

**NATIONAL DEFENDER TRAINING PROJECT
2017 PUBLIC DEFENDER
TRIAL ADVOCACY PROGRAM**

University of Dayton School of Law, Dayton, Ohio
Friday, June 2, 2017 to Wednesday, June 7, 2017

DIRECT EXAMINATION:

"ALLOWING OTHERS TO HELP TELL THE STORY"

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I. A Few Key Concepts

.A. Persuasive Storytelling: The Goal of direct examination is to persuasively have others tell your story or to discredit the prosecutor's case.

.B. The SIX Ps: "**Proper Preparation Prevents Piss Poor Performance!**" (John Delgado, Esq.)

.C. **Advances the Theory of Defense**

...

.D. You must have an "**AURA**" about yourself:

A = **ATTENTION** Get and Keep Your Jurors' **ATTENTION**.

U = **UNDERSTAND** Make Sure The Jurors **UNDERSTAND** Your Witness' Testimony.

R = **REMEMBER** Make Sure The Jurors **REMEMBER** Your Witness' Testimony.

A = **ACCEPT** Make Sure The Jurors **ACCEPT** Your Witness' Testimony.

.E. Keep the **Jury in Mind**

1. What you do must be considered from the perspective of the jury (or your trier of fact).

2. Try viewing your ideas through the eyes and minds of your potential jurors.

3. While delivering your direct, always consider the juror's ability to see, hear, understand, etc.

.F. YOUR Witness: The witness is in your possession and it is your responsibility to do all you can to ensure that your witness' testimony is successful.

.G. Persuasion

1. Communication is 65% non-verbal.

2. Use non-verbal communication (body language, key words, tone, pitch, pace, movement, gestures, etc.) to reinforce your message.

3. If you communicate one message with your words and a different one non-verbally, the trier of fact will believe the non-verbal message or not know which one to believe.

.H. Your witness is the Attraction: On cross examination, the focus is on you. On direct, the focus must be on your witness

II. Do I Put This Witness On?

.A. Does your theory of defense require you to put on this witness?

1. Test your theory of defense with this witness and without. Which is better? Why?

2. Benefits of calling this witness

- a. Directly supports your theory of defense
- b. Damage the prosecutor's version.
- c. Corroboration by witness supports theory.

3. Benefits of NOT calling this witness

- a. Good defense witnesses can help. Bad defense witnesses can destroy. Weigh the benefits against possible damage. Do you need it? Is it valuable enough?
- b. Keeps spotlight on the prosecution's case. Limits prosecutor's case and arguments.
- c. Even truthful witnesses may not be believed.
- d. Defense witnesses can fill or fix holes in the prosecutor's case.

.B. Choose quality over quantity.

- ...
- 1. Put up the best evidence and witnesses to back up your theory of defense.
 - 2. Having the body to say the words, does not make a defense. They must say it well!

III. INVESTIGATING For Direct Examination

.A. Investigation concepts.

1. Investigation Fact finding

- a. What are the facts? What does the witness have to say?
- b. Does the witness seem credible? Will s/he be a good witness?
- c. Help decide theory of defense?

2. Investigation Fact development

- a. Find facts that support or enhance your theory of defense.
- b. Seek details that make the witness' testimony real and believable.
- c. Collect corroborating documentation and locate other supporting witnesses.

.B. What do you need to know about your witness? **EVERYTHING.**

- 1. **History (background)** - educational, employment, military, family, criminal history, religious affiliations, health, vision problems, hearing problems, etc.
- 2. **Relations** - to client, other parties, witnesses, relatives of witnesses or parties
- 3. **Knowledge** - facts of the case, other witnesses or other parties, source of knowledge and reason for recollection

4. **Quality** - demeanor and attitudes, intelligence, willingness to cooperate, communication skills, ability to survive cross examination, etc.
5. **Actions** - With whom has this witness spoken about the case? police? prosecutor? written statements? contact with other witness? nature of that contact?

C. Is this witness essential to the theory of defense or case?

1. Is there a less dangerous means of presenting the evidence than through a witness who may be subject to cross examination? A document? A less "attackable" witness?
2. Is the witness' testimony cumulative, trivial or peripheral?

IV. PREPARING The Direct Examination: 13 STEPS

Once you have decided that your theory of defense allows and requires to call *this* witness, you must have an organized method of preparing. There are many methods of preparation. What follows is one method. It is one method of many, but it is one that may work for you. Whether you use this one or another is immaterial, so long as you develop one that works for you.

A. STEP 1: Review Everything

1. Read everything document in the file. Then re-read everything that you have about this witness.
2. **"Stream of consciousness note taking"** - anything that pops into your mind about this witness or this witness' testimony should be jotted down. By writing down these thoughts and ideas, you preserve your initial reactions, as well as those flashes of brilliance (that arrive invariably while you are in the shower!) about trial tactics and direct examination techniques that will be perfect for this case and/or this witness.
3. Brainstorm with others – including others who are not lawyers.

B. STEP 2: Juror Questions and Emotions Lists

1. **Anticipate the jurors thoughts about and reaction to your witness and your witness' testimony. (Assess your witness).** This includes the factual thoughts and the "gut" or emotional reactions.
2. **Juror Questions List**
 - a. What questions will "normal" people i.e. non-lawyers ask about this witness? about the witness' testimony? What are the motives of the witness?
 - b. **Write them down.**
 - c. Which questions work for you? against you?

3. Juror Emotions List

- a. What will the jurors "feel" about your witness and his/her testimony?
- b. **Write them down.**
- c. Which emotions work for you? against you?

C. STEP 3: Determine your Objectives

1. How will this witness advance your theory of defense?
2. What are your **legal, factual, emotional and "believability enhancement" themes and objectives with this witness?**

3. Factual Themes

- a. What do you want the jurors to believe after hearing from this witness?
- b. Every objective must advance your theory.
- c. Develop objectives that appeal to people, not lawyer.

4. Emotional Themes

- a. How do you want the jurors to **feel** when the witness is finished testifying?
- b. What words would you like them to use to describe the witness?
- c. Emotional objectives must advance your theory.

5. "Believability Enhancement" Objectives

- a. Make the witness be and appear to be believable in the eyes of your jurors.
- b. What facts can you bring out? What things can you have the witness do? What can you do to make this witness more believable?
- c. Develop in the jury one of the following reactions: **Identification**, "The Witness is like me;" or **Understanding**, "The Witness is nothing like me, but I understand how s/he came out that way."
- d. Create a connection between the witness and juror i.e. "That's what I would have done."

6. Legal objectives

- a. Is this witness necessary to establish a legal point?
 - the absence of an element?
 - an affirmative defense?
 - to generate an issue?
 - to lay an evidentiary foundation?
- b. List the legal point(s) that must be established.
- c. List the legal point(s) that this witness must establish.
- d. List the facts that this witness must testify to, to satisfy the legal objective(s).

7. Re-evaluate and Reduce

- a. We all have limited attention spans. Re-evaluate your objectives, reducing them to the essentials. Discard any that you believe are not important.
- b. Select, from among all of the objectives lists, only those objectives that are critical for this witness.

D. **STEP 4: Marshal the facts**

1. Ask yourself, "what am I trying to achieve, and why?"
2. For EVERY THEME, list EVERY SUPPORTING FACT.
3. Consider every fact in the case in light of the particular theme. Repeat this process for each objective, going through the facts over and over, considering the next objective each time.
4. Don't settle for just the obvious facts. Develop reasonable and logical extrapolations.
5. Ask yourself: Which facts lead you to believe that the stated objective is true. Write those facts down. Then look for more!
6. Marshaling the facts develops depth and believability in your theory. It provides new facts that support your objectives that had not been identified before.

E. **STEP 5: Develop story(s), images and key words**

1. Identify and develop the **witness' story(s)** and develop **key words**.
2. Whatever information you want the witness to convey, put it in story form.
3. **Why Stories?**
 - a. Stories create and maintain interest.
 - b. Stories provide a context into which the jurors may understand and place the facts. It allows the jurors to discern which facts are important and which are insignificant.
 - c. Stories enhance recall.
 - d. Stories encourage empathy and increase believability.
4. **Identify the witness' story(s).**
 - a. A single witness may have one or several relevant stories. Whatever the witness has to offer, be it short or long, consider how to present it in story form.
 - b. Gives your jurors a better sense of the witness and makes the witness more "real".
 - c. You work with the witness as they are the storyteller. The lawyer's role is that of facilitator.
5. **Develop key words**

- a. "Words Are Magic". Maximize the effectiveness of a witness' testimony e.g. "scared" or "in fear" is less compelling than "terrified," or "I knew I was about to die."
- b. Consider the best words and the worst words that the witness can use. The witness must use the best language to make their point and avoid the bad phrases.
- c. Develop word that **maximize or minimize** the desired impression.
- d. Develop descriptive, poetic language.

F. STEP 6: Organize persuasively

1. Organize your themes and your witness' story(s) persuasively and effectively. Organization is a key tool of persuasion.

2. Where To Begin Your Direct

a. Traditional Organization: Ease-In

- Allows the witness to get comfortable on the stand.
- Allow the witness to ease into the testimony.
- Allows the witness to get over the nervousness of being on the stand.
- Allows better communication of the important points better.

b. Modern Organization: Primacy and Recency

- We remember best what we hear first and last.
- Jurors will perceive the first and last points as most important.
- Identify your best one or two points. This points should be the first and last points you have the witness make.
- Consider starting with questions that establish the theme of the witness' testimony superficially, turning to background information and returning to the theme.

3. Other Organizational Issues

a. Background / Scene / Action organization - This approach is logical and easy to follow.

- (1) Witness background
- (2) Event background
- (3) Scene of the action described
- (4) Action described

b. Logical progression of your questions; from general to specific

c. Complete a topic before moving to another.

4. Do you disclose weaknesses?

a. The "**majority opinion**" recommends that you disclose weaknesses to maintain credibility and take the "sting" out of disclosure by the adversary. The disclose must be made in a way that reduces the impact of the weakness.

b. The "**minority opinion**," sometimes referred to as the "sponsorship" theory, recommends that you do not disclose weaknesses because doing so increases, rather than reduces, the impact of the weaknesses. "If they are admitting that much, imagine how bad it really is" is representative of this view.

- c. **If you do plan to disclose weaknesses**, consider the following:
- Place it in the middle where it is least likely to have a major impact and least likely to be remembered.
 - Only disclose weakness that you are sure will come out.
 - Present the **good stuff before the bad stuff**.
 - Present the weakness in the best possible light.
 - Attempt to reasonably minimize the weakness by using minimizing words and questioning about it briefly.

G. **STEP 7: Anticipate cross examination**

1. Anticipate the weaknesses in witness' attitude, testimony and history for cross examination.
2. What are the weaknesses of this witness?
 - a. Easily riled?
 - b. Have an "attitude?"
 - c. Will s/he hold up on cross?
 - d. Does s/he answer well, volunteer too much or shade the answers?
3. What are the weaknesses of this witness' testimony?
 - a. Holes in the story
 - b. Unbelievable story
 - c. Absence of expected corroboration
4. What attitude/demeanor do you anticipate from the prosecutor during cross.

H. **STEP 8: Prepare re-direct examination**

1. Be very careful with re-direct. Use it to rehabilitate or introduce something that is necessary and failed to introduce during direct (if you can).
2. Re-direct can be dangerous. Because it is difficult to plan the result, often questions that are unartfully crafted, open doors, and permits re-cross providing the prosecutor with another chance to hurt your client and the witness.
3. If re-direct is necessary be brief. It is not necessary to refute or respond to every point made by the prosecutor on cross examination. Stick to the important ones.

I.. **STEP 9: Prepare Your Trial Props**

1. Doing things and using things during the trial heighten interest, clarify facts, increase recall and promote acceptance.
2. Using slides, videos, pictures, etc., or moving around during the presentation usually is more interesting than just standing still and talking. Appeal to the jurors' senses.

3. Use actions and creations during trial

- a. Use re-enactments, demonstrations by the witness
- b. Create and use maps, diagrams, pictures, things written on flip charts
- c. Rebuild the interrogation room where your client confessed in the courtroom.
- d. Use clothing, toy guns, knives or weapons similar to the ones involved in the case. Use Sweet N' Low packets to show a gram of cocaine, or an ounce of oregano to show an ounce of marijuana. Such things help illustrate the witness' testimony.

J. **STEP 10: Prepare the other parts of the trial to aid your direct examination**

1. The trial is an "integrated whole." Each part of the trial should be used to support and advance the other parts of the trial and the theory of defense.
2. Think about how each part of the trial can be used to aid the testimony of this witness. The other part of the trial may be used to undercut anticipated cross, to minimize weaknesses, to corroborate strengths, etc.
 - a. What **pre-trial motions** can/must be filed to aid the direct examination of this witness?
 - During a suppression motion, "lock down" a witness' testimony that will corroborate the direct of a defense witness.
 - File a Motion In Limine to determine whether a particular defense witness' prior conviction or an item of evidence will be admissible.
 - b. What **voir dire questions** can be asked to aid the direct examination of this witness?
 - c. What **types of jurors** are most desirable considering this witness and his/her testimony?
 - d. What can/must be said in **opening statement** to aid the direct examination of this witness?
 - e. What **cross examination** of state's witnesses can/must be conducted to aid the direct examination of this witness?
 - f. What **jury instructions** can/must be requested/given to aid the direct examination of this witness?
 - g. What must be said in **closing argument** to aid the direct examination of this witness?

K. **STEP 11: Prepare your questions**

1. Review your themes & objectives lists and marshal the facts sheet.
2. Should you write out your questions for each theme? It depends on your organizational style.
 - a. Writing out your questions can be beneficial however it is time consuming and may prevent you from actually listening to the answers.
 - b. It requires you to think about the best way to ask the question. It also encourages better use of good key words.
 - c. If you don't write out your questions, write out the themes and facts that must be covered.

- Use a separate page for each theme / objective (Posner and Dodd)
- Easy to re-organize or discard.

3. Choreograph the direct

- a. Build movement into your direct. The absence of movement during the direct will add to the boredom potential substantially. Movement adds interest to the exam.
- b. Plan when, where and how YOU and YOUR WITNESS will move.
- c. Plan how to use your voice; loud, soft, when to use the appropriate tone of voice, etc.

L. STEP 12: Practice

1. Practice your questions and practice with props and demonstrations.
2. If you don't practice out loud, alone or in front of someone else, at least, go through the questions and movements in your head. Ideally, ask a friend, spouse, etc. for feedback. If not, a mirror will do.
3. Sometimes ideas that seem wonderful in your mind or on paper, don't work when given sound. Try it, and find out before you are standing before a jury.
4. Practice demonstrations and practice with demonstrative aids or items of tangible evidence. A great demonstration about the ease of misfiring a gun may fall flat if you can't get the gun open when standing before the jury.

M. STEP 13: Tune-up

- ... Review and refine your direct examination. This is the time to tighten-up your examination, to add anything necessary, to discard anything unnecessary, etc.

V. PREPARING Your Witness:

.A. General thoughts

1. **The witness stand is an alien environment.** It has strange rules, a foreign language and an odd Q & A style of communication. Keep this in mind when preparing the witness for testimony.
2. **Don't forget to ask your witness.** S/he may have good suggestions and insights about what will work.
3. **Explain why.** Your witness must understand why everything that s/he is to do or say is necessary. If your witness understands "why", s/he will respond better on direct and cross.

B. STEP 1: The Basics

1. **Logistics**

- a. The physical layout of the courtroom
- b. Courtroom location, number, directions, etc.
- c. Court reporters, sheriffs, bailiffs, jail guards, etc.
- d. Time to arrive, where to wait, what to do upon arrival, who will meet the witness
- e. How the witness will be called into the courtroom, the oath, etc.

.. 2. Basics of law, procedure and evidence

C. STEP 2: Explain Witness' Role

1. Explain your **theory of defense**, the **witness' role** in that theory and it's **importance**.
 - a. If the witness understands the **big picture**, this will help the witness to know what is important to tell you and tell the jury.
 - b. **Beware** giving too much detail or explaining too much to a potentially hostile witness, as they may use this information against you or tell your adversary what they learned.
 - c. Your explanation should clarify what information is required of the witness, how it fits in with the overall theory and why it is important.

D. STEP 3: Discuss Appearance and Communication Skills

1. Refine the witness' appearance and communication skills.
2. Discuss how to dress for court
 - a. Proper dress is about **respect** for the court, the trial process and the jury.
 - b. Be **specific**. Don't merely say, "Dress nicely," or "Wear what you would wear to worship services."
3. **Discuss non-verbal communication and refine these skills**
 - a. May require **Q & A sessions**
 - b. **Explain** what non-verbal communication is and its **impact**
 - what the jurors believes
 - the jurors' impression of the witness
 - believability
 - c. **Body language**
 - d. **Voice and manner**
 - volume - loud enough for the farthest juror to hear
 - tone - should be conversational but congruent with the content of the testimony
 - polite, always polite
 - pause before answering to ensure that the question is completed; to ensure that witness understands the question and, on cross, to permit you to object
 - Nervousness is OK - Acknowledge witness' reality
 - e. **Words Choice**
 - Encourage **Simple words** - "bar" talk, per Terry MacCarthy e.g. "Told me" rather

than "indicated"

- Encourage **Fact words** - not opinions, characterizations or conclusions; "6'2" and 240 lbs." rather than "big"; "Light blue button down shirt, khaki pants and docksiders" rather than "preppie attire"
- Encourage **Power words** - Words that communicate certainty.
- Avoid **Hedge words** (I think, probably, I submit, we contend, etc.)
- Avoid **Unnecessary intensifiers** (really, very, extremely, etc.)
- **Hesitations or filler words** (ah, ladies and gentlemen, well, etc.)
- **Question intonation** (when your voice goes up at the end of a sentence)

E. **STEP 4: Review Prior Statements**

1. Review all of the witness' prior statements with your witness.
2. Let your witness read all of his/her prior statements, especially those given to the State.

F. **STEP 5: Practice Questions and Answers**

1. Practice and refine your questions and answers with the witness.
2. Encourage **NARRATIVE ANSWERS** by the witness
3. **Conduct a mock direct examination** session with your witness.
 - a. **Ask the exact questions** and explain why you are asking those questions; don't merely talk about the topics you plan to ask about.
 - b. **Get the exact answers the witness will give** - as they will answer in the courtroom.
 - Improve the quality of the answer - The answer may not be clear, may not bring out all of the facts, use poor language, include irrelevant information, etc. You must help the witness answer clearly and effectively.
 - You are not putting words into the witness' mouth. You are ensuring that the words that do come out are clear, complete and effectively communicate the information.
4. Tell the witness to look at the jury, where appropriate or at the questioning lawyer.

G. **STEP 6: Practice Cross and Re-direct**

1. Prepare your witness for **cross examination and re-direct** examination.
2. **Explain "typical" cross examination objectives and tactics.**
 - a. Leading questions
 - b. Attempts to limit the witness to "yes" or "no" answers
 - c. Efforts to show that the witness is unsure, mistaken, biased or lying
 - d. Efforts to show that the witness is not reliable or a believable person
 - e. Efforts to get the witness upset or angry, in the hope that the witness will appear violent, rash, less believable, or will say something foolish or wrong.

3. **Explain "typical" cross examination techniques** that you expect will be used.
 - a. Asking about the witness' recollection about other days around the time of the crime.
 - b. Asking why didn't the witness tell this information to the police.
 - c. Asking how does the witness recall this particular date.
 - d. Exploiting the witness' relationship with the client to suggest that the witness is lying.
 - e. Making big issues out of minor variations or inconsistencies with the testimony of others witnesses or with the witness' prior statements.
 - f. Asking the "lying then or lying now" question.
 - g. The old, "You say A. Witness X says B. Is Witness B lying or mistaken?" technique.
 - h. You discussed this information with the defense attorney and others and were told what to say.

4. **Explain this prosecutor's anticipated cross examination objectives and why.**

5. **Practice cross Q & A session.**
 - a. Have someone else play the prosecutor's role. Don't take it easy on the witness.
 - b. Consider several different styles - an aggressive, fast paced, in-your-face style or a friendly disarming pleasant style cross.

6. **Explain the rules of re-direct and your objectives.**
 - a. Explain your **objectives**, why and how they fit in with the theory
 - b. Conduct a **Q & A** session for the re-direct questions.

VI.DELIVERING Your Direct Examination.

- A. Remember your "**AURA**" and being **jury centered!**

- B. **Your Organization - Start Well**
 1. **Traditional or modern "primacy" approach**
 2. **Primacy** - You may start with the **ultimate question**.
 3. **Traditional** - You may wish to **ease in** to the exam

- C. **Your Movement, Body and Voice**
 1. **Your movement**
 - a. Movement **adds interest**. Exciting movies aren't called "action" pictures for nothing!
 - b. Your movement should **not detract** or distract attention from the witness
 - c. Your movement should be intentional. **Limit** your movement.

 2. **Your witness' movement**

- a. **Build in** as much movement of this witness as is possible e.g. witness draw diagrams, show photos, demonstrate actions, handle exhibits, etc.
- b. Good witness? Get him or her off the stand and as close to the jury as much as possible.

3. Your Voice

- a. A lack of variety in the examination makes any direct **boring**.
- b. Inflection in your voice will create interest. If your tone of voice is monotone, your witness will begin to answer in the same monotone. If you sound interested, your witness will sound interested and be more interesting to your jurors.
- c. **Variety in your voice:** Pace, tone, volume, pitch
- d. **Belief** - Your belief in your witness must come across. If you do not believe your witness, do not put the witness on the stand.

4. Congruity

- a. You and your questions must be congruent. Your tone, volume, pace, word choice, etc. must be congruent with the content of the question and the content of the witness' testimony.
- b. **Mirror the emotion**
- c. Your pace, tone, etc. must be congruent with the message

.. D. Basic Questioning Thoughts and Techniques

1. **Main objective: Get THE WITNESS to speak.** The witness must be the focus of attention, not the attorney.
2. **LISTEN** to your witness and her answers.
3. **Avoid Prosecutorial techniques**
 - a. The "What, if anything,..." questions.
 - b. The "And then what happened?" or the "What happened next?" questions.
 - c. These are examples of being unprepared

4. Simple and short questions

- a. **Single issue** or single point per question
 - Avoid compound, long questions
 - Simple questions are understood easily by your witness and your jurors.

5. Open-ended questions

- a. Ask questions that seek and solicit a **NARRATIVE** response.

- b. **Journalism questions** - Ask questions that begin with **who, what, when, where, why, how, tell us, describe, explain**, etc. These are the questions that will let the witness speak, the objective of direct examination.

6. **Leading questions? RARELY.**

- a. Leading questions reduce your and your witness' credibility and the impact of the witness' testimony because it appears that you are putting words into your witness' mouth.
- b. Leading sometimes is okay
 - Preliminary or inconsequential matters
 - Hostile witness

7. Avoid or clarify "**quibble**" words

- .. a. "Quibble" words are unhelpful qualifiers and words that are subject to interpretation. Unhelpful qualifiers are words like very, really, extremely, so, etc.
- .. b. Words that are subject to interpretation usually are adjectives, such as upset, big, fast.
- .. c. These words do not clearly define the testimony for the trier of fact. How upset is upset? Is really upset any clearer?
- d. Prepare your witness not to use these words. Prepare them to offer the facts instead. If they do use them, ask a clarifying question.

8. **Transitions**

- a. Transitions are used to let everyone know that you are changing the subject or to highlight an important question or answer.
- b. **Pauses**
 - Those golden moments of silence in the courtroom, the ones that terrify lawyers. Those moments of silence are powerful weapons and should be used.
 - A moment of silence between topics signals a change in the subject matter of the questions to the witness and the trier of fact.
 - Silence lets the good stuff sink in and lets the jurors think about and **feel the emotional impact** of the testimony

.. c. **Headlines**

- Use to **change topic or objectives**
- **Orient the jurors** and make the testimony easier to follow
- **Orient the witness** and make the questions easier to answer e.g. "I'd like to ask you about the lighting in the alley"; "Lets talk about the moment when you first saw Mr. Violent."; "Can I stop you right there. What was going through your mind at that moment."; "I have some questions about your relationship with Mr. Smith."

9. **Avoid "recollection stage" of questions and answers.**

- a. The recollection stage, ("Do you recall seeing....") can lead to confusing and inefficient responses.
- b. For example, if you ask "Do you recall if the person had a moustache?" and the witness says "No," does the witness mean that she didn't see a moustache or that she doesn't recall seeing a moustache or doesn't recall whether the person had a moustache or not. To avoid the problem, leave the "do you recall" part of the question out.
- c. Further, including this stage in the question suggests uncertainty. If the question suggests uncertainty, the witness may become or appear uncertain.

E. Advanced Questioning Thoughts and Techniques

1. Present tense questions

- a. Ask questions in the present tense, rather than the past tense.
- b. This techniques adds interest and immediacy to your witness' testimony. If you ask the questions in the present tense, the witness will begin to answer in the present tense.
- c. Q: Where were you on May 2, 1993 at 1 a.m.? A: I was in Red Alley.
Q: Now Mr. Client, it is May 2, 1993 at 2 a.m. in Red Alley. What are you doing?
A: I am standing there and this big guy is walking toward me.

2. Sense questions

- a. Ask questions that seek answers that focus on the **senses**. These questions seek evocative answers to which the trier of fact will relate.
 - **Hear**
 - **See**
 - **Smell**
 - **Taste**
 - **Touch**
 - **Feel physically**
 - **Feel emotionally.**
- b. Focusing on colors and familiar objects at the scene will make the scene come to life for the jurors.

3. Looping technique

- a. Use the words of a question or answer in a succeeding question or questions.
- b. These can be planned and/or spontaneous.
 - Q: How big was the man? A: He was 6'2" and weighed about 225.
 - Q: What was the 6'2", 225 lb. man doing when you saw him? A: Hitting Mr. Client.
 - Q: When the 6'2", 225 lb man was hitting Mr. Client, what was Mr. Client doing?

4. Juror's Voice Technique

- a. Ask the questions that are in the jurors' minds. (See your "juror questions list")
- b. Ask the questions using the same words and the same tone of voice that the juror would use if asking the question. Hear it in your head.

- c. You become the juror's representative. The jurors will come to rely on you to ask the things they want to know. This also takes the sting out of the prosecutor's points
 - d. For example:
 - Q: How could you have seen it wasn't Mr. Client when you were driving the car at the same time as you say you were watching the fight?
 - Q: How could you possibly recall such details about a single day 14 months ago?
 - e. A well prepared witness will knock these questions out of the ballpark!
5. **Jury instruction questions.** Use the language of the anticipated jury instructions in framing questions and refining answers.
6. **"What were you thinking / feeling" questions**
- a. Ask questions that disclose the witness' thoughts, feelings and motivations, particularly at the critical time for the witness.
 - b. These question humanize the witness and help juror identification.
 - Q: "As you saw the person being robbed, what were you thinking?"
 - Q: "When you heard that your son was charged with shooting someone on Saturday, May 3, what went through your mind?"
 - Q: "You told us that he came at you with a knife. What were you feeling at that moment?"
7. **Emphasis**
- a. Highlights, clarifies and adds interest
 - b. Placing **emphasis** on a particular word in a sentence can change the meaning or focus of the question.
 - Q: **WHERE** was Fred when you first saw him?
 - Where **WAS** Fred when you first saw him?
 - Where was **FRED** when you first saw him?
 - Where was Fred **WHEN** you first saw him?
 - Where was Fred when **YOU** first saw him?
 - Where was Fred when you **FIRST** saw him? etc.
 - c. **Pausing** after a particular word in a sentence can change the meaning or focus of the question.
 - Q: Where..... was Fred when you first saw him?
 - Where was..... Fred when you first saw him?
 - Where was Fred..... when you first saw him?
8. **Flagging** a question will give it emphasis.
- Q: "Now, Mr. Witness, this question is very important, so please listen carefully before answering...."
 - Q: "What is the one thing that stands out most in your mind?"
9. **Stretch out / shrink down technique**

- a. The "**stretch out**" technique seeks to maximize the impact of information by "stretching out" answers. It can be used to make something big seem bigger, something far seem farther, something slow seem slower, etc. For example:
 To show that the client stood far from the shooting and, therefore, was not involved;
 Q: You told us that Mr. Client was across the street from where the shooting took place. I'd like to ask you about how far away he was. First, is there a sidewalk?
 Q: How wide is it?
 Q: Is there a lane where cars park on the south side of the street?
 Q: How many lanes of traffic going south?
 Q: How many lanes of traffic going north?
 Q: Is there a lane where cars park on the north side of the street? etc.
- b. The "**shrink down**" technique seeks to minimize the impact of information by "shrinking it down." It can be used to make something fast seem faster, something minor seem even more minor, something close seem closer, etc. For example:
 To show client stood close to the shooting and therefore, was not involved:
 Q: You told us that Mr. Client was across the street from where the shooting took place. How close was he to Mr. Decedent at the time the shots were fired?
 A: Pretty close. He was just across the street. He's lucky he didn't get hit himself.

10. **Influencing words**

- a. The words included in the question can influence the answer.
- b. Decide what answer you want and use the language of the desired answer to ask the question.
 - If you want something to seem far, ask "How far?"
 - If you want something to seem close, ask "How close?"
 - Short/tall; big/small; fast/slow. etc.
- c. Your question may presuppose a desired fact. "Did you see THE gun?" versus "Did you see A gun?" This presumes the existence of the gun. The jurors and the witness are more likely to believe that a gun was involved and seen by the witness.

11. **Stop action or Freeze frame technique**

- a. Have the witness focus on a specific moment or part of an event and have her describe it in detail. For example:
 Q: "Let me stop you there. Please describe Mr. Aggressor at that moment."
 Q: "Where was the knife?"
 Q: "Where was his other hand?"
 Q: "What was he saying?"
- b. This technique brings a critical moment to life by presenting substantial detail.

F. **Techniques for Problem Witnesses**

1. Non-responsive answers or who won't stay on the subject
 - a. Take the blame - "I'm sorry, my question wasn't clear. Let me try again."

- b. Explain what you want - "Mr. Witness, I'm trying to find out about whether you got a look at the face of the attacker. Do you understand that? Now, did you see his face? Can you please tell us about it?"
2. Who has a bad attitude (occasionally, your client)
 - a. Confront it.
 - b. Your jurors are taking it in. "Mr. X, you seem upset. Would you like to tell the ladies and gentlemen of the jury why you are upset?"
 3. Who repeatedly refer to **inadmissible evidence**: Explain the rules, but be nice!

Q: "Mr. Witness, the law doesn't allow you to offer your opinion about Mr. Victim. When I ask you a question about him, please just tell us the facts that answer the question. OK?"

Q: "Ms. Witness, the law doesn't permit you to tell us what you heard in the neighborhood. That is called hearsay. You can tell us only what you saw, you heard. Not what someone else told you. Do you understand what I mean by that?"
 4. Who gives an **unexpected bad / fatal answer**
 - a. Prevention, through preparation, is the best technique.
 - b. There are no good ways to handle this. Seek the lesser of evils.
 - Ignore it and hope the jurors didn't hear it. At least you aren't making a big deal out of it for the jurors.
 - Claim surprise and cross examine the witness.
 - "You just said.... Is that what you meant to say?"
 - Refresh recollection with previous interview notes. Q: "You and I just spoke about this yesterday, didn't we?" Q: "Didn't you say X, not Y?" Q: "Can you explain that?"
 - **Fail-safe response** - Approach the bench and hope for a good plea!
 5. Who is **forgetful**
 - a. Refresh recollection
 - b. Use a document as "past recollection recorded"
 - c. Ask for a recess
 - d. Lead the witness - option of last resort

G. Storytelling and picture painting techniques

1. **Scene Before Action.**
 - a. Before describing the action of a story, tell the jurors about the place where the events are happening. This gives context for the story; gives the jurors a place to put the people and events to follow.
 - b. Sometimes a **physical description** of the location is required.

Q: I'd like you to tell the ladies and gentlemen of the jury about Red Alley. Can you please describe it?

Q: If I were walking in it, what things would I see?

Q: What does it smell like?

c. Sometimes the **emotional landscape** must be described.

Q: What kind of place is Joe's Bar? A: It's a filthy biker's bar.

Q: Can you describe the people who have been there when you've been there in the past?

A: They're all biker's, big guys with tattoos who get drunk and like to mess with people.

Q: What activities have gone on there when you've been there? A: There are always fights, every night I was ever there.

d. Having set the scene, you can describe the action using any of the techniques described below.

2. **Flashback or flash forward** - Start the story at the point that is most critical for your theory. Then, flash back to something earlier or forward to something later. For example:

Q: Mr. Client, why did you hit Mr. Jones?

A: He threw a beer in my face and was reaching for a pool stick. I hit him before he got the stick and smacked me with it.

Q: Let's back up a moment, and please, tell us how this all started?

A: I was in the bar with a few friends and this guy was drunk and

3. **Parallel action development** - Present the story of different parties separately, a little at a time, until you bring them together at the critical moment. For example:

Q: Ms. Witness, what was Mr. Client doing at this time?

A: He was sitting there minding his own business, drinking a beer at the bar.

Q: While Mr. Client was minding his own business, what was Mr. Accuser doing?

A: He was shooting pool.

Q: How was he acting?

A: He was screaming at some guy, accusing him of taking his quarter. He was pretty drunk and pretty loud.

Q: How did Mr. Client come to fight with Mr. Accuser?

A: Mr. Accuser swung the pool stick at the guy he was playing pool with and missed. He hit Mr. Client. As Mr. Accuser was winding up again, that's when Mr. Client hit him.

4. **Freeze frame** - Select the critical moment in light of the specifics of your theory and paint it in minute detail so that your jurors see it exactly as it was. For example:

Q: Mr. Witness, you told us that you saw the whole thing. Can you tell us what you saw?

A: Yes, I saw Mr. Deceased running at Mr. Client with a table leg and Mr. Client shot him.

Q: I'd like you to tell us about Mr. Deceased and what he was doing. First, How big is he?

A: He is a big man, 6'2", maybe 225 lbs.

Q: How was he built?

A: He was real strong. Built kinda like a weightlifter. Big arms and all.

Q: Tell us about his clothes?

A: He had on a black tank top with something like "...Meanest SOB in the valley" on it.

Q: What else was he wearing?

A: Jean shorts, cutoffs, black combat boots....

5. The **Interview** or the **Investigation** - Tell the story by following the police investigation or the interview of an important witness.

Q: Officer Jones you told us that you were the investigating officer? Was Mr. Witness on the scene when you got there? A: Yes

Q: Did you talk to him? A: Yes.

Q: Did he tell you he saw the guy who did it? A: Yes

Q: Did you ask him whether he could describe the guy?

A: Yes. He said he could.

Q: Tell us about the questions that you asked him?

6. **Panorama to zoom** - Put the story into context. Question the witness about the big picture and move to questions about the specific important things. For example:

Q: Can you tell us about the area?

A: It's a nice neighborhood. There are row houses on both sides of the street. Cars park on both sides too. There's a little Ma & Pa grocery on the corner. It's nice.

Q: What kind of day was it?

A: It is a beautiful day. Real sunny, the sky was blue and it was real warm. In the street, some of the kids were playing stickball.

Q: Did you see Mr. Violent in the area?

A: Yeah, on the corner with a group of guys, wearing a blue coat and had a black steel revolver in his right hand.

Q: Tell us about the gun?

7. **The walk through.** Directional comments are confusing and meaningless too often. Think about the homicide police report; "The body was lying in a northerly direction with the head facing in a westerly direction and the feet facing the southeast...." Not very helpful. Instead, select a place to start and question the witness about the things they see to their right, their left, in front, etc. as they walk through the scene. For example:

Q: Officer Jones when you walked into the alley, what did you see?

A: I saw a body.

Q: Please describe the way the body was lying as you were looking at it?

A: It was face down. The person's face was to the left...

Q: Whose left?

A: My left and his left. His face was facing kind of away from me.

... 8. **Chronological** - Easy to follow, but it's less interesting and harder to highlight the important stuff.

H. Objections

1. **Your objections to the prosecutor's cross examination.**

a. Can you object? Is the prosecutor doing something improper? Can you win? at what cost?

- b. Should you object?
 - Your objections must be consistent with your theory.
 - Does the question hurt the witness? damage your theory? If the answer is no, why object?
 - Jurors dislike objections. They feel excluded and believe that you are hiding something from them. So, even if the objection is proper, is it worth the price?
- c. Protect your witness. If your witness needs help, step in with a proper objection.
 - Harassment, too fast paced
 - Prosecutor won't let witness answer
 - Interrupting the witness
 - Remember, a good witness may be able to handle it.

2. **Objections by the prosecutor to your direct examination**

- a. Prevention; don't ask objectionable questions.
- b. Make 'em pay
 - Tell the jury that you won; "Thank you, your Honor. Mr. Witness the Judge has ruled that the question is proper. You may answer the question."
 - Repeat the question; "Let me state the question again. Why do you say that Mr. State's Witness is known to be a lying scumbag in the neighborhood?"
 - Summarize what the witness said; "Before the objection, you told us that Mr. Victim was drunk, had a large knife and was looking for my client. Had you finished the answer or is there more you'd like to add?"
- c. Don't apologize or withdraw the question. Rephrase the question so that the judge will allow it.
- d. Use proffers and other strategies to get the court to allow an important question.

I.FINISH STRONG: You should save something with high impact and substance for your last point.

VII>Your Client in the Courtroom and on the Stand

A. To Testify or Remain Silent

1. There should be no set rule. Like any other witness, the decision to have a client testify depends on the quality of the client as a witness and the value and necessity of his/her testimony. Remember, this is the client's decision, but should be reached with the advice of counsel.
2. Recent research suggests that jurors expect the client to testify and held it against him or her when s/he didn't. However, the same study found that when the client did testify, the testimony did more harm than good far more often than not.

B. Should the client show emotion?

1. Traditional wisdom suggests that clients shouldn't show emotion in front of the trier of fact. However, a lack of emotion under the circumstances seems unnatural. Your call.

2. If the client will be emotional, be sure that the emotion is consistent with the theory of defense.
3. Anger and violence are not suggested, but frustration and righteous indignation may be fine.

C. Over preparation? No such thing with your client

1. Everything done to prepare a witness for direct, should be done to prepare your client.
2. Discuss how your client should behave in the courtroom. Remind her that someone on the jury will always be watching.
3. Practice denials: Just saying "no" may not have enough force. Tell your client to give the denial some verbal "ummph" and add something like "No, I didn't do it," "No, that is not true" or the like.

D. References to your client

1. Physical reference.

- a. Do not have witnesses point at your client. You shouldn't do it either.
- b. You and/or the witness become just another accusing finger. Clients have suggested that this makes them uncomfortable.
- c. If you must, gesture to your client using an open hand, palm up. Preferably, walk over to the client or ask the client to stand.

2. Verbal reference

- a. Have witnesses call your client by name, preferably a less formal name. John is better than Mr. Client. If a judge won't permit this, call him John Client. CAVEAT: If you are considerably younger than your client or circumstances suggest that it will appear disrespectful to use the client's first name alone, don't do it.
- b. Never use the dehumanizing phrase "the defendant." The only way to ensure that you do not use this phrase during the trial is not to use it at all. Calling your client by name will help you to see him or her as a person. Where a generic name is needed, such as in motions, substitute the word "accused" for defendant.

E. Beware of, and counsel against, overly broad responses

1. **Opens the door** to otherwise irrelevant and inadmissible testimony.
2. Avoid generalizations like:
 - a. "I never have done..."
 - b. "I wouldn't even know what that stuff looks like."
3. This is a good suggestion to discuss with all witnesses.

F. Organization for the client's direct

1. The beginning (The important stuff)
 - a. Consider beginning with an absolute denial and brief explanation why. Client wants to say it and jurors want to hear it. The explanation orients the jurors. A simple "No" isn't enough. A little added punch is necessary.
 - b. Q: "Mr. Client, did you do it?"
A: "No, I didn't."
Q: "If you didn't do it, where were you at the time of the shooting?"
A: "I was home with my mother and girlfriend the whole night."(Pause)
Q: "Can you tell us about yourself?"
2. The middle (The bad or less important stuff)
 - a. Confront prior record, prior inconsistent statements and other bad stuff in the middle where they are more likely to be minimized or forgotten.
3. The end (More important stuff or the same important stuff from the beginning)
 - a. Select a second strong point and question about it here. Alternatively, repeat the same point with which you began.
 - b. Consider ending with a denial again, if asked in a slightly different way to avoid an objection.
 - c. Consider closing with a trilogy.
You may close with a trilogy
Q: On June 1st did you point a gun at Mr. Jones? A: No, I didn't.
Q: On June 1st did you shoot a gun at Mr. Jones? A: No, absolutely not.
Q: On June 1st did you have a gun? A: No, I didn't have a gun at all.

PAUSE

Thank you. I don't have any other questions.

G. Humanize the client.

1. Lots of background information, whenever you can
2. All the good stuff and Even the bad stuff, playing up the rough upbringing angle to develop understanding or sympathy.

H. **Corroboration.** Seek as much corroboration of the client's testimony as is possible, but don't get bogged down in details.

VIII. Conclusion

Direct examination is too important to surrender to prosecutors. If you prepare yourself, your case and your witness well, direct examination and the techniques set forth here will help you win cases. Remember the "Six Ps" and always remember your "AURA."

Daniel Shemer

"I was an Assistant Public Defender in Maryland from 1980 until 1999. The material included in this handout was shamelessly stolen from numerous parties and publications. I have listed many of the subjects of my theft below. My thanks to the ingenious authors, actors and lawyers, particularly, the many other Maryland Public Defenders, for creating and sharing this wealth of ideas. May your creative juices continue to bubble up and 'may justice flow down like the waters and mercy like an everflowing stream.'"

- 1."Direct Examination: Strategic Planning, Preparation and Execution." by Phyllis H. Subin, Esq., Director Of Training and Recruitment, Defender Association Of Philadelphia.
- 2.The ABA Journal, Litigation Section, by James McElhaney, Esq.
- 3."The Art Of Formulating Questions: Preparation Of Witnesses." by Neal R. Sonnett, Esq., 2 Biscayne Blvd., 1 Biscayne Tower, Ste.2600, Miami, Fla. 33131
- 4."The Drama and Psychology of Persuasion in the Defendant's Opening Statement," by Jodie English, Esq. (I know this outline is about direct examination, but this is an exceptional article that explains the psychological bases for many of the techniques recommended in this outline.)
- 5.Joe Guastafarro, Actor, Director and Trial Consultant. 4170 N. Marine Drive, #19L, Chicago, Ill. 60613. Just about anything Joe has ever said or done!
- 6."Jury Psychology" by Paul Lisnek, J.D., Ph.D., Trial Consultant. 612 N. Michigan Ave., Suite 217, Chicago, Ill. 60611.

Any thoughts, comments or suggestions to improve this outline? Share them, please. Write me at Office of the Public Defender, Training and Continuing Education Division, 6 St. Paul Street, Baltimore, Maryland 21202, call me at (410) 767-8466 or FAX to me at (410) 333-8496. Thank you.