

American Bar Association Commission on Domestic Violence
Continuing Legal Education Teleconference Series
Litigation Techniques and Strategies In Domestic Violence Cases:
A Teleconference Series

DIRECT EXAMINATION¹
Wednesday, March 15, 2006, 1:00 p.m. – 3:00 p.m. EST
Presenters: Laura Martinez, Esq. and Klaus Sitte, Esq.

Notes	Outline
	<p>I. DIRECT EXAMINATION</p> <p>A. Preparation</p> <ol style="list-style-type: none">1. Preparation is critical to effective direct exam<ol style="list-style-type: none">a. Recognize that requiring a client to "relive" her abuse on the stand can be emotionally and psychologically painfulb. Prepare client carefully and sensitively to minimize discomfortc. Inform client that the testimony is valuable and that it is important to explain what happened in detaild. Be prepared to ask questions which will elicit the full story in graphic terms

¹ These materials were adapted by Laura Martinez and Klaus Sitte from the prior teleconference series prepared by Hallie Bongar White of the Southwest Center for Law and Policy from *The Domestic Violence Civil Law Manual Protection Orders and Civil Law Cases*, Lisae C. Jordan, Bette Garlow, et al. (American Bar Association, 2001).

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	<p>B. Presentation of Custom, Tradition, and World View Evidence for the Battered Native American Client and/or Immigrant Client</p> <ol style="list-style-type: none"> 1. Consider using an expert witness to explain the customs, traditions, and cultural values of client and her tribe and/or culture(may be especially important in child custody determinations) 2. Expert witnesses can be 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. 3. Consider presenting: <ol style="list-style-type: none"> a. Testimony and evidence about the children’s residency, language, and religious beliefs. b. Testimony about the cultural basis for claim of self-defense 4. Educate the court on the richness of the social fabric of the client’s community, the importance of cultural continuity, and the value of the support provided by the client’s extended family. <p>C. Presentation of Testimony when the Client does not speak English</p>

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1. Obtain a court certified interpreter
2. If one is not available be prepared to respond to objections and establish that the interpreter is qualified to interpret in a court hearing.
3. If you do not speak the client's language, try to always use the same interpreter during preparation and for court hearings.
4. Make sure that the client also feels comfortable with the interpreter.
5. Establish whether the interpretation will be simultaneous or consecutive in court and instruct client about how that will work.
6. If the interpreter is not from the same country or region as client, make the interpreter aware of any words or phrases peculiar to client's dialect.
7. If client is hearing impaired, try to have an additional interpreter available to establish that the interpretation is correct and to relieve the other interpreter if necessary.
8. If you become aware of a misinterpretation during your examination, object and get

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the correct interpretation for the record.

D. Conducting Direct

1. Watch the basics:
 - a. Accrediting
 - b. Development
 - c. Form
 - d. Anticipation
 - e. Relationship
2. Let client tell the story. Attorney’s role is to support the direct, not to take it over by interrupting. *Do not ask leading questions.*
3. Listen to witness carefully for breaks in the story. Fill in gaps by asking follow up questions and don’t get tied to a script
4. Paint a vivid picture. Provide detail and do not let discomfort - even your own - result in a watered down telling of the story.
5. Anticipate:
 - a. Client’s reluctance or client’s exuberance
 - b. Opposing party’s reaction and objections
 - c. Court’s impatience or interest

E. Consider Covering the following topics during the direct examination:

1. History of Parties’ Relationship

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2. When the Abuse began
3. The Last Incident of Abuse and what caused the separation prior to court hearing.
4. Past Incidents of Abuse
5. Children of the Relationship
6. Any abuse toward or witnessed by the children
7. The Impact of the Abuse on Client and Children
8. Other forms of Abuse, i.e. Economic/Emotional, etc.
9. Client's request for Custody/Visitation
10. Special requests for Supervised Visits, limitation of parental rights of abusing party, etc.
11. Child Support and Spousal Support needs
12. Plans for the future of the Client
13. Client's continued fear of Respondent and why these orders are necessary.

F. "Drawing the Sting"

1. "Drawing the sting" means allowing the client to explain the circumstances surrounding prior convictions, prior guardianships of her children, and struggles with alcohol and substance abuse.
2. Less damaging than if the evidence is first introduced by the Respondent in

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his impeachment of client on cross examination.

- a. Allows a favorable “spin” on the less than flattering evidence.
- b. Helps gain additional credibility with the judge if he or she hears these potentially damaging facts on direct rather than hearing them for the first time from the Respondent.

G. Introduction of Photographs of the Victim’s Injuries (F.R.Ev.1001)

- 1. Elements to introduce a photograph:
 - a. photo is relevant
 - b. witness is familiar with what is depicted . . .
 - c. at the time it is depicted
 - d. photo "fairly and accurately represents" what is depicted as it appeared on the relevant date
- 2. Objections to anticipate:
 - a. prejudicial effect outweighs probative value (see F.R.Ev. 403)
response: this is a bench trial; judge will not be swayed by passion and should have all relevant facts

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- b. 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
- c. 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.
- d. 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?"

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- e. injuries depicted are self-inflicted, produced with make-up, etc.
response: opposing counsel will have opportunity to cross

H. Demonstrations by Witness/Displaying Injuries

1. If you plan on asking a witness to show scars:
 - a. Look at them first. If a scar is not clearly visible, it may harm client’s case to show it. If trial will be much later, obtain a good photo of scar.
 - b. Advise client to wear clothing which will provide easy and modest access to the scar. If modesty is not possible, use a good photo instead.

2. If witness uses her hands to demonstrate what happened, be attentive to the record.
 - a. Describe what the witness is doing or showing. (*e.g.*, "may the record indicate the petitioner has pointed to the back of her right arm.")

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- b. Without this information on the record, a transcript may be indecipherable on appeal.

I. Other Witnesses in General

1. Interview all potential witnesses; do not rely on client’s expectations about what witness will say
2. Consider whether a live witness is better or worse than any available records.
3. Some medical or law enforcement witnesses may be able to help educate the court about the dynamics of domestic violence as well as provide testimony as to what they observed in the case at hand.
4. Some witnesses may actually harm your case, especially those who personally believe that many women fabricate allegations of abuse.
5. In general, consider calling witnesses who:
 - a. Saw the violent incident(s).
 - b. Heard violence or threats.
 - c. Observed injuries on a victim.

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- d. Heard admissible statements made by others, including:
 - (1) excited utterances
 - (2) fresh complaints of sexual assault
 - (3) present sense impressions: statements of then-existing mental, emotional, or physical condition
 - (4) statements by the opposing party (the abuser)
 - (5) statements by the victim (admissible if the truth or motive of her statement is attacked)
- e. Observed or heard the reactions of children to violent incidents.
- f. Observed changes in the behavior of children after witnessing violence (*e.g.*, clinging to victim, aggression, withdrawal).
- g. Know of facts which could be harmful to client's case (*e.g.*, drug and alcohol use, initial

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aggression, child maltreatment).

J. Child Witnesses

Try to keep children off the stand. Let the Court know that the child witness is available if the Court feels that it is necessary after having heard all of the evidence. If you anticipate using a child witness, file a motion as to how you want child's testimony to be taken, i.e. in camera, in the presence of both attorneys, outside the presence of the parties, through a GAL's report, etc.

1. Children on the Stand
 - a. Ask *voir dire* questions to establish child's competency to testify, especially child's comprehension of what it means to tell the truth
 - b. Adjust questions for child's age and development
 - c. Be selective regarding topics to cover with child; child will not likely have the attention span or patience to be on the stand long.
 - d. Advise client not to talk to the child about the case

K. Using the Police Officer as a Witness

1. Preparation

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- a. interview the officer, either telephonically or in person, prior to the hearing
 - b. provide officer as much notice as possible of intention to call the officer as a witness.
 - c. Note that some jurisdictions will admit certified copies of police reports in lieu of live officer testimony, although this may raise hearsay objections. Check local jurisdiction rules of evidence.
2. Consider these issues when deciding whether to call a police officer:
- a. Are certified copies of police reports admissible in lieu of live officer testimony in local jurisdiction?
 - b. If certified copies of the police report are admissible in lieu of officer testimony, does the officer have anything to add which was not documented?
 - c. Is the officer knowledgeable about domestic violence?
 - d. Is the officer's knowledge and experience sufficient to qualify the officer as an expert?
 - e. Is there an officer who:
 - (1) Saw the violent incident(s).
 - (2) Heard violence or threats.

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- (3) Observed injuries on a victim.
- (4) Observed injuries on the aggressor.
- (5) Made a determination about whether injuries were caused in self-defense.
- (6) Heard admissible statements made by others, including:
 - (a) excited utterances
 - (b) fresh complaint of sexual assault
 - (c) present sense impressions
 - (d) statements of then existing mental, emotional, or physical condition
 - (e) statements by the opposing party (the abuser)
 - (f) statements by the victim (admissible if the truth or motive of her statement is attacked)
- (7) Observed or heard the reactions of children to violence.
- (8) What will come out on cross-examination?
- (9) Is the officer aware of any prior reports of domestic violence involving the parties?

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- (10) Has the officer ever responded to any prior calls involving the parties?
 - (11) What else does the officer know about client or the opposing party?
 - (12) Were drugs or alcohol involved in the incident observed by the officer?
3. On the stand:
- a. Ask if the officer knows the parties.
 - b. Establish the time frame.
 - c. Elicit testimony describing what was observed.
 - d. Inquire as to what crimes the officer believes were committed.
 - e. If using the officer as an expert or for a layperson's opinion:
 - (1) Establish officer's experience in domestic violence cases.
 - (2) Establish officer's education on domestic violence.
 - (3) Elicit testimony about the officer's opinion as to why a fact is relevant and/or typical for domestic violence cases.

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L. Introduction of Excited Utterance Through the Police Officer (Fed.R.Evid. 803(2))

1. *E.g.*, a victim is beaten and then runs to neighbor, still crying and upset from the abuse. She tells the neighbor, while still under the stress of the abusive incident, “My husband is trying to kill me.” That statement is the excited utterance.
2. Excited utterances are exceptions to hearsay
3. Establishing circumstances of ‘excited utterance’ through victim strengthens the presentation.
4. Elements of an excited utterance admissible under FRE 803(2) are:
 - a. statement is relevant
 - b. statement of declarant heard by witness
 - c. statement is relating to a startling event or condition (e.g., being abused)
 - d. declarant was under the stress of excitement caused by the condition or event (*i.e.*, the statement was made near in TIME to the event)

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5. Elicit descriptive facts about how the victim appeared when she made the statement (*e.g.*, crying, shaking) and the period of time between the event and the statement (*e.g.*, “a matter of seconds”)
6. Research case law in local jurisdiction to determine how much time can elapse between the event and the statement. There may also be case law that addresses how the abuser’s act of not allowing the victim to leave for some period of time impacts on the admissibility of the excited utterance. Some states provide wide latitude in time.

M. Certified Copies of Police Reports in Lieu of Live Testimony

1. Some jurisdictions allow the introduction of certified copies of police reports in lieu of live officer testimony.
2. In many jurisdictions, certified copies of police reports may be introduced as self-authenticating public records under:

F.R.Ev. 803(8) [re: hearsay, public records, and reports]

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F.R.Ev. 902(4) [re: self-authentication]

3. In order to introduce police reports, first establish that the reports are relevant and are a certified public record.
4. Objections to anticipate:

A record of matters observed by a law enforcement person is not admissible under F.R.Ev. 803(8) when offered against an accused. However, this objection applies to criminal proceedings only

N. Demo of Direct Examination