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The Sniper Defense: 7 Principles for Defending Against Claims

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Timothy Murphy fired one of the most important shots in American history. It was 1777 in a pivotal battle in the British effort to separate New England from the southern states. The Americans were gaining critical momentum, but things were still close. As General Simon Fraser emerged and began to vigorously rally British troops, Murphy went into action. He ascended into a nearby tree, finding the perfect vantage point, and took aim at Fraser from a distance of approximately 300 yards.

American Revolution scholar Donald Moran recounted the impact of Murphy's shot in his piece, "The Saratoga Rifleman":

"As soon as General Fraser fell, a panic spread among the British lines...General Burgoyne personally took command of the area, but could not rally his demoralized men. The whole British line caved in and men scrambled for the entrenchments around their camp."¹

Moran went on to declare that this shot "turned the tide of the most important battle of the Revolution." The importance of the battle, as described by historian Edmund Morgan, lied in the fact that "it won for Americans the foreign assistance which was the last element needed for victory."²

A lot can be learned from sniper warfare and the devastating implications it has for battle. The values that snipers espouse can apply to the development of a defense strategy in litigation and provide critical guidance. So let's take a look at seven values that apply to a defendant in litigation:

A sniper immerses himself in his environment

Environmental awareness is the centerpiece of effective communication. An attorney's skill level, like that of the sniper, matters little if he or she has not properly prioritized an awareness of the environment within which he or she will demonstrate those skills. Communication scholars call this "audience-centered communication." There is a difference between how a message is intended and how it is perceived. Many attorneys prioritize the former over the latter, which leads to

¹ Donald Moran, *The Saratoga Rifleman*, <http://www.americanrevolution.org/murphy.html>, Retrieved June 12, 2014.

² Edmund Morgan, *The Birth of the Republic: 1763-1789* (1956) pp 82-83.



complaints about the “incompetence” of jurors. Blaming the audience gets you and your client nowhere. It does not matter how incompetent your jury is; it is still your job to persuade them. This gets us to first principle of the sniper defense: An effective strategy begins with an analysis of your audience and their common beliefs and experiences.

A sniper engages the enemy on his own terms

Reactive posturing (“yah, but...”) is perhaps the single most common misstep for defendants in litigation. It’s an easy trap to fall into because you are the one who has been sued and you must respond to the claims. But consider the research on battling misinformation. Lewandowsky, et al. (2012) examined research on the pervasiveness of misinformation in attempt to figure out why so many attempts at correction fail.³ One of their most important findings deals with the posture of those attempting to correct misinformation. They argue that too many persuasive campaigns take the path of pure negation, which only reinforces the misinformation. To drastically oversimplify this concept, let’s consider the argument, “Jack is a jerk.” A pure negation strategy is one in which the responder focuses on denying and disproving this statement. However, the seemingly appropriate act of denying and disproving still places the misinformation (i.e. “Jack is a jerk”) at the center of the focus, which functionally reinforces and endorses it. Instead, these researchers found that “alternative affirmations” have the greatest success rate when it comes to dismantling misinformation. An “alternative affirmation” is a strategy that offers an alternative competing vision of the issue. Getting back to the example of the claim that “Jack is a jerk,” the alternative affirmation might argue, “Jack has a very successful job and his success depends on his willingness to be direct with people even when the truth is difficult to hear.”

This alternative affirmation functionally refutes the misinformation, but does so by providing the audience with a completely different viewpoint to adopt and consequently, shifts the focus to an area where those battling the information can gain greater momentum. This gets us to the second principle of The Sniper Defense: An effective strategy controls the focus by creating a competing vision of the case.

A sniper makes himself as small as possible

A sniper is hidden within a large expanse, which makes it extraordinarily difficult to attack him. This renders so much of the enemy’s arsenal irrelevant. For

³ Stephan Lewandowsky, Ullrich Ecker, Colleen Seifert, Norbert Schwarz, and John Cook. *Misinformation and its correction: Continued Influencing and successful debiasing*. Psychological Science in the Public Interest, 13, 3, 106-131, (2012).

the enemy to roll out all of its firepower in an attempt to strike back at the sniper would only expose the enemy and waste critical firepower.

Since my early days of competing on the college debate team, it was clear that the smaller you could define the issue you were defending, the more likely the chances are that you would prevail. The reason is simple: smaller targets are difficult to attack. In a litigation setting, this strategy leaves the plaintiff with two options: 1) Engage you on your own ground; or 2) Try to make the case about peripheral issues that the defense can effectively “box out” due to their irrelevance. This brings us to the third principle of The Sniper Defense: The best vision of the case for the defense is that which requires the defense to take on as small of a burden as possible.

A sniper targets high-value items for psychological impact

In litigation, the best defense is an offense that goes for psychological impact. A critical component is a strategy developed out of a psychologically-motivating value or principle. People make decisions they can feel good about. Once a trier-of-fact is motivated to embrace your vision of the case, you will be surprised by what he or she is willing to do in order to fulfill this vision with a favorable decision. Jurors frequently reverse-engineer verdict forms and jury instructions to achieve a desired end result. This brings us to the fourth principle of The Sniper Defense: Identify the psychological satisfaction that can be achieved by the trier-of-fact by finding in favor of your client.

A sniper needs only a few select weapons

In his autobiography, *American Sniper*, Chris Kyle, considered the most lethal sniper in American history, discusses his weapons training, noting that he was trained on four basic weapons. In the field, his weapons consisted of his rifle, a pistol, and ammunition.

Similar to the battlefield, in litigation, it can be tempting to believe the party with the most weapons has the best chance of success. But a few well-planned shots can have a substantially greater impact than the largest and most sophisticated arsenals. Communication research is replete with findings about information retention. Most show the vast majority of what is said at trial will not be remembered by the jury when they enter deliberations.

These retention rates highlight the importance of a simplified plan of attack (i.e. selectively choosing a few effective weapons rather than unleashing a massive arsenal). It is much easier for your trier-of-fact to remember a few prominent elements of your case. This gets to the fifth principle of The Sniper Defense: Develop a defense theory that requires only a few select weapons.



A sniper does not fire unnecessary shots

A common counter-sniper technique on the battlefield involves baiting the sniper into taking more shots than are necessary in hopes of exposing him. In litigation, the defense does not need to win everything. Defense attorneys often mistakenly believe they have to win more than is actually necessary. This leads to unnecessary shots that can create unnecessary exposure. For example, consider the environment of deliberations. In deliberations, you will have plaintiff advocates and you will have defense advocates. When the defense pushes a peripheral issue, it runs the risk of losing on the peripheral issue in deliberations, which creates momentum for the plaintiff advocates. Certainly, this does not guarantee an adverse case outcome, but why take this kind of risk on an inessential issue? This brings us to the sixth principle of The Sniper Defense: Do not waste time and energy on peripheral issues in the case.

A sniper is passionate about his tradecraft

Snipers love their tradecraft and obsess over developing the skills to be effective. It is difficult to overstate the importance of passion in any field, but in defense litigation, it is vital. Litigation requires a uniquely effective persuasive technique. Defense attorneys have to motivate the trier-of-fact to *work* for his or her client and advocate in deliberations by putting together the facts, evidence, testimony, and law in a way that results in a favorable decision. Passion plays a critical role in achieving this objective.

In his book, *Talk Like Ted*, Carmine Gallo analyzed hundreds of the most popular TED talks to determine what made them so successful. Gallo argues that the most effective talks begin with passion.”⁴ Citing several studies, Gallo concludes:

“Science shows that passion is contagious, literally. You cannot inspire others unless you are inspired yourself. You stand a much greater chance of persuading and inspiring your listeners if you express an enthusiastic, passionate, and meaningful connection to your topic.”

This brings us to the seventh principle of The Sniper Defense: The Sniper Defense Principle #7: Find the source of passion in your client’s case.

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⁴ Carmine Gallo. *Talk Like TED*. St. Martin’s Press (2014).