

International Municipal Lawyers' Association

§1983 Litigation-Spring 2017

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Opening Statements-Win from the Start!

Your Story-But Make Sure you can DELIVER!

Case Theory: “Here’s what really happened…”

- Moral of story
- Tell a good story
- One simple clear story told in one minute
- Evidence and testimony at trial must support this theory
- No alternative stories
- Must be reasonable, comport with evidence, show what happened
- Must explain why officer acted that way
- Clear reasonable story wins

Theme/labels/word selection: "think in pictures – visualize"

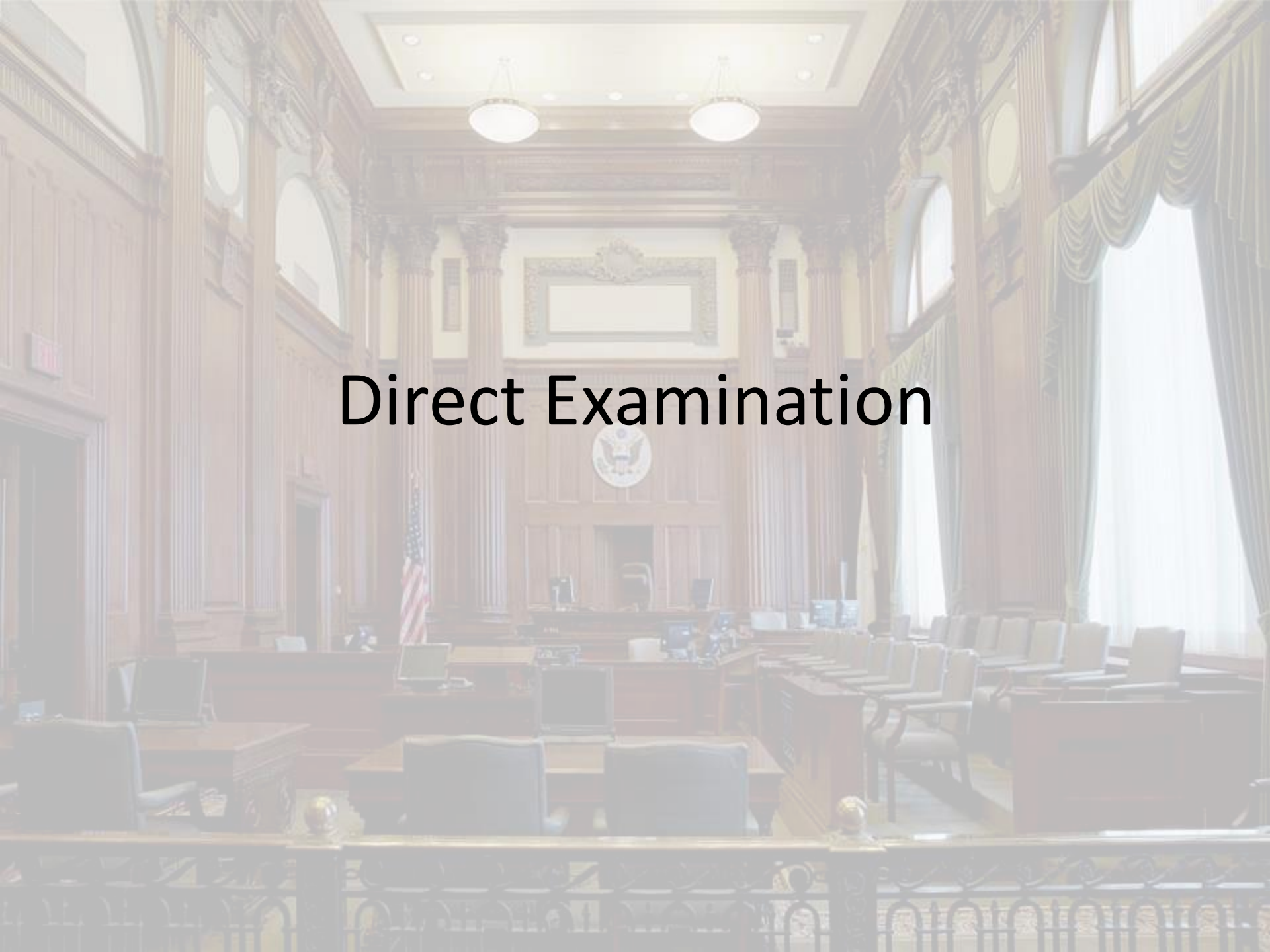
- Words you want jurors to accept and use during deliberations
- Easy to say and remember
- Clear, simple, no jargon
- Assign before trial and use consistently throughout trial
- Memorable words / phrases – sayings, parables, expressions
- Must create emotion or picture
- Emphasize or minimize evidence
- Emphasize people
- Altercation /incident vs. attack/fight/violent assault/struck in temple with tire iron/ bashed with jagged glass bottle

Visual aids key to case…Also key to plaintiff's case…

- Compelling images
- Key evidence
- Photo/weapon/liquor bottle/video/depo/document
- Make evidence yours if open to interpretation (video)
- Permission from judge

Address Case Weaknesses-Stifle the Opposition

- Blunts impact of bad facts
- Heightens attorney credibility
- Heightens client credibility
- Address bad facts in middle of opening – not beginning or end



Direct Examination

Direct Examination

- Organize and keep it simple
- Use theory of case, themes and labels – repeatedly and consistently
- Avoid extraneous facts and testimony
- Use transitions so witness and jurors know what to expect

Background

- Humanize officer
- Family, hobbies, interests, why become police officer
- Enhances credibility
- “Why do you work that shift”
- Demeanor
- Help with nerves: “Testified in federal court before?”

Set the Scene with Officer's Training

- Prior to "action" testimony
- Have witnesses explain police training and department policies
- When officer testifies about action jury will in real time that officer followed training and policies
- Use officer's own trainer

Action Testimony

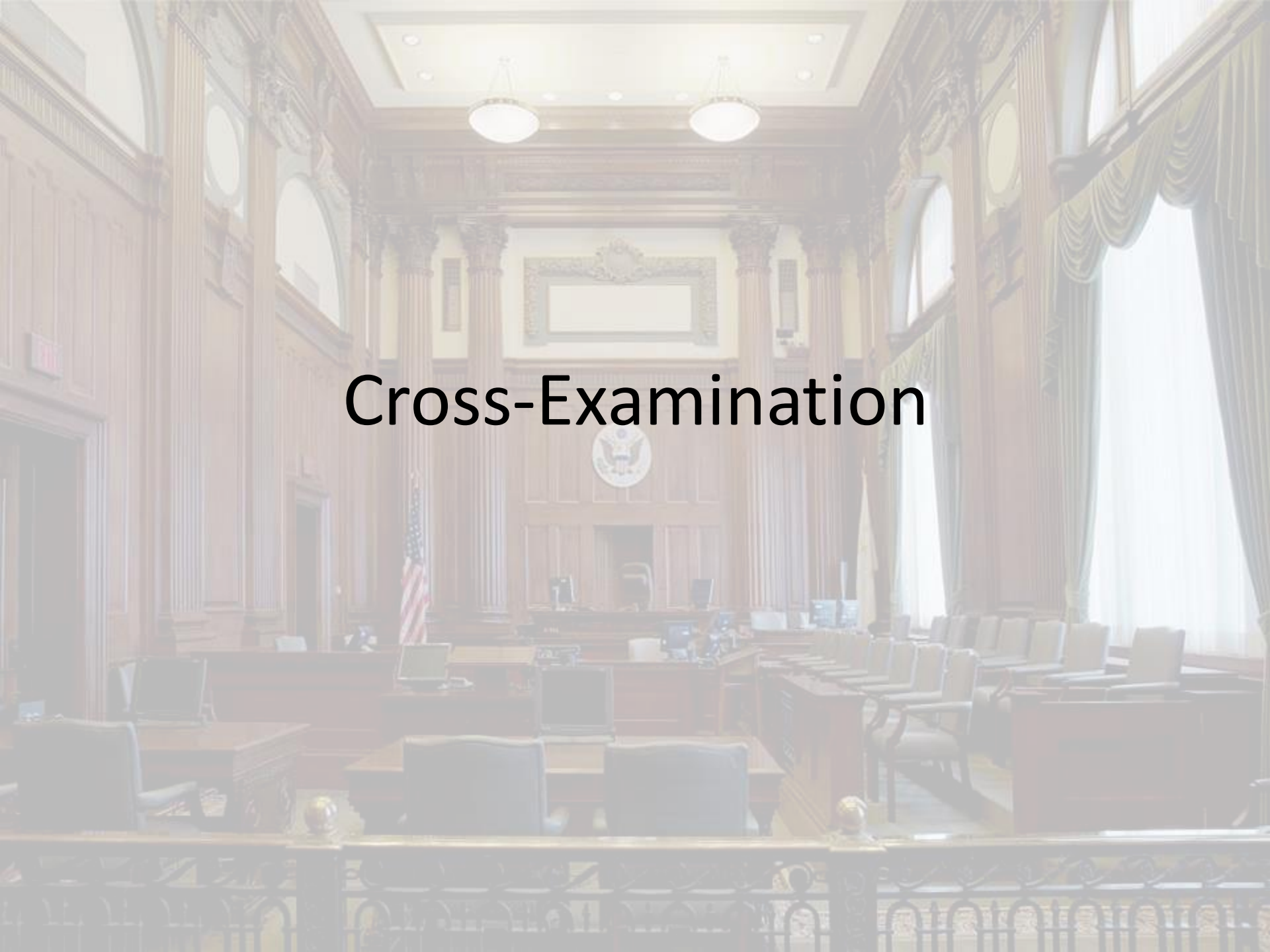
- Recreate the action
- Fully develop crucial facts - slow down action – zoom in on details
- Emphasize and repeat favorable testimony
- Ask multiple corroborating questions about fact or facts (bottles of beer)
- Objection won't be sustained – different questions

Volunteer Weaknesses-Maybe…

- Blunts impact of damaging facts
- Protects witness and lawyer's credibility
- Bury and make part of story – don't highlight
- Judgment call: does other side know?

Use Exhibits-Visual Aids…

- At completion of officer's story
- Don't interrupt officer's dramatic story
- Use exhibits to highlight and summarize facts


Cross-Examination

Cross-Examination

- Reminder: Listen! Listen! Listen! to witness's direct testimony.
- Does testimony
  - (1) help theory or
  - (2) hurt theory?

3 Rules (Roger Dodd)

- Rule 1: Leading questions only
  - More control
  - Train witness answer is “yes”
  - Easier to teach jury your theme of case
  - Statements in form of question – declare answer!
  - Easier to select topics
  - Provide facts
  - Never use “who, what, where, when, why, how, explain, tell me”
  - Allows word selection

3 Rules (Roger Dodd)

- Rule 2: One new fact per question
  - No conclusions (witnesses can argue or explain)
  - Less fighting
  - Not look like trying to trick
  - Certainty of answer
  - Controls witness - hard to be evasive
  - Easier for jury to understand
  - Avoids objections
  - Clearer impeachment

3 Rules (Roger Dodd)

- Rule 3: Progression to goal
  - General to specific questions – facts lead to conclusion
  - Don't reveal goal to witness
  - Each question must support goal – can identify point
  - Know what you're trying to accomplish
  - Build your theory or hurt opponent's theory
  - Don't ask conclusion "So you were drunk?"
  - Facts lead to conclusion
  - Let jury figure out conclusion
  - Jury not give up conclusion they formed themselves
  - Easy to follow
  - More difficult witness, more general start

Constructive Cross- Use Opponents Testimony to Build Case

- Has witness hurt my case? Does witness have facts to support my theory?
  - Attorney does teaching and witness agrees
  - Have opponent's witness verify your good facts
  - Teach your theory of case
  - Especially effective on opponent's experts
  - Stay on safe topics
  - Easier and more productive – no fighting
  - Fact worth more if said by opponent
  - Jury pay attention – cross-examination more interesting
  - Word selection important – detail is visual
  - Amount of time spent proportional to importance
  - Limit re-direct – opponent will re-emphasize points
  - Use in opening statement "opponent even admits"
  - Talk about all of officer's reasonable actions

Destructive Cross-Examination

- Challenge opposing witness on opponent's theory of case
- Challenge witness credibility
- Key: Fight only battles you can win
- Make sure to start and end well

Controlling Difficult Witnesses

- My question was….”
- “That does not answer my question does it?”
- Repeat question slowly
- “If the truth is yes, will you say yes”
- Reverse question “you were driving the car” “you were not driving the car”
- Formal name
- Sir, Ma’am
- Shorted question
- “You got to the bar about 8 p.m.?”
- “You bar 8 p.m.?”
- “Bar?” “8 p.m.”

Controlling Difficult Witnesses

- Shake head
- Object – better know judge
- Pre-trial motions (put opponent on defensive)
- Note in opening statement for jury to expect difficult witness
- Whiteboard (must be important)
- Poster of depo Q & A for key testimony
- Court reporter
- Polite interruption
- “Your answer is yes?”
- Elimination of alternatives
- Hold up hand
- Spontaneous loop

Question Types

- **Simple loop – highlights facts**
  - Establish fact
    - "You drank six beers?"
  - Use fact in next question and attach to undisputed fact (driving):
    - "You drank six beers before getting behind the wheel?"

- **Double loop – (1) highlight two inconsistent facts or (2) highlight image**
- **Highlight inconsistent facts:**

You told us ran because you didn't know Officer Brady was a police officer?

- Establish fact #1 (uniform)
- Q: He was wearing a blue uniform?
- Establish fact #2 (shouted police)
  - Q: He shouted "stop police?"
- Loop both facts together
  - Q: You didn't think the man in a blue uniform shouting "stop police" was a police officer?

Highlight image:

- Establish Fact 1: "Two officers arrived on scene?"
- Establish Fact 2: "There were 20 people outside the bar?"
- Loop both facts: "Two against 20?"

Spontaneous Loops-Use Witness's Own Words

- Trains witness to answer yes or no
- More powerful because witness own words
- Most fun for cross examiner
- "I don't know why the officer tacked me, I was just trying to mind my own business?"
- Q: You were trying to mind your own business, when you ….."