**CROSS EXAMINATION**

**DURING THE PUNISHMENT**

**PHASE OF A**

**CRIMINAL TRIAL**

**and**

**HOW TO USE THE**

**PUNISHMENT**

**PHASE OF**

**A TRIAL**

**2013 CROSS EXAMINATION SEMINAR**

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**The Punishment Phase of a Trial**

More often than not, the punishment phase of a trial is treated like the stepchild. It is something that takes a back seat to the guilt/innocence phase of the trial. However, with the attitude of todays appellate courts, specifically the make-up of the Court of Criminal Appeals, and the publics call for law and order that we face daily, the punishment phase of a trial can be more important than the guilt/innocence phase.

How often have you been appointed or hired on a case, where the facts were such that you had little, if no defense to the charge at all? Or, how often has your client, by the time you are appointed or hired, done everything in his power to assist the government in proving its case? Often, we as defense attorneys are asked to do the impossible. Many times all we can do is damage control in attempting to keep the punishment to a term that our client can accept or live with or to even minimize the number of years that he can be assessed.

Unfortunately, in recent years, I have found that we now often measure success by beating the number of years that are actually assessed as opposed to what the prosecution has offered in the form of a plea bargain. But, if you are willing to put forth the effort, the punishment phase of the trial can actually be more important and more beneficial than the case in chief.

The vast number of attorneys spend all their time and effort on the guilt/innocence portion of the trial, and do not devote adequate time to the punishment phase. In many cases this may be an absolute mistake. In this regard, I have found that you can often lose the battle, but win the war during this second portion of the trial and either walk out of the courtroom with your client or the judge or jury has assessed a much lower punishment than the prosecutor was seeking in the case. We often forget that the general public can be forgiving, if the person warrants forgiveness and we demonstrate that our client is worthy of being if not forgiven, that his punishment be diminished due to his remorse, asking to be forgiven, and total change of lifestyle.

The only place I have found in American Jurisprudence, where you can legally and ethically manufacture, and control your facts is the punishment phase of a trial in Texas.

**CONSIDERATIONS AS TO HOW TO APPROACH YOUR CASE**

1. **WHAT COURSE OF ACTION IS AVAILABLE TO YOU?**

* Plea of not guilty to the jury, with the jury to set punishment.
* Plea of guilty to the jury, with the jury to set punishment.
* Plea of not guilty to the judge, with the judge to set punishment.
* Plea of guilty to the judge, with judge to set punishment.
* Plea bargain agreed to by the parties.

B. **FACTORS TO CONSIDER IN EACH CASE!**

* **Pre-Trial Diversion**
* **Deferred Adjudication**
* **Probation**
* **Jail Time**
* **Penitentiary Time**
* **Community Service**
* **Restitution**
* **Good of the Community**
* **Level of sophistication of the community where the trial is being held**
* **Judicial attitude toward your client or the offense**
* **Your clients criminal history**
* **Your clients attitude**
* **Your clients demeanor**
* **Your clients personal history**
* **Your clients family**
* **Friends of your client**
* **Relatives of your client**
* **Availability of witnesses**

**C. HOW DO I DECIDE WHICH PROCEDURE IS BEST**

You have to make the determination on a case by case basis. I recommend that if the facts are such that the government has a lay-down case, that you consider selecting the punishment phase as the place to make your stand.

There are basically two ways to approach this tactic. One is that you can let the court and the government know what you are going to do. The other is not to reveal your course of action, and let the government think you are going to fight them on the guilt/innocence portion of the trial; then at the time of trial, you enter your guilty plea and you are ready to proceed with the trial you have prepared for. This method circumvents the prosecution from preparing for the punishment phase of the trial. The prosecution will still be required to prove up its case, but the majority of the time, their proof is minimal and often some of the more damning details are skimmed over due to the prosecutor knowing he or she does not have to much to get a conviction. And, the amount of smoke you have thrown up prior to trial may lead the prosecutor to spend all his or her time attempting to offset the defenses you have been touting. Most prosecutors will not devote the time to the punishment phase of the trial and rely on police, law enforcement, probation, and/or parole officers to testify as to the bad reputation of your client. Many times the prosecution has no evidence to put on against your client in punishment. You on the other hand, will have witnesses that you have prepared who are ready, willing and able to take the stand and tell the court or the jury what a great person you client is and why he should not be incarcerated or that they should give your client a lenient sentence. Bottom-line is that not revealing your strategy, will oftentimes give you an advantage over the government. But, you need to make an assessment of your particular case and use the tactic that will be to your best advantage. In Texas, the punishment phase of a trial is the only place in American jurisprudence where you can legally and ethically manufacture evidence that will benefit your client.

When trying to decide whether to go before judge or jury, you absolutely have to know your judge, your community and your clients background. For instance, I know a judge that is fairly light on drug users, but will absolutely hammer a child molester. Or another judge I know is often swayed by crying children begging not to send their daddy to jail, while a spouse or girl-friend has no effect upon her. Therefore, I would suggest that you talk with attorneys that practice before the judge on a regular basis to make sure as to a true assessment of the judge.

As for your community, you have to know what the level of sophistication may be. For instance, in a rural county, where the people think that marijuana is next to the ultimate sin, or that lawyers from Dallas are flatland foreigners, you may not want to use a jury. How do you find out? You talk to lawyers where the case is pending who know the judge and have experience with juries in that area.. You find out what the judges position might be in a particular case. If you are a foreigner, consider associating a local well thought of attorney to assist you in at least picking the jury especially in a county with a population where everyone knows everybody. If he does nothing but take notes for you during voir dire, have him at the counsel table to show that a native is on your clients side. You talk to people from the area and try to get an idea of the sophistication and level of acceptance in a particular area. I have found that if I can find a TCDLA member who is familiar with the community, I can generally get a valid read on jury philosophy in a community as well as a book on the judge who would pass sentence. For instance, there is a county in West Texas that has not had an acquittal by a jury since 1968. Most lawyers who are not from that general area, would not be aware of that fact. You may or may not be aware of that fact, without talking to local lawyers.

* 1. **HOW DO I DETERMINE WHETHER TO USE THE PUNISHMENT DEFENSE?**

Below I have listed the things that I look at to see whether this is a viable way to approach the case. I am quite sure there are more, but these are factors that have worked for me. They are not in any particular order of importance, but each must be looked at by you as the attorney, as a way of possibly assisting your client.

* Evidence by the State
* Past criminal history
* Reputation of client in community where case is pending
* Reputation of client in his home community
* Family of client
* Work history of client
* Religion of client
* Type of offense
* Civic involvement
* Psychiatrics of client
* Children
* Availability of witnesses
* Victim of crime
* Length of incarceration
* Intelligence level of client
* Judge
* Extraneous offenses
* Health of client
* Level of sophistication of community where case is pending

Depending on the case, I try to start work on the punishment phase of the trial from the date I am hired or appointed. In other words, I start trying to build the character for my client immediately. And what is even better, you can actually control, if your client will follow your advice, what your evidence is going to be at the punishment phase. This where you can actually manufacture evidence that can be used by you during the punishment phase of the trial.

I divide the clients into two types:

Client out on bond

Client who is in custody

**FOR THE CLIENT THAT IS OUT ON BOND:**

1. Tell him to get a job, or keep his, and to get as close to his boss or supervisor as he can. This way his boss can testify as to what a great employee your client has made.
2. Tell him to get involved in church. Not just go, but be active. Usher, attend during each service, teach Sunday School, serve at Wednesday night suppers, etc. All the while he should be developing people that are in the church as possible character witnesses.
3. If young and living with parents, develop a course of living to bring the parents into play as witnesses who have noticed a change in their child. Have the parents keep a daily diary of his activities since being charged. This will display to the judge or jury that your client has made a lifestyle change, has seen the error of his ways and is trying to make a useful and viable citizen for the community.
4. If living with wife or girlfriend, spouse or boyfriend, what better witness to a change in lifestyle by your client. Have her or him keep a daily diary of the clients activities since being charged.
5. Get your client involved in volunteer work, YMCA, boy scouts, meals on wheels anything dealing with helping out in the community and develop fellow workers, supervisors, coordinators as possible character witnesses.
6. If drugs or alcohol played any part in the alleged crime, get your client into rehab and/or counseling. Counselors make great witnesses.
7. Try to get your client into counseling. Counselors make great witnesses and are on your side, trying to make your client a contributor to society.
8. Education is something that is oftentimes overlooked. Get your client into GED program, adult education, junior college courses, etc.
9. New job training is another area that can be used to show that all important change in your client, preparing for the future.

**FOR THE CLIENT IN CUSTODY:**

1. Get client involved in religious services at jail. More than just attending. The jail church people are always sincere and convincing witnesses.
2. Education, most jails have in facility education or correspondence courses that can be signed up for.
3. Letters to relatives setting out remorse for the alleged crime (without confessing) and statements about setting his life straight and making a better citizen. **DO NOT HAVE YOUR CLIENT WRITE LETTERS TO THE VICTIM OR THE VICTIMS FAMILY.**
4. If drugs are involved, get counseling for your client. Petition the court for help in drug rehabilitation or counseling.
5. Have your client prepare a plan once he is released. Include in the plan living conditions, family support and support of family, job, church, community involvement, etc.
6. Have clients family arrange employment if he is released.
7. Take advantage of any medical condition your client may have.
8. Have client volunteer for any program in the jail, work crew, trustee, etc. Once again to show the change in your client

The main concept is to develop a plan of action as to all phases of your clients life if he is released and to have all the bases covered to give the court or the jury something to get the judge or the jury to sink their teeth into. CAVEAT: **IT HAS TO BE VIABLE AND SELLABLE.**

For instance, your plan should contain a job for your client upon release, a place to live, people to assist him, your clients remorse for the offense, involvement in the community, involvement in a church, involvement with his family, counseling, support from family and other support groups, etc. All of these items and any more that you can come up with to show the jury that your client will be a useful, contributing member of his community.

**E. WITNESSES**

In the punishment phase of the trial, you have a unique position, as you can actually select whatever witnesses you want to prove whatever you want. In no other type of proceeding before a court do I know of an opportunity that you have like this. I divide the witnesses into two categories:

**Witnesses for the Defense and Witnesses for the State.**

I have used almost any type of person you can possibly imagine as a punishment phase witness.

Here are some of the types of witnesses I have used:

**WITNESSES FOR THE DEFENSE**

* Expert witnesses
* Employer
* Fellow employee
* Relative
* Children
* Family members
* Church people
* Concerned citizens
* Volunteer coordinators
* Counselors
* Civic leaders
* Jail employees
* Deputies
* the Defendant
* Fellow volunteers
* Friends

Each one of these witnesses are or can be important, and the more that you can weave into your case to prove up your plan, the better off you will be. Remember, you can get these witnesses with little or no trouble, and they will almost always be friendly, supportive, and against sending your client to jail. Any evidence you can bring forward concerning the history of your client as compared with your plan will help show a change for the better. If you have evidence of your client as a child, the hardships he endured, the level of training or education by parents or lack thereof, the educational level of your client, his peers, etc. These are all matters which if handled properly can contribute to your plan and either reduce the possibility of a lengthy sentence or even grant probation.

These witnesses must be prepared for cross examination by the prosecutor.

How do you prepare them?

First, if your client has some extraneous acts or crimes that may come into play. You will need to go over these with each witness so that the witness is prepared when the prosecution asks them a “have you heard” or questions about the act or offense.

Second, spend some time with preparing your witnesses for cross examination. I like to discuss cross with a witness from this standpoint: “Every person who testifies is nervous. If we examine why you are nervous, we can overcome that nervousness. Basically there are three reasons: (1) The witness does not want to say the wrong thing; (2) The witness does not want to appear dumb or stupid; (3) The witness does wants to help not hurt your client. Let’s address them one at a time:

(1) The witness does not want to say the wrong thing. This is very simple, if the witness tells the truth, then the witness does not have to worry about saying the wrong thing;

(2) The witness does not want to appear dumb or stupid. For some reason witnesses are afraid to say “I don’t know” or “I don’t remember”. There is nothing wrong with that response. If the witness does not know or does not remember, it is okay to say so. Go one step further, and explain to the witness it is permissible to ask the prosecutor a question, such as: “If you can give me a point of reference, perhaps I can answer your question” or “I do not know the exact date, time, distance, etc., if you can give me more information I may be able to answer your question”. Another approach would be for the witness to state, “I do not understand your question, if you will give me some explanation, then I may be able to answer your question”. However, if the witness does not know or does not remember, it is perfectly okay to say so.

(3) The witness wants to help not hurt your client. Very often the witness will want to explain his or her answer. Tell the witness not to do so. If the matter needs cleaning up, you as the defense attorney will be able to ask additional questions in order to explain the answer. Make sure that you tell the witness that what seems damaging to the witness may or may not be damaging to your client, and that is a decision that you will make and whether to explain or clean it up will be your job.

Another factor in preparing your punishment witnesses for cross examination is to tell them how to answer the questions. There are very basic rules for answering the prosecution’s cross examination questions.

1. Answer only the question asked by the prosecutor. Do not elaborate or explain. This means the answers should be short, such as: “Yes”, “No”, “I don’t know”, “I don’t’ remember”, or “I do not understand your question, if you will explain to me what you are asking, I will attempt to answer your question”.

2. Listen to the question and answer only what is asked and **NOTHING MORE!**

3. Let the prosecution complete his question, before you answer, and make sure you understand every aspect of the question before you answer. If you do not, then politely ask the prosecutor to explain.

4. It is okay to become emotional during cross examination by the prosecution. If the witness needs a break, a Kleenex, etc. it is perfectly okay to request same from the court. Emotion can play a heavy part in the cross examination. A prosecutor will generally not “go after” a crying wife, mother, father or child for fear of alienating the jury or the judge. Advise the witness not to display anger or disgust.

5. Make sure that if your witnesses have any problems (i.e. criminal history, or “bad acts”) you have explored them and prepare the witness for them to be brought up.

6. Tell the witnesses not to look to you for “cues” to answer the questions. Tell the witness to look at the judge or the jury and make eye contact with them when responding to cross examination.

7. Tell the witnesses to be polite and respectful and do not engage the prosecutor. You are seeking mercy at this point, and you want the prosecutor to look like he or she is “badgering” or “attacking” your witness. I always tell my witnesses to respond with a “sir” or “ma’am” in answering cross examination questions.

8. And finally, I always tell my witnesses that if they see me coming up out of my chair, to stop talking or answering immediately. I also tell them that if the prosecutor comes up out of his chair to keep talking until the judge tells them to stop.

**IF YOUR CLIENT IS GOING TO TESTIFY DURING PUNISHMENT**

You must spend a great deal of time preparing him for cross examination during the punishment phase of the trial and the same basic rules would apply.

Additionally, you will need to make sure your client is prepared for the cross examination concerning the offense, the victim, etc. Especially, if your client did not testify in the guilt/innocence phase of the trial. This will take some time, but it is imperative that you cover these issues and how your client should respond to same, to meet the “theme” of your punishment phase of the trial. You will have to make a decision concerning whether your client can “help” or “hurt” himself during the punishment phase. If he can help, you should always use him. If he cannot, then you will have to weigh the benefit against the detriment and see if it is worth the risk of him testifying during the punishment phase of the trial.

Make sure that you prepare your witnesses for the following:

* Have you heard questions.
* Extraneous offense attempts by the Government
* Badgering by the Government

You can actually prepare your witnesses and with your most trusted ones, set traps for the prosecution to step right in the middle of them.

You want to use your witnesses to make the jury or the judge a part of the family. Let them in on what is going to happen. You want tears, crying, weeping, begging for forgiveness, unbridled remorse all coming out. Emotion can be a deadly weapon against the government. The prosecutor is not going to badger or jump all over an emotional witness begging for forgiveness, begging for mercy, pledging his or her loyalty to your client, for fear of alienating the jury. You want to make sure that you have every facet of the life of your client impregnated with assistance from family, clergy , friends, community services, employer, etc.

Finally, the most time in preparation of witnesses should be spent with your client, if you are going to put him or her on. My tips on preparing your client are very simple:

* Develop our plan, know it backward and forward;
* An unrelenting pledge to make a positive contribution;
* Asking to be forgiven for making a terrible mistake;
* Begging for mercy;
* Begging for a second chance;
* Unbridled remorse;
* Emotions running rampant;
* Fear of confinement;
* Fear for his or her family;

Make sure to weave into your case, compassion, drama, tears, or anything that will invoke the emotions of the jurors to sympathize with your client, or sometimes perhaps with one of your character witnesses.

**STATES WITNESSES**

Most of the time, the States punishment phase witnesses are divided into two categories:

* Law enforcement officers
* Probation officers
* Assistant District Attorneys
* Parole officers
* Victims or families of victims

**HOW TO SHOW THE LACK OF CREDIBILITY OF A STATES WITNESS:**

Law enforcement officers are the easiest to attack. They generally will not know where the client lives, his or her spouses name, what church he or she attends, where he or she works, how many children he or she has, whether or not he or she is involved in any volunteer work. For the prosecution, their testimony generally goes like this:

PROSECUTOR: Officer Jones, are you acquainted with \_\_\_\_\_\_\_\_\_\_\_?

OFFICER: Yes sir.

PROSECUTOR: Officer Jones, are you acquainted with the reputation of \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_,

for being a peaceable and law abiding citizen in the community in which he lives?

OFFICER: Yes, sir.

PROSECUTOR: How would you classify that reputation, good or bad?

OFFICER: Bad

PROSECUTOR: Pass the witness

It is at this juncture where you can really go on the attack. Start off low key and get

more and more surprised, disgusted, frustrated as you cross-examine the officer.

You can question the officer as follows:

LAWYER: Officer Jones, do you know where \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ lives?

OFFICER: No sir.

LAWYER: Officer Jones, do you know where \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ works?

OFFICER: No sir.

LAWYER: Officer Jones, what is \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_s spouses name?

OFFICER: I dont know.

LAWYER: Officer Jones, what is the name of \_\_\_\_\_\_\_\_\_\_\_\_\_s oldest child?

OFFICER: I dont know.

LAWYER: Officer Jones, what is the name of \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_s youngest child?

OFFICER: I dont know.

LAWYER: Officer Jones, do you know the name of the church that \_\_\_\_\_\_\_\_\_\_\_ attends?

OFFICER: No sir.

LAWYER: Officer Jones, do you know what volunteer programs \_\_\_\_\_\_\_\_\_\_\_\_\_ participates in?

OFFICER: No sir.

LAWYER: Officer Jones, do you the name of \_\_\_\_\_\_\_\_\_\_\_\_\_\_s best friend?

OFFICER: No sir.

LAWYER: Officer Jones, do you know whether or not \_\_\_\_\_\_\_\_\_\_\_\_, has completed high school?

OFFICER: No sir.

LAWYER: Officer Jones, do you know the names of the parents of \_\_\_\_\_\_\_\_\_\_\_\_?

OFFICER: No sir.

LAWYER: Officer Jones, do you know the occupation of \_\_\_\_\_\_\_\_\_\_s father?

OFFICER: No sir.

LAWYER: Officer Jones, do you know the occupation of \_\_\_\_\_\_\_\_\_\_\_s spouse?

OFFICER : No sir.

LAWYER: Officer Jones, do you know the occupation of \_\_\_\_\_\_\_\_\_\_\_\_, prior to his arrest on this charge?

OFFICER: No sir.

LAWYER: Officer Jones, do you know whether or not \_\_\_\_\_\_\_\_\_\_\_ has ever been treated for mental illness or an emotional disorder?

OFFICER: No sir.

LAWYER: Officer Jones, do you know what religion \_\_\_\_\_\_\_\_\_\_\_\_ follows?

OFFICER: No sir.

LAWYER: Officer Jones, do you know whether or not \_\_\_\_\_\_\_\_\_\_\_\_\_\_ has special training as a \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_?

OFFICER: No sir.

LAWYER: Officer Jones, do you know the name of \_\_\_\_\_\_\_\_\_\_\_\_\_\_s boss?

OFFICER: No sir.

LAWYER: Officer Jones, do you know how long has \_\_\_\_\_\_\_\_\_\_\_\_\_ been held in custody for this case?

OFFICER: No sir.

LAWYER: With disgust------I have no further questions of this witness!

In the proper case you can ask other questions, like:

LAWYER: Officer Jones, do you know whether or not \_\_\_\_\_\_\_\_\_\_ was sexually abused as a child?

OFFICER: No sir.

LAWYER: Officer Jones, do you know whether or not \_\_\_\_\_\_\_\_\_\_\_\_ was physically abused as a child?

OFFICER: No sir.

LAWYER: Officer Jones, do you know who is \_\_\_\_\_\_\_\_\_\_\_\_\_s family doctor?

OFFICER: No sir.

Use anything that can show that the officer really has no knowledge about your client. But make sure that you know that the officer does not know the answers to your questions. You have to make your cross-examination fit your case, and the facts, but you can see how you have set up your final argument. The theme of your argument would be the only witnesses brought by the government were witnesses that the government pays they have no personal knowledge about your client, his family or his lifestyle. In argument to the court or jury weigh the credibility of a witness who doesnt even know where my client lives, works, worships, etc. It can make a really great argument if you have put on your witnesses to show all of these items which I have listed previously, put on my witnesses to prove up and cross-examined the governments witnesses showing their lack of knowledge about your client. Be creative, be cautious, but try to build your case from a character standpoint that will appeal to the judge or the jury. There is not a real burden of proof here, so more is always better. I have literally used witnesses from all walks of life in and out of the courtroom in a particular case for hours and hours, and all the government had was some policemen, undercover agents, and deputies who had little actual knowledge of any of the facts concerning my client or his reputation.

**A MAJOR CAVEAT HERE: NEVER, NEVER, NEVER, NEVER ASK A LAW ENFORCEMENT OFFICER *UPON WHAT HE BASES HIS OPINION*. FURTHERMORE, DO NOT GET EVEN CLOSE TO THAT QUESTION. IF YOU DO, EVERYTHING THAT HAS EVER BEEN SAID ABOUT YOUR CLIENT WILL LIKELY COME OUT AND YOU CANNOT STOP IT.**

**VICTIM OR MEMBERS OF VICTIM’S FAMILY**

My general rule concerning cross examination of a victim or victim’s family is generally: **UNLESS I CAN MAKE POINTS AS TO BAD CHARACTER OR FOR LACK OF CREDIBILITY ON THE PART OF THESE WITNESSES, I ASK FEW OR NO QUESTIONS**. Most of the time you are not going to be able to make any points before a judge or a jury unless it falls into one of these categories. Even then, you do not want to evoke sympathy or compassion for the victim or the victim’s family nor do you want to have the jury turn on you due to an attack upon the victim or the victim’s family. Let the prosecutor be the bad guy, use some psychology that you are compassionate and caring about people. But do not ask any questions unless you are able to make STRONG points in favor of your client.

**ANOTHER FACTOR CONCERNING VICTIM’S IPACT STATEMENT AFTER SENTENCING:**

**Remember victim impact is that “victim impact” not degradation of your client. Neither you nor your client is required to listen to what a sorry person he may be. Victim impact is basically “what impact the crime has had on the victim or the family of victim”. Upon objection, you can make the victim impact statement limited to only those factors. This has nothing to do with cross examination, but I felt that you should always remember this and be vigorous with the court in stopping a verbal degradation of your client.**

**CONCLUSION**

I hope that you can use some of the suggestions I made. My experience has been that you can often turn a sows ear into a purse, it may not be silk, but it oftentimes will be acceptable. If you are successful you can cut your clients exposure and time, and once in a while walk out of the courthouse with him on probation or a deferred or sometimes a sentence below what the prosecution is requesting.

If I can ever be of service in answering questions or advice, do not hesitate to contact me, I will be more than happy to assist you.