NATIONAL DEFENDER TRAINING PROJECT
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DIRECT EXAMINATION

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I. Should You Put On a Case?

Before we begin to think about techniques for doing direct examination, it is important to figure out whether we should even be putting on a case.

There is no rigid rule or formula for determining whether the defense should put on a case, or just rest after the end of the State's evidence.

The two questions every defense lawyer must ask are:

1. Does my theory of defense require me to put on a case? And

2. Do I have the witnesses and/or evidence to make that case?

The answer to these questions is always rooted in the facts of your case, and must be decided on a case-by-case basis. It is impossible to make generalizations about which kinds of defenses require you to put on a case and which do not. Depending on the facts of your case, you may have to call witnesses to convince the jury to accept your theory of defense, or you may be able to rely on the direct and cross-examination of the State's witnesses to establish your theory. You can't know which of these options is best until you have a firm grasp of the facts of your case and of your theory of defense.

There are, however, some general advantages and disadvantages of putting on a defense case:

A. General Advantages of Putting on a Case

1. Jurors both like and expect to hear "both sides of the story."
2. If your witnesses are credible, they will lend credibility to your entire case – not just to the piece about which they are testifying.
3. Defense witnesses often corroborate and lend factual support to the inferences you will be arguing the jurors should make. For example, if your witness contradicts a prosecution witness, when you argue in closing that the State's witness should not be believed, you are not just offering the jury your personal opinion, you are citing testimony they heard from your witness.

B. General Advantages of <u>Not</u> Putting on a Case

1. If your witnesses turn out badly, they will kill your case. An incredible defense witness often makes the jury think the entire defense case is incredible.
2. Calling defense witnesses often confuses the jurors about the burden of proof – they end up deciding that whichever side had the better witnesses must win.
3. Not calling any defense witnesses fixes the jurors' entire attention on the State's

witnesses. If the prosecution witnesses were really bad, this can be enough to earn a not guilty verdict.

II. Deciding to Call a Particular Witness

Assuming that you have decided to put on a case and are considering a witness to call, you can't just talk to the witness for a few minutes, ask him what he intends to say, and then put him on the stand and ask "what did you see?" That kind of sloppy work is a formula for disaster. There are several steps we all must go through before we are ready to do the direct examination of our witness:

A. Know exactly how the potential witness fits into your theory of defense.

1. What facts is the witness going to testify to that are essential to your theory?
2. Are there any other witnesses who can testify to the same facts?
3. If you can't articulate exactly how the witness fits within your theory, don't call her.

B. Know exactly how the potential witness might harm your theory of defense.

1. What facts might the witness testify to that could harm your theory of defense?
2. How do you expect to deal with and minimize that damage?
3. Are the positive facts the witness will testify to more important than the damage the negative facts might cause?

C. Is the witness really necessary to your theory of defense?

1. Are there other, less dangerous means of getting the same information in front of the jury?
    a. A document
    b. Having the court take judicial notice of something
    c. A different, safer witness
    d. Cross-examination of a prosecution witness
2. Is the information the witness will provide merely cumulative?

D. You must learn *everything* about your witness

1. Does the witness have any interest in the outcome of the case? How are you going to explain that interest to the jury so that they will still believe the witness?
2. Does the witness have anything in his or her background that may hurt his or her credibility?
    a. Prior convictions
    b. Prior bad acts

c. Anything the witness has ever done in the past that would cause the jury to disbelieve his or her testimony in your trial

d. A history of lying, fraud, theft, or anything else that smells of dishonesty

3. Has the witness made any statements in the past that would contradict or cast doubt on what he or she is going to say at trial?

a. To the police
b. To the prosecutor
c. In a past court proceeding
d. To the media
e. To anyone else involved in the case
f. To anyone not involved in the case

4. Does the witness have any physical or mental problems that might affect credibility?
5. Does the witness have a problem with drugs or alcohol?

IF THE WITNESS HAS ANY OF THESE PROBLEMS, IT DOES NOT MEAN THAT YOU SHOULDN'T CALL THEM. IT JUST MEANS THAT BEFORE YOU CALL THEM, YOU MUST HAVE A PLAN TO DEAL WITH THE PROBLEM

III. Preparing to Call a Witness

A. Review Everything

1. Everything in your file about the subject the witness will be discussing.
2. Everything you know about the witness.

B. Determine Your Objectives for the Witness

1. Factual Objectives

a. What facts do you want the witness to testify to?
b. Know how those facts fit into your theory of defense
c. Know how those facts fit into the overall picture of the case

2. Credibility Objectives

a. What facts can the witness testify to that will make the jury believe him?

b. What other things can the witness produce, say, or do that will make him more believable to the jurors?

3. Legal Objectives

a. Are you going to use this witness to establish a legal point, such as the absence

of an element of the crime or the existence of an element of an affirmative defense or to establish the foundation for introducing some other evidence?

b. If so, then list your legal objectives and the facts the witness will testify to that establish that objective.

EX: If your theory of defense involves self-defense, the witness might testify to facts that establish the following legal points:

1. The defendant was not the aggressor.
2. The defendant was faced with an immediate threat.
3. The defendant was in his home.
4. The defendant did not have any way of retreating or escaping.
5. The victim/assailant used deadly force
6. The defendant did not use excessive force.

EX: If you are calling a witness to lay the foundation for introducing a photograph, the witness might testify to facts that establish:

1. The witness is familiar with whatever the photo represents.
2. The photo is a fair and accurate representation of its subject.

C. Pair Up Your Objectives With the Facts That Establish the Objectives

1. For each objective, list the facts the witness can testify to that establish that objective.

EX: If one of your objectives is to show that the defendant was not the aggressor in a self-defense case, some facts you may list for the witness to testify to are:

a. The defendant was minding his own business when the "victim" approached him.
b. The "victim" started the verbal argument that preceded the fight.
c. The "victim" made the first threat.
d. The defendant said he didn't want to fight.
e. The "victim" was the first to pull out a knife.

2. Don't just list the most obvious, superficial facts. Don't just list facts that are merely conclusions (eg: "the bar was crowded"). Think about specific facts the jury would find most persuasive.

EX: If you want to show that there was no room in the bar for the defendant to retreat, some facts you might list for the witness to testify about are:

a. All the seats at the bar were taken.

b. There were people standing between the bar stools.
c. People were standing four deep to try and order a drink.
d. There was a ten minute wait to get the bartender's attention to order a drink.
e. People had to hold their drinks over their heads to carry them out of the crowd to a table.

IV. Organizing the Direct Examination

A. Primacy and Recency

Everything we have learned about the art and science of persuasion tells us that people (including judges and jurors) are most persuaded by what they hear first, and what they hear most recently. This means that whenever we examine a witness, it is important to start with a strong point, and end with a strong point.

The principle of Primacy and Recency also tells us that we have to make some changes in the traditional way we have been taught to do a direct examination. Most CLE programs advise that we use the following structure when doing a direct:

1. Ask the witness about his or her background and credentials
2. Ask the witness about the background of the events that are the subject of his or her testimony.
3. Ask the witness about the setting and location of the events that are the subject of his or her testimony.
4. Have the witness describe the events and action of the incident.

While this organization has the advantages of being logical and simple, it has the disadvantage of not being the most persuasive method. The two drawbacks of this technique are:

1. By the time the witness gets around to the main point of the testimony, the jurors may have reached the end of their attention span. This is particularly true if the jurors think they already know the background information from what they heard during the prosecutor's case.
2. Because they have already heard the State's case, the jurors are listening to all the background information and placing it in the context of what the prosecution witnesses have already said. This often means that they are giving your witnesses a negative spin before they even get to the main point of the testimony.

To avoid these problems, and to make out direct examination more persuasive and more memorable to jurors, a technique of organizing your direct examination around principles of primacy and recency is suggested.

B. Identify the strongest one or two points your witness is going to make.

1. Limit this to one or two points at most – the goal is to immediately focus the jurors on what is important.

2. Use this point or two to both start and finish your direct examination.

C. How to Structure the Direct Examination

1. Start with the one or two strongest points the witness is going to make.

2. Then stop the witness, and shift to the background and or credentials of the witness.

3. Then establish the background of the events the witness will testify about.

4. Then have the witness describe the setting and location of the events.

5. Then have the witness tell the factual story of the events.

6. Then have the witness finish by repeating the one or two strongest points.

EX: Assume your witness is going to testify about what he saw in the bar that will establish that your client acted in self-defense. The two main points of his testimony are that the "victim" was the aggressor, and the "victim" was the first to pull out a weapon. An effective structure for the direct examination might be:

Q: Where were you at about 11:00 P.M. on the night of January 14th?
A: In Joe's bar.

Q: Please tell the jurors what you saw happen in Joe's Bar at about 11:00 P.M.
A: There was this guy who was really drunk. I later found out that his name is John Smith. Smith was yelling about how he wanted another drink and that he didn't want to wait for it. So he walked up to the bar, where the defendant was sitting on a barstool talking to the guy next to him. Smith grabbed the defendant by the shoulder and said "get out of my way."

Q: What did the defendant say?
A: He said, "take it easy, pal. Let's all relax."

Q: And what did Smith do?
A: He said, "fuck you." Then he pulled out a knife and said, "I'm going to cut you."

Q: How did the defendant respond to that?
A: He said again, "Take it easy, nobody wants any trouble here." But Smith lunged at him with

the knife and cut his arm. That's when the defendant picked up the beer bottle and hit Smith to protect himself.

Q: We will come back to that, but first I'd like the men and women of the jury to learn a little bit about you. Could you please tell us where you live?

Having established the main point you wanted, you will then have the witness establish his own background and credibility, and will then move to setting the scene at the bar, and then tell the story of the fight. The witness will then finish by hitting those same high points.

D. Background and Credentials – Humanizing Your Witness

It is important that the jury see your witness as a human being, not just a prop or pawn for lawyers. You should therefore find out as much favorable information about the witness as possible, and bring it out at the appropriate time early in his or her testimony. See Section IV, C, 2, above.

E. Dealing With Your Witness's Weaknesses – Anticipating the Prosecutor's Impeachment

Most good lawyers agree that it is important to address the weaknesses of our witness on direct, rather than allow the prosecutor to bring them out and make it look as though we are hiding something. It is important, however to address these weaknesses in a way that will minimize them, rather than allow them to dominate your direct or destroy the witness's credibility. Here are some suggestions for bringing out the bad stuff in a way that will minimize the harm to your case;

1. Do not start your direct examination by bringing out the weakness. Primacy and recency tell us that if you start or finish with the bad stuff, the jury will think that it is the most important thing about the witness.

2. Put the bad stuff in the middle, where it is least likely to be remembered and least likely to be viewed as important.

3. Make sure that you bring out the good information before you bring out the bad information.

4. Spend as little time as possible eliciting the bad information. The more time you spend on it, the more important it will seem to the jurors.

5. When you elicit negative information, present it in the best possible light.

6. When the witness talks about the bad information, use bland, passive language that minimizes the impact of the information.

7. Only elicit bad information if you are sure it is going to be brought out by the State in cross-examination. If you are not sure whether the State is able to question your witness about a weakness, make a motion in limine to preclude the cross-examination. It is important to know in advance what the prosecutor is allowed to cross-examine about. You don't want to be in a position of guessing.

F. Preparing Demonstrative Evidence for Direct Examination

1. A picture (or a diagram, map, or tangible object) is worth a thousand words. It is very persuasive to use demonstrative evidence to support what your witness is saying.

2. Introducing demonstrative evidence gives the witness a chance to repeat to the jurors his or her most powerful facts – first when giving narrative testimony about the incident, then later when describing the demonstrative or physical evidence.

EX: IF your witness describes how the "victim" was the aggressor, and how the defendant only acted in self-defense, you can then introduce a photo or diagram of the bar, and have the witness show where all the parties were located (and repeat what they did in those locations). This repeats and re-emphasizes the powerful self-defense information for the jurors.

G. Preparing Your Questions

1. Review the list of objectives you have prepared for the witness.

2. Use a separate page for each objective.

3. Write out your questions for each objective

4. Be sure to include the questions you will use to lay the foundation for and to introduce any physical and demonstrative evidence you will use.

5. Be sure to include any questions you will ask that use the physical and demonstrative evidence.

V. Preparing the Witness for Direct Examination

The basic rule is that there is no such thing as over-preparation. Before you put a witness on the stand, you must work on preparing him until he gets it right. There is no excuse for putting on a witness who is not prepared.

A. Familiarize Your Witness With the Courtroom.

For most witnesses, the courtroom setting is strange and intimidating. Sometimes this causes a witness to be so nervous that his testimony comes across badly even if he is telling the truth. As defense counsel, we must take some simple steps before trial to make our witness more comfortable on the stand:

1. Take the witness to the courtroom.

2. Show the witness where he will be sitting, and where all the other parties will be sitting.

3. If the court is not in session, have the witness sit in the witness box for a few minutes, just to see what it looks and feels like.

B. Familiarize Your Witness With the Court's Procedures.

1. Tell her who will be in court, and what their roles are.

2. Tell the witness what direct and cross-examination are, and what kind of questions can be asked on each.

3. Tell the witness what objections are, and how to behave during objections.

4. Answer any questions the witness may have.

C. Discuss How Your Witness Should Dress For Court

1. Don't just say, "wear your best clothes," or "dress conservatively," or "dress nicely." These generalizations may mean something very different to the witness than they mean to you. Tell the witness exactly what kind of clothing you a talking about.

2. For Men:
    a. Their work clothes or uniform, if appropriate. Or . . .
    b. Solid color pants. Not dungarees or denims. No sweats.
    c. Solid color shirt with collar. No t-shirts, no sweats.
    d. Suit jacket or sport jacket.
    e. Solid color tie.
    f. Hair cut neatly, conservatively, and clean.

NOTE: If your witness does not have this kind of clothing, it is your responsibility to find them. Thrift shops are a useful resource. Loaners from people in your office are also a

possibility. Many public defender offices keep a clothing closet, with an assortment of clothes for witnesses and clients who don't have the right attire for court.

NOTE: If these instructions involve asking your client to change his normal style of appearance, you must do so -- even if it seems embarrassing to ask him to do things like getting a haircut or changing his hairstyle.

3. For women:
    a. Their work clothes or uniform, if appropriate. Or . . .
    b. A simple, conservative pants suit, a dress, or a skirt and blouse.
    c. No short skirts, no low cut blouses, nothing sexually suggestive.
    d. Moderate makeup.
    e. Moderate jewelry.

D. Discuss How Your Witness Should Behave in Court

1. Showing respect for the court and everyone in it is essential.
2. Sit straight in the witness chair. No slouching.
3. Look at the person who is questioning you. Don't look at defense counsel during cross-examination.
4. Keep your hands away from your mouth.
5. Never lose your temper -- even if the prosecutor or judge acts disrespectfully to you.
6. No eye rolling, deep sighs, or other signs of frustration.
7. Speak loud enough for the farthest juror to hear, but do not yell.
8. Speak in simple, clear language. No lawyer talk or cop talk.
9. Never argue with the judge or prosecutor.
10. If you don't understand a question, ask for it to be clarified.
11. If you don't know the answer to a question, say you don't know. Do not make something up. Do not guess at the answer.
12. **ALWAYS TELL THE TRUTH**

E. Explain to Your Witness How She Fits Into Your Overall Case

1. Make sure the witness knows your theory of defense, and where she fits into it.

2. Make sure the witness knows what facts she has to testify about.

3. Keep it simple, and explain it in language the witness will understand – no legalese.

F. Sit down with your witness and review all of his prior statements

G. Do a mock direct examination with the witness

1. Make it as formal and realistic as possible

a. In a courtroom setting, if possible.
b. Don't just have a conversation about the direct examination – actually do it.

2. Ask the exact questions you are planning to ask at trial

3. Have the witness give the exact answers she is going to give at trial.

4. Discuss the questions and answers with the witness to make sure they are as effective as possible.

5. Keep doing mock directs until both you and the witness get it right.

H. Do a mock cross-examination of the witness.

1. Before you start the mock cross, explain the tactics the prosecutor is likely to use on cross.

a. Leading, yes/no questions.
b. Impeachment with prior convictions or bad acts.
c. Questions to show the witness is biased.
d. Questions that show the witness is unsure or mistaken.
e. Questions that suggest the witness is lying.
f. Questions that suggest the witness is unreliable.
g. Questions and statements that try to get the witness to lose his temper

2. Before you start the mock cross, give the witness a list of typical cross-examination questions the prosecutor is likely to ask. The go over effective answers to those questions.

a. Why didn't the witness go to the police or prosecutor with his story?
b. Questions showing the witness has a close relationship with the defendant.
c. Questions about inconsistencies between the witness's past statements and her trial testimony.
d. Are you lying now or were you lying then?
e. "You say X, the State's witness says Y, are you saying that the State's witness is a liar?"
f. Questions about whether the witness discussed her testimony with defense counsel or the defendant.
g. Questions about how and why the witness remembers the particular date in question.

h. Questions about whether the witness remembers any other dates around that time.

i. Any other questions particular to the facts of your case.

j. Any questions you know that your local prosecutor always asks.

3. Don't do the mock cross yourself. Get another lawyer to do it – preferably a lawyer the witness has never seen before.

4. Don't take it easy on the witness. The goal is to make the practice cross tougher than a prosecutor's real cross will be.

5. After the mock cross-examination, review the testimony with your witness and make suggestions for improvement.

6. Keep doing mock directs until both you and the witness get it right.

VI. Doing Your Direct Examination

A. See **Section IV: Organizing the Direct Examination**

B. How to Ask Questions

1. Your questions should be open-ended:

a. The kinds of questions reporters ask: who, what, when, where, why.

b. Ask questions that allow the witness to talk about things observed with his or her own senses – sight, hearing, taste, smell, touch.

b. Non-leading

NOTE: We should not view the prohibition on leading questions on direct as a bad thing. Non-leading questions are more effective because they make the witness seem more credible, and make the jury realize that the lawyer is not putting words in the witness's mouth. So do not try to "sneak in" a bunch of leading questions. As long as you have prepared your witness properly, you will do better with non-leading questions.

c. Avoid the lazy, boring questions that prosecutors always ask:

1. "And what happened next."
2. "I direct your attention to . . . "
3. "What, if anything . . ."
4. "Do you recall . . ."

d. Ask short, single fact questions:

EX: Do not ask: “what did the bar look like, and how crowded was it where the defendant was sitting.

Instead, ask: “Please describe the inside of the bar.”

“Exactly where was the defendant sitting in the bar”

“Tell us about the other people near the defendant”

e. Use the “looping” technique. This means using the last part of the witness’s previous answer as the starting point for your next question. This technique has several advantages:

1. It establishes the continuity of your questions, so it becomes impossible for the prosecutor to make successful objections on relevancy grounds.

2. It shows the jury that your questions are coming together into a coherent, persuasive story.

3. It allows you to emphasize the most important parts of the witness’s testimony.

4. It helps you make sure that your direct examination is following a logical, easy to understand progression.

EX: Q: How big was the man who came at the defendant in the bar?

A: About 6'2, 250 lbs.

Q: And what did this 6'2, 250 lb man do when he approached the defendant?

A: He grabbed the defendant by the shoulder and said “get out of my way.”

Q: When this 6'2, 250 lb man grabbed the defendant by the shoulder and said “get out of my way,” did he have anything in his hands?

A: He had a big hunting knife in his right hand, and he waved it in the defendant’s face.

Q: While he was waving the big hunting knife in the defendant’s face, did he say anything?

A: Yes. He said, “I’m going to cut you.”

C. How to Make Transitions Between Subjects

1. Use headlines or topic changing statements to the witness. Headlines are short statements that tell the witness and the jurors that the subject is being changed.

EX: “Let’s talk for a few minutes about the layout of the bar.”

“Now I’d like to talk with you about that knife.”

“Let’s get to some information about your background . . .”

2. Pause for a few seconds when changing the subject. A moment of silence draws the

jury's attention and gets everyone waiting to see what will come next.

3. Move to a slightly different place in the courtroom. By changing your physical location, even by a very little bit, you signal the jury and the witness that something different is coming.

D. Some Techniques for Getting Your Witness to Tell His or Her Story

1. Describe the setting and location before you get to the action.

EX: Describe the layout of the bar for us?
What kind of customers frequent that bar?
What do you hear as soon as you walk into the bar?
How does it smell?

2. Flashback and Flash Forward – this is where you start the story at a crucial point, have the witness testify to the essential facts of that point, and then go back, start the narrative from the chronological beginning, and develop it until it meets that crucial point again.

EX: Q: Why did you hit Smith with that beer bottle?
A: Because he had pulled out this big hunting knife, waved it in my face, and said he was going to cut me.

Q: OK, let's go back a few minutes in time. How did this get started?
A: Well, I arrived at Joe's bar at about 10:30. I thought some of my friends were going there, and we were planning on watching the game together.

Q: Tell us a little about Joe's Bar. Describe the physical layout for us?

3. Parallel Action – this is where you present two perspectives on the story a little bit at a time, going back and forth between them, until you end by bringing the two perspectives together.

EX: Q: What was Smith doing when you first saw him?
A: He was at the far end of the room, and was screaming at a waiter to get him another beer. He sounded really drunk. The waiter was refusing to get him another drink.

Q: And what was the defendant doing while this was happening?
A: He was sitting at the bar watching the game on TV. He wasn't saying anything.

Q: What did Smith do after the waiter cut him off?
A: He walked towards the bar. He was still cursing loudly, and he pushed a few people out of his way.

Q: While Smith was pushing his way to the bar, what was the defendant doing?
A: He was just minding his own business, watching the game.

4. Freeze Frame – this is where you choose an important moment in the case and stop the action to paint the moment in very clear, graphic detail, so the jury knows exactly why it is crucial to your theory of defense.

EX: Q: OK Mr. Client, please describe for the jurors how Smith looked at the moment he grabbed you by the shoulder at the bar.
A: His face was red, and he was really angry. He shouted at me to get out of his way.

Q: How did he smell?
A: He reeked of beer. That really sour smell. He put his face about six inches from mine and was yelling. The smell was terrible.

Q: And what did he do?
A: He grabbed my left shoulder with his right hand, and tried to shove me off the bar stool. When he couldn't knock me off, he reached down to his waist and pulled out a knife.

Q: Describe the knife for us?
A: It was a large hunting knife. About eight inches long, made of silver colored steel. It looked like it had a bone handle.

E. **LISTEN TO YOUR WITNESS**

Don't get so wrapped up in asking questions that you forget to listen to the answers. By listening carefully you will know whether the witness has left something out of an answer that you have to prompt him about. You will also recognize when the witness has said something that needs clarification or correction. **Be sure to listen.**

VII. Dealing With Objections

A. When the Prosecutor Objects to Your Questions

1. Pre-empt the objection -- Don't ask leading questions. They are not as good as open-ended questions, and they allow the State to interrupt your flow.

2. If an objection is sustained:

a. **Do Not Apologize, Do Not Thank the Judge**. Doing so not only makes you look wrong in the eyes of the jury, they make you look weak and foolish.

b. Ask the same question in a non-leading, non-objectionable form.

B. Objecting During the Prosecutor's Cross-Examination

1. Some typical grounds for objection are

a. Prosecutor is interrupting the witness.
b. Prosecutor won't let the witness answer or finish answering a question.
c. Prosecutor is harassing the witness.
d. Prosecutor is insulting the witness.
e. Prosecutor is making speeches, not asking questions.
f. Prosecutor is asking questions based on facts that are untrue
g. Prosecutor is asking questions about the defendant's invocation of a constitutional right (silence, counsel, trial).
h. Prosecutor is engaging in improper impeachment.

2. **Remember – All Objections Must Be Made On The Record**

3. If your objection is sustained, ask for a remedy:

a. Mistrial
b. Admonish prosecutor
c. Curative Instruction
d. Strike question
e. Other sanctions