DIRECT EXAMINATION

BASIC PRINCIPLES

OVERVIEW

- Soundbite: Your role is to teach, often in a severely limited time frame, the witnesses of widely varied intelligence levels and backgrounds how to truthfully and effectively communicate what they know about the case to twelve strangers of widely varied intelligence levels and backgrounds.
- To paraphrase Casey Stengal, you can't do it without your witnesses.

Trial preparation

- Theme
  - Tell a *persuasive* story, not just a story. Don't feel confined by chronological order.
- Witness order
  - Primacy and recency: in a nutshell, the theory is that jurors are more likely to accept what they hear first and remember better what they hear last.
  - Think: frontload the good stuff, finish with a bang and bury the junk somewhere in the middle.
  - The "Columbo Effect."
- Expected testimony
  - All elements of each crime, including venue.

Preparing witnesses

- Trial testimony
  - Tell the truth.
  - Use own vocabulary.
  - Eye contact w/ jury.
  - Minimize equivocation.
  - Tell the truth.

Preparing witnesses (cont.)

- Prior testimony and statements
  - Review transcripts, tapes, writings, etc.
  - Address inconsistencies.

Preparing witnesses (cont.)

- Refreshing recollection
  - Don't panic yet. There is always later.
  - Have available materials handy. You can refresh memory with items not admitted into evidence.
  - Rephrase questions to include known facts.
  - Ask simple questions.

Preparing witnesses (cont.)

- Simulate cross-examination
  - Use expected cross questions.
  - Address unfavorable issues.
  - Don't let the witness equivocate.

Direct examination

- Organizing
  - Write down the answers, not the questions.
  - Lead with overview of why witness there.
  - Prepare "bridge" questions to the next topic.
- Avoid leading questions
  - Different with every judge. Don't just because you can, unless you just have to.
  - Start question with who, what, when, etc.
  - Practice asking short questions.

Direct examination (cont.)

- Visual aids
  - Jurors comprehension and retention greatly enhanced.
  - Use your imagination. Enlarge transcripts and highlight the important passages, etc.
  - Don't limit visual aids to direct examination.

Direct examination (cont.)

- Stealing their thunder on problem issues
  - Brady v. Maryland considerations.
  - Tough questions can be softened on direct.
  - Address it and move on.
  - If you decide to wait and see if they bring it up, prepare your witness for an aggressive cross.

Direct examination (cont.)

- Witness mistakes
  - Listening to your witness is just as important as listening to theirs.
  - Conventional wisdom says address all mistakes, and do so right away. Juries forgive honest mistakes much easier than they forgive attempts to cover them up.