A View from the Bench

Keys to a Successful Direct Examination

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"[A] criminal trial is not a game, or a sport. '[T]he very nature of a trial [i]s a search for truth.'"[2]

Most experienced criminal trial attorneys are familiar with this quote from the Supreme Court in *Nix v. Whiteside*.[3] A criminal trial is the acting out of a screen play written by counsel and there should be no surprises at trial. The success of the screenplay is dependent upon the quality of the script, which is counsels' direct examination.

The primary key to a successful direct examination is preparation, preparation, preparation. Part of this key is preparing closing argument prior to the opening of trial. Direct examination does not just happen. It must be planned, after counsel determines the objectives to be accomplished through each witness.

This article will suggest that courtroom control, preparation of witnesses, use of exhibits, and posing open-ended, non-leading questions are the keys to a successful direct examination. The article will conclude by positing that early preparation of a successful closing argument is the key to a successful examination.

Control of the Courtroom

Everything you do, from the time you walk into the courtroom to the time you walk out, should demonstrate that you are in complete control of the courtroom. Direct examination is the focal point of your control of the courtroom, and if accomplished smoothly and effectively, demonstrates to the members that you are in charge.

Both civilian juries and military courts with members look for someone to guide them through the trial, someone upon whom they can rely to show them the way. Members of the court will develop trust and confidence in the attorney whom they perceive as being in charge. Trust and confidence in counsel will make the members more receptive to your presentation of the case. Everything that you do in the presence of the jury should be directed towards that end.

Preparation

Where does direct examination begin? Does direct examination begin at the podium, after you have called the witness to the stand? Or, on the morning of the witness's testimony when you conduct your last minute preparation of the witness? Or, at some point after the opening statement? Or, a day or two before trial begins?

Direct Examination Begins with Your Preparation of Your Closing Argument in the Case

Closing argument drives direct examination. Closing argument is not simply the after-the-fact result of the presentation of direct examination. Your closing argument should be prepared well in advance of trial in order to know what evidence

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[2] Mathews v. United States, 485 U.S. 58, 72 (1988) (White, J., dissenting) (quoting Nix v. Whiteside, 475 U.S. 157, 166 (1986)).

[3] Nix v. Whiteside, 475 U.S. 157, 166 (1986).

you have to present during the trial. Government counsel must ensure that they have presented convincing evidence on all elements of the offenses. Defense counsel have to know how to attack the government's evidence on each of the elements, and how to present the defense case. You have to make sure that you have presented evidence to support all of the things that you want to say at closing.[4]

Take the Other Side of the Case

You must take the other side of your case and attack it to identify your weak points. Having discovered the holes in your case, you must identify the evidence necessary to fill those holes. Government counsel must at least outline the defense closing argument, and then the government's rebuttal to the defense closing.[5] The government rebuttal argument should be prepared before the first witness is called in the government's case in chief. Likewise, defense counsel has to prepare the government's closing argument and rebuttal argument in order to know what the defense closing should say. To the extent possible, defense counsel should try to keep out evidence upon which the government will need to rely for its closing and rebuttal, and should try to eliminate key aspects of the government's rebuttal argument.

Interview All of the Witnesses in the Case

You should personally interview each witness in the case. It is not enough to rely upon the police reports and memoranda of interview. For government counsel, it is helpful to interview the victim and any key witnesses before preferring the charges, so you can ensure that you have the evidence to actually prove the offenses beyond a reasonable doubt.

It is important for you to know what is *not* in the police report because frequently what is not in the report is critical. Police reports and memoranda of interview[6] normally contain those facts or other statements which support the police officer's view of the case. Police reports generally do not include information which does not support the reporting officer's view of the case.[7]

For example, what does the length of the memorandum of interview tell you? It tells you not only what the witness said during the interview, but it also might tell you that there was a lot said which is not contained in the memorandum. If the interview took two hours, and the memorandum is only one page long, then a lot happened during the interview which is not contained in the memorandum.[8] You need to know what happened in the rest of the interview. Usually whatever happened during the rest of the interview will undercut the statements contained in the memorandum. Did the witness volunteer the statement without coaxing and prodding, or was it like pulling teeth to get the witness's statement? Did the witness deny the facts the first five times through the story, and finally give in just to end the interview? Did the officer or agent provide all

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[4] The suggestion that you prepare the closing argument before beginning the case does not necessarily mean that you should write out the full text of the argument in advance of trial. It does mean, however, that counsel should at least outline the closing argument and ensure that all elements of the offense have been addressed, or all aspects of the defense have been addressed. In some cases, it is appropriate to prepare a trial brief summarizing the nature of the charges, the law pertaining to the offense, and a summary of the expected testimony. The preparation of the trial brief is a form of writing the screenplay for the trial, and will necessarily include a summary of what you expect to prove at trial and argue at the close of the evidence.

[5] Government counsel should prepare summation and rebuttal at the same time in order to have the most efficient structure to the overall closing argument. It is necessary for you to know what arguments to make in closing, and which arguments to hold back until rebuttal. Government counsel should "canalize" the defense during the government's summation by forcing the defense to make those arguments during defense closing which government counsel can forcefully destroy during rebuttal. Defense counsel must learn to avoid the land mines planted by the government, and neutralize the Government's rebuttal argument.

[6] Federal law enforcement officers from virtually all federal agencies will prepare a written report of any interview undertaken in the investigation or any action they take in an investigation. These written reports of interviews generally are referred to as "memoranda of interview." They may be reported on a particular agency form and known within that agency by the name and number of the form, i.e. a Drug Enforcement Administration (DEA) Six because DEA memorandums of interview are reported on DEA Form 6, or a Federal Bureau of Investigations (FBI) 302 because FBI memoranda of interview are reported on FBI Form 302. Other agencies have their own forms and form numbers for these reports.

[7] In the author's personal experience covering over thirty-three years, police reports and memoranda of interview generally are written from the perspective of proving the officer's view of the case and rarely contain information which rebuts the officer's view of the case.

[8] In the author's experience, police reports and memoranda by law enforcement officers summarizing a witness interview frequently cover only the high points of the interview, and only those points which support the agent's view of the case. If the witness denied that he did something five times, and finally admitted that he did do it, generally the memorandum will not reflect that he denied the act five times before admitting it. The trial attorney needs to know this information, however, because it goes to the witness's credibility, as well as the likelihood that the witness will recant the statement at trial. If it was like pulling teeth to get the witness to say something and the witness finally gave in after a lengthy period, counsel should not be surprised if the witness changes his statement at trial.

the facts, and the witness simply agree to them? You need to know what the witness actually will say in court and you need to be able to assess the willingness of the members to accept the witness's testimony. The only way that you can make that assessment is to personally interview each witness. You also might want to review the Criminal Investigation Command (CID) agent's notes of the interview to see if the memorandum report accurately tracks the agent's notes as she/he made them during the interview.

Cross Examine All of Your Witnesses

You should thoroughly cross examine your own witnesses in advance of the trial as part of their preparation. The most aggressive and rigorous cross examination of your witness should take place in the privacy of your office. Only by conducting your own cross examination can you make an assessment of what is going to happen to the witnesses on cross examination. You need to ensure that the testimony of each witness will achieve the objective for which the witness is called. It may be that the damage done to your case on cross examination of your own witness outweighs the benefit of calling the witness. Those witnesses should not be called at trial.

A Trial Is Three Dimensional

Other than experienced trial lawyers, people generally look at a trial in two dimensions, length and breadth. In other words, they do not distinguish between the quantity and quality of the evidence. They treat all evidence the same. They look at whether there is some evidence on each element of the offense. Non-trial lawyers sometimes consider the elements of the offense to have been proven if there is *some* testimony or other evidence on each element.

Criminal trials are three dimensional, however. The third dimension is depth, as not all witnesses are equal. The object of calling witnesses is to prove facts going to an element of the offense, or as a predicate to a defense. In order to be effective, the members must accept and believe the proffered testimony. In some instances, due to motive, bias, or opportunity to see and hear the event in issue, the testimony of one witness will be more persuasive than the testimony of multiple witness who testify to a different version of events. Sometimes the testimony of a witness is inherently incredible. It is necessary to evaluate all these factors in order to determine what the available witnesses will actually prove to the members at trial.

Just because there is testimony from one or more witnesses which would prove the element of the offense if the members believed the witness does not necessarily mean that the members *will* believe the witness. If the members or judge sitting alone do not accept and believe the testimony of the witness on any particular element of the offense, then the offense will not be proven. You have to evaluate whether the finder of fact is likely to accept the testimony of the witnesses. You can make that assessment only by personally interviewing the witnesses.

Identify the Objectives for Each Witness

You have to determine what you want to achieve through the presentation of testimony, and which witnesses best accomplish those objectives. You should not necessarily present all the witnesses that the officer or agent identify, or in the case of the defendant, which the defendant or defense investigator identify. Nor should you necessarily present all of the prospective testimony which is outlined in the police reports and/or memoranda of interview. Just because something is in the police report or the investigative file does not necessarily mean that it should find its way into trial.

You should present only those witnesses who support and advance your case. You should limit the testimony of those witnesses to the points which achieve the objective that you want to accomplish. You must identify what you want to accomplish, accomplish it, and then get out. Do not allow a witness's effectiveness to be diminished by getting bogged down in minutia.

In a drug case, there may be 100 photographs depicting a clandestine laboratory, the equipment in the lab, and the chemicals being used. Assuming that it is appropriate to admit all 100 photos into evidence, it does not follow that you should have your witness testify about all, or even most, of them. Do not put the members to sleep by having a witness testify about multiple photos showing the same piece of evidence from five different angles unless it is necessary. The members will see all the photos when they deliberate, and counsel can choose to emphasize as many of them as appropriate during closing. After laying the foundation and authenticating the exhibits, move them into evidence. After they are in evidence, have the witness testify about those photos which are really important.

Identify All of the Exhibits You Will Introduce and How to Track Them

It is relatively easy to keep track of your evidence if you have a trial with ten exhibits. They might all be authenticated by the same witness or by a small number of witnesses. If you have 1,000 exhibits totaling 10,000 pages, and fifty to 100 witnesses, then keeping track of your exhibits and who should authenticate them is a much more difficult task.

In either event, you must identify who will authenticate each exhibit, which witnesses are necessary to lay the foundation to establish relevance, and which order to present the exhibits. You should prepare an exhibit list which identifies the exhibit by number and description and which witness will authenticate it. It also is helpful to have a column on the exhibit list where you can note when each exhibit is admitted into evidence so that you can tell at any given time which exhibits have been admitted and which have not.

One convenient way of keeping track of exhibits in large document cases is to assign a witness number to each witness who will authenticate exhibits, and then number each exhibit which that witness will authenticate with an exhibit number which begins with the witness's number. For example, Jane Doe is witness number 35 and John Smith is witness number 52. The ten exhibits which Jane Doe will authenticate are numbered 3501 through 3510. Likewise, the fifteen exhibits which John Smith will authenticate are numbered 5201 through 5215.

In this fashion, it is easy to ensure that all of the exhibits to be authenticated by any given witness have been authenticated by that witness by simply reviewing the exhibit list before the witness leaves the witness stand. You also should ensure that authenticating all those exhibits is included in the outline of questions for that witness. It is fairly easy to block and copy the list of exhibits into the witness outline if all the exhibits for that witness are grouped together.

Military judges are accustomed to having government exhibits numbered Prosecution Exhibit (PE) 1, PE 2, etc., and defense exhibits numbered Defense Exhibit (DE) A, DE B, DE C, etc. If you have a large document case and want to deviate from this traditional exhibit numbering system, you will need to discuss the concept with the military judge in advance of trial. Most judges simply are looking for the most effective method of tracking exhibits, and likely will be receptive to reasonable alternatives.

Prepare Outline of Witness Examination

You should prepare some form of outline for the direct examination of each witness. There is no single best format and you should choose whatever format works best for you. There are two objectives to keep in mind: the first is preparing you to do the direct examination and providing you with a tool to assist during the actual questioning at trial; the second is preparing the witness for the direct examination. Every witness is different. In some instances, it may be necessary to make a more detailed outline in order to help prepare the witness before they testify at trial.

Some very skilled trial attorneys, with decades of trial experience and dozens of jury trials under their belt, continue to write out in advance every single question which they intend to ask every witness at trial. If that is what works best for you, then that is what you should do.

Other very experienced trial attorneys prefer to prepare witness summaries of the subject matter they wish to cover rather than a formal list of questions. There are two principal reasons why some counsel may prefer outlines or summaries to actual questions. The first is the amount of time it takes to write out all of the questions in advance, many of which add nothing to the ability of the trial attorney to formulate the questions at trial, or to the ability of the witness to answer the questions at trial.

A second and related reason would be to retain a certain degree of spontaneity during the direct examination at trial. To the extent possible, direct examination should be a conversation between the witness and the court members, with the trial attorney asking the questions for the members. The more formal the witness outline and the more the witness goes through the questions, the more rehearsed the testimony may appear at trial. Smooth flowing testimony is good; testimony which gives the appearance of being "canned" is not.

You should choose the combination of outline, summary, and actual questions that works best for you under the circumstances. You may prepare summaries or outlines for seventy-five percent of the witnesses at any given trial, and very detailed questions for the remaining twenty-five percent of the witnesses at that trial. As a general rule, less-experienced trial attorneys should prepare more detailed questions and outlines. Once you are comfortable with formulating non-leading questions on your feet in the courtroom, then you may consider making the outlines less detailed.

Prepare Each Witness for Their Testimony

Interviewing a witness and preparing a witness are two entirely different things. The objective of interviewing the witness is to find out what the witness knows, how much the witness is guessing, and how the witness will respond to cross examination. The objective of preparing the witness is to get the witness ready to walk into the courtroom to present the testimony.

Testifying in court is inherently a stressful situation for everyone. Most witnesses will testify only once in their life. You should do everything possible to reduce the stress which the witness is experiencing. It is important for the witnesses to know what to expect and how they should act.

Witnesses frequently do not even know where to go once they walk through the courtroom door, and as a result will feel alone and alienated. You should not underestimate the apprehension of witnesses to testify in public. Many witnesses are fearful about testifying because of what they have seen on television. Most witness testimony is much more mundane than what they see on *Law and Order* and similar shows. You should put the witness's mind at ease.

Explaining the physical environment to the witness helps the witness feel at home once they walk into the courtroom. Explaining the procedure to the witness further helps to reduce the stress. Explain to the witness that although the questions are coming from counsel at the podium, the witness actually is speaking to the members, and that it is important that the members hear and understand the testimony. Explain to the witness that they must speak in complete sentences even though the witness knows that counsel already knows the answer to the question, because the members do not. Explain to the witness that the members of the court have not read all the police reports and the witness's prior statements, and that the members are hearing the witness's story for the first time.

For most witnesses, the most stressful period of their testimony is in the first few sentences. Witnesses frequently think that they have to memorize their entire testimony, and then recite it without any breaks as a monologue without your assistance. Make sure the witness knows that you will be guiding them through the direct examination and they do not have to recite their entire testimony in response to the first question. Go over the testimony with every witness to ensure that they each know what to expect and you know what they will say. The witness has to know exactly what you are asking of the witness at each stage of the examination. It also is important for the witness to know what you are not asking.

Sometimes it is not entirely clear from the witness's pre-trial statement how much of the statement comes from the witness's personal knowledge and how much is the witness's conclusion, guesses, or conjecture. It is critically important for you to determine what the witness knows and what the witness is guessing.

You must avoid setting your witnesses up for failure by asking the witness about things which are beyond the witness's personal knowledge. You do not want your witness's effectiveness to be diminished on cross examination by admitting that he actually did not have personal knowledge about what they testified to on direct examination. You have to tell the witness that you are not going to ask questions about those things which are beyond the witness's personal knowledge, and that the witness should limit his or her testimony to that which they know, and not include things about which they are guessing.

Length of Preparation

The general rule of thumb used by many experienced trial attorneys is that it takes about three hours of witness preparation time for each one hour of expected testimony. If the witness is particularly difficult, either due to a language problem or an intelligence problem, or the witness is not willing to focus on the subject matter of the testimony, then the amount of preparation time might increase. If the witness is a professional law enforcement officer, who has testified several times, then the amount of preparation time will be less than a lay witness, but probably not less than two hours of preparation for every hour of testimony in court.

You cannot make any assumptions that a witness will know what to do or how to act, even if your witness is a professional law enforcement officer. An officer or agent with several years of experience may not have testified in court before. Even if the officer has testified several times, it still is necessary to spend some time with the officer to prepare his or her testimony.

Prepare a Trial Notebook

Prepare a trial notebook with outlines of your opening statement and closing argument, summaries of witness testimony, outlines of witness examinations, witness and exhibits lists, trial brief, jury instructions, copies of cases which you know you will have to argue during trial to support your position on the admissibility of evidence, and similar items.

Have as many notebooks as you want, but bring only one to the podium with you while examining a witness. Remember, you want to convey to the members that you are in complete control of the courtroom and that your position is the position which the members should adopt. Demonstrating that you have everything that needs to be known about the trial in that single three inch wide notebook which you bring to the podium helps to convey that message.

It may be that your actual trial notebook fills several volumes of three ring-binders. What you want to do in that instance is switch the contents of your courtroom trial notebook every day to ensure that everything you are likely to need during that day of trial is in the single notebook which you bring to the podium. The longer and more complex the trial, the more the court members will be impressed by the fact that you have everything that needs to be known in that single notebook.

Be Careful of the Message you Convey

Do not send an unintended subliminal message with your trial notebooks and related material. You want to demonstrate that you are open, have nothing to hide, and invite scrutiny by the members. You want the members to be able to see you, and either your case agent or your defendant, depending upon whether you are trial counsel or defense counsel.[9]

If you have a dozen three-ring binders as your trial notebook, do not line them up side by side in front of you on counsel table. If you do, you will be sending a subliminal message to the jury that you and your client are hidden away in your fortress, with a very formidable barrier between you and the members. The message conveyed is that the defendant is hiding from both the witnesses and the members, and by implication, the truth. That is not the message you want to convey with the physical environment which you construct for yourself in the courtroom. The same rule applies to counsel for the United States.

Trial Presentation

Elicit from the witnesses, in clear and logical progression, their observations and activities so that the trier of fact understands, accepts, and remembers the testimony. Identify what you want to accomplish from each witness. Tailor your questions to quickly get to what you want the witness to focus on. Get in, get what you need, and then get out. Lay a foundation for the admission of physical or demonstrative evidence. Be focused. Do not waste time on extraneous things which do not establish what you are trying to prove.

Directing v. Leading

It is important to distinguish between permissible questions which direct your witness to the points on which you want the witness to focus, and impermissible "leading" questions which suggest the answer. Generally speaking, directing is good, and leading is bad. Not all leading questions are impermissible in direct examination, however, and there are times when they should be used.

It is important to distinguish between introductory matters and matters of substance. Most courts will allow (and encourage) you to use leading questions about introductory matters about which there is no dispute. This often saves time and focuses the witness on the substantive matters which will follow.

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[9] In civilian courts, the case agent almost always will sit at government counsel table with the prosecutor. In military courts, it is not as common for the case agent to sit at counsel table with the trial counsel. Regardless of who is sitting at counsel table with you, do not create an appearance of hiding in your fortress. While on this issue, however, if you are the trial counsel having your case agent sit at the table next to you is very helpful. Defense counsel has the defendant to provide feedback throughout trial. Why shouldn't government counsel also have someone to help keep track of witnesses, exhibits, and testimony? Perhaps trial counsel should ask the military judge for permission to have the case agent sit at counsel table during the trial if it is not already the practice in your jurisdiction.

When you call a police officer to the witness stand, you will need to introduce the officer to the members and explain why that witness is about to testify. You could say, "How are you employed?" To which the witness will say any one of a number of things, such as, "I am a military police officer," or, "I am a Soldier," after which you will ask a series of questions to establish his or her duty assignment on the date in question.

Or, you could simply say, "You are a military police officer assigned to the 1st Military Police Company, 716th Military Police Battalion at Ft. Riley, Kansas?" The witness will say, "Yes," and you have completed your introduction.

You then want the witness to testify about the events at issue. You could say, "Do you remember the events of 1 June 2004?" Hopefully the witness will say, "Yes," and then you can ask a series of follow-up questions to set the scene.

Unfortunately, in a not insignificant number of cases, the witness will say, "No," or "Can I refresh my recollection with my report?" or any one of a number of other undesirable answers. When you ask the follow-up question of, "What happened on that day?" the witness then goes into an extended discussion about everything he or she did from the beginning of the shift until encountering the accused. This is not the way you want to begin your direct examination.

What you can say to avoid this is, "Drawing your attention to Sunday, 1 June 2004, at approximately 1800, what contact if any did you have with the accused, Private John Doe?" "Where did that contact take place?" "How did that contact take place." In a few short questions, you have brought the witness to the exact time and place about which you want the witness to testify, and have prevented the witness from going through a litany of everything he or she did on the day in question before confronting the accused.

Paint a Word Picture of the Physical Environment

Every time you introduce a new event, it is necessary to paint a picture for the members to be able to visualize the transaction which you are about to describe. You want the members to be able to put themselves on the scene and visualize in their own minds exactly what happened as the witness relates the story. If the members cannot see the picture in their mind's eye, it is very difficult to assimilate the testimony about what happened.

With each new event, you want to address all the issues which might have had any impact whatsoever on the ability of the witness to hear, see, or otherwise witness what happened. Ask the witness to describe the physical environment. Was the area urban or rural? Was it daylight or dark? Was it raining? How light was it? Was it light because of sunlight or because of street lights or other artificial lighting? Were there any visual obstructions which would impede the ability of the witness to see what happened? Were there any noises or other distractions which would have impacted upon the ability of the witness to hear what happened? If the event involved contact with a police officer, was the officer in uniform or plain clothes? Was the police car involved a marked patrol unit or an undercover car? Only after carefully painting a picture for the members, allowing them to see the same thing as the witness who was on the scene, should you elicit the substantive testimony about what happened. The members have to be able to see the scene the same way as the witness saw the scene in order to fully understand and accept the witness's testimony.

If the issue involves a statement of the accused, run through all of the factors which rebut an allegation that the statement was coerced or involuntary in any way. Was the accused free to go? Was the accused handcuffed? Was the accused drunk? Did the accused appear to be under the influence of drugs or medication? Did the accused appear to be tired? Did the accused speak English, or was there an interpreter in the accused's native language? Was the accused allowed to take rest breaks and use the bathroom facility? Was the accused provided something to drink, and if the interview took place over several hours, was the accused offered something to eat?

Primacy and Recency

It is important that the members hear, understand, accept, and remember the testimony which you present during direct examination. It is important to begin the testimony of each witness with a strength of that witness's testimony to grab the attention of the members. You do not want the members to wonder why the witness is on the witness stand. Likewise, you need to finish each witness on a strong point which you want the members to remember. As a result, a chronological recitation of facts by each witness is not necessarily the most effective. When the members go back to deliberate, you want to have advocates among the members who will remind the other members that "witness so-and-so established that."

The "rule of threes" is a good way to proceed. If the members hear something three times, they are more likely to remember it.

Generally, it is better to work from the general to the specific. Have the witness give an overview when you introduce any new subject. After the witness gives an overall summary of the event, go back and break the transaction down into its component parts. Not only does the more detailed questioning provide more specific information to the members, it also repeats and reinforces the general overview the witness just provided. For example:

Q. Do you know Defendant X? Yes.
Q. How long have you known him. *Since 1990.*
Q. Would you describe your relationship as business or social? *Both.*
Q. Drawing your attention to the period between January 1, 1996 and June 30, 1997—please describe the nature of your business relationship with X.
A: *He was my drug supplier; I received 10 pounds of methamphetamine a week from him.*

Q. OK, now let's go back and break that down into little bites [and go back through the whole thing in detail].

Form of Question

On direct examination, use non-leading, open-ended questions to allow the witnesses to tell the story instead of the lawyer. You want the members to hear the story from the witness on the witness stand, not from the lawyer's questions. As much as possible, you want the testimony to be a conversation between the witness and the members. The members want to hear the testimony directly from the witness, and do not like having a witness simply agreeing with the lawyer.

Virtually every question on direct examination should start with the words, "Who," "What," "When," "Where," or "How." It is almost impossible to ask an impermissibly leading question if you formulate the question to begin with one of these words. As a general rule, never use the word "why" to begin a question, with the limited exception of when the witness's state of mind is in issue and you want to elicit why the witness did something. A "why" question may cause you to lose control of the witness, and with it, lose control of the courtroom. A "why" question on direct examination frequently will elicit impermissible and unintended testimony, which you then will have to clean up.

Consider the following questions to a Department of Defense parts inspector testifying in a defense procurement fraud case involving substitution of surplus repair parts in place of newly manufactured repair parts:

Q. Have you ever been the Quality Assurance Representative (QAR) or Quality Assurance Specialist (QAS) assigned to [. . .], Inc.?
Q. What period of time?
Q. When did you leave?
Q. Where are you now?
Q. Who replaced you?
Q. How often did you go to the [. . .] manufacturing facility?
Q. What is a Certificate of Compliance (C of C)?
Q. How many contracts did you supervise at [. . .] at any given time?
Q. What percentage of these contracts involved originally manufactured parts?[10]

Short direct questions lead the witness to the exact topic of discussion, and allow the witness to explain this portion of the industry in his own words, telling a story from the mouth of the witness rather than from counsel.

Focus, or "Keep your eye on the Ball"

Be as brief as possible, but take all the time you need. You want to get in, accomplish your objective, and then get out. Do not fail to cover the point, however, in your attempt to be brief. It is more than just getting testimony into the record in order to support closing argument. You want the members to hear, accept, believe, and remember the testimony.

[10] United States v. Aerometals, Inc., No. CR S-03-220 MCE (E.D. Cal. 2003) (acquitting defendant of defense procurement fraud after jury trial). These questions were asked by counsel for the United States.

Organize logically. Usually chronologically is best, but sometimes order of importance is more important; i.e., start with a recent event, describe what happened, and then work back to explain why.

Use simple language. Police officers are taught certain ways of speaking and writing in their introductory police training. When describing a vehicle stop, do not have the witness testify, "I activated the overhead visual signal, effectuated a vehicle interdiction and instructed the driver to dismount the vehicle." Instead, have the officer testify, "I stopped the car."[11] Likewise, make sure that the witness does not testify, "I activated the door fastening mechanism," when what he did was turn the door knob.

For instance, the following is a quote from a law enforcement report in a defense procurement fraud case: "About 1000 hrs, 14 May 01, Special Agent [Smith] effectuated follow-on coordination with Mr. [Jones] regarding DCMA Quality Assurance Representative (QAR) oversight and inspection process used on contracts pertaining to [XYZ], Inc."[12]

Translation: The special agent called Mr. Smith on the telephone to talk about the procedure for accepting parts on a contract.

Another actual quote from the same case: "About 1500, 11 Jun 01, Special Agent [Smith] coordinated with Mr. [Jones] regarding the use of surplus parts on contracts issued by TAPC." Translation: Special Agent Smith called Mr. Jones on the telephone to talk about surplus parts.[13]

Have your witnesses testify using plain English. A witness loses a lot of credibility by talking about "effectuating coordination" when it would have been much simpler and clearer to simply say "I called him on the telephone." The court members will wonder why the witness felt the need to embellish the language so much. Is the witness trying to make the transaction appear more important, or more incriminating, than it actually was? Anything which causes the fact finder to wonder about your witness's motive rather than the significance of the evidence is a bad thing, and you want to avoid it.

Use of Physical Evidence

Use pictures or other props whenever possible. Some people learn by listening, and some people learn by seeing. Most likely your panel of members will have some visual learners and some who learn by hearing. You need to communicate with each court member, using his or her greatest strength, to help them hear, see, and understand the evidence.

Photographs are excellent for demonstrating the physical environment of the scene where an event took place, or for conveying some other message visually. The proximity and relationship of an outbuilding to the principal residence can be demonstrated in seconds through the use of a photo, whereas describing the physical environment would take several pages of trial testimony, and the court still might not fully appreciate what you are trying to demonstrate.[14]

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[11] This allows you to transition into the follow up question, "How did you do that?" The officer can then take you step by step through each action that culminated in the driver exiting the stopped vehicle. "I turned on the lights, and waited for the driver to pull his car over to the side of the road. After the driver stopped his car, I pulled in behind him and approached the driver's side of the car. I asked the driver for his driver's license and vehicle registration." Counsel then asks about the driver's license, and transitions to a question for which the response is, "When he was unable to produce a driver's license, I asked the driver to step out of the vehicle."

[12] *Id.* This quotation was taken from an Army CID form entitled, "Agent's Investigative Report." The report pertained to an interview which an Army CID agent had conducted in an investigation of a defense contractor for suspected defense procurement fraud. The report pertained to a telephone call which the agent had placed to an employee of the Defense Logistics Agency (DLA) to ask a question about the oversight and inspection procedures used by QAR employed by DLA. A QAR is responsible for inspecting parts manufactured under a contract with the Defense Department to ensure that the parts conform to the contract specifications before the parts are accepted on behalf of the United States.

[13] *Id.*

[14] United States v. Cannon, 264 F.3d 875 (9th Cir. 2001). The district court granted defendant Cannon's motion to suppress approximately 400 marijuana plants found during a search of an attached converted garage on the defendant's property. United States v. Cannon, 104 F. Supp. 2d 1214 (E.D. Cal. 2000). The search warrant authorized a search of the residence, the garage, all outbuildings and the curtilage of the residence. The district court found that a building which once had been a garage had been converted into a rental apartment, and therefore was outside the scope of the search warrant.

The status of the garage as a rental apartment was not discovered until after the agents made entry to what appeared to be either an attached garage or attached outbuilding. The outbuilding was inside the privacy fence surrounding the residence and was attached to the residence building by a wooden deck. The outbuilding was only ten to fifteen feet from the back door of the residence.

On appeal, the United States wanted to demonstrate clearly to the U.S. Court of Appeals that the building at issue was attached to the residence and an integral part of the residential complex, and therefore within the scope of the search warrant. United States v. Cannon, 264 F.3d 875 (9th Cir. 2001). The

For example, in a drug kingpin conspiracy trial, the United States had to demonstrate the relationship between several co-conspirators, and also that the defendant was a leader and organizer of the enterprise. A photo of the drug kingpin surrounded by three of his lieutenants at the beach holding up a ten foot long towel made into the image of a $100 bill demonstrated not only the relationship between the co-conspirators, but also that the defendant was in it for the money. That one photograph summarized the entire case.[15]

Sometimes you do not have the actual drugs which are the subject of a drug trafficking prosecution, or the knife or gun used in an assault case, to show to the court members. In that case, you may be able to introduce a representative exhibit which looks just like the item at issue so that the court can get a visual picture of the object. By seeing the representative exhibit, the court members can get a clear picture in their mind of the object in question.

What if you had a drug trafficking trial in which several witnesses were testifying that they purchased a quantity of drugs from the defendant, but you did not have any actual drugs which were recovered either from the witnesses or the defendant? When asked to describe the size, shape, color, and consistency of the drugs, the witnesses would form their hands in the shape of a baseball to describe the size and shape. Counsel then would have to recite into the record that the witness had formed his hands in the size and shape of a baseball.[16]

To assist the members in gauging the amount of drugs, in addition to the witnesses' demonstration with their hands, counsel for the United States could use a regulation size major league baseball as a demonstrative exhibit to assist the witness to establish the size and shape of the drugs which he received from the defendant. When the witness described the size and shape of the drugs, he would be shown the baseball and asked how the size and shape of the drugs in question compared to the size and shape of the baseball.[17] By using the baseball to represent the drugs, the jury would be able to clearly focus upon the quantity of drugs which were purchased. Because the baseball would be admitted into evidence, the baseball would go into the jury deliberation room with the other evidence for the jury to examine and consider.

A secondary advantage of repetitively using a demonstrative exhibit such as the baseball is that the court members will begin to anticipate the appearance of the exhibit, which is a good thing. As witness after witness testifies, the jury begins to recognize when the foundation has been laid to identify the quantity of drugs, and begin to anticipate the presentation of the baseball to the witnesses. The jury sub-consciously begins to affiliate itself with the counsel who is using the exhibit, concentrating upon the foundation and then looking for the baseball to be produced for the witness.[18] Getting the court members to associate with your view of the case is a good thing.

United States incorporated a photograph into the text of its brief on appeal, showing the rear of the residence, the location of the attached building and that it was attached to the residence, and the distance relationship between the primary residence and the converted garage.

At the oral argument, the presiding judge commented that the photograph which was incorporated into the government's brief (rather than enclosed as an exhibit in the government's supplemental excerpts of record) was the most effective use of a photograph that the appellate panel had ever seen on appeal.

[15] United States v. Jingles, No. 01-10703, 2003 WL 2008158 (9th Cir. 2003) (showing that several cooperating co-defendant witnesses were close personal associates of defendant Jingles, and emphasizing that the purpose of their association was to generate money from drug trafficking, so that they could then enjoy the good life with the proceeds of that drug trafficking).

[16] United States v. Jackson, No. 04-10154, 2005 WL 3134103 (9th Cir. 2005). Decision of the United States Court of Appeals for the Ninth Circuit affirming the conviction, but remanding to the U.S. District Court for the Eastern District of California for re-sentencing.

At trial in the district court, the United States presented approximately twenty-one witnesses who were in custody serving sentences in either federal or state prison. Each came to trial wearing the orange jumpsuit uniform of a prisoner, and were shackled around their waist connecting their handcuffs and leg irons. The prisoners had very limited range of motion with their hands. Jackson was convicted of conspiracy to distribute methamphetamine and related charges. The district court found that he had distributed over 1000 pounds of methamphetamine and sentenced him to imprisonment for five life terms plus 240 years.

The witnesses were asked to describe the appearance of the methamphetamine which they received from Jackson. The witnesses then were asked to demonstrate with their hands the size and shape of the methamphetamine which they received. Because of the restrictions on their hand movements by the handcuffs and shackles, the jury could not see the size and shape of the description the witnesses were demonstrating with their hands. As a result, counsel for the United States had to recite for the record (and for the jury) something like, "Let the record reflect that the witness has formed his hands into the size and shape of a baseball," to which defense counsel would then stipulate.

Counsel for the United States then used an actual baseball, which the jury could see at all times, to demonstrate clearly to the jury the size and shape of the methamphetamine which the witnesses received from Jackson. Counsel for the United States would ask the witness, "Mr. Witness, how did the size and shape of the methamphetamine which you received from the defendant compare with Government exhibit 52, a regulation size and shape major league baseball, which you have in front of you in the witness box?" The witness then would respond, "Exactly the same size and shape as the baseball."

[17] *Id.*

[18] *Id.* As witness after witness in the Jackson trial was presented with the baseball as a point of comparison, it became apparent that the jurors would anticipate when in the questioning that the baseball would be presented to the witness. It also became apparent that the jurors had accepted the baseball as part of their frame of analysis, as if it were their baseball. As a result, the jurors almost become part of the examination process along with the proponent of

If you introduce photographs, documents, or other physical evidence through a witness on the stand, do not circulate those exhibits to the court members while your witness is testifying. If the exhibit is important enough that you want the members to see the exhibit immediately, most likely the members also will find the exhibit important and will study it when it reaches them. The time during which a member is examining the exhibit is time that the member is not paying attention to what your witness is saying on the witness stand. You will completely lose each member during a portion of your witness's testimony.

If you must circulate the exhibit while the witness is on the stand, ask the judge for a short break in place (still on the record) for the members to examine the exhibit, and then resume the witness's testimony after all the members have seen the exhibit. Another way to publish the exhibit to the members is to display it on an overhead projector or computer projection onto a screen and have the witness describe the exhibit while the members are looking at it all at the same time. In that fashion, all of the members' attention is directed to the exhibit at the same time, as well as to your witness's testimony describing the exhibit. It makes a much more powerful presentation of both the oral testimony and the physical exhibit.

Neutralizing Adverse Information

What do you do if there is some information about your witness which might tend to impact upon his or her credibility, or could be used by the opposition to discredit the witness?

You bring the adverse information out yourself during direct examination. Do not ever leave any significant issue which might discredit your witness in the eyes of the members to be introduced for the first time and exploited by the other side. Get the information out yourself, deal with it, and neutralize it as a discrediting factor.

When and how do you do that? You have your witness testify about the events for which you called the witness to the stand. After the witness has laid out the bulk of the testimony, but before the end of the witness's direct exam, ask the witness about the potentially discrediting issue. You do not want to ask the discrediting question until the witness has testified about enough of the events for which you called him/her so that the members can see the picture you are trying to paint, and hopefully have accepted it.

At the same time, you do not want the discrediting issue to be your final questions for the witness on direct. You cannot ever transition from your direct to the other side's cross examination on a point which adversely affects the members' perception of your witness. With each witness you present, you must start strong and finish strong. The discrediting issue has to be raised and addressed somewhere in the middle, so that you have an opportunity to rehabilitate your witness before you turn him over for cross examination.

What you want the members to do is to process the potentially discrediting information and satisfy themselves that it does not make any difference to them before you pass the witness to the other side. In that fashion, when the other side pounds on the issue on cross examination, and the other side *will* pound on the issue, the members will discount the attack on the witness because they already will have evaluated the weakness and accepted the witness's testimony. While the witness is being attacked on cross examination you want the members to go through the thought process, "So what if the witness is an ax murderer and is getting a sentence reduction in return for his testimony in this case, that does not mean that he did not see the drug transaction as he described in his direct examination."

You do not want to lead with the discrediting information or introduce it before you have accomplished what you are trying to accomplish through the witness. If you introduce the discrediting information too early, the members will recoil from the witness and either not listen or not accept the direct examination.

You need to set the hook deeply in the minds of the members before you introduce the adverse information. You do not want the members to be thinking as you present the witness's testimony, "My gosh, this guy is an ax murderer testifying to save himself. I could not possibly believe anything he has to say."

What do you do if there is something immediately apparent from the physical appearance of the witness as soon as he takes the witness stand which has the potential to distract the members from the testimony which you are presenting through the witness? In that case, you have to deal with the issue immediately and get it out of the way before you begin to present

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the demonstrative exhibit. Everyone can relate to a baseball. Hopefully the jurors are unable to relate to a quarter pound, half pound, or pound of methamphetamine without substituting something from their world to understand the quantity of controlled substances.

the substance of the testimony. If you do not, the members will not be listening to the testimony which you need to have them hear, accept, and remember because they are wondering about whatever it is about the witness's appearance which has drawn their attention.

What if you have a series of in-custody witnesses who will be testifying in orange jail jump-suits, while wearing handcuffs and leg irons with chains linking the leg irons and handcuffs so that the witness can move his hands no more than an inch or so? The obvious appearance of the witnesses' attire is going to cause the members to wonder what is going on with a witness that requires him to be chained and handcuffed in court. Until you answer that question for the members, no one will be listening to what your witness says. Get it out of the way immediately.

Q. Mr. Smith, I notice that you are dressed fairly unusually today. (A little humor shows counsel's personality, which is a good thing). Where do you currently reside?
A. *I live in the SHU.*
Q. SHU stands for Segregated Housing Unit?
A. *Yes.*
Q. Where is the SHU located?
A. [Disciplinary Barracks, Leavenworth Prison, Pelican Bay State Prison, whatever]
Q. Why are you at Pelican Bay?
A. *187.*
Q. 187 is the Penal Code section for murder?
A. *Yes.*
Q. What is your sentence for your murder conviction?
A. *Twenty-five years to life.*

You now have explained why this witness, and the next two dozen witnesses, will be wearing orange jumpsuits and chains. The members no longer will be shocked at the witnesses' appearance and will not waste any of their attention on the issue. It does introduce right up front that your witness is a murderer, or drug trafficker, or whatever, but it is necessary in this case in order to keep the members' attention on the testimony. At the end of trial, you will explain that the witnesses are lowlifes, crooks, murderers, and drug traffickers, but they are the lowlifes, crooks, murderers, and drug traffickers that the other side chose to associate with in their every day activities, so that any adverse implication from the witnesses' status should impact the other side, not yours.

Actual Language of Event

Have the witnesses testify using the actual language of the event about which they are testifying. The testimony will lose a lot in translation if you attempt to substitute everyday business language for what the parties actually said and did. If the witnesses are gang bangers and street thugs, do not try to paint them as choirboys. They are what they are. It is not absolutely critical that the members immediately understand everything that was said as the witness is telling the story. It is more important that the members hear exactly what was said and in the language in which it was said, not a watered down interpretation of what was said. The members will hear the testimony at least two more times during your direct examination and will fully understand before you pass the witness for cross examination.

If the parties used slang, street talk, code, half-sentences, etc., when they did the deal, have the witness use the same slang, street talk, code and half-sentences during the first run through of the testimony. Then have the witness go through after each sentence of his or her testimony and explain the meaning of each slang word which was used, i.e., homies, blow, rock, ice, waste, 187, 420, or whatever, so that the witness is translating for the members after each sentence of testimony in which slang and street language is used. Then, and only then, have the witness repeat the testimony using everyday, normal language. By this time, the members have heard the testimony three times. They have heard it in the original version and they have heard it in language which they understand. They are going to remember the testimony. Whether they believe it depends upon how well it is corroborated by third party sources.

When you are having the witness explain or interpret words which might not be in common usage, do not say to the witness, "Mr. Smith, the members may not know what [whatever] means. Please explain it to them." Depending upon how commonly understood the term is which you are having the witness explain to the members, the members may think that you are inferring that they are not very bright. You do not ever want to convey to the members that you do not think they are smart enough to understand anything which you understand. One or more of the members will hold it against you for the rest of the trial.

Instead, say something like, "Just for the record, Mr. Smith, please explain what you mean when you said 'he fronted me an 8 ball.'"[19] In that manner, you will have the witness explain the unusual term to any one of the members who did not understand it the first time, but in a manner which provides the member some cover. It isn't the members who did not understand the witness. The explanation is simply for those appellate judges in Washington who are not as "in touch" as the members of the court. It will go down much more smoothly with the court members whom you are trying to convince.

Order of Witnesses

The order in which you call witnesses on direct is extremely important. You want to tell the story in the most logical sequence, but you also must accommodate the strengths and weaknesses of your witnesses. It is necessary to balance these two objectives.

Always start with a strong witness and end your case with a strong witness. Do not put a number of weak witnesses back-to-back anywhere in the sequence of witnesses. Alternate strong and weak witnesses in the middle of your case.

Remember, everything you do is designed to seize control of the courtroom and to demonstrate to the members (and the judge) that you are in control. When you present your first witness, the opposition is going to try to seize momentum of the case and control of the courtroom from you through cross examination of that first witness. Your opponent will try to knock you off track and seize initiative and control. You need to have a lead-off witness who is bulletproof.

If you have a witness on direct examination for thirty minutes, and the opposition then has the witness on cross examination for two hours, generally that is bad for you unless the cross examination is incompetent and simply reinforces the direct examination several times over. Your opponent will have seized the initiative from you, and with it, seized control of the courtroom. You cannot lead with this witness even if that witness's testimony otherwise would be in chronological order. You do not want to lead off with a witness which the opposition can exploit on cross examination and use the cross examination to seize control.

Similarly, you also need to have your last witness be bulletproof. The last witness is your "closer." When you rest your case and pass it to the other side, whether you are the government or the defense, you want the members to be thinking, "OK, we are ready to vote. This is a no-brainer. We do not need to hear the rest of the case." You do not want any lingering doubt in the members' mind because the opposition scored points on your last witness during cross examination.

The structure of your direct examination of each individual witness will follow the same rules. Start strong, emphasize the substance of the testimony in the middle, and close strong. If there are weak areas, bury them in the middle. Do not expose your witness to unnecessary risk of impeachment. Do not ask your witness to over-extend and give testimony in areas which are outside his actual knowledge. If there is adverse or impeachable information, raise it during direct, but after the witness has already made a strong presentation to the members. End strong. Do not transition on your weakness and play to your opponent's strength.

Corroboration of Witnesses

To the extent possible, always corroborate your witnesses' testimony with third party testimony and documents. Just because a witness says something does not mean that the members will believe it, particularly if your witnesses are inherently unlikeable. A fact of life is that members are more likely to believe a likeable witness than an unlikeable witness. They also are more likely to follow the lead of a counsel who they find to be likeable, than a counsel that they find to be unlikeable.

If you have unlikeable witnesses, or witnesses who are clearly impeachable because of bias or prejudice, or are getting a sentence reduction in return for their testimony, it is extremely important to give the members a reason to believe the witness. The members are much more likely to believe a witness who testified that he went to a particular city, stayed in a hotel, and conducted a transaction with someone if you can corroborate the testimony by introducing documentary evidence which supports the testimony. Corroboration could include copies of the boarding passes from the airline, the rental car receipt at the destination, the rental car clerk who testifies that he demanded a picture identification card and verified that the name on the identification and the name on the contract were the same, and the face on the card and the face in the room were the

[19] An "8 ball" is one eighth of an ounce of methamphetamine or cocaine, or approximately 3.5 grams. An 8 ball is a common quantity of drugs for purchase on the streets by low-level drug dealers.

same, and a copy of the hotel receipt in the witness's name. Having the testimony of third parties who also were at the transaction is very helpful, particularly if the witnesses did not know each other or have an opportunity to fabricate the story.

Re-Direct Examination

Do whatever re-direct examination which is necessary to clarify any points which are not clear at the close of cross examination, but no more. You do not need to do re-direct examination just because the other side did re-cross examination. It is not a matter of who got the last word. Re-direct just gives the other side another opportunity to do re-cross examination. In addition, passing on the opportunity to do re-direct signals to the members that you are confident that nothing happened in the re-cross which is of any importance. Your confidence is likely to be accepted by the members as assurance that cross examination was ineffective. Continual re-direct examination sends the opposite signal, that you feel that cross examination was effective. Rarely do more than two rounds of direct and re-direct examination add to your case.

Conclusion

A criminal trial is not a series of disjointed events. Everything fits together, beginning with closing argument, then back to opening statement, and then through the presentation of direct examination of your witnesses and your physical and documentary evidence. Closing argument is the cornerstone for direct examination, and must be prepared well in advance of trial. The closing argument is the blueprint for the presentation of the entire case, and determines which witnesses should be called and what testimony should be elicited from them. In addition to preparation, preparation, and preparation, the key to successful direct examination is the successful preparation of the closing argument prior to the beginning of the trial.