DIRECT EXAMINATION: HOW TO DO IT EFFECTIVELY

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There have been many articles written about cross examination,[1] but there is not much that covers direct examination.[2] As a result, what I know about direct comes from virtually the only source I have found: the school of hard knocks. And for reasons that I can tell you, direct is harder than cross.[3] You've got to help your witness—this novice in the courtroom—tell a memorable story, with your hands tied by the rules of evidence.

This article is focused on that kind of witness: a percipient witness who has a story to tell. But many, perhaps most, of these people cannot tell their stories well in the artificial atmosphere of a courtroom, with technical rules governing every question[4] and with all eyes staring at them. In other words, this article deals with witnesses like the bystander who happened to see that 18-wheeler T-bone your client's car, or the line worker who saw the disastrous explosion that resulted from that supplier's mislabeled pyrotechnics, or the bank employee who witnessed the workings of the system that his firm invented to shortchange your clients. There are other kinds of witnesses that require different strategies, such as experts[5] or hostile witnesses, but these kinds of fact witnesses dominate many trials.

The first part of this article explains the factors that make direct examination difficult. My thought is that the proposed techniques probably will make more sense if you figure out where the pitfalls are. The second part gives advice about word usage, symbolic detail, and non-leading forms of questions. The third part is the meat of the article. It explains the strategies I have learned from experience. Step by step, this part takes you through my (very simple) method of direct examination. Then, the fourth part discusses variations, and a final section contains the author's conclusions, which include the observation that the methods discussed here are not always easy to implement but almost always give good results.

WHY IS DIRECT EXAMINATION DIFFICULT?

Direct examination is difficult, first, because it means that you have called this witness, and the jurors expect the witness to tell them something significant. The fact that you have called the witness immediately puts a burden on you and the witness.[6] Some jurors think that we as lawyers carry bags of tricks and traps that can prove what we want. Most jurors expect that you and the witness, who after all is your witness, will be trying to show them something important and convincing.

Jurors watch television, and the scene in front of them is like a television show. Jurors know most of what they know about America's system of justice from fiction[7]—from television shows or novels, unfortunately. And fiction is not a reliable source. What is more, jurors sit silently to watch an event that superficially resembles what they think they know. Their stance is like that of a group of people watching TV. Jurors may disconnect somewhat from what is going on, and they interpret the evidence through their own filters.

The language that we as lawyers use sometimes is not familiar to jurors. I had a problem in a trial once long ago that showed it isn't just legalisms that are confusing.[8] I talked about what happened "previously"

and what happened "subsequently." The witness didn't understand my questions. The judge finally suggested, "Why don't you say 'before' and 'after?'" I immediately corrected my mistake, and the witness was able to answer.

And the error was not unique to me. Another lawyer told me a story about two jurors who came up to him after the verdict and asked, "Mr. Shults, what does 'subsequent' mean?"[9] You need to set your verbal selector so that you choose five-cent words instead of fifty-cent ones.

Many trials depend on jurors' reactions to the mood of the occasion, and you have to develop the equivalent of a movie. Was the defendant negligent? Did this offering amount to securities fraud? Was the contract breached? For jurors, these questions require more than the glib answers we may have given in law school.[10] Instead, issues like these depend on a holistic view of the *mood* of the occasion.[11] A well-designed motion picture develops an emotional response from viewers, and that's exactly what you undertake to deliver.

Many witnesses are not good storytellers. They go back and forth and leave out the most important details. "So, before that, guess what happened?" a storyteller may say, but this kind of time inversion will confuse jurors.[12] And once you get the story told, you may have to ask the witness about important omitted details: "Officer, did the skid marks ever show that the truck driver even tried to stop?"

The Rules of Evidence limit the ways in which witnesses can tell their stories. In particular, the rule against leading questions on direct examination limits your questioning.[13] You'll have to find ways to keep the witness on track without leading. Some witnesses cannot answer even a clear question. You ask, "Was the truck going fast?" The answer: "It was red and blue." This kind of witness gives you an irrelevant answer to a different question than the one you asked, making for jury confusion as well as frustration on your part.

Cross examination can be cheap and easy by comparison. Sometimes the cross examination can be effective with just one or two questions. A witness has just told how the truck-car accident happened with a car driven by a juvenile driver. Then, the cross examination: "Well, but you're his mother, aren't you?" "And you'd have difficulty, wouldn't you, thinking he was careless?"

TECHNIQUES FOR EXAMINING A FACT WITNESS

Signposting: letting the witness and jury know where you're going

When you change locations, let the witness and the jury know that you're going to ask about another scene. "Now, Mr. Witness, I want to ask you about events after the accident: about what happened when you went to the hospital." I call this technique *"signposting."* In the manner of a signpost, the words tell where you're going.[14] Without this signal, jurors may miss the first several questions, thinking that this testimony was about something that happened at the accident scene.

In fact, this technique applies to many situations, not just to changes of location. If you have a leap in time, signpost that too. "Now, Mr. Witness, I'd like to ask about later events, a month later, when the machine failed." Or, if you have to cover an evidentiary predicate, use a signpost to let the jury know that the questions are going to be strange. "Mr. Witness, I need to ask you some questions to comply with a rule known as the 'business records rule.'[15] My questions are going to be technical, because that's what the rule requires." Without this signpost, jurors may think you've gone off the rails when you ask whether the "original entry" was "made or transmitted by someone with personal knowledge."[16]

A student of filmmaking would understand the concept. If a scene features a meeting in an office, the camera will show the bottom of the building and pan upward to the top, to "establish the building."[17] Then it will center on a particular window. All of this is quick and preliminary to a shot that shows the inside of the office. It is the film equivalent of signposting.

Symbolic detail

Symbolic detail really helps to tell the story.[18] The bad guy in a period western wears a black hat for a reason. And he draws a pearl-handled revolver that shows what kind of villain he is. In a jury trial, symbolic detail also helps to convey the horror, or the carelessness, or the injuries that the case features.

Here is an example. I once prosecuted a negligent homicide case against a motorcyclist who ran over and killed a six-year-old little girl in a school zone at 3:15 p.m. I showed the jury a photograph of the school zone sign. I located it on a diagram of the scene. But the most poignant piece of evidence was the child's glasses. Her father, searching for something left of her, absently thinking it might bring her back, found her glasses. The frame, with one lens out, was lying on one side of a wide street. The other lens was on the other side of the street.

It was not the most compelling evidence, but this little fact was symbolic detail. I had earlier established the width of the street to let the jury know how far away the other lens was. I offered the glasses as two separate exhibits. And I had the two pieces placed in the courtroom at the distance in which they were found. This evidence symbolized the speed of the motorcycle, and it conveyed a sense of the helplessness of the child as compared to the much heavier vehicle. It was symbolic detail.

And you can find symbolic detail, if you look for it, in any type of case. For example, in a securities or breach of contract case, the conduct of the defendant (or of the plaintiff) may include something that symbolizes carelessness and neglect of the contract.

Visual evidence

Every trial lawyer knows that visual evidence helps to support the story. The glasses in the previous section are an example. The point could have been made by testimony alone, but the glasses themselves elevated the significance of the point. Thus, real evidence—a broken machine, a securities prospectus, or other kinds of case-specific objects—can help your case. So can photographs, motion pictures, or videotaped simulations. If you have nothing else, a diagram or chart made for the case can perform this function.

Non-leading formulas

Objections to leading questions often flummox new lawyers—or even experienced advocates.[19] For one thing, opponents and judges sometimes see a leading question in a question that is not leading. And if you yourself become overly enthusiastic, you may find yourself saying "I suppose what you mean is…," and you're virtually assured of ending with a truly leading question, followed by a perfectly legitimate objection, which will be sustained.

The usual aftermath is that you find yourself confused, and you pause. There is a quantum of dead-air time, with the jury seeing you as a less competent lawyer. And then, you try to ask a non-leading question, and the witness can't understand it, marking you as an even less competent lawyer, who the jury infers has a less than valid case.

The solution is what I call non-leading formulas, or methods for asking questions that are not, and do not appear to be, leading.[20] Here are some non-leading formulas. "State the facts as to whether," as in "State the facts as to whether the contract was signed on a Tuesday." Or, "Directing your attention," as in "Directing your attention to the table, what did you see on it?" Your English teacher would be horrified by the dangling modifier, but he or she taught you only one method of communicating (by a written essay), and the "Directing your attention" formula works. Or, "What was unusual?" as in, "What did you see on the table that was unusual?" Or, finally, "multiple choice": "Was it _____ or was it _____?" as in, "Were the robbers sort of loping along slowly, or were they really hauling it?" And if the witness answers, "They looked like they were about to run outta their socks," you've really scored, because you've got some symbolic detail along with having the question answered. You can quote that answer to an amused jury in final argument.

Rhetoric that supports your case, or at least avoids weakening it

That's what it all is about, of course: your rhetoric. But I am talking specifically here about the nouns and verbs that characterize the disputed issues. The message is simple, in a way: don't use terminology that favors your opponent; instead, use words that suggest that your theory is right.

For example, consider a drunk-driving case. The defense lawyer calls the breathalyzer a "machine" or even a "gizmo," and asks, with studied naivete, something like, "How often do you change the tubes and circuits and rubber bands inside that gizmo?" The prosecutor instead calls the breathalyzer an "instrument" and asks whether "the same technology is relied upon in the space program." And here is another example: The skillful trial lawyer John O'Quinn told plaintiff's lawyers in medical malpractice cases never to use the word "medical" in front of the jury. His reason was that this word reminds the jurors of the public belief that medical workers face avalanches of frivolous lawsuits.

A similar example concerns the law in such a case. The plaintiff's lawyer reads the jurors a part of the definition of negligence that the judge will eventually give. "But put simply," she adds,[21] "negligence is *carelessness*." Why? Because carelessness is less harsh and therefore easier to prove. The defense lawyer, however, says that the plaintiff's lawyer has it wrong. After reading the same portion of the same instruction, he adds,[22] "See, 'carelessness' isn't in the law at all. Instead, to call someone negligent, you have to prove they're *guilty of an unreasonable act*." By thus equating civil negligence with an almost-crime, he hopes to make it more difficult for the jury to decide upon.

Furthermore, don't tacitly agree with what your opponent says. It is surprising how often a prosecutor, having heard the defense refer to the breathalyzer as a "machine," unthinkingly calls it a machine himself. The same error occurs when a lawyer refers to her opponent's theory in the same words as the opponent. For example, one lawyer may say, "Mr. Witness, you didn't really see that happen, did you?" followed by the other lawyer's asking, "You didn't see that happen?" Instead, make it clear that you believe the opponent's theory is wrong. "Mr. Opponent now suggests that you didn't see it. But tell us whether in fact you *did* see it happen." The idea is to convey to the jury that the opponent has only "now" hit upon this theory because he's discarded others over time, and he only "suggests" that it's true because it's a concocted prevarication.

A PATTERN FOR GETTING SOLID TESTIMONY FROM A FACT WITNESS

No doubt there is an infinite variety of methods for developing testimony from a fact witness. My method comes from that valuable teacher, the school of hard knocks. It was built on experiences with the difficulties of direct examination: the absence of storytelling expertise in the typical fact witness, the usefulness of symbolic detail, and rules that prevent good storytelling. It is a simple, simple set of concepts. When you're a big shot, you can adopt a different method, but in the beginning, you could do worse than this one, which I know works.

First, obviously, ask the witness's name. "Please tell us your name." Or, if you want to be fancy, "Please introduce yourself to the ladies and gentlemen of the jury." Most lawyers can do this part even if they are nervous. But it is what gets you started, so plan how you intend to ask this first question. Stumbling over the words will not be a good beginning.

Second, and this advice is unusual, ask a short leading question that tells the jury what the witness is going to tell them. "Officer, you're here to tell the jury what you saw after you arrived first on the accident scene, is that right?" Or, "Mr. Accountant, you're here to tell the jury how the red herring prospectus was composed?" This is signposting,[23] of course: orienting the witness and, more importantly, the jury. Without this question, the jurors may think this fellow is the accident reconstruction specialist or the officer who interviewed the truck driver back at the station, and they might miss the significance of the next ten questions. You may have talked about this witness during voir dire and also in your opening statement,

but don't underestimate the potential for jury misunderstanding.

There's a problem, of course, in the leading nature of the question.[24] But leading questions are permitted by the Rule if they are "necessary to develop the testimony."[25] This question is indeed necessary to develop the testimony. Furthermore, leading questions are more tolerable when they concern "background," and this question is background. I myself never got an objection to this kind of question. That is not enough by itself—I certainly want to comply with the rules, whether my opponent objects or not—but the absence of any objection over many trials is a further indicator that the leading question was not a violation.

Third, develop the witness's background, unless the witness is here for a technical point that is uncontroversial. Family, residence length in the area, occupation, and so forth. "And where did you go to high school?" Enthusiastic answer: "Benedict Arnold High School,[26] the home of the Fighting Ducks!" Why would the advocate develop this fact? Because there may be someone on the jury who also went to Benedict Arnold High School, or whose best friend did, or whose boyfriend played football against the Fighting Ducks; and to this juror, the witness is already a compatriot.

Fourth, ask a question that signals that you are going to the meat of the coconut, as one judge characterized it for me. And you should use the "Directing your attention" formula. "Directing your attention to January 8, 2021, did you happen to be driving on the East Outermost Freeway?" Don't ask the witness, "What date did this happen on?" because the date is the least important part of the event to this witness, who viewed the tragic wreck of a VW Beetle by an 18-wheeler and the loss of three lives, and the witness will stumble over the words, "I . . . don't ah, know the date." Instead, you tell the date yourself. The "Directing your attention" formula is lawyer-talk, but it is acceptable because you are a lawyer, it is familiar, and it lets the jury and the witness know that you are now getting to the liability-producing events.

Fifth, go through the event or events chronologically. It isn't easy, but you should discipline yourself to go through the story chronologically.[27] If you don't, you are going to lose some of the jurors, who may be thinking, "Did this happen before this, or after it?" "Is the witness trying to tell me that something after the fact caused the fact? Now I'm really having difficulty with this testimony." The problem is, chronologically is not the way most people talk, including most lawyers, but you have to force yourself to do it.

"What happened next?" may work fine. Or it may not. The witness may tend to get things out of order. And when that happens, it is up to you to insist: "Wait. What I'm asking is what happened in the very next moment, immediately after the machine failed." You are the one conducting this direct examination, and it's your responsibility to intervene when the witness mixes it up. You are the one who is driving this train, and it is your job to get it back on track when it runs off the rails.

Sixth, let the witness and jury know when you change subjects. Use signposting. "Now, Mr. Witness, I'd like to ask you questions about how Mr. Plaintiff's life has changed since the accident." "Now, Mr. Division Manager, I want to get you to tell us about the meeting you had later with Mr. Opposing President about the failure of the machine."

VARIATIONS: WHEN THE PATTERN DOESN'T WORK

There are times when methods different from this fact-witness pattern work better. For example, it may be better in some cases to organize by subject rather than chronologically. The variation is easy to understand, and parts of the chronological pattern are still useful, such as the short leading question signaling what this witness is going to tell the jurors, the drawing of the witness's background, and even the "Directing your attention" formula. So, organizing by subject might sound like this: "Mr. Employee Witness, directing your attention to January 2021, were you employed then by Acme Corporation, when the firm regrettably had to let four employees go?" "All right, let's focus first on Mr.

John Fired-Employee. Tell us please, about the first time you saw that employee breaking the rules." And now, it may be best to tell the story of this fired employee chronologically, or it may be best to take up his violations by their subject matter. And then: "Thank you. Next I'd like to ask you about the same time period, January 2021, and about Ms. Sarah Fired Employee. . . ."

But the biggest variation, probably, is the expert witness. I've written separately about that subject for an upcoming issue of The Practical Lawyer, where I've described a method for presenting an expert opinion to a jury.[28]

CONCLUSION

Direct examination is more difficult than cross, even if there is much more written about cross. Direct means that you have called this witness, and the jurors expect you to show them something significant. But most witnesses are not good storytellers, and the Rules of Evidence limit both your questions and the witness's answers. As lawyers, we need to learn to use simpler words. And the most important issues in most trials depend on the jurors' impressions of the atmosphere, or the mood, of the occasion, which is hard to construct for them.

To deal with these difficulties, lawyers need to "signpost," or orient the jurors about where they're going with the testimony. And lawyers have to look for, and develop, what I call "symbolic detail." They have to master non-leading formulas that tell their witnesses what the question is about while simultaneously complying with the rules. They need to use visual evidence. They also should use strategic words and avoid giving credence to theories they think are wrong.

One effective pattern for examination of a fact witness begins, after getting the witness's name, with a signpost: a short leading question letting the jury know why the witness is here. Next, drawing out the witness's background, for most witnesses, makes the witness a more familiar and fuller person. Then, the examiner uses a "Directing your attention" question that includes the date. The examiner follows this introduction with questions that have the witness proceeding in chronological order. Chronology helps jury understanding and retention. The examiner should remember to signpost when changing the subject, proceeding to a different time period, or beginning technical questions.

Although there are variations on this sequence, when other questioning patterns may be superior, this basic method often is the best way to examine witnesses.

Notes

1 The most famous source is probably Irving Younger's Ten Commandments of Cross Examination, which originated in a speech by former judge and then-professor Younger at Cornell Law School in 1975. See F. Dennis Saylor IV et al., Ten Commandments of Cross Examination, Mass. Lawyers Weekly, Dec. 7, 2017. The Ten Commandments inspired decades of agreement and disagreement. E.g., Patrick Malone, Burying the Ten Commandments, 43 Litigation 51 (Fall 2016).

2 There are exceptions. E.g., ALI-ABA, Presenting Expert Testimony on Direct Examination, in Conference on Environmental Litigation, June 20-22, 2012.

3 See infra Pt. I of this article.

4 In particular, Fed. R. Evid. 611 limits leading questions on direct examination. As for the reference to staring eyes, consider the rape survivor. Trials are open, so there may be a courtroom full of spectators, and in addition, the survivor testifies while being looked at by twelve jurors, two or more lawyers, a judge, a court reporter, a clerk—and one accused rapist. This is an extreme example, but witnesses of various kinds have trouble settling themselves on the witness stand.

5 See David Crump, Simple Predicates for Some Common Kinds of Evidence Pt. IIC, The Practical Lawyer, Vol. ___, No. ___, p. __ (____, 2021)(describing a method of offering expert testimony before a jury).

6 See ALI-ABA, The Myth of Juror Impartiality: Practical Strategies for Minimizing Juror Bias, in Conference on Life Industry Class Actions and Complex Litigation, Sept. 20, 2012 (discussing juror expectations).

7 See David Crump, The Plaintiff's Lawyer: A Novel (Quid Pro Press 2020)(preface to novel explaining misimpressions created by fiction and promising an accurate portrayal of lawyers and the law in this story).

8 See Irving Younger, The Ten Commandments of Cross Examination, summarized at https://www.dayontorts.com/

files/2015/03/Younger-on-Cross-10-Commandments.pdf (telling the advocate to "use plain words," such as "How did you '[d]rive you[r] car,'" instead of "How did you 'operate your vehicle'").

9 Interview with Attorney Robert Shults, Dec. 28, 2020, in Houston.

10 I recall one exchange in the first year, word for word: A student: "The plaintiff wasn't paying attention." The professor: "And . . . ?" Student: "And so, he was contributorily negligent." Professor: "Indeed yes."

11 "Juries decide cases on the basis of impressions . . . ." W. Ray Persons, Preparing and Delivering the Defense Closing Argument, The Practical Litigator, Vol. 16, No. 3, p. 55, 57 (May, 2005).

12 "In some cases, jurors confabulate . . . ." See Ann T. Greely, Ph.D., Clarity or Confusion: Do You Know When You are Using "Legal Speak?" 10 Litigation Commentary & Rev. 9 (Spring 2018).

13 Fed. R. Evid. 611 generally discourages leading questions except as "necessary to develop the testimony."

14 See also David Crump, Simple Predicates for Some Common Kinds of Evidence Pt.I(C), The Practical Lawyer, Vol. ___, No. ___, p. ___ (___, 2021)(presenting a similar explanation of the same technique).

15 Fed. R. Evid. 803(6).

16 Cf. Id. (the fictional terminology is adapted to cover requirements).

17 Cf. Moviemaker, How They Did It: Planning a Car Crash Scene? Match Two Multiple Locations Into One, Says *24 Hours to Live* Director, https://www.moviemaker.com/how-they-did-it-24-hours-to-live/ (last visited December 7, 2020)(discussing various aspects of establishing a scene).

18 See Symbols in a Story: What's What? at http://www.smithsonianeducation.org/idealabs/myths/symbolsinastory

19 The leading questions objection "has stymied generations of new trial lawyers." Paul F. Rothstein, Myrna S. Raeder, and David Crump, Evidence: Cases, Materials, and Problems 373 (5th ed. 2019).

20 "[T]he principal test of a leading question is: does it suggest the answer desired?" See id. at 373 (citing State v. Scott, 149 P.2d 152, 153 (Wash. 1944). Under this test, these formulas are not leading. Until, that is, the judge decides that they are leading.)

21 See David Crump et al., Cases and Materials on Civil Procedure 611 (7th ed. 2019)(referring to connected online presentation that shows use of this tactic).

22 See id.

23 See Pt. I(A) of this article supra.

24 See note 14 supra and accompanying text.

25 See id.

26 I know, I know: no Benedict Arnold High School is likely to exist anywhere. But it sounded colorful, and you get the idea.

27 "Chronologies help win cases. From the starting gate to the finish line, assembling case facts in an accessible format can put you on track to courtroom victory." Greg Krehel, Chronology Best Practices, The Practical Litigator, Vol. 12, No. 3, p. 7 (May, 2001).

28 See David Crump, Simple Predicates for Some Common Kinds of Evidence Pt. IIC, The Practical Lawyer, Vol. __, No. __, p. ___ (_____, 2021)(describing a method of offering expert testimony before a jury).