



PROGRAM MATERIALS

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**Litigation Series: Session 13 -
Spotlight on the Witness: Direct
Examination Done Right**

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Mauet

- “Experienced trial lawyers recognize that most trials are won on the strengths of their case in chief, not on the weakness of their opponent’s case. Consequently, effective direct examination that clearly, forcefully, and effectively present the facts of the case will usually have a decisive effect on the outcome of the trial.”

A black and white photograph of Fred Astaire in a tuxedo and top hat, performing a dance move. He is leaning back, holding a cane in his right hand, and has a joyful expression. The background is a plain, light-colored wall and floor.

Fred Astaire

Fred Astaire: The Patron Saint of
direct examination

Dispelling Myths

- Myth: Ginger Rogers did everything Fred Astaire did, but she did it backwards and in high heels
- Fact: Ginger Rogers was a mediocre dancer. Fred Astaire made her look good







The Attorney's Goal

Our job is to make the witness
and the story he is telling
interesting, compelling, and
credible.

A Few Basic Rules

- Direct examination is a partnership in which one of the partners attempts to fade into the background and focus all of the attention on the other partner.
- Organize your direct in a way that most effectively conveys the story.
- Develop *emotional* consistency with what the witness is saying (act like a human).

A Few Basic Rules

- Develop *linguistic* consistency with what the witness is saying (speak like a human).
- Listen attentively to what the witness says.
- Be genuinely interested in what the witness says. Don't be thinking about your next question when the witness is answering. A great slogan here is, "Be interested, not interesting."

A Few Basic Rules

- Make it interesting
- Remember your audience

Asking Questions

- Avoid making it a subway conversation where people are simply talking at each other rather than connecting with each other. It usually exists as an unbroken chain of thoughts that spills out as chatter and sounds like stream of consciousness.
- And when that person stops, the other person begins.
- Some of the best conversations are those where the guest pauses before answering the question.

Asking Questions

- In pausing, there is a physical sensation in the guest's body that they connect to before answering the question.
- The ensuing words – especially their underlying sounds – are a reaction to the person's physical state.
- Indeed, even in everyday life, our words come from a deep place.

Form of the Question: Non-leading

- Who
- What
- When
- Where
- Did you
- Why
- How
- Describe

Form of the Question: Non-leading

- Tell us
- Explain
- What was that like for *you*
- How did you *feel* when ...

Form of the Question: Non-leading

- Why use non-leading questions on direct?
 - Rules of evidence require it (obvious answer)
- More important reasons
 - Non-leading questions place the focus on the witness and the story, *not* on the lawyer
 - Non-leading questions make for smooth, seamless testimony rather than choppy testimony
 - With non-leading questions, the story comes from the witness rather than the lawyer and is therefore more credible and persuasive

Form of the Question: Non-leading

- Just because you can “get away with” sneaking in some leading questions doesn’t mean it’s a good idea!

Form of the Question: Non-leading

- Bombshell! Non-leading does not necessarily equal non-control
 - Fred was actually leading Ginger; we just couldn't see it
 - Control the testimony in a subtle fashion using the language of your non-leading questions to edit and direct what the witness is talking about
 - Subtle control is important to ensure that the story is clear and interesting
 - “What, if anything, happened next?” isn't a good question. “What happened next?” isn't much better

Organization of Direct Examination

- What makes the story interesting?
- What makes the story make sense?
(Remember, the jury does not know the case as well as you do)
- What will have the most impact?
- Chronological (easiest though usually not best) *versus* topical (the chapter method)

Organization of Direct Examination

- Setting the scene first will create context for the story (and is easier for the jury to process)
- Be conscious at all times of your theory and theme

Pace & Flow

- Vary the pace and rhythm
- Know when to slow down and fill in details
- Not all details are created equal
- Do not interrupt the flow of the story to fill in details. It's okay to backfill later if necessary
- If you are bored, so is the jury

Foundation

- Not just a matter of evidence
- Persuades the jury that the witness knows what he is talking about and should be believed
- Provides context
- Make it interesting. Foundation is part of the story, not an evidentiary hoop to jump through before getting to the good stuff

Show the Human Connection

- Show the human connection between you and the witness!
 - This is not a solo act (it's not about *you*)
 - Make eye contact
 - Ask follow-up questions. This will force you to listen and will show the jury that you are listening
 - Adjust your tone and emotion so that it is *appropriate* for the subject of testimony

Show the Human Connection

- Speak like you are speaking to a friend
 - It is never appropriate to beginning a question with, “Turning your attention to ...” or “Did you have occasion to ...” Ease the legalese!
- If your client is on the stand, let the jury see that the two of you have a “we’re in this together” and “we’re on the same team” relationship
- Be sincere. Fred was suave, not smarmy

Think Visually

- Long periods of auditory information can be difficult for jurors to digest
- For many jurors, *auditory* information is more difficult to process than *visual* information. Studies show that most people tend to be visual learners. Combining auditory with visual is a “one two punch” that will help you knock it out of the park!

Think Visually

- Whenever possible, incorporate physical or demonstrative evidence, or visual aids, especially when the witness's story gets complicated
- Physical exhibits need not be admissible
- Physical and demonstrative evidence and visual aids will help you and the witness focus the testimony and stay on point so that you don't make a wrong turn and get lost trying to find your way out of the forest

When the witness can't remember the steps

- “The best-laid plans of mice and men often go awry.” Robert Burns, “To a Mouse”
- Whenever possible, allow the witness to review his or her testimony before trial or at least before he takes the witness stand
- Short and simple questions will ease the witness's tension and help him get comfortable talking

When the witness can't remember the steps

- Take control with your questions, but don't lead the witness!
- The witness who provides monosyllabic answers (i.e., "yes") will require broader questions combined with cues about information you are trying to elicit. Begin your questions with "tell us," "explain," or "describe."

When the witness can't remember the steps

- The rambling witness will need to be reeled in with narrow and specific questions about the subject matter sought. Again, don't lead!
- The witness who suppresses his emotions will need a "pinch" to get him going. You can do this by revving up your *own* emotional engine as this will simultaneously heighten the emotions of the witness.
- Encourage the witness to testify in the "first person." This will force him or her to use stronger language and to become more emotionally engaged with the story he is telling. The story will come alive right before the jury's eyes.

Attitude

- Direct examination is not the boring, red-headed stepchild of cross-examination. It is a star in its own right
- Fred Astaire was a fabulous dancer, but in one hundred years he will still be famous because he made Ginger Rogers look good!

Experienced Public Defenders Know

- It would be great to have a truthful, believable, presentable, reliable witness, without a criminal record but the reality is that ...
 - We often don't have any
 - Our client may want to testify

Potential Defense Witnesses

- Defendant
- Alibi
- Fact
- Expert
- Character
- Defense Investigator
- Hostile

Best Practices

- Interview your witnesses as soon as you learn about them
- If the witness will be helpful, obtain a written or recorded statement
- Make sure that the witness's story is consistent with your theory of the case

Prepare the Witness for Trial

- Prepare and rehearse
 - Issues that will be covered;
 - Review evidence and statements;
 - Demeanor on direct and cross;
 - Anticipate what questions the witness is likely to be asked on cross;
 - Prepare the witness for cross by conducting a mock cross-examination in advance of the trial;
 - Be prepared for objections;
 - Appropriate attire

Basics

- You are the “director”
- Draw the jury into this reconstructed reality of past events (from your perspective) for maximum engagement
- Don’t merely tell, “show”

Basics

- Stand where you will best enable and encourage the witness to talk to jurors. It's a good practice to stand as far away from the witness as possible. This shifts the attention off of you and onto the witness. In addition, you'll know instantly whether the witness is speaking loud enough or whether he is speaking too soft. If the witness's voice is too soft, you can ask him to speak louder and project his voice.

Organization

- Personal background
- Prior record?
- Scene description
- Action description
- Exhibits

Set the Pace

- More practice ...
 - Control the witness
 - Set the scene ... let the jury see the story by painting word pictures in their mind
 - Break it down piece by piece
 - Divide it into chapters
 - Short questions, keep it simple (avoid compounded, complex, and obtuse questions)
 - No legalese
 - Listen attentively

Your Client

- Do you really need him to testify?
- Usually first or last witness
- Humanize him
- Deny in sincere and genuine language
- Practice

Your Client

- Background
- Residence
- Family
- School
- Work
- Volunteer

N.J.R.E. 405

- Character evidence
 - Reputation, opinion, or conviction of crime
 - Specific instances of conduct
 - Impeachment
 - State v. Sands, 76 N.J. 127 (1978)
 - State v. Brunson, 132 N.J. 377 (1993)
 - State v. Hamilton, 193 N.J. 255 (2008)

Alibi

- R. 3:12-2
 - File notice
 - Who is the alibi?
 - Limit testimony to:
 - Believability (independent witness versus family member of your client)
 - Supporting evidence (timesheets, video)

Exhibits

- Picture (or some other prop) might be worth 1000 words
 - Mark exhibits in advance
 - If you have something good, blow it up
 - Refer to exhibits during questioning and get it admitted into evidence and into the jury room when the jury begins deliberating

Fact Witness

- Eye Witness
- Who is the witness?
 - Before, during, or after the event?
- Describe the scene
- Describe the event
- Short open-ended questions

Character Witness

- Do you want to put the client's character into evidence? Balance the need to put your client on the stand against the backlash of having your client's bad character revealed and ask yourself the question, "Will putting my client on the stand help the case?" At the end of the day, it's the client's decision.

Character Witness

- Specific trait
- General reputation for truthfulness
- Does the character witness have “good character?”

Objections to Avoid

- Failure to file notice or provide reciprocal discovery
- Don't ask leading questions
- Lay proper foundation
- Stay away from hearsay (“What did Adam tell you when you arrived?”)

Re-Direct

- Don't simply repeat direct (jury will want to strangle you)
- Don't dig the hole deeper
- Don't make the witness vulnerable to a scathing re-cross that would not have happened but for you opening up the door on re-direct with an otherwise innocuous question.

Reasons for Putting a Witness on Stand

- You need substantive evidence
- Will help your theory – themes
- Jurors will identify with and/or like the witness

Reasons for Not Putting a Witness on Stand

- Won't satisfy any of the above
- Potential for being impeached
- The defendant in a criminal case
 - Conviction (FRE 609)
 - Impeachment potential
 - Perjury

The Order of Calling Witnesses

- Primacy/Recency
- Chronology
- Climactic order

Witness Preparation

- Want jury to like them – smile, eye-contact, plant yourself in one spot
- Get the witness to tell a story and to testify in the narrative (“once upon a time”)
- Introduction – identification (“Please introduce yourself”)
- Personalize the witness (How will you refer to the witness? By his first name? By his last name?)

Witness Preparation

- Avoid boring details
- Use short, open-ended questions
 - What, where, why, when, and how
 - Sensory: Did you see, hear, smell, taste, feel?
- “What was it like for you?” “How did you feel about that?”
- Transitions: “I want to ask you some questions about ..., do you understand?”

Witness Preparation

- Use impact words
- Paint pictures and create images in the minds of the jury
- Emphasize to witness that he or she makes eye contact with the jury
- Listen attentively
- When something is unclear or needs clarification, ask the witness to *explain*

Witness Preparation

- Loop to repeat important points
- Use demonstrative aids (i.e., exhibits)
- Know how to handle, “I don’t know” or “I can’t remember”

Avoid Using These Questions And Phrases

- “Mr. Jones, please state your full name for the record and spell your last name for the court reporter.”
- “Did you have occasion to ...?”
- “Did there come a time when ...?”
- “Directing your attention to ...”
- “What, if anything, unusual occurred?”
- “Did you *not* ...?” (negative, confusing)

Avoid Using These Questions And Phrases

- “State ...” (use “Tell us ...” instead)
- “Observe ...” (use “See ...” instead)
- “Conversation” (use “talk” instead)
- “Approximately on or about ...?” (not specific enough)
- “Strike that”
- “For the record, ...”