

“DAMN THE EXPERTS, FULL SPEED AHEAD”
Using Traditional Methods of Persuasion in Chapter 980 Cases When the Experts
Aren’t Good Enough

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- I. The premise: The experts are never good enough.
 - a. It is not sufficient to compile an impressive list of defense experts that will testify that your client does not meet the criteria for commitment under Ch. 980. You cannot win with favorable reports alone.
 - b. Finders of fact (judge or jury) are free to disregard labels and diagnosis when applying legal criteria. You can lose even if all the experts testify in your favor.
 - c. The traditional “science defense” does not work. It is not compelling to make the centerpiece of your case the fact that actuarial data is scientifically invalid.
- II. Telling a story: The cornerstone of successful persuasion is to employ a story telling method that incorporates emotional themes and theories of “innocence” in a way that will move people (jurors) to act.
 - a. But will this really work with a sexual predator case?
 - b. There is a core group of very deviant, disturbed and dangerous offenders that will be subjects for commitment under any standard.
 - c. However, the revised standard of commitment of “more likely than not” sweeps broadly and includes a diverse group of respondents and predicate offenses. These are the cases where successful persuasion must make a difference.
 - d. Every SVP case has a story.

- i. Youthful mistakes not repeated.
- ii. Domestic violence, not sexual violence.
- iii. Treated, not repeated.
- iv. Too old after all these years.
- v. He may be weird, but he's not violent.

III. Preparation: Cases are effectively prepared by working backwards.

- a. Jury instructions – what is the law?
- b. Closing argument – what are the reasons your client should not be committed?
- c. Direct examination – do we have expert or lay witnesses that will help us tell our story?
- d. Cross examination – how do we attack the state's case?
- e. Opening statement – How do we tell the story in a way that explains why our client is not a subject for commitment?
- f. Jury selection – How do we impanel a jury that can be open minded and is free of bias?

IV. Jury Selection: A process that begins before the trial and continues after the verdict.

- a. What are we looking for in a juror?
 - i. People who are open minded about how society treats sexual offenders.
 - ii. People who are free from objective or subjective bias, usually based on a prior experience.
 - iii. People who believe that people can change.
 - iv. People who view commitment as a serious restriction on liberty.
- b. A jury questionnaire prepared in advance that addresses the issue in your case is the most effective way to identify objective bias.
 - i. Defense motion for jury selection procedure.
 - ii. Grounds
 - 1. It will save time!

2. Jurors are reluctant to speak openly about sexual matters in general, and about victimization particularly.
 3. Answers in open court are likely to taint other jurors.
 - iii. Must be done well in advance.
 - iv. Try to obtain the prosecutor's consent.
 - v. Ask the questions that are most important. Avoid asking for information you are not likely to use.
 - vi. Have the questionnaire returned at least 10 days before trial.
 - vii. Question: do you want to identify your client by name?
- c. Individual voir dire is essential to make a record of subjective bias.
 - i. The prosecutor will almost always agree to strike the juror with the "outrageous" answer.
 - ii. Under individual voir dire, jurors will reveal the emotional depth of their feelings.
 - iii. Follow up questions are necessary to prevent rehabilitation of jurors that are close calls.
 - iv. Get jurors to disqualify themselves by asking leading questions.
- d. Voir dire in open court usually sets the emotional tone for the direction of your case and exposes jurors to the "bad" evidence.
 - i. It rarely allows you to challenge for cause, but is essential for exercising peremptory challenges.
 - ii. Ask open-ended questions that require everyone on the panel to participate.
 - iii. Identify the areas that concern you the most. What are you afraid of during the trial?
 1. The facts of the predicate offense?
 2. Lack of treatment?

3. Respondent did not interview and will not testify?
 4. Prison conduct?
 - iv. Avoid making strikes for cause based upon traditional stereotypes. Make decisions based upon who you did and did not connect with. Make sure you involve your client in the process.
 - e. Use a jury survey after the verdict to learn what worked and what did not.
 - i. Don't pass on the chance to speak to jurors after the verdict in the courtroom.
 - ii. The rate of return is the highest when you survey immediately.
 - iii. Adapt your technique based on what you learn.
- V. Themes and Theories: They start during opening statement and set the emotional tone for the story of the case.
- a. Avoid the roadmap analogy.
 - b. Tell the jury why your client is not a SVP.
 - c. Tell the jury a story of what happened to your client and where he is right now (not his physical location, but you might want to do that too).
 - d. Incorporate the emotional strength of your case into your opening statement.
 - i. Forgiveness for past conduct.
 - ii. Hopefulness about the future.
 - iii. Ability to change.
 - iv. Frustration with the government.
 - v. Unfairness in the process.
 - vi. Incompetence of examiners, staff, treatment.
 - e. Be honest with jurors. Don't make promises that you cannot keep.
- VI. Witnesses: It all starts with discovery, baby, and you really do have to read every page!

- a. Prepare the file so it makes sense and so you can find what you are looking for.
- b. Understand the file chronologically.
 - i. Juvenile record including offense history, treatment history, correctional history and supervision history.
 - ii. Prior record of adult offenses including police reports and court records.
 - iii. PSI records.
 - iv. Probation records.
 - v. Prison records
 1. Conduct reports.
 2. Clinical services records.
 3. Work history.
 4. PRC reports.
 5. Treatment records.
- c. Read EVERYTHING and decide what helps and what hurts.
- d. Use the DOC witness to put your case into context before the expert witnesses take the stand.
 - i. You need to mine the witnesses for all relevant nuggets of information that put the prior cases, supervision and treatment into context.
 - ii. It is better not to be afraid of the bad facts from the past. Make them your own.
 - iii. Use the State's DOC witness to identify mitigating circumstances.
 - iv. Identify institutional failures.
 - v. Find evidence of good progress.
 - vi. Clarify events that the experts rely on that may not be true, reliable or credible.
 - vii. Know the file better than the DOC representative. It is not hard to do.

viii. It is possible to introduce some evidence of existing parole or extended supervision, even though the conditions are not relevant under *State v. Mark*, 2006 WI 78.

e. Victim testimony

- i. Prepare for it in voir dire.
- ii. Maybe it really is not that bad?
- iii. Identify mitigating circumstances.
- iv. Be fair to the past, but emphasize the future.

VII. Expert witnesses: Attacking theirs, preparing yours.

a. Some observations:

- i. Jurors are persuaded by common sense more than science.
- ii. Statistics must be presented on a level that jurors can relate to in their own life.
- iii. Jurors are more interested in what the respondent is like now, than what he was like when he offended.
- iv. Jurors want examples based on facts that are known to be true.

b. State experts

- i. It is likely that your client interviewed with the examiner from the DOC Special Purpose Evaluation Unit before the petition was filed.
- ii. The DOC examiners tend to regurgitate large volumes of historical information in their written reports. Examine the underpinnings of their recitations of these facts.
- iii. No matter how much the examiner's rely on the actuarial instruments, they emphasize their clinical judgment.

c. Defense experts

- i. Is the science attack all you've got?
- ii. What is the impact of calling the expert who does not evaluate the client or his case but criticizes the scientific

underpinning of the actuarial instruments? Does it conflict with your expert that did evaluate the client?

iii. Does the defense expert have adequate notes of factual information from the client and the client file?

1. Defense reports must get better. They need to include specific supporting references.
2. Defense experts must speak with conviction on cross examination.
3. Defense experts must attempt to resolve inconsistencies between client comments made to state examiners and defense examiners.

VIII. Motions in limine: Is it possible to keep the bad evidence out and get the good stuff in?

- a. Client statements.
- b. Prison misconduct.
- c. Hearsay.
- d. Unqualified opinions about risk or dangerousness.

IX. Jury Instructions

- a. Pattern instructions may not be enough.
- b. Instructions for theory of defense.
- c. Watch out for supplemental off the cuff instructions during deliberations.

X. Exhibits: How do you present it and what goes to the jury?

- a. Are projection devices available for demonstrative evidence? Visual presentations can be very effective.
- b. Do you want a high tech or low tech presentation? This should be answered by what will be most persuasive for your situation.
- c. What documents do you need to make your case come alive?
- d. Be careful what you send to the jury because sometimes they read everything.

- i. Expert reports must be carefully scrutinized for objectionable material. Redaction may be necessary.

XI. Closing arguments: The last chance to bring it all home.

- a. Summation requires combining the supporting facts with the logical and emotional arguments necessary to persuade.
- b. Give the jurors the tools they will need to persuade others to adopt your position.
- c. Can you answer the question: Will he do it again?
- d. The problem of proving a negative. The state did not prove that the respondent is likely to commit an act of sexual violence.
- e. What is the role of reasonable doubt in the quest for assessing risk? There must be high risk and high certainty, not just one or the other.
- f. Deal with the fact that jurors will be asked to make a judgment concerning your client's likelihood to re-offend and whether he is a suitable candidate for commitment as an SVP.