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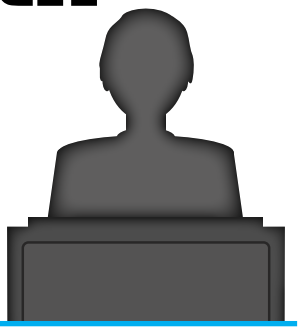
Making Your Case with Witness Testimony



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Considering the decisive effect witness testimony has on the outcome of a trial, preparing witnesses for testimony and improving direct examination techniques will pay dividends for your case presentation.

"Your Honor, the government calls its first witness, Ms. Amanda Silver."

Anticipation builds and the courtroom falls silent as the bailiff leaves the courtroom to retrieve the witness. From the bench, the judge scans the courtroom and observes the lead trial counsel nervously jot a note at the podium, assistant trial counsel resists the urge to stare at the door (but glances frequently in that direction anyway), defense counsel tries to look bored as her client shifts uneasily in his chair, the members sit on the edge of their seat anxious to hear the witness' story. As the courtroom door swings open, every eye shifts towards the entrance and the witness steps inside.

The witness is in the spotlight and the lawyer is there to direct the testimony to synthesize the elements of the offense, address any potential defenses, and incorporate theme and theory in a compelling, understandable, and memorable way.[1] The intent of this article is to emphasize the importance of witness testimony and provide best practices for counsel to strengthen their case through preparation, purposeful witness interviews, and effective direct examinations.

PROFESSIONALISM AND PREPARATION

While accepting the Cecil B. DeMille award for outstanding contributions to the world of entertainment at the 2020 Golden Globe Awards, Tom Hanks relayed some advice he received as a young actor: "You have got to show up on time, and you have to know the text, and you have to have a head full of ideas."[2] While intended as advice for professionals in the entertainment industry, his advice applies equally to trial lawyers.

Showing up on time means being a professional and having respect for others.[3] Having time to "settle down" gives you the freedom to get comfortable, have a drink of water, use the restroom, and be calm and confident *before* trial begins.[4]

Knowing the text means being prepared for the work. New advocates may believe that successful litigators can roll into the courtroom and charm their way to victory. Confidence and charisma are characteristics of a good advocate, but the best lawyers know they cannot rely on talent or past success. Knowing the case inside and out and being prepared for any situation that may arise are part of the formula to achieve confidence and charisma in the courtroom. **Having a head full of ideas** is the result of being prepared and bringing insightful ideas to the case. This is an underappreciated part of trial preparation. Working a case early and often gives you a decided advantage — the ability to think about your case.

> Local counsel can increase their role on the trial team and improve their overall case presentation by embracing their role as "continuity" and developing creative and effective ways to present their case.

In complex courts-martial, local trial counsel and the area defense counsel often serve as the continuity on the case before circuit counsel arrives.[5] By knowing the case inside and out, you give yourself the opportunity to brainstorm and devise effective ways to present your case. A thorough understanding of the case is important for two reasons: (1) as continuity on the case, you can identify key insights that affect trial strategy based on your knowledge of the investigation, prior witness interviews, and procedural history of the case; and (2) taking time to think about the case can help you find innovative ways to present evidence (i.e., using PowerPoint to display text messages, using video editing software to present portions of an interview, etc.). Showing your value to circuit counsel gives them confidence to give you a bigger role in the trial. On the other hand, if you are not prepared, circuit counsel will undoubtedly shoulder the lion's share of the work thereby diverting their efforts from other aspects of trial preparation.

The many competing interests demanding counsel's time can make keeping up with witnesses a challenge. Knowing what a witness will say in their testimony is a basic principle of witness preparation, but experience has shown it is not always clear that counsel interviewed their witnesses before trial. One findings witness, upon being asked to point out the Accused, looked around the courtroom earnestly before proudly pointing to a case paralegal seated in the gallery and wearing service dress. In another instance, a government sentencing witness, after being painstakingly led through the foundation to provide a rehabilitative potential opinion, proceeded to enthusiastically endorse the Accused's ability to be restored to a useful and constructive member of society.[6] These examples show what can happen when one "assumes" what their witnesses are going to say without conducting a thorough interview. Here are a few things counsel can do to ensure they are prepared when their witness takes the stand.

DEVELOP A THEORY AND STRATEGY TO PRESENT YOUR CASE

Trial preparation should start with a thorough review of the evidence and development of a theory that drives all case presentation decisions. This process must necessarily be focused on the members and create a clear and consistent picture of what happened.[7] Once you have a case theory, you must assess how to present your case to the members so that it persuades them to decide in your favor. Remember, while you have been living with the case for several weeks or even months prior to trial, the members feel like they are "jumping onto a fast moving train in unfamiliar territory."[8] Therefore, it is important to present testimony to the members in a logical, straightforward, and easy to follow way. When thinking about witness sequence and how to organize each direct, consider storytelling mechanisms that will make it easier for members to understand and remember the testimony. Some common story structures to consider may be chronological, relational, *in medias res*[9], or utilizing the effects of primacy and recency by presenting the most important facts first and last. Stories are containers that organize and store facts for easier comprehension, so the better you tell the story, the better members will understand and remember your theory of the case.

REVIEW WITNESS STATEMENTS

Before conducting any witness interviews, make sure you are familiar with any statements related to the case made by the witness. The obvious place to start is witness statements but do not forget to review any other source of evidence such as photos, social media, text messages, or reports that contain prior statements or information relevant to the witness' testimony.

When reviewing the case file it may be tempting to only read the typed investigator summary of a witness interview …. However, actual witness statements often contain important details left out of summaries.

When reviewing the case file it may be tempting to only read the typed investigator summary of a witness interview instead of deciphering barely-legible scribbles on an Air Force IMT 1168.[10] However, the actual witness statements often contain important details left out of summaries. In addition to going directly to the source material, there are other ways you can be more efficient with your time. First, take notes as you review the prior statements and highlight important sections of the statement. However you organize for trial, having separate files (or electronic folders) for each witness makes sense so you can have everything related to a particular witness in one easily accessible place.[11] Another way to streamline trial preparation is to type out a verbatim copy of any difficult to read witness statement. Having a legible copy helps you to carefully review the prior statement while simultaneously creating a useful trial aid. Likewise, if the interview was videotaped, typing out a transcript of the interview along with notes and time-hacks will save time, for you and circuit counsel.

PURPOSEFUL WITNESS INTERVIEWS

Plan. Conducting pretrial interviews is not as easy as arranging a time and asking questions. When investigators conduct interviews, they are often starting from scratch and mining for relevant information. By the time a trial lawyer is conducting interviews the issues are narrowed. Therefore, counsel should prepare by creating an interview plan or outline to ensure all important topics are covered. Here are some general areas that should be covered in a pretrial interview (depending on the type of witness).

Location. To the extent possible, it is a good idea to show witnesses the courtroom and walk through the process of testifying. For this reason, trial counsel should conduct most interviews at the legal office so the witness can see the courtroom. For defense counsel, while less convenient, it is worthwhile to coordinate access to the courtroom for a visit. Even if a courtroom visit is not possible, a thorough explanation of the entire process from when to arrive and where to wait, up through the excusal instructions and exiting the courtroom is helpful. Even criminal investigators benefit from a walk-through. Air Force Office of Special Investigations criminal investigation agents and Security Forces investigators are often new and nervousness may affect their credibility as a witness. Preparing the witness so they know what to expect in the courtroom can make a witness feel more comfortable and lead to better testimony. For instance, investigators may have a tendency to become defensive when challenged on cross examination about the quality of their investigation. Giving the witness an idea of what to expect so they are not caught off guard and reminding the witness to remain composed can significantly improve the witness' experience – and their credibility.

Participants. A third-party should be present for all witness interviews.[12] Failing to have a "witness" present to observe the interview and take notes could lead to forgoing the ability to impeach the witness if necessary.[13] Ideally you would have a case paralegal or defense paralegal who is familiar with the case taking meticulous notes. A best practice is also to type up the notes and send to the attorney immediately afterward to keep in the witness file.

Nature of Testimony. Before conducting the interview, counsel should have a good idea of the expected testimony. Drafting the examination outline prior to the interview helps to nail down the areas that you expect to cover during testimony. Communicating to the witness what is expected from their testimony without coaching the witness is not that difficult. Explain what you want them to testify about and then ask related questions so you are familiar with how they respond. This practice may vary based on the type of witness or circumstances, but the basic principles are these: (1) the witness should be comfortable with the questions you will be asking in court; and (2) you should be comfortable knowing what answers to expect.

Prior Statements. It is always a good idea to have the witness review relevant prior statements before their interview and testimony. This pre-emptive refreshing recollection will ensure information is fresh in their mind and can help identify potential discrepancies. If the witness remembers something differently, it is better to know about it in advance so you understand the nature of the discrepancy and how to address it during testimony. This can be particularly important for investigators who completed their investigation several months or even a year before trial. For example, if counsel plan to ask when an investigator took a particular investigative step it may be helpful to review something to identify the exact date they contacted that witness (i.e., phone record, Report of Investigation, etc.). In one trial, a local law enforcement officer testified about their role in an investigation. What should have been a relatively simple line of questioning about how the investigation progressed, took three times longer as counsel repeatedly had to refresh the witness' recollection on minor details that were not in dispute. Simply ensuring the officer was prepared and had reviewed the appropriate documents would have saved time and enhanced her credibility. Witnesses do get nervous and may forget something on the stand; it is a good practice to be prepared for this eventuality by explaining the process for refreshing recollection to the witness in a pretrial interview.[14]

Exhibits. Demonstratives or actual evidence can help make witness testimony more memorable and persuasive as learning and retention are improved when information is presented both aurally and visually.[15] If you expect to use exhibits with a witness, take the time to practice during the interview. The witness should be familiar with any documents you intend to use (except perhaps when counsel is using the exhibit to impeach or surprise a witness on cross examination).

EFFECTIVE DIRECT EXAMINATIONS

Trials are won based on the strength of the evidence presented. Being an effective advocate means presenting that evidence in a way that members will "understand, accept, and remember."[16] Here are a few suggested ways to design and conduct effective direct examinations to present a stronger case.

> Being an effective advocate means presenting evidence in such a way that members will "understand, accept, and remember."

Control and Confidence in the Courtroom. Good advocates realize the members are always watching and are more likely to place their confidence in an advocate if they establish competence in how they perform legal tasks.[17] One way to gain or lose such confidence is when a witness is called to testify. Prior to a witness entering the courtroom, nearly every time, there is a short colloquy between the judge and counsel.

> **Judge:** Counsel, do you have any evidence to present?
>
> **Trial counsel:** Yes, your honor, the government calls Ms. Jane Doe.
>
> **Judge:** Bailiff, please retrieve Ms. Doe from the witness room.

Thus, it is *never* a surprise when a witness is about to enter the courtroom. Yet anecdotal experience reflects it is a common occurrence for the witness to enter the courtroom and

receive no immediate direction. Failure to direct a witness in the courtroom is more common when a witness is called by the defense. On one occasion, a general officer was called to testify in the defense case in chief. Appropriately, counsel alerted the court in advance to the witness' rank and all parties agreed the courtroom should not be called to attention for the general officer.[18] However, despite the anticipation leading up to the witness being called, when he entered the courtroom, no one was prepared to direct the general to the witness stand. He entered the courtroom and looked around uncomfortably before being directed by the judge. By virtue of the procedural guide, trial counsel have a golden opportunity to establish control of the courtroom by *simply being ready*.

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Confidently, courteously, and efficiently directing witnesses to the witness stand and administering the oath is an easy way to show the members (and the judge) you know your way around a courtroom. Once the witness is called, counsel should meet the witness at the entrance to the well, open the gate to enter the well, and clearly and confidently direct them to the witness stand before administering the oath loud enough for all to hear. Counsel should memorize the oath and be prepared to ask the identifying and introductory questions (full name, rank, and unit, if military, or full name and address, if civilian).[19]

Pace and Volume. Once the witness takes the stand, the effective advocate knows the witness should be at center stage while the advocate fades into the background. Counsel should conduct the conversation like a symphony, guiding the tone, volume, and pace. The mechanics of testifying should be worked out in advance by explaining to the witness where to direct their answers, to speak loudly so members can hear, and to speak at a reasonable pace. Even the most seasoned witness will likely fall back into their ordinary speaking habits, so it is incumbent on counsel to remind the witness with subtle conversational signals. For example, if counsel wants the witness to direct their answer to the members, they can do so by making eye contact with the witness and then looking over to direct their attention to the members while using a tagline such as "*can you tell the members …*" Similarly, if the witness is speaking too softly, counsel can cue them to speak up simply by raising their voice slightly to remind the witness to keep their voice up without interrupting the flow of the direct. During emotional testimony a witness' voice may naturally soften, but no matter how emotional, the testimony will be meaningless in the deliberation room if members are unable to hear and understand the witness.

Finally, members are hearing the testimony for the first time and they are processing a lot of information at once. Witness testimony is the feature presentation so if it looks like you or your witness are rushing through their testimony, the members may conclude the testimony is not that important. To avoid this disastrous outcome, counsel should be aware of their own pace and conduct the examination at a measured pace so the listener can digest the testimony. Controlling the pace also allows you to slow down the action so important facts do not get lost.[20] This can be accomplished by breaking the testimony into small, easy to comprehend segments.[21]

Headlines. Another effective tool to present witness testimony in a way members are more likely to understand and remember is to use headlines. When a witness first takes the stand, the members likely do not know what to expect from the witness. Headlines (also referred to as tags or signposts) orient the members to the general nature and purpose of the testimony. After asking the witness to introduce themselves, an advocate can tell the members, and the witness, what to expect from the testimony. For example, "*Airman Jones, I would like to talk to about your relationship with Mr. Crane and where you were on October 31st. But first I want to ask you a few more questions about yourself.*" Each time you move to a new topic, include a transition to serve as a signpost for the change in topic: "*thank you Airman Jones, now I'm going to ask you about your relationship with Mr. Crane.*"

Headlines serve to orient the audience, they can also direct the witness to the topic of conversation and keep a wandering witness on track.

Headlines have several other advantages for an advocate. First, they can help control a witness on direct examination. Just like headlines serve to orient the audience, they can also direct the witness to the topic of conversation and keep a wandering witness on track.[22] For instance, "*Airman Jones, we will talk about that in a moment, but first I have a few more questions about Mr. Crane.*" Second, headlines create an easy way to organize a witness examination and keep it conversational in tone. Headlining a new topic with "*now I'd like to ask about your relationship with Mr. Crane*," will inform the members what they are about to hear from the witness *and* sets up the advocate to follow up that headline with a series of short, easy to follow questions such as: "*how do you know Mr. Crane?*," "*when did you first meet?*," "*where was that?*," "*what was his demeanor like?*," "*how could you tell he was upset?*," "*do you know why was he upset?*" These questions do not need to be scripted out and can be as broad or narrow as necessary to elicit the appropriate information on that topic. As you can see in the example above, you can draw out the information you want by mixing up *who*, *what*, *when*, *where*, *why*, and *how* questions. This also emphasizes the importance of listening to the witness so the direct becomes a conversation in which the advocate asks natural follow up questions based on the witness' responses.

Listening. Just like an engaging conversation, a good direct examination requires listening. A good conversationalist makes the speaker feel comfortable by being an active listener and showing interest in the speaker. If counsel do not appear engaged in what their witness is saying, why should the members be interested? Clinging to a scripted list of questions can lead to a boring and stilted examination. If you are focused on your next question rather than listening to the witness, members will detect disinterest.

One method of preparing for a direct examination is to have a list of the facts you need to elicit from the witness and an outline to guide the conversation with prepared headlines and transitions. This gives the examiner a cheat sheet to direct the story while allowing enough flexibility to create an organic conversation. Another benefit of good listening is that you are engaged in the conversation as a participant and proxy for the members. As this is the first time the members are hearing the testimony, you should play your role as if it is the first time you are hearing the answers as well. Show interest and ask follow-up questions as appropriate to clarify and explain answers when appropriate. Similarly, the witness may leave something out or hurry through a key part of their testimony. By listening attentively, an advocate can use techniques like looping, incorporating a particularly important answer into the next question to highlight the answer and control the witness.[23]

Evidence and Demonstrative Exhibits. It is challenging to present testimony so members will understand and remember it. To compound the challenge, members are operating at two disadvantages: (1) they have never heard the testimony before; and (2) they are receiving it aurally.[24] Studies have shown that learning and retention are improved significantly when information is conveyed visually.[25] Using exhibits during testimony is a good way to corroborate witness testimony and gives you a chance to highlight important testimony through the use of an exhibit. Since a witness' credibility is always at issue, why not use readily available and admissible graphic information such as photographs, a map, or diagram to corroborate the witness' testimony? In addition to supporting the testimony it also creates a mental picture for the members to visualize when they listen to the story, thus effectively giving the members an opportunity to "relive reality from your side's perspective."[26] Exhibits can be used during testimony to break up lengthy testimony by adding a visual component or they can be used at the conclusion of dramatic testimony to summarize and highlight the important facts brought out in the testimony.[27]

Demonstrative exhibits can be almost anything, provided counsel is able to lay the proper foundation.[28] If alcohol consumption is at issue, it may be useful to have a demonstrative of the cups being used on the night of the offense. Instead of saying, "everyone was drinking out of red plastic cups …" counsel could lay the foundation for a photograph of the cups or an actual cup which is identical to those used on the night in question. Given the technology available in most courtrooms, counsel are only limited by their own creativity in presenting admissible videos, recordings, photos, text messages, documents, or other exhibits to complement witness testimony and make the presentation more captivating. Counsel should be aware, however, that using demonstratives and exhibits requires preparation and practice. Particularly with the use of technology in the courtroom, be forewarned — Murphy's Rule applies — anything that can go wrong, will go wrong. This is not meant to deter anyone from using technology, but counsel should prepare in advance, practice the presentation … and have a back-up plan.

When using technology in the courtroom, counsel should prepare in advance, practice the presentation … and have a back-up plan.

CASES RISE AND FALL ON WITNESS TESTIMONY

Witness testimony forms the backbone of every litigated trial. Some trial lawyers would like to think eloquent openings and closings stir the factfinder to decide in their favor, but ultimately, it is witness testimony (and the credibility of that testimony) that determines the outcome of a case. The drama of a courtroom plays out through witness testimony and cases are won and lost on the content and believability of each witness' testimony. Considering the decisive effect witness testimony has on the outcome of a trial, preparing witnesses for testimony and improving direct examination techniques will pay dividends for your case presentation.

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ENDNOTES

[1] Thomas A. Mauet, Trial Techniques 97 (Aspen Publishers, 7th ed. 2007).

[2] Justin Bariso, *Hidden in Tom Hanks's Emotional Golden Globes Speech was the Best Career Advice You'll Hear Today. Here it is in One Sentence*, Inc. (6 January 2020), https://www.inc.com/justin-bariso/hidden-in-tom-hankss-emotional-golden-globes-speech-was-best-career-advice-youll-hear-today-here-it-is-in-1-sentence.html, (last visited 4 February 2021).

[3] 5 Roger M. Goldman, Mark J. Kadish & Rhonda A. Brofman, Criminal Law Advocacy § 80.05 (Matthew Bender & Co., 2020). The public and court members have an expectation that JAG attorneys are knowledgeable and professional at all times. Proving them wrong by showing up late or unprepared is at your peril. "The advocate should always conduct himself in such a way that the jury will conclude that he is a true professional in his field."

[4] Bariso, *supra* note 2.

[5] Circuit trial and circuit defense counsel are senior Air Force litigators competitively selected to serve in the role of prosecutor and defense counsel on the Air Force's most serious and complex cases. They have ordinarily served assignments as both prosecutor and defense counsel prior to selection as circuit counsel.

[6] *See* Rules for Courts-Martial (R.C.M.) 1001(b)(5). Devoting the time to develop a clear understanding of rehabilitative potential evidence, a topic which comes up repeatedly in courts-martial sentencing proceedings, is a good return on investment.

[7] Mauet, *supra* note 1, at 25.

[8] Lt Col Grant L. Kratz, *Guilty Plea/Member Sentencing Cases: The Only Thing that Should Be Relaxed is the Rules*, 37 The Reporter, 6, 7 (2010).

[9] *In medias res*, a Latin phrase meaning to start a narrative "in the middle of things," is a classic storytelling technique used in Homer's *Iliad* and *Odyssey*, Shakespeare's *Hamlet*, as well as modern classics like *Star Wars* and the *Godfather* trilogy.

[10] An Air Force Form 1168, Statement of Suspect/Witness/Complainant, is a commonly used form in Air Force practice by investigators to obtain written statements from witnesses.

[11] Remember the 7-second rule. You should be able to find anything you need in under 7 seconds while in trial.

[12] *See* Air Force Standards for Criminal Justice, Rules 4-4.3(d); 3-3.1(g).

[13] *Id.*

[14] Inexperienced counsel frequently confuse the process for refreshing recollection (I don't remember what you want me to say) with impeachment (commit, credit, confront). This is another area where counsel would get a good return on investment to understand the two and be able to lay the correct foundation at the drop of a hat. As a general matter, with a friendly witness on direct examination, you are trying to help the witness remember. So generally, on direct examination, you want to refresh the witness's memory. With an unfriendly witness on cross examination, you are not trying to help; you are trying to land a blow to the witness' credibility. So generally, on cross-examination, you want to impeach.

[15] Mauet, *supra* note 1, at 169.

[16] *Id.* at 97.

[17] Goldman et al., *supra* note 4, at § 80.05.

[18] *See* Uniform Rules of Practice Before Air Force Courts-Martial, Rule 6.1 (1 January 2021).

[19] *See* R.C.M. 913(c)(2), discussion.

[20] Mauet, *supra* note 1, at 107.

[21] *Id.*

[22] Jim McElhaney, *Direct Answers: Examining a Witness Is Telling a Story — So Make It a Good One*, ABA Journal, 1 May, 2012, https://www.abajournal.com/magazine/article/direct_answers_examining_a_witness_is_telling_a_storyso_make_it_a_good_one, (last visited 2 November 2020).

[23] Mauet, *supra* note 1, at 113. Looping incorporates the witness' last answer into the phrasing of the next question, both highlighting the fact and using it to frame the next question.

[24] *Id.* at 98. Attention spans drop significantly after 15 – 20 minutes.

[25] *Id.* at 169.

[26] *Id.* at 97.

[27] *Id.* at 115.

[28] A good resource for foundational requirements in military practice can be found in Military Evidentiary Foundations authored by David A. Schlueter, Stephen A. Salzburg, Lee D. Schinasi & Edward J. Imwinkelried, (Matthew Bender & Co., 6th ed. 2016).