

Direct Examination Techniques in Protection Order Cases

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Learning Objectives

As a result of this webinar, participants will be better able to:

- ▶ Plan and conduct a strong direct examination with clients and other witnesses
- ▶ Utilize suggested topics and organization when preparing a direct examination
- ▶ Discuss how the addition of physical evidence and demonstrations make a direct examination more effective

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SAFETY ISSUES

- ▶ ALWAYS keep safety at the forefront
- ▶ Develop safety plans
- ▶ Conduct periodic lethality assessments

DANGER!

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Preparation is Critical

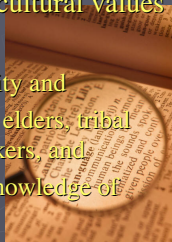
- ▶ “Reliving” abuse can be emotionally & psychologically painful
- ▶ Prepare client carefully & sensitively to minimize discomfort
- ▶ Explain to witness:
 - The value of the testimony
 - Court needs to hear details
 - Courtroom decorum
 - Objections
- ▶ Ask questions to elicit the full, graphic story



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Custom, Tradition, and World View Evidence for the Native American and/or Immigrant Client

- ▶ Consider using expert witness to explain the customs, traditions, and cultural values
- ▶ Expert witnesses
 - drawn from client’s community and
 - can include religious leaders, elders, tribal child protective services workers, and
 - other persons with specific knowledge of custom and tradition



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Custom, Tradition, and World View Evidence for the Native American and/or Immigrant Client continued

- ▶ Consider presenting testimony:
 - evidence about the children’s residency, language, and religious beliefs
 - explaining client’s attitudes or behaviors
- ▶ Educate court
 - on social fabric of client’s community
 - the importance of cultural continuity
 - the value of the support provided by the client’s extended family

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Presentation of Testimony: non-English speaking client

- ▶ Obtain a court certified interpreter
- ▶ If unavailable, be prepared to respond to objections and establish that the interpreter is qualified to interpret in a court hearing
- ▶ If not a native speaker, use the same interpreter during prep and court
- ▶ Ensure client feels comfortable with the interpreter

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Preparing Direct

- ▶ Write out story before beginning prep
- ▶ Pay attention to legal elements, sequence & flow
- ▶ Then create DE questions



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Conducting Direct

- ▶ Watch the basics:
 - Accrediting
 - Development
 - Form
 - Anticipation
 - Relationship



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Conducting Direct continued

- ▶ Let client tell story
- ▶ Listen to witness
- ▶ Fill in gaps
- ▶ Paint vivid picture
- ▶ Anticipate:
 - Client's reluctance or exuberance
 - Opposing party's reaction & objections
 - Court's impatience or interest



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Direct Examination Topics:

- ▶ History of the relationship
- ▶ When the abuse began
- ▶ Last incident of abuse
- ▶ Cause of separation prior to court hearing
- ▶ Past incidents of abuse

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Direct Examination Topics:

- ▶ Children of the relationship
- ▶ Any abuse toward or witnessed by the children
- ▶ The impact of the abuse on client and children
- ▶ Other forms of abuse:
 - Economic or
 - Emotional, etc.
- ▶ Client's request for custody/visitation

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Direct Examination Topics:

- ▶ Special requests:
 - supervised visitation
 - limitation of parental rights of abusing party, etc.
- ▶ Child support and spousal support needs
- ▶ Future plans
- ▶ Continued fear and necessity of orders

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“Drawing the Sting”

- ▶ Allows client to explain bad facts
- ▶ Averts damage *via* impeachment on cross
- ▶ Allows favorable “spin” on the less than flattering evidence
- ▶ Bolsters credibility with judge



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Introduction of Injury Photographs

- ▶ Elements to introduce a photograph:
 - photo is relevant
 - witness is familiar with depiction . . .
 - at the time it is depicted
 - photo “fairly and accurately represents” what is depicted as it appeared on the relevant date



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Introduction of Injury Photographs

continued

- ▶ Objections to anticipate:
 - prejudicial effect outweighs probative value (see F.R.E. 403)
 - ▶ *response*: this is a bench trial; judge will not be swayed by passion and should have all relevant facts
 - photographer not present/not identified
 - ▶ *response*: so what? photographer’s presence is immaterial; victim has testified that the photo fairly and accurately represents her injuries on the date in question
 - no evidence of date photo taken
 - ▶ *response*: witness testified photo is fair and accurate as of a certain date; her testimony is evidence that the photo was taken on the date in question



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Introduction of Injury Photographs

continued

- injuries depicted were caused before/after abuse incident (e.g., caused by subsequent car accident)
 - ▶ *response*: opposing counsel will have an opportunity to cross-examine the witness; if sustained, ask the witness “did you receive any other injuries between the time the photo was taken and the time you received these injuries?” and then ask her “prior to June 30, 2003 did you have any visible red marks on your neck?”
- injuries depicted are self-inflicted, produced with make-up, etc.
 - ▶ *response*: opposing counsel will have opportunity to cross



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Demonstrations by Witness:

- ▶ If planning to have witness show scars:
 - Examine scars first
 - Client should wear modest clothing with easy access to scar/injury. If modesty not possible, use photo instead.
- ▶ Be attentive to the record.
 - Describe what the witness is doing or showing
 - ▶ “May the record indicate the petitioner has pointed to the back of her right arm.”
 - Avoids indecipherable transcript on appeal



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Other Witnesses:

- ▶ Interview all potential witnesses
- ▶ Consider effect of live witness versus available records
- ▶ Some medical/law enforcement witnesses may educate the court
- ▶ Some witnesses may harm victim's case

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Other Witnesses: continued

- ▶ Consider witnesses who:
 - Saw violence
 - Heard violence or threats
 - Observed injuries on a victim
 - Heard admissible statements made by others, including:
 - excited utterances
 - fresh complaints of sexual assault
 - present sense impressions
 - statements by the opposing party
 - statements by the victim

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Other Witnesses: continued

- Observed or heard the reactions of children to violent incidents
- Observed changes in the behavior of children after witnessing violence
- Know facts which could be harmful to client's case

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Child Witnesses

- ▶ Try to keep children off the stand
- ▶ *Voir dire* child to establish competency
- ▶ Adjust questions for child's age & development
- ▶ Select topics appropriate for child
- ▶ Advise client to refrain talking about case with child



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Police Officer as Witness

- ▶ Preparation
 - Interview the officer
 - Provide officer as much notice as possible
 - Check local jurisdiction rules of evidence:
 - ▶ Certified copies/live testimony



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Police Officer as Witness continued

- Is there an officer who:
 - Saw the violent incident(s)
 - Heard violence or threats
 - Observed injuries on a victim
 - Observed injuries on the aggressor
 - Made a determination about self-defense



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Police Officer as Witness continued

- ▶ Issues to consider when calling a law enforcement officer:
 - Are certified copies of police reports admissible?
 - If admissible, does officer have anything to add?
 - Is the officer knowledgeable re: domestic violence?
 - Is officer's knowledge & experience sufficient to qualify as an expert?



Police Officer as Witness continued

- Is there an officer who [continued]:
 - Heard admissible statements made by others, including:
 - excited utterances
 - fresh complaint of sexual assault
 - present sense impressions
 - statements of then-existing mental, emotional, or physical condition
 - statements by the abuser
 - statements by the victim



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Police Officer as Witness continued

- Is there an officer who [continued]:
 - observed or heard children's reactions to violence?
 - aware of any prior reports of domestic violence involving the parties?
 - responded to any prior calls?
 - knows other facts about client or the opposing party?
 - drugs or alcohol involved in the incident?



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Police Officer as Witness continued

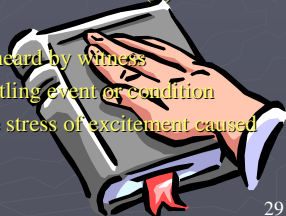
- ▶ On the stand:
 - Ask if the officer knows the parties
 - Establish time frame
 - Elicit testimony describing what was observed
 - Inquire what crimes were committed
 - If using officer as expert:
 - ▶ Establish experience in domestic violence cases
 - Establish education on domestic violence
 - Elicit opinion testimony for domestic violence cases



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Excited Utterance *via* Police Officer

- ▶ What is excited utterance: exception to hearsay
- ▶ Establishing circumstances through victim strengthens presentation
- ▶ Elements admissible under FRE 803(2):
 - statement is relevant
 - statement of declarant heard by witness
 - statement relates to startling event or condition
 - declarant was under the stress of excitement caused by event



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Excited Utterance *via* Police Officer

continued

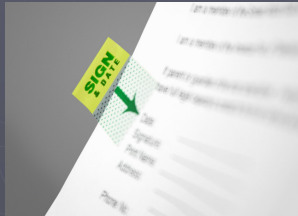
- ▶ Elicit descriptive facts
- ▶ Research case law re: local jurisdiction: how much time can elapse between event and statement



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Certified Copies of Police Reports

- ▶ Some jurisdictions allow certified copies
- ▶ Some jurisdictions: certified copies of police reports introduced as self-authenticating public records under:
 - F.R.Ev. 803(8)
 - F.R.Ev. 902(4)



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Certified Copies of Police Reports

continued

- ▶ Establish the reports are
 - relevant and
 - certified public record
- ▶ Objections to anticipate:
 - record of matters observed by a law enforcement is not admissible under F.R.Ev. 803(8) when offered against accused
 - Applicable to criminal proceedings only

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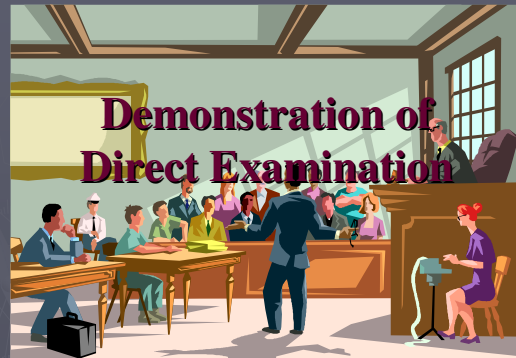
Conclusion:

- ▶ Be prepared
- ▶ Be thorough
- ▶ Be attentive
- ▶ Be seated



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Demonstration of Direct Examination



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- ▶ Q: Mary, can you tell the court when you and Paul separated?
- ▶ Q: Why?
- ▶ Q: What happened?
- ▶ Q: What did he do to you?
- ▶ Q: What did you do?
- ▶ Q: Where were the kids?
- ▶ Q: What did Ann see?

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- ▶ Q: What did Paul do?
- ▶ Q: Mary, I know this is uncomfortable for you but I'm going to ask you to be more specific: Please tell the Judge what you mean by "doing it to you"?
- ▶ Q: And Adam? Where was he?
- ▶ Q: So then what happened?
- ▶ Q: Why did you think you needed to get a protection order?
- ▶ Q: So then what happened?

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- ▶ Q: After you obtained the Order, what happened after that?
- ▶ Q: Was Paul at the hearing?
- ▶ Q: Mary, what does the order of protection say about the kids?
- ▶ Q: How has that worked for you and the kids?
- ▶ Q: So has Paul had contact with the kids since September when the order was issued?
- ▶ Q: So when was the last time Paul saw the kids?

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- ▶ Mary, let's talk about your whole relationship with Paul.
- ▶ Q: The violent incident you described earlier – was that the first time?
- ▶ Q: Were the police ever called?
- ▶ Q: Do you recall another incident?
- ▶ Q: Let's go back to 2005. Did anything happen in 2005?
- ▶ Q: What happened?
- ▶ Q: And did he go to sleep?

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- ▶ Q: What happened after you got out of bed?
- ▶ Q: Did the police come that night?
- ▶ Q: Did you call them?
- ▶ Q: What did you tell the police?
- ▶ Q: Where were the kids when the cops arrived?
- ▶ Q: Why did you tell the kids to stay in the bedroom?

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- ▶ Q: Has that happened before? Them seeing you getting hurt?
- ▶ Q: What would they see when they got up or came out of their bedroom?
- ▶ Q: Would you describe what he would do?
- ▶ Q: Did he slap them the night when Adam called the police?
- ▶ Q: Were there other incidences in 2005?
- ▶ Q: What happened then?

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- ▶ Q: What did Paul do?
- ▶ Q: What did you tell them?
- ▶ Q: Did you try to get an Order of Protection then?
- ▶ Q: Why not?
- ▶ Mary, let's talk a bit about your work while you and Paul were together.
- ▶ Q: Did you work while you and Paul were together?
- ▶ Q: So where did you work?

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- ▶ Q: How long did you work there?
- ▶ Q: Why did you leave that employment?
- ▶ Q: Why did they fire you?
- ▶ Q: What do you mean by 'hanging around down there'?
- ▶ Q: Did you talk to Paul about it?
- ▶ Q: Did you have other jobs?
- ▶ Q: What kind of dancing did you do there?

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- ▶ Q: How long did you work there?
- ▶ Q: So why did you stop working there?
- ▶ Q: Did Paul know how you felt about working there?
- ▶ So let's go back to September of 2006 again, Mary. That time you left Paul.
- ▶ Q: What was different in September of last year that made you finally leave?

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- ▶ Q: Now that you have your order of protection, what do you want this court to do with the protection order?
- ▶ Q: Why?
- ▶ Q: Has Paul made threats to do that – to take your children away from you?
- ▶ [END OF DEMO]

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Additional Resources



- ▶ Trial Objections List (handout)*
- ▶ Roger Haydock and John Sonsteng, Trial Advocacy Before Judges, Jurors, and Arbitrators (1999).
- ▶ Kenny F. Hegland, Trial and Practice Skills in a Nutshell (1994).
- ▶ Ronald L. Carlson and Edward A. Imwinkelried, Dynamics of Trial Practice (3rd ed. 2002).
- ▶ Thomas Mauet, Trial Techniques (2002) (6th ed. 2002).
- ▶ Edward Imwinkelried, Evidentiary Foundations (5th ed. 2002).
- ▶ National Institute for Trial Advocacy, Federal Rules of Evidence (2006). (pocket size)

*available on ABA Commission on Domestic Violence website (www.abanet.org/domviol)