



Bridging the Gap

Judge Rob Shuck

Circuit Judge, 4th Judicial Circuit



“RED TEAM” Pretrial Preparation: Discover Why You Lost Before the Verdict

Trial attorneys are best when best prepared. Experienced counsel anticipate objections, are ready with responses, understand the strength of their opponent's case, and recognize the weaknesses of their own case.

“We become overconfident in our plan [case]. We need to imagine a failed outcome to find its weaknesses.” [Refresher: Premortem Analysis](#)

Such ability to develop “outside their own case” expertise is not easily attained. All too often, such insight is earned afterwards when counsel hear (only to their own ears) a surprising verdict.

Pretrial war gaming and discussion typically focus on preparing to win, and, only when the case concludes, at conducting After Action Reviews (AARs). Supervisors ask counsel how they are going to meet the elements of the crime or defense, “prove” their case, or demonstrate reasonable doubt. Training is focused on in-court advocacy and winning the case. Even our “Bridging the Gap” sessions are retrospective. As a result, as I have told numerous counsel over the years, the biggest problem with case preparation oftentimes is that they know their own case too well. Their confidence is high. Then counsel get blinded at trial from facts or arguments that seemingly came from nowhere—something they never anticipated.

Is there a simple way to improve pretrial preparation while avoiding the fog overconfidence creates?

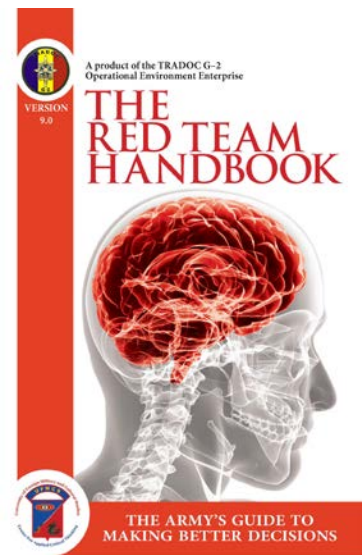
You can simulate failure without failing. We just need to look to the seemingly disparate worlds of American business and military intelligence. Both entities use surprisingly simple questions to learn in advance how new ideas (from product launches to military plans) will likely fail. Such insight can be incredibly valuable. For example, what if you knew ahead of time that a single variable would result in case disaster. Would that alter your trial strategy?

Businesses conduct project “premortems.”¹ Military planners use “red team”² techniques. Essentially, both ask at the beginning, “Why did we fail, and what could have been done to increase the odds of success?”

Assign a “red team” within the office to point out weaknesses—the defense would assign someone as a prosecutor. Trial counsels would designate someone as the defense attorney.

Why provide a court-martial the first opportunity to test your case? Instead of asking “How do you plan to win this case?” try imagining failure. “You just lost this case, what happened?”

Approved by the Chief Trial Judge/TPH 21 Jan 2020



¹ ‘Prospective’ hypothetical hindsight used to identify project risks. Gary Klein, “Performing a Project Premortem,” *Harvard Business Review*, September 2007 available at <https://hbr.org/2007/09/performing-a-project-premortem>

² *The Red Team Handbook: The Army’s Guide to Making Better Decisions*, version 9.0, available at <https://usacac.army.mil/organizations/ufmcs-red-teaming/>. An approachable guide of various critical thinking tools, techniques, and practices (in addition to conducting ‘premortems’) used by U.S. Army Red Teams.