— CHAPTER FOUR —
Direct Examination

I. THE ROLE OF 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. Every other aspect of the trial is derivative of direct examination. Opening statements and final arguments are simply the lawyer's opportunity to comment upon what the witnesses have to say; cross examination exists solely to allow the direct to be challenged or controverted. While we could easily imagine a reasonably fair trial system consisting solely of direct examinations, it is impossible to conceive of anything resembling accurate fact finding in their absence.

Direct examinations should be designed to accomplish one or more of the following basic 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.

Assume, for example, that you represent the plaintiff in a case involving damage to the exterior of a building, and that the defense in the case is consent. Even if the question of ownership of the premises is not in dispute, it is still an element of your cause of action. Thus,

you must present proof that your client had a possessory or ownership interest in the building, or run the risk of a directed verdict in favor of the defendant.

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, 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 Foundations 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.

It is not unusual for a witness to be called only for the purpose of introducing an exhibit. The "records custodian" at a hospital or bank may know absolutely nothing about the contents of a particular report, but nonetheless may be examined solely in order to qualify the document as a business record.

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.

You can expect the credibility of some witnesses to be attacked on cross examination. In these situations you can blunt the assault by bolstering the witness's believability during direct examination. You can strengthen a witness by eliciting the basis of her knowledge, her ability to observe, or her lack of bias or interest in the outcome of the case.

You may also call a witness to reflect adversely on the credibility of the testimony of another. Direct examination may be used, for example, to introduce negative character or reputation evidence concerning another witness. Alternatively, you may call a witness to provide direct evidence of bias or motive, to lay the foundation for an impeaching document, or simply to contradict other testimony.

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.

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,[1] 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.[2]

In the absence of evidence or other indications to the contrary, all individuals called to the stand are presumed competent to testify.[3] If the competence of a witness is reasonably disputed, it may be necessary to conduct a preliminary examination in order to "qualify" the witness. Such inquiries are usually conducted by the direct examiner but may also be conducted by the trial judge. In either case, the

1. Rule 602, Federal Rules of Evidence.
2. Rule 603, Federal Rules of Evidence.
3. Rule 601, Federal Rules of Evidence.

examination must be directed toward that aspect of competence that has been called into question.

In the case of a very young child, for example, the qualifying examination must establish that the witness is capable of distinguishing reality from fantasy, is able to perceive such relationships as time and distance, and appreciates that it is "wrong to tell a lie." Following the preliminary examination, the adverse party should be allowed an opportunity to conduct a "voir dire," which is a preliminary cross examination limited to a threshold issue such as competence.[4]

Note that there are several exceptions to the general rules of competence. Expert witnesses, for example, are excused from the requirement of testifying exclusively from personal knowledge.[5] Judges and jurors are generally disqualified from giving evidence in cases in which they are involved.[6]

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.

Whether a certain question is leading is frequently an issue of tone or delivery, as much as one of form. The distinction, moreover, is often finely drawn. For example, there is no doubt that this question is leading:

QUESTION: Of course, you crossed the street, didn't you?

Not only does the question contain its own answer, its format also virtually requires that it be answered in the affirmative.

On the other hand, this question is not leading:

QUESTION: Did you cross the street?

Although the question is highly specific and calls for a "yes or no" answer, it does not control the witness's response.

Finally, this question falls in the middle:

QUESTION: Didn't you cross the street?

4. See Chapter Nine, Section II C 1(d), *infra* at p. 276.
5. Rule 703, Federal Rules of Evidence.
6. Rules 605 and 606, Federal Rules of Evidence.

If the examiner's tone of voice and inflection indicate that this is meant as a true query, the question probably will not be considered leading. If the question is stated more as an assertion, however, it will violate the leading question rule.

There are, in any event, numerous exceptions to the rule against leading questions on direct examination. A lawyer is generally permitted to lead a witness on preliminary matters, on issues that are not in dispute, in order to direct the witness's attention to a specific topic, in order to expedite the testimony on nonessential points, and, in some jurisdictions, to refresh a witness's recollection. In addition, it is usually permissible to lead witnesses who are very young, extremely old, infirm, confused, or frightened. Finally, it is always within the trial judge's discretion to permit leading questions in order to make the examination effective for the ascertainment of the truth, avoid needless consumption of time, protect the witness from undue embarrassment, or as is otherwise necessary to develop the testimony.

In the absence of extreme provocation or abuse, most lawyers will not object to the occasional use of leading questions on direct. It is most common to object to leading questions that are directed to the central issues of the case or that are being used to substitute the testimony of counsel for that of the witness.

C. Narratives

Another general rule is that witnesses on direct examination 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."

An example of a non-narrative question is, "What did you do next?" The objectionable, narrative version would be, "Tell us everything that you did that day."

As with leading questions, the trial judge has wide discretion to permit narrative testimony. Narratives are often allowed, indeed encouraged, when the witness has been qualified as an expert.[7]

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?

[7] Many lawyers prefer to present expert testimony in narrative form, but this often interferes with effective communication. See Chapter Eight, Section V.C., above, at p. 231.

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.

In order to refresh recollection with a document, you must first establish that the witness's memory is exhausted concerning a specific issue or event. You must then determine that her memory might be refreshed by reference to a certain writing. Next, show the writing to the witness, allow her time to examine it, and inquire as to whether her memory has returned. If the answer is yes, remove the document and request the witness to continue her testimony. Note that in this situation the testimony must ultimately come from the witness's own restored memory; the document may not be offered as a substitute.

III. PLANNING DIRECT EXAMINATIONS

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

Your principal tool in presenting a persuasive direct examination is, of course, the knowledge of the witness. If the underlying content of the examination is not accurate and believable, the lawyer's technique is unlikely to make any noticeable difference. Your primary concern, then, must be content—the existence of the facts that you intend to prove.

The content of a direct examination can be enhanced through the use of organization, language, focus, pacing, and rapport. Effective organization requires sequencing an examination in a manner that provides for logical development, while emphasizing important points and minimizing damaging ones. Questions should be asked in language that directs the progress of the examination without putting words in the witness's mouth. A direct examination uses focus to underscore and expand upon the most crucial issues, rather than allow them to be lost in a welter of meaningless details. Pacing varies the tone, speed, and intensity of the testimony to insure that it does not become boring. Finally, the positive rapport of the direct examiner with the witness is essential to establish the witness's overall trustworthiness and believability.

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 it must contribute to the persuasiveness of your theme. Preferably, it will do both.

Begin by asking yourself, "Why am I calling this witness?" Which elements of your claims or defenses will the witness address? How can the witness be used to controvert an element of the other side's case? What exhibits can be introduced through the witness? How can the witness bolster or detract from the credibility of others who will testify? How can the witness add moral strength to the presentation of the case, or appeal to the jury's sense of justice?

Since a witness might be called for any or all of the above reasons, you must exhaustively determine all of the possible useful information. List every conceivable thing that the witness might say to explain or help your case.

Now you must begin to prioritize and discard. This is a ruthless process. 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