

CAMBODIA

Guide to Effective Advocacy in the Cambodian Criminal Justice System



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“The European Union is made up of 25 Member States who have decided to gradually link together their know-how, resources and destinies. Together, during a period of enlargement of 50 years, they have built a zone of stability, democracy and sustainable development whilst maintaining cultural diversity, tolerance and individual freedoms. The European Union is committed to sharing its achievements and its values with countries and peoples beyond its borders.”

-The European Commission is the EU's executive body.

Guide to Effective Advocacy in the Cambodian Criminal Justice System

The purpose of this guide is to provide advice to criminal defense lawyers in Cambodia on how to most effectively represent their clients. Criminal defense lawyers do this through techniques of advocacy and persuasion, which we discuss below.¹

Before turning to this discussion, our assumption is that the criminal defense lawyer has studied - indeed mastered - the Cambodian Penal Code and the Code of Criminal Procedure. These codes, particularly the procedure code, must be read over and over again in order to learn all the rules that will protect your client and guarantee him or her a fair trial.

There are, in our view, three qualities which every effective defense lawyer must have:

1. A sincere belief in your client's case. If your client is innocent or substantially innocent, the sincerity of your belief in the client's case will transmit itself to whomever you are trying to convince at the time, whether it be the police, the prosecutor, the investigating judge or the trial judge.

¹ International Bridges to Justice is most grateful to Delaine Swenson and Herbert D. Bowman for their important and extensive contributions to the contents of this Manual. Professor Swenson is a member of the Faculty of Law at John Paul II Catholic University of Lublin, Poland. Mr. Bowman has provided his expertise in International Legal Reform to the criminal justice systems of various countries.

If there is little or any doubt that your client has committed the offense, and there is proof of his guilt beyond a reasonable doubt, you must still argue your client's cause as a human being to convince the court to give lenient treatment. Treat the client as you would your father, son or brother. Do not lose your ability to be objective about the case but argue with passion that there were extenuating or mitigating circumstances surrounding the commission of the crime.

2. The criminal defense lawyer must be resourceful. By that we mean the ability to make the most of the facts and circumstances presented to you and often there is very little. You must be creative enough to exploit to the fullest every bit of evidence in favor of your client and to defuse as far as possible the counter-evidence presented by the prosecution.

3. You must work hard. You will be successful in your case only if you have spent sufficient time to master both the facts and the law. You should know more about the case than anyone else in the courtroom.

Before any further discussion of principles of advocacy and persuasion, let us look at a typical criminal case in a Cambodian courtroom. The overwhelming majority of cases - both felonies and misdemeanors - are over in a day or less. Let us assume a felony case (robbery, rape, theft, battery) is to be heard by three judges. The judges will have the complete dossier of the case before them, including any reports, witness statements and summaries of the evidence assembled by the police, the prosecutor and the investigating judge. As a criminal defense lawyer, you have full access to this dossier and you must make the most of it. You must spend all the time necessary to study this material and make copies of any important documents. This is the raw material of your case and you must look for

weaknesses in the prosecution's case to create a reasonable doubt in the minds of the judges. You must try to construct a theme - a theory of the case based on the facts - that will make sense to the judges.

And you must be able to present your case quickly and with precision. Indeed, a very large percentage of the cases are over in a morning or less so you have to get to the heart of the case to convince the judges of the justice of your cause. Assuming that you have done a thorough and complete investigation of the facts and circumstances of the case, the tools of advocacy and persuasion that you will use at the trial will be the opening statement, direct and cross examination and the closing argument. We will discuss each of these matters in turn.

The Opening Statement

There is no provision in the Cambodian Code of Criminal Procedure that specifically allows either the Prosecution or the Defense to make an opening statement. There may be a good reason for this. After all, the three judges in a felony trial already have before them the full investigative file so there seems little necessity for the parties to make an opening statement unlike, for example, an American jury trial where the jury learns about the case only after the prosecution and the defense have made their opening statements.

However, despite the lack of a rule allowing opening statement, experienced defense lawyers in Cambodia (as well as prosecutors) have been allowed by the judiciary on occasion to make an opening statement in selected cases. In such cases, the defense lawyer, after a careful examination of the investigative file and

knowing what the evidence on both sides is likely to be, can craft an opening statement that will expose both the legal and factual defects in the prosecution's case and set forth the essential facts and theory of the defense case.

Developing a Theory of the Case

Ideally, an opening statement should present the defendant's theory of the case. Whether or not the defense lawyer is allowed to make an opening statement, a theory of the case is essential as it will guide both the direct and cross examinations of the witnesses and form the cornerstone of the closing argument.

A theory of the case is a party's version of "what really happened." It is a concept which explains the legal aspects of the case and the factual background of the case and ties them together. It is at the center of a party's case. A good theory of the case answers two important questions: (1) What Happened? and (2) Why Did it Happen?

A theory of the case should meet the following requirements:

- Should be simple and easy to understand
- Should be logical
- Should meet the legal requirements of a party's claim
- Should be consistent with decision maker's view of how real life works

Defense theories of the case are usually wrapped around a legal defense but the legal defense is normally not sufficient to complete the theory since it does not

usually go far enough to explain the facts surrounding the event. Examples of frequently used legal defenses in criminal cases are as follows:

Legal defense 1: The accused did not engage in the action making up the offense.

Legal defense 2: The accused was justified in taking the action since he was acting in self-defense.

Legal defense 3: The accused engaged in the action but did not possess criminal intent.

Examples of theories of the case constructed upon these defenses are as follows:

Theory 1: This is a case of mistaken identity and poor police investigation. My client was not the person who committed the crime. The police were so eager to arrest someone they blamed my client without doing sufficient investigation to find the real perpetrator.

Theory 2: This is a case of a frightened woman protecting herself against a violent and abusive drunk. My client's husband physically abused her for years and when he attacked her this time, she was forced to defend herself with the only weapon in reach, a kitchen knife.

Theory 3: This is not a crime but a tragic accident. My client and his friend were foolishly playing with the handgun when it accidentally went off.

Execution

1. A lawyer should build a general theory of the case centered on the client's best interests and based upon the actual situation, which will help him or her evaluate what choices to make throughout the defense process.
2. Counsel should allow the theory of the case to guide his focus during the investigation and trial preparation process. Counsel should dig into and expand upon the facts and evidence supporting his theory of the case. Nevertheless, the counsel should not become a "prisoner" to his theory of the case.

Work form for developing a theory of the case

The following points may help a defense lawyer to build a complete and coherent theory of the case:

1. What is your theory of the case? (e.g. innocence, alibi witness, misidentification)
2. Why do you believe this is the best theory of the case?
3. What is the relevant law? What are the elements of the offense? How will your theory of the case prove the client's innocence?
4. What are the unalterable facts that you need to confront and explain in the theory of the case?
5. What are the facts in favor of the client?
6. What is the key emotional theme in the case?

7. What emotional themes is the prosecutor most likely to use in his argument? How will you use your theory of the case and emotional theme to refute these emotional themes?
8. Make a list of the prosecution witnesses with specific questions attached to their names.
9. Make a list of the defense witnesses, and under each of their names, write out how you plan to question them.
10. If the accused will testify, list your main desired objective when directly questioning the accused. How will the accused's testimony strengthen your theory of the case?
11. What further investigation do you need to do to complete your theory of the case?
12. Do you need to solve any problems with the evidence? Are these problems likely to strengthen or weaken your theory of the case? How will you explain the evidence that is inconsistent with your theory of the case?
13. Make a brief, effective statement for your theory of the case.

Storytelling: Test your Theory of the Case and Themes at Court

To defend your client effectively, the lawyer must understand how to tell a story to the court. The more convincing and touching the story is, the more persuasive the argument becomes to the judge who ultimately decides the facts of the case. Every well-knit story needs a plot, and for a defense argument, a plot provides the best tool for explaining the facts of your theory of the case.

Why must the defense lawyer use storytelling methods in the court?

Storytelling allows the defense lawyer to set the stage, introduce the characters, create an atmosphere, and organize ideas into a carefully crafted narrative format, thereby impacting the way each judge perceives a given case. Without such a framework, judges will understand the evidence and testimony in accordance with the prosecutor's argument. Once the defense lawyer successfully executes a framework, he or she can use the client's experiences to influence the judges' imagination, leading most judges to understand the evidence in the context of the client's past experiences.

Conclusion

To develop a theory of the case, the defense lawyer should objectively evaluate the prosecution's case and then, in accordance with applicable laws, structure a moving story based on the facts of the crime and emotions that will serve as a rebuttal. The theory of the case will influence the investigation, which witnesses will testify at trial, and what demonstrations will be held in court. Through telling a reasonable and convincing story, the lawyer can persuade the judge to find the client innocent, mitigate his sentence, or exempt him from criminal responsibility.

Questioning Witnesses in Court

The questioning a party does of its own witnesses is called direct examination. The examination a party does of the opponent's witnesses is called cross-examination.

Direct Examination

Direct examination of witnesses provides a party with the opportunity to present the substance of his or her case through witness testimony.

Direct examination is used to:

- Introduce undisputed facts
- Present a party's version of disputed facts
- Lay the foundation for admission and consideration of exhibits (evidence)
- Enhance the credibility of witnesses

Direct Examination Techniques:

Organize Logically

Organize the points you wish to make through your witnesses in a logical fashion. Most people are better able to understand a series of events or other information if it is presented in chronological order. For example, a defense lawyer when questioning a witness of a robbery with serious injuries might put his examination together in the following order:

- a. Witness background (age, occupation, etc.)
- b. Description of scene of robbery
- c. What occurred immediately before the robbery

- d. What happened during the robbery
- e. What happened immediately after the robbery

There may be cases where chronological organization is not the best way to present the information. Whatever the order of examination points, the organization should be logical so the court can easily follow and better remember what the witness said.

Introduce Witness and Develop Background

Every examination of a witness called on direct examination should begin with questions whose answers introduce the witness and reveal relevant background information. The examination should result in the witness providing answers to the questions:

“Who is he?”

“Why is he here?”

“Why should I believe him?”

Example:

Q. Mr. Sophal, what is your full name?

A. My name is Chan Sophal.

Q. How old are you?

A. I am 22 years old.

Q. What is your profession?

A. I am a tailor.

Q. On the morning of September 5, 2003, did you see a man attacked near the corner of Monivong Boulevard and Mao Tse Tung Boulevard?

A. Yes.

Through this short exchange of questions and answers, the examiner has identified the witness, indicated why the witness has been called, and provided some support for why he should be believed – he is an ordinary citizen who was an eyewitness to the event.

Background questions should be asked of all witnesses since credibility is always an issue. The amount of background information necessary (or allowed by the court) will depend on who the witness is and how important his testimony is to the case.

It is wise to keep in mind that the answers to the questions will form the record of the case. In the example above, while it may be obvious to the trial judge(s) that Mr. Sophal is a young man, it will not be obvious to appellate court judges who may later attempt to understand the facts by reading the record of the case. If the age and physical characteristics of the witness are relevant to the case, the best way to ensure these facts make it into the record is to ask the pertinent questions. Providing such details also helps a judge “paint a mental picture” of the witness.

Use Appropriate Questions

Use short, open-ended questions that assist the witness tell his/her version of events in a logical, organized fashion.

Examples:

Where did you go that day?

How did you feel?

What did the man look like?

What happened next?

Do not use leading questions. Leading questions are questions that contain or suggest the answer.

Examples:

You went to the market that day didn't you?

You were frightened weren't you?

He was a tall man wasn't he?

He attacked you, right?

Use Exhibits to Assist the Examination

Exhibits can be maps, diagrams, photographs, weapons, clothing or any other physical object which can be testified to by a witness and which can be used to prove a fact relevant to the outcome of the case. (The term "exhibits" includes all forms of physical evidence.)

Exhibits can make a witness' testimony easier to understand. If a witness testifies, for example, about the location of people and objects at a crime scene, a listener can quite easily become confused or draw erroneous conclusions. If the witness is

asked to place the people or objects on a map or diagram that can be seen by the listener, the testimony is much more likely to be followed and understood.

Exhibits can make a witness' testimony easier to remember. Studies have shown that most people remember much more about the information they see than the information they hear. They remember even more about information they see and hear.

Exhibits may express more about an event than words are capable of expressing. Pictures of injuries often fall in this category. They also may have a greater emotional impact on the listener than words alone. In the English-speaking world there is a saying that captures this idea, "A picture is worth a thousand words."

Exhibits can assist the fact finder to acquire a more accurate understanding of the facts. When one person hears another person describe a place, a person, or an object, his or her mind constructs an image of that place or thing. The image they construct may or may not resemble the actual place or thing. Other people who hear the description will construct their own, different images. Allowing witnesses to refer to maps, diagrams or photographs during their testimony can reduce this "distortion" between the actual place or object and the image created by a listener in his head.

Exhibits lend credibility to the witness' testimony. An exhibit that supports what a witness has said makes the witness and the exhibit have greater credibility.

Example:

The victim of a domestic assault testifies that her husband hit her with a belt and left a bruise on her back. Hearing this, one judge on the panel has an image of a small bruise; another judge has an image of a large bruise. If the prosecutor shows a picture taken of the victim's back after the attack, all of the judges will have one, more accurate, image of what the injuries really looked like. This could make a big difference in how they decide the case.

The best time to use exhibits is usually after the witness has completed telling the “action” part of his story. The witness can then be asked to describe and explain the exhibits and how they relate to the events that took place. An advocate who follows this approach will not interrupt and detract from the oral telling of the action. Once the action is related, the advocate can then ask the witness to describe the exhibits and ask questions that focus attention on the more important parts of the witness' testimony.

Prepare the Witness

Where possible, the examiner should prepare his witnesses for the examination. This means letting the witness know before hand what questions they will be asked on direct and what questions they might be asked on cross examination. It means, where possible, showing the witness, ahead of time, the exhibits they will be shown during trial so that they can better explain the exhibits to the court. If a witness is not given any advance notice of what will be covered during questioning, the witness may be easily confused and may perform poorly under the stress of open court questioning.

Of course, a lawyer must take special care not to “coach” a witness, by telling them what to say or what answers he or she wants to hear. This risks misleading the court and raises serious ethical questions about the conduct of the lawyer. Also, a witness who is coached comes across as less credible than one who honestly answers the questions and tells his or her story.

Cross-Examination

Whether dealing with the inquisitorial system (Cambodia) or the adversarial process (United States), cross-examination is said to be at the heart of the adversarial process. The two broad purposes of cross-examination are 1) to bring out information favorable to your case and 2) to damage the case of your opponent – this is called a “destructive examination.” A destructive examination is designed to discredit the witness or her testimony.

Remember that not every witness needs to be cross-examined. If an opposing witness has not damaged your case, there may be no reason to ask the witness any questions. Sometimes the best cross-examination is simply to say, “No questions of this witness.”

A destructive cross-examination is not necessary in every case and may only hurt your case when the witness has testified to facts that are helpful to you.

Structure of Cross-Examination

A lawyer planning a cross-examination should create an organizational structure to his/her questioning. The structure should limit the number of main points to three or four. This is because attempting to cover too much ground during cross-examinations risks diluting the impact of the main points and also increases the chances the examiner will lose control of the witness and the examination. The main points should be points that support your theory of the case.

Cross-examination should not be a repeat of the direct examination. This is a frequent mistake made by many lawyers. Asking the same or similar questions on cross-examination that were asked during direct examination, usually helps the witness solidify the testimony they gave on direct.

One of the most important rules of court trial advocacy is, “Never ask a question if you do not know the answer.” This is especially true of cross-examination. The purpose of cross-examination is to elicit facts that are favorable to you or to diminish the impact of the direct examination. It is not a time to go fishing for information. Ask questions you know the answers to or questions that will provide answers that you know you can handle without hurting your case.

Do not argue with the witness. Because cross-examination often puts the questioner in a confrontational frame of mind and because in many cases the witness is in fact antagonistic, it is easy to slip into argument. This is not only unprofessional but is likely to be counterproductive. The more effective cross-examinations are those in which the examiner is in control of the questions, and of his/her own emotions. The best way to avoid becoming argumentative with a witness is to organize and structure your examination carefully.

A cross-examiner should normally avoid asking the witness open-ended questions that ask the witness to “explain”. Questions that ask “what,” “how” or “why” give the witness a chance to give testimony that is damaging to the examiner’s case. When a witness is asked a question that allows him to “explain” rather than provide a simple answer, the cross-examiner loses control of the examination. Cross-examination is about control. Remember that the direct examiner can ask these types of questions of the witness on redirect if he or she feels it necessary.

Style of Cross-Examination

During direct examination, the examiner usually tries to maintain a secondary role to the witness. In cross-examination, however, the examiner should attempt to play the main or dominant role. The attention of the fact finder should shift from the witness to the examiner. The cross-examiner can make this shift occur by using certain techniques, such as asking leading questions. These are questions that suggest the answer, and normally call for a yes or no answer.

Examples of leading questions are:

Q: Ms. Tiri, on June 28, you owned a bicycle didn’t you?

Q: You hit the man with your fist, isn’t that right?

Q: You were drinking liquor that night, correct?

You can also make your questions leading not by your language but by your intonation and attitude.

Example:

Q: Mr. Vanny, you were assaulted at around 11:00 p.m.?

A: Yes.

Q: It was December 5, wintertime?

A: Yes.

Q: It was nighttime?

A: Yes.

Q: The sun was down?

A: Yes.

Q: The stores were closed?

A: Yes. Most of them, I think.

Q: Not many cars driving around?

A: Not at that time of night.

Q: You said during your direct testimony that there was light from the streetlights?

A: Yes.

Q: And those lights were located at end of each block?

A: Yes.

Q: But there weren't any streetlights in the middle of the block?

A: No.

Q: And that is where the robbery happened, didn't it?

A: Yes.

In the short piece of cross examination above, the examiner has successfully built a factual basis for his argument that the lighting conditions were too poor for the victim to see and accurately identify his attacker. In such an examination, the examiner might consider having a photograph of the scene available to show to the witness at the right moment during the examination. If the witness claims that there were streetlights in the middle of the block and the photo shows that there

were not, the witness' recollection will be proven faulty. This may cause the court to question other aspects of the witness' recollection, which may lead to the court finding his identification of the defendant unreliable.

Ask short, clearly understood questions that move the witness bit by bit toward giving you the information you seek. In the example above, the examiner did not ask, "You really didn't see the man who robbed you, did you?" If he had done that, the witness would probably have given an answer that the examiner did not want to hear. The questioning style he used helped him draw facts from the witness that he could later use to argue that the lighting on the scene was not good enough for the victim to make a reliable identification.

Keep control over the witness. In Anglo-American trial proceedings, one method lawyers use to control witnesses is to object to the response of a witness that does not directly answer the question posed, then ask the court to order the witness to give a more direct answer.

A less formal method of exerting control is simply to use the witness' fear of looking foolish or providing false information to the examiner's advantage. If the examiner carries himself with confidence and the questions are delivered with certainty, the witness will often adopt a more submissive, less antagonistic attitude. This will help the examiner control the witness and get to the information that is helpful to his case.

Use a style that is natural to you. There are many styles of examination and presentation that are effective. While American movies may give the impression that a "dramatic" style is desirable, in reality, most judges are not impressed by

overly dramatic presentations. Every advocate should develop a style that is natural for himself or herself, a style that he or she is comfortable with.

Bringing Out Favorable Information

When another party's witness possesses information that supports a party's case and is consistent with its theory of the case, the cross examiner should bring out this information from the witness. This should be done at the beginning of the cross-examination. If the examiner is pleasant and polite in her questioning, this will cause the witness to relax and be more cooperative. If the examiner needs to ask questions that discredit or challenge the witness, she can do this later in the examination, after the witness has given the favorable information the examiner seeks.

It is very rare that a witness' entire direct examination is damaging to a party's case. Usually the witness gives some information that is helpful. It is often helpful to a cross-examiner to have the witness repeat those facts that are favorable to their case. Having the witness repeat favorable facts improves the chances that the judges will remember those favorable facts when they are making their decision.

It may be that the other party's witness can corroborate, or support, parts of the cross-examiner's case. It may be that the witness possesses certain facts that support statements made by witnesses he or she has called. Statements made by the other party's witnesses that support the cross examiner's case or the cross examiner's witnesses often leave a very powerful impression with the judges. An

advocate can argue during closing statement that certain facts must be true since even the opposing party's witnesses have admitted that they are true.

Discrediting Unfavorable Testimony

This type of cross-examination has one main purpose – to show or suggest that the testimony of the witness is less reliable or less likely to be true than it appeared at the end of the direct examination. The aim is not to discredit or “destroy” the witness personally. Rarely will an examiner have the opportunity to show that a witness purposefully lied during direct examination. Most witnesses, however, will include their own perspectives, attitudes and beliefs in telling their stories. This can distort the reality of the event. Cross-examination can develop and reveal this distortion.

Two approaches that can be used to discredit a witness' testimony involve challenging a witness' perception and challenging a witness' memory.

Perception

An obvious way to discredit a witness' testimony is to bring out facts that suggest that the witness did not have the best ability or opportunity to observe the event he testified about on direct examination. This usually means showing that the event occurred quickly and unexpectedly, that the witness was frightened or excited, that the distances were far or the lighting was poor. This type of examination can result in the court questioning the accuracy of the witness' observations.

Example:

Q: Mr. Vuth, you are 74 years old, correct?

A: Yes I am.

Q: And you have to wear prescription glasses because your eyesight is not very good anymore, correct?

A: True.

Q: And the night this incident happened you had forgotten your glasses, correct?

A: Yes, that's true.

Q: And everything that you saw that night was very blurry, wasn't it.

A: Yes, I would have to admit it was.

Memory

A witness' ability to remember the details of an event can have a great impact on the reliability of his testimony. If a large amount of time has passed since the event, he may have difficulty remembering the event accurately. He may have trouble separating the actual details of the event from details he heard from others or details his own mind created. Cross-examination can often point out that a witness has forgotten, confused or has otherwise mixed up certain facts which are necessary to the accurate reconstruction of events.

Example:

A police officer arrested a defendant six months prior to the trial and took a statement from him. The cross examination reveals that the officer did not write the statement down in his report and suggests that the officer has arrested so many

people and taken so many other reports since then, that he cannot possibly remember with accuracy what the defendant said:

Q: You arrested my client more than six months ago?

A: Yes.

Q: How many arrests do you think you make a week?

A: Maybe 4 or 5.

Q: So, since you arrested my client six months ago you have made approximately 120 arrests?

A: Probably about that. Maybe a few less. Its difficult to say how many.

Q: It's impossible to remember all of the details of every one of those arrests isn't it?

A: Yes.

Q: That's why you write the details down in police reports?

A: Yes.

Q: And you try to write down in the report everything you think is important?

A: Yes.

Q: But your report in this case does not mention anything about a statement made by the defendant?

A: No.

Q: Your report says nothing about what the defendant actually said, does it?

A: No.

Impeachment

Impeachment is a cross-examination technique that discredits a witness or his testimony. Its purpose is simple – to show the court that the witness or his testimony cannot be believed.

There are several basic impeachment techniques. Two standard techniques are:

- a. Showing the witness possessed bias, interest, or motive.
- b. Revealing the witness made prior inconsistent statements.

Bias and prejudice are tendencies or inclinations that a person has that prevent him from being impartial. An individual can be biased in favor of, or prejudiced against, another person or position. Exposing this bias or prejudice usually involves revealing a family, business or personal relationship that makes the witness unable to be impartial or objective.

Example:

The defense is alibi. The defendant's mother testified on direct that her son was home when the crime was committed. The cross examination reveals the mother's obvious bias toward her son.

Q: Mrs. Raneth, your son was living with you on October 6, the date this assault occurred, is that right?

A: Yes.

Q: He is still living with you?

A: Yes.

Q: It's fair to say that you talk to your son every day?

A: Yes.

Q: He tells you about his problems?

A: Yes.

Q: You've talked with your son about this case many times, haven't you?

A: Yes.

Q: The court did not force you to come to court today did it?

A: No.

Q: Your son and his lawyer asked you to come and testify today, is that right?

A: Yes.

You will note that this cross-examination was very gentle. The examiner asked enough questions to point out the mother's obvious bias without attacking her and making her look more sympathetic to the court.

Interest refers to the possible benefit that a witness might derive from the outcome of the case, or the possible detriment. Often interest is financial. Since human greed is a common human motivation, revealing that greed can have a damaging effect on a witness' testimony.

Motive is the psychological urge that causes a person to think or act a certain way. Common motives are greed, love, hate, and revenge. Effectively suggesting that a witness has a motive to testify in a certain way can result in the court viewing the witness' testimony with skepticism.

Example:

Q: Mr. Panna, the defendant, Socheeta is your ex-girlfriend, is she not?

A: Yes she is.

Q: And the two of you dated for over two years, correct?

A: Yes we did.

Q: And the relationship was very serious, was it not?

A: I suppose so.

Q: At one point you loved Socheeta so much you asked her to marry you, didn't you?

A: Yes I did.

Q: And when she said no, that she was in love with your best friend Sophal, that made you angry didn't it?

A: Yes

Q: And upset with Socheeta and Sophal?

A: Yes

Prior Inconsistent Statements

Confronting a witness with inconsistent statements he made at some time prior to testifying in trial can be one of the most effective methods of impeaching a witness. These statements can be statements made to the police or civilians or even statements made in court at previous hearings. The aim is to show that the witness has given two or more versions of the same event or fact, and therefore his testimony cannot be trusted.

There is an organized and simple technique that can be used for impeaching a witness in this fashion. It is three-step technique – the steps are to commit, credit and confront. The first step involves committing the witness to a fact or statement he gave on direct examination. The second step involves building up the prior statement the witness made which was inconsistent with his direct testimony to

show its importance. The third step is to confront the witness with the prior inconsistent statement in such a way that he must admit that he made it.

Example:

Q: Mr. Seyha, you stated on direct that you were less than 20 meters away when you saw the cars collide?

A: Yes.

Q: There is no doubt in your mind about that?

A: None whatsoever.

Q: Mr. Seyha, weren't you more than 20 meters away when you saw the crash?

A: No.

Q: Mr. Seyha, you spoke with a police officer a few minutes following the accident didn't you?

A: Yes.

Q: That was at a time when the details were still fresh in your mind?

A: Yes.

Q: You knew the police officer was investigating the accident didn't you?

A: Of course.

Q: And you were careful to give the officer the correct facts?

A: Of course.

Q: Mr. Seyha, you told the police officer, minutes after the accident, that you were more than 20 meters away when you saw the crash, didn't you?

A: Yes.

In the above example, the examiner used the commit, credit and confront technique to reveal that the witness had given two versions of a crucial fact. The fact that the witness has made contradictory statements is something the court is likely to use in

determining whether the witness' testimony was reliable. It should be pointed out that where a witness denies he made a previously contradictory statement, unlike the example above, the examiner should be prepared to confront the witness with the evidence of that statement – for example showing the witness a police report or transcript of a prior hearing containing the prior inconsistent statement, or by presenting actual witnesses who will testify to the contradictory statement being made.

Introducing Exhibits

As mentioned previously exhibits are important in a case to show to the finder of fact what the scene looked like or to give to the court evidence in the case. In order to use an exhibit, a proper foundation must be laid that allows the court to accept the exhibit as being true and authentic. This is often called “laying a foundation’ for the evidence.

Introducing exhibits involves three steps: (1) Have the witness identify the exhibit; (2) have the witness authenticate the exhibit and (3) move to have the exhibit admitted into evidence.

Example:

Q: Officer Sopheak, what did you see when you arrived at the scene?

A: I saw the victim, Sok Sowathey, lying on the kitchen floor with a knife sticking out of her chest.

Q: What did you do then?

A: I knelt down and ascertained that she was not alive. I then radioed for assistance and began my investigation.

Q: What happened to the knife that was in the victim?

A: At the direction of the coroner I took the knife out of the victim's body and I put it in a plastic bag, which I marked with the time, date and my signature.

Q: Officer Sopheak, I am showing you what has been marked as Prosecution Exhibit 1, do you recognize it?

A: Yes, it's the plastic bag containing the knife that was in Sok Sowathey's body.

Q: And is this the knife that you pulled out of the body?

A: Yes it is.

Q: How do you know?

A: I recognize the knife, and that is my signature, date and time writing on the plastic bag.

Q: Your Honor, the State would like to admit Prosecution Exhibit One into evidence.

Defense: No Objection Your Honor.

Judge: Prosecution Exhibit Number One will be admitted.

Closing Arguments

The closing argument provides the advocate the opportunity to finally argue their case to the fact finder. The closing argument is not a summation of the facts. It is an argument used to convince the fact finder that the advocate's case is the true and correct one.

An effective argument takes the theory of the case, the evidence, and the law and molds them together into a persuasive whole. A successful argument makes the judges do what the advocate wants them to do and feel good about it.

The closing argument should be efficient. Again, remember that most people can maintain a high level of concentration for only a short period of time. An effective closing argument should focus on the main themes and key pieces of evidence. It should not overwhelm the judges with details. Most closing arguments should not be more than 15-30 minutes in length.

General Considerations

While there are an infinite number of ways to create and present a convincing closing argument, there are some basic strategic devices that should be considered in every case. These devices include:

Arguing the theory of the case. The theory of the case that was presented during the opening statement should remain the center of the advocate's case. It should be stated clearly in closing. It should be repeated.

Arguing the facts. Argue the facts by carefully choosing the facts that support your theory of the case. Refer to specific witnesses and testimony. A fact is only a fact when a specific witness vouches for it or an item of evidence proves it. Avoid giving your personal opinion. Your personal opinion is irrelevant.

Using exhibits and visual aids. Exhibits can do many things. They can enhance the emotional content and persuasive power of a presentation. They can organize complicated factual scenarios or legal concepts in ways mere words cannot. They can provide a refreshing change of pace for the listener that will allow him to refocus his attention on what the advocate has to say. They can also have an emotional impact.

Use analogies and stories that relate to real life. If they are short and they are pertinent, they can make an advocate's point extremely clear.

Argue strengths. The most successful arguments are those that focus on the strengths of the advocate's case. If an advocate spends too much time focusing on the weaknesses of the other party's case, he may convey the feeling to the listener that his own case is not that strong.

Deal with your weaknesses. While an argument should be positive and stress the strengths of an advocate's case, it should not entirely avoid discussing the weaknesses of the case if they exist. There are two advantages to addressing a case's weaknesses during argument. First, if an advocate mentions the weaknesses before the opposing party does, he or she diminishes the impact the opposing advocate would make if they raised them first. This is often referred to in English speaking courtrooms as, "stealing the opponent's thunder." Second, judges are likely to respect the honesty and candor of an advocate who discusses the weaknesses of his case. Respect for the advocate often translates into respect for his argument.

Elements of an Effective Closing Argument

There are a variety of ways to construct an effective closing argument. Of course the structure will depend on the nature and facts of the case and the style of the advocate. Many effective closing arguments however generally follow the structure below:

1. Introduction
2. Issues
3. What really happened and the proof
4. Basis for guilt/innocence
5. Conclusion

Introduction

Judges want to hear a clear, concise explanation of what an advocate wants and why he or she wants it. They want to hear it in a way that captures their attention. The advocate should deliver an introduction that does these things using the theory of the case to bind it together.

Example:

Samut Socheeta is on trial here for defending herself against a very large, very drunk man who was trying to kill her. Our law, sensibly, allows a person the right to self-defense. This right to self-defense extends to wives in the same way it

extends to husbands, or to friends, or to mere acquaintances. Samut Socheeta acted in self-defense and therefore she must be found not guilty.

Issues

Somewhere, either before or after discussing the facts of the case, the closing should clearly state the issues in a way that the answer is obvious. This is where you emphasize your theory of the case.

Example (prosecution):

To find Samut Socheeta guilty of attempted murder you must answer two simple questions: First, did she intend to kill her husband when she plunged that 10 inch kitchen knife directly into his chest with such force that it snapped the blade. Second, would a person who was truly acting in self-defense behave in the manner she did after the killing – not calling the police or ambulance for five hours?

Defense: There is only one issue in this case: Was Samut Socheeta justified in defending herself against a drunken man twice her size who came into the house screaming that he was going to kill her – a man who had beaten her senseless many times before?

What really happened – the proof.

After hearing the evidence presented in pieces during the trial, the court will want to hear the party's version of how the pieces fit together to make a believable whole. This should not be a repetition of all of the evidence presented but a

presentation of the critical facts supporting an advocate's case and what those facts mean.

A standard approach to this part of the argument is to tell the court the story from the point of view of the party then move immediately to a discussion of the sources of information that support the story.

Example (defendant):

For Samut Socheeta, the evening of July 20, 2004 began in a familiar way. Her husband, the defendant, pushed himself away from the dinner table and announced that he was going out and would not be back until late. She knew that he would be back alright – he would be back drunk, angry and wanting to take out the frustrations of his life on her. She knew that she would be beaten. She just didn't know how badly, or if this time, she would survive. She waited in fear for hours, until she heard the sound of his steps in the hallway outside.

During this trial you heard Socheeta talk about the life of fear she led. She told you about the many times the defendant beat her up in his drunken rages. You also heard from her neighbors, Mrs. Raneth and Mrs. Tiri. They told you about those many times they heard the defendant come home late at night; they told you about hearing the sound of blows being struck and hearing Socheeta's voice begging her husband to stop hitting her. From this evidence, you know that Samut was justified in her belief that this time, the defendant would kill her.

The artistry of good closing statement is to weave the facts that support your case into a cohesive, logical, and compelling argument.

Basis for guilt/innocence

It is essential that an advocate spend some time focusing on the areas of the law that are of main importance to the outcome of the case. For the prosecution this often means reminding the court of the legal elements of the offense and discussing how the evidence in the case has proven up each element. For the defense, this usually means singling out certain legal elements necessary to prove the crime and arguing that the prosecution has failed to meet its burden of proof on those elements, or raising an affirmative legal defense and arguing the facts that establish that defense.

Example (prosecution)

Article 279 of the Criminal Code says that a person is guilty of bribery when he 1) hands over to an employee any gift, present, makes a promise to him/her or provides him/her with any benefit; and 2) his purpose is for the latter to perform or to abstain from performing his/her duty, without the knowledge of the employer and without his/her consent. The evidence has shown that the defendant gave property to an employee by providing the employee with many free meals from his restaurant in the period between May and July 2004. The only reasonable inference that can be drawn from defendant's actions is that the defendant's purpose was to secure the illegitimate benefit in purchasing a car from the employee of a car dealership. This being the case, both elements of the crime have been proven.

Example (defendant)

There is no question that my client hosted Mr. Sophal at his restaurant a few times and that he gave him a few bottles of liquor as gifts. But this is no crime. The law requires that the prosecution prove that my client's purpose was to secure illegitimate benefits. Where is this proof of purpose? The prosecution has presented no evidence at all of any agreement existing between my client and Mr. Sophal to get a cheaper price for a car in exchange for a few free meals. It has proven no illegal purpose. In fact, the evidence has indicated that my client's purpose was friendship. He knew Mr. Sophal, he liked him, he acted as a generous host. This is no crime.

Conclusion

The end of the argument should smoothly conclude the advocate's case. It should remind the court of the advocate's theory of the case. It should make clear what the advocate is requesting. If possible, it should end on a confident, decisive and dramatic note. It should also end with your request of the court to "find the defendant not guilty".