Direct Examination Primer

• *Preliminary Observations*

Direct examinations are hard to do. Communicating effectively in a "question and answer" format is an extraordinarily unnatural and difficult process. An attorney must learn to ask good questions. The witness must accept the discipline imposed by the "question and answer" format. He must listen carefully to each question, answer completely, and then have the good sense and patience to stop and wait for the next question.

A direct examination is not like a normal conversation. In a normal conversation, a person with a story to tell simply tells it. At trial the rules say a witness may not narrate but must respond to questions one at a time. In normal conversation, narratives are a mix of observation, intuition, conjecture, and guesses. At trial, a witness must speak from personal knowledge, a basic requirement of evidence law. In normal conversation, people usually leave out ideas and events that are mutually understood. At trial, a witness must fill in enough detail to make the testimony comprehensible to strangers. In normal conversation, questions function mostly as prompts, a means of moving the conversation in a particular direction. At trial, questions demand careful and precise answers.

During a direct examination a mock trial attorney and witness effectively compete with each other for points. An attorney who simply hands the stage over to the witness gives up the opportunity to score well. An attorney who over controls and dominates the examination deprives the witness of the opportunity to score well. For both to get top scores, attorney and witness must work together. Think of the witness as the "featured vocalist," the attorney as the "piano accompanist." To create beautiful music, vocals and piano must harmonize and complement each other.

• *Purpose of Direct Examination*

The purpose of a direct examination is to argue your case to the jury through the witness. It's commonly said that the purpose is limited to presenting the witness, who then tells his [or her] own story as far as possible. The best trial attorneys, however, do not leave it to the witness to present the facts. They carefully organize the material into a chronological or logical order, or both. They break the testimony into clear and identifiable parts. They use transitions to move the questioning from one topic to another. They control the pace of the examination, varying the amount of information coming from a witness. They focus attention on and obtain repetition of important parts of the testimony.

By way of contrast, a common approach is to introduce the witness and then work chronologically through the information the witness has in an

unbroken chain of questions and answers that frequently becomes mind-numbing. A series of questions and answers merges into more questions and answers. Topics merge into topics. Jurors lose any sense of what is important about the witness's testimony.

• *Getting Started*

Make an inclusion list! List the facts the witness knows that the jury needs to hear if it is going to decide the case in the team's favor. Each fact should have a direct relationship to something the jurors must decide. If there's none - if it's just background, a bit of fluff, or worthless drivel - keep it off the list. Ruthlessly edit the list. Don't leave something in just because you think it might become important. The inclusion list tells you what the direct examination should cover. Everything else is distracting clutter. Everything else should be omitted.[1]

Make a credibility list! List the facts that make the witness more or less believable. They may be moved into the inclusion list if the jury's verdict depends on whether or not it must believe the witness's testimony regarding a fact on the inclusion list. The decision depends on the likelihood that the opponent will attack the witness's credibility, the strength of the attack, and whether the attack is best anticipated in the direct examination, handled by the witness during cross-examination, or dealt with on redirect examination.

Work up a description of the character's emotions! Ask what the character might be feeling while testifying. Ask how the character's feelings might affect the testimony. Emotion is an important part of persuasive messages, and emotion helps a student witness turn a cardboard character into a human being. As you draft questions and answers, you will want to create opportunities for the witness to express emotion.

• *Write a Script.*

You should always write a direct examination script. The process of preparing a written draft of questions and answers vastly improves trial performance. The effective formulation of questions requires a lot of thought, more than can be mustered spontaneously during a trial. A script also frees up mental energy to attend to the many other things you will want to watch and listen for during the trial.

Your script should include variations, parts that can be added or dropped. You need to be flexible. Assume, for example, that the defense in its opening

[1] A mock trial witness statement should not be treated as the starting point for drafting a direct examination. Witness statements typically include some useful pieces of testimony buried in a pile of junk. Before you begin drafting, you must toss the junk and put the good stuff in some order.

statement claims that the prescription opioids found at the crime scene were stolen from him. The prosecution needs a variation in which the investigating officer testifies to facts rebutting the idea that the drugs were stolen. Assume instead that the defense in opening admits that the defendant gave the opioids to his friend. You don't want to waste time dealing with what has become a non-issue.

Your scripted testimony should sound spontaneous. Of course, it's not spontaneous. It's scripted. But it must be made to sound spontaneous. An examination loses spontaneity when the questions sound like cues instead of questions. For example, the question "Did you see any clowns at the circus?" calls for a yes or no answer. It does not ask the witness to tell all he knows about clowns. It's a mistake to use a question as a cue for testimony. As you draft the script, make sure you are asking real questions, and the witness is giving real answers. The witness should say no more than what's necessary to answer each question and stop.

A direct examination loses spontaneity when a witness does not give the appearance of thinking about his answers. He is ready to go with a fully formed answer, on the tip of his tongue, no matter how hard or easy the question. And it loses spontaneity when an answer ends with a too obvious cue for the attorney to tee up the next question.

• *The Direct Examiner's Toolbox*

Questions are a direct examiner's tools. At each step along the way, she needs to choose the form of question that best gets the job done.

1. *Interrogatory Questions*. As far as possible, a direct examiner should be asking non-leading questions beginning with "who," "what," "when," "where," "which," "why" or "how." Interrogatories using these words can be divided roughly into two kinds, depending on how much information the attorney wants from the witness.

"Big Chunk" interrogatories ask a witness for a lot of information. For example, an attorney is questioning an eyewitness who stumbled upon the scene of a bank robbery. She might ask this question and get this answer.

> Q: What happened after you entered the bank?
> A: I saw this man carrying a gun. There were about ten folks lying face down on the floor. I didn't see any tellers. My brain screamed "robbery." The man was wearing a mask. He was coming toward me. I raised my hands and backed off. I was shaking. Thankfully, the robber walked by and out the door. The next thing Bill Fields, the bank guard, was asking me if I was okay.

A “big chunk” interrogatory has advantages. It gives a witness freedom to tell his story in his own words. Jurors generally find testimony in narrative form to be more credible. It can also be used to speed up an examination. In response to a single question, a witness can quickly pour out a lot of information. And there are times when an attorney must allow a witness to explain himself at length.

It has disadvantages. Long answers tend to overwhelm the capacity of jurors to absorb information. Key facts get crammed into a single answer that passes by so quickly that many jurors do not notice or cannot remember them. And the witness effectively takes on the role of attorney. The witness selects what he thinks are the important facts and decides how to present them. In mock trial, the student-witness slips out of character. He may be playing a middle-aged accountant, a teenage techie, or a 25-year-old ski bum, but what the judges hear is trial attorney.

“Small Slice” interrogatories present facts in small, incremental steps. Jurors are not forced to digest the entire package in one fleeting answer. The attorney decides what’s important. She highlights the important stuff and makes it memorable. Some jurors may not be paying attention during the time it took the witness to answer one question, but no juror will be inattentive through an entire series of “small slice” interrogatories. Once again, our attorney is questioning the eyewitness who stumbled upon the scene of a bank robbery. Read it and compare it to the earlier “big chunk” question and answer.

Q. As you entered the bank, who was the first person you saw?
A. A man carrying a gun.
Q. What kind of gun?
A. A shotgun.
Q. Of the man’s face, what could you see?
A. Nothing.
Q. Why not?
A. He was wearing a mask.
Q. What kind of mask?
A. A clown mask.
Q. How far was the man with the clown mask from you?
A. About ten feet?
Q. Was he standing in place or moving?
A. Moving.
Q: In what direction?
A: He was walking straight toward me.
Q: As he approached, what did you do?
A: I raised my hands and backed off.
Q: Why did you raise your hands and back off?
A: I was afraid he would shoot me if I didn’t.
Q: Where did the man go?

A: Out the front door and into a waiting car.
Q: What kind of car?
A: A clown car.

In general, a mock trial attorney on direct examination should be using "small slice" interrogatories, along with a few "big chunk" interrogatories.

2. *Imperative sentences* beginning with words such as "describe," "explain," and "tell" can be used in place of a standard interrogatory. The substitution is useful when it breaks the oral monotony created by an unvaried rhythm of interrogatory questions and answers. It can also be used to change the pace of the examination. Anytime you suddenly vary the type of question you emphasize the testimony that follows.

Q: You said that the man got into a clown car. Tell us what you mean by a "clown car"?
A: It looked like a car I once saw at the circus. It was really small, smaller than a VW Beetle. It was painted bright red, blue, and green and decorated with what looked like starbursts. I remember asking myself how the robber could possibly fit into the car.

3. *Questions that give a witness choices among options*. This kind of question has the advantage of leading without seeming to. Example: An attorney wants the witness to say that it was sunny the day the robbery occurred. If she asks, "What was the weather like that day?" the witness might answer "hot and windy." Instead, the attorney guides the witness by giving him three choices. "Q. On the day of the robbery, was it sunny, cloudy, or overcast? A. Sunny." Example: A witness has just testified that a bank robber was holding a water pistol in one hand. If the attorney asks, "Was he holding the water pistol with his right hand?" she may draw a leading question objection that many judges would sustain. Instead, the attorney guides the witness by giving him the only two possible choices, "Was he holding the water pistol in his right or left hand?"

4. *Questions that call for a "yes" or "no" answer*. This form of question typically begins with a verb such as "did," "could," "would," and "have." No rule says that this type of question is always leading, but they can smell leading. They should be used carefully. They are useful to direct a witness's attention to a topic the attorney wants to cover and to provide transitions between parts of the testimony. They are also useful when you need a witness to confirm a fact, and necessary when you need a witness to deny something.

Q: Did you rob the Wells Fargo bank at Fairview and Grand Avenues?
A: No.
Q: Have you ever possessed a gun?
A: No
Q: Have you ever worn a clown mask?

A: No.
Q: Were you in St. Paul the day the bank was robbed?
A: No.
Q: Where were you?
A: In Sarasota, Florida.
Q: Was anyone with you?
A: Yes.
Q: Who?
A: My friends, Emma Kelly and Finn Barnum.

5. *Leading Questions*. A leading question is one that suggests to the witness the answer the examiner wants to hear. They have the advantage of getting factual information out with speed and specificity. They have the potential disadvantage of undermining a witness's credibility. When asked frequently, they signal jurors that the examiner does not trust the witness to give the "right" answers. If the examiner doesn't trust the witness, jurors will not trust the witness. On direct examination, you should use leading questions sparingly, and only when they are both permissible and desirable.

When drafting a script, you should not be intimidated by the rule against leading questions. Some leading is necessary to guide a witness and keep a direct examination moving along smoothly and efficiently. You must know when judges permit leading questions.

Evidence Rule 611(c) states that an attorney on direct examination "should" not ask leading questions. The rule does not say leading questions may never be asked. And the rule specifically permits the use of leading questions when "necessary to develop a witness's testimony." The rule effectively gives presiding judges authority to allow leading questions.

Trial judges ordinarily permit leading questions when the testimony concerns a witness's background, preliminary and introductory matters, foundations for exhibits, matters already proven, and matters not in dispute. In these areas, the obvious efficiency of leading questions in getting factual information out is thought to outweigh any danger. So, don't be shy about using leading questions, especially when the fact the question suggests is not in dispute. You may draw an objection, but you can score well with an argument that the question is permissible. If the judge sustains the objection, you will only need to rephrase the question.

Most important for drafting direct examinations. Judges routinely allow examiners to use a leading question to suggest to a witness a topic for examination. A witness does not have to be left clueless. An examiner is allowed to tell a witness what she wants the witness to talk about. Once the topic is identified, judges expect the examiner to use non-leading questions to elicit facts related to the topic.

Q: I want to ask about what you saw when you were a block away from the bank. Okay?
A: Yes.
Q. What street were you on?
A: Ringling Street. [And so on]

Q: I have questions about your friend Finn Barnum. Okay?
A: Yes.
Q: What does he do for a living?
A: He runs the youth circus here in Rochester. [And so on]

A leading question on direct should sound different than one on cross-examination. You should end the question with an upward-ending verbal inflection. You give voice to the question mark. You make it sound like you're asking the witness to confirm something you're not sure of.

• *Starting the Direct Examination*

Ask the witness to introduce himself. "Q. Please introduce yourself. A. My name is Alfred E. Newman." You might add one or two additional introductory questions before getting down to business. "Q: What do you do for a living? A: I'm the cover model for a well-known humor magazine."

Don't begin, "Please state your name, spelling the last name for the record." It sounds weird. In what business or social setting does a person, when introducing himself, spell his name? And the question implies that the lawyer doesn't really care about the witness's name but is just going through a technical formality. If a lawyer does not show genuine interest in the witness, neither will the jury.

Next Questions. The examiner should get from a witness the two things jurors want to know immediately: why the witness is testifying, and how the witness knows what he knows. "Q. Mr. Newman. Why are you here? A. Because I saw this small clown car smash head on into a huge eighteen-wheel truck leaving pie all over the face of the truck. Q. Will you be able to tell us if the clown car was traveling in the left-hand or the right-hand lane of traffic? A. Yes."

Continuing. Primacy is the psychological principle that says the brain puts greater significance on early information than later information. The first minute, or two, of a witness's testimony is more valuable to jurors than testimony delivered later. Use the time wisely. Ask about a topic that goes to the heart of the case. Don't feel you have to immediately ask questions about the witness' family, education, or work history, unless the witness's credibility is a critical issue. Put off those questions until later or ask them not at all.

• *Making Testimony Clear – Drafting Questions & Answers*

The acronym K.I.S.S. stands for "Keep It Simple, Stupid." A witness's testimony must be understandable, and the facts must be delivered in digestible bites. Appreciate how hard it is for jurors to stay attentive and remember what's been said. Always strive to make it *easy* for jurors to get your points. The easier the better.

Ask short, straightforward questions that contain just one new thought. Short questions are easier to understand, call for short answers, and turn the spotlight on the witness. As a guideline, questions should be 20 words or less. If a question is short and contains just one new thought, the witness will usually be able to answer it in around five seconds. Jurors will have no difficulty processing the answer.

Use simple words and skip any legalese. Instead of asking a witness to "state" something, ask him to "tell" us. Instead of asking a witness what he "observed," ask him what he "saw," or "heard," or "tasted," or "smelled," or "felt." Find simple substitutes for the cumbersome phrases: "Directing your attention to, . . ." and "Did there come a time when. . ."

As a rule, say a date or time once, and never again without good reason. Ditto, numbers. You can't expect jurors to keep straight a bunch of dates and times or do mental math. When dealing with time, what's usually important is when events occurred in relation to one another, not the specific dates or times.

Occasionally mix in questions that allow the witness to give longer answers. An attorney who restricts a witness to brief answers risks the jury thinking that she does not think the witness competent or trustworthy. To counter that impression, an attorney must give the witness some opportunities to open up.

• *Making Testimony Clear – Headlines & Transitions*

A direct examination should be divided into parts. Each part should have a headline at the beginning, and parts should be connected by transitions. Headlines and transitions help jurors keep things organized.

A headline is a simple statement announcing a part's subject matter. It is followed by a series of questions that allow the witness to tell the jury the facts relevant to the part. A transition includes a wrap-up stating what was covered, and a headline for the next topic. Here are examples. The witness is a circus performer, who specializes in the "impalement arts," meaning she throws knives and other sharp objects at targets.

Q. Ms. Borden. I want to start by asking you about how one goes about sharpening an axe. Have you ever done it? [Testimony]

Q. You've told us about sharpening axes. Now let me ask you about what you do with the axes you've sharpened. Have you ever thrown an axe? [Testimony]

Q. You've told us about sharpening and throwing axes. My next questions are about this axe, the axe found at the scene of the murder. Have you seen it before today? [Testimony]

Don't use the phrase "Now moving on." It's a lousy transition. It does not say where you've been or where you are going. Too often it sounds like a confession that the examiner has become bored or frustrated and feels the need to hustle along.

Avoid asking "What happened next?" The question encourages a long answer that is often a mess. Important facts get buried in distracting detail or may go unmentioned. From a mock trial viewpoint, it's a lazy question. The attorney effectively hands the ball to the witness, leaving the witness to decide where to run with it.

Q. What did the clown car do?
A. It ran through the red light.
Q. <u>What happened next?</u>
A. It hit a hearse and bounced over onto its side. All these red, yellow and blue balloons floated out. A bunch of red clown noses went rolling down the street. There was screaming and blood. The police got there first. It was all very surreal.

Instead of "What happened next?" specify the exact instant that you want the witness to talk about. You will get just the information you want and no more. You control the witness without seeming to.

Q. What did the clown car do?
A. It ran through the red light.
Q. A*fter the clown car ran through the red light, <u>what was the very first thing that happened</u>?*
A. It hit a hearse.

After finishing the questions related to a part, an examiner should pause. Rushing ahead immediately to the next part makes it difficult for jurors to mentally process what they just heard.

• *Making Testimony Memorable - Repetition*

An examiner needs to achieve a certain amount of repetition to make important testimony memorable but must avoid too much repetition. Jurors routinely complain that lawyers do not respect their ability to retain information and needlessly repeat the same information - over and over and over again. Here are three ways to get repetition without seeming to hammer jurors' heads.

Looping involves tying into a question language from the previous answer. Looping guides a witness to the next event and the repetition of part of the previous answer underscores that part. Assume you have a case about a bar fight. A small clown is accused of hitting a big clown with a beer bottle. The small clown claims self-defense. An eyewitness is being examined.

Q. After you heard people yelling, what did you do?
A. I looked over to see what was happening.
Q. What did you see?
A. I saw this big clown pounding this little clown with his fists.
Q. Where were you standing when you saw the big clown pounding the little clown?
A. At the end of the bar.
Q. Who else was in the room when you saw the big clown pounding the little clown?
A. The bartender, the waitress, and a lion tamer.

The last two questions in the example are not asked because it is important where the witness was standing or who else was there. They are asked because they create opportunities for the examiner, by looping, to burn into jurors' minds the image of "big clown pounding on little clown."

From broad to narrow. The examiner moves in to get a more detailed description of an event. Think of a movie close-up, or an action sequence in slow motion. The questions call for narrow detail. They slow down the examination to focus attention on a critical part. For example, assume that a witness has testified to coming upon the scene of a shooting. The examiner wants jurors to focus on the gun used by a shooter.

Q: Did you see a gun in the clown's hand?
A: Yes.
Q: Was it a big gun or a small gun?
A: A big gun.
Q: Was the gun dark or light?
A: It was light, shiny.
Q: Was the clown holding the gun in his right or left hand?
A: In his left hand.
Q: When you first saw the clown, where was he pointing the gun?

A: At a body on the floor.
Q: Did the clown see you?
A: Not at first, but yes.
Q: When he saw you, what did he do with the gun?
A: He pointed it at me and said "Pop."

Illustrative Aids and Demonstrations. The lawyer first elicits facts from the witness orally, and then uses something visual to get repetition. For example: after the examiner has finished getting details about that gun, she might continue:

Q: Would a diagram of the room help you explain where the clown, the body, and you were when you first saw the clown with the gun?
A: Yes.
Q: With your Honor's permission, may the witness step down from the stand and make use of a diagram?

The witness steps down and in the process of pointing out things in the diagram repeats the important testimony.

• *Making Testimony Memorable – Reverse Leading*

Instead of suggesting the right answer to the witness, the examiner suggests the wrong answer. When the witness refutes what the question suggests, it both highlights the answer and says that the witness knows what he is talking about.

Q. When the clown said "pop," you must have thought it was a joke and laughed?
A. Absolutely not. I was terrified. I turned and ran.

• *Making Testimony Memorable - Recency*

Recency is the psychological principle that says the brain remembers better what it heard most recently. The last topic of a direct examination is what mock trial judges will be thinking about when they score the performance. The last topic should make an important point related to the team's case theory and theme.

You can do two things to enhance the impact of the last topic. First, signal the jury that you are about to start the last topic. Jurors' attention improves as they perceive an end is near. Second, pause briefly after the last answer to give the jury time to absorb what it has heard. Only after the pause, do you turn to the judge and say, "Your Honor. I have no further questions at this time."

• *Making Testimony Credible – The Importance of Believable Characters*

Witnesses in "mock trial" are not real persons, but students playing fictional characters. You want your side's characters to be perceived as persons that jurors could care about and respond to emotionally. Most importantly, you want them to appear worthy of belief.

When possible, establish that the character is not a partisan. Jurors listen more closely to the testimony of a witness who has no relationships with the parties and no stake in the game. For example: Q. Do you personally know the plaintiff, Mr. Tilden? A. No. Q. Do you personally know the defendant, Mr. Hayes? A. No. Q. Do you stand to gain anything by how this case turns out? A. No.

When possible, establish that the witness is confident of his testimony. Jurors give greater credence to a witness who says he is "sure" than a witness who is hesitant or unsure. Q. Mr. Kelly, you just testified that the gun the clown carried was a water pistol. How certain are you that it was a water pistol? A. 100%.

If a witness's credibility is a critical issue, give the jury facts that reveal who the witness is, and why factually and emotionally they should believe him. The witness's credibility can be the focus of an examination topic. Consider a case in which the victim of an armed robbery is called to testify. He has introduced himself and identified the defendant as the person who robbed him. What jurors want to know next is whether they should believe the victim.

Q: Mr. Kelly. These folks will have to decide whether or not to believe you. So, I want them to get to know you. Okay?
A: Yes.
Q: Are you employed?
A: Yes.
Q: By whom?
A: The Big Banana Circus.
Q: What do you do for Big Banana?
A: I'm a clown
Q: Is that a full-time or part-time job?
A: Full-time.
Q: How long have you worked full-time for Big Banana?
A: Twelve years.
Q: Are you the only clown employed by Big Banana?
A: No, beside me, there are ten clowns.
Q: Of the clowns, does one of them supervise you, or do you supervise the other ten?
A. I am the captain of the troupe. I supervise all the other clowns.

> Q: Now, Mr. Kelly, in addition to you being a full-time employee and a supervisor of ten other clowns, are you taking any educational courses?
> A: Yes, I am pursuing a master's degree in Contemporary Circus Practices.

And so it goes. The witness is shown, despite being a clown, to be a steady, reliable person – one who would not point an accusing finger lightly.

During an examination, give the witness opportunities to express feelings. When the witness's feelings ring true, the witness appears more credible. Assume, for example, that a witness has been describing a robbery.

> Q. Now, Mr. Kelly, where were you looking while the clown was pointing his gun at you?
> A. I was staring into his face.
> Q. Why were you staring into his face?
> A. I was desperately trying to read his intentions. To see if he was going to pull the trigger. I was trying to read his eyes.

Look at the last answer. Take a moment to think about various ways a student playing the witness might deliver the lines to convey the character's fear of being shot.

• *Making a Witness Invulnerable to Cross-Examination*

Pre-Empting means dealing during direct examination with a matter that is likely to be the subject of cross-examination. An attorney discloses a problem to avoid jurors thinking she was trying to hide something, and before the opponent has the chance to exploit it.

When preempting, the direct examiner does not want to highlight the problem more than the opponent could have, or give it legitimacy, by appearing defensive. The best approach explains away the problem without actually acknowledging it. For example, the star prosecution witness in a drug conspiracy trial has three convictions for selling heroin. The prosecution gets the detective in charge of the investigation to testify that the leader of the drug ring never dealt with people who didn't have criminal records. The testimony explains the government's need to use the witness.

When preempting, never put the problem material at the beginning of the examination. Bury it in the middle unless the material is so conspicuous that it cannot be buried. In that case, try putting it at the end. Try having the jury with you as long as possible. If the jury found the witness believable up to the point that the problem material is disclosed, the jury may be more willing to discount the problem.

Making Memories Believable. A direct examiner should not make a witness more vulnerable to cross-examination by asking for too much precision. Words like "in substance" or "indicate" help the witness. Words like "exactly" and "precisely" fix the witness rigidly in place, making it easier for the cross-examiner. You want to use words like "Tell the jury as best you can." Consider that a jury is unlikely to believe a witness who purports to remember exactly the words used in a conversation that took place even a week ago, let alone months in the past.

Dealing with Jury Skepticism. A witness's testimony is sometimes hard to believe because it is contrary to common sense or ordinary experience. Jurors are likely to be skeptical. The attorney needs to give voice to the jury's skepticism and provide the witness a chance to explain. Instead of dodging a tough question, the attorney asks it. Assume the defendant is accused of illegally recruiting clowns for a college's circus team. He denies sending a letter to the mother of a recruit, although the letter is written on his stationary and the signature looks like his. He says it must be a forgery.

> *Q. Coach, I need to stop you there. I want to focus your attention on this letter. How in the world do you explain how this letter, Exhibit 1, on your stationary with something that looks like your signature, made it from your office to Finn Barnum's house?*
> A. [The witness gives the best explanation he can.]

• *Delivering the Direct Examination*

Before you begin, make sure you have at hand everything you may need including your notes and script, the exhibits you plan to introduce into evidence, and a clean copy of the witness's statement. If an exhibit is already in evidence, retrieve it from the judge before starting the examination. You do not want to interrupt your examination to search frantically for something at counsel table or retrieve an exhibit from the presiding judge.

The examiner should do the examination from a position in the courtroom where it's easy for the scoring judges to see both attorney and witness. You want the judges to be looking back and forth, as if they were watching a tennis match. The attorney serves up a question; the witness hits a return answer. Judges should be able to follow the action without suffering neck strain.

The examiner needs to make eye contact with the jury. She should act as if she is asking questions on the jury's behalf. She might begin a question looking at the jury but end it with eyes on the witness. The shift signals the jury to focus on the witness during the answer. When the lawyer wants jurors to look only at the witness, the lawyer looks only at the witness.

The examiner needs to show genuine interest in the witness's testimony, however bored she feels, having heard it many times. If an attorney does not appear interested, jurors will be asking themselves "why should we be interested?" An examiner signals interest by leaning forward and tilting her head slightly to one side as she finishes a question, by maintaining eye contact with the witness during the answer, and by staying still while the witness is answering.

Don't talk too fast. Jurors should not feel like they are being forced to drink from a gushing fire hydrant. If you think you must rush to get everything in, the solution is to cut. Less is better than more.

Don't tailgate, jumping in immediately with the next question before the jury has time to digest the witness' answer. Pushing ahead immediately to the next question signals jurors that the witness's answer was not important.

Listen to the answers. You need to make sure the witness gave the intended answer, including all the necessary details. Allow that your teammate may forget something and need prompting. Useful prompting phrases are "Please explain." "Give an example of what you mean," "Tell us some other details you remember," and "Give us some specifics of what you mean."

Don't interject the word(s) "Okay," "I see," or "Thank You" immediately after a witness's answer. The words disrupt the rhythm of the examination and distract the jury from focusing on the witness and the witness's answers.

• *On Using Notes*

A mock trial attorney cannot score well if she reads her direct examination questions or is over reliant on notes.

If you must use notes, follow one simple rule: Never pose questions while looking at your notes! When you ask a question, your head must be up, your eyes on the jury or witness. When the witness is answering, your head must be up. The only time you should ever refer to notes is after a witness answers a question and before you ask the next question.

A good time to refer to notes is after you finish a part of the examination and before you launch into the next. The pause is natural and gives the jury time to think about what it has just heard. When you look at notes, take your time. Don't rush. When you look, really look at them and read what is written there. Get everything you need.

Truly useful notes must be a visual aid. Write big and legibly. If created using a computer, double or triple the size of the font. Key words, dates, or other information should be printed in red or marked with a yellow highlighter. Place

the notes where you can easily look at them without having to awkwardly bend down.

In mock trial, you will want as much as possible to altogether eliminate, or at least minimize your use of notes. Here are steps that may help you get to the point where you don't use notes at all, or at least don't rely on them.

(1) Start with the script of questions and answers. Read it over and over. Practice it with the student playing the witness. Switch roles – it helps you to know the answers you expect. Don't try to memorize the exact words. Practice memorizing the ideas.

(2) Take a copy of the script and delete the questions. Then, practice framing questions to get the answers. It does not matter if your questions are not the same as those in the script. It matters only that your questions get the testimony that you want.

(3) Reduce the script to a one-page outline that highlights the points you want to make and key language you want to get from the witness. Practice using the outline. Then practice performing without the outline.

• *Teamwork - Order of Witnesses*

A team needs to think about the order of its three witnesses. Primacy and recency principles tell us that the two witnesses who best advance a team's theory and theme should go first and last. And a team should not want to end with a witness who is highly vulnerable to cross-examination.

The plaintiff/prosecution most often will want its first witness to cover a lot of the facts it promised to prove in its opening statement. The witness provides quick confirmation that the side is delivering on its promises. In a criminal case, the typical first witness for the prosecution is the victim or the investigating officer.

The defense needs to think about who, after hearing the opponent's case, the jury will most want to hear. When the opponent's third witness is its expert, the defense may want its own expert to take the stand next. He can immediately rebut the testimony of the other side's expert.

The defense should also consider the possible impact the last part of its last witness's testimony might have on closing argument. If the defense can make jurors think that "this is what we most want" to hear discussed, jurors will pay less attention to prosecution/plaintiff arguments about other things.

In a criminal case where the defendant is testifying, the jury is usually anxious to hear the defendant declare his innocence and explain himself.

However, it can be better for witnesses whose testimony will corroborate the accused's story to go first. The early corroboration can make the accused's testimony more believable when it's given.

• *Teamwork - Time Limits*

A team has to complete its three direct examinations, along with any redirect examinations, within a fixed amount of time. In high school mock trial, the typical time limit is 25 minutes a side. In college mock trial, it has been 25 minutes, more or less. Whatever the limit, team members must cooperate to ensure that each attorney/witness pair gets a fair share of the time. In mock trial, "time hogging" is a capital offense.

Redirect Examination.

Redirect examination is an opportunity to leave the scoring judges with a last favorable impression of the examiner and witness. Redirect is not worth doing if the judges' last impression will not be good, or even just blah.

Redirect examination is optional. Here are two reasons to skip it. (1) Because judges understand that redirect is for making necessary repairs, you can skip it if the cross-examiner didn't lay a glove on your witness. Your witness won the fight. Let the scoring begin. (2) You can skip it if you don't have strong factual material that you are confident you can elicit from the witness. A redirect is not worth doing if you can't end strongly.

While redirects are for making repairs, you should aim higher. If you can, reiterate your theme. If you can, reprise one of the greatest hits from the direct examination. If you can, show that the cross-examiner's failures left your witness in a stronger position.

As far as possible, redirect examinations should be planned, not improvised. An attorney and witness know in advance the likely topics of cross-examination, along with what parts of the direct examination are most important. Attorney and witness together should work up tentative redirect examinations that will allow them to highlight important testimony and end the redirect examination memorably.

It is an error to conduct redirect examination on too many points in an effort to clear up all the confusion. Mock trial attorneys doing redirect often sound defensive and try to cover too much. They make it appear that the opponent did lots of damage. Their boat is leaking, and they must scramble to patch up the holes. As a guideline, an attorney should limit herself to one or maybe two points, the most important point(s) raised by the cross-examination.

By doing no more, she signals that everything else covered in the cross-examination was too minor to be worth her time.

Redirect is tactically useful when a cross-examiner often interrupted the witness and insisted on limiting him to yes or no answers. It can be an opportunity to hammer home an important point while also showing the unfairness of the cross-examiner who denied the witness the opportunity to explain. You make your points and undermine the adversary's credibility. During the opponent's cross-examination, a direct examiner should keep track of times the opponent prevented the witness from explaining an answer.

Don't' "sandbag," the tactic of omitting important testimony from the direct examination expecting to present it during redirect. It's too risky. You may not get the chance because Evid. Rule 611(d) says that questions asked on redirect must relate to "matters raised by the attorney on cross exam." Many judges strictly interpret the rule.

Redirect is difficult to do without slipping into asking leading questions. To avoid an objection, you need to preface your questions with a statement about something that happened during the cross examination. You tell the witness exactly what you want him to talk about.

> Q. Detective, on cross-examination you admitted that the defendant's statement "I shot the clown. He deserved it" did not appear in your initial case report. Did you make any other case reports?
> A. Yes. I made a supplementary report.
> Q. Did you put the defendant's statement in this supplementary report?
> A. Yes.
> Q. Is there a reason the statement wasn't put in your initial report?
> A. Yes. The initial report covered only the events up to the defendant's arrest at the circus. He made the statement at the station, and what happened there is covered by the supplementary report.

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