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Direct Examination: How to Lead Your Witness in a Non-Leading Manner

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On direct examination, counsel's task is two-fold: to bring out the facts necessary to support the case-in-chief and to help the witness appear credible. To do this, counsel must lead the witness without *leading*; counsel must steer the witness's testimony without asking questions that suggest the answer. Questions should be short and open-ended, and begin with "who," "what," "where," "when," "why," or "how" or short phrases such as "tell us" or "please describe." An open-ended question might ask "What did you observe?" while leading questions relating to the same subject might ask "You observed Mr. Jones accelerate through the red light, didn't you?" or "Was Mr. Jones driving north?"

Although leading questions are usually appropriate for cross-examination, they are generally objectionable on direct examination. Not only does Federal Rule of Evidence 611(c) prohibit leading questions on direct examination, "except as necessary to develop the witness's testimony" (more on that later), but also it makes sense not to lead on direct. On direct, the witness is supposed to be the "star" and the jury's focus should be on the witness's testimony. When a witness is asked leading questions, the jury's focus shifts to the lawyer; and the witness, who is being spoon-fed the answers, may lose credibility.

In the days and weeks leading up to trial, preparation for direct examination is key. Counsel should prepare a direct examination outline with questions and anticipated answers, do several run-throughs with the witness (but not so many that the testimony sounds rehearsed), and tweak the outline as necessary. The outline should be organized, chronologically or by theme, to allow the witness's testimony to flow naturally. Yet, even when a witness is fully prepared for trial, pitfalls may arise on direct examination. For example:

- The witness doesn't understand the question.
- The witness understands the question but doesn't recall the answer.
- The witness gives an incomplete answer or skips in time.
- The witness gives a damaging answer.
- The witness becomes anxious or looks like a "deer in headlights."

This article suggests four strategies for leading a witness without inviting a leading objection, and one tip for leading when absolutely necessary.

1. Consider leading questions where permitted. On direct examination, Rule 611(c) permits leading questions that are "necessary to develop the witness's testimony." Fed. R. Evid. 611(c). Thus, counsel may lead the witness when addressing preliminary matters, such as the witness's education and employment history or matters not in dispute. Counsel may also use leading questions on direct when the witness is hostile, an adverse party, a child, a mentally disabled person, or a person with language barriers. Although leading is allowed in these instances, it is a

matter of preference whether to ask leading questions and counsel should be cognizant of the jury. For example, counsel may conclude that a jury may be more compelled by a witness's description of his or her personal background than by counsel's summary.

2. Give a road map. Providing a road map (also known as signposting), reminds the jury of what they just heard and signals how the testimony will proceed. This is particularly helpful when moving to another date, location, or topic. For example, "You just told us about the events of July 1. I'd like to turn to what happened on July 15." Or "We just learned about how the product was developed; let's switch gears and talk about how the product was marketed." A road map is an essential, non-leading tool for organizing a witness's testimony and ensuring that counsel and the witness are on the same page. In addition to making it easier for the witness to know where the examination is headed, road maps also make it easier for the judge and jury to follow the testimony.

3. Employ verbal and physical cues. The way that you phrase a question may help direct the witness's attention to the essence of the issue. In particular, counsel should consider asking a series of narrow questions in lieu of one all-encompassing, open-ended question. Open-ended questions tend to invite a great deal of information all at once, and when a witness provides such answers, he or she is likely to overlook important details. To illustrate, imagine that your expert witness is on the stand and your goal is to use him or her to impugn the credibility of an opposing expert witness's report. Rather than ask "Which statements in the report do you disagree with?" ask the expert pointed questions about specific sections of the report, such as "Do you agree with Section I's conclusion that the product was defective?"

Eye contact, body language, and inflection also give a witness important cues. Maintaining eye contact instills confidence in the witness. Body movements, such as gestures by the hands or movements of the face, can signal the introduction of a new topic. Taking a short pause before asking a question indicates that the next question will be important. Using vocal inflection is also key. For example, asking "What *conclusions* did you reach?" or "How *fast* was the car going?" signals the focus of the question and also encourages the witness to give more demonstrative testimony.

4. Use documents and visual aids. The effective use of documents and visual aids can engage the witness and help illustrate the witness's testimony. It is common, particularly in trials involving a large number of exhibits, for each witness to have his or her own binder with the subset of exhibits to be discussed on direct. Although the witness binders provided to the judge and opposing counsel should be clean, each witness's binder may have the relevant passages highlighted. Upon turning to the next tab and seeing the highlighted selection, the witness will anticipate which questions will be asked. Alternatively, if witness binders are not permitted, counsel could display a highlighted document using software or an overhead projector.

Summaries, charts, graphics, diagrams, visual aids, real evidence, and other forms of demonstrative evidence are useful tools for guiding a witness's testimony. Visual evidence

reduces the stress of testifying, as the witness is given an "open-book exam" rather than a "memory test." In turn, counsel may feel more comfortable asking an open-ended question, such as "What does this spreadsheet show?" when he or she knows that the witness can view the spreadsheet and demonstrate familiarity with the topic. Ultimately, this enables counsel to readily guide the jury through the spreadsheet entries and their significance. Demonstrative evidence also has the benefit of corroborating and visually reinforcing the witness's testimony.

When a witness doesn't recall the answer, his or her recollection can be refreshed using a document (or any other item). *See* Fed. R. Evid. 612. First, counsel must establish that the witness's memory is exhausted. The witness can then be shown a document, given time to examine it, and then asked if his or her memory has been refreshed. If the witness answers affirmatively, the document may be removed and the witness can continue testifying. Because a document used to refresh recollection is not evidence, counsel may use an inadmissible document to refresh the witness's recollection. However, that document must be shown to opposing counsel, who may use it on cross-examination.

5. Use leading questions only when necessary. Finally, sometimes it is necessary to lead a witness in circumstances where leading questions are generally prohibited. Although it is generally preferable to ask non-leading questions, if opposing counsel does not object, a leading question at the opportune time may go unnoticed. But if you interpose many objections during an adversary's case, your adversary will surely return the favor. In the event that your adversary does object and the question posed was indeed leading, the best course is to withdraw the question and ask a proper one. For example, suppose your witness gives an answer that you were not expecting:

> Q: What color was the plaintiff's car?
> A: It was green.
>
> Q: Excuse me, didn't you mean that the car was red?
>
> Objection, leading!
>
> Q: Withdrawn. What color was the car?
> A: It was red.

As shown in the above example, the leading question will suggest the correct answer to the witness who, when faced with a proper question, will *hopefully* give the correct answer. Because this tactic is risky and may undermine the credibility of the witness's corrected testimony, it is best used only after understanding the presiding judge's preferences. Judges will have different interpretations of what constitutes a leading question and different preferences about hearing objections during direct examination. Some judges may view objections during direct examination as obstructionist. Other judges may apply the rules of evidence strictly and expect objections to leading questions.

These tips are best used not only at trial but also during your pretrial preparation. If your direct-examination outline has leading questions where permitted, provides a road map, narrows the breadth of open-ended questions, and uses documents to support the witness's testimony, your run-throughs will be more effective and the witness will ultimately feel more comfortable at trial.

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