



NATIONAL INSTITUTE FOR TRIAL ADVOCACY

TRIBAL COURT PROGRAM

ADVOCACY SKILLS

PROGRAM SCHEDULE & MATERIALS

JULY 15 - 17, 2009

**UNIVERSITY OF NORTH DAKOTA SCHOOL OF LAW
GRAND FORKS, NORTH DAKOTA**

I. The process of mastering advocacy skills

Welcome to NITA's advocacy training program for advocates working within tribal court systems. You are about to begin a unique program designed to help you improve your skills in the courtroom. The emphasis is on "learning by doing" so for most of the program you will be performing exercises designed to make you a more effective advocate. Each time you perform, an instructor will share ideas on how you can be more effective. These suggestions will be constructive and offer specific ways for you to improve and be more successful in representing your client's needs.

Each day will be filled with demonstrations and exercises on each of the skills you will need to be an effective advocate. This program employs a number of different teaching techniques, each designed to provide important information. We will ask you to read about each of the skills. Instructors will demonstrate each skill and tell you why they did things. You will perform in several different settings and receive suggestions for improvement. The performances of others in the program will also help you learn as you benefit from watching them perform and the suggestions on how they can improve. In short, just about everything that happens at this program is done to help you learn.

We will use the "A" and "B" adversary method of assigning most problems. Each participant in the Program will be designated as either an "A" or a "B." The problems listed in this Program Schedule are designated with "A" and "B" assignments.

You should assume that all of the problems will be conducted in a simulated courtroom setting as if it were an actual trial. We will be using the Federal Rules of Evidence and Procedure to govern each exercise.

II. Materials

The Materials for this Program are:

- (1) Nita Housing Authority v. Ladonna Johnson, (NITA, 2008)

III. Preparation

Before you come to the Program it is essential that you become thoroughly familiar with the case materials. **Participants will be expected to perform beginning on the first day of the Program.**

IV. Purpose of the program and case balance

The goals of this program are to help participants improve their skills as trial advocates. **It is not a goal that either party prevail.** The fact pattern is designed to provide balance for both sides and to help you focus on improving your trial skills.

The file is designed to support a program in trial skills. Its purpose is to provide opportunities for participants to present a compelling story of the case; to draw information from witnesses in direct examination that support the legal elements while keeping the interest of the fact finder; to demonstrate that a witness is biased, mistaken, or untruthful through cross examination; to effectively make use of exhibits to support witness examination and fill in details of the case story; and to present argument points that tie the facts to the law in a way that demonstrates why your client should prevail. To accomplish these goals you will find flaws in witness statements that you must deal with on direct or provide opportunities for cross examination.

Our goal is to provide you with materials that support the process of teaching trial skills, ethics, and professionalism. Your job is to focus on mastering each of the skills, not to win.

Advanced preparation: It is critical that you are familiar with the case file Please become familiar with the facts and law of the case before you come to the program.

Read, Lubet, Chapters One, Case Analysis; Three, Persuasion Theory; and Five, Direct Examination.

EXHIBITS: Except for Workshops you may assume that all exhibits in the file have been previously admitted by stipulation. While you may wish to lay a persuasive foundation (the relevance of the exhibit) you do not need to lay the legal foundation in any of your direct or cross examinations.

DAY 1 WEDNESDAY, JULY 15 -- BASIC DIRECT EXAMINATION TECHNIQUES

9:00 - 9:45 **Welcome to the program, familiarization with the NITA’s methods of instruction, program learning objectives, and introduction to instructors and participants.**

9:45 - 11:15 **Workshop #1 -- Introduction to direct examination. Drills for focused learning on form of the question.**
Participant performances in plenary session. Problem: *Nita City Housing Authority v Ladonna Johnson*.

The goals of this first exercise are to acquaint participants with the process of asking open ended questions in direct examination. Focus will be on the use of newspaper style questions who, what, when, where, why, how, describe and explain. Other concepts include building topics to conclusion, stringing a series of short questions together to complete a topic, and placing the focus upon the witness not the examiner.

11:15 - 11:30 **Refreshment break.**

11:30 - 12:45 **Workshop #2 – Case Analysis**
Participants working in a plenary session. Problem: *Nita City Housing Authority v Ladonna Johnson*.

Case analysis is critical to every case. It establishes the framework for every part of the trial from Opening Statement, through witness examination and use of exhibits, to Closing Argument. This initial session focuses upon a process of examining facts and creating the three case theories – factual, legal, and persuasive. We will present a model for participants to use during this program and in future cases.

Working with others on your trial team you should examine the laws that govern this case and develop a **Legal Theory** that shows why the law says your side should win. Following our development of a legal theory we will look at the facts to determine how the facts tie to the law to tell a fact based story that shows how facts combine with the law to give us a **Factual Theory** of the case. Finally, we will look to the wrong that happened to our client and see why it is fair for our side to prevail. This will be our **Persuasive Theory** and be the basis for how we tell our story to the finder of fact.

12:45 - 2:00 **Luncheon break.**

DAY 1 CONTINUED

2:00 - 3:30

Workshop #3 - - Direct examination as a conversation.

Participant performances in small groups. Problem: *Nita City Housing Authority v Ladonna Johnson*

Workshop #3 is the first small group performance session of the program. In this workshop participants will practice the basics of direct examination introduced in Workshop #1 and outlined in Workshop #2. Focus will be on form of the question, organization, use of language, exhaustion of topic, and the persuasive aspects of witness examination.

Using the skills of gathering information through the use of open ended questions (who, what, when, where, why, how, describe, tells us about...) we want you to find out what happened to the Johnson family and why they are being evicted from Nita Gardens.

A's, using conversational language, examine Ernest Comstock in a way that talks about his knowledge of Nita Gardens and the building's policies. Your goal is not to sound like a lawyer/advocate - just someone who is having a talk with another person.

First participant: Who is Ernest Comstock and what does he do at Nita Gardens? How does Comstock know Rachel Longly, Ladonna Johnson, and Elroy Johnson.

Second participant: What does Comstock know about gang activity and drug use in the neighborhood? How does Comstock feel about the policies regarding evicting tenants for criminal activity?

Third participant: What does Comstock know about Ladonna Johnson's concerns about fire safety? How do these concerns affect Comstock's work at Nita Gardens?

Fourth participant: What does Comstock know about Elroy Johnson and graffiti? What is Nita Garden's policy regarding graffiti. What kinds of graffiti have been put on the walls at Nita Gardens and how does this graffiti affect tenants?

DAY 1 CONTINUED

2:00 - 3:30

Workshop #3 - - Direct examination as a conversation - continued.
Participant performances in small groups. Problem: *Nita City Housing Authority v Ladonna Johnson*

B's, using conversational language, examine Elroy Johnson in a way that talks about his knowledge of Nita Gardens, the building's policies, and graffiti. Your goal is not to sound like a lawyer/advocate - just someone who is having a talk with another person.

First participant: Who is Elroy Johnson? How does he know Ladonna Johnson, Rachel Longly, and Ernest Comstock?

Second participant: What is graffiti and how does Elroy know about graffiti? Who is Modern Neighborhood Art?

Third participant: Who are the Vice Lords? What connection does Elroy have with the Vice Lords?

Fourth participant: What happened on November 10, YR-1? Why was Elroy arrested? What were the results of his arrest?

3:30 - 3:45

Refreshment Break.

3:45 - 5:00

Workshop #4 - Closing Argument and Direct Examination -- Planning
(Participant planning in Small Practice Groups) Problem: *Nita City Housing Authority v Ladonna Johnson*

Closing argument is your opportunity to persuade the jury why your case story is the one to believe. It is your chance to actually argue the law and the facts - telling the jury why you are right and the other side is wrong. It is your chance to comment on whether a witness should be believed and why or why not. It's your time to be passionate.

All examinations are tied to closing argument. Plan your examinations as you plan your closing.

DAY 1 CONTINUED

3:45 - 5:00

Workshop #4 - Closing Argument and Direct Examination -- Planning, continued

Look to the legal theory of the Nita City Housing case. Pick one of the elements that is in controversy and must be proved to win your case. For thirty minutes examine all the facts available (supporting and detracting) and consider how you will prove the element (who says it, what exhibits show it, etc.). For the next 30 minutes each participant will have 2 minutes to argue that point (The emphasis here is not on the style of closing argument but on the content). Finally, participants will use the remaining time to practice a few direct examination questions that bring out the facts that support the legal argument (rehearsal for Workshop #5).

Use your time to aid in planning your direct examination of this witness in Workshop #5 to make the points you will argue in your closing argument.

5:00

Recess for the day.

Evening assignments: Take the work you did in Workshop #4 and create an outline of the witness examination for either Rachel Longly (A's) or Ladonna Johnson (B's). Choose one or two points that you would want to prove to the finder of fact and design an outline to present those facts in a way that is both engaging and persuasive - so it tells a story. Look to the direct examination of both Ernest Comstock and Elroy Johnson (see the schedule for topics) and consider how you can show that your opponent's witness is biased, mistaken, or not telling the truth. How would you question this witness to demonstrate he should not be believed?

DAY 2 - THURSDAY, JULY 16, 2009 - DIRECT AND CROSS EXAMINATION OF FACT WITNESSES

8:30 - 9:00

Faculty meeting.

9:00 - 9:45

Discussion of the day's learning objectives. Participants and instructors in plenary session.

Lecture and discussion on making and meeting objections. Participants and instructors in plenary session.

This presentation offers the basics of making and meeting objections. Included will be the process of how to make an objection, a discussion of the most common objections, strategy for making objections, and the ethics of making objections.

DAY 2 CONTINUED

9:45 - 11:00

Workshop #5 – Direct Examination of Fact Witnesses.

Participant performances in small groups. Problem: *Nita City Housing Authority v Ladonna Johnson*.

A's, conduct a portion of the direct examination of Rachel Longly. You may skip the accreditation phases (why the fact finder should believe this witness) and focus your performance on scene setting (putting things in context) or describing the action (getting facts that support one or more of the legal elements you must prove to win your case).

B's, conduct a portion of the direct examination of Ladonna Johnson. You may skip the accreditation phases (why the fact finder should believe this witness) and focus your performance on scene setting (putting things in context) or describing the action (getting facts that support one or more of the legal elements you must prove to win your case).

NOTE: The all object rule is now in effect for the remainder of the program. If an advocate asks a question that is objectionable either for form or substantively everyone in the room may object. The process is: 1. Stand and say “Objection” ; 2. State the grounds for the objection (the name of the objection, for example “Compound Question”; 3. Wait for the judge to rule.

11:00 - 11:15

Refreshment break.

11:15 - 12:15

Workshop #6 --Introduction to cross examination. Drills for focused learning on form of the question.

Participant performances in plenary session. Problem: *Nita City Housing Authority v. Ladonna Johnson*.

Workshop #6 is similar to the first workshop. Its goal is to acquaint participants with the process of asking closed, or leading, questions in cross examination. Focus will be on the use of controlling, confining leading questions that are limited to one fact and are not conclusory. Other concepts include building topics to conclusion, stringing a series of short questions together to complete a topic, and placing the focus upon the examiner, not the witness.

12:15 - 1:45

Luncheon break.

DAY 2 CONTINUED

1:45 - 3:00

Workshop #7 -- Cross examination of fact witnesses.

Participant performances in small groups. Problem: *Nita City Housing Authority v. Ladonna Johnson*.

Workshops #7 offers participants the chance to further refine their questioning techniques for cross examination. In addition to demonstrating an ability to ask controlling, confining, leading questions participants must focus their questions on particular topics. Each participant must build to a specific point with their topic.

A's, conduct a cross examination of Elroy Johnson that uses declaratory statements, one fact questions, and no conclusions that support your story of the case, detract from the other side's case story or illustrate how this witness could be mistaken, biased or lying.

First participant: Elroy knows members of the Vice Lords and plays basketball with them. He has invited members of the Vice Lords into the Nita Gardens building and on to the building's property.

Second participant: Elroy was arrested on November 10, YR-1 and charged with conspiracy to sell drugs. His charge was dismissed because he agreed to testify against others who were arrested.

Third participant: Elroy has placed graffiti on public and private buildings, including Nita Gardens. He is part of a group of taggers who call themselves a "crew". He knows that painting on public and private buildings is against the law.

Fourth participant: If the Johnson family is evicted, Elroy will have to drop out of school and find a job to help pay the rent. He is angry at Rachel Longly about her decision to evict the Johnson family because of his behavior.

B's, conduct a cross examination of Ernest Comstock that uses declaratory statements, one fact questions, and no conclusions that support your story of the case, detract from the other side's case story or illustrate how this witness could be mistaken, biased or lying.

First participant: Comstock does not know if Elroy Johnson is a member of a street gang. He only assumes that Johnson is a member because of his arrest.

DAY 2 CONTINUED

1:45 - 3:00

Workshop #7 -- Cross examination of fact witnesses, continued.

Participant performances in small groups. Problem: *Nita City Housing Authority v., Ladonna Johnson.*

Second participant: Comstock understands there are different types of graffiti - "the fancy kind of street art" and gang related graffiti that "gets people upset." He hates all types of graffiti and those who paint on "his" walls. He thinks Elroy is responsible for graffiti at Nita Gardens because he once caught Elroy writing on a wall.

Third participant: Comstock doesn't agree with Ms. Longly's enforcement of the drug use/criminal acts part of the lease. He believes anyone who violates these policies must be evicted.

Fourth participant: Comstock knows that Ladonna Johnson formed a tenant union to protest the building's fire system. He is sure Ms. Johnson is the leader of the December YR-1 protests. He believes she "crossed the line" in organizing the protests and disrupted other people's lives.

3:00 - 3:15

Refreshment break.

3:15 - 4:30

Workshop #8 – Closing Argument and Cross Examination -- Planning

Participants planning in small groups. Problem: *Nita City Housing Authority v., Ladonna Johnson.*

Pick one of the elements that is in controversy and must be proved. Spend 30 minutes looking at the facts available and consider how you can show this witness is mistaken, biased, or wrong. See if you can find a way to spin the facts in a way that tells your client's story of the case through this witness. For the next 30 minutes each participant will have 2 minutes to argue that point (The emphasis here is not on the style of closing argument but on the content). Use the remaining time to practice a few cross examination questions that bring out the facts that support the legal argument (rehearsal for Workshop #9).

DAY 2 CONTINUED

4:30 - 5:30 **Lecture and discussion on dealing with problem witnesses.**
Participants and instructors in plenary session.

This demonstration is to illustrate the processes of impeachment, witness control, and refreshing recollection. Each segment will provide illustrations of requisite evidentiary foundations. Discussion on strategies for impeachment, what topics are worth impeaching, when to refresh recollection versus impeachment, and the escalation of control with difficult witnesses will be part of the session.

5:30 **Recess for the day.**

DAY 3, FRIDAY, JULY 17 -- CROSS EXAMINATION AND PROBLEM WITNESSES

8:00 - 8:30 **Faculty meeting.**

8:30 - 8:45 **Discussion of the day's learning objectives.**
Participants and instructors in plenary session.

8:45 - 10:15 **Workshop #9 – Disarming and Marginalizing the Witness through Cross Examination.**
Participant performances in small groups. Problem: *Nita City Housing Authority v. Ladonna Johnson*.

A's and **B's**, conduct a cross examination of either Ladonna Johnson (A's) or Rachel Longly (B's) that uses declaratory statements, one fact questions, and no conclusions that supports your story of the case, detracts from the other side's case story or illustrates how this witness could be mistaken, biased or lying.

At the conclusion of your performance you must tell the group the point or points you would make in closing argument based upon your cross examination of this witness.

10:15 - 10:30 **Refreshment break.**

DAY 3 CONTINUED

Workshop #10 concentrates on the problems caused by witnesses who forget, lie, or who are hard to control. Faculty will serve as the witness and work with you to deal with your greatest fears when examining a witness.

10:30 - 12:00

Workshop #10 – Dealing with Difficult Witnesses.

Participant performances in small groups. Problem: *Nita City Housing Authority v. Ladonna Johnson*.

A's and **Bs**, you will have opportunities to work with witnesses who may forget facts, who have misrepresented the truth by making inconsistent statements of fact, or who may be difficult to control in either direct or cross examination. This is your opportunity to face your greatest fears when examining a witness and overcoming those fears.

12:00 - 12:30

Program evaluation and closing ceremonies.

12:30

Adjourn.