Direct Examination

Basic Prosecutor's Course
August 2014

I. THE ROLE OF THE DIRECT EXAMINATION

Cases are won as a consequence of direct examination.

Direct examination is your opportunity to present the substance of your case. It is the time to offer the evidence available to establish the facts that you need to prevail. Having planned your persuasive story, you must now prove the facts upon which it rests by eliciting the testimony of witnesses.

Direct examination, then, is the heart of your case. It is the fulcrum of the trial – the aspect upon which all else turns.

Direct examination should be designed to accomplish one or more of the following goals:

A. Introduce Undisputed Facts

In most trials there will be many important facts that are not in dispute. Nonetheless, such facts cannot be considered by the judge or jury, and will not be part of the record on appeal, until and unless they have been placed in evidence through a witness's testimony. Undisputed facts will often be necessary to establish an element of your case. Thus, failing to include them in direct examination could lead to an unfavorable verdict or reversal on appeal.

B. Enhance the Likelihood of Disputed Facts

The most important facts in a trial will normally be those in dispute. Direct examination is your opportunity to put forward your client's version of the disputed facts. Furthermore, you must not only introduce evidence on disputed points, but you must do so persuasively. The true art of direct examination consists in large part of establishing the certainty of facts that the other side claims are uncertain or untrue.

C. Lay Foundation for the Introduction of Exhibits

Documents, photographs, writings, tangible objects, and other forms of real evidence will often be central to your case. With some exceptions, it is necessary to lay the foundation for the admission of such an exhibit through the direct testimony of a witness. This is the case whether or not the reliability of the exhibit is in dispute.

D. Reflect Upon the Credibility of Witnesses

The credibility of a witness is always in issue. Thus, every direct examination, whatever its ultimate purpose, must also attend to the credibility of the witness's own testimony. For this reason, most direct examinations begin with some background information about the witness. What does she do for a living? Where did she go to school? How long has she lived in the community? Even if the witness's credibility will not be challenged, this sort of information helps to humanize her and therefore adds weight to what she has to say.

E. Hold the Attention of the Trier of Fact

No matter which of the above purposes predominates in any particular direct examination, it must be conducted in a manner that holds the attention of the judge or jury. In addition to being the heart of your case, direct examination also has the highest potential for dissolving into boredom, inattention, and routine. Since it has none of the inherent drama or tension of cross examination, you must take extreme care to prepare your direct examination so as to maximize its impact.

F. Establish a Prima Facie Case

You must prove your case beyond a reasonable doubt.

II. THE LAW OF DIRECT EXAMINATION

The rules of evidence govern the content of all direct examinations. Evidence offered on direct must be relevant, authentic, not hearsay, and otherwise admissible. In addition, there is a fairly specific "law of direct examination" that governs the manner and means in which testimony may be presented.

A. Competence of Witnesses

Every witness called to testify on direct examination must be legally "competent" to do so. This is generally taken to mean that the witness possesses personal knowledge of some matter at issue in the case, is able to perceive and relate information, is capable of recognizing the difference between truth and falsity, and understands the seriousness of testifying under oath or on affirmation.

B. Non-leading Questions

The principal rule of direct examination is that the attorney may not "lead" the witness. A leading question is one that contains or suggests its own answer. Since the party calling a witness to the stand is presumed to have conducted an interview and to know what the testimony will be, leading questions are disallowed in order to insure that the testimony will come in the witness's own words.

C. Narratives

Witnesses may not testify in "narrative" form. The term narrative has no precise definition, but it is usually taken to mean an answer that goes beyond responding to a single specific question. Questions that invite a lengthy or run-on reply are said to "call for a narrative answer."

D. The Non-Opinion Rule

Witnesses are expected to testify as to their sensory observations. What did the witness see, hear, smell, touch, taste, or do? Witnesses other than experts generally are not allowed to offer opinions or to characterize events or testimony. A lay witness, however, is allowed to give opinions that are "rationally based upon the perception of the witness." Thus, witnesses will usually be permitted to draw conclusions on issues such as speed, distance, volume, time, weight, temperature, and weather conditions. Similarly, lay witnesses may characterize the behavior of others as angry, drunken, affectionate, busy, or even insane.

E. Refreshing Recollection

Although witnesses are expected to testify in their own words, they are not expected to have perfect recall. The courtroom can be an unfamiliar and intimidating place for all but the most "professional" witnesses, and witnesses can suffer memory lapses due to stress, fatigue, discomfort, or simple forgetfulness. Under these circumstances it is permissible for the direct examiner to "refresh" the witness's recollection. It is most common to rekindle a witness's memory through the use of a document such as her prior deposition or report. It may also be permissible to use a photograph, an object, or even a leading question.

III. PLANNING DIRECT EXAMINATION

There are three fundamental aspects to every direct examination plan: content, organization, and technique.

A. Content

Content – what the witness has to say – must be the driving force of every direct examination. Recall that direct examination provides your best opportunity to prove your case. It is not meant merely as a showcase for the witness's attractiveness or for your own forensic skills. The examination must have a central purpose. It must either establish some aspect of your theory or contribute to the persuasiveness of your theme. Preferably, it will do both. In direct examination, length is your enemy. You must work to eliminate all nonessential facts that are questionable, subject to impeachment, cumulative, distasteful, implausible, distracting, or just plain boring.

1. What to Include

First, go through a process of inclusion. List the witness's facts that are necessary to the establishment of your theory. What is the single most important thing that this witness has to say? What are the witness's collateral facts that will make the central information more plausible? What is the next most important part of the potential testimony? What secondary facts make that testimony more believable? Continue this process for every element of your case.

You must also be sure to include those"thematic" facts that give your case moral appeal. Your content checklist should include consideration of the following sorts of information:

Reasons. Recall that stories are more persuasive when they include reasons for the way people act. A direct examination usually should include the reason for the witness's own action.

Explanation. When a witness's testimony is not self-explanatory, or where it raises obvious questions, simply ask the witness to explain.

Credibility. The credibility of a witness is always in issue. Some part of every direct examination should be devoted to establishing the credibility of the witness. You can enhance credibility in numerous ways. Show that the witness is neutral and disinterested. Demonstrate that the witness had an adequate opportunity to observe. Allow the witness to deny any expected charge of bias or misconduct. Elicit the witness's personal background of probity and honesty.

2. What to Exclude

Having identified the facts that most support your theory and most strengthen your theme, you may now begin the process of elimination. It should go without saying that you must omit those facts that are "untrue." Unless you have an extraordinarily compelling reason to include them, you will need to consider discarding facts that fall into the following categories:

Clutter. This may be the single greatest vice in direct examination. Details are essential to the corroboration of important evidence, and they are worse than useless virtually everywhere else.

Unprovables. These are facts that can successfully be disputed. While not "false," they may be subjected to such vigorous and effective dispute as to make them unusable. If you can't prove it, don't use it. Especially if you don't need it.

Implausibles. Some facts need not be disputed in order to collapse under their own weight. They might be true, they might be useful, they might be free from possible contradiction, but they still just won't fly.

Impeachables. These are statements open to contradiction by the witness's own prior statement. Unless you can provide an extremely good explanation of why the witness has changed, or seems to have changed, her story, it is usually best to omit "impeachables" from

direct testimony.

Door openers. Some direct testimony is said to "open the door" or inquires on cross examination that otherwise would not be allowed.

B. Organization and Structure

Organization is the tool through which you translate the witness's memory of events into a coherent and persuasive story. This requires idiom, art, and poetry. An artist does not paint everything that she sees. Rather, she organizes shapes, colors, light, and impasto to present her own image of a landscape. In the same manner, a trial lawyer does not simply ask a witness to "tell everything you know," but instead uses the placement and sequence of the information to heighten and clarify its value. The keys to this process are primacy and recency, apposition, duration, and repetition.

Primacy and recency refer to the widely accepted phenomenon that people tend best to remember those things that they hear first and last. Following this principle, the important parts of a direct examination should be brought out at its beginning and again at its end.

Apposition is the placement or juxtaposition of important facts in a manner that emphasizes their relationship.

Duration refers to the relative amount of time that you spend on the various aspects of the direct examination. Spend time on the important points and issues of your case.

Repetition is a corollary of duration. Important points should be repeated, preferably throughout the direct examination, to increase the likelihood that they will be retained and relied upon by the trier of fact.

Even applying these principles, there is no set pattern for the structure of a direct examination. The following guidelines, however, will always be useful:

1. Start Strong and End Strong: The Overall Examination

Every direct examination, no matter how else it is organized, should strive to begin and end on strong points.

2. Use Topical Organization

Chronology is almost always the easiest form of organization. What could be more obvious than beginning at the beginning and ending at the end? In trial advocacy, however, easiest is not always best. In many cases it will be preferable to utilize a topical or thematic form of organization. In this way, you can arrange various components of the witness's testimony to

reinforce each other, you can isolate weak points, and you can develop your theory in the most persuasive manner. The order in which events occurred is usually fortuitous. Your duty as an advocate is to rearrange the telling so that the story has maximum logical force.

3. Do Not Interrupt the Action

Every direct examination is likely to involve one, two, or more key events or occurrences. The witness may describe physical activity such as an assault. Alternatively, the witness may testify about something less tangible, such as the making of the threat, or the injuries following the assault. Whatever the precise subject, it will always be possible to divide the testimony into "action" on the one hand and support details and description on the other. The cardinal rule for organization of direct examination is never to interrupt the action.

4. Give Separate Attention to the Detail

We have seen that details add strength and veracity to a witness's testimony. Unfortunately, they can also detract from the flow of events. It is often best to give separate attention to the details, an approach that also allows you to explain their importance.

5. Try Not to Scatter Circumstantial Evidence

Circumstantial evidence is usually defined as indirect proof of a proposition, event, or occurrence. When your case is based on circumstantial evidence, it is therefore effective to present all of the related circumstantial evidence at a single point in the direct examination, rather than scatter it throughout.

6. Defensive Direct Examination

From time to time it may be advisable to bring out potentially harmful or embarrassing facts on direct in order to blunt their impact on cross examination. The theory of "defensive" direct examination is that the bad information will have less sting if the witness offers it herself and, conversely, that it will be all the more damning if the witness is seen as having tried to hide the bad facts. You should conduct a defensive direct examination only when you are sure that the information is known to the other side and will be admissible on cross examination. An extremely useful technique is to allow the trier of fact to "make friends" with your witness before you introduce harmful information.

7. Affirmation Before Refutation

It is usually best to offer the affirmative evidence before proceeding to refutation. As a general organizing principle it is useful to think about building your own case before destroying the oppositions.

8. Get to the Point

A direct examination is not a treasure hunt or murder mystery; there is seldom a reason to keep the trier of fact in suspense. The best form of organization is often to explain where the testimony is headed and then to go directly there.

9. End With a Clincher

Every examination should end with a clincher, a single fact that capsulizes your theory and theme.

10. Ignore Any Rule When Necessary

If you need another principle to help interpret the others, it is this: Apply the rules that best advance your theory and theme.

IV. QUESTIONING TECHNIQUE

It is the witness's story that is central to the direct examination; the style and manner of your questioning should underscore and support the credibility and veracity of that story. Since content is the motive force behind every direct examination, you must use questioning technique to focus attention on the witness and the testimony.

A. Use Short, Open Questions

You want the witness to tell the story. You want the witness to be the center of attention. You want the witness to be appreciated and believed. None of these things can happen if you do all of the talking. Therefore, ask short questions. As much of your direct examination as possible should consist of questions that invite the witness to describe, explain, and illuminate the events of her testimony.

B. Use Directive and Transitional Questions

You cannot use open questions to begin an examination or to move from one area of the examination to another. To do so you would have to start with "When were you born?" and proceed to ask "What happened next?" in almost endless repetition.

A better approach is to use directive and transitional questions. Directive questions, quite simply, direct the witness's attention to the topic that you want to cover. Transitional questions utilize one fact as the predicate, or introduction, to another. Although these questions tend to be leading, they are permissible as long as they are used to orient the witness, expedite the testimony, or introduce a new area of the examination.

C. Reinstate Primacy

The doctrine of primacy tells us that the trier of fact will pay maximum attention to the witness at the very beginning of the testimony. You can make further use of this principle by continuously "re-beginning" the examination. That is, every time you seem to start anew, you will refocus the attention of the judge or jury. This technique can be called reinitiating primacy, and there are several ways to achieve it:

1. Use General Headlines Questions

Most direct examinations, including even those that are organized chronologically, will consist of a number of individual areas of inquiry. If you treat each such area as a separate examination, you can reinitiate primacy every time you move to a new topic. You can divide the direct into a series of smaller examinations through the use of verbal headlines. Rather than simply move from area to area, insert a headline to alert the trier of fact that you are shifting gears or changing subjects.

2. Explain Where You Are Going

You can reinitiate primacy even more directly through the use of a few, well-chosen, declaratory statements. Everything that you say during direct examination does not have to be in the form of a question. You may say to the witness, "Let's talk about what happened after you were assaulted," or, "we need to move on to the subject of your injuries." Such statements are permissible so long as they are truly used to make the transition from one part of the testimony to another or to orient the witness in some other manner.

3. Use Body Movement

Another way to segment your examination, and thereby reinitiate primacy, is through the use of body movement. You can effectively announce the beginning of a new topic by pausing for a moment and then moving purposefully to a different part of the room or to a different side of the lectern. You needn't stride dramatically – a few short steps will usually suffice. The key to this is to stop talking as you move. The silence and movement will reinforce each other, making it clear that one topic has ended and another is about to begin.

D. Use Incremental Questions

Information usually can be obtained in either large or small pieces. Incremental questions break the "whole" into its component pieces, so the testimony can be delivered in greater, and therefore more persuasive, detail. Use it only where the details are available, significant, and convincing.

E. Reflect Time, Distance, Intensity

The very best direct examinations virtually re-create the incidents they describe, drawing verbal images that all but place the trier of fact at the scene of the events. Your pace and manner of questioning are essential to the process. The timing or duration of an event, for example, is often crucial in a trial; one side claims that things happened quickly and the other asserts that they were drawn out. It is possible to use the pace of questioning to support your particular theory. Similar techniques can be used to establish distances and intensity. Draw out your questions to maximize distance; move through them quickly to minimize it. Ask questions at a rapid pace to enhance the intensity of an encounter; slow down to make the situation more relaxed.

F. Repeat Important Points

In every direct examination there will be several essential ideas that stand out as far more important than the rest. Do not be satisfied to elicit these points only once. Repeat them. Restate them. Then repeat them again. Then think of ways to restate them again. Repetition is the parent of retention, and your most important points should rise again and again throughout the testimony to insure that they are retained by the trier of fact.

G. Use Visual Aids

Seeing is believing. In daily life we are accustomed to receiving as much as 70% of our information through the sense of sight. Ordinary witness testimony is received primarily through the sense of hearing. This makes it harder to follow and harder to retain. You can enhance the effectiveness of almost any witness by illustrating the testimony through the use of charts, photographs, maps, models, drawings, and other visual aids.

H. Avoid Negative, Lawyerly, and Complex Questions

Do not phrase questions in the negative. You must avoid "lawyer talk." Do not pose questions that call for more than a single item or category of information.

V. ADVERSE AND HOSTILE WITNESSES

From time to time it may be necessary to call a witness who will be hostile to your case. Because unfriendly witnesses cannot be expected to cooperate in preparation, most jurisdictions allow the use of leading questions for the direct examination of such witnesses. They fall into two broad categories: adverse and hostile.

A. Adverse Witnesses

Adverse witnesses include the opposing party and those identified with the opposing party. Examples of witnesses identified with the opposing party include friends, employees, close

relatives, business partners, and others who share a community of interest. It is within the court's discretion to determine whether any particular witness is sufficiently identified with the opposition as to allow leading questions on direct examination.

B. Hostile Witnesses

A hostile witness is one who, while not technically adverse, displays actual hostility to the direct examiner or her client. The necessary characteristic may manifest either through expressed antagonism or evident reluctance to testify. Additionally, a witness may be treated as hostile if his testimony legitimately surprises the lawyer who called him to the stand. Whatever the circumstances, it is generally necessary to have the court declare a witness to be hostile before proceeding with leading questions.

C. Strategy

There are limited situations in which it may be profitable to call an adverse witness. In general, adverse (and potential hostile witnesses) should not be called unless it is clearly necessary. If necessary, the scope of adverse testimony should be made as narrow as possible.

VI. ETHICS OF DIRECT EXAMINATION

Most of the ethical issues in direct examination involve the extent to which it is permissible to "assist" a witness to prepare or enhance testimony. It is absolutely unethical to participate in the creation of false testimony. Prosecutors must not ever collude with witnesses in the invention of untrue facts.

A. Preparation of Witnesses

It is generally considered incompetent for a lawyer to fail to meet with and prepare a witness in advance of offering testimony.

B. Offering Inadmissible Evidence

When evidence is admissible only for a limited purpose it is unethical to attempt to put it to further use.

C. Disclosing Perjury

You must disclose perjury to the court and take the necessary steps to remedy perjured testimony.