REFLECTIONS ON HOW TO TEACH TRIAL ADVOCACY

By Frank D. Rothschild

PREPARATION BY FACULTY BEFORE THE SESSION BEGINS

— Read the file. Then read it again. Even once more if necessary to have a complete familiarity with the facts.

— Think through and map out dates, locations, the order of events and other details that are likely to affect strategy and theory of the case. Be clear with exactly what happened.

— Develop the themes and theories that both sides are likely to use or should use.

— Do each student assignment yourself, at least in your head, and preferably on paper. Think through the difficult and/or important issues and decide on how they can best be handled. If you see more than one way to deal with an issue, make note of that for a discussion of choices and strategy. Preparing as if you were a student will supply you with the kind of insight that makes for valuable, specific, lesson-oriented critiques.

— Anticipate what the likely failings will be by the students in trying to perform each assigned task. Plan a critique around each of these likely mistakes.

— Prepare mini-demos on those areas where you anticipate students will have difficulty. These snippets can then be given seemingly off-the-cuff, which gives credibility to the faculty and provides a model via concrete example of how to do a specific task just right.

— Anticipate the likely evidentiary problems inherent in the case file and in the specific assignments, decide what the correct or likely “real world” rulings are (they may not be the same), and what the evidence code basis should be for deciding each.

— Figure out what kind of demonstrative aids you would use to highlight or feature the assignment goals.

— Have the lessons that need to be taught for each area of advocacy clearly in mind (this will help in topic selection).

— If there are teaching notes, review them, but don’t rely solely on them, since they are often overbroad and miss important issues.
HALLMARKS OF A GOOD CRITIQUE

— First and foremost: HONESTY.

— Identifying the skill level of the student and going from there.

— Identifying things that are done well, pointing them out and explaining why it was good. “Clap whenever you can” should be one motto of the skilled advocacy teacher.

— In big group, choosing areas of critique that apply to everyone, which everyone can learn from (i.e. “global” comments). The student is but a foil for your rap to the group on whatever area is inspired by his or her performance.

— Selecting and prioritizing problem areas. One of the toughest jobs an advocacy teacher has is picking and choosing from among the many things which could be commented on the one or two which should be commented on and then ordering those comments.

— Head noting areas you wish to discuss.

— After head noting, giving the general rule and explaining the reason for the rule. For example, explain that you shouldn’t lead on direct and reasons are that, besides being objectionable, more importantly it’s not the most effective and credible way to communicate information (and explain why that’s so). Believe it or not, a majority of young attorneys know age-old rules such as “don’t argue in opening statement” or “lead on cross” but have no idea why they exist. They are more likely to adhere to the rule and know when it can be violated if they understand the rationale.

— Giving specific feedback on what the student did right or wrong. This requires extensive note-taking and supreme concentration. Critiquing is hard, hard work if done right.

— Keeping the critique to two points max. Remember how you felt after having a near accident.

— Asking the student up front what his or her goal was, if you’re not sure what the student’s agenda really was, and if it makes a difference in how you comment. Avoid doing this when you truly know, since it then looks like you’re trying to embarrass the student.

— Being brief but pithy.

— Giving a formula or prescription on how to improve the next time. Make the formula for improvement clear, such as: “Next time go direct, instead of forming your questions with ‘You did... didn’t you’, start the questions with ‘What did you do’ or ‘Did you...’”

— Keeping the atmosphere one of fun, fun, fun (“whistle while you work”). Humor is a great learning tool, so if you are blessed with it, use it.

— A good critique must be a performance unto itself. No matter how insightful, unless it is given with zest and verve, your comments will not have the impact you want. Presenting a critique like “a real trial lawyer would” lends credibility to what is said, so stand up, get rid of your notes, and belt it out.

— Using sayings or stories to make a point. These points are often best remembered. (Examples: “Hot poker up the nose test”, “Go with the flow”, “Pigs get fat, hogs get slaughtered”, “A yellow elongated fruit,” when the radio goes dead, the priest at the funeral story).
Giving *mini-demos* is a fabulous way of illustrating a point, modeling for the students exactly how it can and should be done. Many light bulbs have switched on in students’ heads after watching a master whip off a 30 second demo on how to accomplish a particular task.

Last, and important enough to bear repeating, is HONESTY. Just like a jury can see through our B.S., so can the students, and our credibility is just as critical to our success as teachers as a lawyer’s credibility is to convincing a jury. “Tell it like it is” (thank you, Howard). Cut out the critique that starts with: “That was good, but...”. Experience has conclusively proven to me that truthful, straight-forward and pointed critiques will be received, digested, and appreciated so long as the student feels you know what you’re talking about, care about their progress, and are honestly trying to help them improve.

**OTHER GENERAL CRITIQUING SKILLS**

Develop riffs on how to deal with common problems that continually occur. Try to make them lesson oriented. For example, if the witness won’t answer the question on cross examination, don’t simply say as your critique “you should have hammered him” or “he was in when the witness does that.” What does that tell the student? To go buy a hammer or honing shears? Give the students a way of dealing with that situation the next time it comes up (perhaps creating a chart listing some options such as: (1) Ask the question again and again; (2) Say: ‘Perhaps you didn’t understand my question, my question is...”; (3) Say: “The short answer then is “Yes”; or (4) Hold up your hand to stop the talking; (5) Move to strike; (6) Say: “We’ll get to that, but what I want to know now is...”; (7) Ask for the judge’s help; (8) If it’s a long answer dumping all over your case and evading the true question, say, “Are you done? Can you now answer my question?”) Another common problem is when your own witness screws up on direct and gives an answer that is clearly wrong. The critique should identify what the incorrect testimony was and explain what the options are in dealing with such a situation. Here’s the riff: (Create FDR’s chart for the faculty to see how it’s done).

Even when there’s the all-object rule, you as faculty can and should object as a teaching device to point out a problem area and test the student to see if he or she can do it right or has a basis for the question. (Good examples are when the question calls for a narrative or hearsay response.)

Those who play judge in class sessions can “teach” via their questioning of attorneys upon objections and their rulings, which can be wrong on purpose to see how the student handles it. (Judges do make incorrect rulings in real life, you know, and can even be persuaded to change a ruling at times.)

Sometimes it’s helpful for a faculty member to assume a witness role and “teach” by your answers and manner. This is especially true for cross and impeachment exercises.

Look for the “down side” of what the student has done. In other words, how can it be turned by an opponent. Our mock performances may be in a vacuum, but real life is not, so our students need to think without blinders. Pointing out, or better yet demonstrating what the turn might look and sound like leaves a lasting impression on the whole class.
Look at the tone and manner of the student. Is the student hiding behind a legal facade? Stiff or expressive? Can you tell how the student feels? “Let the juices flow.”

Things to avoid:

— War stories (save them for the coffee break).
— Repeating what’s already been said (it’s best to say you have nothing to add if that’s the case).
— Agreeing with what’s already been said, unless, and only unless you have another angle on why it was good or bad.
— Inflexibility as to how something should or can be done with success. Remember that there’s more than one way to marinate a fish.
— Any reluctance you may have to disagree with another faculty member’s critique. Nobody is infallible, and if you think a fellow faculty member has sent the group off on the wrong track, you should give your idea of what you think a better route might be. This is not to suggest your comments should “attack” or in any way belittle the other critiquer or the comments already made. Be clear in explaining you disagree, but use some finesse when speaking your mind.
— Critiquing on style only. Yes, it’s the easiest area to comment on, and nobody will boo you out of the room, but it’s usually the least productive critique in a large group (unless the flaw is one that many students share and your comment will straighten them all out. Examples of when it’s okay: echoing, all right’s, OK’s, checking off your notes after every answer on direct).
— Intellectual discussions on ethics and evidence. These usually get long-winded and use up valuable time better spent in teaching advocacy techniques.
— Going on too long with your critique. It’s like “cup in the ear” analogy told by Irving Younger. Information overload results in no information being received at all.

SPECIFIC SUGGESTIONS FOR TEAM LEADERS

— Suggest that the students keep a separate list of “pointers” that they pick up throughout the course.
— Announce the “all object” rule, explain its function, and encourage its usage.
— Explain how much learning comes from watching others do the same task you’ve worked on, both strategy and skill-wise. In other words, urge the students to be involved during class, even when they’re not performing.
— Encourage students to take risks, stretch their capabilities and experiment. A trial lawyer must have range; to be able to go to their right and left.
— Explain that it’s not where you start the course that counts, nor is it a contest with others in the class. You’re only competing with yourself, with the true measure being where you are at the end of the course and how you feel about yourself then.
— Figure out time allotments for each segment, mindful of the number of students, how much time you have, and how much time is needed for whatever is being done. Tell the faculty and students. Also tell the students that we don’t want them to squeeze their entire direct, cross, opening, or closing into the allotted 5-6 minutes, but rather do a segment of it, and do it as good as you can, covering less, but doing it thoroughly.

— Explain the importance of playing witness roles straight, of knowing the facts, and unloading on cross if it’s called for, so much is learned playing a witness, and so much can be taught to the performing lawyer, if it’s done right.

— Keep time, both of student performances and critiques. Shut them off when the time is right. The train must run on time.

— In big group, select a lead critiquer and follow-up critiquer for each student performance. Add a point of your own now and then, but limit other faculty input.

— If a faculty critique is confusing or plain boring in your judgment, fix it (on the biggies only).

— It’s especially appropriate for the team leader to use the board to get across lesson-oriented points.

— Have in mind a goal of certain basic lessons you want passed on for each area of the program, and make sure they are communicated.

— Remember: You set the tone for the whole learning experience. Keep the class focused and the mood light.

CRITIQUES THAT ARE GENERAL IN NATURE

As to language:

Too legalistic (assuming arguendo, prior, contend, in toto)

Too highfalutin (who is on the jury?)

Too colloquial

Lack of color words (“collided with” v. “smashed into”). Be an advocate at all times, including with word choice.

Avoid pronouns (the advocate says “the attack”, not “it”)

As to positioning:

Behind the podium or not (I know, Manny, it’s a lectern).

Too close to the jury

Too close to the witness (or not close enough)

Pig leaf (hands in general)

Head up (not buried in notes), shoulders square

Coins in pocket
Buttoned up
Hit the mark before starting.

No Waltzing (movement should be purposeful)
Turning back to the jury
Triangle when at the board v. talking to the board.

As to voice delivery:

No modulation or change of pace
Too loud/soft/fast ("Lawyers don't get paid by words per minute.")
No urging/caring/anger/sadness (i.e. emotionless)
No hi-lighting of words/phrases. "Shout it out" for emphasis.
Echoing answers, or habitually saying "Okay", "and", "all right", "uh-huh" and a whole host of other sounds before or after each question or answer.

As to ordering:

Chronological or not
Use of repetitions or lack thereof
The loop back technique
Use of laundry lists to argue for your point of view
Primacy/recency
Imagery and inferences created by what's placed next to what (example for an opening statement: "The defendant told the police officer he hadn't been drinking. When then asked to do a field sobriety test by the officer, he refused.") This concept of ordering is important in all phases of the trial.

Where to put the bad stuff. Students usually front it, instead of burying it in the middle (and then dwell too long to boot - sometimes, the more you stir it, the more it stinks).

Endings. Does the student have a "get down" Is it a grabber? Is the last question likely to draw an objection? If so, does the student have a ready comeback (one more in reserve in the back pocket)?

As to theory:

Is the theory of the case consistent throughout the trial?
Is it a theory that will sell? (How do we teach good judgment?)
Are there inconsistent theories?
Shooting yourself in the foot.
Always keep your eye on the target.

As to gestures:
  Appropriateness
  Not enough/too much gesturing
  Smashing the table to give emphasis (gestures can be overdone)
  The prosecutorial finger
  Skrunkling your face in disbelief
  Shrugging shoulders/hands in the air

As to notes:
  Okay, but how to use them
  Where to position them
  What they should look like

  Cues:
  Writing on notes as you question (and the times when this is okay)

As to eye contact:

  Be interested, or at the least look interested.
  Look at the witness, nurture.
  Pick up vibes on witness or, during voir dire, on prospective juror.
  As a method of control on cross. Stare ‘em in the eye.
  Looking down at notes after asking a question, or while witness is answering a question. Boo.
  What does this say to the jury? To the witness?
  Ideas of the ceiling.

As to mood:

  Is it appropriate given who the witness or what the topic is? Example: Your mood when you direct a victim v. a snitch should be vastly different.
  Don’t check your emotions or humanity at the courtroom door. Stiffs get stuffed.
It's okay to let the jury know how you feel (of course it helps if you are a feeling person).

For each witness ask yourself when preparing your examination: Who is this person? What is his or her agenda in being here? And how will this person be perceived and received by the jury? Only then can you assume the appropriate mood.

Beware of over-zealousness and self-righteousness.

Be positive, confident, like a pro.

Be candid, fair, own up to problems: i.e., a straight-shooter.

As to problem analysis:

Buying into the other side’s case (it amazingly happens all the time).
Does the student see the positive points to be made?
Does the student see the problems that are lurking around every corner?
Has the student scoped out potential evidentiary problems and come up with responses and authority.
Have the elements necessary to prove the case been covered?

As to transitions:
Pausing
Movement
Headnoting
Rhetorical questions
Use of visual aids

CRITIQUES SPECIFIC TO OPENING STATEMENT

— The canned start which says nothing, or worse yet says what I am saying is not the evidence of the case.

— The first minute or two of your presentation is critical. This may be the jury's first impression of you and your case. The "grabber" start.

— Opening is a fact-based presentation. Argument is not only objectionable; it may not be as persuasive as a skilled recitation of facts. "Why should I believe you?" Give the jurors facts to hang their hats on.

— How to tell if what you are saying is fact argument. The jeans test.
— Use of theme. Is there one? It should be short and to the point, simple and easy to understand, catchy but not offensive, and unequivocal. “A deal’s a deal”, ‘Desperate men do desperate deeds”, “Safety first,” “Drinking and driving don’t mix.”

— A story-like presentation. “Once upon a time.” “It was a dark and stormy night.”

— How is the story told. Protagonist(s). Options.

— Marshalling of facts to create a favorable image of your case. Use of repetitions.

— Organization/structure. Is there a flow to the facts. How to transition from one topic to another.

— Rather than merely a statement, opening should be more like a presentation. We learn more and with greater ease through our eyes than through our ears. Use props, exhibits, charts, quotes. Get court clearance.

— The danger of information overload. Make it a selective recitation. Leave something for the jury. Tittered.

— Get the names of the cast of characters and facts right.

— Reading from notes.

— “The evidence will show…”

— Highlight your key witnesses (experts, eye witnesses, police).

— Personalize the victim or your client.

— Use of quotes. “Did I hurt him bad?”

— Anticipate evidence problems. How am I going to get that in? Motions in limine to clear this up,

— Be careful not to over commit. Know what your witnesses can and will deliver in their testimony. “When in doubt, leave it out.”

— Don’t hide from the problems. Diffuse them where possible.

— State your case positively and with conviction.

— Dwelling too much in the other side’s field of play: Defense attorneys are especially prone to this malady of being too defensive and reactive in their approach.

— The Paul Harvey opening. The advantage of going second.

— If you’re going to argue, don’t be piggy about it

— At the end, tell the jury what you want them to do for you.

CRITIQUES SPECIFIC TO DIRECT EXAMINATION

— Lack of control. Too much narrative. “What happened next” or “And then what happened” questions.

— Importance of short questions to help control flow of information.

— Importance of the word “first” as a control device.
— Slow down the action on important segments. Row to do it.

— Use of loop backs.

— Avoid compound questions. They cause confusion.

— Avoid vague, wishy-washy questions. Especially as to place and time.

— Use of leading questions. When it's okay, when not. Why you should avoid leading questions even if you're "getting away with it." "It's preliminary" "so" "As I understand it...."

— How to avoid asking leading questions: "What, where, why, when, how, explain, describe" type questions.

— Be genuine. Avoid the "I know this is hard, but..." approach unless it's real.

— Accrediting and background. How much is enough.

— Create comfort with the witness v. scary formality of the courtroom (good example: "State your name for the record" v. "Miss Smith, please tell the jury your full name").

— Lack of foundation for admissibility (why the judge should let it in). Merely an impediment to overcome to get the information to the jury. Students usually overlook the foundation questions, take an objection, and then have to backtrack and "catch up," rather than incorporating the foundation as part of their direct. The areas this comes up most frequently are 602 personal knowledge, 803 hearsay, 701 lay opinion, and 406 custom and practice.

— Lack of foundation for persuasion (why should the jury believe it). Just getting by the judge is not always enough with the ultimate audience.

— How and when is the bad stuff dealt with. Anticipating the cross. What to front and what to save for re-direct.

— Use of topic sentences.

— Precision is a key ("Before August 1, 1990, how did you get along with Miss Jones?").

— Setting the scene with enough detail so the jury can "see." This requires precise, short questions.

— How to get to a point in time. Does it look like "a fix" ("Directing your attention to 9:37 P.M. on November 2, 1989, what were you doing?" is the classic) or does it flow in a natural way ("Did you investigate the murder of Miss Jones?" followed by "When did you begin the investigation?").

— "Did you" questions.

— "Do you recall" and "Do you remember" questions.

— "Occasion" "Indicate" questions.

— "How far" v. "How close," "How fast" v. "What was the speed."

— Using diagrams in direct. Lack of a record. No direction to your witness. No easy legend or identification system. Who does the marking. Where does everyone stand. When can I sit down.

— Anticipating objections and having an argument at the ready. In preparing direct, you should ask for each question you are considering: (1) Why am I asking this, (2) What are the potential objections, (3) What is my response. Students are usually caught flat footed with objections.
especially hearsay (the usual response is, gulp!, “It’s not being offered for the truth, your honor” – a great message to the jury).

— Defining terms and procedures where the witness is going to speak about things most of us don’t know anything about.

— How to deal with a wrong answer or memory loss. This is a good time to use the board and brainstorm with the class on what the options are, and then rate them in order of preference. The options include: do nothing (preferred by all too many attorneys), lead, impeach, refresh, rephrase, recess, former testimony, past recollection recorded.

— Have a snappy ending. An example, “the denial.”

CRITIQUES SPECIFIC TO CROSS EXAMINATION

— Establish a rhythm.

— Conditioning the witness to give just “yes” or “no” answers. Start off with questions for which it is easy to say just yes or no.

— Short questions. One point per question.

— An ordering problem which comes up regularly is the slap-in-the-face start, then followed by a plea for camaraderie and understanding. Lesson: Do the non-destructive, enlistment portion of the cross first, attack only after you’ve milked all the good stuff.

— Making statements v. asking for information.

— This is not the time to go fishing (remember: you are not taking the witness’s deposition).

— Another way of saying the above, go with what you’ve got in black and white (or can otherwise impeach with). Only ask a question where you don’t know the answer if you don’t care what the answer is (and can deal with it no matter what it is) or where the logic that controls the world tells you it can only be answered one way.

— Don’t ask “open-ended” questions (explain what they are and why they’re no good).

— Avoid (1) long, (2) convoluted, (3) argumentative questions (or any one of these).

— It comes up so often: don’t argue with a witness. Explain why, using the student’s own situation as a model. Save the “ahah!” for closing.

— The most typical error of neophyte examiners is going straight for the home run on a point v. laying the foundation and building up to the big point. “The one question point.” It usually doesn’t work because the witness is being asked to make a major concession, and the student has no fallback questions, or has now created a large mountain to overcome in order to ultimately make the point. Or, as often happens, the witness does answer the question and the lawyer goes on thinking he or she has done a great job, with absolutely no emphasis having been given and no impact made on what was presumably a major point. Make a “hurrah.”

— “Did you” questions (v. “You didn’t, did you?”).

— “Do you recall?” or “Do you remember” questions.
— Keep control of your emotions (even though we all know you want to strangle the witness).

— Use of topic sentences.

— Points on cross should be easily discernible. Diagram what a cross looks like.

— Is there a game plan?

— Is the game plan thrown off by the opponent's ordering? “Plan your work, and work your plan.” Start and end with good points, keeping one in your pocket, just in case.

— You must listen to answers (which can only be done if you control your emotions). Only then can you begin to do something in response. An effective critique is where you note an answer which could have been used to advantage, but wasn't (likely because it wasn’t heard), and you quote the answer and demonstrate what could have been done in response.

— “Go with the flow” (Governor Moonbeam). You can only do this if you listen and hear the answer and are flexible enough to change your game plan. Stated another way, don’t be wed to asking your 20 questions just as they are written down. Adjust to the circumstance. If the issue is on the table, deal with it then and there.

— If you feel like you’re getting pushed, your instinct must be to push back. You are numero uno. That’s got to be the message to the witness. Give specific examples from the examination.

— Rein in a talkative or wise-ass witness (a lesson unto itself). List some of the options on the board.

— When the witness gets cute, throw the words back in his face.

— Be careful when using color words. Witnesses often don’t bite. Work up to the color word, which will increase your odds of getting the witness to accept it (another version of the home run question). Sometimes it’s neat to have an alternative color word ready (usually presented with dripping sarcasm).

— What didn’t happen, or what the witness didn’t do is often a safe and valuable area of inquiry.

— The whole point of control techniques on cross is to increase the odds of getting what you want, and not getting killed with answers you don’t want. There are no guarantees, no matter how skilled you are. How to increase odds.

— Get the answer you deserve. A predictable problem. Point it out and show how to do it right. The cross examiner will usually be tested by the witness within 30-60 seconds. You have to hear the waffle before you can deal with it.

— “Cross examination need not be cross.” Appropriateness. Who is this person. What is their agenda. Should this be a cross friendly, or at least neutral. “You get more bees with honey.”

— Know the difference between refreshing recollection and impeachment from a technical, strategic and mood perspective. When to do which one.

— Take the course of least resistance (see increasing odds). For example, if you can deflect your attack, do it. Best example of this is when the expert hasn’t been provided with something by the lawyer, and therefore hasn’t reviewed it.
CRITIQUES SPECIFIC TO CLOSING ARGUMENT

- Careful start thanking the jury (only if it's real)
- Early use of them or grabber start (the hook)
- Making inferences and weaving facts into your theme/theory vs. rehashing facts as if in opening statement
- Use of logic
- Use of common sense, of what our life experiences show
- Use of key instructions to explain the law of the case
- Use of exhibits
- Use of quotes
- Use of rhetorical questions
- Use of repetitions
- Use of sarcasm (and its dangers)
- Tie in the voir dire
- Use of analogies (real life stories, the Bible, fables)
- Use of key color words (from testimony or instructions)
- Create charts as part of the argument (or have them prepared)
- Laying out the elements of your case
- Do you deal with or duck problems
- Turning anticipated arguments from your opponent
- Explanation of inconsistencies
- Organization/flow/sequence/transitions
- How credibility of other sides’ witnesses is dealt with
- How credibility of your witnesses is dealt with
- Mode of delivery. Do you care, do you believe.

- Defensiveness. Students tend to be overly defensive, both as plaintiffs and defendants. Plaintiffs should start with their positive case, not fending off the defense. With rebuttal, they need not wallow in the other side’s ballpark. Defendants also should start with their positive defense, rather than responding to the other side’s thunder. Each side should have its own game plan and go with it.

- Combination of emotion and fact.
- Eliminate “non-issues” (there’s no question about…).
- Your mindset should be “we” and “us.”
— Eliminate “I think” from your vocabulary. Ethical problems.
— Don’t “submit,” “contend,” “maintain,” “assert,” anything.
— A call to arms (“it’s time for you to do your job”).
— Always keep in mind the hidden truths of every case, the real world bottom line.
— Your credibility is a key to success. Don’t overstate your case, interpret the facts dishonestly (zealous v. overzealous argument).
— Have a “get-down.” The last 30-60 seconds must be cold. If you’re a plaintiff, you need 2 get downs.

DRILLS

— This is a case about......................................................... (Fill in the blank.)
— The bumper sticker on this case reads:.......................................................... (Fill in the blank.)
— 45-60 second drill for opening or closing
— Impeachment set-up question committing the witness which shows you think it’s a crock: “You say you were going only 30 miles per hour?”
— How to ask leading questions that are short, 1 point each, and without a tag on the end:
  “You went to high school with Miss Jones.”
  “You do work together.”
  “Volunteer work, right.”
  “You do social things together.”
  “Like going to the movies”
  Keep this drill to 4 to 5 questions max.
— How to ask non-leading questions on direct. Again, put together a series of 4 or 5 questions each starting with the words “who”, “what”, “where” and so on.
  “Where were you going?”
  “What did you see?”
  “What was he doing?”
  “Describe how he looked.”
— How to develop a point (make a “hurrah”), and avoid the one question point. Ask the class what facts exist that contribute to the point you are seeking. Write them on the board. Order them then have each student ask a short question for each point in the order you have chosen. Voila! You’ve made a “hurrah” out of a point on cross.
  “The movie was over at 11:30.”
  “You hadn’t eaten all day.”
  “You went from the theater to the Pizza Hut.”
"The Pizza Hut is close to the theater."
"The Pizza Hut serves pizza."
"You ate pizza."
"The Pizza Hut serves beer."
"You drank beer."
"Out of a pitcher."
"You left the Pizza Hut at closing time."
"Closing time is at 2 P.M."

How to deal with non-responsive answers such as:

Question: You are good friends with the defendant?
Answer: We know each other.

OR

Question: Defendant didn’t stop right after the cop put his lights on, did he?
Answer: He thought they must be going for someone else because he wasn’t doing anything wrong.

Voice drills: "John" "Mary"

To recognize objections do a Q & A incorporating objectionable questions with the usual tip offs (i.e. "so", "as I understand it", "in other words", "tell us everything that happened", "what did she say", "what do you suppose he was thinking", "how did he appear"). Also put information in the answers that goes beyond the question and brings in objectionable material, calling for a motion to strike and perhaps admonition to the witness to answer only the question asked.

CRITIQUES SPECIFIC TO IMPEACHMENT

What to impeach on. Avoid “ticky tack” impeachment points.

Understand there are two types: of an inconsistent statement or by omission.

The proper mindset should be: what the witness said originally is not a prior inconsistent statement, as the evidence rules call it, it’s the prior truth. What the witness is now saying is inconsistent, and this inconsistency must be exposed, with the jury coming away with the view that what was first said should be believed. The federal rules only allow a “prior inconsistent statement” to come in for the truth if it was given under oath. Many state rules, it should be pointed out, allow all such statements in for their truth, whether under oath or not.
— The three step process of impeachment: the classic ordering is to commit, validate, and confront. Increasingly, lawyers are varying this to validate, commit, and confront so as to juxtapose the two conflicting statements right next to each other.

— When committing, be sure to shut all avenues of escape (close the corral gate). The bigger the hammer in your back pocket, the more you can “ask for it” (“hurt me, hurt me”). There’s a big difference between a videotape of someone saying something and a signed statement saying the same thing (a sledgehammer v. a tack hammer).

— Using the words “true” or “correct” in the committing stage sends the wrong message to the jury, since you want them to think it’s not true and correct. Use a different tag.

— As you set up the impeachment, be careful not to “buy into” the statement you want to show is a lie. Use tone and body language to show you think it’s a crock when you ask the commit questions.

— Take time on the validation process, especially the first time it comes up at trial. Jurors do not know what a deposition is, or how the grand jury operates, or how a signed statement is taken, or how reports are properly written. Lay it out in enough detail so the jurors are “there” and can appreciate why what was then said or written should be trusted as truthful.

— It can be helpful when this first comes up in class to write on the board via brainstorming all the indicators of reliability for whatever type impeaching document you are dealing with. For example, with depositions these indicia might include: it was given closer in time to the event, you know it was important (and why), knew it was part of the trial process, could be used against you in court if you later said something different, could be used to help you later remember exactly what happened, met with your lawyer beforehand, your lawyer was there, you were under oath, swore to tell the truth, did tell the truth, knew we were trying to find out all about X (the key issue), wanted to help, thought about it ahead of time, told us everything you knew about X, had the chance to review what you said and did, signed the transcript.

— Eliminate “Do you recall” or “Do you remember” questions.

— When confronting, keep in mind the “rule in Queen Anne’s case” and modern variations.

— Do you hand the document to the witness? Alternate views.

— If you do hand the document to the witness, do you stay there or back off? The concept of hovering.

— Who reads the damming material, you or the witness? You should.

— Read the damming material with a flourish. “Shout it out” to the jury.

— Stick to what the document says, and not what the witness remembers saying.

   “These are the questions asked and the answers you gave,”

   “That’s what it says right here, isn’t that so.”

   “Did I read that correctly?”

— Do not accept equivocal answers to your confrontation question, such as “I guess so,” “if you say so,” “I don’t remember what I said.” It’s in black and white.
— Never impeach with "half a loaf." In other words, don't impeach on part of a sentence or paragraph or transcript when somewhere following it's all explained away. A skillful opponent will expose you as being unfair and sneaky.

— In an impeachment by omission, the confronting question usually sounds like: "Where in here does it say anything about...?" or "Show us where it says (what you just said)." Mood is an important aspect to such questioning.

— It's critical that you control your emotions when diving into an impeachment. True, you've just heard the witness change his or her story in a way that hurts and you want to wring the witness's neck, but the jury is not aware of this. You must funnel that anger constructively. Arguing with the witness over whether he's lying or not will do no good.

— Another result of losing control of your emotions will be your asking the one question too many, which usually sounds something like: "So, which is it, which is the truth?" or "So, you lied when you just told us X, isn't that right?" or 'Were you lying then or now?'. Don't try to argue the case with the witness on the stand. Wait until the witness cannot respond, and you can give it the spin you want. In other words, save the argument until the end of the trial.