DIRECT EXAMINATION

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1. OVERVIEW

After the jury's curiosity has been aroused by voir dire and the opening statement, they must be guided through the evidence. As you begin your case-in-chief, the jurors are wondering if you can deliver what you promised. They wait in anticipation of what "the evidence" will really show. It is your responsibility to back up what you have said by presenting the evidence in an interesting, informative, and organized manner.

To some extent, the jurors will view voir dire and the opening statement as the wrapping around a gift or as the clothing on a person. Their real interest now lies on what is inside the package - what kind of a heart and soul does the individual possess? This heart and soul, or the contents of the package, will make up your case-in-chief, most of which you present by direct examination of witnesses. Your witnesses will prove facts in issue or will lay critical foundations for other forms of evidence to be viewed or heard by the jurors.

2. CHECKLIST: SETTING GOALS FOR DIRECT EXAMINATION

In preparing and delivering direct examination, an important and often missed goal pertains to "making the record." To some extent, cases are tried to appellate courts. Succinctly, it is necessary for the advocate to present the client's case in a manner that will withstand appellate scrutiny. The proper foundations must be laid. The trial advocate must make the proper predicate. Magic

words and phrases having to do with admissibility become essential. All of the elements of proof of the case-in-chief or the affirmative defense, whether it be a civil or criminal case, must be covered to satisfy the legal requirements.

In setting your goals, always consider the following:

(1) What is it that I need to prove?

(2) What is the best method of proving a given point, i.e., expert testimony, courtroom demonstration, documentary evidence, etc.?

(3) What witnesses do I want to call and why?

(4) In what order do I want to call the various witnesses and why?

(5) How can I make my presentation most interesting to the judge and jury?

(6) What objections can I anticipate to my direct examination and how can I combat those objections?

(7) What are the legal requirements of my proof (in order to present a prima facie case)?

(8) What witnesses or other evidentiary matters can I eliminate to help make my direct examination smoother, more compact, easier to understand, and more persuasive?

(9) What should I use in the way of demonstrative aids during direct examination?

(10) Where shall I place myself in the courtroom?

(11) What is the best method of blending my direct examination testimony into the other phases of the trial?

Comment: In addition to setting your own goals, anticipate the goals that will be set by your opposition. Constantly be on the lookout for clues to your opposition's next move and future moves. Get to the point in direct examination and your goals will be easier to achieve.

3. FOSTERING JUROR CONFIDENCE

In preparing for your direct examination, always keep these considerations about jurors (and judges) in mind:

- Jurors are impressed (and therefore more readily persuaded) by an organized and obviously well-prepared case.

- Jurors will punish you for being unprepared, disorganized, or for what they perceive as wasting their time.

- Jurors do not appreciate lawyers who put on witnesses that are obviously unprepared.

- Jurors can't stand it when a lawyer "Mickey-Mouses" around with unimportant or trivial matters.

- Jurors appreciate and respect a lawyer who is firm, but reasonable and compassionate.

- Jurors will generally not be attentive if your direct examination is extremely lengthy.

- You will lose credibility with the jurors if the evidence does not show what you said it would in your opening. Jurors appreciate a lawyer who will "get on with it" and prove the major points of the case, as opposed to the lawyer who draws out the case over a longer (and unnecessary) period of time.

4. RECENT CASE LAW DECISIONS AND LEGAL PERIODICALS OR TREATISES OR RELATED MATERIALS DISCUSSING SUBJECT OF "IMPROPER DIRECT EXAMINATION"

(1) *State v. Humphrey*, 36 P.3rd 844 (Kan. App. 2001) – (court determined that objection by defense counsel to "improper direct examination" of prosecutor should be overruled where prosecutor was examining a "victim" with a behavioral disorder and learning disabilities by using leading questions once prosecutor became frustrated by inability to obtain testimony through use of non-leading questions).

(2) *McCartney v. Kerchner*, 1993 Westlaw 541639 (Ohio 2d Dist. Ct. App. 1993) – (court stating that, "The purpose of direct examination is to establish facts; the purpose of cross-examination is to cast doubt on facts established during direct examination.").

(3) *State v. Kackley*, 2004 WL 1532219 (Kan. App. 2004) – (when the witness has merely testified on direct examination, without any impeachment, proof of consistent statements is unnecessary and valueless).

(4) 2 Herbert J. Stern, *Trying Cases to Win: Direct Examination*, at 7 (1992) – noting that the purpose of direct examination is to argue your case through the witness to the jury – the most effective direct examination is clear, vivid, memorable, and credible.

(5) The Maryland Institute for Continuing Professional Education for Lawyers, Inc. – 2002 – "Preparation and Trial of Tort Claims," by David W. Allen – (noting that, "The purpose of direct examination is to let the witness speak, while keeping that witness along the path that best displays the evidence to the jury. Thus, it is truly important to have a clear idea of what evidence you want to get from the witness and to have prepared an outline of questions that allows you to do so as effectively as possible.").

(6) 29 Fall Brief 46 (1999) – (The purpose of direct examination is to present the client's version of the facts in a straightforward manner. How an attorney elicits information will vary from witness to witness. The "better" the witness, the more control the witness will have over the presentation of the story to jurors. The best direct examination usually contains the right combination of open-ended questions, leading questions, and narrative explanations. The witness can respond to inquiries by either succinct yet accurate responses, or by longer, more detailed ones. Combined with good word selection, in both how questions are framed and answers are given, direct examination will keep the jury's attention. However, unless the witness falls into the category of "good" witness, counsel must be wary not to encourage too much testimony because the results can be dangerous. Again, the goal is to draw out the witness' story in simple and logical terms and to establish all necessary case elements.)

5. PRACTICE CROSS-EXAMINATION TO PREPARE FOR DIRECT EXAMINATION

Prepare the witness for direct examination by going over the testimony several times before trial. Put each witness through a severe, detailed cross-examination before trial. The best way to do this is by having another attorney conduct this cross-examination. It gives the witness more confidence about her testimony and puts her at ease because she has a better idea about what may be coming in the way of cross-examination. Consider it a great compliment when the witness tells you later that your preparatory cross-examination was rougher than the real thing.

Comment: Be sure that all exhibits are neat, well organized, and as easy to handle as possible. For example, when presenting hospital records into evidence, don't present 100 pages of photocopied records stapled together. Rather, present them in a notebook with all pages numbered and tabbed where appropriate. In this manner, you will be able to present an exact duplicate copy of these records to the judge as well as the jury. Furthermore, you will have

one for yourself with corresponding page numbers and a similar tabbing setup. This not only makes the hospital records more presentable in appearance and much easier to use during trial, but also emphasizes your control and preparation.

6. CHECKLIST: PRINCIPLES OF DIRECT EXAMINATION

(1) Each witness must be prepared thoroughly by the trial lawyer.

(2) Never put a witness on the stand unless you have met with the witness beforehand and discussed the case with the witness and are thoroughly familiar with what the testimony will be. (Obviously, exceptions will include the adverse or hostile witness, etc.)

(3) Familiarize the witness with the courtroom arena and the trial procedure.

(4) Explain to the witness the details of any matters on which the court has ruled in limine and about which the court has entered an order concerning matters that cannot be mentioned.

(5) Explain hearsay to the witness and matters pertaining to the witness discussing the case with other witnesses.

(6) When necessary, advise the witness about proper dress and personal habits or mannerisms.

(7) Interview and prepare your witnesses separately.

(8) Provide each witness with a copy of any previous statements or interrogatories that he or she may have answered, and copies of the witness' deposition. Your first witness should be one who will have major impact on the trial. This should either be one of your own witnesses who is strong and convincing and key to your case or it may be an adverse or hostile witness through whom you will gain numerous admissions.

(9) The direct examination should be direct and to the point and should follow the structure and character of your outline. Don't get into the courtroom and then "wing it" on direct examination.

(10) For psychological reasons, you generally want the jurors to focus their attention on the witness. Therefore, during direct examination, you should generally place the jurors between yourself and the witness.

(11) Refine your questions through practice by learning not to ask objectionable questions (i.e., leading, compound, questions which call for conclusions, etc.). Jurors will not appreciate continuing objections to your direct examination when the objections are continuously sustained by the court.

(12) Think out your direct examination in terms of logic and common sense and prepare your case accordingly.

(13) As to "weak" or problematic types of witnesses that you must call because they provide a valuable link in your chain of evidence, the pace of your direct examination should be brisk and the testimony should be brief. It is best to avoid questions calling for a narrative answer with these types of witnesses. Control is particularly important here.

(14) As to strong, persuasive, and convincing witnesses, questions calling for a narrative form of answer are often preferred. The pace should be one that holds interest and one that provides a smooth and even flow of testimony, making point by point by point. As to strong points in the witness' testimony in the circumstantial evidence case, be sure to lay a strong and detailed foundation for that evidence. For example, where a key witness is testifying as to a matter of "negative evidence" in that she noticed that a particular activity did not happen at a given time and location, it is imperative that you go into detail

about her observation capabilities, i.e., the fact that she was paying particular attention to the location and noted with specificity the lack of activity, etc.

(15) Always be cognizant of your "choice of words" in direct examination. Dr. Elizabeth Loftus of the University of Washington has conducted experiments determining the effect of choice of words in a given question on the answer. Some time ago, she had a film of an intersection collision viewed by two groups. Both groups were asked to estimate the speed of the vehicle. The first group was asked, "How fast was the car going when it *smashed* into the other car?" The other group was asked, "How fast was the car going when it *hit* the other car?" The average estimate of group one was 40.8 miles per hour, while the average of group two was 33 miles per hour. The disparity arises as a result of the key word, which was the verb *smashed* - a word implying greater speed and force at impact than the verb *hit*. When a witness views a collision or a similar factual event such as a robbery, he forms a "memory representation" of the actual event, which Dr. Loftus refers to as "original information." When you ask the witness, "How fast was the car going when it smashed into the other car," your question includes new, external information, which enters into the witness' memory and, if believed, will result in an alteration or change in memory.

(16) Remember the importance of your "order of words." Robert Lawson, a law professor at the University of Kentucky, published an article in the 1970 issue of the Arizona State Law Journal entitled "Experimental Research on the Organization of Persuasive Arguments and the Application to Courtroom Communication." The experiment really dealt with order of words and in the experiment Dr. Lawson divided an audience into two groups, both of which were out of the hearing of one another. To both groups he described the same person. To the first group he said, "George is intelligent,

industrious, impulsive, critical, stubborn, and envious." To the second group he said, "George is envious, stubborn, critical, impulsive, industrious, and intelligent." He stated the same exact words or adjectives to both groups and merely reversed the order and he then asked both groups to state their impressions of George. The first group concluded that George was an able person with some minor shortcomings, while the second group concluded that George was a problem personality with serious difficulties.

(17) Remember the laws of primacy and recency. (People tend to believe and accept as accurate that which they hear and understand first and last. These rules apply to all phases of the trial.) The last question can have an important effect on the perceived quality of the witness' testimony.

(18) Use demonstrative evidence with your witnesses on direct examination wisely, effectively, and efficiently. Remember that jurors will not really understand and comprehend everything that they hear from the various witnesses. Since jurors more easily understand that which they both see and hear as opposed to that which they only hear or that which they only see, your demonstrative evidence coming in via the testimony of a witness will help the jurors understand and comprehend the testimony. Visualization is exceptionally important. Consider using medical illustrations, sketches, maps, aerial photographs, skeletal devices, and the like.

(19) Remember that reception of a message will improve with repetition. Persuasion or speed of agreement increases with the number of times that an individual is exposed to a communication.

(20) Preempt the defense by exposing your weaknesses and problem areas in direct testimony. If the weakness is significant, you can be sure that opposing counsel will expose it if you don't. By exposing the weakness

yourself, you minimize its impact. You may even gain credibility with the jury by being open. On the other hand, you may appear untrustworthy if the opposing side exposes the weakness. In addition, the weakness may be perceived as more important (i.e., "This must really be bad for his case, since he tried to keep it from us.").

Comment: Direct examination requires planning to keep it moving. If testimony does not add anything, it shouldn't be used. The direct testimony should, above all, present the elements of your case and support the other forms of evidence.

7. PREPARING SENSORY-BASED DIRECT TESTIMONY USING NEURO-LINGUISTIC PROGRAMMING

Authors Paul Katz and Sid Jackobson have discussed the vital and critical nature of preparing sensory-based direct testimony using neuro-linguistic programming. Katz and Jackobson, "Preparing Sensory-Based Direct Testimony Using Neuro-Linguistic Programming," The Advocate - published by The Florida Bar (February, 1993). According to Katz and Jackobson, "neuro" refers to the brain; in this context, to a model of how the brain receives, stores, creates, connects and remembers information. "Linguistic" refers to both verbal and nonverbal elements of communication. "Programming" refers to the recognition and control of human patterns of thought, communication and behavior. "In general, neuro-linguistic programming presumes that an appropriate model for human thought should be sensory-based (i.e., based upon the five senses). Each thought stored in the brain contains a visual, auditory, kinesthetic, olfactory, and gustatory (in English, seeing, hearing, feeling, smelling, and tasting) components."

"Each of these senses is made up of submodalities that define and determine the quality of the information in that sense. Visual submodalities include brightness, size, shape, color, and location. Auditory submodalities include volume, pitch, tone, etc. One of the most important visual submodalities is "associated" versus "disassociated." In

an “associated” image, the thinker is seeing the image as if he or she were present in the action. In a “disassociated” image, the thinker is looking at the image from an outside perspective.”

“Neuro-linguistic programming is a communication model in which the programmer, therapist, practitioner, or attorney uses a system of reframing, or restructuring, information so that the listener or the reader can absorb these thoughts in a new way.”

“When dealing with neuro-linguistic programming, things like ideas, images and thoughts can either be remembered or constructed. When they are constructed, they can come either from direct experience or from information which is supplied by someone else - such as you and your expert during direct examination. It is not possible to give anyone truly complete information. From a practical point of view, all information is incomplete. So when information comes from someone else or another source - such as via direct examination at trial - it comes in pictures and sounds that are constructed into a thought along with the feelings generated by those components. The natural response of a listener is to fill in the missing information based on personal experience, beliefs and values. The more complicated the message, the harder the listener or observer attempts to fill in the missing components. As a result, once the hard worker filling in the missing parts has been satisfactorily completed, the listener or observer will nearly always fight hard to keep his or her conclusions.” According to Katz and Jackobson, it is an important part of our job to have the jurors draw the conclusion we support before they get the chance to construct one we have to fight to get them to give up. This has implications for opening statements and voir dire, as well as for the examination of witnesses.

It is strongly recommended that you obtain a copy of the article by Katz and Jackobson. Among other things, they discuss the vital importance of such things as rapport, anchoring and other vital steps involved in persuading people through direct examination.

8. SPECIAL CONSIDERATIONS WHEN PLANNING AND PREPARING THE "DIRECT EXAMINATION" OF "FACT" WITNESSES

The following is a list of special items to consider when planning for and preparing the direct examination of a fact witness:

(1) Fact witnesses are generally nervous and anxious with respect to their testimony and dealing with the legal system. The manner in which you communicate with them will go a long way towards calming them down and placing them in a mental state where the fact witness can focus on the testimony as opposed to being overwhelmed with the circumstances of a courtroom, a judge, a jury, trying to remember facts, and the like.

(2) Most fact witnesses are not savvy when it comes to cross-examination. Fact witnesses generally tend to do a good job on direct examination and, unless properly prepared for cross, they will make errors, forget things that seemed unforgettable, get confused, and say things highly inconsistent with the direct examination. Again, preparation and communication is the key.

(3) Most fact witnesses are fact witnesses merely by happenstance. For example, a particular fact witness just happened to be standing on the corner and witnessed an automobile collision; or another fact witness is a co-worker on a job site who happened to witness a forklift roll over which was a hundred yards away; or perhaps another fact witness is a receptionist in a doctor's office who happened to be on the receiving end of a phone call from a patient where the conversation becomes a major issue in a medical malpractice case. The problem is that these "fact witnesses" are not parties in the case and they are not expert witnesses, and they have not spent months focusing and concentrating on the evidence in the case. Therefore, you, as the trial advocate, have to work with these witnesses to make sure in advance that each has the proper documents or other items necessary to review in

order to make certain their testimony is as accurate and truthful and responsive as possible.

(4) Some fact witnesses are very unmotivated to cooperate when it comes to giving a deposition or testifying at trial. They either "don't want to get involved," or take the position that "it ain't my problem," or similar positions. You, as the trial advocate, must work even harder with these witnesses to at least try to make them understand the importance of their testimony and their role. You also need to make it as easy as you can. Be ever so cautious with these witnesses though, as these are often the witnesses who tend to approach lawyers with the concept of "what am I going to get out of this?"

(5) Fact witnesses often make statements without giving any thought in advance to the true meaning of what has just been said. They often speak by making comments that are simply "figures of speech." For example, in a deposition in one recent case, a fact witness was asked, "Once you came to a complete stop at the traffic light on U.S. 1, how long did you remain at a full stop?" Her answer was, "About three or four minutes." This was, of course, a rather preposterous answer, as the truthful answer was more like eight to ten seconds. Caution fact witnesses about just these types of comments or statements and make certain they understand the necessity of concentrating on the question and the answer.

(6) Some fact witnesses want to play "lawyer." They think they know the legal system and they seem to get a charge out of joking with the judge and joking with the jury, or making snide comments, or being wise-guys, or trying to debate with the other lawyer during cross-examination. It is only through preparation and planning of the direct examination and working with the witness that you can avoid such things. Work diligently with the fact witness who gives new meaning to the phrase "perception is reality." Some fact witnesses will swear up and down that they saw or heard or smelled or felt something where it is truly impossible for such to have occurred. Work with that witness to make certain that they understand the difference

between what they really saw and what they think logically they might have seen.

(7) Never assume a fact witness knows how to act or how to dress for a deposition or court. In my years, I have seen it all – a construction worker coming to court wearing a hat with a series of filthy four-letter words written all over it; a prostitute in a rape case in a military court martial coming to court dressed as a prostitute; a witness in a drunk driving case coming to court…drunk; and lots of others. Talk to fact witnesses about how to act, how to dress, and stress that the single most important thing for them to be concerned with is telling the truth and being accurate.

(8) Fact witnesses are often confronted in court with having to look at a piece of evidence or a document. In order to appear intelligent, they often do not want to take the time to clearly review the evidence or read the document when such is necessary. Caution them about this.