

Trial Advocacy Manual

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Trial Advocacy Manual

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OPENING STATEMENT

The prosecutor should take full advantage of the opening statement to present a case in the clearest most positive light possible. While prosecutors have many individual styles this information is aimed at helping you to use your strengths and your style to present your case in the most effective manner possible, keeping in mind your legal objectives.

I. PURPOSE OF OPENING STATEMENT:

The purpose of an opening statement is to inform the a judge(s) of the evidence the prosecution intends to present, and the manner in which the evidence relates to the prosecution's theory of the case. Nothing prevents the statement from being presented in a story-like manner that holds the attention of a judge and ties the facts and law together in an understandable way.

As your first opportunity to address the court, your opening statement should serve three purposes:

1. Communicate the facts and theory of the case.
2. Persuade (not argue)
3. Establish your credibility.

Although the prosecutor is certainly not legally required to make an opening statement, don't give up this opportunity to address the judge(s) and convince them of the defendant's guilt.

II. PREPARING FOR OPENING STATEMENT

Preparation cannot be stressed enough at this stage of the trial. A good trial attorney would never think of examining a witness or doing closing argument without proper preparation, and yet this same type of care and preparation is often neglected at opening statement because the attorney feels "I know what my case is about so I can improvise".

A. Select a Theme:

Prior to starting any trial, you should give serious thought to the facts and circumstances of your case and develop a theme. The theme of your case is not to be confused with the theory of the case. The theory of the case is generally "how it happened" while the theme is the common experience that judge(s) will be able to relate to: an emotional tie. In developing the theme think about your experiences, what emotions or feelings do you have as you consider the facts of your case. Sometimes it's helpful to describe the facts of your case to a friend and find out what they think about it. Remember, in developing a theme you're only limited by your own creativity, and the evidence you will present.

Examples:

Callousness of defendant- “Defendant committed this crime.... Without feeling or emotion”.

Irresponsibility of defendant- “All defendant cared about was partying when he drank and drove that evening”.

Selfishness/ Greed- “Defendant’s sole motivation was greed and avarice”.

B. Make an Outline:

How many times after addressing a judge(s) have you thought to yourself “I forgot to mention...?” Making an outline of the key facts and points which must be brought to the judges attention will avoid this problem. An outline also helps you to see relationships of evidence and groupings of issues.

It is important to note that making an outline does not mean writing out your opening statement in its entirety. When the statement is completely written, it may cause you to rely on it as a crutch, or worse yet, read it to the judge(s).

C. Practice:

Practice your opening statement in front of anyone you can get to listen.

Again, getting feedback can be very helpful in making your statement as clear and understandable as possible.

Never attempt to “improvise” your opening statement.

III. PRESENTING THE OPENING STATEMENT

The opening statement can be broken down into three parts: 1) The Introduction; 2) Fact Narration; and 3) the Exit Line or Conclusion.

A. The Introduction:

The first words out of your mouth should be designed to grab the judge(s) attention. Start with a **strong opening phrase** utilizing a key point or main **theme** of your case.

Step directly into the story.

Consider telling the story from a specific point of view (victim, witness, officer, or defendant), this makes it more interesting and tends to put the judge(s) in the shoes of the person whose point of view you select.

Pull the judges in emotionally.

Avoid using standard introductory phrases (they waste time):

Remember, the judge already know who you are and why they’re there, what they want to know most at this point is, “*what happened*”.

B. Fact Narration:

1. THE STORY

One of the goals of opening statement is to get the judge(s) to *remember* what you are saying and to have *your view of the evidence* in mind as they evaluate the testimony.

Develop the story. Telling a story is probably one of the best ways to give a persuasive opening statement that judges will remember. it's okay to Story telling is the art of bringing an event to life through the use of details: *Example* "July 20, a warm and sunny, summer day, found Officer _____ patrolling the eastbound lanes of the Main Street...".

Here are some things to consider to help in the development of your story:

1. What are the most important facts for your theory of the case?
2. What will the judge(s) most easily relate to in your case?
3. What physical items of evidence* would be helpful to the judge(s)?
4. What details can be elicited during testimony to create a picture for judges?
5. Should the story be told in chronological order or some other fashion?
6. How would you describe the case if a friend asked, "What happened?"

Story telling technique becomes easier with practice and is well worth the time and effort necessary to develop it. Nothing will cause a judge to tune-out quicker than a monotonous recitation of "just the facts".

2. LANGUAGE

Use Descriptive Words When Telling the Story

Instead of: "She heard the sound of a bone breaking"

Try: "She heard the crack and splinter of breaking bone"

Try: "He got out of the car and walked toward the officer

Keep Sentences Short and Simple

Remember the judges must be able to follow and understand what you are saying. It's also more emphatic and more easily retained by a judge.

Instead of: "He choked, beat, and stabbed her"

Try: "He choked her. He beat her. He stabbed her"

3. VOICE MODULATION

A monotone delivery is tuned out. No matter how great your story is, if the judges tune out and stop listening, they simply won't get it. Thus, delivery of the message is important. It gets content across.

Use your voice to help set the mood or tone;

Volume:

Note: You should use exhibits in your opening statement whenever possible!

Increase to wake up a judge and draw attention (also effective when quoting defendant)

Whisper to focus attention, create drama

Vary to prevent boredom

Rate:

High speed for a long time is hard on the judge as well as the court reporter

Too slow allows the mind to wander

Vary according to content of statement, and for transition

Faster = excitement, tension, intensity of action

Slower = serious, subdued, focused

Silence (is golden)

Creates drama

Places emphasis on that which is to follow

Provides transition

Allows judges to absorb what's been said

(Also allows you to collect your thoughts)

4. MOVEMENT

When addressing the judges you should neither stand in one spot like a statue, nor march up and down. When you do move, it should be with a purpose, such as:

- to signal a transition
- to use exhibits
- to make a point

Eliminate nervous movement:

- Pacing
- Rocking back and forth
- Empty pockets
- Keep hands free

5. ESTABLISH RAPPORT

This is your first opportunity to make a first impression on the judges. Obviously, your professionalism and preparation is a big part of establishing a rapport with the judges, but you should also consider the following:

- Make eye contact with each judge.
- Use notes sparingly
- Don't try to intimidate judges.

IV. The Conclusion:

- End on a strong point
- If you feel it necessary to comment on the expected defense, keep it brief
- Tell them what you want from them

Example: "At the end of the case we will ask you to find that the defendant is guilty!"

A FEW ADDITIONAL SUGGESTIONS

Be yourself- Select the style and methods that suit your personality

Confront problems or weaknesses in your case- by addressing matters such as a victim with a criminal record, a recanting victim, etc. you enhance your credibility while diffusing the issue

Don't overstate your case- Don't make promises or claims that you can't produce; they will come back to haunt you

Avoid too much detail- At this stage, you will only bore the judges and they will tune you out.

DIRECT EXAMINATION

I. GOALS AND OBJECTIVES

- A. To present evidence, prove the elements beyond a reasonable doubt, and create a clear record on appeal.
- introduce proof by testimony and exhibits.
 - Elicit all testimony which supports the theory of the case.
 - Make the witness appear credible.
- B. To evoke the interest and desire on the part of the judges to do what is right and necessary: convict the defendant.
- Ensure that the testimony is clear to the judges.
 - Persuade the judges that the testimony is accurate.
 - Minimize the witness's weaknesses and maximize his/her strengths.
- C. To nullify what you expect from the defense, both on cross examination of each witness and as part of your opponent's case in chief.
- D. Other Considerations
- Utilize *effective* repetition to make your points.
 - Allow the witness to narrate what happened, to explain, to build context, and in effect, to come alive on the stand.
 - Pose questions that the witness will clearly understand.
 - Ask questions in the simplest form possible.
 - Avoid objectionable questions.
 - Present testimony in an order that maximizes its impact.
 - Control the witness.
 - Lay proper foundations for all evidence.
 - Mark and identify all exhibits.
 - Make and preserve an accurate trial record.

II. PREPARATION FOR DIRECT EXAMINATION

- A. Establish a Theme/ Rationale for the Trial
- Develop a compelling "factual theme" that can be carried through the trial and which will set up, and be carried forward, by your closing argument.
 - Structure Direct Examination to reinforce and refresh this theme during the presentation of your case.
- B. What must be proved
- Review elements of all crimes charged in the information and determine which admissible evidence proves each element and connects defendants to each count.
 - Develop theory of case i.e., commentated murder, aider and abettor, conspiracy, etc. as well as a theme of the case i.e., pillow case rapist.
 - Pull and review all cases which relate to the charged offenses. Determine whether facts of case warrant tailored instructions.
- C. Learn the facts of your case

- The police reports and attachments.
- Any investigator notes or witness interviews.
- Comments or notes or other presents or operand.
- Defendant's criminal and records, any tapes, medical records, chemical tests.

D. Examine the evidence

- Go look at the booked evidence.
- Develop and examine all photographs.
- Get a copy of he booking photo.
- Obtain and listen to all tapes.
- Visit the crime scene and other relevant locations.

E Determine what other evidence may exist

- Medical records, bank records, store videotapes, security reports, witness notes, transcripts of tapes or any other "paper trails".
- Determine if further investigation is needs.
- Review transcripts of prior proceedings.
- Begin noting the gaps in reports, including whatever witness statements there are – what questions you need answered.

F. Organize your Exhibits

- Exhibits and other visual aids are extremely important in bringing your case alive for the jury. A "visual trial" is a compelling trial.
- Use photographs, charts, diagrams, maps etc. Prepare in advance since few witnesses are comfortable or skilled at free handing exhibits in court.
- Have plastic overlays for exhibits you expect will be marked by more than one witness in court.
- Organize all exhibits- decide on the order in which they will be presented at trial and prepare an exhibit list for the court, defense counsel and yourself.
- Determine through which witness each exhibit will be introduced.
- Review requirements for laying the foundation for introduction of exhibits.
- Anticipate and research admissibility issues as to each exhibit.
- Consider videotaping the crime scene.

G. Preparing a Trial Notebook (For More Complex Cases)

- Three ring binder with dividers.
- Number the dividers.
- Make a topic index of the dividers for quick reference.
- Index of contents.
- Complaint with charges.
- Summary of charges (in simple English).
- Element sheet to check off the elements as each is established in trial.
- List of witnesses.
- List of exhibits.
- Opening statement outline.
- Police reports.
- Other reports/ investigator notes.
- Direct examination for each witness (lay and expert):

- Outline of witness testimony- use only an outline.
- Exhibits to be used with each witness- have copies for use as exhibit for defense attorney, for the court, for use during direct examination- 4 total.
- Copies of statements/ notes including copies of police reports or statements for each witness.
- Cross examination outlines.
 - Anticipate cross examination.
 - Review trial preparation material for confrontation issues.
 - Which facts are contested?
 - What is your opponent's objective with the witness?
- Copies of all document exhibits.
- Closing argument outline.
- Pertinent case law/ statutory authority.
- Subpoena/ witness information.
- Transcripts of tapes/ prior court proceedings.
- List of motions.
- List of objections.

G. Interview the Witnesses

- Discuss testimony with each witness- including officers.
- Go over testimony in stages.
- Have the witness tell you the whole story in a narrative.
- Go back over story in segments- i.e., establish "frames of reference".
- Ask questions to fill in the gaps.
- Ask about notes, documents, exhibits witness may have.
- Have witness tell you everything- whether or not it is in the report; anything else you want to tell?
- Elicit as much information as you can concerning witnesses' background- past and present- occupations, hobbies, professional training, interests that might be useful in:
 - Personalizing the witness.
 - Establishing his/her qualifications.
 - Establishing witness's accuracy and credibility.
 - Uncover any bias, interest or prejudice.
- Have the witness review prior statements or his/her report in order to refresh their recollection and memory. Have the witness explain any inconsistencies, discrepancies or mistakes.
- Find out if the witness has talked to the defense and what was said.
- Have the witness handle the evidence or exhibit (or at least tell them about the item) so they will be familiar with the physical object when they testify.
- If the witness is going to draw a diagram or perform an act in the courtroom, make sure they practice it first so as to avoid embarrassment and to insure a convincing performance.

H. Pre-trial Interview

- This interview should be conducted prior to the date of trial. At this time, you should put the witness at ease and prepare him/her for appearing in court.

- Discuss appropriate court attire, the respect which is due the trial proceed and be careful to discuss how they will act in the hallways since will see them there.
- Familiarize the witness with the courtroom, its process and the varied players involved including the judge, the clerk and the defense attorney. Remind the witness to always tell the truth (even if painful). Tell the witness what areas you will cover and the general questions you will ask.
- Let the witness familiarize himself/herself with any diagram you intend use and have the witness go through a trial run explaining their testimony with the use of the diagram.
- Prepare the witness for questions by the defense. Consider playing ** advocate with your witness taking the role of the defense attorney and giving the witness an opportunity to experience the types of questions ** anticipate your opponent asking.
- Test the witness's ability to estimate (if this may occur during testimony):
 - Test the witness' ability to estimate time, distance, height and weight.
 - Go the scene to estimate distances and measure them.
 - Go to courtroom for estimates and measure.
 - Test witness's ability to describe scenes.

I. Explain Courtroom Procedures

- Civilian and especially child witnesses, show them the courtroom, let ** meet court staff.
- Give brief rundown of rules (good practice to do this with any witness certainly any important witness).
- ALWAYS TELL THE TRUTH.
- Listen to the question, make sure the question has finished the question and be sure you understand it, before you answer it.
- Give short, but complete answers and then wait for the next question.
- If an objection has been made wait for the judge to rule before answering.
- If you do not understand the question or any word used in the question say so.
- If you don't know the answer or can't remember something, say so ** but don't use this as an excuse to not confront painful or embarrass memories.
- Don't guess at an answer, be clear when answers are estimates or ** qualified in some fashion.

J. Other Information

- Schedule witness, when feasible, with consideration of witness's schedule. KEEP WITNESS INFORMED of changes in time or status of case, explain what's going on.
- Be sure witness knows it is their choice whether or not to talk to defense attorneys/ investigator.

K. Witness Management

- First impressions are lasting. With this in mind, open your case with an appropriate witness whose testimony is strong and who will make a good impression

- Be coherent and cohesive in structuring the order of the appearance of your witnesses. It should be either chronological or at least, very logical.
- If you feel it is important to corroborate a witness's testimony or you have several witnesses to substantiate or establish a crucial point, they should be called successively, in order to impress the judges. Don't scatter this testimony throughout as it only lessens its impact on the point you want to establish.
- Finish Strong- this rule applies not only at the very end of your case but also at the end of session, the end of a day and the end of the week. Look for convenient stopping points and use them accordingly. Timing can be a useful tool. Avoid putting on a crucial witness at a time when the judge won't be paying attention such as at quarter to twelve or four fifteen in the afternoon.
- If you have a vulnerable witness, work on a way to build a foundation of credibility for him/her before the defense gets a chance to take its best shot. For example, precede an informant with the police officers who can give you much of the same testimony, or at least provide a solid framework for it, so that when the informant testifies, the basic truth of what he/she is saying has already been established. This blunts the usual defense attacks.
- Too Much Evidence: Calling more witnesses to the stand for the same event can be dangerous. If the witnesses testify alike, their testimony will be suspect because people do not observe and remember in the same way and they may be subject to a defense claim of collusion. If they differ, they are open to the attack that they are unreliable or liars or both.

III. STRUCTURE OF DIRECT EXAMINATION (BASIC APPROACH)

A. Mechanics of Direct Examination

1. The Basic Approach

a) Introduce the Witness First

- a. Personalize the witness by using his/her proper name.
- b. Elicit professional background, when you can.
- c. Elicit background that bears on ability to perceive, power of observation or lay opinion (211 victim trained as clothes buyer who might watch clothes and hair better than other; Dunk dues witness who used to work as a bartender; race car driver who sees someone speeding...).

2. Go Through Their Story Chronologically, if possible.

Example: drunk driving usually breaks naturally into these parts:

- Driving observations or accident scene.
- Physical manifestations of alcohol influence:
 - Odor or alcohol.
 - Speech.
 - Eyes.

- Unsteadiness etc.
- Field society tests.
- Admissions (the “universal” two beers).
 - Refusal this same ordering of events will help organize opening statement and closing argument and assist in preparing cross examination of defendant.
- 3. Listen to the answers you witness gives and adjust you questions accordingly.
- 4. Marking and introducing Exhibits.
 - a) Ask to have exhibit marked as example, People’s 1 for I.D.
 - b) State for the record where you are placing a P1 on the exhibit.
 - c) Make sure to have shown the exhibit to defense counsel and state for the record that you have shown the exhibit to defense.
 - d) Ask to approach the witness. Take the exhibit to the witness and then return to you place of questioning.
 - e) Lay the foundation.
 - What is P1 as marked for identification.
 - How do you recognize it?
 - For photographs.
 - What is P2 a photograph of?
 - Is P2 a fair and accurate picture of--?
 - For diagrams.
 - What does P3 depict?
 - Is it to scale?
 - Is it a fair and accurate diagram of the (scene) as the (scene) was on (the date in question).
 - f) Chain of custody for certain exhibits.

B. Wait for the witness to first talk about the exhibit (before you have the witness identify it). Let the witness mention the subject matter of the exhibit in the natural flow of testimony. When the witness mentions the exhibit, then have him/her describe it.

W: the defendant had a knife.

DA: describe the knife.

W: it was silver.

DA: how long was the blade.

W: about six inches.

Use demonstrative evidence: it will help make up for most witness’s inability to describe events and increase juror’s retention of key facts.

C. The Style of Direct Examination

1. STAND while questioning witnesses. Standing is a position of authority. However, make sure the judges are watching your witness, not you.
2. Stand still and upright- you may vary your position for emphasis but avoid distraction movements.
3. Speak slowly, loudly, clearly and confidently.
4. Do not rush through your questions. Take enough time so the judge fully absorb what is happening
4. Look at the witness while the witness is answering.
5. Keep nothing in your hands.
6. Use no more than an outline. Do not read questions.
7. Don't editorialize or make comments (okay, uh huh, etc)
8. Don't let defense objections confuse you. Recognize that defense attorneys sometimes object just to throw you off.- never look or act beaten, wrong or embarrassed if something goes awry. If you don't react, chances are the judge might not either.
9. Show respect for the court and opposing counsel.
 - Address the court and not opposing counsel.
 - Stand when addressing the court.
10. Use Simple Direct Language and Short Questions.
 - True technical terms may be appropriate with experts; however have them explain the term in everyday language.
 - Each question should be designed to elicit specific and known responses. Ask questions to elicit evidence to support the theory of the case. You should ask brief questions and let the witness talk, waiting until the witness finishes his/her answer before asking your next question. Then clear up any ambiguities and misstatements immediately.

Introductory questions:

- Ask warm-up questions which allow a witness to relax.
- Ask the witness if he/she is nervous-humanize them in front of the jury.
- Personalize the witness where appropriate.
- Ask the witness to "Tell the judges..." and have the witness look at the judges when speaking.
- Give the judges a full opportunity to hear and see what an important witness has to say.
 - a. First, have the witness give a brief account in narrative form of what happened.

- b. Go back over it, eliciting more detail.
-Example: Using exhibits, you can have the witness go through the testimony again.
- c. -Leading questions are appropriate for:
preliminary matters or where there is little danger of accusations of improper suggestions and/or facts warrant them.
Examples: Expert witnesses, the very old, handicapped witnesses, children, hostile witnesses, refreshing recollection, etc.
- d. Listen to what the witness says. Oftentimes, we concentrate so hard out next question that we fail to listen carefully to the answer of the question we just asked and therefore, are unable to straighten out an ambiguous or misunderstood response.
- e. Taking notes is a matter of personal preference. Just remember, the more you write the harder it is to listen.
- f. Use inflection in your voice; raise and lower your voice; speak slowly (and vary only for emphasis). Don't be afraid to pause.
- g. Allow natural emotions to affect voice.
 - Anger.
 - Indignation.
 - Sorrow.
 - Sympathy.
- h. Avoid dropping your voice at end of question.
- i. Be sincere.
- j. Don't posture: Don't be mechanical.
- k. Use IMPACT language.
 - Crash, not accident.
 - Attack, not incident.
- l. Establish defendant's identity as early as possible.
-Example: Is the person you saw driving the car in court today? (Or) Is the man who came into the store, in court this afternoon?
- m. Move the witness along in stages:
- n. Use language that lets the witness know to go in small steps.
 - What time did you get home? Was there anyone else there? (or);
 - What was the first thing you saw when you got to the warehouse? What were the lighting conditions? Describe the weather conditions. How far was the defendant from you when you first noticed him?
- o. Loop back part of the answer into the next question.
 - When defendant leaned against the car which hand did he use? When you first saw the broken window, where were you standing? After you heard defendant say, "I'm going to kill you" what did you do?
- p. When all else fails: "What happened next?"

11. Remember These Additional Factors.

- Be sure to cover the elements of your case.
- If the witness refers to an exhibit as “this”, identify exhibit by number and description.
- If the witness estimates distances by using courtroom markers.
 - Have the court quantify for the record: Ex:
That is about thirty feet, your Honor.
- If the witness gestures or demonstrates describe it for the record. Example: The witness is pointing to the ceiling with his right hand, the witness has his left hand in a fist, the witness is nodding her head.
- Clear up loaded, vague or too vivid words.
- Slow down events to emphasize eyewitness testimony.

1) Break every detail down into a question. Examples:

The observations of a defendant...

- Outside the store.
- As he entered the store.
- As he roamed the aisles.
- As he approached the register.
- As he drew a gun.
- As he demanded money.
- As the victim opened the cash register.
- As the victim handed over the money.
- As the defendant left the store.

2) Establish the witnesses ability to perceive.

- How far away from defendant were you?
- Was there anything obstructing your view?
- Describe the lighting.
- Were the lights on?
- How long was defendant in your store?

3) You may wish to speed up events with general questions that invite the witness to tell a story.

4) Demonstrate time by asking witness to pause and tell you when the appropriate period of time passed (be sure it is something you want to elicit - and have discussed with your witness).

12. Control Runaway Witnesses.

- Avoid by proper witness preparation.
- When it happens anyway try to control witness. Examples:
 - “Let me stop you for a moment”; “Hold on”, or just a second.
- Be polite and courteous.

IV. SPECIFIC TYPES OF DIRECT EXAMINATION

A. Child Witnesses

Children will obviously require special attention. You must take the time to establish rapport with them. You must also make sure that you are both speaking the same language. Never force a child to use your vocabulary. You must always adapt yours to theirs. With child witnesses, or with anyone who seems overly frightened, it is always wise to show them the courtroom ahead of time. Show them where everybody will be and let them get comfortable. If possible, a neat little trick with child-witnesses is to introduce them to the defense attorney a short time prior to their testimony. In many cases this may reduce the combativeness of the cross examination.

1. Meet them personally first. Let them get to know you and be comfortable with you before you get into trial preparation. Explore the level of maturity. A five year old may turn out to be more mature than a nine year old.

Don't over prepare them. Going over the facts too often may confuse them. Know the terms they use and prepare them to testify in those terms.

2. Let them see the courtroom and understand who will be there. Where possible, do a little role playing.
3. Have a special person in the courtroom during trial if that will help. Let the child carry a toy to the witness stand if that will help.
4. Don't make children testify to the facts over and over again. Once is enough if you can get it.
5. Use some leading questions, but then follow the short and simple question and answer approach.

B. Elderly Witnesses

1. Meet them personally first. Explain who you are and what you are going to do. Let them know you're going to help them through this process..
2. Go over the facts with them.
3. Let them know it's alright and necessary to use certain distasteful words in court. Tell them the judge will understand and it will help them convict the defendant. (You will have prepared for this in opening statements)
4. Show them the courtroom and explain the process while there.
5. As with all witnesses, tell them not worry about anything but telling the truth. If they do not remember something it's alright.
6. Make sure they can hear you in the courtroom and help them to project their voice by standing further back from the witness box.

7. Think about how to make them more comfortable in the courtroom.
8. Use some leading questions to get them started and feeling at ease. Ask them to tell the judges a little bit about themselves.
9. Use carefully selected words and make sure they understand you.
10. Don't keep them on the stand for a long time. They may not be able to take it. But, make sure they have ample opportunity to get the facts out.

D. Expert Witnesses

As with all witnesses, experts should be contacted and interviewed prior to trial. One of the most important things in using expert witnesses is to get them to speak in language easily understood.. This will require your reading over the expert's reports and reviewing them with the expert so that you, yourself, can understand what they are saying. If you cannot understand it, how can anyone else jury? If the expert has prior experience in courtroom testimony you might ask him if he knows of a good way to explain the complexities of what he is saying. If the defense is also offering expert testimony, ask your expert how he would counter the defense expert and why his conclusions differ from the defense.

1. Don't assume the expert is familiar with testifying in court.
2. Make sure the expert understands his/her role and what is expected of them.
3. Explain how you intend to "qualify" them as an expert witness.
 - Knowledge, skill experience.
 - Education.
 - Training.
 - Honors.
 - Memberships.
 - Publications.
 - Previous time qualified to testify as an expert.
4. Don't stipulate to your expert's qualification. Your expert's qualifications will impress the judges.
5. Types of Experts.
 - The hypothetical expert renders an opinion based upon facts presented to him/her in the form of a "hypothetical question" (which mirrors our case's facts).
 - The non-hypothetical expert testifies as to his/her opinion based upon his/her own observations, experimentations or research which he/she conducted.

6. Interview them prior to trial. Make sure you understand what the expert is going to say. Have him explain it to you in laymen's terms. Ask if there is anything you can read on the subject to prepare for trial. You may want the expert to bring to court any books and authorities which bolster his testimony.
7. Have your expert help you prepare for cross examination of the defense expert and help you to ask the right questions of him on direct to diffuse the testimony of the defense expert ahead of time.
8. Go over any report the expert has made and make sure you understand it.
9. Go over tests performed and make sure you understand them.
10. Go over foundation questions with the expert, as well as any hypothetical you intend to use.
11. Tell your expert when he is going to testify and don't make him wait. Call and thank him afterwards. You may need to use him again.
12. In trial, qualify your witness and do not stipulate. The judges should understand why this witness and his opinion are to be afforded great respect.
13. Have the expert testify in laymen's terms. The "gas chromatograph" has an impressive sound to it, but won't help your case unless the judges understand what it does.
14. Have the expert use visual aids.

E. Police Officer

1. Don't assume the officer is familiar with testifying in court. Stress the importance of their being familiar with the entire case as well as their individual reports.
 - Make sure he/she has read their reports.
 - Make sure they can identify any evidence they had contact with in the case.
2. If the officer is experienced remember the two key questions: What happened next? What did you do then?
3. Don't let them read their reports on the stand. Occasional referral to refresh their memory is acceptable.
4. Get them to look at you and the judges.
5. Go over the testimony with them. Make sure they understand what you need them to establish.

6. Anticipate the defense and have them explain any mistakes they might have made.
7. Have them remain available during the entire trial if possible.
8. Have them wear their uniforms if they normally do.
9. Make sure they know to act like professionals in and out of the courtroom.

E. Accomplices

Tread softly when using this type of witness. Always be prepared for them to turn on you. Use them only if absolutely necessary.

1. Present any prior convictions at the outset. Take the wind out of defense sails. (The judges will have a clue here because you prepared for it in opening statement).
2. Make sure you've interviewed these people ahead of time with an investigator present to take notes. It might be necessary for impeachment.
3. These people are not your friends. Do not treat them as such. Be assertive and tell them you expect them to tell the truth, period.
4. Don't apologize for these witnesses. (On closing, discuss how barroom brawls don't occur in convents). Stress the corroboration for their testimony. Always keep in mind that the judges distrust the testimony of an accomplice.

F. Sexual Assault Victims

Careful pretrial preparation is imperative. Get to know this person, so that you can try to understand what he/she's been through. You want judges to see the crime through his/her eyes. The more you know the victim, the more you will understand why he/she is certain the defendant is his/her attacker and why he/she was so frightened he/she couldn't scream etc.

1. Help the victim understand what the process is and why he/she has to through it.
2. Dress and demeanor are very important in these cases. The victim can look like he/she hangs out on street corners. Keep the victim in a safe, secure, comfortable place as much as possible when he/she's not on the stand. Caution: the victim to be very careful about his/her behavior, in and outside of the courtroom.
3. This witness should be prepared to go through all steps of direct examination: The narrative, the detail, the demonstration, the exhibits the diagram. During the course of this, the use of sensitive language is necessary. Work with the victim on this. (You will already have prepared the judges for this in opening statement).

G. Non-Arabic Speaking Witnesses. The use of interpreters.

Interview this witness with an interpreter even if the witness can speak some English. Do it carefully using simple, direct questions, making sure the witness understands. This will take some time and patience. Be sure that the interpreter you use pretrial is the same interpreter you use for courtroom testimony. It helps the interpreter to know what the facts of the case are supposed to be.

H. Witnesses with Criminal Backgrounds

Let them know that the criminal history will come in and that you are going to elicit it. Tell them why and tell them they can explain it briefly. Go over that explanation with them.

1. Caution them to tell the truth.
2. Get the criminal history out right away and put it behind you.

I. Hostile Witnesses

Call them only when necessary. But, don't avoid them just because they are difficult. There are two types:

- The ones who will lie. Be prepared with their prior statements for impeachment or;
- The ones who will be truthful, but not helpful.
- Control this witness leading, short and specific questions.

V. EVIDENTIARY TOOLS/ STATUTES

The rules of evidence govern every aspect of the trial including direct examination. The following are some recurring evidentiary issues which warrant a thorough understanding.

A. Business Records

The business record exception to the hearsay rule and provisions allowing these records to be authenticated through either an affidavit or live testimony, without requiring the testimony of the person who made the report, make it easier for businesses to provide records during litigation without undue disruption. "Business Records" applies to records of every kind of business enterprise, occupation, calling, institutional operation, or governmental activity, whether profit or nonprofit.

To lay its foundation for entry, the -Custodian of records, or one who qualified to authenticate the relevant business records, testifies that:

- a) The writing was made in the regular course of business; and, the writing was made as a record of an act, condition, or event and is offered to prove the occurrence of the act, condition or event; and
- b) The writing is identified, and its mode of preparation discussed; and

- c) The writing was made at or near the time of the act, condition or event occurred; and
- d) The sources of information for the writing and the method and time of its preparation indicate the writing is trustworthy.

B- Prior Consistent Statement

Evidence of a witness's prior consistent statement may be introduced to rehabilitate the witness after witness' truthfulness has been challenged, either expressly or impliedly. To lay the foundation:

1. Prior Statements of Testifying Witness

- a) A prior inconsistent statement of the witness has been admitted in evidence; and,
- b) The prior consistent statement was made before the alleged inconsistent statement was made; and
 - If statement is written, authenticate it..
 - or
 - a) The witness's testimony at trial is claimed to be the result of a recent fabrication or to have been influenced by bias or improper motive; and
 - b) The prior consistent statement was made before these circumstances are alleged to have arisen; and
 - If statement is written, authenticate it.

2. Prior Statement of Hearsay- Declarant

- a) Statement is admissible to support the credibility of a hearsay declarant

C. Prior Inconsistent Statements

Prior inconsistent statements of testifying witnesses are admitted as an exception to the hearsay rule because they safeguard against changes in testimony. They are admissible for the truth of the matter stated because the witness declarant is available for confrontation and cross examination and because the previous statement may be closer to the truth since made nearer in time to the recalled event. Prior inconsistent statements by hearsay declarants are allowed as an exception to the hearsay rule, but are not admitted for the truth of the matter stated. They are admitted only to reflect on the hearsay declarant's credibility. It's Foundation is....

1. Statement is inconsistent with any part of either the express or implied testimony of the witness.
2. Witness, while testifying, was given the opportunity to explain or deny making the prior statement.
3. Witness has not been excused from giving further testimony in the action; and
4. If statement is a writing, authenticate it.

D. Prior Identification

Victims or observers of a crime are often called upon to identify an accused in a police lineup, and later, at the trial, either the victim himself or some other witness testifies to identity. The prior identification is the equivalent of a prior statement-inconsistent if the witness testifies differently at the trial, consistent if he makes the same identification. The foundation is as follows:

1. Must be of defendant or another crime participant.
2. Made when the crime was fresh in witness's mind.
3. When identification was made it was witness's true opinion.

ETHICS OF DIRECT EXAMINATION BY THE PROSECUTOR

I. EXAMINATION OF WITNESSES

A prosecutor should not call a witness who he knows will claim a valid privilege not to testify, for the purpose of impressing upon the judges the fact of the claim of privilege.

II. PRESENTATION OF THE EVIDENCE

A It is unprofessional conduct for a prosecutor to knowingly offer false evidence whether by documents, tangible evidence or the testimony of witnesses, or fail to seek withdrawal thereof upon the discovery of its falsity.

B It is unprofessional conduct for a prosecutor knowingly and for the purpose of bringing inadmissible matter to the attention of the judges to offer inadmissible evidence, ask legally objectionable questions, or make other impermissible comments or arguments in the presence of the judges.

C It is unprofessional conduct for a prosecutor to permit any tangible evidence to be displayed in the view of the judges which would tend to prejudice fair consideration by the judges until such time as a good faith tender of such evidence is made.

D. It is unprofessional conduct to exhibit tangible evidence in view of the Judges unless there is a reasonable basis for its admission in evidence.

WITNESS'S RULES FOR GIVING EFFECTIVE TESTIMONY

(For the Witnesses prior to their testimony)

1. If you can answer a question "yes" or "no", do so.
2. Say "yes" or "no". do not nod or shake your head or mumble "un-huh" or "uh-uh".
3. Don not volunteer any information which is not requested.
4. Keep all your answers short and to the point.
5. Speak in complete sentences.
6. Answer in a loud clear voice.

7. Look at whomever is doing the questioning, whether it be myself, the defense attorney or the judge.
8. Do not stare at the defendant, it will only distract you. Do not look at me when the defense attorney is questioning you.
9. Put all your concentration into listening to the questions and answering them accurately.
10. Be sure the questioner has finished the question before you answer.
11. On the other hand, don't pause too long before answering; it will look like you're thinking up the answer.
12. Don not speak unless there is a question pending.
13. If you don't understand a question, ask to have it rephrased.
14. Do not, under any circumstances, give an answer to a question you don't understand.
15. No one expects you to remember every detail. If you do not remember, or don't know something, just say so.
16. However, don't say you don't remember something just because it is painful or embarrassing to discuss.
17. As much as possible, try to remember and repeat verbatim the words the defendant used when you are asked what he said.
18. When asked questions about time, distance, height, weight and age, estimates are acceptable. Don't be more specific than you feel is accurate.
19. Don't apologize for your testimony. Avoid prefacing your answer with such comments as "I Guess", "I don't really remember, but...".
20. The defense attorney may ask questions that end with "isn't that true?" Don't agree with him if it isn't true.
21. If you find yourself getting upset, tearful, or if you need a recess for any reason, do not hesitate to ask the judge for a moment.
22. The defense attorney may ask offensive questions. Don't get angry. Remember that it is not a personal attack against you.
23. Direct examination will usually proceed in chronological order. Cross examination will generally jump from topic to topic in no apparent order. Don't let this confuse you.

24. The defense attorney may show you written statements, police reports, or transcripts of prior testimony in an attempt to impeach you. You should not feel obligated to conform your testimony to such prior testimony. If there are discrepancies, you should be able to explain them.
25. The defense attorney or his investigator may contact you outside the courtroom for an interview. Whether or not you speak to this person is entirely your decision. You have the right to refuse or to have someone from the presenter's office with you.

CROSS-EXAMINATION

Cross-examination is a misleading term for the important process of asking an opposing witness questions to gauge reliability. It implies a vexatious attitude, which may or may not be appropriate. It implies some kind of test, which it is, but only in the loosest sense of the word. Whatever its description, it is a critical component in the effective presentation of a case if only because of the expectations of jurors after years of movie and television dramas.

It is also highly overrated in its importance. Why? Because the most brilliant cross-examination will never compensate for a lack of proof or a weak case-in-chief. Nor should it. Even when the defense witnesses are destroyed, the judge will always go back to what the allegations are to determine, independently, whether or not the case is there.

Nevertheless, the ability to demonstrate that the defense is empty smoke is essential to a winning prosecution. And the best way to do that is through effective cross-examination. This requires following certain fundamental principles which, if ignored, can lead to disaster. For it is the proper mindset, and not so much the clever questions, that is the key to success.

CARDINAL PRINCIPLES

Keep perspective

When a case is prosecuted, the one and only reason is because we believe the defendant is guilty. How do we know that? Because of the evidence which was used as the basis for the prosecution. And how do we know the evidence is reliable? Because, since we were not there at the time of the crime, and all of the evidence is to us, secondary, we have kept an open mind and objectively assessed our own witnesses and evidence to come to the conclusion that the case is meritorious. Keeping that open mind not only helps us to sleep better at night, it is also critical to our success in trial, because we must demonstrate that open mind at all times.

The first thing to remember, before we ask a single question, is why do we know the defendant is guilty? Perhaps it is because there is a mountain of objective evidence which convinces us...and any rational person, of the defendant's guilt. It is that mountain which must always be the focus of our case. It is that mountain that is going to convict the defendant.

Keeping that perspective is the most important thing to do in your cross-examination and in your trial. If you have it, the truth will literally shine through you. If you don't, the judges will properly sense it and acquit.

Focus on your winning issues

Trials are sometimes embarrassingly long, despite our best efforts. The defense strategy is to avoid our winning issues at all costs, because to concede their

importance, even their existence, is to admit defeat. So we must strive at every opportunity to focus on our winning issues.

What are they? They are the same in every prosecution: *the crime and the defendant's connection to the crime*. Almost every case that is lost has little to do with a lack of rational proof. It is lost usually because the crime and the defendant's connection to the crime has somehow become lost or seemingly irrelevant. Some other issue has become more important. Some hidden agenda had come to the fore. Some stronger emotional feeling has grabbed root in the judge's mind. The best way to defeat this tactic is to focus, whenever possible, especially on cross-examination, on the crime and the defendant's connection to the crime. It is the surest and best way to bring any judge back to reality.

Quality in and Quality out

The quality of an answer depends upon the quality of the question. That means that if the premise of the question is false or misleading, a distortion, a half-truth, then the answer is meaningless. Does this mean you cannot be sarcastic or clever, or even funny at times? No. It simply means you will always ask fair questions to maintain your integrity and impartiality and to insure that the points you do make on cross-examination generate their full logical force.

Scoring a Goal Every five Minutes

Sometimes a colleague will brag about how he is killing some witness, usually an expert, on the witness stand. How long has it gone, I will ask? When I'm told anything more than an hour, I start to cringe. That is not to say that cross-examination should never be that long; it's just that it rarely should be. To be most successful it usually should be shorter, not longer. Why?

A judge can only absorb so much so quickly and for so long. They have to be interested; they have to be entertained; and they revel in conflict. The best way to do that on cross is to figuratively score a goal (make a serious point) every five minutes on an important issue. If you can do that for an hour, fine. If you can do it for two hours, fine. But understand there is a law of diminishing returns and that the longer you go with a witness, the more important you are making him or the issue he is raising.

Most witnesses can be effectively cross-examined in no more than fifteen to thirty minutes. The exceptions are difficult experts in complex fields, where you may have to think in terms of half a day or so, and defendants who are dumb or desperate enough to take the witness stand. But even in these instances if you haven't done your job in half an hour to an hour, it better be because you're having too much fun hitting grand slams and not because you're wasting the judge's time on trivia or showing off how much you think you know.

PURPOSE OF CROSS-EXAMINATION

Accentuate the Good/Minimize the Negative

Most evidence, especially from defense witnesses, is two-edged. It helps and it hurts. It's not simply black and white. Counsel on direct has surely emphasized all those factors that hurt your case. So your main job on cross is to get the witness to concede all those things that help your case, those things that the defense has glossed over or ignored.

This is a simple and powerful technique that normally should be used at the start. Why? First, it doesn't make much sense to attack a witness, or even destroy him, and then focus on matters he must concede to be true. Ending that way confuses the judges and weakens your main goal which is to label the witness unreliable. Second, getting the witness to admit things narrows the contested issues that the judges will actually decide; the less they have to decide, the better. After you have squeezed the witness for those admissions and concessions that help, then decide how to minimize the negative and whether you even need to go on the attack.

A Reason to Doubt

Our burden is to prove the case. But we don't have to prove every defense witness is wrong by cross-examination alone. This is impossible and that would be satisfied only if the witness admitted their error on the witness stand. That happens infrequently.

Our real burden on cross-examination is much smaller. It is to give the judge a reason to doubt the credibility or reliability of the witness and, given that mountain of evidence which is behind us, to be able to argue there is no doubt that the witness is mistaken or simply lying. Once you have effectively demonstrated that there is a substantial reason or reasons to doubt the credibility of a witness, your job is essentially done.

Tell the Judges How to View the Evidence

Of course, the judges need to know what you think of the witness. This will become obvious by your questioning which will signal exactly how unreliable you view the witness and why. As you do your cross you will be creating a label for the witness in the minds of the judges. During final argument you wave your results to the judge and demonstrate how, in the context of your whole case, this witness was meaningless or, even better, helped you. The label, of course, must be a true one. If you don't establish it in your cross, how can you claim it later?

What do you do when you can't? you step back and look at your evidence and ask the judges to do their job, to weigh whatever contradictory evidence is before them and decide which side, if any, is more reliable given your mountain of evidence.

CONTROLLING THE WITNESS

When you cross-examine, as opposed to the rule in direct questioning, you should be the star, not the witness. You should be in control at all times. Losing control means losing direction, focus and momentum. It means giving the witness the chance to surprise or ambush you. Here are some suggestions to prevent that.

Demeanor

Sometimes overlooked, demeanor is a critical method of control. No matter what happens you must never show that you are upset or nervous about a response to a question. Such a visceral signal by itself could undermine an otherwise meritorious case. A positive tone, an assertive and powerful voice, an organized structure, an unflappable mien all of these things tell the jury that you are in control, that you are unconcerned.

Does this mean you have to be loud and bombastic? No. Sometimes the most effective ploy is to let the witness quietly and softly know exactly where you are headed but there is nothing to stop your simple, direct questions. Losing your temper, expressing frustration or emotion will rarely be rewarded and often punished.

Sarcasm, when appropriate, can be deadly to the witness. But you must be careful. Don't get ahead of the judges. Otherwise you may simply look mean and the judges will miss your point.

Leading Questions

This is the time and place to ask all of your leading questions. Essentially, on cross-examination, you testify by making statements and simply ask the witness to agree, yes or no. When he does, you smile and mutter a mental, "Thank you". And when he doesn't, you simply slap him down by reminding the judges that the evidence supports your side and not his.

Make the leading questions simple and short, or at least focused on a single point. Compound questions will blunt your attack and encourage evasion by the witness. Just take the statement you want to assert as true and finish it with, "Right?" Your record will be impeccable and your cross-examination effective.

Demand Answers

The surest way to lose control is to allow equivocal or tangential answers to be accepted without correction. You must close the door on any maybes, probablys, possibly or any other watered down qualifiers like, "I believe, I think, I guess, etc". Confusion and drift are the defense friends and our enemies.

Shut them down immediately. Initially, polite follow up questions should be used. But shift into a higher gear if the problem persists. "Did you understand the questions?" "Answer my question, please". Do not waste time. Be polite but show you mean business if evasion continues. Demand answers and make the proper objections and motions to strike the non-responsive replies, i.e. Everything after the word yes. Your questions are important. If you don't insist on getting them answered clearly, the judges will assume they're just not as important as you think and your case will suffer for it.

Avoid "Why" Questions

Some advocates say never to ask a why question unless you know the answer. Others say don't ask them unless it can't hurt you. Yet they can be highly effective, as with a pontificating expert who you want to encourage, or as with an obviously lying witness you're simply encouraging to lie more, or when there is no reasonable explanation for the witnesses' action or inactions. On such occasions the "why" question is simply giving the witness more rope to hang himself. But be careful. Remember that by their very nature why questions threaten your momentum. They are the most non-leading, open-ended questions possible. They are a bluff in front of the judges that wins you points only if not called.

FORGING THE TRUTH

Trials are supposed to be a search for the truth. Developed in medieval times they replaced earlier, more irrational methods of gauging the guilt of a defendant. What were the old ways? In England it was trial by combat; the concept was that God would intervene on the side of the righteous. Some kind of divine intervention would protect the innocent of heart from harm. The assumption was the honest person had nothing to fear.

Today we laugh at these ancient customs as ridiculous. But how much better are our assumptions that from the basis of cross-examination as the crucible of truth? Our assumptions are that liars or connivers exhibit certain behaviors when questioned. They are nervous, look away, cower, are inconsistent. They sweat, have tics, mop their brow, choke up. Our modern-day assumption is very similar to the old, discarded ones. The honest person has nothing to fear from tough questioning and will not break down or appear confused. He will not be bitten or impaled if he has nothing to hide.

The problem, of course, is that while this may be generally true, even our own honest witnesses will sometimes exhibit the same bad symptoms of the liar. And when that happens, our job is to show how their testimony is reliable nevertheless, and hopefully corroborated. But this concept of the crucible of truth, because the righteous have nothing to hide, is the basis of cross-examination as a "test" of credibility. So almost any reasonable question that logically serves that purpose is permissible when questioning an adverse witness.

No Foundation

We want our information to be first-hand, direct, from an eye or an ear witness. So any questioning that establishes such is not the case is permissible. The quality of the observations of the witness is critical in determining their actual ability to hear and see what they claim. Equally important is whether the witness had a reason to remember the event at all and/or when was the first time he had a reason to do so? An entire cross-examination could be directed to simply exploring the simple who, what, where, when and how of a witnesses' ability to see or hear something and whether they had a reason to remember.

The lace curtain witness. A witness may swear she saw someone else on the motorcycle, and not the defendant, at a critical time on direct. If all you do on cross is to establish she saw the person rounding the corner for only a second or two at night,

with only the aid of a distant street light through her window with lacy curtains [that she swears were open even though people could see into her bedroom], and had no reason to remember or focus on who the driver was until she was contacted by the defendant's family the next day, you have gone a long way to undermining her credibility.

Unreliable

Anything that establishes the witnesses' testimony as unreliable is normally permissible. This includes mental, physical or memory problems, inconsistencies and confusion. It is not enough to have actually seen and heard something. The witness has to be able to recollect and to recall and to articulate what he has seen in a sensible and reasonable fashion. Any mistake in this chain of communication skills opens the witness to a charge of unreliability. Being confused or mistaken is just as damaging as being an outright liar. You will rarely be able to establish the latter, but you will often be able to demonstrate the former through simple cross-examination.

Impeachment

This is a cross-examiner's dream situation. There is no stronger attack on a defense witness than to establish they have said exactly the opposite on a prior occasion. Thankfully, the reverse is not always true. Why? Because recalcitrant witnesses are normally the best thing we can hope for in gang and/or domestic violence cases. Why? Because judges understand the effect of fear on victims which supplies a reasonable explanation for the inconsistency and which further establishes the truth and veracity of the original statements made when fear was temporarily suppressed by righteous indignation over the original violent attack.

Defense witnesses rarely have such reasonable explanations for their double-talk. So when we know we can impeach a defense witness, the main question is whether to do it up front or save it for a final, climactic ending. This is a pure judgement call. You might want to get some concessions from them first. You might have an effective attack short of the impeachment and use the latter to put the icing on the cake. But if you are having any problems with the witness, just slam them and be done with it. Why let them hurt you at all?

Contradicted

The fact that other witnesses contradict what this witness is saying is within the proper scope of questioning. It is especially effective when cross-examining the defendant because it can dramatically present the isolation of the defendant's uncorroborated situation. A simple approach is to go through the laundry list of witnesses who have testified to the contrary on various points ending with, "SO he must be mistaken or lying, right?" Your final question is equally simple. "So, all of these different people have to be mistaken or lying for you to be not guilty, right?"

Simply Improbable

There are times when you can't show the witnesses' testimony unreliable internally. Within itself, the answers are consistent and unimpeachable, cool, calm and collected.

There is no hint of evasion or equivocation. You feel you have hit a wall. Sometimes, however, you can step back and look at the whole picture and see that the story of the witness is nevertheless inherently improbable given the mountain of evidence that is behind you. And if it is, this is where you can have some fun.

- **Example:** A defense witness living in Ramallah testifies that he saw the entire murder from beginning to end in Bethlehem, and we've got it all wrong. Everything he says is internally consistent and exculpatory, but the scope of the cross is directed at the murky circumstances under which he was in Bethlehem. After establishing he "just happened" to arrive there immediately before the murder, and "just happened" to somehow be contacted by the defense attorney and "just happened" to show up in time to testify for trial, the label for argument is now set up. Was he really being honest with us about how and why he was there that night? No. So can we rely upon his only too-convenient testimony to be reliable? No. He's a great guy helicoptering all over the county on a moment's notice for the defense, but the reality is, he is an unreliable witness who has not truly been forthcoming as to why he was there and how he was contacted by the defense. So let's move on to what really counts, our mountain of evidence.

Any unfair and/or inflammatory question is properly objectionable on cross. It is not necessary to use unfair, inflammatory questions to have an effective cross-examination. And why should you feel comfortable in using them in the first place when by their very nature they encourage trial by innuendo, supposition and speculation? Remember, you have that mountain of evidence behind you. That is what is going to convict the defendant, not clever, conniving, unfair, trick questions.

PREPARATION FOR CROSS-EXAMINATION

Know and Show

Before you cross-examine a witness you must know everything you can about them and the subject of their testimony. You must know the facts of your case, and the reasons the defendant is guilty, so well that you can articulate and expound upon them in detail and so that you can immediately detect any fact that is inconsistent with fact of guilt known to you.

Then you must show the judges that you have this knowledge and control over your case. You do this by being organized at counsel table, by your constant attention to detail, and by your willing and open help to the court and counsel whenever they show even a momentary loss of concentration or a lapse of memory about any factual detail.

You must do this no matter how small or trivial the case may seem. The judges must have this confidence in your competence or you may give them reason to doubt the points you are trying to make in cross-examination, and later, final argument. Remember, no one else can do it. Only you, the prosecutor in court, can establish this necessary foundation.

Anticipate

This means putting on your thinking cap and determining in your mind the most likely testimony of the witness given everything you know about the case and his statement as given to you in discovery. Don't simply be a knee-jerker. Don't simply take what is said in the reports at face value. Think things through. What does this mean? To what issues does it relate? What is the witness's likely fall back position? Is it contradicted? Is it corroborated? What is his motive? How was he discovered? Who does he know? What is his foundation? Why does he have a reason to remember? What are his strengths? What are his weaknesses? How can he help me? Where is he vulnerable?

Interview

The chance to interview defense witnesses should not be missed. Remember, you should never do this alone. Always have another witness, preferably a police officer or investigator, take notes or aid in the questioning. This procedure is recommended for any witness who may be problematic.

Think of this as a fact-finding mission, not a search and destroy mission. Nor is it a time to threaten the witness or intimidate him. Think small. Save the big stuff for cross.

It is amazing how often defense witnesses interviewed by you will deny the precise statements attributed to them. Ask the simple follow-up questions to check the witness's personal knowledge. Make sure you have the proper identifying information so that you can contradict or impeach them. About all, when you interview the witness, even if it is only for a few minutes, use those minutes to gauge his personality, intelligence, demeanor, attitude, bias, all the subtle things that you are going to probe on cross-examination.

Outline Issues

For a typical witness, there will be only a handful of factual issues. For some there will only be one or two. But pre-prepared checklist of issues will help guide you during your cross and insure that you have not missed anything important. The other habit to develop, to help insure you do not miss something critical, is to always consult your investigating officer and ask the simple question, "Can you think of anything else?" before you end your questioning.

Listen

This is the most important part of your cross-examination: listening. The biggest difference between successful and unsuccessful questioners is that the good ones always listen to the exact words of the witness and think about their meaning to formulate their next question. The poor ones get the gist of what is said and then rush on in their own head to try and trump the witness with some seemingly-devastating question that simply flops because they have not really listened to exactly what was said..

Acting on Information Received in Testimony

If you have listened, you will find that your most effective questions are the ones you never planned, the ones that came up simply because you logically thought about the impact of the witnesses' testimony and turned his own words against him. Not to twist the facts but to illustrate that the witness is testifying in a way which does not fit the facts.

BOLSTER YOUR CASE

Get concessions

Assume you are finally going to actually start questioning the witness. Normally, the best thing to do is to start out by showing how the witness helps to bolster your case. It is rare when any witness cannot help your case. Testimony is rarely so black and white. It is usually two-edged. So squeeze from the antagonistic witness those facts which he must concede and which, by the fact that a defense witness must concede them, helps to narrow the contested issues that the judges will have to decide.

-The Major Facts

At the very least, get the witness to concede the major facts of the case, particularly if he claims to be an eyewitness. This can go a long way to proving your case.

Example: You are the brother of the Defendant, right? You claim he acted in self-defense, correct? If that is the case, what was he doing carrying a fully loaded AK 47 with him when he killed the victim? And if it was self-defense, why was the victim shot in the back? And what was the defendant doing outside the Victim's house so late at night?

-Motive and State of Mind

In any trial mental states are critical. So take advantage of the defense witnesses, most of whom you would have never heard of unless they were called by the defense.

Example: The defendant and the witness have had a long standing grievance with each other. Right? They have actually come to blows on a prior occasion, right? Did you see these fights? Describe them.

-Bad Life Style

When relevant, you can also use defense witnesses, especially friends, to establish the bad lifestyle of the defendant. This is especially true in gang cases where membership in the same criminal organization or gang can help establish bias or help supply the motive for the charged assault.

- *Contrary Facts*

A sometimes subtle but effective form of cross-examination is to pin the witness down on a contrary or disputed fact which you and the jury know to be true from other evidence, but the witness doesn't, so you just hammer the point home. Generally, in those instances, the witness has no idea that he is being tested

Example: In a murder case a defense alibi witness claims he was with the witness the entire time inside a house watching his every move far from the murder scene. You go into detail about everything that he saw the defendant do and never does he mention the critical fact that the defendant changed his shirt after the murder, a fact which has been established irrefutably by other evidence including the defendant's own admission. You have shown the witness is probably lying because he omitted a crucial fact.

ATTACKING

An attack implies a very aggressive approach. Again, generally all you need to do is to establish a reason or reasons to doubt the reliability of the witness. However, these are some areas to consider:

-*Irrelevant*

This is the attack to use when the testimony lacks any personal foundation on the key issue or does not pass the "So what?" test, such as most character witnesses. Simply highlight the lack of foundation or the irrelevancy with a few simple questions and sit down. Finish nicely. "So you really can't help us to know if (this fact occurred) because you didn't see or hear it, right?"

-*Mistake*

You don't have to prove the witness is a liar. If you can establish he is probably mistaken, you've done your job.

- *Bias*

Bias is the most easily established attack because it is the relationship that undermines reliability even if the testimony itself seem internally consistent.

Example: How long have you been friends with the defendant? If he asked you for help you would give it to him, right? So as you sit there testifying for your friend, you are biased by your close relationship with him, are you not?

- *Inconsistent*

An inconsistent witness is one who says different things about the same issue, usually in the same hearing, but sometimes in a prior hearing or statement so

that he is subject to impeachment by the prior inconsistent statement. An inconsistency on a major issue is deadly to any witness. When you can impeach a witness on a major issue it is deadly to any witness. When you can impeach a witness on a major point the only judgement call is whether to cross-examine on other matters at all. In any event, you should not dwell long on your other cross before you simply finish with this type of witness.

-Confused

When a witness is inconsistent about numerous little things, the implication is that he is simply confused. The attack is gentle but effective. You elicit a laundry list of all the little inconsistencies. Invariably that will produce more and the unreliability of the testimony is transparent.

-Inherently Improbable

This is where sarcasm can reign supreme, but you must be careful not to get ahead of your judge. And your attack must pass the common sense test.

Example: in a rape case, the defense called a number of women, friends of the victim, to establish she liked her men young and a category one of the defendants charged with gang rape seemingly fit. One cross examination of the third friend, the prosecutor, having had enough of this baloney, brought the judges back to reality.

So she bragged about how she liked her men all the time to you, right? And so you, of course, did the same back to her, right? No? you mean when she was bragging all about how she liked her men you just said nothing, right? I thought you were her friend, right? Don't friends share secrets with each other, right? And so when she told you here secret about how she liked her men, you told her how you liked your men, right? No? Oh. I thought for sure you would have told her you liked your men old and smart and empty, right?

If the victim were the slut she was painted out to be by the defense, she should have been shouting for joy instead of crying rape in the streets after having been forced to have sex with six different men in the young man's house.

Liar! Liar!

Except when a defendant testifies, it is rare that you can prove that a witness actually lied, so you must be careful before implying such. But when you can prove it, by all means go ahead and do so and let the judges know you are indignant at the witnesses' effrontery especially with a defendant.

SETTING TRAPS

Impeachment through a prior inconsistent statement is a classic technique of cross-examination. When properly used it is the simplest and cleanest way to objectively undermine a witnesses' reliability.

In fact and in spirit

Look at the whole substance of the witness's testimony and prior statement and make sure that the prior is inconsistent not just in fact, but also in spirit.

Important, unless...

The factual issue should be an important one, not a trivial one, or you could lose your own credibility in front of the judges. The exception is when you are trying to establish that the witness is inconsistent in general or easily confused; then there is a larger, appropriate material purpose for the impeachment on what would otherwise be a minor technicality.

Have your proof ready

Make sure that the witness, normally a police officer, is available and ready to testify should the witness deny the inconsistency. Absent such proof, all you have is the innuendo of asking the question which is an insufficient foundation from which to argue the impeachment. You should keep a list of all witnesses necessary to prove any necessary prior statement before the trial and maintain and expand it throughout the trial. Then when time for rebuttal comes you will be ready to call them almost automatically.

Letting them Talk

Before you impeach the witness give them a chance to embellish. Let them wax poetic about the point that you are going to destroy. You don't care. It just makes it farther for them to fall. So encourage them in this area. You're just trying to make the target of your impeachment as big as possible. The more rope you give them to hang themselves, the better.

Pin down the "now"

If it isn't already clear, pin down exactly what the witness is saying currently. So you're saying today that XXX, right? The worst that can happen is that he contradicts himself in front of the judges, which only helps you. The best that can happen is that he will say yes. He is now setup for the impeachment.

Pin down the prior

Now is the time to pick up prior statement and just read it to the witness matter-of-factly. Did you say, on such and such a date, to such and such a person, at such and such a time, at such and such a place, the following: XXXX? Yes or no?

Do not paraphrase. Read the prior statement exactly. The answer is yes or no. If the witness says he can't remember, go to plan B and refresh his recollection. Walk up to him, hand him the same piece of paper, ask him to read it to himself, and tell you when he is done. Ask if that refreshes his recollection. If he says yes, pin him down,

yes or no, if he made the prior statement. If he says no, the judge can see the evasiveness for itself.

Conceding the double talk

Once the witness has been pinned down on the current and the prior statements, the judges know he is talking out of “both sides of his mouth”. The only thing left for you to do is make him concede the double talk, not why or how or if he has an explanation. That’s for counsel to worry about. You don’t care, so show that to the judges.

Do you admit you said A before and now you say B? Yes or no? He must admit the truth or look even worse. And his concession allows you to argue to the judges that, whether intentional or not, whether understandable or not, the bottom line is that the witness is unreliable having given two conflicting statements about the same thing. You can’t do better than that. And as long as you mountain of evidence remains intact, you should prevail on the issues..

Of course, there are times when we have to use prior inconsistent statements to impeach our own witnesses to help prove our case. This is especially true in gang cases and domestic violence cases. Usually, impeaching such recalcitrant witnesses is the best way to prove your case; they make your case easier, not harder, to prove. Why? Because their refusal to tell the truth in trial is understandable given the nature of the charges and out mountain of evidence.

CHARACTER WITNESSES

Use of opinion, reputation and specific acts of the defendant to establish any relevant character trait which are in issue is sometimes critical, but generally an attempt to obfuscate and confuse the issues. Evidence, as it comes from people who were not witnesses to the crime, is inherently weak.

A perfunctory reminder of their irrelevance is normally sufficient. You weren’t there, were you? You don’t know what happened, do you? You have no personal knowledge of anything in this case, do you? You may feel it is not even necessary to ask questions, particularly if it is a close family member, such as a mother or father or sister or brother.

Such witnesses also suffer from an inherent problem of bias. If they have had enough contacts with the defendant to have an opinion about his character, those same contacts will normally establish a biased relationship

If you think the defense has gotten any mileage out of a character witness, there is a fail safe series of questions. Assuming the defendant committed the crime with which he is charged, would your opinion of him change?” If he says yes, the worthlessness of his testimony is conceded; if he says no, then the follow-up is simple: So, even if he committed this crime, your opinion would still be that he is a person of good character, right?

IF THE DEFENDANT TESTIFIES

When you finally, see a defendant take the witness stand you can truly focus on the two most important aspects of the case: the crime and the defendant's connection to the crime.

Props

You get to use those material objects which are part of the case.. You get to use the weapons, the diagrams, the clothing, everything that you can think of to bring the crime to life in front of the judges. You get to hold it in front of the defendant and confront him with it.

Details of the Crime

You get to focus on the exacting detail of the crime. You get to force the defendant to admit all of the little choices, all of the tiny steps, all of the deliberate things he had to do to complete the crime. You get to confront him about what he was thinking, what was going through his mind, every step of the way. You get to probe his motives, his reasons for action, his hatred, his greed, whatever it is that made him tick and determined his course of action.

And always, at the most critical moments, the defendant will have lapses of memory, of control, of failure to remember, of blacking out, or fading out, or whatever, because they can't admit the obvious, that they were conscious of what they were doing. Because if they were, they are obviously guilty.

Failure to Report

You may not be able to comment on the defendant's post-arrest silence, but you can certainly inquire why he failed to report the crime, or call for help, or why he ran off and took flight in those cases where he claims he acted in self-defense or was an innocent bystander or was the real victim. This is a particularly good line of questioning in domestic violence and cafe fights.

No Corroboration

Whenever possible, stress that there is no corroboration for what the defendant is claiming. You can always do this when it comes to the defendant's claimed mental state.

CONCLUSION

The proper mindset of cross-examination requires an understanding that no witness is all good or bad. You want to accentuate the positive and minimize the negative as you control your witness, for example, by having witnesses concede the things they must, admit the things they don't know, listen and use their testimony in light of the truth, and, if necessary, further undermine their reliability by establishing

they are, irrelevant, mistaken, biased, inconsistent, confused, inherently improbable or simply lying.

Once you have done that, once you have established a substantial reason to doubt testimony, since you are backed up by a mountain of evidence that points towards guilt, you have done your job. It is time to stop.

FINAL ARGUMENT

PURPOSE

Final argument is the best chance for the prosecutor to build a fortress of evidence, brick by brick in front of the judge that establishes guilt beyond any reasonable doubt. Strong final arguments never lose this focus. They consistently center on guilt and only discuss the attacks of the defense in this context. Weak final arguments never build or, worse, focus on the defense issues in a vacuum. This exaggerates their importance and encourages confusion.

Its strength is a function of the evidence in the case-in-chief. The most brilliant argument cannot make up for a lack of evidence, nor should it. When the sound and fury of final argument is over, the judges must, of necessity, go back to the proof. If it's not there, you should and will lose. Never forget this: A good final argument will lead the judges to do justice.

Equally important, after you have won your case, you want to be able to sleep at night knowing that the people you send to prison, and sometimes to their execution, are actually guilty. So in planning your argument, remember that you were not there at the time of the crime. Structure an argument that convinces you, as a reasonable person, that the defendant is guilty and the defense is wrong, on the state of the evidence. From there, the purpose of your final argument before the judges is clear: to demonstrate that truth and justice is on your side in a powerful and persuasive manner.

INTEGRITY

Integrity must be your watchword in any case. The judges look to you to have and to hold it at all times. But they will severely punish your client, the people of Palestine, if they have any hint that you are cutting corners or playing fast and loose with the truth. That is why so many defense attorneys will try and get you mad or to respond in a non-judicious way. They want to cut you down to their level in front of the judges knowing that they will not be hurt, but your case will be. You must fight such temptations and teases. You must maintain your integrity at all costs. Any tactics which undermine your integrity should be avoided even if lawful. Some examples to be avoided follow.

Overselling

Never oversell your case, especially in your opening statement. If anything, undersell and overprove your case. Overselling occurs when you promise too much, mislabel the defendant or the seriousness of the crime, when you push a not-so-hidden agenda as a major factor in the case going into too much detail to prove the obvious. Such tactics undermine your integrity because judges will rightfully infer that you are overzealous, out of focus with reality, or simply want to win for all the wrong reasons.

Show respect for the truth regardless of the consequences and you will maintain your credibility, your perspective, your integrity with the judges, all of which are critical for the emotional acceptance of your final argument.

Be Careful of the “I

Expressing your personal belief is not only improper, it is anathema to your integrity because it robs you of your most important asset, your impartiality. Trials are not supposed to be swearing contests of counsel; they are supposed to be tests of the quality and quantity of the evidence. To avoid such error, make it a habit to avoid using “I” when addressing the judges. If you do say I, you must incorporate another habit, that is, to always add a qualifying phrase. “On this evidence”. Or use the royal “We”, as “We submit, with this evidence..”.

Personal Attacks

You may be tempted to respond in kind to personal attacks made upon you by defense counsel. You must resist this ploy and do your best to never respond in kind. It is sometimes very hard. Just remember that losing your cool and getting in the face of counsel is exactly what they want. They want the trial to appear to be a contest of personalities and not a search for the truth. They want you to look angry or irascible. They want you to play up to a bad stereotype from the movies or television. It only helps their defense.

Do respond vigorously and professionally when appropriate. Oftentimes, the best response is to make an oblique reference to the charge, note that you heard it, and tell the judges you are not going to pursue it, that you are going to let the evidence do all the talking

COMPETENCE

Competence is another attribute which judges expect. A prosecutor is supposed to be professional and knowledgeable, familiar with the facts and the law, confident in his actions and in the presentation of evidence. The judges will look to you to meet these requirements, particularly in the heat of a courtroom battle. If you are sloppy with the facts or the law your competence will rightfully be called into question. This can seriously undermine or compromise your case.

Loss of Control

Under no circumstances should you resort to shouting, yelling or name-calling. The judges may believe that you are acting out of control because your case is weak. To paraphrase a wise Chinese proverb: You can tell which side is losing an argument by hearing who is raising their voice.

This does not mean you cannot be emotional or powerful. You should be to have an effective argument. But you must always show that you are under control of your

emotions, that you are arguing the logical inferences of the evidence and not seeking to win through intimidation or arrogance. Never let them see you sweat, even if you do.

Make it Complicated

Too often prosecutors who are overworked and properly zealous want to show off to judge how much they know or how hard they have worked in bringing a case to trial. They want the judges to understand all of the incredible, sophisticated paths they took to investigate and prosecute the case. They want the judges to know how much expertise they have garnered in some esoteric scientific area or discipline. In their questioning of witnesses they will deliberately display an encyclopedic knowledge of the same.

Yet, often without realizing it, they have complicated their case and their arguments needlessly. By doing so, they create an open invitation to doubt where none should exist. Don't do it. Keep it simple both when you put on your case and when you argue it.

Remember, every case should be simple. A crime was committed and here is how we know the defendant did it: one, two, three. That's it. If you cannot summarize your case in a few short sentences, if you cannot tell the judges why the defendant is guilty as simply as one, two, three, you are not doing your job.

Why? If it's not simple, it must be hard. If it's hard, there must be a reasonable doubt. No matter how many experts are called, no matter how much science is involved, no matter how many counts or how many victims, no matter how long the trial, your final argument must show why it's simple to convict the defendant. Making the complex simple is what separates the effective prosecutor from the weak ones. It is what you must do in every final argument if the judges are to see the truth.

Simply Reciting the Facts

Inexperienced prosecutors, or those who don't understand the purpose of argument, simply recite the facts of the case. But argument means more than simply reminding the judges about the important evidence. That is only the bare bones beginning. It is essential that you explain the meaning of the evidence, its legal significance and impact in proving the guilt of the defendant. Use the "*What Does It Mean*" argument.

Example of the "What Does It Mean?" argument:

"On the night of the crime, after slapping his wife in the face, the brave defendant left the house the moment his wife, the victim, screamed for help. What does this mean? He fled the scene to avoid the police. What does that mean? He knew he had done wrong. His feet were telling us right then and there, without him saying a word, as he stepped out the door and into the night, that he knew what he did was wrong, that he knew that he was guilty, that the police wouldn't believe him. That's called a consciousness of guilt. The law allows you to use that guilty conscience against the defendant when deciding his guilt. Don't forget that when deciding who was telling the truth

and who was lying about what happened that fateful night, the night the defendant hit his wife. He fled into the night. She stayed at home and called for help. Is there any doubt about who's telling the truth and who's making up a story to try and get off? What does that mean? He's guilty".

Sanitize the Facts

You must tell the judges "like it is" when arguing your case. This lets the judges hear the full impact of the crime and demonstrates your scrupulous faith to the actual record of that happened. Don't sanitize the facts or the threats or the statements made by the defendant or any other witness. If you do, the judges will wonder if you were listening, wonder if they made a mistake or minimize the severity of the defendant's misconduct or another witnesses' experience. Such confusion only hurts you, it can never help you. Whatever happened, happened. Don't help the defense to pretend it never happened or, if it did, the incident was trivial.

Read or Memorize

A trial is a movie, not a book. You are the director who plots out every memorable moment. Your job is to paint dramatic word pictures for the judge, not to read prose, however sublime you think you might make it. If you want to read your argument to the judges, save yourself the trouble. Type it up and mail it in to them and hope they read it. That would be more effective than having them sit there wondering why you can't tell them what's important without reading a cold statement.

Nor should you memorize your argument, unless you can act it out as though it were completely extemporaneous. Anything that hints that your argument is canned or contrived is death to a judge. The judges want to know that you are thinking, reflecting, persuading from the strength of the evidence.

SHOW YOUR INTEGRITY AND PROFESSIONALISM

Manner is Your Message

In court, your manner is your message as the judges will be looking for visual clues from you to help them in every phase of the trial. From the moment you walk into the courtroom you must show your integrity and professionalism.

We all, of course, have different styles and each of us must be true to our own. But your manner must always be courteous and polite. Learn to speak only when necessary. That way you will be heard when it really counts. Dress appropriately. Be businesslike. Avoid excessive camaraderie with officers, investigators and counsel. Be a complete professional.

Sincere and Clear

Say what you mean and mean what you say. Judges will spot fakery, insincerity or patronization instantly. Only make arguments which are logically and powerfully

sound based upon the evidence, the evidence, the evidence. Ignoring of the evidence is for the defense, not you.

Active and Powerful Voice

This is how you show the judge you care about the case, an essential factor of your argument. If you don't care why should they?

This does not mean you have to be a man, have a booming voice or be loud. It means, simply, that you must be positive, assertive, and confident in the timber of your voice when you make your points. This can be done very softly, often better with a pause, with reflection, with pace. Don't be shy, diffident or indifferent. That would send the wrong message.

Talk to the Judge

Use the words and arguments you would if you were trying to persuade a judge face to face, alone in a room.. This will keep you from preaching or intimidating or browbeating. It will foster persuasion and reasoning and, above all, direct communication with each judge. That is how you win your argument, by talking to each and every judge one at a time, yet all together.

Organize, Organize, Organize

You must plan your final argument and make it as simple and clear as possible. You must stress key themes and points of evidence and the law. You must give it a logical and cohesive structure with a beginning, a middle and an end, with a clear purpose. It must be simple to follow and understand. It must be organized.

Remember, you are the only one in the court charged with making order out of chaos. The judges are merely umpires not advocates

FIRST THING FIRST

The following recommended structure for a final argument is not a formula to be applied by rote, but an example of what has been used successfully. Once the basic principles have been incorporated into your practice there are many variations that should work for you.

Repeat your Theme

You should have used a theme in your opening statement that crystallizes the essence of the case and makes sense to the judge by identifying a simple human value with which they can identify. If the theme is still valid, and still best sums up your case, then start off with it. If not, or if a later developing theme such as a gem of a statement by the defendant is more powerful, start with that.

Examples of themes:

-Domestic violence:

“He crossed the line”.

“One hit is one too many”.

“Violence in the home is still violence”.

“When does one spouse have the right to beat the other? Never”.

“Home is supposed to be where the heart, not fury, rules”.

-Theft:

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“The defendant stole a watch. Now he wants to steal the truth. Don’t let him”.

“The defendant ‘forgot’ to pay for the merchandise. Now he wants you to ‘forget’ your common sense”.

-Murder:

“Three shots, two hits, one murder”.

“Follow the facts and find the murderer. Follow the blood. Follow the wifebeater. Follow the jealous, jilted husband. Follow the simple, clear facts, and you will find your murderer sitting right here, in the flesh, in the courtroom.”

-Here Because the Defendant Did It

A common ploy of the defense is to single out the defendant as a person to be pitied, a victim of circumstance, someone who has been rushed to judgement. You can blow this out of the water from the very beginning by telling the judges why we’re here, why we’re having this trial. It’s for one reason only, because he did the crime. He’s being prosecuted for what he did, not who he is or what he is. All of the evidence points to him; that’s why we’re here. If it didn’t someone else would be on trial. But there isn’t, so he is.

-Confront the Emotional and Sympathetic Issues

Almost every case will have certain emotional and sympathetic issues which form the heart of the defense. It could be the victim’s status, or race, or youth or naiveté, whatever. The defense cannot argue the defendant should be acquitted because of such. But what they can do, and always do, is push this sympathetic agenda and then point to the law or the facts of the case to give the judges something to “hook on to” to vent their emotional sympathy.

At some point in your argument you must deal with these issues head on.. Do it early to clear the judges heads as soon as possible. Don’t overdo it. Make it short. Something like this is normally sufficient.

Example:

“We’re going to prove the defendant is guilty from the evidence, from the facts. I’m talking about sympathy, passion and prejudice, public opinion or feeling, anything that takes you away from your fair and reasonable interpretation of the evidence.

“Reference has already been made to the defendant’s young age and appearance. But neither of those things has any logical relevance to why we’re here today. The defendant sitting in court does not look like or act like he did on the night of the crime. You can’t tell if someone is guilty or not because they’re young or look nice. If that’s the way you think, we may as well not ever have trials with evidence and the law. It would be a waste of time.

For the sake of fairness, we ask that you follow the law and ignore emotions. We are in a trial that must be based upon the evidence. Otherwise we are not doing the job we swore to do.

The Elements

You should then explain how to prove the defendant committed each element of the charge or charges. Simply explain the necessary act and intent to each crime using simple language. Stress that the defendant was the perpetrator, nothing more, nothing less. Once that burden is met, the defendant is guilty. End of story.

Our burden is not to find out every possible thing some curiosity seeker might want to know about what happened that night. Nor is to prove the defendant is a bad guy or not nice. We don’t even have to prove there was a motive, though, if there is one, it helps point to guilt.

Narrow the Issues

Now that the judges the law, narrow the focus to the contested issues. Explain that whatever is not contested is, essentially, conceded. That means it’s proven. The trial is only to decide those issues which the defense puts into contention. Point out what the defense has not contested: the fact he drove or the fact he killed. More often than not there will only one issue at trial, either did the defendant do it, or if he did it, what is it? So point that out to the judges. Let them know they’re more than half-way there before you even start to talk about the evidence.

FOCUS ON THE CRIME CHARGED

Building a mountain of evidence against a defendant is the whole purpose of a criminal trial. Your final argument must remind the judges of that mountain of evidence, but it must do more. It must show the judges how to find that mountain, how to climb it, how to take the right path to the top that allows them to see from above the overwhelming evidence of guilt high above the defense clouds and smokescreens. How do you show the judges the way to that mountaintop? By focusing on your winning issues.

Those issues are always the same, the crime and the defendant's connection to the crime. If you don't focus on them, the defense will certainly not do it for you. The defense will spend most of its time talking about everything else but these issues. No matter how successful it is at doing so, you must bring the judge back to reality in your argument. You must constantly focus on these winning issues, again and again.

Tell the Victim's Story

You are a story teller in final argument, a story teller of the truth. So tell that story in a compelling fashion from the point of view of the victim. Set the scene. Highlight what they were doing, where they were going, the coincidence of them being where they were, walking, talking, whatever, as they headed unknowingly towards their Fate

Weave-In Why They Should (Must) Believe

As you relate the key, critical events and testimony, take special emphasis to weave in why the judges should believe the victim. Show how the victim's version is corroborated either by other witnesses or physical, or documentary or scientific evidence. Especially helpful is when you identify the circumstances or motivations which support your facts.

You must never simply recite the facts. Facts in a vacuum are meaningless. You must explain and expound on the significance of each and every fact and how those facts prove the elements of your crime, the defendant's connection to it, and why he is guilty. Get in the habit of telling the significance of every fact every time you list one.

Example: "Why should we believe the battered victim? Because her testimony is corroborated by the physical evidence, the photographs of her injuries taken that night, by the testimony of the officers who personally saw those same injuries and documented them in their first report.

"And the truth of what she said that night is also supported by your common sense. Why? Because she called the police. She cried for help. She was there when help finally came. But the defendant was long gone, nowhere to be found. What does that prove? That she knew she was in the right, and the defendant, who fled, knew he was in the wrong. That's additional corroboration for the truth of what our victim testified.. That night the defendant beat his wife and ran, because he was guilty and is guilty as he sits here before you".

Use Photographs, Charts and Diagrams

Clarity is the key to a convincing argument. So make full use of those physical items that will make your argument more memorable and clear. Show the photographs of the scene and the injuries. A diagram of the crime scene is imperative so the judges have a clear picture of the locations and distances that have a direct bearing on the facts.

Charts of the elements of the crime, the key points of law and which list the significant evidence, that shows proof of the defendant's guilt serve a dual purpose. They help the judges remember your main points long after they have forgotten your exact words. And they aid you as an outline of the essentials of your argument.

Protect from defense Assault

After you have taken the judges to the mountaintop, and only after doing so, you are ready to protect your case from the defense assault. There is, of course, no formula, but you should be spending most of your time building your mountain and much less time in discussing the defense case.

Remember, the more time you spend talking about why the crime is not what the defense claims, the more credence the judges gives to the defense argument. If you spend half your time explaining why a crime is not voluntary manslaughter, the chances are that is exactly what the judges are going to find. Why? Because you have lost your focus by focusing too much on the defense case, not your case.

Put in the Context of Your Case

The best way to insulate yourself from overemphasizing the defense case is to only discuss the defense issues in the context of your case. You do this by narrowing the issues and then discussing how the defense claim is related to your elements or to the connection of the defendant to the crime. Now that you have isolated it, you are ready to discuss it and why it should be dismissed as irrelevant, illogical or insupportable. After having done so, you immediately go back to your case and show how you have won that issue and how your case remains intact.

Discuss Alleged Weaknesses

If there were significant weaknesses in our case we wouldn't be where we are now, in the middle of final argument. But, if in your honest and sober judgment, you have had problems with some witnesses or evidence, now is the time to directly address them. This is your chance to show how the apparent weakness is irrelevant or inconsequential or to again highlight how your point has been corroborated by other evidence. Do this in a positive manner in the context of your case.

Example: "Now as we all know, our victim came into court and denied all that she told the police the night he beat her. Now, months later, she says it was all a lie, that she had an accident. And the defendant wants you to remember what she said here in court and to forget what she cried out over the phone so desperately that night. But that would be wrong, a victory for the defendant that he does not deserve, a victory for injustice, a victory for fear, a victory for intimidation, a victory for the strong over the weak. It would be a loss for justice, a loss for what is right over what is wrong.

"Why? Because we know from all of the evidence, before the victim changed her story, what the truth is. The photographs don't lie. The officers didn't lie. And neither did the victim before she had time to reflect.e.

Attack the Major Defenses

Normally, there will only be one defense. Sometimes there are more, and where there are, they are usually inconsistent or mutually exclusive. So make a point to highlight that to the judges immediately. The defendant is talking out of both sides of his mouth. Both things cannot be true at the same time. So his defense starts off s a sham, a ploy, whatever “sticks”, not what is the truth.

Label the defense witnesses fairly

This is where you plug in the labels that you have developed for the defense witnesses during cross-examination. They are irrelevant, or mistaken, or biased, or inconsistent, or confused, or inherently, or simply a liar, or whatever you can legitimately call them given the nature of their testimony. These form the reasons to doubt their testimony in light of the mountain of evidence which you have proven, and which you have shown the judges in your argument how to climb.

For this argument to be effective, you must give detailed examples of why the critical defense witnesses, if any, fit the label you have given them. You o not simply attack the witnesses without substance. You must give details when attacking a witness or your argument is specious and unreliable.

If you cannot properly show an independent reason to doubt a key defense witness, don't give up. That happens sometimes. The judges simply have to decide which witnesses are reliable and which are not. Then you must explain, in detail, why the judges should logically disregard the conflicting testimony in light of your contrary evidence.

THINGS NOT TO DO ON REBUTTAL

Try not to “involuntarily” respond

This is a good policy to remember at all times. Try not to respond point by point to what the defense has just argued. That will only support its credibility and reinforce it in the judge's mind. That's the exact opposite of what you want.

Think things through. Keep your perspective. When the defense tries to make a point, see if it really hurts you before attacking it. Many times what they try to prove or argue helps you.

Let's say the defense in a murder case claims there were two attackers when you've only proven there was one. Think about i. Assuming that it's true, does it necessarily hurt you? No. The evidence still show the defendant was one of the attackers no matter how many there were. Think about it some more. If there were two attackers, if the defendant had “helpless”, what does that mean? It means that the attack was

planned and premeditated, even more diabolical. It means the murder was in the first degree

Consolidate

You must learn to consolidate issues and argument, to look at the big picture and show the judges how your mountain is untouched. You must focus on you positives to counter the defense “noise”.

Ignore the Defense Script

Avoid answering dramatic questions posed by defense counsel at the end of his case. These questions are usually complicated, tricky or out of context and may take considerable time simply to explain or respond to given the form of the question. That is how they are designed. Don't go there unless you can take one of the questions and blow it out of the water simply and clearly with the turn of a phrase or a key piece of evidence which has been ignored or twisted by the defense.

Show How Defense Claims Relate to your Case

Again, do not make your argument in a vacuum. Show how your argument relates to an element you have to prove, or a key witness on the issue of etc. It does you no good to destroy a defense witness in your without establishing the relationship to your case. The judges will have no clue as to the true significance unless you make that connection.

Defense Achilles' Heels

Normally, there are some typical problems for the defense claims. Usually, their claims have little or no corroboration. It is usually one, isolated witness that is the cornerstone of some key point. When scientific tests are used by the prosecution, it is rare for the defense to conduct or present their own tests. So if they claim there is something wrong with the blood test or DNA or whatever, ask the judges, where was their test? If it was faulty, as they claim, it would have been easy to do a retest. Why didn't they?

And, in almost all cases, especially on the issue of intent, the credibility of the defendant is the key. No one can corroborate that. And, if he's lying, which is usually transparent, it means there is nothing to counter the prosecution's reasonable inferences of guilt.

Emphasize the Winning of Each Issue

As you score points, give the judges a scorecard. Remember, confusion is the defense's best friend. Let them know how you are doing. Show how you have won each significant issue. You can even check them off using your charts. This will graphically demonstrate how you are satisfying you case proof needs.

THE BIG FINISH

You want to finish with emphasis, that is, positively, on the mountaintop with the judges at your side, ready to do justice. So help them out.

Unsullied

Point out that your case is unsullied, impregnable, unaffected by all of the defense “evidence”. The defense has had every opportunity to challenge your case, and they have failed to damage it.

Use Props or Weapons

If you’ve got a photograph or a gun, display them, hold them, remind the judges of why they’re here visually. Don’t wave them or go overboard. Just show them, talk about them, their meaning, briefly.

Repeat

Repeat the items which you have proved. Repeat your theme. Repeat your rationale. List the reasons why the defendant is guilty, why she/he should be found guilty as simply as one, two, three.

Cry for Justice

Empower the judges do justice. Make sure they understand that since the defendant has been proved guilty there is only one right thing to do and, most importantly, they are the only ones who can do it.

CONCLUSION

No argument can or should make up for a lack of proof. But following these guidelines will maximize the power of your presentation to the court. In short, integrity, professionalism, clarity, building a mountain of proof and showing the court the path to the top by explaining the significance of the evidence and keeping it simple, protecting it from assault by arguing from a position of strength, focusing on your winning issues again and again, and asking for justice to court empowered by the truth are the fundamental keys to an effective, compelling and winning final argument.

EXPERTS

Expert testimony is of critical importance in number of criminal cases. This chapter provides some guidance in both the use of experts by the prosecution and the cross-examination of defense experts. The subject of experts is first approached generally, then followed by several sections relating to specific trial issues such as mental defenses and DNA evidence.

Admission of Expert Testimony

Expert opinion is admissible if it is related to a subject that is sufficiently beyond common experience and would assist the trier of fact. Expert opinion is not admissible if it consists of inferences and conclusions which can be drawn as easily and intelligently by the trier of fact as by the witness.

When an expert testifies that his opinion is based in whole or in part upon the opinion or statement of another person, that person may be called and examined by any adverse party.

Testimony in the form of an opinion that is otherwise inadmissible is not objectionable because it embraces the ultimate issue to be decided by the trier of fact.

However, in the guilt phase of a criminal case, an expert cannot testify as to whether a defendant had or don't have the required mental state. Whether or not a person is criminally liable for an offense is a legal, moral, and ethical decision, not a medical one.

Pretrial Preparation

A. When do you need an expert?

1. As soon as you review a file, you should be thinking about whether you need an expert. When you do decide an expert is necessary, you should call or visit him as soon as possible. Sometimes it is difficult to accommodate the schedules of the best experts, and it may be necessary to get an expert's commitment for specified days. This is especially true where there are highly specialized issues to be addressed. For example, in DNA cases you may need additional experts to support your analysis and his/her conclusions.

3. Your decision as to whether or not you call a witness in any case depends not only on whether you need a piece of evidence explained to the judges through issues where expert testimony is vital or extremely useful include the following: expert testimony, but also on whether the defense is likely to present a defense in which a prosecution expert can assist you or the judges common.

Examples:

- a) Ballistics and firearms

- b) Fingerprints
- c) Hair and fibers
- d) Documentary evidence
- e) Narcotics
- f) Arson
- g) Blood
- h) Etc.

Finding the right expert for your case is sometimes difficult. . If that is a problem for you, you should contact individuals, generally police or prosecutors, who are most likely to find someone who has faced the same issues and can give you advice on locating a well-qualified expert.

The Trial

A. Preparing and conducting direct and cross-examination of experts:

1. While visiting your expert, ask him about materials to which you can refer in order to better familiarize yourself with the subject at issue. In order to conduct a thorough direct, you must know and be able to elicit from the expert, not only the bottom-line opinion, but also the important preliminary facts which support the opinion upon which the judges will rely in order to accept the expert's opinion. Again you may also want to contact other prosecutors who are familiar with your subject area.
2. Ask your expert what should be presented to the judges. In this way, you can frame your questions for trial. It does not go over well with the judges when an expert is sitting in the witness chair telling you he either cannot answer or does not understand your question.
3. It is important that you appear well in command of the facts and science, otherwise, the defense attorney will educate the judges himself and have the judges believing everything he says. The information you convey should be presented in a simple, tight, and understandable package designed to keep the judges attention. Knowing the subject well help you pare down the information to a manageable level.
4. Show the judges that your witness is a star in his field. It is a good idea to be very familiar with your expert's professional background and qualifications.. You do not need to go over every honor and every title, but do hit the highlights.
5. Relate your expert's testimony to your case and emphasize its importance at every opportunity, beginning with opening statement. To avoid confusion, set up your expert's testimony by calling foundation witnesses in a logical order. It is best not to resort to calling witnesses out of sequence when you are dealing with experts. For example, when your expert is prepared to testify about ballistics, make sure you have already

called the officer who collected the evidence and all other witnesses in the chain of custody.

6. Cross examination of an expert, in many ways, should be approached in the opposite manner as your direct. If you believe that the defense expert is not qualified to express an opinion, you can request a hearing to prevent the expert from testifying at all. Similarly, on cross, you can expose the defense expert's lack of expertise to the judges. If the defense expert is qualified but the opinion rendered is spurious, then you will want to develop a cross examination which, in a simple and concise way, demonstrates that the expert's opinion is entitled to little or no weight. Exposing the defense expert's professional bias (i.e., he or she only testifies on behalf of the defense) or financial bias can frequently be useful. Foremost, use your common sense (i.e., why doesn't this opinion sound right?) when framing your overall examination. If you think the defense expert's opinion is absurd, so will the judges.

B Mental Defense Experts:

1. The use of forensic mental state experts by criminal defendants to mitigate their crimes or to avoid penal consequences is a possibility. When you know a psychologist is going to testify for the defense, it is important to develop a strategy for effectively dealing with his opinion. Whether you choose to focus on cross-examination of the defense experts and thereby demonstrate the limitations of psychological testimony or to bring in your own psychiatrist or psychologist for a battle of the experts, you need to be familiar with the area of expertise. Forensic psychologists and psychiatrists are commonly encountered at certain stages in the criminal justice system, i.e., at pre-trial competency proceedings, at the guilt phase.

Mental defense experts are vulnerable to highly effective cross-examination both because of the shortcomings and fallibility of mental state diagnoses, and because defense experts usually try hard to avoid the facts in the case.

The permissible scope of direct and cross-examination of mental experts is addressed in these examples and suggestion:

- Where a psychiatrist testifies that he disregarded defendant's statements of crimes, a prosecutor can still cross-examine the expert on defendant's statement.
- It is permissible to cross-examine an expert about an evidence if the expert read or considered the evidence in forming his opinion.
- It is permissible to cross-examine experts about report statements he either did not have or that he overlooked or ignored.
- It is permissible to cross-examine on the amount of compensation an expert received, because it bears on the issue of credibility.

- A presenter is allowed to obtain all documents that a witness has used to refresh his recollection.
- The prosecution to have its own expert examine defendant after defendant tenders a mental defense. A prosecutor may cross-examine defense expert regarding defendant's failure to cooperate with prosecutor's evaluating expert.
- It is permissible to provide defense psychiatrist with defendant's criminal history and to cross-examine the expert on that history if the read and considered it.
- A trial court has considerable latitude in determining whether a witness qualifies as an expert. If you encounter a witness who you really believe is unqualified to offer an opinion, request hearing on the issue. Because the definition of expert is so broad however, you should exercise caution in attempting to keep an expert off the stand.
- An expert is permitted to testify as to the doubtful value of psychiatric testimony.
- The scope of cross examination of expert witnesses include the right to cross-examine on texts and treatises that the expert referred to, considered, or relied upon in forming his opinion.

Conclusion:

Prosecutors must not only be able to use this powerful evidence in order to convict those guilty of crimes, but also be able to thwart defense efforts to present spurious or ill-founded expert opinion. Ultimately, the prosecutor's goal should be to convey the expert testimony in the simplest way possible so that the jury has the best opportunity to understand the evidence. Hopefully, by clear understanding, the judge will know: the expert testimony points inexorably to the defendant's guilt. On direct examination, all that is necessary is to get your expert to explain why you are right in a simple and concise manner. On cross, you only need to find the holes you know are there. While presenting or countering expert testimony can be intimidating, it can also be an exciting courtroom experience.

Real and Demonstrative Evidence

It is important for trial attorneys to use real or demonstrative evidence to enhance the presentation of evidence and to highlight the important parts of the case.

A prosecutor conducting a trial has three major goals: (1) to assist the judges in determining the facts of the case, (2) to assist the judges the law of the case, and (3) to assist the judges how to integrate the facts and the law of the case. There is generally a lot of information for the judges to absorb and retain. The manner in which people process information affects how they will assimilate it and recall it at a later time. If the information is presented in a manner which involves many of the senses of the judges, they will recall it with more accuracy after time has passed. If a learner is presented with information that is both seen and heard, such a person may recall substantially more of the information for a substantially longer period after it is presented.

Another reason for choosing to use real or demonstrative evidence is that it allows for a change of pace during the presentation of the case. By changing the focus of the audience from the testimony of witnesses to an object marked and introduced into evidence, the judges are allowed a chance to absorb some of the information which has been presented to them. This momentary break provides judges with an opportunity to rest for a second and allows them to focus with more attention on the rest of the case when testimony resumes. By stimulating a judges other senses during trial they can be involved to a greater degree in the case so that when the case is presented to the judges for deliberation, the individual judges will recall details of the case with more clarity.

Types of Evidence

“Evidence” can be defined as testimony, writings, material objects, or other things offered to prove the existence or nonexistence of a fact. This includes witness testimony, tangible objects, sights, sounds, and anything else relevant to the issue.

“Real” evidence is evidence which related directly to an issue in the case and which arises out of the event in dispute. For example, a gun used in a robbery, a rape victim’s clothing, or contraband seized during a search warrant would qualify as real evidence.

Evidence may also be classified as “demonstrative evidence” if it helps a witness explain his or her testimony or assists the judges in understanding the event. Demonstrative evidence includes photographs, charts, diagrams, reenactments, charts used during closing argument, and other similar items.

Admission of Exhibits

In order to introduce evidence during the presentation of your case, you must follow basic rules of evidence. When considering whether to use exhibits during the trial, chose only those exhibits which focus he trier of fact on the issues in your case. If the

exhibit you choose clarifies a point for the trier of fact or helps a witness to testify more effectively, you will be able to avoid a relevancy objection. All visual aids should highlight important information, enhance your credibility with the judges, and increase the judges retention of that knowledge through repetition.

A. Marking and Introducing Exhibits

In order to introduce an exhibit, follow these six steps:

1. Have the witness describe the item;
2. Ask the court clerk to mark the exhibit using the witness’s description;
3. Show the marked exhibit to opposing counsel and indicate that counsel has previously seen the item (make sure to show the attorney the item before marking it in court);
4. Ask to approach the witness and hand the exhibit to the witness;
5. Have the witness identify the exhibit;
6. After laying a proper foundation, introduce the exhibit into evidence.

For a clean record, once the item has been marked for identification, call it, “Presence Exhibit One for Identification, the knife”, or “Presentation Exhibit Seen for Identification, the diagram”. After the item has been moved into evidence you may refer to it as “Presence Exhibit One, the knife”. Once you have provided a sequential number for the exhibit, make sure that the record stays clear by having all witnesses and attorneys refer to the item by its proper exhibit number.

B. Keeping Track of Exhibits

Keep exhibits together and appear organized by placing all items of evidence into a box clearly marked ‘*People v. (Defendant’s name)*’, “the case number, and in bold letters. **“EVIDENCE”**. Keep this box on or near your table in plain view of the judges throughout the trial.

In addition to keeping your evidence organized before it is presented in court, you must also keep it organized as it is introduced during the trial. For this reason, it is helpful to keep an exhibit log for each trial. This log can contain valuable information about the exhibit, who located it, who can properly lay a foundation for its admission into evidence at trial, and whether it has been marked for identification and admitted into evidence. The following is a sample Exhibit Log:

#	Description of Item	Witness	Police Report #	Marked	Admitted	Published

C. Sample Foundation for Admission

1. Real Evidence

- a)The item is relevant to the case;
- b)The witness can identify the item;
- c)The witness describes how the item appeared when seen earlier;
- d)The witness testifies that the item is in the same, or substantially the same, condition it was when seen earlier.

2. Controlling your evidence

Blood, narcotics, bullets, casings, soil samples, biological samples. You must establish the chain of custody when the item is not unique enough to be identified by the witness in order to maintain the integrity of the item. Remember that if you are unable to show an unbroken chain of custody, that does not necessarily mean that the item is inadmissible. Rather, any break in the chain of custody shall go to the weight of the evidence and the trier of fact may consider the break in the chain when deciding how much weight to give to the evidence.

-Establish that the item has been in the continuing possession of one or more individuals; Or

The item was distinctively marked or was placed in a tamper-proof container which was marked for easy identification. Be sure to have the witness describe the precautions taken to ensure the integrity of the item marked, and subpoena the evidence technician.

3. Documentary Evidence

Handwritten or typed items, official records, business records, computer data. There are specific foundational requirements for every type of documentary evidence. Here is a brief overview of some of the issues you may face and some requirements for specific types of documentary evidence.

- Is it a writing?
- Can it be authenticated?
- Is it original?
- Is the document hearsay?

a. Handwritten Items

- **Authentication**

Anyone who saw the writing made may testify to the authenticity of the item. A handwriting expert may be used or the court may accept authentication of

handwriting by an individual who has personal knowledge of the handwriting of the supposed writer. Or, if the court has admitted into evidence another handwritten item by the supposed writer, the trier of fact may compare the two writings to determine authenticity. Lastly, an item may also be self-authenticated. Example: the authentication of a writing which purports to be signed by the person to whom the witness sent a first communication. If this second communication responds or refers to the first communication, then courts may determine that these facts presented create an inference that the second communication is authentic and it may be admitted.

- **Best Evidence**

If you have a copy instead of the original, the court may exclude the evidence unless certain factors exist which allow the admission of a duplicate. Duplicates are sometimes defined to include a writing produced by the same impression as the original, or from the same matrix, or by means of photography or by chemical reproduction or by any other technique which accurately reproduces the original.

- **Alteration**

If the portion of the writing sought to be introduced has been altered in any way, why and how it became altered must be explained. You may show this by the fact that another party altered the writing with permission after it was made or that the alteration was innocently consented to, or that the alteration did not affect the meaning of the writing.

b. Business Records

- **Reproduced Copies of Business Records**

A nonerasable optical image reproduction which does not allow additions, deletions, or changes to the original document may be admissible if the item was made and preserved during the regular course of business.

- **Foundation**

Establish that the writing was made during the regular course of business, at or near the time of the act, condition, or event. The person testifying must have personal knowledge of the business recording process, but need not have personal knowledge of the recorded information. The evidence must also show that the writing was made in a manner in which the circumstances indicate the item is trustworthy.

c. Computer Data

- **Admissibility**

A printed representation of computer information or program should be admissible to prove the existence and content of the computer information. Rather, printed representations of computer recorded information will be presumed to be accurate representations of the computer information they represent until any party introduced evidence that such is inaccurate or unreliable. If the evidence is shown to be inaccurate or unreliable, the burden of producing evidence shifts to the party which seeks to introduce the

computer information to show by the evidence that the printed representation is the best evidence of the content of the computer information or program.

4. Test Results

This includes laboratory analysis of urine or blood for the presence of alcohol or narcotics, and the analysis of semen or other biological samples for DNA identification.

- Establish the relevance of the results to the case.
- Establish the witness's qualifications and training for the testing equipment and procedure.
- Outline the testing procedure and any safeguards which may help preserve the integrity of the testing process.
- Establish that the equipment was functioning properly at the time of the test.
- Establish that the witness can recognize and understand the test results.
- Establish that the test results are in the same condition as when the test was completed.

5. Photographs

This includes photographic prints, slides, movies, and videos. You generally do not need to call the photographer as a witness.

- Establish that the photograph is relevant to the case and is offered for probative.
- Establish that the witness is familiar with the scene depicted at the time of the event.
- Establish that the scene is fairly and accurately depicted in the photo, video, movie, or slide as a representation of the area at the time the event occurred.

6. Maps and Diagrams

Published maps and charts, when offered to prove facts of general notoriety or interest and made by parties indifferent to the facts at issue, are admissible.

- Establish that the map or diagram is relevant to the case.
- Establish that the witness is familiar with the area depicted in the map or diagram.
- Establish that the map or diagram fairly and accurately shows the area as it was at the time of the event.

7. Audio Tapes

Audio tapes such as tapes of recorded witness interviews or suspect confessions are admissible if they can be authenticated. Be sure to prepare a transcript of the recorded information which you present to the triers of fact when you seek to introduce the tape into evidence.

Present the defense attorney with a copy of the transcript and a copy of the tape itself in advance of the hearing. Ask the defense to review the transcript with the tape and stipulate to the accuracy of the transcription. If the defense attorney does this, you may enter the transcript into evidence. If the defense attorney does not stipulate to the transcript, you may use the transcript to assist the judges when the tape recording is played. But ** should ** consider the transcript as an aid.

-Establish that the operator of the recording equipment was qualified, that proper recording procedures were followed, and that the equipment was operating well at the time the recording was made.

-Establish when and where the operator recorded the event.

-Establish that the tape you seek to introduce into evidence is a good reproduction of the conversation.

-Establish a chain of custody for the tape.

-Establish that the tape remains a good reproduction of the conversation.

Exhibit Preparation

A. Charts and Diagrams

1. Visit the scene and have any witness visit the scene before testifying. If you visit the scene before the trial begins, you can verify the accuracy of the diagram.
2. Take along a Polaroid or other easy to use camera to take photographs of the scene.
3. For all charts and diagrams, **MAKE THEM BIG!!**
4. For diagrams, a helpful technique is the use of overlays. Clear plastic overlays may be purchased, cut to the size of the diagram, and taped over the diagram to protect it during witness testimony. This is especially helpful if many witnesses will refer to the same diagram. By doing this, you can mark each overlay with the witness's name and place a new overlay over the diagram each time you use it. In closing argument you

can tape all of the overlays together to show a consistent or inconsistent pattern of recollection of the event.

5. If there are photographs of the scene and you also wish to use a diagram, one way you can display the photographs is to attach them around the perimeter of your diagram with arrows pointing toward the particular places to which the photographs refer.
6. If your investigating agency or your office has computer capability, you may want to use one of the computer programs on the market to make professional drawings of the crime scene.
7. For closing argument use charts which highlight for the judges any essential law. It is important to shorten the instructions so that they are easily understood, but take care to accurately state the law. Consider writing all of the evidence which supports a particular element in the margin of your closing argument charts. Make notes very lightly in pencil and use only key words to jog memory and to keep your argument flowing smoothly. These notes cannot be seen by anyone else in the courtroom and give the appearance of never referring to notes during the presentation.
8. Instead of using flip charts, you may decide to use an overhead projector during your presentation. Try "progressive disclosure". This technique allows information to be released bit by bit so that the judges can absorb it. Keep the majority of the information covered up by a dark sheet of paper. As you reach the pertinent point to be addressed, simultaneously pull the coversheet back to reveal the information.
9. When flipping to a new chart, give the judges a chance to read it first to themselves. Try to remain silent while they read the information for the first time. This helps them absorb the information so they can focus on what you are saying.
10. Try to leave the bottom quarter to a third of the chart blank. This allows everyone, even judge sitting in the back row, to read the entire text. If you cram too much information onto a single chart, it will appear disorganized and confusing.
11. When addressing the judges, do not block the chart. Instead, stand next to it.
12. Do not speak into the chart. Refer to the chart and gesture toward it, but avoid looking at it excessively. If you look at your chart too much, you will lose your connection with the judges they will lose interest in the subject.
13. Use a chart for closing argument with a column of details from the victim's description of the perpetrator, or with other items of evidence, so the prosecutor can check off each item when recounting the facts.

14. If a map is used during the testimonial portion of the case, make sure that the witness clearly marks his or her position on the map by using distinct color or by writing his or her name or initials near what he or she marked.
15. After you are done with the diagram, offer it into evidence before the defense begins cross-examination. That way, the diagram is protected if you neglected to bring clear acetate overlays to protect the diagram from defense markings.

B. Photographs

1. Most photographs today are in color which is the best type to use before judges.
2. If the cost of reproducing photographs is too expensive, consider duplicating the photographs on a color photocopy machine. The resulting pictures are a bit more grainy than an actual copy, but the cost is much less.
3. Are there planning departments where you can obtain aerial photographs of particular portions of the community. Aerial photographs are invaluable in pursuit cases, gang cases, or in cases where there is a pattern of criminal activity such as a serial rape or multiple burglary case.
4. Enlarge photographs to at least 8½" x 11". Remember, bigger is better when it comes to visibility in the courtroom.
5. If the case involves laboratory tests and results, consider using a diagram of individuals working in the lab. In this manner the expert may point to the equipment used when he/she is testifying and the judges can understand how the lab operates.
6. A photograph of a weapon being fired may perfectly enhance and explain the expert's description of how gunshot residue lands on a person's hands or clothing if they are near the weapon at the time it is fired.
7. If an expert witness is describing for the judges the similarity between a test bullet fired from a gun found at the crime scene and the bullets found in the victim, or if the expert is testifying about a questioned document or about fingerprints or shoe prints, create a display that will allow the judges to view the evidence and should be obvious enough to allow the judges to make their own comparisons and to reach the same conclusion as the expert. If the test results are not so clear that an untrained judge could easily see the similarities, consider having the expert use an example from a different case which would more clearly demonstrate the similarities or test procedure for the judges.

C. Slides, Movies, Videotapes, Audiotapes

1. If you have chosen to use slides, movies, videotapes, or audiotapes to enhance the presentation of the case, you should carefully plan the technical equipment that you will need well in advance of the trial date.
2. Be sure that all of the equipment is working properly. For movies and tapes, be certain that the volume can be heard throughout the courtroom. This may require that you set up the equipment during a time when court is not in session so that you can test all of the equipment.
3. Bring along an extra extension cord in case you need it.
4. If the videotape has material on it which does not apply to your case, make a copy of the tape and include only the portion relevant to your case. Then, whether the tape is rewound or shown to the judges frame by frame, there is no danger of accidentally forwarding or rewinding the tape too far. This may help save valuable time during your presentation.
5. Always retain a copy of the original video or audio tape. Sometimes the original may be inadvertently destroyed. You need to be protected in case this happens.
6. Experts may be able to take a videotaped image and slow down each frame of the incident by using computer capabilities and a capture board. The slowed-down images may be placed on a computer disk or CD and may be played in court with the assistance of a computer.

D. Models, Clothing, Demonstrations

1. Models

Many prosecutors find that the two dimensional charts, diagrams, or even photographs cannot accurately portray to judges the angle at which a knife or bullet entered a person. In order to show bullet trajectory, some prosecutors have obtained discarded store manikins in which they have inserted dowels to show the path of the bullet. As needed, make other models, i.e., a model of the scene of the crime can be imagined better if it is three dimensional.

2. Clothing

It may be helpful to establish what clothing the victim or defendant wore at the time of the crime. Check the crime reports to see if the defendant's clothing may be at issue.

If used, make sure that the exhibit is enclosed, especially if it contains biological fluids. Do not handle the clothing in open court without having it sealed in some fashion. If you do handle the clothing, be sure to wear protective gloves.

3. Demonstrations

Sometimes a courtroom demonstration is the most effective manner to recreate the crime for the judges. This can be very risky if you are not totally prepared.

You could try asking a victim to demonstrate an assault. Ask the victim to stand up and reenact the defendant's actions, using you as the victim. Be sure to freeze the action at critical moments so that you can describe the details of the movement for the record.

Courts have also ordered the defendant to model clothing in front of the judges. You may choose to employ this technique if you have a witness who needs to see the defendant in sunglasses or a hat before making a positive identification, or to see if an article of clothing left at the crime scene may fit the defendant. As with any other type of courtroom demonstration, be very careful.

Special Evidentiary Concerns and Developments

A. Narcotics

The presentation of evidence in narcotics cases takes some preparation since the evidentiary items may be toxic in nature. Most law enforcement agencies package narcotics for identification at a later date. This packaging may consist of a plastic heat-sealed envelope which has a chain-of-custody sheet affixed to the outside of the envelope. This type of packaging is helpful since the evidence is easily viewed through the plastic. Every time the package is checked into and out of the evidence locker, the date, time, and weight of the item is catalogued, in addition to the name of the individual who signs for the item.

Some agencies use a brown paper envelope to contain the narcotics. This creates difficulty due to the fact that the evidence is not as easily viewed as with the plastic envelope. If the narcotics are not stored in a clear container, make sure that the officer has a chance to review the evidence before testifying about the exhibit. By doing so, you can avoid an unwelcome surprise in the event the officer is unable to recognize the item.

Be sure to take care when handling narcotics evidence.

B. Weapons and Ammunition

If you decide to introduce a weapon as evidence in your case, alert the bailiff that you will be bringing the weapon into court. If the weapon is a firearm, arrange to have the bailiff inspect it to be certain it is unloaded. The bailiff should also secure the firearm so that it is inoperable. Do this when the weapon is first brought into the courtroom, and again in front of the judges when the weapon is marked as an exhibit. If you have ammunition as an additional exhibit, be sure that it is not within close proximity to the firearm while court is in session.

When you handle the weapon, be aware of where it is pointing. Never point the weapon at any person in the courtroom. Handle every weapon with the respect that it deserves. By doing this, you communicate to the judges the power of the weapon.

If the weapon used in your case was never recovered, you can still use a similar weapon as illustrative evidence. Establish through witness testimony a specific description of the weapon used. You may want to have the witness try to draw a picture of the weapon. In one case, a little boy was five years old when he saw his mother stabbed to death. Despite the young age of the witness, the picture closely resembled the murder weapon which was eventually recovered.

If you have bullets, expended rounds, and casings to present as evidence, the expert or evidence technician may place the items in a plastic envelope or container for easy viewing. The firearms expert may package different types of ammunition into plastic containers and mount them on a foam core board to demonstrate the differences between different types of ammunition.

The firearms expert may have enlarged photographs or drawings which can help demonstrate the testimony. The expert can take electron microscope photographs which may show matching impressions or similarities between evidence recovered during the investigation and the test result.

C. Biological or Hazardous Evidence

Of particular concern to criminal trial attorneys and court staff is the careful handling of biological or other hazardous evidence which may be introduced at trial. Evidence such as actual blood or urine specimens, sexual assault kit samples, semen samples, or the clothing worn at the time of the crime by either the victim or the defendant, are examples of evidence which should be handled with care at all times. Before trial you should arrange for the items to be displayed for the judges so that no one may actually touch the item. Try placing the biological evidence in a heat-sealed plastic envelope such as those used to store narcotics. Any clothing introduced as evidence could be mounted on a board and covered in plastic. By doing so you can hold up the board and the jury can see the evidence, but everyone is protected from the item.

D. Computer Assisted Design and Presentation Tools

It is amazing to see all of the developments in the area of computer assisted design and graphics capabilities. Development in this area occur quickly. For that reason this discussion is limited to a brief overview of the many possibilities computers offer for courtroom presentations.

1. Laptop Computers

The wave of the future is definitely in laptop computers which have advanced to a level allowing a person to make slides, connect the computer to an overhead projector, and then to coordinate the slides and computer generated

graphics in a slide show. These computer shows can be controlled with a remote control pointer which acts as a mouse. This mouse can be used to highlight particular areas, to draw on particular areas, and to magnify certain portions of the item viewed.

If you or your office is lucky enough to have such a computer, be sure to check the courtroom for the location of any power source. Always remember to keep a backup copy of the presentation and test all of your equipment before beginning your presentation.

2. Digital Imaging

Most agencies use 35mm cameras to preserve evidence during the course of their criminal investigations. However, agencies may soon switch to digital cameras. When this occurs it will be important to focus on maintaining the authenticity of the photograph so that it is admissible at trial.

If investigative agencies are experimenting with digital photography, be sure to have them keep an unaltered copy of the images. In the future prosecutors may not have to wait for photographs to be developed by conventional photographic methods. Instead, prosecutors will have the ability to view images by accessing their computers and tapping into their investigating agency's computer system. Prosecutors could select and copy the images they choose and produce as discovery an intact version of all images for the defense.

3. Computer Assisted Design Programs

Many companies now produce landscape and architectural design programs which may be successfully used to create beautiful computerized diagrams and floor plans of crime scenes. By using these programs you can generate a diagram which is perfectly to scale. The diagram could depict an aerial view of the crime scene or an aerial of a building with the walls of the building folded down so that a side view of the interior is possible. Even more interesting for judges are the three dimensional diagrams which may be computer generated.

Your Trial Toolkit

This is a brief checklist of some of the items you may want to consider keeping in your trial briefcase.

- Marking pens in various colors.
- Pencil and eraser.
- Correction fluid.
- Dots.
- Rubber bands.
- Big binder clips.
- Dry erase board or sheets and pens.
- Masking tape.

- Clear tape.
- Measuring tape.
- Glue stick
- Glue.
- Scissors.
- Stapler and staples.
- Extra paper.
- Easel.
- Portfolio carrier or tube for transporting charts.
- Extra gloves for handling sensitive materials.
- Self adhesive notes and tape flags.
- Paper clips.
- Blank overhead transparencies.
- Polaroid film/ camera.
- Pocket tape recorder and tape.
- Extension cord.
- Batteries.