

COMPARATIVE TRIAL ADVOCACY

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Trial technique is one of the more idiosyncratic aspects of the law, where wide variations in legal rules, cultural norms, and historical traditions have led to divergent courtroom practices. There are fundamental differences in criminal procedures of many legal systems — professional versus lay fact finders, oral versus written testimony, and judicial versus party questioning of witnesses. Practitioners in different countries often appear to speak a different legal language. At first glance, comparative trial advocacy would seem to offer little opportunity for meaningful cross border sharing of experience, except in narrow circumstances where countries come from a similar legal tradition.

Nevertheless, recent experience suggests there are some sufficiently universal or near universal issues in advocacy such that trial skills can be shared across jurisdictions. Trial advocacy programs conducted in various countries and across various legal traditions over the past ten years indicate that there is a basis for productive comparative cooperation, even if such programs should be tailored to reflect local procedures and sensibilities.

There is also a convergence in the methods of teaching trial advocacy. The learn-by-doing, repetition-based experiential model for trial advocacy skills transfer is seeing wider adoption. This technique, pioneered by the U.S. National Institute for Trial Advocacy (NITA), relies less on lectures by distinguished legal academics, and instead focuses more on small group exercises where participants test their own skills before receiving both skilled practitioner and peer critique to sharpen core trial skill competencies, followed by a moot court experience.

This Article will focus on two trial skills for prosecutors that can be fruitful areas for sharing of best practices: examination of government witnesses (direct examination) and examination of defense witnesses including the defendant (cross examination). These topics are often individually the subject of multiple chapters in books on trial technique, or even the subject of an entire book by itself. Therefore, this Article will necessarily only discuss some of the broader tactics and considerations.

Persuasive direct examinations begin with witness preparation. In some jurisdictions, prosecutors do not meet with witnesses in advance of trial out of concern that they could be accused of improper coaching. In reality, preparation insures that witnesses provide coherent, streamlined testimony focused on the key issues of trial. The benefits of good witness preparation outweigh the potential downside of giving a defense lawyer the opportunity to make the argument that there was collusion.

Proper witness preparation requires having both the prosecutor and the investigator present during meetings with the witness. This ensures that the prosecutor has the benefit of the investigator's knowledge of the case and ensures that if there is any allegation of fabrication or prosecutorial misconduct, the prosecutor has a witness (the investigator) to rebut that claim without having to become a witness in their own proceeding. Having the investigator participate in the trial preparation also helps build a strong team model of police/prosecutor cooperation that should begin at the outset of the investigation and continue through the trial itself where the investigator can sit with the prosecutor during the testimony.

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Through witness preparation, the witness understands the process of being a witness, what will be involved in direct and cross examination, and how to be comfortable in the courtroom setting. The prosecutor better understands the strengths and limitations of the witness, how to phrase questions so the witness understands what is being asked, and often discover additional relevant information, not necessarily reflected in the investigator's interview notes, that the witness has to offer. Standard procedures include simulated questioning, review of prior statements, and use of exhibits. A properly prepared witness will know what to wear in court, where to sit, what to do if there are objections, what to do if they do not remember, how to respect both parties in the proceeding, and how to conduct themselves generally in the courtroom. Some general instructions all government witnesses should receive from the prosecutor could include:

- TELL THE TRUTH ALWAYS.
- Speak in your own words as you answer the questions.
- Look directly at the person asking you questions—prosecutor, defense attorney, and/or the court.
- Take time and think before answering questions. Don't feel rushed.
- Use the same effort in answering questions from the court and all lawyers.
- Be positive in answers.
- If you don't know an answer, say you don't know.
- Ask for the question to be repeated or clarified if you are not sure you understand it.
- Be comfortable with your limitations—every witness knows only parts of the case.
- TELL THE TRUTH ALWAYS.

Prosecutors need to keep in mind two significant psychological observations: listeners' attention spans are approximately 20-30 minutes, listeners understand better when provided with both visual and oral information together, and listeners recall the information they hear first and last ("primacy and recency") more accurately than information conveyed in the middle. The witness will be judged not only on the substance of their testimony, but also on their background and their demeanor. To keep the listeners' attention, unnecessary detail should not be included. The trier of fact will be making judgments throughout the trial and filtering the evidence to fit those judgments. Therefore losing their attention with unnecessary details or repetitive witnesses will undermine the case from the outset regardless of how strong later witness testimony proves to be.

An effective direct examination itself can be divided into several stages: personal background; scene setting; transition to get the trier of fact's attention; action description; exhibits to highlight and repeat; acknowledgment of any bias or weakness; and a strong ending. During direct examination, the prosecutor wants to make the witness the star, yet still control them. Questions should use simple words that convey an image, generally beginning with who, what, where, when, how, and please explain. Use of transitional sentences between new areas of testimony is key to keep the listener's attention. Prosecutors must avoid interjecting their own views and also avoid personal bad or distracting habits. It is critical to listen to the witness' answers — the prosecutor may have heard the answers a dozen times during witness preparation, but under the stress of trial it may come out differently. It can be helpful to repeat a witness' own words to a previous answer in a follow up question, although this should be done only on important answers and in moderation to avoid invoking the judge's ire. Pace is also extremely important — it is necessary to slow down for key areas by using a series of narrow questions and verbal and nonverbal cues. A prosecutor must maintain interest in their own witness no matter how familiar the prosecutor is with their testimony or risk inadvertently signaling to the trier of fact that the witness can be safely ignored or is unimportant.

Physical exhibits are an important way to both corroborate a witness' testimony and give them an opportunity to repeat key portions of the testimony. A witness should have multiple opportunities to make their point. For example, first, they can describe how a gun was pointed, second, they can then identify it in a search scene photo, and then third, they can show how the gun was pointed using the gun itself. Using the same exhibits with different witnesses demonstrates to the court how the witnesses reinforce each other. Demonstrative exhibits, such as summary charts, timeline charts, diagrams or models, may not actually be evidence, but they can also substantially aid the fact finder. Complex information or information from different witnesses who may have testified days or weeks apart can be combined in a single demonstrative exhibit. Witnesses will be more confident with demonstrative aids to assist them, particularly if they have practiced with the demonstrative aids during witness preparation. In cases where there is little physical testimony, demonstrative exhibits can give some much needed visuals to sharpen the case and bring the facts to life.

While all prosecutors have experience with direct examination of their witnesses, it is still possible to apply new techniques to streamline the government's proof to make it both more efficient and more effective.

By contrast, the cross examination of defense witnesses, particularly the defendant, provides a significant challenge to prosecutors worldwide. Defendants who breakdown on the stand and admit their own guilt make for good movies but that rarely happen in real courtrooms. The defendant is not bound by the truth; they will testify in any manner they reasonably hope will allow them to convince the fact finder of their innocence. In addition, prosecutors generally do not receive a great deal of specific information regarding the defendant's testimony in advance — the prosecutor may possess some reports of post arrest statements by the defendant that can be used for cross examination, but generally prosecutors do not receive significant helpful pretrial discovery regarding a defendant's testimony and are left guessing what that testimony may be based on the defense attorney's oral or written submissions to the court. In addition, most criminal trials have a predominance of witnesses for the prosecutions, rather than witnesses for the defendant, so prosecutors generally have less practical experience in cross examining defense witnesses than their defense counterparts. Therefore, following the direct testimony of the defendant or a defense witness, the prosecutor may have little time to develop an effective cross examination on the spot.

An effective method to address these structural disadvantages to the prosecutor is to use a concession-based cross examination approach. In a concession-based approach, the prosecutor prepares in advance a series of questions to use during cross examination that the witness will have to concede or the witness will look like a liar or a fool to the fact finder. In other words, the prosecutor can push through the theory of his case and support the testimony of prior government witnesses through careful questioning of the defendant or defense witness before the witness becomes more hostile.

Maintaining control of the defense witness through asking narrow, fact-based questions that the witness must agree with is one key to successful concession-based questioning. This is not the time to seek opinions from the defense witness, or to ask the defendant or defense witness how or why they did something or give them an opportunity to explain by asking a question that is too open ended. The prosecutor should be seeking concessions on facts, not on conclusions — the defendant will rarely concede a conclusion and attempting to seek it may simply result in an unproductive argument over what conclusions to draw. This in turn will muddy the careful factual concessions that the prosecutor hopefully has achieved.

Concession based questioning does not have to focus only on the testimony provided by the defendant during the direct examination. This is not an opportunity to allow the defendant to simply repeat their direct testimony, which would only strengthen its impact through repetition and further the defense's theory of the case. The cross examination also does not have to cover all areas that were covered by the defendant on direct examination. Instead, the prosecutor should use this time more strategically and focus on the areas the prosecutor wants to highlight, such as the defendant's need for money, the items found in their home, the incriminating statement made at arrest. In fact, the prosecutor does not have to pursue topics in chronological order — it can be disorienting to the

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defendant if the prosecutor moves around in topics and the defendant does not know what will be next, although the prosecutor must not also make it too disorienting for the fact finder. As with direct examination, "primacy and recency" still matter, so the prosecutor should consider beginning the cross examination in an area where they feel comfortable that they will score concessions.

One of the benefits of starting the cross examination with the concession-based approach (compared to the frontal-assault approach where the prosecutor seeks to force the defendant to improbably admit their guilt) is it allows the prosecutor to stay in control and develop a rhythm with the defendant in which the defendant is having to admit a series of small facts that strengthen the prosecutor's case. The concession-based approach does not require of displays indignation or outrage. Quite the opposite, it allows the prosecutor to appear to the fact finder as the systematic and reasonable person trying to get to the truth rather than create an image of the prosecutor as an intimidating or emotional bully trying to force a defendant to admit conclusions.

A straightforward example of a concession-based cross examination of the defendant would be where the defense's theory is self-defense. A series of fact-based concession questions, if supported by other facts in this case, could proceed as follows:

- You drove to victim's apartment
- You were there at 9:00 p.m.
- You were with the victim
- You owed the victim money
- You had an argument with the victim
- You had a knife
- This knife (showing the exhibit)
- You stabbed victim in the chest
- You left victim in his apartment
- The victim was bleeding
- The victim was moaning
- You didn't call 911
- You didn't contact neighbors
- You went to your car
- You put the keys in the ignition
- You put into gear
- You drove away
- You didn't stop along the way
- You threw the knife away
- You drove to your apartment

- You entered it
- You closed and locked door
- You didn't call the police
- You didn't call the ambulance
- You went to bed

At this point, the prosecutor could stop this line of questioning. It is critical to resist the urge to ask the hostile witness to draw your conclusion — “So, you fled to avoid getting caught?” This question would only lead to the defendant coming up with their own explanation and would undermine the facts the prosecutor developed through careful concession-based questioning.

Once logical areas of concession-based cross examination are exhausted, it may be time to turn to a more confrontational approach but still focusing on using preplanned lines of impeaching the defendant or the defense witness. Such impeachment can come in many forms — by prior inconsistent statement, by prior omission, by other bad acts, by bias and interest, by motive, by ability, by lack of perception or by memory. Concession-based cross examination can even effectively be used in these impeachment categories of cross examination in appropriate cases.

For example, a defense alibi witness provides a statement in court that is inconsistent with a statement that the witness provided earlier to the investigator. There is an effective three-step process to show the original statement was more truthful, and demonstrate that the new story has been fabricated to save the defendant's skin.

The first step is to confirm the new statement, locking the alibi witness into this new version.

You testified a moment ago on direct examination that you were with the defendant during the night of the burglary, correct?

The second step is to credit the prior statement to demonstrate the witness' first version of the facts was more likely true by asking the defense witness a series of short questions. Such question could be as follows:

Back on July 1, you were interviewed by the police correct?

And that was at your home?

And they asked you a series of questions?

And you provided them with answers?

You understood that you were talking to the police?

This was a criminal matter, it was important to be truthful to the police, you would agree?

When they asked you that question, the burglary in question had taken place only a few days earlier?

Then comes the final step, to confront the witness with the prior inconsistent statement (which should be ready and marked). The confrontation should be done with the precise words used by the witness on the prior occasion as much as possible.

You were asked by the police where you were on the night of the burglary, and you replied that “I was in my house with my girlfriend the whole time,” isn't that correct?

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Having confronted the witness with the prior inconsistent statement, it is generally then a bad idea to ask why their story has changed or to explain the contradiction. To do so, would blunt the impact of the approach; let the defense attorney try to address the contradiction, you now move on to another contradiction and another contradiction, if possible. Perhaps if there are no other significant contradictions, time to move on to the bias of the alibi witness, for example, that they are good friends with the defendant:

- Known each other for ten years
- Play basketball together every week
- Live close to each other
- Went to school together
- Visited defendant in jail
- Would you agree he's one of your best friends
- You try to be a good friend to him
- You don't want any harm to come to him
- You don't want to see him go to prison

More effective to build up facts then to start with the opinion question (“you're good friends with the defendant, correct?") that will lead to a long and not very helpful response by the witness.

Given that defense witnesses are likely to be hostile, the prosecutor has to be prepared for non-responsive answers. It is advisable to have an escalating strategy to address it. First, repeat the question, word for word if possible. If the witness still does not respond to the question, ask if witness understands the question. Then, ask the witness if something is preventing him or her from answering the question. If there is still no answer, consider asking the court to order the witness to answer the question. If the defense witness is still non-responsive, the prosecutor can ignore the witness and, when stops talking, say, “Oh, are you finished? Now please answer my question.”

As with every witness, preparation is essential. If a fellow prosecutor can play the role of the defendant and act in a uncooperative and hostile manner, the prosecutor can practice asking questions and determine what concessions they can reasonable obtain, what strategies actually work, and determine how and when to end the cross examination on a strong note.

Both direct and cross examination require planning and practice. Prosecutors stand to gain when they consider trial techniques developed and tested in other jurisdictions and properly adapt them to the context of their own courtroom. While rules are different, the common goal of effective advocacy is true everywhere — to add value to the case by being persuasive.