and every case you try, you're doing something wrong.

Mini-Problems

In between each of the trials I will hand out miniature problems which focus on a specific trial skill for everyone in the class to take a shot at. For example there will be problems on cross examination, and also on business records. In between each trial everyone will perform on these mini-problems.

FURTHER STUDY

Black's Law #11: Don't be afraid of getting help: A coach; a memory course; a public speaking course. Read blogs, CLE courses, books. How coachable are you? Lawyers are a remarkably lock-step, timid bunch. Don't be afraid to try new and cutting-edge approaches. Ralph Waldo Emerson wrote an essay, "Always do what you are afraid to do."

This section is for those obsessive enough to want to be the best. Become a student of yourself. Sound self-absorbed? Do it anyway – you need the help. Molly Sargent asks a good question: "Have you invested as much this year in your career as in your car?" Now is the time to realize your most important investment will be in yourself and your career. Never miss a chance to upgrade your skills. Think of yourself as You, Inc. Think ROI (return on investment) the standard formula for valuing an investment. None will be more profitable than the investment in yourself. Design your career. Don't wait. A year from now you will have wished you started today. Success is not an accident, nor is it something you wish for. Success is something you design.

The only required text for this course is the Federal Rules of Evidence, but the legal world has spawned some creative writers, poets and musicians such as: Kafka, Mahatma Ghandi, Goethe, Cole Porter, Ranier Rilke and John Grisham. None of them are on this list but the following books are all about trials and lawyers and impart some nuggets of wisdom. Teach yourself to find and admire excellent writing. It is more worthwhile to reread the best writing in our field rather than lesser works for the first time. Find the works which speak to you. It is not necessary to read any of these for this course but for the student who wants to stretch the mind and enjoy a good read I recommend:

"Attorney for the Damned: Clarence Darrow in His Own Words" edited by Arthur Weinberg. In conjunction with reading this book watch the movie "Compulsion" starring Orson Welles as Clarence Darrow. Concentrate on Darrow's speech taken partially verbatim from the Leopold and Loeb trial (it is on YouTube). Darrow's speech is the single finest trial performance in history. There is a reason why everyone still knows his name seventy years after his death.

The second best book to read is "The People v. Clarence Darrow" by Geoffrey Cowan. Darrow's speech in his own defense is a work of genius.

SELECTED BIBLIOGRAPHY

Books on the Brain.

"The Art of Advocacy: A Plea for the Renaissance of the Trial Lawyer" by Lloyd Paul Stryker

"My Life in Court" and "The Jury Returns" by Louis Nizer

"The People v. Clarence Darrow" by Geoffrey Cowan

"The Killing of Bonnie Garland" by pschiatrist Willard Gaylin

"How Can You Defend Those People?" by James S. Kunen

"A Civil Action" Jonathan Haar

"Black's Law," which details four trials of mine

"The Best Defense" by Alan Dershowitz

"My Life as a Radical Lawyer" by William Kunstler

"The Man to See: Edward Bennett Williams" by Evan Thomas

Any articles on evidence or trial advocacy by James McElhaney, particularly those first published in Litigation Magazine.

"Modern Trials" by Melvin Belli (West Pub. Co., 2 ed. 1982), which is the seminal work on demonstrative exhibits and persuading jurors

"How To Argue and Win Every Time" by Gerry Spence (St. Martin's Press 1995)

Additional thoughts: Use listservs to keep current. There are many great ones out on the web. Find the ones in your specialty. One email to hundreds of lawyers will get you lots of free and useful advice. Use web blogs and internet searches for "trial techniques and tips." The web is full of wonderful materials dedicated to trial work.

LIKE STEROIDS FOR YOUR CAREER

Black's Law #12: For every trial, try to master one new thing that will improve your skill set. Power Point, focus groups, jury questionnaires, computer graphics.

History is full of those who overcame seemingly impossible odds: Helen Keller was blind, deaf and couldn't speak; FDR was crippled from polio; Beethoven and Rush Limbaugh went deaf in the apex of their careers; Lord Byron had a club foot; Ray Charles was blind; and Julius Caesar was an epileptic. Today with dazzling developments in teaching, training, and medicine, there is no legitimate excuse. Do not allow any physical impediment to hinder your professional career. Plenty have succeeded with disabilities. For example if you don't like the sound of your own words, there are specialists in voice beautification or speech therapy to remedy stuttering, lisps or similar medical problems. Look for personal trainers, self-help books, cosmetic surgery, personal voice trainers, and other forms of coaching. Take personal training seminars like www.landmarkededucation.com.

Some say why do I need that after three years of law school? Perhaps for the same reason that Tiger Woods has a golf coach. ("Everything can always be better. This game is fluid; it's always changing; it's always evolving. I could always hit the ball better, chip better, putt better. You can get better tomorrow than you are today." Tiger Woods, Sept. 4, 2006 after winning 5 tournaments in a row). All the world's knowledge is available at your fingertips on the internet, and the blogs, listservs, etc. – bring the maximum number of human minds into the process.

Suggestions:

FindLaw

Read the legal blogs.

Go to as many hands-on seminars you can afford.

Read the books and manuals. Think of the edge if you are 100 books ahead of your opponent.

It is an observation. I usually value a book when I get one piece of information that is useful that I can implement in my life. There are several excellent resources that may be worth your time if you are serious about accomplishing your goals in life. I will mention just two of them here by the same author. These are not his original ideas at the same time he is able to package it in a way that is helpful to me. Steve Scott has mentoring program for Super Achievers and second educational material is the Richest man ever lived. I am impressed by the material content, specificity of action plan. It's not how good she was that mattered, it's how good she wanted to be. What is interesting in her quote is that she didn't compare herself with George Michael or Mariah Carey, rather she saw the fame of Persil Automatic as her yardstick. Laugh at it as you may, it's this highly original imagination that got her where she is today. One of the UK's leading detergents. 18. You know who . 19. It means their imagination hasn't been fired up by academic tuition. People who are conventionally clever get jobs on their qualifications (the past), not on their desire to succeed (the future). Very simply, they get overtaken by those who continually strive to be better than they are. As long as the goal is there, there is no limit to anyone's achievement. He's already. "Chapters such as It's Right to be Wrong, Have you Noticed How the Cleverest People at School Are Not Those Who Make It In Life? and Do Not Seek Praise, Seek Criticism are accompanied by an entertaining collection of photos and illustrations. Get it and you'll never think the same way again." Shots. "The former creative director of Saatchi & Saatchi teaches readers how to smash down life's impossible barriers using a fresh combination of wit, smart thinking, and horrific mistakes.

