FUNDAMENTALS OF TRIAL ADVOCACY COURSE

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DIRECT EXAMINATION

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DIRECT EXAMINATION

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I. General Goals for Direct

A. Identify your worst enemy at trial – not the judge, not the defense, not the jury – the worst enemy of your case is confusion. Your direct examinations must remove confusion and clearly leave the jury with the understanding that the defendant is guilty.

B. Tell the story of the case.

C. Advance your theme of the case.

D. Create memorable images for your jury to use during deliberations.

E. Attack the defense theory of the case.

F. Admit physical evidence to support your theory of the case.

II. Obstacles to Overcome in Direct

A. You – Lawyers get in the way of their witnesses more often than not. This leads to a disjointed presentation that may get the necessary elements into the record, but does little to persuade the jury that the defendant ought to be convicted, is immediately forgettable, and worst of all, may lead to more confusion than it resolves.

B. Witnesses – Lay witnesses are nervous and imprecise in their answers and descriptions. They can became confused and give answers that are completely opposite of the actual facts. Professional witnesses can be arrogant and antagonistic which fosters dislike and distrust of them among the jury. At times, professional witnesses may think they know how to present the case better than you and they decide to give answers to "help you out."

C. Method of Presentation – The question and answer method of telling a story is stilted and hard to follow. It is not a procedure that "normal" people use to give and receive information. This procedure can lead to a disjointed presentation of the facts and a hard to follow story that is anything but memorable.

D. Rules of Evidence – In addition to requiring the questions and answer format discussed above, the Rules of Evidence also hamper the attorney's ability to tell a cohesive story. Often facts and details "normal" people

would want to complete a story cannot be admitted because they are prejudicial or irrelevant (at least to the judge.) The Rules of Evidence further complicate the attorney's job because there are certain foundational items that must be established to admit physical evidence. Often these foundational items break up the witnesses story and can add complexity and confusion.

E. Objections – Imagine trying to tell a story to someone who has never heard it before while someone else is constantly interrupting saying that you're not telling it correctly or in the right way. The potential for confusion is obvious. Objections can be a huge barrier to effective communication and clarity, but some objections – like foundation – can help you add additional important information and some – like narrative – have almost no power to hurt your case.

F. One witness at a time, please – The fact that you can only question one witness at a time and that usually those witnesses will be gone after they leave the stand requires the skillful advocate to carefully determine the proper order of witnesses to attempt to present all of their testimony as one compelling story. The challenge is further complicated by witness schedules – work, vacation, training, babysitting obligations, illness, etc – which rarely correspond to your timing.

III. Presenting the Compelling Direct

A. Ordering your witnesses – Chronology is powerful, but don't forget primacy and recency. Make sure you have some contingency plan for witnesses who have scheduling problems with your schedule. A chronological presentation will frequently be the clearest way to tell your story. Victims who lived the crime, witnesses who saw the crime, officers who investigated the crime, and experts to analyzed evidence may be an effective order for most cases. Each case should be considered individually, however, to determine the best witness order. You also want to avoid putting on witness just because they are in the police report. If they don't advance the story, they have the potential to do more harm than good – don't use them. If they add just a little piece to the story, get them to that piece and be done with them. Just because you put them on the stand does not mean you have to talk about everything they did that day.

B. Plan your Direct – A compelling direct examination does not "just happen." It requires thorough preparation and organization. Preparing in advance will allow you to anticipate objections and your responses as well. Use element outlines and exhibit lists to organize the presentation of the trial and use witness OUTLINES for each witnesses you will present at trial. Use of scripted questions, whether your own or from someone else, is the easiest way to lose your witness and your jury.

C. Three Pass Method – The three pass method allows you to fully develop a witness' story in a way that directly combats many of the obstacles to effective direct examinations discussed above. Most importantly it allows you to repeat the witness' story at least three times while adding new details and information which avoids the "asked and answered" objection. Repetition is the key to retention and this methods makes the repetition admissible.

1. First Pass – Allow the witness to give an overview of their testimony. The witness is allowed to tell their story in a cohesive, easily understandable manner.

2. Second Pass – Repeat the witness' story using photographs and diagrams to bring out details and visual images that were omitted or not fully developed in the first narration.

3. Third Pass – Repeat the witness' story using physical evidence and demonstrations.

D. Presentation

1. Positioning in the Courtroom – You have the burden of proof. To meet that burden your jury must be able to hear the witness. Position yourself in the courtroom so you know the jury can hear what is being said and so that you are not distracting the jury from the witness. While standing is not required in most courtrooms, it should be the preferred method of conducting the majority of your direct examination. You need to be in control of the courtroom during your direct exam and standing will help you achieve that control. Sitting for some portions of the direct may be appropriate in some specific situations, but the most important work should be done from your feet.

2. Use of Notes – Unlike an opening statement, attempting to conduct an effective direct without any notes is ill-advised. The direct is where all the work for the case is done. Using notes is one way to be sure you don't miss anything that might be fatal to your case. There are many different styles of direct examination notes and the one you use will depend on what you are comfortable with - use whatever outline style you need to keep you organized and on track; the key is to avoid scripting your questions.

3. Content of your Questions – Obviously the Rules of Evidence have some guidance on the types of questions you can ask. A few of the key issues for direct exam are the following:

a. Leading Questions – Leading questions are those questions that suggest their own answers. Merely because a question is a "yes or no" question does NOT make it leading. Thus, "You saw a green car, didn't you?" is a leading question but "Did you see a car?" is not. *See State v. McKinney*, 185 Ariz 567, 917 P.2d 1214 (1996). However, in practice, many, if not most, judges will hear a "yes or no" question and assume that it is leading and will frequently sustain leading objections to them. The concern with a leading question is that the attorney is feeding the answers or the information to the witness instead of having the information come from the person who was actually there. Leading questions may be used on preliminary matters such as a witness' background and issues that are uncontested. *See Rule 611(c)*, Ariz. R. Evid. Hostile witnesses may be asked leading questions, but non-leading questions should be used initially until the hostility is established or becomes obvious. For the advocate, the problem with leading questions on direct is that is that it puts the focus on the attorney not on the witness with is not generally persuasive, particularly in the direct examination where you are presenting "your" witnesses.

b. Narrative Questions – Narrative questions allow a witness to ramble with little guidance or direction from the examiner. The danger of narrative questions it that they may allow a witness to wonder into inadmissible evidence. When properly prepared, however, witnesses can be allowed to narrate to some degree. Usually narrative objections can be handled by simply asking the witness, "What happened next?" after a narrative objection is sustained. If you have a judge that is particularly hostile to narrative questions, you can be more directive to specific time and places while still allowing the witness to answer fully and completely.

c. Compound Questions – Compound questions permit a witness to answer one part of the question without answering the second part. They may compound so many facts that it is difficult for the witness to answer completely. For example, "You weren't able to see the person because it was dark and your eyesight is not very good" is a compound question. If the witness says "yes" we have no idea if he or she was unable to see due to the darkness, the sight issue, or both. When your question includes "and/or" you may be asking a compound question. The danger in asking compound questions for an effective direct is that they lead to confusion because it is unclear what the witness has said. One juror my hear it was dark; another heard that the witness does not see well – and on the basis of the record, both would be right but no one would know the truth.

d. Short questions – Short open-ended questions on direct will avoid the problems of compound questions, confusing questions, and questions that draw excessive attention to the attorney.

e. Simple Language – If you review our list of obstacles, you'll note that you, the lawyer, are the first one. The words you use in your questions are often barriers to effective communication with your jury. Even worse, our questions may create confusion instead of providing clarity. Our goal is to sound like people not lawyers. Some common examples include "How are you employed?" "How long have you been so employed?" "Wind-up" for questions is another type of lawyer speak. Examples are phrases like "to the best of your knowledge" and "what, if anything." Such phrases add nothing to the question and frequently rob the question of clarity and persuasiveness. "Cop talk" is closely related to "lawyer speak" and it will also rob our direct of clarity. Use phrases that involve the jury in the questioning such as "Tell the jury ..., Show the jury..., Explain to us..." etc.

f. Look for ways to add visuals to your direct examination. Take "notes" on easel paper of key issues and statements for the jury. Visuals will help keep the jury interested in your direct and can be useful for them in recalling the key testimony of a witness during deliberations.

4. Drawing the Sting – If you have negative information that will impact the credibility of a witness, you do not want to have it come out solely on cross. Rest assured that regardless of your covering it on direct, the defense will still explore it on cross, but you don't want the jury to think you were trying to hide something from them. Some examples of negative information you will want to draw are testimonial agreements, benefits to a witness to testify, prior felony convictions of the witness, "unsympathetic" victims (such as a prostitute who is raped by a "John"), previous lies to police, etc. The issue you'll want to consider is when to present this negative information. There are some behavioral science studies that suggest that if negative information is presented before the story, people tend to reject what the witness has to say. If the negative information is presented after the story, people tend to believe the story. These studies would suggest that drawing the sting after the witness has told his or her story may be the most effective way to deal with these problems on direct. You certainly wouldn't want the negative information to be the very last thing the jury hears in your direct, but you don't want to taint the witness unnecessarily before the jury has even had a chance to judge the witness' story for themselves.

IV. Foundation Issues

A. Foundation Scripts Pros and Cons

Use of pre-prepared scripts to admit certain pieces of evidence can be effective, but only if they are used during your preparation for your direct and not during the direct. Such scripts can give you a good idea of what information you want to present to establish sufficient foundation for a given piece of evidence. Using them during your examination, however, will make your questions stiff and unnatural. Such scripts tend to make you sound like a lawyer and they do little to add clarity to your presentation.

B. Laying foundation for an officer's expertise

Frequently you will be relying on your police officer's training and experience as foundation for opinions you want from this witness. Examples include drug experts, DUI experts (HGN), etc. You need to think about where you want to lay the necessary foundation for this information. There are several possibilities, the two most common are to do it all at the beginning or to do it right before you're going to get the opinion. I've tried both and for a while I felt the second was better because it had the advantage of getting into the story faster at the beginning of the testimony and the foundation is given right before the opinion. However, from the standpoint of keeping the jury's attention and telling a clear, persuasive story the injected foundational background in the middle breaks up the story of the case and risks losing the jury's attention with dull information immediately before the key opinion testimony. My recommendation is to do all the foundational ground work at the beginning as part of the training and experience background so you can fluidly go through your three passes. The training and experience of your witness should be focused on what you need for this case. For example, you don need to elicit three minutes of the officer's DUI training and experience if you are trying a narcotics case.

C. Key foundational issues for physical evidence

1. The record needs to know what we are doing as does the jury. "Officer, I'm showing you exhibit 1."

2. Can the witness identify it? "Do you recognize it?"

3. "What is it?"

4. Why should we believe this witness? "How do you recognize it?" or "How do you know it is _____?"

5. For photos, videos, diagrams, etc – "Does it fairly and accurately show (whatever is in the photo or video) the scene, the house, the crash, the defendant, the roadway, etc."

6. For diagrams – Some details – "Is it to scale?" "Will it assist you in explaining your testimony?"

7. For audio tapes – Who is on the tape? "Do you recognize the voices on the tape?" "How?" "How do you know their voice?" "Were you part of this conversation?" – etc depending on the facts of the case.

C. Refreshing Recollection

In almost every criminal trial, an officer will need to review his or her report to recall some detail about the offense. It may be a license plate number, a name, a street address, a specific time, specific signs of impairment during the FSTs, etc. This is why you'll want the police report marked as an exhibit in every trial. While little "foundation" is needed to do this, you'll want the jury to know what the witness is using. Use the same steps listed above even though you won't admit it. A typical exchange might look like this

"What was the license plate number?"
"I don't remember it exactly."
"Is there something you could review that would refresh your memory?"
"Yes, my report in this case."
"Officer, I'm showing you what has been marked as Exhibit 1. Do you recognize it?"
"Yes"
"What is it?"
"This is my departmental report that I prepared for this incident."
"Did you complete this report shortly after your investigation that night?"
"Yes"
"Did you write that report when these events were still fresh in your mind?"
"Yes"
"Directing your attention to page 7, about half way down the page. Does that refresh your memory as to the license plate number?"
"Yes."
"Please hand me the report and tell the jury what the license plate was on the defendant's car."
"Arizona plate KJY-NOR."

The questions regarding whether the report was completed shortly after the events and whether the events were fresh in his mind are not technically necessary to refresh recollection (but would be if you needed

to get statements in under Rule 803(5)), but they may be useful information for the jury to have depending on the specific facts of your case. Always keep in mind that you are trying your case to a jury not to a law professor so just because you're not technically required to lay a specific foundation does not necessarily mean that it is not useful information for the jury.

D. Chain of Custody

1. Keep focus on why the chain of custody matters for this piece of evidence. For example, a crack rock is impounded and tested. Since one crack rock looks just like another, we need to be able to prove that this is the rock that the officer removed from the defendant. Additionally we need to prove that is was not tampered with before it got to the lab for testing. Your questions to establish chain of custody should focus on those issues.

2. Look at your case to determine how to address the necessary chain of custody with the fewest witnesses. For example, the witness that sealed a piece of evidence and the first person to break that seal should be sufficient to show the evidence was not tampered with, as long as the seal was undamaged, regardless of how many people touched the evidence bag in between those 2 people.

3. Keep in mind that a defect in the chain of custody goes to the weight not the admissibility of the evidence.

E. Handling Evidence

1. Show everything to the defense first – yes they've already seen it, but it will prevent them from making a stupid objection when you try to show it to a witness. Some attorneys like putting on the record things like, "Let the record reflect that I am showing defense counsel what has been marked as exhibit X." If that works for you (and your judge) that's fine, but I just hand it to them.

2. Asking to approach the witness – discuss with the judge before the trial.

3. Lay the necessary foundation with the witness.

4. Admit the evidence - No magic phrases – "State moves for the admission of Exhibit X." - will do nicely.

5. Show the exhibit to the jury and have the witness explain it.

V. Preparing Your Witness

Witness preparation is the single most important element in presenting a compelling direct examination. Unfortunately, most prosecutors do not have the time or resources to fully prepare witnesses. For example, being able to conduct a "dry run" in a courtroom with a video camera recording the event would be an ideal preparation technique (you might want to consider Rule 15 issues with this technique, however – unless this tape is work product it is the statement of a witness that would need to be disclosed) but it is not a practical solution for most prosecutors. Nevertheless, preparing your witness for the courtroom is frequently overlooked, but essential to your success at trial. Witness preparation does not need to be done months before a trial, but it should not be done in a hallway five minutes before the direct unless that is completely unavoidable. Whenever and where ever it is done, it should be a face-to-face meeting where you can size up the witness and gauge their reactions to what you are saying.

A. Telling the Truth

Witnesses must understand that, contrary to what they may believe or what they have seen on TV, prosecutors are interested in only one thing and that is the truth. You were not there. You did not see the crime. While you may know what happened based on the evidence, the witness needs to understand that you are not trying to feed them answers. All you want them to do is to tell the truth, no matter how it looks. For example, if you have a victim of an Aggravated Assault who did some aggressive things first, you can't sugar coat these facts. Get them out. Make sure the witness knows not to hedge on the "negative" facts because if they do the jury will think they are liars. During other phases of the trial you will have prepared the jury for your closing as to why this is not a self-defense case, but having your witness minimize their own conduct is not going to help. This goes for our officers as well as civilians – we don't need officers "helping" us by improving the facts or minimizing facts on the stand. Explain that we can deal with negative facts; we can't deal with a witness the jury does not trust.

B. Prepare the Witness for the Courtroom

Here TV may help some because the witness has probably seen a general courtroom before and they have some idea of what to expect. Regardless, you need to explain how direct and cross works. Explain that the jury will be making the decision so the witness needs to talk to them. Explain objections and what to do when one is made and when they are sustained or overruled. Discuss the purpose of cross – give them some example areas of cross and sample questions that might be asked. Explain that showing hostility during cross does nothing but hurt their credibility. Make sure they understand that you will have a chance to clear up problem areas after the cross is over.

C. The Dry Run

You may not have time to go over every direct exam question you plan to ask, but there are some critical things you need to "practice" before the exam begins.

1. For professional witnesses – experts and officers – it may be sufficient to discuss general areas that you will go into and you'll want to review any exhibits you'll be using with them so there are no surprises. Verify key foundational issues for their testimony for both physical evidence and any opinions you think they are going to be qualified to give. If you want an officer to draw a diagram give her plenty of time to do it before her testimony begins. If you have the time, interviewing officers at the scene is ideal. They will remember things far more clearly than they will in your office and you will get a complete picture in your mind of what happened where.

2. For civilian witnesses you'll want to conduct at least a few minutes of your direct with them to get them used to the question and answer method of getting information. Explain where you are going in your direct – that you'll give them a chance to introduce themselves, they'll have a chance to generally review what happened (first pass), you'll show them some photographs and/or diagrams (it is essential to review these before the direct to make sure the witness can identify them and use them as you need them to) (second pass), and show them any physical evidence you plan to admit or identify with them (third pass). If you plan on using a demonstration you need to practice it before trial – the goal here is not to "stage" what happened, it is to be sure the witness understands what you are asking them to do.

3. If a witness is making statements that are different than any prior statements, confront them about the inconsistencies and find out why they are different. Often you'll find out that the officers report is not quite what the witness said or it is what they said but not exactly what they meant. You may also learn that the witness has changed his story but that he has good reasons for doing so. It is much better to learn these things in your office instead of in the courtroom.

D. Specific Issues to Discuss

1. Explain how the subpoena system works in your jurisdiction. Does the date on the subpoena definitely mean the date that witness will testify? If not, you'll want to tell them what to expect. What is the probability of continuances? Will there be delays after

the witness gets to the courtroom? If you have a system like Maricopa County – case transfer – that will need some explanation.

2. Inadmissible Areas – you must cover any areas that the witness is precluded from discussing. Some typical examples include prior convictions of the defendant, previous DUI arrests, opinions of intoxication in a DUI case, probation or parole status, previous time in prison, evidence that shows the defendant is currently in jail, defendant's invocation of his/her right to remain silent, suppressed evidence, etc. Don't assume your witnesses knows what to avoid just because they have testified before. A good method is to make a list of all areas to avoid and go over your written list with each witness who might go into any of those areas – giving them a copy of it is also a good idea and may save your re-trial if your witness blunders into one of the prohibited areas.

3. Explain the problems with guessing or speculating and why they should not do it.

4. "I don't know" and "I don't remember" are not the same thing – make sure the witness knows the difference and why it is important. Similarly officers like to say "Not to my knowledge." This is a hedging answer and leaves the jury wondering whether the witness forgot or whether it might have happened and the witness just does not know. "I don't know", "I couldn't see that", "I don't remember", and "No" are all better answers depending on what is true in your case.

5. If estimates of time or distance are important discuss it before trial. Some people are terrible at estimating time and distances. Here a demonstration of time and/or distance may be helpful and necessary. You won't know if you don't discuss it with your witness in advance.

6. The rule of exclusion – what it means and what they must do to comply with it.

7. Dress and demeanor.
Witnesses come from all walks of life and their dress will reflect that fact. If you don't discuss dress at all with your witness, you are likely to get whatever they wear on a day to day basis and that is not usually good. Some general rules –
a. Shorts are bad and are specifically prohibited in some courtrooms. This may be a surprise to your civilians and your officers in the summer.

b. Revealing clothing – low cut tops, tank tops, muscle shirts, etc, do not convey the seriousness warranted in a criminal trial. Encourage your witnesses to wear long sleeve, clean shirts and professional length skirts or pants.

c. Officers – Uniforms are always appropriate. Generally, telling officers to wear what they wear on duty is safe – exceptions may need to be made for undercover officers.

d. Remind witnesses that their demeanor – good or bad – is on display anytime they are in or near the courthouse. Jurors will form powerful impressions about people based on the way they behave outside the courtroom. Demeanor is also important during direct and cross. Being glib or flippant on direct will tell the jury the witness does not care. Being aggressive on cross will make the witness appear to be biased to your side. It will also look unprofessional.

F. Hostile Witnesses

Whether they are friends and family of the defendant, recanting victims, or witnesses who just don't want to be bothered with a trial, you will have to deal and effectively handle hostile witnesses. Professionalism is the key. Treat the witness professionally, regardless of how they are treating you, and you will find that in most cases you can still effectively present their testimony despite their hostility. To be sure, there will be times when you will have to come on strong to confront the hostility – just be sure it does not become a personal battle. The hostile witness could be anyone you are calling to the witness stand. Below are some of the more frequent types.

1. Doctors and other non-law enforcement experts – although doctors and other experts are not generally hostile to the facts of your case, some are very hostile about having to give up their time to testify. They do not understand why they can't give an affidavit or a deposition outside the courtroom to spare them from having to come to trial. Be sympathetic to their position. Understand that their time is valuable. Explain to them that you will work with them and the court to get them on and off the stand as quickly as possible. If you show them you care about not wasting their time, they will be much easier to deal with.

2. Co-defendants

Proper use of co-defendants is a subject for a completely separate class. A few things to keep in mind – they are not your friends – you have purchased their testimony with a plea agreement and you will have to justify that to the jury eventually. Record your interviews with them in case they change their story when they are face-to-face with the defendant. Tell them you are going to discuss

their plea deal and their priors with them and explain why that is necessary.

3. Recanting Witnesses

This is another topic that should be studied in its own course for prosecutors who have use recanting witnesses frequently. In Arizona, since prior inconsistent statements can be used as substantive evidence, it is generally more important to get the recanting witness on the stand than it is to get the witness to tell the truth. Usually, once a witness has recanted their story, they are not going back to the truth. There are circumstances where a relationship goes south or some other event happens that makes the witness decide to tell the truth in trial, but you can't count on it. Let the witness know that in the trial they will have a chance to tell their story to the jury. You need to prepare to impeach them with their prior statements – it does not have to be done with hostility – try to keep in mind that this person was the victim of a crime and there are challenging psychological forces that make it seem reasonable to them to change their testimony. While you will ultimately argue that the evidence shows they lied on the witness stand, you should work to keep your relationship with this witness as professional and collegial as possible in and out of the courtroom.

4. Officers with *Brady* Issues

Human beings make mistakes. Police officers, as human beings, will make mistakes. Sometimes these errors raise questions as to the officer's integrity. When that happens, that information will be disclosed and unless it is precluded as irrelevant, it will come out at trial. When dealing with this situation – if you know the evidence is coming in – it is usually best to draw the sting. You need to discuss the issue with the officer in advance and explain what you will ask about this situation and why you have to do it. Springing this type of information on a witness in the courtroom is one sure way to have a perfectly willing witness become instantly hostile.