Trial Preparation

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Introduction

Trial preparation starts well in advance of your trial date. Important steps include reviewing your charging document, preparing your witness list, considering the foundations for your physical evidence/exhibits, identifying weaknesses, and anticipating potential defenses and legal issues. When evaluating your case for trial it is imperative to know your jurisdiction's statutes governing the offenses alleged, juvenile and criminal court procedure, etc. You must have a solid working knowledge of the rules of evidence and current caselaw relating to court procedure and the offenses alleged.

Preliminary Preparation

Petition

Check charging document (petition) for accuracy. If you determine that changes have to be made in the petition, make them as soon as possible.

Review the:

- Charges and elements
- Time/timeframe of occurrence
- Location and jurisdiction
- Witnesses listed/endorsed on petition:
  - If your jurisdiction requires you to provide the names of all of the witnesses you intend to call at trial, make sure if there are witnesses you intend to call whose names were not already provided to the defense, that you provide that notice to both the court and the defense.
  - Once the court allows the witnesses to be added, ensure that they receive notice of trial and a subpoena (not all jurisdictions subpoena all witnesses; follow your jurisdiction's law and office policy).
- Disposition/sentence/enhancements:
  - If required in your jurisdiction, make sure the petition includes the disposition or sentence information required as well as any special designations or enhancements.
  - If the petition needs amendment, follow the statutory procedure on amending pleadings which may differ if your amendment is substantive versus non-substantive.
  - If the court allows the amendment, ask for a new arraignment under an amended petition (and anticipate that the amendment of the petition could alter/push out the trial date).

Subpoenas

If required in your jurisdiction or by office policy, ensure that the witnesses you intend to call receive subpoenas. Make the witness list for trial (check against the previously disclosed/endorsed witnesses in the petition and endorse accordingly), subpoena all endorsed witnesses needed for trial (save your process server time by identifying which of your witnesses is willing to receive service of subpoena by email versus person service), and check the returns prior to trial to make sure that all witnesses have been properly served.

Jury Instructions

Even if your case is proceeding to a bench trial, the jury instructions for your charges and legal issues can be helpful and instructive. Instructions that may be helpful to review include: circumstantial evidence, eyewitness identification, prior inconsistent statements, and any other issues in your case. Jury instruction committee notes or legislative notes can provide useful insight and relevant caselaw on a variety of trial issues.

Complete Discovery

Be mindful that prosecutors have an ongoing discovery obligation. In most jurisdictions, cases should not be set for trial until all discovery is complete. An important step in determining whether your discovery is complete is to speak to or meet with the main officer/detective on your case and review the entire file (hard copy and electronic). Depending on your case, it may also be necessary to meet with other officers or witnesses to determine if you have all of the discovery materials. Review what you have with the officer(s) or other witness(es), to be certain that there are no reports or other evidentiary items that should be tendered to the defense. If your office policy allows, meet with the defense to have a file review to be certain everything has been tendered. Have a comprehensive understanding of how cases in your jurisdiction are handled by local law enforcement, including what police personnel are assigned to specific types of cases, so you are aware of the typical discovery for your cases.

Know that certain types of cases have specific pieces/kinds of discovery related to charges. For example, weapons charges may have firearms testing reports, and cases where an officer uses force during an arrest may result in additional reports. Further, some records (i.e., child welfare records, mental health/therapy/counseling records, social service records, medical records, records containing juvenile or criminal history, school records, etc.) may require a court to review them in camera before they are tendered. Some records may have to be redacted; others may require a protective order. Know which records in your jurisdiction should be reviewed by a court, which records may require a protective order, and which records may need to be redacted.

Whenever possible, if the Court orders an *in camera* review of sensitive or confidential records and then disseminates those records (complete or redacted) to the parties, make sure the Court has bate stamped those records and if they have not, check your office to policy to see if it allows the bate stamping of the records and dissemination of the bate stamped records for easy review and retrieval of specific pages.

Pursuant to *Brady vs. Maryland*, 373 U.S. 83 (1963), prosecutors are required to obtain and tender all potentially exculpatory material on all cases. This includes but is not limited to, police reports (initial reports from on the scene officers as well as supplemental detective reports, evidence technician reports, etc.), evidence logs, forensic evidence testing results, surveillance videos, body worn camera videos, medical records, and any evidence containing witness or respondent statements. *Brady* material exists not only in written reports and records, but in any information that we are aware of, including oral statements. All exculpatory evidence MUST be tendered. Be aware that some *Brady* material may pose risks or put an individual in danger. Consider a protective order or similar remedy available in your jurisdiction.

Review Defense Filings

Check your jurisdiction's code/statute to see if the same rules of discovery apply to both the prosecution and the defense. The defense may also have an obligation to disclose witness information and any evidence that they intend to introduce at trial. Where permitted, it is important to review any evidence the defense will be introducing at trial, the defense's witness list, and any information required to be disclosed about defense witnesses. Consider asking for an offer of proof where permissible, if there is any ambiguity as to the nature of the testimony. The defense may have an obligation to give alibi notice and provide a list of alibi witnesses to the prosecution. If your office has investigators, request that they interview all defense witnesses.

Determine whether the defense has given notice of any affirmative defenses and if that notice was given in a timely manner. If notice was given but no additional discovery was offered to support it, consider a motion to compel to allow the court to decide the issue. What is permissible in this situation varies by jurisdiction.

Pretrial Motions, Motions *in Limine* and Relevant Caselaw

Consider the facts of your case carefully. Determine if there are any issues of law that should be considered by the court before trial. Admissibility of certain types of evidence may require that you provide support for your request to admit such evidence with case law and/or statutory citations. Determine if a pre-trial ruling is more appropriate than waiting to commence the trial and face an objection and possible delay during the trial. If there is a novel or complex issue, consider filing a motion *in limine* to get a pre-trial ruling. This will reduce delays at the time of trial. File a motion *in limine* in advance of trial to obtain a pre-trial ruling on any issues that might affect your ability to proceed or the way in which you will proceed.

An important part of preparation is to anticipate defense arguments and to research case law to support your legal positions. Tender the case law to defense and the court prior to arguments. Be prepared to draw distinctions between your case and case law provided by the defense, to the extent possible.

Quick Tips

- Never tender originals. Copies of all originals should be tendered.
- Know which items in your jurisdiction require a signed protective order before they are tendered (i.e., forensic interviews).
- Read/review each piece of discovery before you tender it.

Witness Preparation

Prepare your witness list by identifying which witnesses will be needed to prove the elements of the charges; ensure that you are prepared to lay the proper foundation for exhibits. Once witnesses have been identified, determine all discovery related to each witness, including which exhibits they will be testifying about. For law enforcement witnesses, have all of the officers' reports available. Likewise, for civilian victims and witnesses, have all discovery available that includes statements made by each witness. Be clear about all existing discovery related to your witness. Thorough witness preparation is essential in determining witness strengths and weaknesses and allows for a well thought out trial strategy. Let the witnesses know that the questions asked will take them step by step through the offense.

Law Enforcement Witnesses

Review of Discovery Materials

Prior to speaking with the officers regarding the facts of the case, have the officers review all of the case reports and any video evidence, unless this is prohibited in your jurisdiction. Do not assume that because an officer has appeared pursuant to a court notification that they are familiar with the case facts. Where permissible, allow police personnel to review the reports and tangible evidence prior to beginning your discussion. If applicable, officers should watch all available body worn camera footage as well as any surveillance footage associated with your case prior to case preparation. Determine whether officers reviewed body worn camera footage prior to generating reports. Once the officer(s) have gone through the discovery, begin your discussion with a broad overview of what happened. Interview each officer separately. Allow each officer to tell you in his/her own words what occurred, and clarify any ambiguities or vague responses.

Identification Procedures

It is necessary to flesh out the details of identification procedures during trial preparation, including descriptions of suspects given by victims (determine whether your jurisdiction allows police officers to testify about descriptions of suspects given by victims/witnesses). In some jurisdictions, police officers are not permitted to testify at trial that a victim/witness identified a person in an identification procedure; only the victims or witnesses themselves can testify to that. The officer may be permitted to testify about where each party was located during the identification, which law enforcement officers were standing with each party, who was asking questions about the identification, what the distance was between the suspect and the victim, and what the lighting conditions were. Be mindful that suspects may self-identify in a manner different than how victims, witnesses and police describe them, and adhere to the laws in your jurisdiction pertaining to the use of gender pronouns.

Civilian Witnesses

Logistical Information

If your office has witness coordinators, they can assist in ensuring that your witness knows exactly where to go and when to arrive. Have the witness advised of all the details of the trial day, including the length of their appearance, relevant courthouse regulations, where to check-in, where to wait, who will let them know when it is their turn to testify, where to walk to in the courtroom, being sworn in, where to sit, and what to do when their testimony concludes.

Review of Discovery Materials

Before speaking with your civilian witnesses, you must review all of their statements related to the incident and all video coverage involving them. In addition to the law enforcement and any medical personnel, note any statements made to entities such as child welfare agencies, emergency operators or possibly other on-scene witnesses to the extent permitted by law. Also review any social media or other digital evidence that may be related to the case.

Explaining the Process to Witnesses

Separate your witnesses and speak to them individually. Start with a brief explanation of the trial process. Remember most witnesses have little, if any, experience with the juvenile justice world. Most of what they know is gleaned from television shows and movies, that often depict the juvenile and criminal justice systems inaccurately. Once an overview of the process has been described, begin preparation by inquiring generally about the witnesses' knowledge of what happened. This overview allows for an analysis of the witnesses' level of cooperation, understanding of the facts and intellectual ability. Throughout the interaction with the witness, give the witness opportunities to ask questions.

Preparation for Testimony

Once you describe to the witness what to expect during the direct and cross-examinations and any pertinent rules of evidence or pretrial rulings to navigate, do a run-through of how a direct exam might sound.

Ongoing Obligation to Provide Testimony

Understand that we have an ongoing obligation to tender discovery as we learn of it. If a victim or witness provides new or different information than what has previously been tendered, this information must be tendered to the defense. If it is determined that the new or different evidence will not be elicited by you, still tender this information.

Conclusion of Preparation

Wrap up trial preparation by asking if the witness has any questions, and if there's anything that wasn't discussed but may be important. Often these questions reveal important information.

Direct Examination Tips

- Start witness testimony with basic background questions about the individual including age, employment information, educational history, and county of residence. Civilians should not testify as to their specific employment information, home address, or any information that would put them in danger.
- Highlight important areas of your direct examination including descriptions of suspects and identification procedures. Do this by asking detailed questions in a slow methodical manner. Allow the court to absorb this testimony by not rushing through it. Slow down the narrative when the questions involve the crime itself.
- Ask pointed questions about distance and lighting. Use language that supports your evidence and theory of the case. For example, asking "how *close* were you to the person who hit you?" instead of "how *far* were you from the person who hit you?" can have an effect on the trier of fact. Choose words that allow the trier of fact to picture the incident.

- Have the victim demonstrate specific actions. If the victim was grabbed, have the victim show how they were grabbed. If the victim was shot, have the victim point to where they were shot. If there is a visible scar on the victim's person from the incident, have the victim show that scar to the court or to the jury. Always have victim's rise from their chair (with the court's permission) when addressing the court directly to demonstrate or show something.
- You must make a record of demonstrations. ("Let the record reflect the witness is standing up and [action taken by witness].")
- After the witness has slowly gone through the events of the crime, show them the relevant exhibits. This allows the trier of fact to hear the facts again and connect the testimony with the physical evidence. In the alternative, admission of exhibits can be woven in to the direct as they come up. Determine during trial preparation which style fits each case and witness best.
- Do not write out direct or cross questions in their entirety. Instead, use an outline format with bullet points for main areas of inquiry. Use boxes to check off your elements, in court identification, and any other essential details that must be elicited during trial (i.e., license plate numbers for stolen car cases). This allows for active listening, which is the concept of listening closely to a witness's answer before proceeding to the next question. It is essential to listen to the witness's answer to ensure that a sufficient response has been elicited. This process also aids in avoiding the habit of asking a question that has already been answered.
- Wrap up trial preparation by asking if the witness has any questions, and if there's anything that wasn't discussed but may be important. Often these questions reveal important information.

Witness Cross-Examination

Prepare witnesses for the defense cross-examination and common tactics used by defense attorneys during cross-examination.

Many of the same directives in direct examination apply to cross-examination:

- Tell the truth.
- Listen carefully to each question and answer only what is being asked.
- If the witness doesn't understand the question, ask counsel to rephrase.
- If the witness doesn't know the answer, they can say they don't know.
- If the witness does not remember something, s/he should say s/he does not remember.
- Remind your witness that the judge/jury is making credibility determinations based on their testimony. Highlight the importance of being truthful and respectful.

Common tactics used by the defense attorneys during cross-examination:

- If the tempo of questions increases, the witnesses should carefully consider each question and not be rushed. Defense attorneys may like to get into a rhythm and ask questions rapidly. Instruct witnesses that they are in control of the pace of their answer even if they can't control an attorney's rapid fire questioning. If the tempo of questions increases, the witnesses should carefully consider each question before answering and not be rushed.
- Some defense attorneys might ask a question in an insulting tone or insinuate a mistake was made by the witness - this may be intended to make the witness mad and show anger; discuss the importance of remaining calm and not be goaded into getting hostile or defensive. Direct the witness to listen to the question, not the tone of the attorney's voice.
- Attorneys like to ask "yes" or "no" questions during cross-examination. If "yes" or "no" is not the most truthful answer, then they should say that.
- Some defense attorneys like to ask questions that cover a lot of the same ground covered during direct examination but using "yes" or "no" questions. If the defense attorney does that, and the witness finds himself/herself answering "yes" to a lot of questions in a row, be alert to the "yes train" - the attorney might ask a line of obvious, undisputed "yes" or "no" questions to get the witness into a rhythm, but then follow it with a "yes" or "no" question on an issue in dispute. Prepare witnesses to be aware of this technique and to listen carefully to every question.
- Some defense attorneys like to ask compound questions; listen carefully before answering; there may be a different answer to different parts of the question.

Go through the expected areas of cross-examination that will likely occur.

- If there is a problem area, identify it and discuss the plan of action.
- Do not let the witness hear about the problem for the first time from the defense attorney during cross-examination.

Quick Tips

- Go over foundational questions and what questions you will ask prior to offering an exhibit into evidence.
- Discuss the procedure for objections.
- Explain that trial preparation is normal and expected.
- Prepare all of the witnesses in advance of the trial date; it may be necessary to prepare some witnesses more than once depending on their age, amount of discovery and length of testimony.
- Utilize victim/witness advocates for child victims and for sensitive domestic violence and sex crime cases.

Opening Statements

Opening statements should focus on the theory of the case, the facts expected to be elicited and the applicable law. No evidence or statements should be included unless there is a good faith basis to believe such evidence will be admitted. Remember, opening statements are the trier of facts' first impression of the case. Recognize the need to be clear and concise about the evidence. This is a preview of what will be elicited at trial and should be captivating and persuasive.

- Discuss the main points of your case without going through every detail. Focus on the evidence that will prove your elements. Give an overview of what the witnesses will testify to, instead of a recitation of their entire testimony. Refrain from referring to all of your witnesses by their full name, instead identify them by their role in the occurrence. Avoid a sterile rendering of what each witness will say. Instead, give a narrative of what happened using all of the evidence that the trier of fact will hear.
- Limit the number of people, places and events that are introduced in an opening statement, only using what is necessary for a clear picture of the occurrence.
- Be thoughtful when choosing language for your opening statement. Simply choosing a more descriptive word over a common word can have a real impact.
- All cases have weaknesses on some level. If there is a significant weakness in your case, consider addressing it in your opening statement. Witnesses with criminal convictions, witnesses whose testimony has changed, witnesses who have provided information for reduced charges are some examples of significant case weaknesses. Highlighting these issues in your opening statement allows the trier of fact to hear about the weakness while also learning how additional corroborative evidence reduces the significance of the weakness. Controlling how the weakness is presented can minimize its impact.
- The first and last sentences in your opening statement should be particularly engaging. Grab the attention of the court or jury with descriptive language or a phrase from your case. If you choose to use a verbatim statement attributable to any witness or the respondent, you must make clear the words are theirs.
- You can choose to describe the crime from the victim's perspective by discussing how the unsuspecting victim was going about daily life when the crime occurred. In the alternative, you can use the respondent's perspective and discuss all the steps that were taken to prepare for the execution of the crime.
- Start and end with the same perspective of your theory. Like all of your trial work, plan your opening statement in advance. Create an outline and not a full speech so that there is no temptation to read from it.

Quick Tips

AVOID the following:

- Discussing evidence that will not be admitted in your case in chief
- Reading from a script
- Over promising what the evidence will show
- Giving personal opinions
- Using exhibits without the court's permission

Admitting Evidence

Identify the physical evidence associated with your case and determine what is relevant or necessary to establish an element. Determine which witness will lay the foundation for your evidence. Sometimes multiple witnesses will testify using the same exhibit. Always go through the foundation questions with your witnesses during your preparation.

Foundation

An evidentiary foundation must be established for all exhibits and consists of required facts that demonstrate the evidence is relevant and is what it purports to be. A foundation establishes reliability for the fact finder. It need only be established with the first witness that identifies the evidence once it is admitted. Know the necessary foundation questions for your evidence. The basis is different for photographs/videos than for physical objects. Styles for foundation may differ, but the fundamentals must be there for each piece of evidence.

The witness must:

1. Identify the exhibit by stating the nature of the exhibit; and
2. Verify that it is in *the same or substantially same condition* as it was when witness last saw it (for an object) or that it *accurately depicts that which it purports to show*.

After the witness has laid the foundation for the exhibit, offer the exhibit into evidence and, if admitted, proceed with questions related to the content of the exhibit. Exhibits can be admitted at the time the foundation is laid or before you rest your case in chief. However, exhibits must be admitted before they can be published or described in any detail to the jury.

Example: Object (exact foundational words may vary by jurisdiction)

Approach your witness:

Q: *"Sir, I am showing you what is marked as People's Exhibit A. Do you recognize this?"*

A: *"Yes."*

Q: *"What is People's Exhibit A?"*

A: *"That's the knife that I saw in Bob's hand when he left the house that night."*

Q: *"Is this knife in the same or substantially same condition as it was when you saw it in Bob's hand?"*

A: *"Yes."*

Example: Picture (exact foundational words may vary by jurisdiction)

Approach your witness:

Q: *"Sir, I am showing you what is marked as People's Exhibit B. Do you recognize this?"*

A: *"Yes."*

Q: *"What is People's Exhibit B?"*

A: *"That's a picture of the car that crashed into my house."*

Q: *"Does this picture truly and accurately show how the car looked after it crashed into your house?"*

A: *"Yes."*

Specific Types of Evidence

Photographs

Photographs are among the most commonly used type of evidence in juvenile and criminal cases. The foundation for a photograph can be laid by the photographer or someone who has personal knowledge of what is depicted in the photograph. For example, if the photograph is of a crime scene, any witness who was at the crime scene can lay the foundation for the photograph. The original or a duplicate may be used as evidence. Photographs are relevant to show scenes, injuries, physical evidence and more. Any witness present in the picture or with personal knowledge of what is in the photograph can authenticate the exhibit for foundational purposes. Have copies of the relevant rule(s) of evidence available in case there is a challenge.

Videos

Body worn cameras, home or business surveillance videos, cellular phone footage and police monitored cameras are all excellent sources of evidence. These videos can provide essential evidence including statements by victims, witnesses, and respondents. Videos allow the trier of fact to observe firsthand the important details of the offense including the scene, lighting conditions, the actions of those involved, and any injuries sustained. This type of evidence can be more powerful than witness testimony and can be utilized to value in corroborate testimony or other evidence.

Police officers can lay the foundation for their own body worn cameras or for another officer's camera footage if they were present when it was recorded. In other words, if Officer A has personal knowledge of what is captured in Officer B's body worn video, either can lay the necessary foundation. A witness can lay the foundation for a surveillance video if they were present in the footage or were on scene and can authenticate the footage. If only the respondent is in the footage, the operator of the video recording equipment must authenticate the recording by establishing that the equipment was functioning properly at the time of the recording and that the recording has not been altered. In the alternative, an expert who observed the recording equipment may be able to testify to its authenticity.

Have copies of the relevant rule(s) of evidence and case law available in case there is a challenge.

Social Media

Evidence from social media can be incredibly persuasive at trial for a multitude of reasons. It can capture the planning or commission of the offense, or be used to show individuals in possession of the proceeds. It can also link faces or clothing to individuals in videos. Social media evidence includes videos, screen stills, phone extractions and detailed account information. This evidence can be obtained through preservation letters, subpoenas and search warrants or provided with consent by the accused or victims and witnesses. The foundation for this evidence can be established by direct or circumstantial evidence. An example of direct evidence includes account information linking the social media account where the evidence was recovered to the respondent. An example of circumstantial evidence for text messages from a respondent includes testimony from a witness that regularly communicates with the respondent, and therefore recognizes the account name or number.

Quick Tips

- Clearly identify what is being admitted, particularly if it is a partial clip and not the entire recording.
- Show exhibits to witnesses before trial.
- Consider possible hearsay objections for the evidence.

Defense Case

Anticipating defenses requires a critical analysis of your case facts. Certain defenses, such as alibi, must be disclosed by the defense in advance of trial. Details of the alibi must also be provided by the defense. (These laws may vary by jurisdiction.) Use this information to have investigators attempt to interview the alibi witnesses. It is essential to thoroughly evaluate and investigate alibi defenses. If no alibi or affirmative defense is filed in an answer by the defense, the defense will likely be that "the State has not met their burden" and there are several common theories that will likely be put forward. Prepare for them during your case in chief. Some of the most common defenses include reasonable doubt, lack of physical evidence, mistaken identity, and lying victim. Eliciting detailed information during direct examination in your case in chief can effectively combat these theories. Always keep an open mind throughout the pendency of a case when evaluating defenses.

Reasonable Doubt/Lack of Physical Evidence

This defense attacks the sufficiency of evidence in the prosecution's case and is perhaps the most popular defense. It often attacks true weaknesses in the case. This defense is defeated by presenting more than enough evidence for a guilty finding in your case in chief. Consider putting negative evidence in your case in chief. Be mindful that the law does not require physical evidence to prove a case beyond a reasonable doubt despite the popular defense argument for it. This defense can be defeated by highlighting the credibility of the witnesses and using additional evidence to corroborate their testimony.

Mistaken Identity

By their very nature, crimes typically happen very quickly. Identities may be disguised and actions may be taken quickly to avoid being caught. These factors alone do not render witness identification untrustworthy, but rather require clear testimony surrounding all identification processes. Be cognizant of the circumstances of identification in your case. Go painstakingly through them with your victim and witnesses. Be certain to address every aspect of the witnesses' ability to identify the respondent. Distance,

lighting, opportunity to observe, clear view, degree of attention, presence of any face covering, and vantage point are important topics to discuss with your witness. Flushing out these details in your direct can be used later to rebut the argument of mistaken identification. Further, it prepares your witness for the inevitable cross-examination questions that seek to discredit your witness's opportunity to make an accurate identification. It is also important to pay close attention to the initial description given by the witness to police. The accuracy of the description, the level of certainty shown during the identification procedure and the length of time between the offense and the identification will all be considered by the trier of fact in weighing the identification. Discuss each of these with your witness when you prepare for trial. Know your case strengths and weaknesses. Have arguments and explanations prepared to explain the weaknesses.

Lying Witness

This defense can arise regardless of whether the respondent and the victim are acquainted. It is easiest to defeat when the parties are strangers. The lack of motivation to lie about a crime can typically defeat this defense. Elicit the steps the victim has taken to report the crime, cooperate with police, meet with police, go through identification procedures, cooperate with prosecutors, and appear for testimony. Without evidence of any benefit to the victim for all of this effort, this is not a strong defense argument. Further, elicit background information, if available, to bolster the credibility of your witness. Information about their education, career, and community involvement may be helpful in this regard. If the parties are acquainted, draw out details of the relationship. Determine if there was a lack of trouble between the two prior to the incident. Talk candidly with your witness about the history of the relationship. Be aware that the defense likely knows from the respondent more information about the relationship than what is listed in reports. Seek this information from your witness. Remember to disclose any newly obtained discoverable statements.

Bolster problematic witness testimony with physical evidence and other corroborating witness testimony. Address any issues with your witnesses on direct examination rather than having them come out for the first time on cross-examination.

Alibi

In most jurisdictions, the defense must produce statements made by alibi witnesses that they intend to call at trial. Even if you receive these statements, the witness should be interviewed by an investigator. If you don't have a detective or investigator to interview the alibi witnesses, check with your supervisor about whether someone else can do the interviews.

It is important to evaluate the credibility of the alibi witnesses. If the alibi witnesses are credible the case must be dismissed. Determine the relationship between the witness and the respondent, what the witness knows about the offense, and the details of the whereabouts of the respondent at the specific time of the crime.

Most often the alibi witness is a friend or family member of the respondent. If an alibi witness is not credible, the goal in cross examining that witness is to expose the incredulous testimony and highlight their motive, bias and interest. The objective is to show that the alibi witness is not credible. It is important to flesh out the improbabilities of their testimony.

Areas to cross-examine an alibi witness include:

- The timeline (know the distance between the offense and address of the alibi; determine if the crime could have been committed by the respondent based on the timeframe).
- The timing of when the alibi arose (learn if the witness advised police or prosecutors of the alibi at the time of arrest; know if the alibi witness was with the respondent at the time of arrest).
- Challenge the witness's ability to recall a specific night in the distant past.

Cross-Examination of the Respondent

During cross-examination, it is important to be mindful of the age of the accused. The tone of your cross-examination should reflect that you are questioning a minor. Style adjustments may be necessary. Understand that the respondent is not going to admit to committing the offense on the stand unless there is a self-defense claim. The objective here is similar to that of the defense witness, to show the unreasonable nature of the testimony and to demonstrate the lack of credibility in their testimony. Leading questions are permitted and preferred. However, there may be an advantage to asking an open-ended question(s) in certain situations. Be thoughtful about your questions and how they are framed.

- Start by corroborating the testimony of the prosecution witnesses if possible.
- Be slow and deliberate about questioning the respondent.
- Confirm all of the details from the direct of the respondent that are similar to your own witnesses' testimony. Does he/she admit to part of the prosecution's theory? Slowly go through the testimony that matches the prosecution's evidence. Later in argument you can highlight the convenience of that for the trier of fact.
- Show that the respondent is minimizing their involvement, possibly because of some evidence that cannot be otherwise explained or argued away. For example, if there is forensic evidence linking the respondent to the scene, they must admit their presence, as a challenge to forensic evidence is unlikely to prevail.

Like statements given by any witness, it is critical to be aware of all statements that the respondent has made prior to your cross-examination. Be prepared for the impeachment process. If the respondent gave a video statement previously, have it transcribed. This will aid in the impeachment process during cross-examination.

Stay in control of the examination. Do not allow the respondent to avoid a question. Do not get defensive or show frustration.

Closing Arguments

Closing argument is your opportunity to weave the facts and the law together to support your theory of the case. Arguments should be based on reasonable inferences and conclusions from the evidence. This is an argument, not a speech. Do not simply recite the facts! Apply the facts to the law and argue persuasively about how you proved your case. Craft your argument using the style that suits you best.

Opening Close/Closing Argument

In this portion of the closing arguments, it is essential to establish how you have met your burden. Limit the opening close to the case in chief, save your arguments related to the defense case for rebuttal if your jurisdiction allows rebuttal. The structure of the argument should include an introduction that grabs the attention of the trier of fact, followed by an application of the facts to the law, followed by a final statement that encapsulates your case theory.

- When applying the facts to the law, address each element and establish how it has been proven. Highlight the strengths of your case.
- Focus on the strongest evidence that you have while also incorporating all the corroborative evidence.
- Argue the credibility of your strongest witnesses.
- Minimize any inconsistencies or impeachment, which are often related to minor points.
- Show how the evidence elicited and admitted has proven the charges.
- Use your exhibits during your argument.
- Remind the court how they prove your case theory.
- Insignificant details that do not add to your theory should be excluded. Do not read your arguments.
- While it may be necessary to read from case law or from some pieces of evidence, generally avoid reading a script. This practice is not persuasive.
- End your opening close with a statement that is riveting and summarizes your theory of the case.

Rebuttal

- Rebuttal arguments should be confined to rebut what the defense presented.
- Plan for rebuttal in advance of the defense closing.
- Assess your case for areas of weakness.
- Anticipate the defense by critically analyzing your case.
- Be prepared to rebut several possible defense arguments based on your knowledge of the evidence.
- Assessing your case closely will allow you to accurately anticipate which might apply to your case.
- Draft notes based on your facts and evidence that show how these defenses do not apply to your case.
- During the defense argument, add to your notes if necessary. If the defense does not argue an anticipated topic, then discard your argument on that point.

- Do not defend arguments that were not presented by the defense.
- At the close of rebuttal, similar to your opening close, summarize your theory and how you have proven your case.

Quick Tips

- Do not comment on the respondent's failure to testify.
- Do not comment on the respondent's exercising their right to remain silent.
- Do not comment on the defense not putting on a case.
- Do not be overly theatrical.
- Do not shift the burden.

Ethical Considerations

Ethical considerations arise at every stage of prosecution from charging decisions through discovery and trial. A prosecutor's role is to seek justice. Yet, the path to justice has many forks and pitfalls. While each agency and its administration handle ethical issues differently, identifying these issues is critical for all. While policies and practices may vary, the issues are largely the same. The following areas represent some common ethical issues related to trial preparation. This is not intended to be an exhaustive list.

Discovery

It is a prosecutor's obligation under Brady v. Maryland, 373 U.S. 83 (1963), to obtain and tender all discovery, including exculpatory evidence. If there is a doubt about whether a particular piece of evidence is exculpatory, tender it. Be familiar with witness's previous statements and if you are tendered additional information, include that in a supplemental filing and tender it. If you become aware that additional discovery exists, even if this occurs moments before trial, disclose this information to the defense and request a date to obtain it. The prosecutor's discovery duties are ongoing. Even if the information arises in an untimely fashion, it must disclosed. Prepping a witness in advance of trial is preferable but not always possible. This opens the door for new information coming to light at the last minute. It must nonetheless be tendered. Err on the side of disclosure when it comes to tendering discovery materials.

Be cautious handling defense subpoenas for mental health or therapy records for a victim or witness. These materials are highly confidential and although they may be relevant, most jurisdictions require a preliminary showing of relevance before disclosure. If the defense fails to articulate a relevancy basis for the disclosure of such records, the court may still allow the subpoena to issue with an *in camera* inspection.

Victims and Witnesses

Know your jurisdiction's Victims Bill of Rights. This legislation affords crime victims certain rights that all prosecutors must know and follow. Most include provisions related to notice of proceedings, as well as the right to be present and to participate. These rights must be honored and safeguarded. Although prosecutors have the ultimate authority in the handling of criminal cases, we work on behalf of our victims. As such, they deserve to have their rights honored and the law requires us to do so. (*See* NDAA's *Handbook for Juvenile Court Prosecutors* (Publications-Juvenile-Prosecutors-Handbook-1.pdf) Chapter 5, "Working with Victims During the Early Stages of a Case," and Chapter 2, NDAA's *Juvenile Prosecution Principles and Guidelines* (2023), for more information on victims.)

When speaking with an adverse or potentially adverse witness, it is essential to have an additional person (commonly referred to as "prover") present to potentially testify to prove up impeachment should the witness change their testimony during trial. Do not skip this step. You risk making yourself a witness to the litigation and rendering yourself unable litigate the case yourself.

If a witness refuses to appear, determine your agency's policy for enforcing subpoenas. There are various processes for issuing warrants for victims and witnesses. Depending on the nature of the offense and the extent of the evidence, forcing a witness or victim to appear in court for testimony may not be the best practice.

If at anytime your witness expresses concerns about the accuracy of their identification, bring this to a supervisor's attention immediately. This is exculpatory evidence and must be tendered. Depending on the existence of additional evidence this circumstance may result in a dismissal. Likewise, if a victim or witness recants or substantially alters their recollection of the events, seek out the advice of a supervisor. This must be tendered and the witnesses credibility must be re-evaluated. This circumstance too, may result in a dismissal.

Giglio v. United States, 405 U.S. 150 (1972) requires disclosure of any evidence that could call into question the credibility of prosecution witnesses. This includes any adverse credibility finding related to law enforcement witnesses. Your agency may have a database of officers that have been the subject of such findings. Check this database during case assessment and at the time that you notify the officer for a court appearance. Other impeachment material of law enforcement witnesses may also be subject to disclosure in your jurisdiction. You must have a clear understanding of what prosecutors have a duty to acquire and tender to the defense in this area. All materials obtained should be reviewed to assess credibility. This way you can determine how best to proceed if you have a necessary witness with credibility issues. Consider whether the case can proceed without an officer with a negative credibility finding, as their testimony is inherently problematic. Similarly, prosecutors have a duty to disclose criminal backgrounds of civilian witnesses for purposes of impeachment. (This may be limited to certain types of crimes in different jurisdictions.)

Confidentiality

Juvenile court proceedings are generally confidential; confidentiality statutes vary by jurisdiction. The law recognizes the interest in protecting juveniles and young adults from having youthful indiscretions publicized. When speaking with witnesses and victims be mindful of disclosing information related to the accused or about the case. In most jurisdictions release of information for any reason must be by court order only. Some statutes contain enumerated exceptions. It is important to understand the laws of confidentiality in your jurisdiction.

Other records related to the victim or to the accused may also have confidentiality implications. Some common examples of confidential documents include child welfare records, social service records, medical records, search warrant affidavits containing confidential informant information, records containing juvenile or criminal history, and mental health/therapy records. Depending on the content, these records may require redaction, an *in camera* inspection, or a protective order before they can be accessed by one or both parties. It is recommended practice to discuss these issues with a supervisor to ensure that all confidentiality laws are followed.

Conclusion

Thorough preparation for trial is a critical aspect of a prosecutor's responsibility. It will allow you to become fully familiar with all the facts, evidence, and legal issues in your case, and will maximize your ability to prevail on disputed issues in the case, to obtain justice for the victim(s), and to ensure that the respondent is held accountable and receives appropriate services and treatment.