

**UNIVERSITY OF MIAMI LAW SCHOOL
CRIMINAL EVIDENCE WORKSHOP
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Fall 2019**

Class Manual

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

This course is designed to teach the trial skills I have learned from over four decades of working in courtrooms. There is no textbook, no formulas, edicts, or commandments. I have read hundreds of trial advocacy books, attended numerous seminars and listened to CLE tapes, but none are useful for beginners. So I designed this course to teach the basic trial skills. What you get out of this course depends on what you put in, through your participation, motivation and ability.

I make this promise, I will go as far and as deep as you are willing to go. I can tell who is invested in the process. This doesn't require any prior experience or a special talent. These are skills that can be mastered by any of you. I am not into grading or grade point averages. I am interested only in teaching the skills of communication, persuasion and strategy. This is a joint venture and you must fully engage in the process. Ask questions. Challenge opinions. Debate the tactics.

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 rank amateur. 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's 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. Great trial lawyers are those who continually and obsessively soak up knowledge from every possible source – literature, politics, culture.

I learned the hard way; by doing it, recognizing my mistakes, and improving. It may be the only way to master the skills. My aim is to give you the tools, the format, the ideas to design your career. My promise is that if you make the investment, you can be one of the best.

THE MISSION

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

It is a myth that gifted trial lawyers are born with special aptitudes for trial work and need little, if any, formal training. Litigation has a theoretical body of knowledge, and academic training is required to master it. Trial skills, like basic skills of other professions, are capable of being taught and serious students can become outstanding advocates.

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, and 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. Pride yourself on always knowing more than your opponent. Aim to outwork your opponent by a factor of three.

Evidence is the fuel that runs every trial, and 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 sell it.

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 demands persuasion. It is advocacy that turns mundane objects into powerful and persuasive evidence. Advocacy is far broader than the law; trial presentation is a multi-disciplinary subject with elements of psychology, communication, philosophy, science, and technology, and none by themselves ensures success. As you become more experienced as a trial lawyer, you will master these disciplines.

THE METHODOLOGY

Black's Law #4: The only effective method of teaching trial skills is to allow the students to discover the principles for themselves. As Nike sells it -- just do it. Do it with instruction. It is time consuming and expensive, but it works. The more you do it, the more you get it. You don't have to be perfect. No one is. You don't even have to be good. But you must actually do it, and there is no doing without mistakes. This is the only way. There are no shortcuts. Imagine learning a language without speaking it or riding a bike without getting on it.

The traditional law school is designed to stuff students into lecture hall seats and force feed them the accepted wisdom. 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. We don't do lectures, films, or special guests. 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 create concrete examples rather than use abstract principles. Our brains are hard wired to learn through concrete images.

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.

In the class sessions, we conduct mock trials. These trials are your textbooks. These cases are just like cases that appear daily in court. 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.

I want as many students as possible to perform the trial skills. Thus we will not follow the structure of a typical trial. Every lawyer on each team will do a short voir dire. I will also double up lawyers on opening and closing arguments. As the course progresses I will assign additional multiple trial performances. The goal is to get everyone on their feet as often as possible.

You must perform your role well, either as a lawyer or a witness, to make the presentation work. 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 evaluate 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 can see the trial through the eyes of a juror. Every speaker must know who the audience is; in trials we have the advantage of selecting our audience. We craft our message for this specific 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, only doing 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 classic trial. I use the mock trials as a vehicle to teach. I will interrupt the proceedings at times to discuss an evidentiary issue, a trial tactic, or ask the strategy behind an action. The issues will then be concrete and in context; if we wait until the end of the trial they become hard to recall.

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: Relentlessly prepare. There is no substitute for preparation. Don't assume a damn thing. The biggest mistake that good lawyers make is assuming too much – that the jury would make the right inferences, that the opponent wasn't ready, that their own clients wouldn't screw-up in the witness box.

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 obsessive preparation. Be the best-prepared lawyer in the courtroom.

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 of each rule with good examples of how they operate, and Graham's Federal Rules of Evidence for a good primer. You don't need additional research. The class is not designed to teach research, but for putting the rules to practice. 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. You 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. Create a detailed plan for the trial, drafts of opening and closing arguments, exhibits, charts, but once the trial begins, strategy takes over. Strategy is flexibility.

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 planning. The reason for that is simple, you only engage in strategy if you have an active 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 contingent on the reaction of the enemy which in turn is modified by an anticipated response. But 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 strategy is intimate knowledge of the weapons available to you and your opponent. Without full and working knowledge of these elements, no successful strategy can be developed. Our weapons are the witnesses, evidence, rules, statutes, regulations, expert opinions, and everything else in the legal arsenal.

When you develop case theories, 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 your arguments. Tactics and strategies are not just learning some clever 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 responses to a problem, and many alternative 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. Direct examination is the opportunity to bring the client's story to life in the minds of the jurors. You, as producer, director, and moderator, will use the fact witnesses to paint a series of word pictures. Most jurors think visually.

Law is a social not a real physical science like math or physics. Outcomes are not guaranteed no matter how righteous the claims. It may be that the adversary system of justice in its theoretical construction is almost perfect. Yet, as in any system run by human beings, it is deeply flawed and subject to influence and persuasion. The best prepared and most persuasive advocates have an advantage. Thus: 1) Fight for every piece of evidence. Your job is to find a reason why it is admissible. 2) Don't be blinded by the tyranny of 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 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 to call on. Each piece counts. You must find a method, a rule, a statute, a case, or a new policy reason to convince the judge to admit it. Don't take no for an answer. Keep pushing the arguments. Best example: the Supreme Court carved out a new exception to the hearsay rule to admit evidence of innocence in *Chambers v. Mississippi*. You are an advocate, not the judge. Find a solution.

SITTING IN THE JURY BOX

Yogi Berra said: "You can observe a lot by watching." Lawyers spend huge amounts of money on jury consultants and psychologists to understand how jurors think. Through polling, focus groups and mock trials, we learn how jurors might react to our case and use this information to mold our presentations. Being a mock juror gives you a taste of this.

Sitting in the jury box and observing and evaluating the lawyers' performances is an important learning tool. 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 criticizing the performance of fellow students. 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? 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, trial, or appeal, do an autopsy of your performance. Find what you need to work on. Be honest with yourself. Willingly risk the judgment of strangers. Embrace those who tell you your faults. 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 success and the 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

Before the first class you will receive a cross examination problem. At the first class each student must be prepared to cross-examine as outlined in the problem. Everyone will participate.

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 the CEO of you. 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 work for.

The only required text for this course is the Federal Rules of Evidence. However, I learned the craft of trial lawyering by reading books of the great trial lawyers. These books are gold. The best are mentioned in blog posts on my website:

[Vincent Bugliosi: The Legacy](#)

[F. Lee Bailey](#)

In addition read "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 a [small part of Darrow's sentencing speech taken 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 calls Darrow our greatest trial lawyer eighty 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

"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 Killing of Bonnie Garland" by psychiatrist Willard Gaylin

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

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

"The Best Defense" by Alan Dershowitz

"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, the list is endless.

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 voice, there are specialists in voice or speech therapy to remedy stuttering, lisps or similar problems. Look for personal trainers, self-help books, cosmetic surgery, personal voice trainers, and other forms of coaching. Take personal training seminars like www.landmarkeducation.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.