# Chapter 6

# DIRECT EXAMINATION

## § 6.01 INTRODUCTION

The direct examination of witnesses is the most important part of the trial. Cross-examination may be more exciting and closing argument more eloquent, but it is the direct examination of your own witnesses that will determine whether the jurors hear, understand, and remember the facts upon which your case is based.

Unfortunately, direct examination often is done poorly. Witnesses are not presented effectively, and attorneys fail to elicit coherent evidence from them. You cannot just put a witness on the stand and ask, "What happened?" Your direct examination must elicit what the witness knows in a manner that helps the jury understand, remember and believe it. Several obstacles stand in your way that must be overcome:

- Your witness is only human. A witness may know only a portion of the entire story, may have a poor memory, and even may contradict other witnesses.
- Witnesses testify only in response to the questions you ask, which places a burden on you to be comprehensive and articulate.
- The rules of evidence limit the form of questions and the content of testimony. Many rules, such as the hearsay rule, defy common sense, make telling the complete story difficult, and make testimony different from normal conversation.
- Your opponent can object and interrupt testimony, diverting the attention of the jurors.
- The separation between direct and cross-examination may result in one topic being discussed at two different times, separated by an hour or more of unrelated information.

The goal of a good direct examination is to overcome these obstacles and present the testimony of witnesses in an understandable and persuasive manner. This requires a clear, logically organized presentation in which each witness describes the activities he or she observed or participated in. It requires that you concentrate not only on presenting enough evidence to make out a prima facie case, but also on making that evidence persuasive and rememberable. A legally sufficient case is not enough — you must persuade a jury that your client deserves a favorable verdict. Direct examination can help accomplish this goal only if it is carefully prepared and conducted.

What makes direct examination effective? Most trial practitioners agree that it is based on two fundamental principles.

- Let the witness dominate the direct examination. You should make a conscious effort to be as unobtrusive as possible — by standing

out of the way, keeping your questions short and simple, and trusting your witnesses.

- Prepare your witnesses in advance to give complete and descriptive testimony. The better prepared your witnesses are, the easier it will be for you to fade into the background and let them tell their own stories.

## § 6.02 EXAMPLE OF A DIRECT EXAMINATION[1]

PLAINTIFF'S ATRTORNEY : We call the plaintiff, Barry Phillips.
[Plaintiff walks to the witness stand with the aid of a cane.]

BAILIFF: Raise your right hand. Do you swear or affirm to tell the truth, the whole truth and nothing but the truth?

WITNESS: I do.

Q: What is your name?

A: Barry Phillips.

Q: Where do you live?

A: 1130 South Stewart Avenue, here in Bayshore.

Q: How long have you lived here?

A: All my life, forty-eight years. I moved into the house on Stewart Avenue eighteen years ago when I got married.

Q: Any family?

A: Yes, my wife Kerry, and two children, Laura and Kim. Laura is sixteen and Kim is thirteen.

Q: Where do you work?

A: Finderson Engineering and Architects.

Q: How long have you worked there?

A: Twenty-three years. I started as a draftsman, and rose to chief field engineer. Then I was in the bus wreck and my knees got all smashed up, and now I'm back working as a draftsman again.

Q: Let's start at the beginning. Where did you go to school?

A: In 1972, I graduated from Englewood High School and entered Illinois Institute of Technology to study design engineering. I did some graduate work at M.I.T., and then got a job with Finderson Engineering in 1979.

Q: Doing what?

A: I started as a draftsman. That's the usual entry level position. You do final drawings of other people's construction plans.

Q: How was your health back then?

A: It was fine. Except for the flu, I had never really been sick. I had no problems as far as I know.

[1] Adapted from FRANCIS X. BUSCH, LAW AND TACTICS IN JURY TRIALS, vol. 3: 397–418 (1960).

Q: How about your legs?

A: They were fine. I broke my right leg once sliding into third base in a freak accident. I was playing on the company softball team.

Q: When was that?

A: In 1983.

Q: What happened to your leg?

A: I guess it healed. I was able to play softball the next year, and it never gave me any problems again.

Q: Will you describe your jobs over the next few years?

A: Sure. In 1985, I was promoted to the position of estimator. In 1987, I was made an assistant design engineer and later that same year I was promoted to field engineer. In 1993, I was made chief field engineer.

Q: What were your responsibilities as chief engineer?

A: I supervised all on-site architectural engineering projects for Finderson. That meant I had to travel all over the Midwest. We might have as many as six construction projects going at once. This was what I had always wanted to do. I usually delegated most of the preconstruction planning, but I loved to direct the actual construction. That is when most of the crucial decisions had to be made. For instance, we might be working on the steel frame for a twenty-story building, and a steel worker would notice that the girders were not lining up properly. Then it was a challenge to find and correct the problem. Sometimes it was a risky job. I had to be able to climb around the steel framework like the steelworkers, testing for alignment and tension and so on.

Q: Did this job require a good memory?

A: Yes, of course. You have to be able to remember lots of details about different projects. You can't carry sixty sheets of blueprints with you when you're climbing steel girders twenty stories above ground.

Q: Directing your attention to April, 2002, were you still working as chief field engineer?

A: Yes.

Q: At what salary?

A: My base salary was $95,000 a year. I also averaged about a thousand a month in bonuses based on the completion of projects under budget.

Q: Do you remember the events of April 20, 2002?

A: God, yes. That was the day of the bus wreck.

Q: What happened? Start at the beginning of the day.

A: Well, my car was in the shop, so I went to catch the bus to get to work. I walked to the corner of Stewart and Miller Street and got on a downtown bus.

Q: About what time?

A: About 8:20 a.m.

Q: Did you pay your fare?

A: Yes.

Q: What kind of bus was it?

A: A regular city bus that said Bayshore Transit Authority on the side.

Q: What did you do after you boarded the bus?

A: I sat down in the second seat, next to the window, and started reading over some preliminary estimates prepared by my staff.

Q: Can you describe the seating in more detail?

A: Sure. I was in a two-person seat, next to the window. There was no one beside me. I was facing the front, on the right side. There was one seat in front of me.

Q: Did anyone sit there?

A: Yes, one person, but she got off before the wreck.

Q: Did you know anyone else on the bus?

A: No, I rarely ride the bus.

Q: How much space was there for your legs?

A: Well, of course I never measured it, but it was pretty close, sort of narrow for your legs. I would say six to eight inches or so.

Q: Would you say more or less room than in a coach airplane seat?

A: About an inch or two less. My knees brushed against the seat back

Q: What did that seat back look like?

A: It was a flat sheet of metal of some kind, probably aluminum.

Q: Do you have any familiarity with scale models?

A: Of course, we work with scale models all the time in construction engineering.

Q: Would you be able to recognize a scale model of the bus your were riding?

A: Sure, I think so.

ATTORNEY: Your honor, may the witness step to the table and examine plaintiff's exhibit one?

COURT: Yes.

Q: Mr. Phillips, look at the exhibit. Can you tell what it is?

A: Yes, it's a good scale model of the inside of the bus I was riding in.

Q: Is it fair and accurate, especially with reference to the front seats?

A: Yes.

Q: What about the view out the front window?

A: Yes, that looks correct.

Q: Will this exhibit help you in explaining what happened next?

A: Yes.

ATTORNEY: We offer plaintiff's exhibit one into evidence as an illustrative exhibit.

COURT: It will be received.

ATTORNEY: May I move exhibit one to a position in front of the jury box and have the witness step to the model and refer to it while describing the next few events?

COURT: Yes.

Q: Will you indicate where you were sitting?

A: Right here, in the right-hand seat, second from the front.

Q: What happened next?

A: I was reading my reports and not paying much attention, when there was a terrible crash.

Q: What was the first thing you noticed?

A: Well, it all happened very fast. I remember hearing the squeal of tires and I felt myself floating out of the seat. It was very quiet and I remember trying to reach out to grab this metal bar on the seat in front of me but my arms wouldn't move. For a moment I felt sort of suspended in midair, and then my face smashed into the top of the seat in front of me. I hit the metal bar, here, and I blacked out.

Q: Do you remember anything else?

A: I remember looking out the front window while this all was going on, and seeing nothing — no street, no sky, or anything. Then in a fleeting second I realized that the reason I couldn't see anything was because I was looking at the back end of another bus right in front of us, only a few inches away.

Q: You may sit down. What happened next?

A: Everything was black. My eyes felt like they were open but I couldn't see. I could hear voices way off in the distance. I thought I was dead and started to cry. I thought I would never see Kim and Laura again.

Q: Do you remember anything else from the scene of the accident?

A: No.

Q: What is the next thing you remember?

A: Waking up in a hospital bed. My glasses were gone and there were bandages all over my head. I tried to move but couldn't. At first I was just numb, then my head and legs began to ache. Sometimes there were shooting pains in my legs. I don't remember much from those first few days; they — the nurses — kept giving me shots, and I would fall into a sort of half-sleeping stupor.

Q: Do you remember hearing anything?

A: No. Sometimes there would be voices, sort of indistinct and far away.

Q: What happened next?

A: I became increasingly aware of myself, and slowly recovered my consciousness. As I did, the pain in my legs became worse. It is hard to be precise, because I had no sense of time.

Q: Can you describe the pain?

A: I have never felt anything quite like it. By comparison, the pain I felt when I broke my leg back in 1983 was nothing. This was like a constant itch, and I wanted to hit my legs or cut them off to make it go away. At times there would be sudden pains like when you crack your shin against a table — sometimes a series of ten spurts of pain in a second or two. Sometimes the nurses would come in and hold me down by my shoulders and I would realize that I was crying and screaming. I don't remember much else. The pain shut out everything else around me.

Q: Do you remember your wife being there?

A: No. All I was conscious of was the pain. I do remember the first time I saw Kelly there. The pain had subsided, and I saw her looking at me. I said hi and asked what time it was. She started crying and said I'd been in the hospital for ten days.

Q: What else did you notice?

A: That my legs were both in casts from the foot to mid-thigh.

ATTORNEY: Your honor, may I approach the witness with an exhibit?

COURT: Yes.

Q: Showing you plaintiff's exhibit two, do you recognize it?

A: Yes. That's a photograph of me in the hospital bed with my legs elevated and the casts on.

Q: Is it accurate?

A: Yes.

ATTORNEY: We offer this into evidence as plaintiff's exhibit two. We have already supplied opposing counsel with a copy.

COURT: Received.

ATTORNEY: We have copies for the jury and the court. May I distribute them?

COURT: Yes, go ahead.

Q: How long did you wear these casts?

A: Six weeks.

Q: Any problems?

A: Other than the pain from what used to be my knees, the only other problem I had was itching under the cast. It felt like little bugs were

crawling on my legs, and I couldn't scratch it because it was under the casts.

Q: What kind of treatment did you receive?

A: Twice a day, they would come in and put me in a metal contraption that fitted under my arms. It was like a cage on wheels and moved when you pushed with your foot. They would tell me to try to walk.

Q: With casts on both legs?

A: Yes.

ATTORNEY: Your honor, may I approach the witness with an exhibit?

COURT: Of course.

Q: Showing you plaintiff's exhibit three, do you recognize it?

A: Yes. That's a photograph of me in the metal cage during a therapy session, taken by my wife.

Q: Is it accurate?

A: Yes, it is.

ATTORNEY: Your Honor, we offer this into evidence as plaintiff's exhibit three, and ask to be allowed to distribute copies as before.

COURT: Of course; it will be allowed.

Q: What happened during these sessions?

A: I couldn't move much. I could push a little with my left foot, but every leg movement was very painful.

Q: How long did this continue?

A: Until the casts came off, and then a little beyond then. I don't remember the exact day, but it went on for about seven weeks from the time I woke up.

Q: Did your treatment change after that?

A: Yeah. The nurses started coming in four or five times a day to massage my legs. That felt good. But I dreaded it, because the doctors would come in afterwards to try to bend them.

Q: How did that feel?

A: Excruciating, like when your finger is bent backwards the wrong way. It made me scream. After a few times, I would beg the doctors not to bend them whenever they came in.

Q: How long did this go on?

A: Another four weeks, until I left the hospital.

Q: Did you try to bend your legs yourself?

A: Not at first, the pain was just too great. About the time I left the hospital, I could bend my knees if I moved them very slowly. It still hurt, but not as much.

Q: Did you try to walk?

A: Yes. They gave me crutches, and I learned to hobble around a little. On the day I was released, they got me up and helped me walk without the crutches. I could take a few steps, but the pain got so bad after three or four steps that I fell. I was told to practice walking every day.

Q: When were you released?

A: July 15th, my sister's birthday.

Q: Did you practice walking after that?

A: No, not every day. Sometimes I just couldn't bear to go through the agony, knowing that walking would bring the pain back.

Q: Did it get better?

A: Yes. I gradually improved for another six weeks or so, until I got to the point where I could walk across a room without much pain. It felt awkward. My left knee would bend okay, but my right one would only move a little, and it hurt whenever I tried to walk. I could get around better with the crutches, but still not walk very far.

Q: During this time did you go to a doctor?

A: Yes. I went to Dr. Ho three times a week. He had been the doctor who operated on me and treated me in the hospital.

Q: Is that Dr. Nester Ho, the orthopedist?

A: Yes.

Q: What happened next?

A: Around the end of August, I got to where I could get around pretty well using only a cane. I worked up to where I could walk about three blocks if I was careful not to stumble or put any strain on my legs. After three blocks, my knees would give out. Any farther and the pain would come back.

Q: What happened then?

A: I stopped improving. Dr. Ho said there was no reason to continue to see him regularly. I should go in only if there was some change.

Q: When was this?

A: Early in September.

Q: Did you see him again?

A: No.

Q: Did you go back to work?

A: Yes, on October first.

Q: Five months after the crash?

A: Yes.

Q: Did you get any paychecks during this time?

A: Yes. I had accumulated a month's sick leave, so I was paid for May.

Q: And after that?

A: Nothing. Why should they pay me? I wasn't working.

Q: When you went back to work, did you return to your old position as chief field engineer?

A: No.

Q: Why not?

A: I couldn't do it — physically, I mean. The position of chief engineer involved traveling every day to the firm's job sites, and walking through buildings under construction — some of which covered a large area. It involved walking up and down stairs and climbing over temporary and incomplete constructions, and sometimes scrambling around on steel beams and girders. Altogether, it was a strenuous job and required a person in excellent physical condition.

Q: What did you do?

A: The firm was very good to me. They let me go back to being a draftsman, a job that can be done in the office, sitting down.

Q: At what salary?

A: The same as the other draftsmen, forty-four thousand a year.

Q: About half what you had been making?

A: Right. Less than half, actually.

Q: What about bonuses?

A: Draftsmen do not share in the bonus program because they are involved before construction begins, and have no part in bringing in a job ahead of schedule or under budget.

Q: So that cost you how much?

A: About a thousand a month.

Q: Why didn't you go back to one of the other jobs — estimator, design engineer, or field engineer?

A: They all involve travel, on-site design, and lot of walking around job sites and partially completed constructions. I can't do that because of my damn knees. Excuse me.

Q: Is your job satisfying?

A: No, it's frustrating. I had always wanted to be a chief engineer — that is an important and respected position. Now I'm back where I started, as a draftsman. All the other draftsmen are young men and women on their way up, twenty years younger than me. They work hard and enthusiastically, looking to the future. We have nothing in common — they look at me with pity, like I was some token cripple hired by the company for public relations purposes.

Q: Do you look to the future?

A: Yes, but only with dread. Upper level management in the firm is changing, and I'm afraid that one day they will forget that I used

to be chief engineer, and fire me because I have no potential for advancement. Every time some young person gets promoted I'm reminded of the career I lost.

Q: Can you get away from it all on weekends at least?

A: Not really. I used to swim and play golf and now I can't anymore. My legs just won't work. I tried and tried, but the pain was too great and my knees too weak, so I had to give up. So my weekends are a constant reminder of the fact that I'll never get any better.

ATTORNEY: No further questions.

### NOTE

***Other examples.*** Other examples of direct examinations can be found in SCOTT BALDWIN, ART OF ADVOCACY — DIRECT EXAMINATION §§ 4.01 et seq (2002) and PATRICK L. MCCLOSKEY & RONALD L. SCHOENBERG, CRIMINAL LAW ADVOCACY — WITNESS EXAMINATION vol. 4 (2001).

## § 6.03 THE RIGHT TO PRESENT WITNESSES

Witnesses do not "belong" to either side. In general, every party has the right to subpoena witnesses, call them to the stand, and conduct direct examination to elicit any relevant testimony they can offer.

In criminal cases, the defendant's right to present evidence arises under the Compulsory Process Clause of the Sixth Amendment. The Supreme Court has interpreted that clause to mean that the defendant is entitled to present the direct examination of any witness who possesses "material and favorable" testimony.[2] That includes the victim, police informants, law enforcement personnel, and anyone affiliated with the government or prosecution who might have material and favorable testimony. The prosecution has a similar right to call witness, *except* the defendant. The accused is protected by the Fifth Amendment from being compelled to be a witness against himself. In civil suits, either party may call any witness with relevant evidence, including the adverse party, and (if the adverse party is a corporation) its officers, directors, and managing agents.

The rule is subject to a few procedural hurdles. You must generally have complied with discovery rules and disclosed the witness's identity to the other party, and included the witness on your pretrial witness list. Failure to do so gives the judge discretion to refuse to permit you to call and question the witness, if your evasions of the discovery rules has hampered the opposing party's ability to prepare their case. In addition, the witness must have obeyed the court's witness separation order. Violation of this rule also can result in the witness being excluded in both civil and criminal trials, if the judge believes the witness is likely to be influenced by what the witness heard.[3]

[2] *United States v. Valenzuela-Bernal,* 458 U.S. 858 (1982).

[3] *E.g., Drilex Sys. Inc. v. Flores,* 1 S.W.3d 112 (Tex. 1999) (trial court has discretion to allow or prohibit testimony or hold witness in contempt).

### NOTE

***Extent of criminal defendant's right to present evidence.*** The Sixth Amendment right to present direct testimony is not unlimited. The defendant has no right to present unreliable testimony prohibited by the rules of evidence. *United States v. Scheffer*, 523 U.S. 303 (1998) (affirming per se rule barring polygraph evidence as constitutional). However, rules of evidence and procedure that exclude evidence based on policies other than reliability, such as the rules of privilege, cannot necessarily be applied to criminal defendants. If evidence is reliable and critical to the defense, and not available elsewhere, these rules of evidence may have to be overridden. *See Sullivan v. Hurley*, 635 N.Y.S.2d 437 (NY 1995) (journalist privilege). State laws that impose other kinds of prohibitions on who can testify that are unrelated to the rules of evidence are generally valid in civil cases but not criminal. *See Fuselier v. State*, 702 So.2d 388 (Miss. 1997) (state statute that rendered convicted perjurer forever incompetent to testify interfered with right to call witnesses); *State v. Jackson*, 496 S.E.2d 912 (Ga. 1998) (statute prohibiting alleged child abuser from compelling testimony of child under age of 14 struck down).

## § 6.04 PLANNING DIRECT EXAMINATION

### [A] UNDERSTANDING LEGAL RULES THAT LIMIT THE CONTENT

#### [1] The Rules of Evidence

Obviously, the rules of evidence control the content of direct examination. They dictate what evidence must be omitted, and require you to include specific foundations that may take a lot of time and bore the jury to tears. There is not sufficient space here to review the evidence rules in detail. We assume you have already taken an Evidence course. Appendix A at the end of this book provides a simple review outline of the basic principles of Evidence in case you need to refresh your memory. However, there are a number of other rules of trial procedure that you might not have covered in Evidence that affect how you present your evidence and limit what you can include, that we will discuss in this section.

You may not include in your direct examination evidence which is not admissible. It is unethical to deliberately violate the rules of evidence. Rule 3.4 (c) of the Model Rules of Professional Conduct states that a lawyer shall not "knowingly disobey an obligation under the rules of a tribunal" (including its evidence rules), nor allude to any matter that is probably inadmissible.[4] Therefore, you may not include evidence that you think is not admissible[5]

[4] The superseded ABA CODE OF PROFESSIONAL RESPONSIBILITY was clearer. DR 7-106(C) provided: "In appearing in his professional capacity before a tribunal, a lawyer shall not: (1) state or allude to any matter that he has no reasonable basis to believe is relevant to the case or that will not be supported by admissible evidence. . . .(7) Intentionally or habitually violate any established rule of procedure or of evidence." *See also id.*, EC 7-25 (a lawyer should not by subterfuge put improper matters before a jury).

[5] *See, e.g.*, *State v. Galloway,* 551 S.E.2d 525, 529–30 (N.C. App. 2001).

You lack a good faith basis for doing so, and it is not a defense that the opponent might not object or a judge may unexpectedly decide to admit the evidence.[6]

### [2] The "Res Gestae" Rule

In most cases, there is a central event that is at the heart of the litigation — the commission of a crime at a certain date and time, or the happening of a traffic accident on a particular afternoon. Many judges adhere to an unwritten and informal doctrine called the "res gestae" rule, which permits the parties on direct examination to elicit all the details of that central event regardless of whether they are otherwise admissible under the Rules of Evidence.

The res gestae rule mostly affects evidence that might otherwise be excluded as irrelevant or hearsay. Although it might seem irrelevant or unduly prejudicial to inform the jury that the defendant charged with selling drugs to an undercover officer was carrying a gun at the time, most judges would allow it. It is always relevant to show the jury the entire picture of the crime scene. Similarly, although it sounds like hearsay for the officer to report that when he arrived at the scene of a robbery, several witnesses said the robber ran down the alley, most judges would let it in not for its truth, but to show what happened at the scene.

The res gestae "rule" has been criticized by appellate courts, who say they cannot find it in the codified Rules of Evidence,[7] so it must not exist. The rulings of trial court judges indicate otherwise.

### [3] The Rule Against Using False and Perjured Evidence

What do you do about false evidence? A party to an action may fabricate favorable evidence to improve the chances of winning. Family and friends may provide false alibis. A battered woman may falsely recant her statement that her boyfriend has beaten her. It should be obvious that you cannot ethically include false and perjured evidence in your direct examination.[8] Rule 3.3(a)(4) of the Rules of Professional Conduct states that a "lawyer shall not knowingly offer evidence the lawyer knows to be false."

For some reason, however, some lawyers seem to have a hard time with this basic ethical principle when it is a *client* who has created the false evidence and wants the lawyer to present it. Some argue that the lawyer must abide by the client's wishes as part of the attorney-client relationship, and therefore must go along with the client's decision to present false evidence.[9] The argument is absurd, of course. There is nothing in the nature of the attorney-client relationship that requires us to commit crimes and misdeeds

[6] *See Onstad v. Wright,* 54 S.W.3d 799, 807–08 (Tex. App. 2001) (attorney sanctioned for eliciting inadmissible evidence even though opponent did not object).

[7] *E.g.*, *Anderson v. State,* 681 N.E.2d 703 (Ind. 1997).

[8] *See United States v. Williams,* 205 F.3d 23, 29 (2d Cir. 2000).

[9] *See* Monroe Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469, 1479–80 (1966); MONROE FREEDMAN, UNDERSTANDING LAWYERS' ETHICS 119–21 (1990).

because some psychotic client wants us to. Indeed, Rule 1.2(d) forbids the lawyer to "assist a client in conduct the lawyer knows is criminal or fraudulent." There is no exception in the Rules of Professional Conduct that allows the presentation of false evidence created by a client. To the contrary, the Supreme Court has said that "under no circumstance may a lawyer . . . tolerate a client's giving false testimony."[10]

If a client creates a phony receipt, the attorney may not offer it. If a witness offers to lie and create an alibi, the lawyer may not call that person. If a client is going to lie from one end of his testimony to the other, the lawyer must keep him off the stand. At least as an abstract proposition, these principles are ethically indisputable.[11]

But the problem arises when the issue is small fabrications rather than major ones. What if a client intends to testify truthfully most of the time, but will insert one or two pieces of false testimony here and there to strengthen the case? The attorney cannot overreact and refuse to present the truthful evidence in order to keep the false evidence out of the trial. What is the attorney's duty?

If an attorney learns of a client's or other witness's intent to commit partial perjury before trial, the lawyer's first duty is to try to dissuade that person from giving the false testimony.

> It is universally agreed that at a minimum the attorney's first duty when confronted with a proposal for perjurious testimony is to attempt to dissuade the client from the unlawful course of conduct.[12]

The attorney should point out that exaggerations and small lies are easily exposed on cross-examination and easily detected by the jury. False favorable testimony therefore will end up hurting rather than helping. In addition, perjury is a crime that can be separately prosecuted, or considered by the judge as an aggravating circumstance at time of sentencing.[13]

If the attorney cannot get a client to agree not to tell small lies, the attorney's second duty is to seek to withdraw from representation.[14] Withdrawal would seem to be required under Rule 1.16(a)(1) of the Rules of Professional Conduct, because continued representation "will result in violation of the rules of professional conduct or other law," although it is not so universally recognized as dissuasion. In criminal cases, withdrawal might not work because most defendants are represented by public defenders or assigned counsel who will probably not be permitted to withdraw. Withdrawal also may implicate other ethical principles, for example, if the case is so close to trial

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[10] *Nix v. Whiteside,* 475 U.S. 157, 166–67 (1986)

[11] *See* ALI RESTATEMENT OF THE LAW OF LAWYERING § 120 (lawyer may not assist a witness to testify falsely, offer false evidence, make a false statement of fact, or offer evidence as to an issue of fact known to be false, and may refuse to offer testimony or other evidence reasonably believed to be false.)

[12] *Nix v. Whiteside,* 475 US at 169.

[13] Donald Liskov, *Criminal Defendant Perjury: A Lawyer's Choice Between Ethics, the Constitution, and the Truth*, 28 NEW ENG. L. REV. 881, 900 (1994).

[14] Comment to ABA Model Rule of Prof. Conduct 3.3, ¶¶ 5, 7, 11; ABA *Committee on Professional Ethics and Grievances*, Formal Op. 87-353 (1987).

that a lawyer cannot ethically withdraw without jeopardizing the client's case.[15] Withdrawal would also seem an inappropriate response if it is a witness, rather than the client, who plans to exaggerate. If withdrawal is refused or inappropriate, the attorney should plan the direct examination to steer around the false testimony.[16]

### [4] The Rule Against Repetition

Federal Rule of Evidence 611(a) gives the judge discretion to control the mode of interrogation so as to prevent needless consumption of time. When an attorney on direct examination goes over and over the same ground with a witness, the trial is delayed and there is a danger that the jury may become confused into thinking there were two or three similar events. Repetitious testimony may therefore be objected to on the ground that it has already been "asked and answered." The objection only applies to situations in which the same attorney repeats a question to the same witness who already clearly has answered it. Similar questions can, of course, be asked of different witnesses, by different attorneys, or on both direct and cross-examinations. Also, if a question is asked on direct and the matter is challenged on cross-examination, the judge may allow the same question to be repeated on redirect examination if it will help clarify the issue.[17]

### [5] The Rule Against "Bolstering"

It is generally accepted that you may not bolster the credibility of a witness before that witness has been impeached. The usual rationale for the rule is that it would be a waste of time to open up side issues of a witness's good character and credibility until we know whether the other side intends to impeach.[18]

However, a distinction must be drawn between improper bolstering and bringing out relevant background information from a witness that will have the effect of making the witness more credible. The bolstering rule prohibits two kinds of evidence:

- ***Un-impeachment.*** Testimony that the witness has *not* done an act falling under any of the impeachment rules (e.g., has never committed a crime or lied under oath). Think of the rule as prohibiting proving the absence of a defect when no one has yet suggested that a defect exists.

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[15] *See* Model Rule 1.16(b) (withdrawal not permitted if it will have "material adverse effect" on client); *Sanborn v. State,* 474 So. 2d 309 (Fla. Dist. Ct. App. 1985) (refusing to let defendant's fifth attorney withdraw, client trying to keep case from getting to trial).

[16] Some commentators have suggested a "narrative approach, in which the attorney steers directly toward the false evidence but then lets the witness testify in narrative form when they get there. See Norman Lefstein, *Client Perjury in Criminal Cases: Still in Search of an Answer*, 1 GEO. J. LEGAL ETHICS 521, 542 (1988). However, the narrative approach is explicitly rejected by Model Rule 3.3, Commentary ¶ 9 and *Nix v. Whiteside,* 475 U.S. 157, 171 (1986).

[17] *E.g.*, *Brown v. United States,* 763 A.2d 1137, 1140 (Ct. App. D.C. 2000) (matter of discretion).

[18] *E.g.*, *United States v. Sumlin,* 271 F.3d 274, 282 (D.C. Cir. 2001). *See also* Fed. R. Evid. 608(a) (evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked).

- ***Good character.*** Evidence of acts of good character, e.g., showing that the witness is trustworthy, loyal, helpful, friendly, courteous, kind, obedient, cheerful, thrifty or brave, clean or reverent.

Thus, you may not begin a direct examination by eliciting testimony that the witness has no criminal record, has no bias against the other party, told the police exactly what he is saying today, loves his mother, or once saved a child from drowning.[19] However, the rule does not prohibit eliciting general background information about the witness, such as address, family, occupation, and education, and the witness's prior relationship with the parties. Nor does the rule prohibit enhancing a witness's credibility in ways that are directly relevant to the witness's testimony, such as proving that an eyewitness has good vision or a police officer has experience in investigating this kind of crime. The line is obviously hard to draw, and judges are likely to differ on exactly where to draw it.

### [6] The Rules Concerning Redirect Examination

The fact that you may not bolster the credibility of a witness in direct examination does not leave you defenseless and unable to repel a cross-examination impeachment attack. You may "rehabilitate" an impeached witness during redirect examination. You may introduce prior consistent statements to rebut an express or implied charge of recent fabrication, improper influence, or motive to fabricate,[20] or to explain the reasons an inconsistent statement was made.[21] You may offer evidence of truthful character to rebut evidence of untruthful character,[22] and show mitigating circumstances surrounding a criminal conviction or other act of bad character.[23] If your witness was attacked for bias or interest, you may use redirect to qualify, minimize, or deny the existence of bias,[24] but not to justify a bias by giving the reasons for it.[25]

Redirect is also routinely allowed in two other circumstances: to clarify matters made confusing by cross-examination, and to respond to any new matters brought out during the cross-examination.[26] It is always proper to use redirect examination to clarify any confusion and correct any misunderstandings that may have arisen during the cross-examination, so that the entire examination of a witness will represent fairly his or her complete knowledge. You may correct a mistake or misstatement made during cross-examination,[27] ask the witness to explain an apparent inconsistency between

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[19] *See Anderson v. State,* 471 N.E.2d 291 (Ind. 1984).

[20] Fed. R. Evid. 801 (d) (1) (b).

[21] *See, e.g., United States v. Panebianco,* 543 F.2d 447 (2d Cir. 1976) (received death threat); *People v. Nakis,* 184 Cal. 105, 193 P. 92 (1920) (bribed by defendant's brother).

[22] Fed. R. Evid. 608 (a).

[23] *See Castillo v. State,* 490 So.2d 1066 (Fla. App. 1986).

[24] *See* John W. Strong, McCormick on Evidence § 47 (5th ed. 1999).

[25] *See Clark v. State,* 348 N.E.2d 27 (Ind. 1976).

[26] *E.g.*, *Brown v. United States,* 763 A.2d 1137, 1140 (Ct. App. D.C. 2000) (matter of discretion). See Ark. Code Ann. § 16-43-703 (reexamination as to new matters approved).

[27] *See e.g.*, *Gurliacci v. Mayer,* 590 A.2d 914 (Conn. 1991).

testimony given on direct and cross-examination,[28] clarify ambiguous or incomplete testimony, place a misleading answer in proper context,[29] elicit testimony about a whole transaction or conversation when the cross-examiner only referred to part,[30] and refresh a witness's recollection after he or she testified to a lack of memory on cross-examination.[31] What you may not do is use redirect examination for the introduction of new matters that should have been presented in the examination in chief, although the judge has the discretion to permit you to ask questions inadvertently omitted from the direct examination. Determining the scope and extent of redirect examination rests largely in the discretion of the trial judge.[32]

## [B] PRE-TRIAL PREPARATION

Planning is the key to a successful direct examination. Although a good direct examination may appear spontaneous, it cannot be improvised at trial. You must know in advance what testimony you will elicit and what exhibits to introduce, the order in which you will proceed, the evidentiary issues that are likely to arise, and how you will emphasize and make persuasive the most important points.

Preparing direct examination is unique because it involves a joint effort between attorney and witness. You cannot prepare alone. Not only must you think about the topics you will raise, the exhibits you will use, and evidentiary issues that may arise, but you must also work with your witnesses on what they will say and how they will say it. In every other phase of the trial, you address the jury using your own words. In direct examination, the witness must address the jury, while you remain mostly silent.

This dual preparation is an interactive process. Based on your interviews with a witness, you can prepare a draft direct examination. Then you can go over that direct examination with the witness and work on particular sections. During this "prep" session, you will undoubtedly learn more about the witness's testimony, which will require that you revise your direct examination, which you will then have to go over again with the witness. It is not uncommon for a lawyer and key witness to go back and forth on direct examination a half dozen times before trial.

### [1] What Topics to Cover

Direct examination is not simply putting a witness on the stand and asking the witness to tell the jury everything the witness knows. Your most important job is to *select* which topics to cover and which to omit. This selection is based on your theory of the case, which tells you which issues you will pursue, what important themes and facts you will emphasize, and which items of evidence will help the jury resolve disputes. You should include:

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[28] *See, e.g.*, *Daniel v. State,* 735 A.2d 545, 548 (Md. App. 2000).

[29] *See, e.g.*, *United States v. Senffner,* 280 F.3d 755, 763 (7th Cir. 2002) (on cross witness said defendant returned money that was subject of fraud suit; on redirect government could elicit that money returned only after defendant held in contempt).

[30] *See, e.g.*, *State v. James,* 677 A.2d 734, 742 (N.J. 1996).

[31] *E.g.*, *State v. Thompson,* 705 S.W.2d 38, 40 (Mo. App. 1985).

[32] *E.g.*, *People v. Stevens,* 584 N.W.2d 369, 372 (Ct. App. Mich. 1998).

- Sufficient facts to make out a prima facie case on every issue on which you bear the burden of proof.
- Any testimony from the witness on one of your main points of emphasis.
- Testimony that directly or circumstantially corroborates your other witnesses, especially your client.
- Information about the witness's background that makes their particular evidence more credible.
- Testimony that is necessary to lay a foundation for other evidence
- Testimony that provides continuity and makes the story understandable.

### [2] Organization

It has long been the collective opinion of trial lawyers that most direct examinations should be organized chronologically. This keeps the witnesses from becoming confused, makes their testimony easy for the jury to follow, and allows you to use simple, nonleading questions such as "what happened next?" knowing that all events will be covered.

Chronological order is safe, but strict adherence to it is not the best approach. Part of our overall strategy is to take advantage of the principles of primacy and recency by placing special emphasis on what we do first and last. A direct examination structured to take advantage of these effects will probably be more effective. Instead of a strict chronological order that might bury the important facts in the middle, consider starting with the most important point you want the jury to remember and ending with particularly important details.

A typical order for direct examination is summarized in the following sections.

#### [a] The beginning.

To take advantage of the primacy principle, you should put one of your most important broad facts first. Using such an organization, the direct examination of a criminal defendant might start as follows:

Q: You are Mr. Ozie Davis?

A: Yes. Ozie Davis the third.

Q: You know, don't you, that you are charged with an armed robbery of the Eastwood Quick-Pick store on July 4?

A: Yes.

Q: Mr. Davis, please tell the jury whether you committed that crime.

A: I did not. I did not go into that store on July 4th. I was not even in town. I was visiting my wife's family all day in Chicago, celebrating the Fourth of July.

### [b] Background information.

The first major topic in most direct examinations is the witness's background — age, address, occupation, family, and so forth. The most commonly stated reason for putting neutral biographical questions at the beginning is that they present familiar topics that are easy for witnesses to talk about, thereby helping them over their initial nervousness. This also is consistent with a chronological presentation, and it helps the jurors get to know something about a witness before they are asked to accept that person's testimony. In a case in which the credibility of a witness is an important issue, you often can kill two birds with one stone by beginning with background information that will enhance credibility as your initial point of emphasis.

Eliciting background information may be counterproductive if you dawdle too long or fail to draw a distinction between relevant and irrelevant background. If this stage of examination lasts a long time, the jurors may lose interest. In general, people pay close attention at the beginning, but their ability to pay attention falls off as time passes. You also run the risk of losing the attention of the jurors if you ask a lot of seemingly irrelevant background questions. Many attorneys ask the same pro forma questions of every witness: age, residence, employment history, marital status, and children. There is nothing magical about these particular questions — any background questions will help the witness feel at ease.

You can select instead particularly relevant background items that tie into and credit the particular testimony the witness will give. If the witness is a police officer who is going to talk about an investigation, experience on the police force is more relevant than the names of the officer's children. In a will contest case, the strong family ties between the testator and claimant can be emphasized. You also may chose to emphasize civic and social similarities between your witness and members of the jury. If you discover during voir dire that three jurors served in the Navy, it probably would make sense to bring out the military service records of your witnesses.

### [c] Setting the scene.

As a transition from background matters to the facts of the case, you should consider having your witnesses describe their familiarity with the people, objects, and locations involved in the occurrence. That way, a witness will not have to interrupt his or her description of the action to explain this background information. Such a transition might proceed like this:

Q: (After the witness testifies about his employment) Do you know Matt Cook?

A: Yes. He works with me at the factory.

Q: Do you ever do things together?

A: We usually go out for a beer a couple of nights a week after the shift ends.

Q: Where do you usually go?

A: We always go to the same place, Fast Company on Main Street.

Q: What is it like?

A: It's sort of a dive, usually pretty crowded between five and seven when we go there. There's a bar along one wall, a pool table in the back, and a row of tables on the other wall.

Q: Is it well lit?

A: Between five and seven it is, because the sunlight comes in the front window.

Q: Would you recognize a drawing of the floor plan of Fast Company if you saw one?

A: I think so.

Q: Handing you state's exhibit five, is this a fair and accurate drawing of the floor plan of Fast Company?

A: Yes it is.

[State's exhibit five moved into evidence]

Q: Directing your attention to August tenth, at about 5:30 p.m., where were you?

A: I was at Fast Company with Matt Cook. We were seated at this table closest to the window, when all of a sudden. . . .

This technique probably is more effective if the scene is simple than if the testimony will involve many people and more than one location. In complicated cases, there is a danger that the jurors may forget background information if it is explained out of context in this manner.

### [d] Telling the story.

The body of the direct examination consists of a narrative that tells the witness's story. In general, you will want to pause, direct the witness's attention to a specific time and place, and then ask the witness to tell the jury what happened. Your job will be to guide the witness through his or her narrative in chronological order. If you have gotten the preliminaries out of the way, you will not have to interrupt your story to explain who people are, or how they got to know each other, nor to describe the scene or instrumentalities involved in the crime or event.

The more your direct examination sounds like a story, the better. Stories are easier to follow, understand, and remember. Compare the following two possible direct examinations:

Q: Directing your attention to October 12, the kitchen of your home at about 10:00 am, please tell the jury what happened.

A: My mother gave me a basket of goodies and asked me to take them to my grandmother's house in the woods. I put on my red riding cape with the hood, and set out for grandma's house.

Q: What happened next?

A: I walked through the woods, taking a shortcut. Along the way I met Mr. Wolf. He asked me some questions about what was in the basket, and I showed him. He looked very hungry.

Q: What happened next?

A: Mr. Wolf went on his way. I walked another fifteen minutes, and then got to grandma's house. I knocked and a voice said to "Come in."

Q: What did the voice sound like?

A: Very scratchy. It didn't sound like grandma at all, but I figured maybe she had a bad cold.

Q: What happened next?

A: I entered the house. It was very dark. I tried turning on a light switch, but the lights didn't work. I went over to grandma's bed. She looked real bad — she had big eyes, big dog-like ears, and lots of sharp teeth. Or at least that's the way it looked in the dark.

Q: Did you question her about this?

A: Yes. I said, "What big eyes you have." She answered, "The better to see you with, my dear." Then I said, "What big ears you have." She answered, "The better to hear you with, my dear." I was getting nervous, because she didn't sound at all like herself. Then I said, "What big teeth you have. New dentures?"

Q: What happened then?

A: The person in the bed jumped up and grabbed me. It was Mr. Wolf wearing grandma's nightgown. He sneered and said, "The better to eat you with, my dear." I screamed for help.

Obviously, this version makes an effective story. Too often however, a direct examination sounds like this:

Q: Directing your attention to October 12, the kitchen of your home at about 10:00 am, please tell the jury what happened.

A: My mother gave me a basket of goodies and asked me . . .

Q: Handing you state's exhibit one, do you recognize it?

A: Yes, that's the basket.

Q: Is it still in the same condition as when your mother handed it to you?

A: The basket, yes. Of course, the contents have since been eaten or thrown out.

Q: What had the basket contained at the time?

A: Cookies, a fruitcake, fresh baked bread, cheese, and a bottle of wine.

Q: A bottle of wine? Does your grandmother drink?

A: Only occasionally. I've never seen her drunk.

Q: So to the best of your knowledge, she was not drunk on October 12 when she was attacked by Mr. Wolf?

A: No.

Q: What did you do with this basket?

A: I took it to my grandmother's house in the woods.

Q: Would that be 2501 Lonely Lane, Bayshore?

A: Yes.

Q: What were you wearing?

A: I put on my red riding cape with the hood.

Q: Showing you state's exhibit two, is this the cape?

A: Yes it is.

Q: And is it still in substantially the same condition as it was on October 12?

A: Yes.

ATTORNEY: Move state's exhibit two into evidence.

COURT: Received.

Q: What happened next?

A: I set out for grandma's house, through the woods, taking a shortcut. Along the way I met Mr. Wolf.

Q: Had you ever seen Mr. Wolf before?

A: No.

Q: Had you done anything to attract Mr. Wolf's attention?

A: No.

Q: Looking around the courtroom today, do you see the person who accosted you on the path?

A: Yes, he's over there.

ATTORNEY: May the record reflect that she has identified the defendant?

COURT: Fine.

Q: What happened next?

A: Mr. Wolf asked me some questions about what was in the basket, and I showed him.

Q: That's the same basket we referred to earlier? State's exhibit one?

A: Yes.

And so on.

### [e] What to do with weaknesses.

Part of our persuasion strategy is to be open with the jury about weaknesses. When should you elicit testimony about them during direct examination? Since jurors will best remember what comes at the beginning and end, the middle would seem an obvious choice. Yet, unless damaging evidence fits logically into the middle of direct examination, a sudden break to insert damaging evidence out of its natural order will only emphasize it. Trial practitioners have reached no consensus. If it does not fit naturally into the sequence of events, some recommend that damaging information be disclosed at the beginning, and others that it be saved until the end. The research of

social psychologists tends to support the latter view — in most cases, especially when no mitigating explanation is available, weaknesses should be included near the end. If they occur early in an examination, especially if they relate to the witness's character, they will taint the bulk of the testimony that follows.[33]

### [f] Conclusion

The direct examination should end on something important to take advantage of the principle of recency. You can use this opportunity to emphasize one of the main points you want the jury to remember. For example:

Q: Can you prove you were not in town on July 4?

A: Yes, I can. I filled my car up with gas at a Shell station in Chicago about 2:00 that afternoon, just before we left to drive home. I paid by credit card, and I got a receipt with the date on it.

Q: Handing you defense exhibit F, is this that receipt?

A: Yes, here's my signature, and here's the date: July 4.

DEFENSE ATTORNEY: We move defense exhibit F into evidence. No further questions.

### [g] Redirect

You should give some advance thought to planning your redirect examination. You may be able to anticipate that your opponent will impeach your witness by proving acts that suggest bias, bringing up a criminal conviction, or eliciting a prior inconsistent statement. If so, you can plan what questions you will ask to rehabilitate your witness, so that you and your witness are ready with an explanation for an anticipated impeachment attempt. Even if you cannot anticipate exactly how your opponent will try to cast doubt on the veracity of your witness, you can feel sure that some impeachment will occur. You should therefore have several questions planned in advance that permit the witness to restate the most important testimony. You can always decide not to ask your question if that part of the direct examination has gone unchallenged.

## [3] Making the Testimony Persuasive

The body of the direct examination consists mainly of eliciting from a witness what he or she remembers perceiving and doing. It is not enough, however, just to elicit the basic factual details and rest. Your job is to make the testimony *persuasive.* For testimony to be persuasive, four things must happen:

- The jury must hear it.
- The jury must understand it.
- The jury must remember it.

[33] *See* Brian Sternthal, Lynn W. Phillips and Ruby Dholakia, *The Persuasive Effect of Source Credibility*, 42 PUBLIC OPINION Q. 285 (1978).

- The jury must trust the witness who says it.

In this section, we will discuss techniques for enhancing the persuasiveness of your direct examination.

You must accomplish two things to insure that the jury hears your important evidence:

- ***Attract and keep the jurors' attention.*** Most direct examination is boring. Much of it is not very important. Therefore, you want to assure that the jurors' attention is focused on the witness before you cover the most important parts of the direct examination. You can attract jurors' attention to the witness by having the witness do something unusual. For example, you can hand the witness an exhibit, have the witness get up and demonstrate something, or have the witness walk to a diagram. You can keep the jurors' attention by being brief and using visual aids.
- ***Get your evidence admitted.*** The jurors cannot hear your evidence if it is ruled inadmissible by the judge. This means you must anticipate objections your adversary might make, and prepare to circumvent them. With advance preparation, you can come equipped with legal arguments that support admissibility. You can make sure that your direct examination contains sufficient evidence to satisfy foundations. You can prepare alternative theories of admissibility, such as offering evidence for a limited purpose. And, you can be prepared to look for other alternative methods of proof, perhaps through other witnesses, in case your evidence is excluded.

Obviously, once you have the jury's attention, you must present evidence the jury can understand. To a large extent, this is accomplished by working with the witness to make sure the witness can communicate in simple, clear language to the best of the witness's ability. This process is discussed at length in the next section on Witness Preparation. There are five additional techniques you can employ over which you have somewhat more control.

- ***Maintain chronological order.*** A story is easier to follow if it is in chronological order. Rarely is there any reason why you should deviate from it.
- ***Subdivide direct examination into smaller units.*** If you break up a long story into "episodes" it will be easier for the jurors to understand and remember. Thus, you might divide up the plaintiff's story of a traffic accident into six segments: the plaintiff's happy and active life before the accident; the events of the day leading up to the accident; a detailed account of the accident itself; the minutes immediately following the accident; the next few days in the hospital; and what plaintiff's life has been like since the accident.
- ***Plan transitions between segments.*** It will be easier for the jury to follow your story if they understand when one "episode" stops and another starts. You should therefore plan verbal and visual transitions between segments. A transition is made up of three parts: a clear closure on one segment, an interruption of the flow of the direct examination, and then a clear beginning to the next

segment. You can close a segment with a question such as, "Do you recall anything else about the accident?" For an interruption, you may remain silent for a few seconds, move to a different location, have the witness sit down if the witness was standing, and/or insert a phrase such as, "Let's move on to the events following the accident." You can open the next segment with the same kind of topic question you use to start the chronology: "Directing your attention to immediately after the accident, tell us what happened."

- ***Elicit facts and details, not conclusions.*** Conclusory testimony depends for its success on the witness and jurors sharing a common frame of reference. It is unlikely that all jurors will share the witness's view on what constitutes "large," "fast," or "a good look at the suspect." The more you are able to provide the jurors with the details of important points, the more certain you can be that the jury will understand it. Thus, you want your witness to say "six feet tall and two hundred pounds" rather than "large," "going over eighty miles an hour" rather than "fast," and "close enough to read the words 'born to lose' tattooed on his upper arm" rather than "got a good look at the suspect."
- ***Use appropriate visual aids.*** Miscommunication is least likely if you can show the jury the actual objects and places involved in a litigated event. Photographs, diagrams and other illustrations also reduce the likelihood of misunderstanding.

If you expect the jury to remember the important parts of the direct examination, you must emphasize them. A large number of emphasis techniques are available. Basically anything you do that is different and makes evidence stand out will emphasize it. It is the contrast that makes this technique work, so you must remember that you cannot emphasize everything. Rather, you want your basic direct examination to consist of a verbal witness narrative with little interference from you. Then, when a particularly important item of evidence is coming up, you interfere in the direct, cause a little commotion, and focus the jury's attention on the important item. The following are common emphasis techniques:

- ***Using visual aids.*** Perhaps the most effective tactic is to use visual aids or demonstrations. If an exhibit can be introduced at any one of a number of places during the direct examination, why not offer it at a time when it will help emphasize something important? If a witness picks up an exhibit or walks to a blackboard, it gets the jury's attention. Whatever the witness says immediately after this will receive particular attention from the jury. The introduction of an exhibit often can be effectively combined with a series of preliminary questions going into considerable detail describing the exhibit. If your jurisdiction allows pedagogical exhibits, it can be particularly effective to have the witness write the key points of his or her testimony, or the amount of damages, on a chart.
- ***Going into specific detail.*** The more details you elicit, the more you emphasize the event being described. If the witness testifies, "I was walking down the street when the defendant pulled a gun

on me and said, "Give me a hundred dollars," the jurors might miss the gun reference. If you wanted to emphasize it, you could break in at that point and elicit details:

A: I was walking down the street when the defendant pulled a gun on me and said . . .

Q: Did you get a good look at the gun?

A: Yes.

Q: What color was it?

A: Black.

Q: About how big was it?

A: It was pretty compact, about the size of an open hand.

Q: Short barrel or long barrel?

A: Short. I would call it a snub-nosed gun.

Q: Automatic or revolver?

A: Revolver.

- ***Changing your questioning pace or pattern.*** If you have been conducting a normal direct examination, you have been asking simple neutral questions such as "What happened next," and "What did you see?" If you suddenly vary the type of question you ask, it emphasizes the testimony to follow. You can use a signal question, such as "Now think about your answer carefully, and tell the jury . . ." Or, you can change from narrative questions to slow, narrow, detailed questions. For example:

Q: What happened next?

A: I went down to the street to see if I could be of any help. It looked like a bad accident. I got down there and found the defendant sitting in his car. I went up to see if he was okay.

Q: How close did you get to his face?

A: About a foot.

Q: Could you hear his voice?

A: Yes.

Q: Clearly?

A: Yes.

Q: Could you understand any of what he said?

A: Yes I could.

Q: What did the defendant say?

A: He said, "I wish I hadn't had that last drink."

- ***Changing your position or the witness's position.*** For example, if you have been standing near the corner of the jury box, you could walk over to your table before asking an important question. Or,

you can ask the witness to step to a diagram just before eliciting some crucial fact.

- ***Repeating the evidence.*** Psychologists have demonstrated that repetition of a message several times increases the likelihood that it will be remembered and believed, as long as it is not repeated to the point where it becomes boring.[34] Repetition can take three forms: similar testimony from different witnesses, similar testimony elicited more than once from a single witness, and repetition of testimony by the attorney. Clearly, if you use all three methods, the message will be repeated too many times and become boring. The calling of multiple witnesses is easiest, if they are available. Repetition within a single witness's direct examination is more difficult, because mere repetition is generally not permitted. However, it is permissible to ask a similar question, or have the witness explain an event once in words and then show the location on a diagram. It is often the case that there will be an opportunity to repeat some of the evidence in one of your questions during this process. For example:

  Q: What happened next?

  A: I saw the defendant pick up a beer bottle and hit poor Charlie over the head with it.

  Q: Will you step to the diagram, state's exhibit one, and point out exactly where the defendant was when he hit Charley with the beer bottle?

  A: Sure. The defendant was standing here next to the bar. He grabbed a bottle off the bar and smacked Charlie with it as Charlie walked by.

Several techniques are available to increase the trustworthiness of a witness's testimony: enhancing the witness's personal credibility, enhancing the credibility of the witness's story, proving expertise and familiarity, proving motives that are consistent with conduct, and admitting weaknesses.

- **Enhancing the witness's personal credibility.** Subject to the rule prohibiting bolstering, it is helpful to show that a witness is likely to be credible in this particular case. You can show the witness is unbiased by eliciting that the witness has never met your client before. You can prove that the witness is trustworthy by showing the witness holds a responsible job. You can forge links to the jury by eliciting background concerning the witness's family, social status, occupation, and residence. For example:

  Q: Where do you live?

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[34] One experiment found that the optimal number of repetitions was three; after that the effects become negative. John T. Cacioppo and Richard E. Petty, *Effects of Message Repetition and Position on Cognitive Response, Recall, and Persuasion*, 37 J. PERSONALITY & SOCIAL PSYCHOLOGY 97 (1979). *See* Daniel Linz and Steven Penrod, *Increasing Attorney Persuasiveness in the Courtroom*, 8 LAW & PSYCHOLOGY REV. 1, 28–29 (1984) (more than 3 or 4 repetitions produces psychological reactance).

A: 2333 East Third Street, Bayshore.

Q: Is that a house or apartment?

A: Well neither, actually. It's a rectory.

Q: A rectory — are you a priest?

A: Yes, for St. Charles Catholic Church.

Q: But you're not wearing one of those black and white collars.

A: They are optional.

Q: Should I address you as Father Zoeller?

A: We're generally called by our first names. My parishioners call me Father David.

Q: Father David, do you know the plaintiff?

A: No.

Q: Are any of the parties in this case members of your parish?

A: No.

Q: Where were you on January 16th?

A: Well, I had just finished mass and was on my way to the hospital to anoint the sick, when . . .

- ***Enhancing the credibility of the witness's story.*** Regardless of the witness's inherent credibility, techniques are available to enhance the likelihood that the witness's story is accurate. You may prove that the witness has a good memory by having the witness so testify, eliciting things the witness did to preserve recollection such as taking notes, and eliciting detailed testimony about the event itself. If the event was an ordinary one, you can elicit any reason the witness has for remembering this one transaction out of many similar ones, such as the event being particularly pleasant, painful or embarrassing. Specific dates and times can be fixed by reference to some contemporaneous event or activity. The reliability of the witness's observations may be enhanced by proving good eyesight and hearing, good health, lack of fatigue, a particular reason for paying attention, or favorable conditions for observing (distance, obstructions, lighting). For example:

  Q: How do you know it was 6:25?

  A: I looked at my watch. I was waiting for my brother to pick me up, and he said to be there by 6:30 or he'd leave without me, so I double-checked the time.

- ***Proving the witness's expertise and familiarity with the subject-matter.*** A witness's opinions and observations of other events and people are more credible if the witness is familiar with that type of event or the people involved. If a witness is going to describe a traffic accident, bring out that the witness used to be a cab driver. If a witness is going to testify about the condition of the testator at the time a will was executed, bring out the witness's

knowledge of the details of the testator's general life, family, habits, mannerisms, and so forth. For example:

Q: Did you recognize the intruder's voice?

A: Yes.

Q: How did you recognize it?

A: I had heard it before. It belongs to a friend of my son's named Bryce. Bryce calls on the phone often, and also has been to our house.

- ***Proving motives that are consistent with conduct.*** People do things for reasons. If the reasons and motives are explained, the conduct makes more sense. If a witness acted out of habit, jealousy, love, shame, curiosity, or any other common emotion, proving the emotional state will make the conduct seem more logical. For example:

  Q: What drew your attention to the corner booth?

  A: It's my table. One of my jobs as a waitress is to keep an eye on my tables, and try to sell another round every time someone's glass is empty.

- ***Admitting your weaknesses.*** Every witness has weaknesses in their backgrounds, demeanor, or testimony. There is nothing you can do about this — your case is always bound by its facts. Many lawyers simply avoid these unfavorable matters, apparently hoping they will go away. If the harmful matter is something that your opponent does not know about, that is unconnected to the main issues, or that your opponent probably will not bring up, then it may make sense to avoid bringing it up in direct examination. However, if harmful evidence is likely to come out, then it can have a serious impact on the perceived credibility of the witness if you appear to be trying to hide it. It does less harm if you disclose weaknesses yourself in a way that minimizes them. Once the jurors have decided that the weakness is not particularly important, they will be inoculated against your opponent's attempts to make it seem important during cross-examination.[35] For example, suppose your witness had been drinking:

  Q: What kind of place is Mulligan's?

  A: Like a pub, you know. They sell food and beer.

  Q: Did you have anything to eat or drink while you were waiting?

  A: Yes, a cheeseburger and a couple of beers. I didn't want to have too much, because Al and I were going to a party later where the beer would be free.

[35] Arthur Lumsdaine and Irving Janis, *Resistance to Counterpropaganda Produced by One-Sided and Two-Sided Propaganda Presentations,* 17 PUBLIC OPINION Q. 311 (1953); William McGuire, *Persistence of the Resistance to Persuasion Induced by Various Types of Prior Belief Defenses*, 64 J. ABNORMAL & SOCIAL PSYCHOLOGY 241 (1962).

## NOTES

**1.** ***Should you try to create sympathy for a witness?*** You may be tempted to emphasize emotional testimony by the victim of a crime or accident in order to produce jury sympathy. Lawyers do this frequently, apparently believing that jury sympathy for a plaintiff or crime victim will increase the likelihood of a verdict against the defendant. Interestingly, such tear-jerking testimony may have the exact opposite effect. Social psychologists have discovered that jurors react negatively to the misfortunes of a victim, and an attempt to arouse sympathy for him or her merely undermines the victim's credibility and reduces the jurors' liking for that person. People are reluctant to face the fact that tragedy can strike them, so they tend to convince themselves that victims are different — more stupid, more careless, or more responsible for their own misfortunes. While people react positively to a victim who is emotionally distressed immediately after a traumatic event, *see* Calhoun et al., *Victim Emotional Response: Effects on Social Reactions to Victims of Rape*, 20 BRITISH J. SOCIAL PSYCHOLOGY 17 (1981); they seem to expect victims to have recovered and regained a positive attitude toward life by the time the case goes to trial. In one experiment, subjects were more favorably impressed with a crime victim who minimized the trauma of the event and maximized her positive attitude about the future than with a victim who was still suffering and unable to forget the crime. Dan Coates, CAMILLE WORTMAN & ANTONIA ABBEY, REACTIONS TO VICTIMS, IN NEW APPROACHES TO SOCIAL PROBLEMS (I. Freize, et al. eds. 1979). The research is summarized in Steven Penrod et al., *The Implications of Social Psychological Research for Trial Practice Attorneys*, in PSYCHOLOGY AND LAW 443–44 (D. Muller et al., eds., 1984).

**2.** ***Children as witnesses.*** Before children will be allowed to testify, the court must be convinced that they are competent to do so, *i.e.*, whether a child has the general capacity to observe, remember, and communicate about events; and whether she understands the difference between truth and falsehood, that lying is wrong, and the obligation to testify truthfully. *Commonwealth v. Monzon*, 744 N.E.2d 1131 (Ct. App. Mass. 2001) (good discussion, one child held competent, one found incompetent). Children offered as witnesses are usually questioned by the judge, and may also be questioned by the attorneys because on issues of competency, every party has the right to ask questions. Typical questions ask a child for examples of truth and lies, pose hypothetical situations in which it would be self-serving to lie (*e.g.*, being asked who broke a vase) and asking the child what she would do; or posing an obviously false statement (e.g., I am ten feet tall) and asking the child if it is the truth or a lie. *See Haycraft v. State*, 760 N.E.2d 203 (Ct. App. Ind. 2001).

## [C] WITNESS PREP

Witness prep has two aspects: preparing the content of a witness's testimony and preparing the witness to give that testimony in the courtroom. The first task involves working with the witness on how to communicate persuasively what he or she knows. The second involves preparing the witness to present that knowledge as effectively in the courtroom setting as the witness does in the informal atmosphere of your office.

The importance of witness preparation cannot be overemphasized. Witnesses who are confident in their ability to give effective testimony and who know what to expect in the courtroom can only give more persuasive testimony than they would otherwise. However, most experienced trial practitioners warn against over-preparation. If testimony appears too rehearsed, the jury may become suspicious of it. If too much emphasis is placed on using specific words or descriptions, the witness may become panicky because of a fear he or she will not remember the exact words learned in your office.

### [1] Preparing the Content of Testimony

The first task in preparation is to work with the witness on the content of the direct examination. Your task is to help the witness remember and articulate details, reduce conclusions to their underlying facts, and choose words and descriptions that are vivid and accurately convey the witness's perceptions in his or her own words.

> Many witnesses have a woefully inadequate conception of lapsed time. Others have no judgment of distance. Others will glibly describe an automobile as traveling at 75 miles an hour, and have no idea of the distance a car traveling that speed would traverse in a matter of seconds. It is better to spend some extra time with these witnesses in the office than to be embarrassed by their ill-considered answers on the witness stand. When a witness is asked how long he had an approaching automobile within his vision before a collision and answers "four or five minutes," pull a watch on him and show him what four or five minutes mean. After the demonstration he will probably say he meant "seconds." If he estimates a distance at 50 feet, test his judgment by asking him the distance between two fixed points within his view, and when he has given his estimate measure that distance with a tape or rule. If it develops he has no judgment of distance, tell him to say so on the witness stand. If he is over-estimating the speed of an automobile, figure out for him on a piece of paper how far a car going at, say, 75 miles an hour, would travel in five seconds.[36] All of these measures, it is submitted, are justified in order to aid the witness in giving accurate testimony, and protecting him from the consequence of ill-considered answers.[37]

Part of this process is to help your witnesses reduce conclusions to their underlying facts so that they are prepared to communicate the kinds of details that will make their testimony credible. For example, a witness to an accident might tell you that she was looking out her window and saw a car strike an obviously drunk pedestrian who had stumbled into its path. If you want the jury to see a vivid picture of the intoxicated pedestrian, the witness is going to have to do better than that. This is the time to make sure your witness will be able to give such a description. Preparation might proceed along these lines:

LAWYER: Ms. Reinisch, how could you tell the pedestrian was drunk?

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[36] Approximately 550 feet.

[37] FRANCIS X. BUSCH, LAW AND TACTICS IN JURY TRIALS, vol. 2: 529–30 (1959).

WITNESS: Well, he looked drunk, you know, weaving and stuff.

L: Tell me everything you remember about him.

W: He sort of stumbled and wasn't walking straight.

L: When did you first see him?

W: When he stepped off the curb.

L: Describe his clothes.

W: Rumpled, an old shirt — I think it was untucked.

L: Okay, describe that first step he took.

W: Oh, I remember, he stumbled then, and almost lost his balance, swaying from side to side.

L: Was he carrying anything?

W: Not that I remember.

L: Did you see a liquor bottle?

W: No.

L: Okay, how was his posture?

W: His head hung over, like this.

L: The chin almost on the chest, eyes looking down?

W: Yeah.

L: Did he walk into the street next?

W: No, he sort of looked around. Then he walked, sort of shuffling.

L: How straight a line did he follow?

W: Not at all straight, he weaved from side to side.

L: How far — a foot, two feet to one side or the other?

W: Probably about a foot to the left, then a few steps, then to the right a foot or two.

L: Did he keep his balance?

W: No, he almost fell again, and then lurched forward into the path of the car.

L: What did he do with his arms when he stumbled?

W: Reached out like he was trying to grab something.

L: All right, now when you testify in court, it is important to be as detailed as possible. So when you describe this man, can you go into details like these?

W: Sure.

L: As I understand it, then, you saw him on the curb in rumpled clothes with his shirt untucked. He almost fell stepping into the street, swayed from side to side, then he shuffled into the street, weaving a foot to the left, taking a few steps, then weaving to the right. He almost fell down again, reached out his arms, and then lurched into the path of the car.

W: That's right.

L: And you figured he had to be drunk?

W: Yes.

The final stage of preparation is to help the witness improve his or her choice of words for their maximum vividness and persuasive effect. The words used to describe an event can have an impact on how the jurors picture it. An incident or accident may sound like a minor matter to the jury, while a collision, wreck, or smash-up may sound more serious. However, if you are dissatisfied with a witness's word choice, it is dangerous to suggest a particular word you like better. If a witness tries to use words that do not come naturally, the witness may lose credibility with the jurors.[38] A better tactic is simply to ask the witness to use a more descriptive word or to let the witness pick a better one from a list of alternatives.

The most difficult task may be helping a witness find words to describe intense sensations or emotions. Pain is especially hard to convey through words. Many injured people will describe pain as "bad," but this general conclusory description will not be sufficiently meaningful to the jurors. Your witness will need to conjure up a mental picture of the intensity of the pain. Help your witness analogize his or her pain to a type of pain some of the jurors are likely to have experienced. The range is limitless: stubbing toes, cracking shins, hitting heads underneath kitchen cupboards, burning fingers on hot dishes, stepping on a tack, hitting fingers with a hammer, childbirth, and so forth.

Many trial practitioners encourage their witnesses to use descriptive phrases such as the following:

(1) "My head felt like the top had been blown off by a shotgun,"

(2) "It felt like someone was sticking a knife in my eye and twisting it."

Are these really any better than general descriptions? None of the jurors has had his or her head blown off or been stabbed in the eye.

### [2] Ethical Considerations

Everyone knows that fabricating false evidence and the outright subornation of perjury is wrong, unethical and illegal. No rule is required to tell us that a lawyer may not use witness prep as an excuse to tell the witness what to say and create false evidence, although Rule of Professional Copnduct 3.4 does so: "A lawyer shall not [f]alsify evidence [or] counsel or assist a witness to testify falsely." This has always been a clearly understood and fundamental principle.[39] An attorney may neither personally fabricate evidence,[40] nor

[38] In one experiment, it was found that witnesses who used "hypercorrect" speech (e.g., an assistant ambulance attendant who described an unconscious person as "comatose") were viewed as less convincing, less competent, and less intelligent than witnesses who used normal speech. John Conley, William O'Barr and E. Allan Lind, *The Power of Language: Presentational Style in the Courtroom*, 1978 DUKE L.J. 1375, 1389–90.

[39] ALI RESTATEMENT OF THE LAW OF LAWYERING § 118 (lawyer may not falsify evidence); *Dodd v. Florida Bar,* 118 So. 2d 17, 19 (Fla. 1960) (no breach of professional ethics causes more harm to the administration of justice than an attorney using false testimony).

[40] *In re Jones,* 487 P.2d 1016 (Cal. 1971) (lawyer altered and antedated a document and offered it at trial).

induce another to do so.[41]

Evidence fabrication on a grand scale is probably rare. Attorneys do not routinely go around hiring actors to pretend to be eyewitnesses or forging documents. However, evidence fabrication on a small scale is far more common. This fabrication commonly occurs during witness coaching, when an attorney asks a witness to change some aspect of his or her testimony to make it more persuasive.[42] Such coaching sounds like this:

> LAWYER: How did it feel?
>
> CLIENT: It hurt pretty bad.
>
> LAWYER: We're not going to get a lot of money for that answer. Look, when I ask you that question at trial, I want you to say that it felt like your hand was stuck on a hot stove and you couldn't get it off, okay?
>
> CLIENT: Sure.

Everyone would agree that the lawyer has just fabricated false testimony. On the other hand, most lawyers probably would see nothing unethical in the following example, although whether there is really any difference between the two is dubious:

> LAWYER: How did it feel?
>
> CLIENT: It hurt real bad.
>
> LAWYER: When I ask you that question at trial, I want you give a more vivid description but still be truthful. Would it be accurate to say that it felt like your hand was stuck on a hot stove and you couldn't get it off?
>
> CLIENT: Yes, that's sort of what it felt like.

In *The Verdict*,[43] there is a wonderful scene in which eleven people from a defense firm prepare their client for trial by rehearsing his direct examination. The client is an anesthesiologist accused of medical malpractice.

> Initially, the doctor's responses to his lawyer's direct examination questions are stiff, patronizing, and clinical. After forceful prompting, however, the doctor is convinced to talk in emotional, human terms that suggest his caring nature and superhuman efforts on his patient's behalf. His lawyers accomplish this transformation by pressing the doctor to adopt substitute terms and phraseology that they suggest and by applauding the witness when he shows his emotions.[44]

The prep goes as follows:

During the prep session, the legal team suggests a number of changes that Dr. Towler should make in his testimony. They begin with innocuous ones. When the client refers to the plaintiff as another doctor's patient who was merely referred to him, the attorney interrupts:

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[41] *Bar Ass'n of San Francisco v. Devall,* 210 P. 279, 280 (Cal. App. 1922) (lawyer advised a friend of a decedent to change the will to reflect the decedent's true intentions).

[42] *See In re Eldridge,* 37 N.Y. 161, 171 (1880) (A lawyer's duty "is to extract the facts from the witness, not to pour them into him").

[43] David Mamet and Barry Reed, *The Verdict* (20th Cent. Fox 1982).

[44] Fred C. Zacharias & Shaun Martin, *Coaching Witnesses*, 87 KY. L.J. 1001, 1002–03 (1998).

ATTORNEY: Don't equivocate. . . . You were her doctor?

CLIENT: Yes.

ATTORNEY: Say it.

CLIENT: I was her doctor.

Every time the client refers to the plaintiff, he is reminded to call her by her first name.

CLIENT: Well, when she had been. . . . [Associate interrupts] When *Debby* had been. . .

CLIENT: Thank you. When Debby had been. . .

When he uses medical terms, he is reminded to speak in words the jury will understand:

CLIENT: She had aspirated vomitus into her mask.

ATTORNEY: She threw up in her mask. Now cut the bullshit, please. Just say it. She threw up in her mask.

CLIENT: She threw up in her mask

In the end, however, the attorney ends up suggesting more major changes and telling the witness exactly how to answer key questions:

Q. You brought 30 years of medical experience to bear, isn't that what you did?

A. Yes

Q. A patient riddled with complications, with questionable information on her medical charts.

A. We did everything we could

Q. To save her and to save the child.

A. Yes.

Q. You reached down into death. . . .

Where do you draw the line concerning aggressive witness preparation? No competent attorney would dream of calling a witness, especially a client, without adequate preparation.

> The lawyer must try to elicit all relevant facts and to help the client — who, typically, is not skilled at articulation — to marshal and to express his or her case as persuasively as possible . . .. That is done by asking questions and by explaining to the client how important the additional information may be to the case . . .. The process of preparing or coaching the witness, of course, goes far beyond the initial eliciting of facts. In the course of polishing the client's testimony, [some lawyers recommend] as many as fifty full rehearsals of direct and cross-examination. During those rehearsals, the testimony is developed in a variety of ways. The witness is vigorously cross-examined, and then the attorney points out where the witness has been "tripped" and how the testimony can be restructured to avoid that result. The attorney may also take the role of witness and be cross-examined by an associate. The attorney's "failures" in simulated testimony are then

> discussed, and the attorney then may conduct a mock cross-examination of the associate. In that way, new ideas are developed while all the time the client is looking on and listening. He probably is saying, "Let me try again." And you will then go through the whole process once more. By that time, as one might expect, the client "does far better". In fact, after many weeks of preparation, perhaps on the very eve of trial, the client may come up with a new fact that may perhaps make a difference between victory and defeat.[45]

The best resolution would seem to be that if the prep changes the *substance* of a witness's testimony in ways that are more favorable than the witness's unprepped testimony would have been, the resulting testimony is unreliable as the witness's true recollection. If the attorney is aware of the change, and especially if the attorney has deliberately caused it, the attorney cannot ethically present it. A lawyer must either "prep" it back to the way it was (dissuade the witness from giving the enhanced version) or forgo proffering it. In the example from *The Verdict*, the defense lawyer cannot ethically present the doctor's testimony that Deborah Ann Kaye was his patient and he was her doctor, because both pieces of evidence have come from the attorney and materially changed the witness's natural testimony. On the other hand, where the prep merely refreshes the witness's memory, makes the witness comfortable with the examination process, or changes the *form* of the testimony to maximize its effectiveness without changing its meaning, the attorney still has a good-faith basis for believing the final product is reliable and can ethically use it.[46] In the example from *The Verdict*, when the lawyer gets his client to call his patient by name, and to say "throw up" instead of "aspirated vomitus," he has not changed the substance of the testimony and has conducted an ethical witness prep.

### [3] Preparing Witnessses for the Courtroom

Part of the preparation process is preparing your witnesses for the courtroom so they will be able to communicate effectively with the jurors.

As a first step, witnesses should be familiarized with courtroom procedures. Tell them (or show them) where the courthouse and courtroom are, where to park, where you will be, where they will wait, where the restrooms are, who will summon them to the courtroom, which seat is the witness chair, whether they should remain standing until sworn, and so on. Explain the order of questioning, including the possibility of redirect examination. Witnesses should be warned that the judge may ask questions, too. You also should describe the process of objections and the need to wait for a ruling before answering. It is a good idea to visit the courtroom with your witnesses so they can see how a trial really looks. If they have not testified before, witnesses probably have a seriously distorted view of trials acquired from television. This will help relieve any anxiety they have about an alien system, and will give you the opportunity to discuss how they should act on the stand.

Witnesses also must be prepared to be good witnesses. Lawyers frequently give their witnesses the following general advice:

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[45] MONROE FREEDMAN, LAWYERS' ETHICS IN AN ADVERSARY SYSTEM 59–76 (1975).

[46] Richard C. Wydick, *The Ethics of Witness Coaching*, 17 CARDOZO L. REV. 1, 39–40 (1995).

- Do not attempt to answer a question unless you have heard and understood it clearly.
- If you want a question repeated, say so. It is your right.
- Always answer courteously.
- Keep your voice up so the jury can hear you.
- Look at the jury when you speak.
- Do not try to be funny or sarcastic.
- Correct any mistakes you might make, interrupting if necessary.
- Answer with words rather than gestures.

In addition, trial practitioners stress the need to work with your witnesses to correct bad habits and distracting mannerisms — nail baiting, mumbling, constantly saying "y'know," looking at the floor, and so on. The best vehicle for this process is a practice examination in which you ask a witness the kind of questions you will ask at trial. This will help alleviate a witness's fear of the unknown, and will increase his or her self-confidence. It also will provide a context in which to discuss proper procedures and point out bad testifying habits. A practice examination provides an opportunity for the witness to become familiar with handling and referring to exhibits, drawing diagrams, and so forth, so that these parts of the direct will run smoothly at trial. If the witness will have to mark exhibits during trial or conduct a demonstration, the witness can practice this in advance to reduce the possibilities of confusion or error. If the facilities are available to enable you to videotape the practice examination, you can show the witness exactly how he or she appears, which will make your constructive criticism more readily understood.

Finally, your witnesses should be given advice (tactfully, of course) about how to dress for the courtroom. Witnesses who dress conservatively but appropriately for their occupation and social status seem to be more effective than witnesses who overdress. Obviously, witnesses should avoid heavy make-up, ostentatious jewelry, extreme hairstyles, or inappropriate clothing — soiled overalls, short skirts, low-riding pants, evening dresses, tuxedos, and so on. However, this does not mean all witnesses should dress alike. In general, both lawyers and psychologists advise that witnesses are most effective if they dress the way they would for work.[47]

### [4] Preparing Your Witness for Cross-Examination

You also should prepare your witnesses for cross-examination. Most trial lawyers recommend some combination of lectures or written instructions to the witnesses and practice sessions in which you engage in simulated

[47] Albert Mehrabian and Martin Williams, *Nonverbal Concomitants of Perceived and Intended Persuasiveness*, 13 J. PERSONALITY & SOC. PSYCHOLOGY 37 (1969) showed that witnesses who overdressed for their social status were less persuasive than those who underdressed. ELLEN BERSCHEID AND ELAINE WALSTER, *Physical Attractiveness*, in 7 ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY 158 (L. Berkowitz ed. 1974), showed that attractive witnesses are more persuasive than unattractive. For those reasons, you should probably discuss clothing with all witnesses, and ignore advice that most witnesses will dress appropriately even if you say nothing. Why take the chance?

cross-examination. The following is typical of the advice given to prospective witnesses.[48]

- ***Tell the truth.*** Tell the truth, the whole truth, and nothing but the truth. Do not exaggerate. Do not leave anything out.
- ***Admit weaknesses.*** Be honest about any weaknesses, failings, or criminal activity you are asked about on cross-examination. Don't act embarrassed or be evasive. Nobody expects you to have led a perfect life. Remember that the lawyer who asks these questions is just doing a job.
- ***Give yes/no answers.*** If you can answer a question "yes" or "no," do so.
- ***Don't volunteer information you were not asked.*** The lawyers are in charge of deciding which topics to bring up. Limit your answers to the subject-matter of the question. Information you volunteer may be inadmissible under rules of evidence, which could cause the judge to rebuke you in front of the jury. That would only hurt our case. If you think something important has been left out, speak to me before you leave. You can always be re-called for more testimony.
- ***Don't give explanations.*** If any explanation is called for, one of the lawyers will ask for it during re-direct examination.
- ***You can refer to documents if you need to.*** If you need to see a document in order to refresh your memory, ask for it.
- ***Don't speculate or guess.*** If you are not sure of the answer to a question, just say so. The lawyer may be trying to trick you into giving testimony that you are not competent to give. If you know most of the answer, but not all, say what you remember and tell the lawyer what parts you are uncertain about.
- ***Keep calm.*** The cross-examining lawyer may try to get you angry. When you are angry, you are likely to say things that are not true. The best thing to do is remain calm, even if questions are insulting or the lawyer is being sarcastic. Remember that if the lawyer is picking on you, the jury will be on your side.
- ***Don't argue with the lawyer.*** If the lawyer seems to want to pull you into an argument, don't fall for it.
- ***Make sure you understand the question.*** First, you must listen carefully to the whole question before answering. Then, if you don't understand it, tell the lawyer you don't understand the question.
- ***Ask for clarification if you need it.*** If you do not understand a question, or if the question is ambiguous, you may ask the lawyer for clarification. For example, if the lawyer asks what you were

[48] Based on suggestions by RICHARD GIVENS, ADVOCACY: THE ART OF PLEADING A CAUSE 151–55 (1980); JEFFREY KESTLER, QUESTIONING TECHNIQUES AND TACTICS 581–606 (2d ed. 1992); D. Lake Rumsey, *Selecting, Preparing, and Presenting the Direct Testimony of Lay Witnesses*, in MASTER ADVOCATE'S HANDBOOK 88–90 (1986).

doing on a certain day, you may ask the lawyer to clarify what time of day the lawyer is asking about.

- ***Beware of leading questions containing lies and half-truths.*** The other lawyer will try to put words in your mouth, and will ask you to agree with the lawyer's view of the events. Such leading questions often contain false statements and half-truths. If any part of a question is false, say so. If you think your answer is misleading, say so. If the question suggests that something is true but you are not sure, do not assume the lawyer knows what he or she is talking about. Say you are not sure.
- ***Beware of agreeing to exact measurement.*** The cross-examining lawyer may ask you to agree to exact distances and times of events when you are uncertain. The lawyer's suggestion may sound plausible. However, do not agree to a specific measurement unless you are personally sure the measurement is accurate.
- ***Listen for objections and stop.*** If I make an objection, stop talking immediately. Wait until the judge decides whether you should continue.
- ***Have you talked to a lawyer?*** Of course you have. You have talked to me. Some cross-examiners may try to trick you by asking questions such as whether you discussed, planned, or rehearsed your testimony. If asked, tell them you talked to me. That is the truth.
- ***You may be asked about prior statements.*** The other lawyer may ask you to recall exactly what you said in a prior statement or deposition. If you do not remember, say so. If you wish to look at the prior statement before answering, say so. Don't be upset if there are some inconsistencies. Think about it, and make sure that your testimony reflects the truth.
- ***Don't look at me.*** Look at the attorney who is asking the questions, and look at the jury when giving your answers. Don't look over at me for reassurance, because the jury may think I am giving you signals.

## [D] PREPARING A GOOD OUTLINE

Conducting direct examination is like conducting an orchestra. You are in charge, but others must produce the sounds. No conductor would think of trying to lead an orchestra without a detailed score, so you should not consider conducting direct examination without detailed notes.

Despite the obviousness of this advice, many trial practitioners caution against using notes when conducting direct examination. They argue that notes are inevitably inflexible and interfere with spontaneity. The reason that some lawyers have found notes less than useful may be that they were outlining the wrong thing. Since you are most familiar with preparing and outlining what *you* will say, your instinct will be to write out or outline the questions you will ask. The first time the witness gives a longer, shorter, or

otherwise different answer than expected, you have nothing prepared. Either you will ask your next prepared question, thereby either skipping over or repeating facts, or you will flounder around trying to phrase a question when you cannot remember precisely what the witness should say next.

In all other phases of the trial, you do most or all of the talking; therefore, it makes sense to outline what you intend to say. During direct examination, the witness will do most of the talking. Does it not make sense to outline what *the witness* will say? Recall the orchestra conductor's score — on it are the notes the musicians will play.

One such model outline is presented here. This outline uses a piece of paper or note card that has been divided into three columns. In the right-hand column is a detailed outline of the witness's testimony as you have worked it out in preparation. Essential testimony on your most important parts is written out in detail; unimportant testimony is summarized. In this way you will know when testimony is important enough for you to interrupt a witness to elicit more detail. In the middle column are your choreography notes on what you will do — when you will move, when you will pick up an exhibit, and so forth. For some testimony, such as eliciting evidentiary foundations, it may be important for you to phrase a question in a particular way. Such questions also can go in the middle column. In the left-hand column you can summarize your evidentiary research, writing out the responses you will give if there is an objection. An excerpt from the outline for a witness to an automobile accident is presented below:

| | |
|---|---|
| Leading permitted to direct attention, Rule 611(c), Starks v. State | DIRECTING YOUR ATTENTION TO JUNE 24, 1981, AT ABOUT 11:15 PM, DO YOU RECALL WHERE YOU WERE? |
| | Corner 5th & Main<br>On Main Street<br>Headed south<br>Stopped<br>Light was red<br>No other cars on Main<br>Streetlights on each corner<br>Nothing blocking view<br>Radio off<br>Heard roar |
| Helpful opinion based on perception, Rule 701 | Like car without muffler<br><br>Getting louder<br>Saw car to left<br>On 5th Street<br>75 - 100 feet away<br>Coming west<br>Toward witness<br>Watched 1-2 seconds |
| Opinion of speed, AMC v. Robbins | Speed about 45 |
| Relevant, not speculation, explains why he waited though light green | Light turned green<br>Waited<br>Didn't think car would stop |
| | (Walk to table, pick up photo blow-up) |
| | Car sped through<br>Estimate speed now 50<br>Car swerved left<br>Hit pick-up truck<br>On 5th Street<br>Headed east<br>Pick-up in correct lane<br>Hadn't seen pick-up before<br>Attention focused on car<br>Truck appeared to be stopped<br>Big crash<br>Jumped out of own car<br>Ran across<br>Took 10-15 seconds |
| | WOULD A PHOTOGRAPH OF THE TWO VEHICLES ASSIST YOU IN DESCRIBING THE SCENE? Yes.<br>MAY I APPROACH THE WITNESS, YOUR HONOR?<br>HANDING YOU PLAINTIFF'S ONE, DO YOU RECOGNIZE IT?<br>IS IT A FAIR AND ACCURATE DEPICTION OF THE ACCIDENT SCENE AT ABOUT 11:15?<br>(show to opponent) |

| | | |
|---|---|---|
| Photo admissible if witness would be allowed to describe what is shown, Jones v. State; blow-ups admissible, Garcia v. State | WE OFFER PLAINTIFF'S ONE INTO EVIDENCE AS AN ILLUSTRATIVE EXHIBIT. | |
| | (Hand to bailiff to mark)<br>(Put photo on easel)<br>WILL YOU DESCRIBE WHAT YOU SAW? | |
| | (Walk back to table) | Cars all smashed up<br>Glass all over<br>Gasoline on road<br>Ran to truck first |
| Collective fact, permissible opinion | | Driver looked dead<br>Blood on face<br>Blood on chest<br>Ran to car<br>Passenger side first<br>Saw young woman<br>Looked dazed<br>Eyes open<br>Turned head<br>Looked in witness's direction<br>Was conscious<br>30 seconds since crash |
| | (Move to end of jury box) | |
| Excitied utterance Rule 803(2)<br>Opinions based on perception OK in excited utterance, Lacy v. Wilson | | I asked if all right<br>She said:<br>"He didn't stop for light"<br>"The fool was speeding"<br>"We had been drinking" |
| | (Walk over and remove photo, give it to bailiff) | |

As the witness testifies, you can follow along on the outline. As long as the witness is covering the desired facts, you can let the witness talk. If the witness omits a fact, you will know it immediately and can interrupt to ask for it. If the witness stops, you need only ask "what happened next," or direct the witness to the next subject. If an objection is made, you can respond crisply and professionally, giving your reason and citing the rule or case supporting admissibility. When it is important that questions be phrased precisely, they are written out. Yet for most of the testimony, you can preserve spontaneity by focusing your attention on the testimony the witness is giving and not on yourself.

## NOTES

**1.** ***Additional techniques of witness preparation.*** Many trial practitioners recommend that you take your witnesses to visit the scene of the occurrence to help assure the accuracy of their recollections of details about angles, obstructions, times, and distances. *See, e.g.*, HENRY ROTHBLATT, SUCCESSFUL TECHNIQUES IN THE TRIAL OF CRIMINAL CASES 82 (1961).

**2.** ***Remedying witnesses' bad habits.*** One of the most common habits that reduces the credibility of a witness is speaking in an unconvincing style dubbed "powerless speech." Powerless speech is characterized by hedging ("I think," "sort of," "you know"), hesitation ("well," "um"), polite forms ("please," "sir"), and frequent use of intensifiers ("very," "definitely," "surely"). In one study, witnesses who spoke in this style were viewed as less convincing, less truthful, less competent, less intelligent, and less trustworthy than those whose speech was free from these habits. John Conley, William O'Barr, and E. Allan Lind, *The Power of Language: Presentational Style in the Courtroom*, 1978 DUKE L.J. 1375, 1379–86. Although this kind of speech habit may be hard to remedy, if you make a witness aware he or she is doing it (preferably through videotape playback), that person may be able to change. The remedy for most bad habits is repeated rehearsals and practice examinations in which the bad habits are pointed out. Long-winded witnesses should be told that their answers are unnecessary or unresponsive, short-winded witnesses should be forced to give more complete answers, opinionated witnesses should be made to stick to the facts, antagonistic witnesses should be warned not to attack the other side, egotistical witnesses must be convinced to be more humble, slow talkers should be speeded up, and fast talkers should be slowed down. Witnesses who try to be dramatic or emotional may be cured by videotaping their practice testimony and playing it back, so they can see how phony it looks. Witnesses with stage fright might be helped by a practice run in an empty courtroom, preferably with other persons (members of your firm, other witnesses, members of the witness's family) present. There is no guarantee that practice will change a witness's style of speaking, but it is probably worth a try.

**3.** ***Preparing for the unexpected.*** During trial, your witnesses are likely to do two things: omit certain facts to which you wanted them to testify, and forget or misstate other facts. While you can be sure this will happen, you cannot know when it will occur. Trial practitioners have suggested some techniques for handling these unexpected annoyances that require pretrial preparation. One suggestion is to work out a signal — a particular question you will ask when the witness has made a mistake. For example, ALAN MORRILL, TRIAL DIPLOMACY 37 (2d ed. 1972), suggests that you tell your witness you will use the question, "Is there anything else you can recall?" as a signal he or she has omitted something, and that you warn the witness always to answer that his or her memory is exhausted if the witness cannot figure out what was omitted. *But see* GARY BELLOW & BEA MOULTON, THE LAWYERING PROCESS 692 n.39 (1978): "It has been suggested that counsel should arrange ways of signaling to the witness that [something] has been omitted . . . [T]his strategy often only increases the anxiety that produced the . . . omission in the first place." To reduce anxiety, you should consider

telling your witness that you will help him or her out by asking leading questions if the witness becomes confused or forgets things.

Some practitioners also suggest that you have your witnesses prepare special written statements containing everything you want them to testify about, in the order in which you will proceed. These statements can be used conveniently to refresh recollection and will make it easy for the witnesses to find their places. Such a statement may be more effective than refreshing memory from a deposition because it is more compact, organized in the same order as direct examination, and contains little that can benefit your opponent if your adversary exercises the right to introduce it (unless the statement has been made too one-sided). *But cf.* ROBERT KEETON, TRIAL TACTICS AND METHODS 29–30 (2d ed. 1973) (providing witness with outline of direct examination has the disadvantage of interfering with spontaneity).

## § 6.05 CONDUCTING DIRECT EXAMINATION

### [A] PROCEDURE

The mode and order of direct examination is controlled by judicial discretion. Although you are generally free to conduct the examination any way you want, judges may impose time limits, regulate whether the witness may leave the witness box, or require you to conduct the examination from a seated position, or standing, or from behind a lectern.[49] Rule 611(a) of the Federal Rules of Evidence provides:

> The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

The advisory committee noted that spelling out detailed rules to govern every aspect of direct examination was neither desirable nor feasible. Nevertheless, direct examination is usually conducted according to these rules:

- The witness is seated and sworn by the bailiff.
- The attorney stands to conduct the direct examination, and may move around the courtroom, but may not approach near to the witness or jury without requesting permission from the court.
- Direct examination proceeds by question and answer. The attorney asks a question, and the witness answers it.
- If a party is represented by more than one attorney, only one may conduct the direct examination. That attorney must also do the redirect and make and respond to any objections during this witness's testimony.
- When you are though with direct examination, you inform the court that you have no further questions. Contrary to what you see on

[49] *Cf.* S.C. R. Civ. P. 43(h): "One counsel only for each party shall examine or cross-examine a witness. During direct examination in opening court, the examining counsel shall stand."

television, you do not say anything to the other attorney such as "Your witness."

## NOTE

***Moral support for witnesses.*** The usual procedure requires that the witness appear by herself. Occasionally, a critical witness who has been traumatized by a crime or other event may refuse or be unable to testify alone. A child may become terrified and freeze up; a rape victim may break down and be unable to continue. In such cases, may someone sit with the witness to calm her down so that the testimony can continue? The courts generally hold that a support person may be allowed if necessary, but there must be an individualized determination that no lesser alternative will work, such as a recess or clearing the courtroom of spectators. The support person must be as unobtrusive as possible so as not to appear to be endorsing the testimony. *See People v. Patten*, 12 Cal. Rptr. 2nd 284 (Ct. App. 1992) (family members preferred; rape counselors rarely allowed); *State v. Harrison*, 24 P.3d 936 (Utah 2001) (permissible for children, not adults); *State v. Torres*, 761 A.2d 766 (Ct. App. Conn. 2000) (after rape victim broke down and could not continue, her fiancé could sit next to her but outside the witness box); *State v. T.E.*, 775 A.2d 686 (Super. Ct. N.J. 2001) (support person may not speak, prompt the witness, disrupt the testimony, or influence the witness's answers).

## [B] FORM OF QUESTIONS

### [1] Leading Questions

Leading questions generally are prohibited during direct examination. Federal Rule of Evidence 611(c) provides:

> Leading questions should not be used on the direct examination of a witness except as may be necessary to develop the witness's testimony. . . .When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions.

There is no precise definition of what constitutes a leading question. Like obscenity, exactly when a question is leading is in the eye of the beholder, and different judges will rule differently In general, a question is leading if it suggests that particular words, phrases, or ideas constitute the correct answer. Leading questions usurp the witness's power to choose his or her own words and explanations. They are usually answerable by a simple "yes" or "no," and often contain the phrase, "Isn't it true that . . . ." The following examples may help:

1) **LEADING:** The man you saw that night is this man right here in the purple shirt, isn't it?[50]
**NOT LEADING:** Do you see the man you saw that night in the courtroom?

2) **LEADING:** Did you go to school with the man that murdered John Lewis?[51]

[50] *Williams v. State,* 733 N.E.2d 919, 923–24 (Ind. 2000).

[51] *Id.*

**NOT LEADING:** Do you know the man accused of murdering John Lewis?

3) **LEADING:** Isn't it true that the traffic light had just turned green?
**STILL LEADING:** Had the light just turned red?
**NOT LEADING:** What color was the light?

Even if a question is leading, that does not mean a judge will sustain an objection. The judge has discretion to allow leading questions if he or she thinks they will be effective in developing complete testimony. In general, leading questions are permitted in the following situations:[52]

- During cross-examination.
- When a witness displays hostility or evasiveness.
- During the direct examination of the adverse party or other witnesses closely aligned with the adverse party.
- When covering preliminary matters, such as a witness's background and the events leading up to the event in dispute.
- For laying evidentiary foundations.
- When asking about matters not in dispute.
- To direct a witness's attention to a time, place, or event.
- When examining witnesses who have difficulty giving testimony (e.g., young children).
- When inquiring into "delicate" (i.e., sexual) matters.
- In order to refresh a witness's memory.
- When asking a witness to confirm or deny a specific allegation or accusation.
- On redirect examination to save time.

### [2] Ambiguous, Unintelligible, and Vague Questions

You have an obligation to ask clear questions. If a question is incoherent, vague or ambiguous, and if it is likely to confuse the witness or jury, the judge can force you to rephrase the question in a clearer manner. For example, the following questions are unclear:

(1) "What happened in class today?" (ambiguous if the witness had more than one class).

(2) "If you had an opportunity to say something to the victim, what would you say?" (vague and too open-ended)[53]

### [3] Compound Questions

Compound or multiple questions contain two or more separate factual inquiries. They usually are objectionable because of the possibility of confusion concerning which part of the question is being answered.[54] For example:

[52] *See, e.g., State v. Wiggins,* 526 S.E.2d 207, 210 (Ct. App. N.C. 2000).

[53] *State v. Knowles*, 946 S.W.2d 791, 795 (Mo. App. 1997).

[54] *See Commonwealth v. Willis*, 552 A.2d 682, 688 n.3 (Pa. Super. 1988).

(1) "Did you type this letter and send it to Mr. Pratter in the usual way?"

(2) "Didn't you kill your wife with this gun and then arrange with your accomplice to hide the body in the closet?"

## NOTES

**1. *Leading on redirect.*** Whether a leading question may be asked during redirect examination is primarily a matter for the court's discretion. As in direct examination, leading questions that directly suggest the desired answers generally are improper; however, those used to bring a particular matter to the witness's attention or to make the need for explanation obvious often are allowed. Some judges use their discretion to permit leading questions during redirect examination to save time or to help a witness who has become genuinely confused. *See State v. Gomes*, 764 A.2d 125, 137 (R.I. 2001).

**2. *Leading adverse witnesses.*** Leading is generally permitted when examining adverse witnesses, including officers, agents, and directors of corporations. *See, e.g., Stauffer Chemical Co. v. Buckalew*, 456 So.2d 778 (Ala. 1984). Under Federal Rule of Evidence 611(c), you also may use cross-examination techniques when questioning witnesses identified with the adverse party, such as lower level employees or the insured in a direct action against the insurance company.

**3. *Leading hostile witnesses.*** A witness who is unfriendly or hostile may be asked leading questions. A witness is never presumed to be hostile, but must demonstrate actual hostility or unwillingness to testify before you can resort to cross-examination techniques such as leading questions. *See Smith v. State*, 533 S.E.2d 431, 432 (Ga. App. 2000) (witness refused to cooperate and denied an earlier statement).

## [C] FORM OF TESTIMONY

Although a witness is supposed to testify in his or her own words, proper examination must be in a question and answer format. The attorney, not the witness, is supposed to select the topics and guide the testimony. If a witness testifies in a long narrative, in which the witness controls the choice of subjects to be testified about, the risk that inadmissible testimony will be injected into the interrogation is increased. If this happens, the opposing attorney may object that the testimony is taking the form of an unguided narrative.[55] Usually, the judge will not sustain this objection unless the witness demonstrates an inability to confine himself or herself to relevant information. However, this is matter entirely in the judge's discretion. Some judges prefer specific questions because they afford the opposing counsel greater opportunity to object, and tend to keep the testimony of witnesses within the limits of the rules of evidence more than a narrative format. Other judges tend to permit narrative testimony if it is a reasonable way of eliciting testimony from a particular witness.

[55] *Newson v. State*, 721 N.E.2d 237, 239-40 (Ind. 1999).

## [D] HANDLING MISTAKES AND ERRORS BY THE WITNESS

### [1] Correcting Mistakes

If your witness says something by mistake that is not true, you must correct it. You cannot knowingly allow a misstatement of evidence to remain in the record, whether it is favorable or unfavorable.[56] The easiest way to do this is to step in immediately with a leading question:

Q: What happened next, Officer Davis?

A: I noticed that one of the suspect's taillights was not working, so I pulled him over . . . .

Q: Excuse me, are you sure it was the taillight? Could it have been one of his headlights that was burned out?

A: That's right. It was his headlight.

Leading questions may be used if "necessary to develop the witness's testimony," Fed. R. Evid. 611(c); and the court is supposed to exercise its discretion "so as to make the interrogation . . . effective for the ascertainment of the truth." Surely this is such a situation.

### [2] Refreshing recollection

Similar to a misstatement is an omission. The witness may simply forget parts of the direct testimony. Again, the simplest thing to do is to step in immediately with a leading question:

Q: What happened next, Officer Davis?

A: I noticed that, uh, there was something wrong with the car, so I pulled him over.

Q: Do you remember what was wrong with the car?

A: No.

Q: Could one of his headlights have been burned out?

A: That's right. He had a defective headlight.

During direct examination, it is proper to refresh the recollection of a witness whose memory of specific events proves to be insufficient. Most jurisdictions require a foundation that the witness cannot recall all the facts of an event or that the witness's memory is exhausted. You then can attempt to jog the witness's memory by any means. Leading questions may be used for this purpose,[57] and that is the best way to handle small lapses of memory.

More complicated memory lapses require a more cumbersome procedure — letting the witness examine a written document, deposition, police report, or other writing. Proper procedure consists of the following steps:[58]

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[56] *See Smith v. Kemp,* 715 F.2d 1459, 1463 (11th Cir. 1983) ("The state must affirmatively correct testimony of a witness who fraudulently testifies that he has not received a promise of leniency in exchange for his testimony.").

[57] *State v. Wiggins,* 526 SE2d 207, 210 (Ct. App. N.C. 2000).

[58] *See Thompson v. State,* 728 N.E.2d 155, 160 (Ind. 2000) (describing foundation and procedures).

- Establish that the witness's memory is exhausted
- Mark a document for identification
- Show the document to opposing counsel, or refer to it by page and line if it is a deposition
- Hand the document to the witness
- Ask the witness to read silently the specific portion of the document that covers the forgotten material
- Retrieve the document
- Asking the witness if his or her memory has been refreshed
- Continue the examination if the witness now remembers the information

A few jurisdictions permit you to refresh recollection only with writings prepared by the witness at or near the time of the event, but most follow the common-law rule permitting you to use any kind of writing: tax returns, police reports, summaries prepared for trial, depositions, and so forth. You can also use writings prepared by others to refresh memory, but you must be careful to establish that it is a matter about which the witness once had knowledge to avoid the appearance that you are simply giving the witness information.[59] It is generally improper to elicit any details about the document itself on direct examination unless it is independently admissible.[60]

### [3] Dealing with False Testimony and Perjury

Despite the good faith of an attorney, false testimony happens. When an attorney discovers that false evidence has been presented to the court, the attorney is required to take remedial action even though it is not the attorney's fault. Rule of Professional Conduct 3.3 (a)(4) states: "If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures."

Rule 3.3 does not say what form that remedial action must take, and there is some debate about it. The preferred remedies for false evidence discovered before trial — dissuasion and withdrawal — are technically available for false testimony at trial, but may not be realistic. The lawyer could ask for a recess, woodshed the witness, and seek to persuade him or her to withdraw the false evidence.[61] The only problem is that judges are not generally inclined to permit attorneys to interrupt their direct examinations in order to hold a quick coaching session with a witness on what to say next.[62] An attorney could also ask to withdraw in the middle of a trial, but it is inconceivable that a judge would permit it. It also would seem to violate Rule 1.16(b)'s prohibition against

[59] *See United States v. Weller,* 238 F.2d 1215, 1221–22 (10th Cir. 2001); *Germain v. State,* 769 A.2d 931 (Ct. App. Md. 2001).

[60] *See* Joseph Kalo, *Refreshing Recollection: Problems with Laying a Foundation*, 10 RUT.-CAM. L.J. 233, 233–38 (1979).

[61] This is the preferred remedy in A.B.A. COMM. ON ETHICS AND PROF. RESP. FORMAL OP. 353 (1987).

[62] *See Moore v. Purkett,* 275 F.3d 685 (8th Cir. 2001) (defendant not entitled to consult with attorney in the middle of his testimony).

withdrawal under conditions that would have a "material adverse effect" on the client.

The presumptive remedy would seem to be disclosure. Rule of Professional Conduct 3.3(a)(2) requires that a lawyer must "disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client." Perjury and presenting false evidence are criminal and fraudulent acts. Dissuasion and withdrawal are unlikely to be adequate, so the disclosure becomes "necessary." The commentary explains:

> [T]he rule generally recognized is that, if necessary to rectify the situation, an advocate must disclose the existence of the client's deception to the court or to the other party. Such a disclosure can result in grave consequences to the client, including not only a sense of betrayal but also loss of the case and perhaps a prosecution for perjury. But the alternative is that the lawyer cooperate in deceiving the court, thereby subverting the truth-finding process which the adversary system is designed to implement.[63]

Although the Commentary cautions that it "has been intensely debated" whether the requirement of remedial action applies in criminal cases,[64] it does not take the position that the requirement is in fact ethically debatable. To the contrary, the commentary rejects the suggestion "that the advocate be entirely excused from the duty to reveal the perjury if the perjury is that of the [criminal] client" because it would make the attorney a knowing instrument of perjury.[65] If dissuasion has not worked, "the advocate should make disclosure to the court."[66] The disclosure requirement is not optional; it is mandatory and applies in criminal cases as well as civil.[67]

## NOTE

***False Evidence.*** Some commentators have argued that despite the clear language in the Rules of Professional Conduct, a lawyer is *not* obligated to take remedial action if the false evidence came from the client. Several justifications are offered; none is persuasive. Taking remedial action would not violate the attorney-client privilege, because presenting false evidence is perjury, and the attorney-client privilege does not apply to crimes and frauds. JOHN W. STRONG, MCCORMICK ON EVIDENCE § 95 (5th ed. 1999). *See also* RESTATEMENT OF THE LAW OF LAWYERING § 82 (attorney-client privilege does not apply when a client uses the lawyer to engage in a crime or fraud.) Nor would it violate the requirement in Rule 1.6 that "a lawyer shall not reveal information relating to representation of a client unless the client consents," because the commentary says that the rule does not apply when the client engages in

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[63] Commentary to Rule 3.3., ¶ 6

[64] *E.g.*, Robert C. Horgan, *Making Black and White Out of Gray: An Attorney's Duty to Investigate Suspected Client Fraud*, 29 NEW ENG. L. REV. 795, 853–54 (1995) (disclosure undermines the trust between attorney and client, which is the "cornerstone of the adversary system and effective assistance of counsel," *citing Linton v. Perrini,* 656 F.2d 207, 212 (6th Cir. 1981).

[65] Comment to Rule 3.3, ¶¶ 7–9.

[66] *Id.*, at ¶ 11.

[67] *Id.* at ¶ 12. *See also Nix v. Whiteside,* 475 U.S. 157, 174 (1986) (a rule that "would require an attorney to remain silent while his client committed perjury, is wholly incompatible with the established standards of ethical conduct").

conduct such as perjury that is criminal or fraudulent. Monroe Freedman suggests that acting against a criminal client's wishes violates the right to counsel, LAWYERS' ETHICS IN AND ADVERSARY SYSTEM 29–30 (1975), but the Supreme Court has rejected this argument and ruled that defendants "have no "right" to insist on counsel's assistance or silence. *Nix v. Whiteside*, 475 U.S. 157, 172 (1986).

## [E] THE TACTICS OF CONDUCTING DIRECT EXAMINATION

### [1] Domination by Witness

The single most important principle of direct examination is to keep the jurors' attention focused on the witness. The attorney should fade into the background, doing as little as possible to distract the jury and letting the witness be the dominating presence during testimony. Your case depends on the jury seeing, hearing, remembering and believing your witnesses, not on whether they think you are a brilliant lawyer. Your job is to guide the witness and ask the questions. The extent to which you insert yourself into the direct examination will therefore depend on what kinds of questions you use.

### [2] Narrative vs. Fragmented Testimony

If the witness is going to dominate direct examination, it would seem that the witness must do most of the talking. To accomplish this, you should ask broad questions that allow the witness to tell the story in his or her own way, at least to the extent that long, narrative answers are allowed by the judge. Although there are tactical risks inherent in giving free rein to your witnesses — unresponsive answers, the inclusion of irrelevant matters, the omission of essential details, chronological confusion — the collective wisdom of trial practitioners is that spontaneous statements of the witness will carry more weight with the jury than answers that appear tailored to fit a lawyer's questions. The narrative of a witness is also likely to be more interesting and less boring than a monotonous repetition of narrow questions and short answers, the endless cadence of which has been described as dull torture, "not unlike being nibbled to death by ducks."[68]

While the preference for a narrative might seem intuitively obvious, it may be that there is little actual difference between it and a more controlled questioning style. When social scientists tested the effects of narrative and fragmented testimony in direct examination, they found only weak support for this principle. Occasionally narrative testimony was more effective than fragmented testimony, but often it appeared to make no difference. However, fragmented testimony was never significantly more effective than narrative.[69] It probably depends more on who your witness is — if a witness is comfortable doing most of the talking, you should let the witness do so. But if the witness is reluctant and responds better to specific questions (or if the judge requires them), don't panic! Using fragmented testimony appears to have little negative impact.

[68] JAMES JEANS, TRIAL ADVOCACY 326 (2d ed. 1993).

[69] Conley, O'Barr & Lind, *supra* note 38, at 1386–89.

### [3] Phrasing Questions

The way in which questions are asked can greatly affect whether the witness dominates direct examination. If you ask long, complicated, leading questions, you will end up doing most of the talking, and the jurors will have to pay more attention to you than to your witness. For this reason, trial practitioners long have recommended that you ask short, simple, positive questions:

- ***Ask only one question at a time,*** and not a question with several parts. Compound questions are sometimes hard to understand. Answers to compound questions are worse; they are likely to be incomplete, ambiguous, or both.
- ***Avoid negatives in the question,*** if possible. Consider this exchange:

  Q: You do not know whether Jones was there?

  A: Yes.

  Did the witness mean "Yes, I know," or "Yes, it is true that I do not know," or "Yes, Jones was there"?
- ***Make the question brief.*** Both the witness and the jurors must remember all of the question in order to understand it.
- ***Use simple words.*** Use words that are used in everyday conversation. You want all of the jurors to understand both the questions and the answers, and this requires words that the least educated among them will understand. This is not a recommendation for use of slang or bad grammar, however. That practice, unless it comes naturally, probably will be recognized and resented as talking down to the jury.
- ***Avoid leading questions.*** Not only might leading questions be objected to, which interrupts the flow of testimony and distracts the jurors from the witness, but also they severely limit the witness's answers. You end up testifying instead of the witness.

  Facts should come from the witness. It is, therefore, clumsy work to frame questions, even if allowed, so that the answers shall be a mere affirmative or negative. If, for instance, the advocate asks, "Did the accused kill the deceased by a pistol shot?" and the witness answers, "Yes," the testimony is not so effective as if the killing is described in detail.[70]

### [4] Controlling the Witness

Maintaining control over a direct examination may appear at first glance to be inconsistent with the goal of letting your witness dominate. Yet failure to keep the direct examination on its planned course can be disastrous. Witnesses given complete freedom may omit essential details, make inadvertent errors, wander off into irrelevant matters, or leave the jurors confused by ambiguous testimony. You must either reach a delicate balance, keeping witnesses on track without appearing to control them, or give up and resort

[70] Byron K. Elliott & William Elliott, the Work of the Advocate 273 (1888).

to the less effective technique of using narrow questions. The following suggestions might help.

### [a] Controlling the Content of Testimony

To make sure that your witnesses cover all important matters in sufficient detail, you must maintain control over the substance of their testimony. If your witnesses have been well prepared, most of their narrative answers will be adequate, so that you will not have to do anything. Inevitably, however, witnesses will give some answers that are incomplete, confusing, or wrong. In these situations, you must either let the answer stand or find some way to elicit better testimony.

It is axiomatic that you must hear a bad answer in order to do anything about it. Therefore, the first step in controlling the content of testimony is to be aware of exactly what your witnesses say. As surprising as it may seem, many trial lawyers simply do not listen to what the witnesses are saying. This may be caused by thinking about how to phrase the next question or by making the risky assumption that witnesses will say in court what they said in the office.

If a witness gives a bad answer, you must decide whether it is worth interrupting his or her testimony to remedy the situation. You pay a price for interrupting a witness in the middle of a narrative. One experiment indicated that jurors' opinions of the fairness and intelligence of the lawyer went down significantly if he or she interrupted a witness.[71] Interruption also may be interpreted as a lack of trust in your witness.

Nevertheless, interruption may sometimes be preferable to letting the testimony continue. If the witness begins crying and cannot continue, or begins to panic on the stand, you may have to stop the direct examination altogether and ask for a recess. If the witness gives incomplete or inadequate testimony, some trial practitioners argue that you must interrupt in order to amplify or clarify it. This is certainly sound advice if the witness is testifying about something important. However, if the witness omits an unimportant detail or testifies incorrectly on a tangential issue, the better course would seem to be to let it stand and move on to the important matters.

If you decide that it is necessary to amplify an incomplete answer, a number of techniques are available. You could go through the process of refreshing the witness's recollection with a document, but this is a cumbersome and distracting practice, better suited to major lapses of memory than to the forgetting of small details. It may be better to try asking narrow questions that direct the witness's attention to the omitted detail and, if this fails, to use a leading question. For example:

Q: What happened next?

A: The Explorer went through the red light at about thirty miles per hour and smashed into the Mercedes. I heard the sound of brakes only after the Explorer was in the intersection.

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[71] Conley, O'Barr & Lind, *supra* note 38, at 1390–92.

Q: Do you remember any pedestrians?

A: Oh yes, there was a person in the crosswalk who the Explorer missed by inches.

Q: Do you recall anything the driver of the Explorer had in his hands?

A: I'm not sure I remember.

Q: Did he have a cell phone in his hand?

A: Oh, yes, now I remember. The window was down, and he had a cell phone in his ear and was gesturing angrily and appeared to be shouting into it.

Occasionally, witnesses will get confused and inadvertently give incorrect testimony. This presents a particularly delicate problem. Any attempt to correct the misstatement may sound like coaching, yet correction may be essential.[72] One suggestion is to drop the matter and return to it later with a different, more leading approach, hoping the witness will give the right answer. The problem with this method is that the witness may repeat the same incorrect information. The same problem arises if you immediately ask the witness, "Are you sure about that answer?" hoping he or she will admit uncertainty so that you can refresh recollection. The witness is more likely to say that he or she is certain of the answer, making it even more difficult to extricate yourself from your predicament.

The solution is simply to confront the witness with the misstatement and suggest the correct answer:

Q: What happened next?

A: I saw the defendant run away from the store. He ran south to Kirkwood Street, turned west, and disappeared from sight.

Q: Don't you mean that he turned east, away from the downtown area?

A: Let's see. Yes, that would be east, not west. He ran to the east.

### [b] Controlling the Witness's Delivery

You can do little during trial to improve the manner in which your witnesses deliver their testimony. You must work with your witnesses during the preparation stage on their appearance, demeanor, and speaking style. However, you may be able to correct two common problems that occur during the presentation of testimony. If a witness is speaking too quietly, you can ask the witness to speak louder, or you can move farther away so that the witness will naturally speak louder. If you want a witness to look at the jury, you can employ similar tactics. You can phrase a question so that it asks the witness to "tell the jury" what happened, or you can position yourself at the far end of the jury box so that the witness will be looking at the jurors when he or she looks in your direction.[73]

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[72] ABA MODEL RULE OF PROFESSIONAL CONDUCT 3.3 (a) (4) states: "If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures."

[73] This position has been recommended by social psychologists. *See* Steven Penrod, et al., *The Implications of Social Psychological Research for Trial Practice Attorneys*, in PSYCHOLOGY AND LAW 442 (D. Muller et al., eds., 1984).

### [5] Manner and Style of Attorney

The most important thing to remember when conducting direct examination is to be unobtrusive and let the witness dominate. Some other common suggestions include:

- Manifest confidence and belief in the witness. Show the jury that you believe in the case you are presenting. Act like you care.
- Use a conversational tone of voice. Speak clearly and distinctly, using ordinary language. It probably is better to be too loud than too soft. The judge, witness, jurors, and court reporter have to be able to hear what you say.
- Let your voice reflect the emotional level of the examination. You probably should question a physician in a formal, professional manner, but when you examine an injured child, let your voice reflect your compassion and understanding.
- Do not try to suppress all human emotion. Laugh if something funny happens. If you win a difficult battle over an objection, allow yourself a quick smirk of triumph.
- Watch the witness, so you see what the jury is seeing. Watch for signs of nervousness or confusion. Be careful not to get distracted staring at your notes.
- Watch the judge. Look for signs of irritation or a raised eyebrow. You also need to watch for visibly negative reactions that could affect the jury, such as the judge shaking her head in disbelief.
- Watch the jury for their reactions. Are they attentive, bored, falling asleep? Have they begun to look at your witness like the witness has some loathsome disease?
- Keep an eye on opposing counsel. Some unethical attorneys may try to distract the jurors' attention away from the direct examination.

## NOTE

***Conducting the examination: standing or sitting?*** In some courts you may be required to conduct examinations while seated, while standing, or at a lectern. In other courts you have a choice. Many lawyers think that they are supposed to stand while examining witnesses, but there is no general rule requiring it. There are advantages to standing, of course — you can place yourself in a favorable position from which you can see the judge, jury, witness and opponent; you can handle exhibits smoothly; and you can easily change positions for emphasis or to make a witness speak louder. Conducting direct examination while seated also may have advantages. If you need extensive notes or will use many exhibits, and it would be awkward to carry them with you around the courtroom, you may want to remain seated where you can refer to notes less obtrusively. *See* LEONARD PACKEL, TRIAL PRACTICE FOR THE GENERAL PRACTITIONER 9–10 (1980).

One group of social psychologists, after reviewing the social science literature, cautiously suggests that you conduct direct examination in a standing

position from behind the corner of the jury box farthest from the witness. This helps reduce the possibility that your witness will be seen as lacking credibility because he or she is "shifty-eyed" (witness's gaze shifts between the jurors and the attorney asking questions). If you stand behind the jurors (or at least as close to behind the jury as the walls of the courtroom permit), a witness can gaze at both the jurors and you with only minimal shifting of eye contact. Steven Penrod, et al., *The Implications of Social Psychological Research for Trial Practice Attorneys*, in PSYCHOLOGY AND LAW 442 (D. Muller et al., eds., 1984). No matter where you stand, be sure of at least one thing: do not stand between the jury and a witness or exhibit where you might block the jurors' view.

## § 6.06 EXHIBITS AND DEMONSTRATIVE EVIDENCE

One picture is worth a thousand words. No where is this truer than in a courtroom. It often is easier and clearer to show something to the jury than to try to explain it in words alone. Also, an exhibit can be continual communication, remaining in front of the jury much longer than spoken words. Jurors may become distracted and miss important testimony, but it will be almost impossible for jurors not to see an exhibit passed to them. Some demonstrative evidence, such as photographs of injuries or a demonstration of what a witness means by "a threatening gesture," can convey information that may be impossible to communicate in words. Demonstrative evidence also tends to alleviate the boredom of hours of droning witnesses.

The preparation and use of demonstrative evidence is an essential part of the trial. Understanding demonstrative evidence requires that you learn three things:

- The customary procedure for handling all exhibits in a courtroom.
- The specific foundations that must be laid for each unique category of demonstrative evidence.
- The tactical considerations for effectively using exhibits in your trial.

### [A] GENERAL PROCEDURE FOR HANDLING EXHIBITS

The procedure for introducing exhibits varies from jurisdiction to jurisdiction. However, it is safe to say that most courts require something approximating the following steps:

- Mark each exhibit with the name of the party who will offer it and a unique letter or number for identification, e.g., Plaintiff's Exhibit 1. This is usually done by the attorneys before trial, but you also may request the clerk or court reporter to mark exhibits just before you use them. Every exhibit brought into the courtroom or handled by any attorney or witness must be identified.
- Establish the relevancy of the exhibit. Before you introduce a knife, elicit testimony that a knife was involved. Before you bring out a diagram of the accident scene, elicit testimony from a witness that an accident happened at that location.

- Lay the appropriate foundation through your witness, referring to the exhibit only by its identification mark. If you must hand the exhibit to the witness so the witness can examine it, you will need to ask the court's permission to approach the witness.
- Show the exhibit to opposing counsel or ask the court if opposing counsel would like to examine it.[74]
- Formally offer the exhibit into evidence, referring to it only by number or letter. For example, "Your Honor, we offer defendant's exhibit C into evidence."
- If appropriate, hand the exhibit to the bailiff (or directly to the judge) for the court to examine. You probably should in all cases ask the judge if he or she wishes to view it.
- The opposing lawyer may conduct a voir dire examination of the witness concerning foundation matters, and/or may make objections to the admission of the exhibit.
- The court rules on whether to admit or exclude the exhibit.
- If the exhibit is received into evidence, publish it to the jury. With simple documents and photographs, you can distribute copies to individual jurors.[75] Real evidence can be passed among them. In either case, you should request the court's permission to approach the jury. Large diagrams or charts can be placed where all jurors can see them. If anything about the exhibit needs to be explained, you must do so through witness testimony — you are not allowed to talk about the exhibit yourself at this time without explicit permission from the court.

## [B] FOUNDATIONS

Exhibits can be divided into five categories: real evidence, writings, illustrative exhibits, pedagogical exhibits, and silent witness evidence. Each has a separate foundation requirement — also called "authentication" — in which you must prove with witnesses that an exhibit is what you claim it to be. "Trial judges traditionally are given broad discretion to rule on the admissibility and use of exhibits.

### [1] Real Evidence

Real evidence consists of those objects that were actually involved in the event itself — the knife used in a homicide, the clothes the victim was wearing, and the defective tire that caused an accident. When you offer real evidence, you must lay the following foundation:[76]

- The exhibit is the actual item involved in the crime, event or incident.

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[74] *See State v. Taylor,* 733 So. 2d 77, 81 (La. App. 1999).

[75] *See Nugent v. Owens-Corning Fiberglas, Inc.,* 925 S.W.2d 925, 931 (Mo. App. 1996) (discretionary).

[76] *See Van Hattem v. K-Mart Corp.,* 719 N.E.2d 212, 223–24 (App. Ct. Ill. 1999)

- The exhibit is still in the same condition as it was at the time of the incident in all material ways.

You may prove this foundation in either of two ways: direct evidence or circumstantial evidence. If the offered exhibit is unique, readily identifiable, and relatively impervious to change, the foundation may be laid by direct evidence. A witness who remembers seeing the item either at the scene of the crime or in the possession of one of the main actors, may testify that the exhibit now offered is in fact the same one in the same condition.[77] For example, a gun with a serial number is unique and readily identifiable, so a police officer may lay the foundation by direct evidence as follows:

Q: What happened next?

A: I chased the defendant down an alley, caught him, placed him under arrest and handcuffed him.

Q: What did you do next?

A: I searched him and found a semi-automatic pistol in his jacket pocket.

Q: Do you recall the type of gun?

A: Yes, it was a Smith and Wesson forty-four caliber.

Q: Would you recognize that gun if you saw it again?

A: Yes, by its serial number, AP 45562 T.

ATTORNEY: May I approach the witness?

COURT: Yes.

Q: Handing you state's exhibit six, do you recognize this?

A: Yes. This is the handgun I recovered from the defendant. It is a Smith and Wesson, and here is the serial number, AP 45562 T.[78]

Q: Has this exhibit changed in any way since you removed it from the defendant?

A: No, except that the clip has been removed.

If the offered evidence is not readily identifiable, because many similar such items exist, or because the item is susceptible to tampering or contamination, you must lay a circumstantial evidence foundation known as a "chain of custody." The chain of custody traces what has happened to the item since it was originally recovered, so that it appears reasonably certain that the original item has not been contaminated or tampered with.[79] In a chain of custody, each person who had possession of the item testifies where it came from, that it was kept safely, and to whom it was eventually given. Drugs seized during an arrest are a good example of the kind of fungible item that requires a chain of custody.

Q: What happened next?

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[77] E.g., *State v. Nelson,* 953 P.2d 650, 657 (Id. 1998).

[78] If the witness cannot remember the unique serial number, you may refresh the witness's recollection.

[79] *See Dachlett v. State,* 40 P.3d 110, 114–15 (Id. 2002).

A: I chased the defendant down an alley, caught him, placed him under arrest and handcuffed him.

Q: What did you do next?

A: I searched him and found a plastic bag of white powder in his jacket pocket.

Q: What did you do with this powder?

A: I placed it inside a plastic evidence bag and sealed it to protect the powder from contamination. I took the defendant to the police station for booking, and then delivered the powder to the police laboratory at around 3:00 pm on September 7th.

Q: While it was in your possession, did you tamper with it or alter it in any way?

A: No.

Q: To whom did you deliver it?

A: To Heidi Kendall-Sage, a police chemist.

Q: No further questions. We call Heidi Kendall-Sage [Witness is sworn]. Dr. Kendall-Sage, were you on duty at 3:00 pm on September seventh?

A: Yes.

Q: Did you see Officer Cook?

A: Yes. He gave me a sealed evidence envelope containing a white powder.

Q: What happened to it?

A: I locked it in the drug cabinet until I had time to test it the next day. On September 8, I broke the seal, removed a small amount of the powder, and resealed the bag. I tested the powder and discovered that it contained cocaine.

Q: While the bag was in your possession, did you tamper with it or alter it in any way?

A: No.

Q: While the bag was open in your laboratory, could other substances have gotten mixed in with it?

A: No, I was very careful.

Q: To whom did you deliver the bag?

A: I delivered the bag to Detective Yolanda Riley on September fourteenth.

Q: No further questions. We call Yolanda Riley [Witness is sworn]. Detective Riley, were you on duty on September fourteenth?

A: Yes.

Q: Did you see Dr. Kendall-Sage that day?

A: Yes. She gave me a sealed evidence envelope containing a white powder.

Q: What happened to it?

A: I logged it into the evidence room at the police station. As far as I know, it just sat there for six months until today, when I retrieved it to bring it to the trial.

Q: Was it still sealed when you picked it up?

A: Yes.

Q: Did it appear to have been tampered with in any way?

A: No. It's unlikely, because the evidence room is always locked and there is always an officer on duty there, and only command officers have direct access to it.

Q: Would you be able to recognize it if I showed it to you?

A: Yes. It would have my initials on it

ATTORNEY: May I approach the witness?

COURT: Yes.

Q: Handing you what has been marked as state's exhibit seven, do you recognize it?

A: Yes. This is the bag of powder I was referring to.

If the chain of custody has been broken, or there are gaps in it, the exhibit may still be admissible. There is a presumption that evidence in the custody or responsible institutions, such as hospitals, police departments, and chemistry labs, has been regularly and properly handled and that small gaps in the chain have not resulted in alteration.[80]

Real evidence also must be relevant, but no higher standard of probativeness is required for an exhibit than for testimony. If an item of real evidence tends to prove any issue, it is relevant. There is a common misapprehension that an exhibit must be connected to one of the parties to be admissible. The law is otherwise.[81] For example, a gun found at the scene of a robbery is admissible to help prove that the crime was *armed* robbery, whether or not it can be connected to the defendant.

### [2] Writings

Written documents require the following foundation:

- The document must be authenticated by proving who wrote or created it.
- The document must satisfy the original document rule.
- The document must satisfy the hearsay rule.

The authentication requirement can be satisfied in two ways. Public and official documents are generally *self-authenticating.* Under Federal Rule of Evidence 902, a public document automatically satisfies the authentication

[80] *See Dachlett v. State,* 40 P.3d 110, 114 (Id. 2002); *Wrinkles v. State,* 690 N.E.2d 1156 (Ind. 1997).

[81] *See, e.g.*, *Malone v. State,* 700 N.E.2d 780, 782 (Ind. 1998) (real evidence need only constitute a small but legitimate link in a chain of evidence connecting the defendant to the crime).

requirement if an appropriate government official certifies in writing on the face of the document that it is true, accurate, and genuine. No additional evidence of who wrote or created the document is needed. In many jurisdictions, business records are also self-authenticating if they are accompanied by an affidavit of authenticity from the records custodian.

To authenticate most private writings, however, you usually must call a witness to establish the genuineness of the document. Federal Rule of Evidence 901(b) contains four commonly accepted ways of accomplishing this.

> (1) ***Testimony of witness with knowledge***. Testimony that a matter is what it is claimed to be.
>
> (2) ***Nonexpert opinion on handwriting***. Nonexpert opinion as to the genuineness of handwriting, based upon familiarity not acquired for purposes of the litigation.
>
> (3) ***Comparison by trier or expert witness***. Comparison by the trier of fact or by expert witnesses with specimens which have been authenticated.
>
> (4) ***Distinctive characteristics and the like***. Appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances.

If the exhibit is signed, you can prove its authenticity by calling the witness who actually signed it or another witness who recognizes the signature. Handwriting experts are sometimes used to compare a questioned document to a handwriting sample (called an "exemplar") known to come from a particular person, or the jury can do this comparison itself. If the document is unsigned, its authenticity must be proved by circumstantial evidence based on its contents or other distinctive characteristics. The most common example is a reply letter that contains references to an original letter or telephone call, indicating that the author of the reply letter was the person to whom the first communication was directed.[82]

A writing also must satisfy the original document rule. This does *not* mean it must be the original. The original document rule (sometimes called the "best evidence rule") only requires the original writing to be produced when its terms are material; even then, you do not have to produce the original if it is unavailable. The Federal Rules of Evidence are typical:

> ***Rule 1002. Requirement of Original.*** To prove the content of a writing . . . the original writing . . . is required, except as otherwise provided in these rules or by Act of Congress.
>
> ***Rule 1003. Admissibility of Duplicates.*** A duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original.
>
> ***Rule 1004. Admissibility of Other Evidence of Contents.*** The original is not required if:

[82] *See* Cal. Evid. Code § 1420.

(1) *Originals lost or destroyed*. All originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith; or

(2) *Original not obtainable*. No original can be obtained by any available judicial process or procedure; or

(3) *Original in possession of opponent*. At a time when an original was under the control of the party against whom offered, that party was put on notice, by the pleadings or otherwise, that the contents would be a subject of proof at the hearing, and that party does not produce the original at the hearing; or

(4) *Collateral matters*. The writing, recording, or photograph is not closely related to a controlling issue.

***Rule 1005. Public Records.*** The contents of an official record . . . if otherwise admissible, may be proved by copy, certified as correct in accordance with rule 902 or testified to be correct by a witness who has compared it with the original. If a copy which complies with the foregoing cannot be obtained by the exercise of reasonable diligence, then other evidence of the contents may be given.

***Rule 1006. Summaries.*** The contents of voluminous writings . . . which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at reasonable time and place. The court may order that they be produced in court.

Writings, like real evidence, must also be shown to be free from tampering. They must be the same in all material ways as when they were involved in the transaction. To satisfy this rule, the document must be free from alterations on its face, but otherwise carries a presumption that it has not been altered unless the opponent raises legitimate questions of its accuracy. A typical foundation for a written document sounds like this:

Q: What happened next, Ms. Oldham?

A: I got a call to pick up a fare at the Hillcrest Nursing Home. I started the cab and entered the time into my trip log.

Q: What happened to that log?

A: I brought it with me to court today.

ATTORNEY: May I approach the witness?

COURT. Yes.

Q: Handing you state's exhibit five for identification, do you recognize it?

A: Yes. That's my trip log from March 12th of this year.

Q: Whose handwriting is this?

A: My own.

Q: Whose initials are at the bottom of the page?

A: Mine — "K.E.O."

Q: Is this the original page from your logbook?

A: Yes.

Q: Have any changes or alterations been made on it?

A: No.

Q: Is keeping this logbook a regular part of your job as a taxicab driver?

A: Yes. The Yellow Cab Company provides the forms and all drivers must fill them out every time we get a call to pick up a passenger.

Q: Do you make these entries at or near the time of the event from your own personal knowledge?

A: Yes.

Q: Your honor, we move state's exhibit five into evidence as a business record.

For computer records, which are easily altered, particular attention must be paid to that part of the foundation:

Q: Where are these records normally kept?

A: In our computer file server. They are electronic.

Q: Could someone have altered them?

A: In this case, no. We keep a taped back-up of our file server that is prepared every Friday. The tapes are dated and stored. I went back and pulled the tape for the week of September 16, when the record was made. I printed out the back-up copy and compared it to the print-out I brought today. They were identical, so no changes had been made.

### [3] Illustrative Evidence

Exhibits that played no direct role in the transaction, but are offered to illustrate a witness's testimony and make the evidence more comprehensible to the jury, are commonly known as illustrative exhibits. These are the visual aids of the trial: maps, charts, diagrams, scale models, photographs, movies, and similar items used to help illustrate how events occurred and what things looked like. The specific identity or source of an illustrative exhibit is irrelevant. For example, it makes no difference whether you use a diagram drawn by the witness or one prepared by a surveyor. The only foundation requirements are:

- The exhibit is a fair and accurate depiction of something a witness observed. The true accuracy of the exhibit is seldom pertinent; what is important is that it depicts things the way the particular witness remembers them.[83]

[83] See *Smith v. Ohio Oil Co.,* 134 N.E.2d 526 (Ill. App. 1956) (the inaccuracy of an exhibit is not grounds for objection unless it is so inaccurate that it is misleading and therefore not helpful). Cf. *Henson v. Bd. of Ed.,* 948 S.W.2d 202, 208 (Mo. Ct. App. 1997) (reasonable assurance that illustrative object is same in all significant respects as original).

- The judge believes that the use of the exhibit will be helpful to the jury in understanding that witness's testimony.[84]

The foundation for an illustrative exhibit requires that you prove it is an accurate *depiction from the witness's perspective,* not that it is objectively accurate. Because two witnesses may have perceived an event differently, a diagram that appears accurate to one witness may appear inaccurate to another. Therefore, if you use a diagram or scale model of the accident scene, you should lay the foundation separately for each witness who wishes to use it. Each witness must verify that the exhibit accurately depicts his or her recollection before using it.[85] For example:

Q: What happened next?

A: I arrived at the intersection of Fifth and Walnut Streets.

Q: Are you familiar with that intersection?

A: Sure. I drive that way to and from work almost every day.

Q: Do you remember what it looked like on April 3rd?

A: Yes.

Q: Can you describe it?

A: Sure. Fifth Street is two lanes each way going east-west. Walnut is three lanes and is one-way south. There is parking on both sides.

Q: Would it help you if we could refer to a diagram of that intersection?

A: Yes.

ATTORNEY: May I approach the witness?

COURT: Yes.

Q: Handing you plaintiff's exhibit three for identification, is this a fair and accurate diagram of that intersection as it appeared to you on April 3rd?

A: Yes it is.

Q: Your honor, we move into evidence plaintiff's exhibit three as an illustrative exhibit.

Photographs present some unique problems and must be distinguished from other kinds of illustrative evidence. Jurors are likely to assume that a photograph is correct, even to the minute details recorded. They may forget that it is offered only as a general representation — a mistake they are not likely to make with a diagram. A photograph, because of its ability to record detail, also carries a higher potential for being dramatic and emotional than other kinds of exhibits. Two considerations follow from these differences: gruesome or dramatic photographs are more likely to be excluded because of their prejudicial effect,[86] and the judge may require a stricter foundation on

[84] *See, e.g.*, *State v. Cowans,* 717 N.E.2d 298, 308 (Ohio 1999).

[85] *E.g.*, *Beckett v. Monroe,* 548 S.E.2d 131, 133 (Ct. App. Ga. 2001) (does not matter who prepared diagram).

[86] *See Cornelius v. Macon-Bibb Co. Hosp. Auth.,* 533 S.E.2d 420, 426–27 (Ct. App. Ga. 2000). However, the court has broad discretion to admit gruesome photographs that are relevant. See *Robinson v. State,* 693 N.E.2d 548 (Ind. 1998); *State v. Morales,* 587 P.2d 236 (Az. 1978).

the accuracy of a photograph before admitting it, especially one taken several months after the actual event.[87]

### [4] Pedagogical Exhibits

A pedigogical exhibit is similar to an illustrative exhibit, except that it summarizes or clarifies testimony or other evidence, rather than the actual events themselves. It may be created during testimony or in advance, by either the attorney or a witness. If the exhibit summarizes voluminous documents fairly, it is admissible under Fed. R. Evid. 1006 as a summary of exhibits that cannot conveniently be examined in court because there are so many of them. If the exhibit summarizes the testimony of one or more key witnesses, however, it is not admissible, because it is more akin to argument than evidence. Nevertheless, at the discretion of the trial judge, a chart summarizing key testimony may be created in front of the jury during witness examination if the judge believes doing so will "make the presentation effective for the ascertainment of the truth." Fed. R. Evid. 611(a). Pedagogical charts will be often have captions and organizational devices that are partisan and designed to aid closing argument. These charts do not generally go to the jury room, but the judge has discretion to send them if they are an accurate and reliable summary of testimony and will assist the jury in understanding the evidence.[88] Not all courts permit the creation and use of pedagogical exhibits, especially if they merely summarize clearly understandable testimony, and serve only to emphasize certain testimony taken out of context.[89]

### [5] Silent Witness Exhibits

The fifth kind of exhibit is the "silent witness." These are photographs, videotapes, bank surveillance pictures, and other recordings of the actual events as they happened. These exhibits do not merely illustrate a witness's testimony, but act like witnesses themselves, giving the jury a first-hand account of what transpired.

The foundation can be laid in two ways. If a witness with personal knowledge is available to describe the events depicted in a photograph, the witness can verify that the photograph accurately and fairly captures the events depicted. The foundation is the same as for an illustrative exhibit.[90]

But what happens if no witness can verify that the photograph is an accurate representation of events? For example, a bank robbery that was recorded by automatic cameras can take place in the absence of eyewitnesses. If no human witness is available to verify the accuracy of the photograph, you must find some other means for establishing a likelihood that the contents of the photographs are accurate and unaltered.[91] One common procedure is to call an expert witness who can establish that the process involved in recording and reproducing an image is likely to produce undistorted results,

[87] *See Gorman v. Hunt,* 19 S.W.2d 662, 665–66 (Ky. 2000).

[88] *United States v. Bray,* 139 F.3d 1104, 1111–12 (6th Cir. 1998).

[89] *People v. Williams,* 641 N.E.2d 296, 325 (Ill. 1994).

[90] *Dept. of Pub. Safety v. Cole,* 672 A.2d 1115, 1119 (Ct. App. Md. 1996).

[91] *Id.* at 1120–23 (thorough discussion).

but an expert is not required. A lay witness who set up the camera can testify that it was in good working order, that it was properly loaded with film, and that the film was properly handled and developed. If a computer was used to process a digital image, there must be testimony that the image was not manipulated or altered.

There is no simple accepted set of foundation requirements for all silent witness exhibits.[92] Instead, you must convince the court of the probable accuracy and authenticity of your exhibit by "describing [the] process or system used to produce [the] result and showing that the process or system produces an accurate result." Fed.R.Evid. 901. Such a foundation might sound like this:

Q: What happened next, Detective?

A: After planting the microphone in the defendant's apartment, I returned to the vacant apartment down the hall to run a sound test. My partner walked around the defendant's apartment speaking out loud, and I turned on the tape recorder. We made a sample tape and then listened to it. Everything was working fine; I could hear my partner's voice loud and clear.

Q: Have you used this equipment before?

A: Oh sure. It's our standard recording equipment we use on all our electronic surveillance.

Q: Have you ever had any trouble with it?

A: No.

Q: What did you do next?

A: Turned on the machine and left the premises. Next day we returned and picked up the tape.

Q: Did it appear that anyone had tampered with the recording equipment overnight?

A: No.

Q: What did you do with the tape?

A: Took it back to the station and listened to it. I found a two-minute conversation between two males recorded at approximately 2:15 a.m.

Q: Did you recognize either voice?

A: Yes, one was the defendant's voice. The other voice was unknown to me.

Q: During that conversation, did either person say anything about drugs?

A: Yes.

Q: Officer, have you brought that tape with you?

[92] A variety of approaches are summarized in *State v. Pulphus,* 465 A.2d 153 (R.I. 1983), and 41 A.L.R.4th 812.

A: Yes.

ATTORNEY: May I approach the witness?

COURT: Yes.

Q: Handing you state's exhibit two for identification, is this the tape you have been referring to?

A: Yes.

Q: Is it still in the same condition as the night it was made?

A: Yes.

Q: No alterations, erasures, or changes of any kind?

A: None.

Q: I move state's exhibit two into evidence.

## [C] USING EXHIBITS IN YOUR DIRECT EXAMINATION

### [1] Whether to Use an Exhibit

Using exhibits is almost always a good idea. They convey details that are hard to verbalize. They draw and hold the jurors' attention. They are easily remembered. If they are sent to the jury room, they constitute reminders of your key evidence throughout deliberations. Exhibits can also be useful for reasons completely apart from their content, but related to the witnesses who uses them. For example, a plaintiff with crippling injuries can make a dramatic impression on the jury as he or she struggles out of the witness chair in order to mark locations on a chart. An expert who stands up and uses the blackboard may appear more knowledgeable than one who testifies sitting down.

There are some situations in which you must be careful about using exhibits. Too many exhibits can bog down a direct examination. Exhibits may even be inappropriate for a particular witness. For example, if you represent a defendant who claims to have killed someone in the heat of passion, you probably should not ask your client to calmly reconstruct minute details of the event on a diagram.

### [2] Using a Diagram

Diagrams and other illustrative exhibits are used with the expectation that they will make a witness's testimony more easily understood. To accomplish this, you should:

- Make sure the exhibit is large enough to be seen.
- Make sure neither you nor the witness blocks the jurors' view of the diagram.
- If possible, go to the courtroom in which your case will be tried with the witness, and practice. Have someone sit in the jury box and make sure the use of the diagram is visible and understandable.

You also have another audience: the court of appeals. The use of illustrative exhibits can have a deleterious effect on the appellate judges' ability to understand the evidence. All too often, the trial transcript will read like this:

Q: Using this diagram, tell the jury what happened next?

A: I parked my car here and walked over here. Just then I saw a person get out of a small truck.

Q: Who was this person?

A: That man, sitting over there.

Q: What happened next?

A: He walked over to a car parked here and then to a car parked here. I heard gunshots and ducked behind a car over here. I looked out and saw him fall to the ground, and another man run off in this direction.

Obviously, the court of appeals has no way of figuring out what actually happened, which will make their review of the factual record difficult. Yet you obviously cannot conduct a direct examination that sounds like this:

Q: Using this diagram, tell the jury what happened next?

A: I parked my car here.

ATTORNEY: Let the record reflect that the witness has pointed out a location on the upper left corner of exhibit six, between what is marked as Sixth Street and what is marked as Kirkwood Avenue, on the left side of what is marked as Walnut Street. Continue, please.

WITNESS: Well, then I walked over here.

ATTORNEY: Let the record reflect that the witness has indicated a path in a southwesterly direction representing approximately three inches on exhibit six, beginning at a point on the upper left corner of exhibit six, between what is marked as Sixth Street and what is marked as Kirkwood Avenue, on the left side of what is marked as Walnut Street, and ending at a point on the right side of Walnut Street in front of a location marked as The Book Corner. What happened next?

WITNESS: I saw a person get out of a small truck parked here.

ATTORNEY: Let the record reflect the witness has indicated a point in the approximate center of exhibit six, on the south side of what is marked as Kirkwood Avenue . . . .

By now the jury has fallen asleep.

You need to use a diagram in a way that is understandable both to the jury and to the court of appeals. Two methods are available for these combined purposes: having the witness make marks on the diagram to indicate locations, and having the witness give adequate descriptions in words other than "here" and "there." Both are illustrated in the following example.

Q: Using this diagram, tell the jury what happened next?

A: I parked my car here.

Q: On Walnut Street in front of the Book Corner?

A: Yes.

Q: What happened next?

A: I walked to the corner to cross the street.

Q: Using this red marker, will you write your last name where you were standing?

A: Sure. It was right here.

Q: What did you see?

A: I saw a person get out of a small truck parked here.

Q: Will you mark that place with the word "truck."

A: Sure.

Q: Who was this person?

A: That man, sitting over there.

Q: The plaintiff, Adam Mildred?

A: Yes.

Q: What happened next?

A: He walked over to a car parked here and then to a car parked here.

Q: Will you draw his path on the diagram with a dotted line?

A: Sure.

Q: What happened next?

A: I heard gunshots. I ran and ducked behind a mail box right about here. It was all I could find to hide behind.

Q: Will you mark that with the word "mailbox"?

A: Sure.

Q: What happened next?

A: I looked out and saw the plaintiff . . . .

Another technique is to let the witness testify to an entire episode, and then go back over it using a diagram. This has two advantages: you get to repeat important testimony two or three times, and you get to choose which parts of the narrative to emphasize and which to omit. It is not necessary to clarify every use of a "here" or "there" by a witness. It also has a potential disadvantage of jumbling chronological order. Such a technique works like this:

Q: Using this diagram, tell the jury what happened next?

A: I parked my car here and walked to the corner over here. Just then I saw a person get out of a small truck and walk over to a car parked here. I heard gunshots and ducked behind a mailbox right about here. When I looked up, the man was slumping to the ground.

Q: Please put your initials on the diagram where you were standing when you heard the gunshots.

A: Okay.

Q: Please place a "P" on the diagram to show where the plaintiff was when he fell to the ground.

A: Okay.

Note that the attorney did not bother to have the record reflect where the witness initially parked the car. The matter is unimportant, either to the jury or to the court of appeals.

### [3] Communicating Contents of Exhibits to the Jury

For many kinds of exhibits, it is easy to make sure the contents and details are communicated to the jury. Large diagrams can be seen at a distance; most real evidence can be passed around the jury box. For other exhibits, such as multi-page documents, small photographs, and dangerous weapons, it is more difficult to devise an adequate way to make sure all jurors get a good look at them. Any document or small exhibit could be just passed around the jury, of course, but this is a time-consuming process. For example, if a four-page document is introduced that takes five minutes to read, it will take an hour for one copy to circulate among twelve jurors. If you resume testimony during this hour, then the jurors become distracted — each juror must decide whether to read the document or listen to the witness. You obviously would like them to do both, but the judge is not likely to let you suspend direct examination for an hour, nor would this be a good tactic, since each juror would have to sit there doing nothing for fifty-five minutes while other jurors read the document.

Trial practitioners suggest a number of methods for effectively communicating the contents of an exhibit to the jury. Every photo-finishing store can turn photographs into slides that can be projected large enough for all to see. Copy stores can easily make poster-size enlargements of almost anything. You can make a dozen copies of photographs or simple documents so that each juror (and the judge) has one. Documents and diagrams can be made into transparencies and shown on an overhead projector. For short documents, one alternative is to ask a witness to read it to the jury. For this to be effective, it must be appropriate for the witness to read it, as in the case of a witness who wrote or received a document, and the witness should have a good speaking voice.

The need for an effective method of communicating the contents of an exhibit is especially strong in the case of complicated documents. You could use any of the techniques just discussed, but this can still be an unsatisfactory solution when you only want to emphasize one paragraph of a twenty-page commercial lease agreement. One solution is to introduce the whole document into evidence, but read only the portions you need. This procedure usually is permitted, although your opponent may have the right to compel you to read other relevant excerpts at the same time to prevent you from taking sections out of context.[93] You also may be able to enlarge just the one paragraph you consider important and display it on an easel. If you have any doubts about the propriety of a method you want to use to communicate an exhibit to the jury, check with the trial judge before trial. If the judge will not let you do it your way, you still will have time to prepare to do it the judge's way.

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[93] *See* Fed. R. Evid. 106.

## NOTES

**1. *Suggestions on types of demonstrative evidence.*** An excellent discussion of a variety of kinds of exhibits, with illustrations, can be found in JOAN M. BROVINS & THOMAS OEHMKE, THE TRIAL PRACTICE GUIDE 165–94 (1992). For innovative suggestions concerning demonstrative evidence, *see* Roger J. Dodd, *Innovative Techniques: Parlor Tricks for the Courtroom*, TRIAL at 38 (April 1990).

**2. *Using leading questions to lay foundations.*** It is proper in most jurisdictions to use leading questions to lay foundations. Nevertheless, some lawyers suggest that you use open-ended questions such as "Do you recognize this exhibit? What is it?" Even if well prepped, a witness is unlikely to use the proper words of art to lay a foundation without some prompting from you. If the judge permits it, it is more efficient (and will result in less confusion) for you to guide the witness through the foundation with leading questions.

**3. *Examples of demonstrative evidence foundations.*** For sample transcripts showing how to lay foundations for demonstrative evidence, *see* Jersey M. Green, *Demonstrative Trial Technique: The Introduction of Illustrative Exhibits*, TRIAL DIPLOMACY J., Summer 1991, at 65; EDWARD J. IMWINKELRIED, EVIDENTIARY FOUNDATIONS 37–81 (2d ed. 1989).

**4. *Inaccuracies and dissimilarities.*** Illustrative exhibits such as drawings or photographs of the scene of an accident can never be 100% accurate. No demonstration or experiment will exactly duplicate the conditions that existed at the time of an event. Does this matter? The contemporary view is that inaccuracies and dissimilarities affect weight, not admissibility. As long as the problems are clearly pointed out to the jury, the demonstrative evidence will be admissible. *See Allen v. State*, 686 N.E.2d 760 (Ind. 1997). Courts have broad discretion in this regard. Mark Dombroff suggests that you may be able to object to photographs as misleading if they appear accurate but: a) the distances are exaggerated or foreshortened by the use of telephoto or wide-angle lenses; b) important landmarks have been omitted because of the way the photograph was framed or cropped; c) it has been printed reversing left and right; or d) it has been over-or under-exposed, distorting the light or color. DOMBROFF ON UNFAIR TACTICS 486–88 (2d ed. 1988).

**5. *Showing exhibit to opponent.*** This is a tricky procedure. You must remember that you are in open court and on the record. While court is in session, you are not supposed to make any remarks directly to your adversary. It is at least technically improper to turn to your opponent and ask, "Marva, do you want to examine this?" It is both improper and may irritate the jurors or the judge for you to walk over to the other counsel table and engage in a whispered conversation about the exhibit. We recommend that in general, you say nothing. The record does *not* need to reflect that you have handed an exhibit to your adversary. If you feel the overwhelming need to make some remark, consider something along these lines: "Your Honor, may I show this exhibit to Ms. Leonard?"

**6. *Disclosing contents of exhibit before it has been admitted.*** It is improper during the evidentiary phase of trial for you to show the jurors an exhibit or mention its contents before it is formally admitted. To do so would

be to communicate evidence to the jurors that has not been properly introduced. JAMES MCELHANEY, STEPS IN INTRODUCING EXHIBITS, LITIGATION, Winter 1975, at 55. Therefore, you must refer to exhibits by their numbers or letters and not by a description of them. For example, you should say "Handing you plaintiff's exhibit three, do you recognize it?" rather than "Handing you a copy of the lease, do you recognize it?" When exhibits are large and obvious, you probably cannot introduce it without prematurely displaying it to the jurors. If you successfully move it into evidence, of course, any error in disclosing it prematurely will be cured. If your exhibit is excluded, however, a mistrial may be required if the jury has seen it. Melvin Belli suggests that such an exhibit should not be brought into the courtroom at all without first obtaining the court's permission, and if brought in, should be covered or kept in a container. MODERN TRIALS, vol. 2: 941–42 (1954). Assuming you are confident it will be received, this tactic also heightens the jurors' interest.

**7. *Exhibits in the jury room.*** Despite popular myths about jurors examining exhibits during deliberations, not all jurisdictions permit exhibits to go to the jury. Most exclude depositions and other testimonial substitutes. *E.g.*, Minn. R. Crim. P. 26.03 (19). Some allow real evidence and writings but exclude purely illustrative exhibits. *See United States v. Soulard*, 730 F.2d 1292 (9th Cir. 1984). Some leave to the court's discretion which exhibits are sent to the jury. *See* ABA STANDARDS FOR CRIMINAL JUSTICE 15-4.1 (2d ed. 1980). In some courts, no exhibits go to the jury unless consented to by all parties. *Bass v. Johnson*, 560 S.E.2d 841, 848 (N.C. App. 2002).

**8. *Objections to exhibits.*** Apart from the usual substantive objections (*e.g.*, relevance, hearsay) and objections that the full foundation has not been laid, some special objections can be made to exhibits. If an illustrative exhibit is an incorrect representation, it can be objected to on grounds that it distorts facts, exaggerates an injury, or is otherwise misleading or confusing. The mere fact that an exhibit is not absolutely correct (not to scale, containing identifying marks, retouched or posed photographs) does not make it objectionable unless it is also misleading. Gruesome or indecent exhibits (bloody clothing, photographs of corpses, obscene movies) can be objected to on the grounds that they will unduly arouse or inflame the emotions of the jury or have some other articulable prejudicial effect. *See* Fed. R. Evid. 403. An objection on the sole ground that an exhibit is inflammatory, cumulative, gruesome, or indecent is rarely successful, however. An increasing number of jurisdictions require you to raise objections to exhibits before trial in civil cases or risk waiver. *See* Fed. R. Civ. P. 26 (a)(3)(c).

## § 6.07 DEMONSTRATIONS AND EXPERIMENTS

Demonstrations and experiments are closely related to exhibits. They create similar visual evidence for the jury, and can act in similar ways to emphasize and repeat important evidence. Unlike an exhibit, however, these procedures are done "live" in the jury's presence. You can rehearse, but you cannot prepare them in advance. They may not come out the way you planned!

Whether to allow a witness to demonstrate something to a jury is a matter left almost entirely to the discretion of the trial judge.[94] No precise set of foundation requirements exist, but the following is probably sufficient in most jurisdictions:

- The demonstration is relevant and would neither create undue sympathy nor place anyone in danger.
- There is no readily available alternative means of proving the same fact with the same degree of accuracy.[95]
- The demonstration can be conducted under "similar conditions and circumstances" to those existing at the time of the original event.[96] For mere demonstrations, variations in conditions generally affect weight, not admissibility.[97] However, if the demonstration is designed to show cause and effect (*i.e.*, an experiment), the requirement of similarity of conditions is strictly enforced.[98]

Persons other than witnesses, such as attorneys and jurors, generally are not allowed to participate in demonstrations.[99] The court has discretion to allow a party to use non-trial participants (e.g., actors or paralegals) to help stage a demonstration, as long as they are directed by the testifying witness.[100]

With respect to the demonstration of injuries, courts have reached a variety of results. *Exhibiting* injuries, scars and wounds is almost always permitted to illustrate the nature and extent of an injury, regardless of the gruesomeness of it.[101] However, *manipulating* an injury in an attempt to produce a cry of pain or to demonstrate limitations on natural movement is more easily feigned and more emotional, so is more often prohibited.[102]

Demonstrations can be divided into two types. The easier is an illustrative demonstration. This is like using a chart or diagram, except the witness acts out or demonstrates some aspect of testimony. Witnesses may indicate size by holding their hands apart or may demonstrate how the defendant was holding a weapon. An expert may use a mannequin or scale model to demonstrate how a series of events happened. This kind of illustrative demonstration

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[94] See *Hutchinson v. Mo. Hwy & Transp. Comm'n,* 996 S.W.2d 109, 111–12 (Ct. App. Mo. 1999) (discretion to allow demonstration involving flashing lights from escort vehicle); *Floyd v. Gen. Motors Corp.,* 960 P.2d 763, 767 (Ct. App. Kan. 1998) (discretion to refuse to allow demonstration involving front end of car).

[95] *See Powell v. State,* 487 S.E.2d 424, 425 (Ct. App. Ga. 1997) (physician demonstrated how he believed defendant had shaken the baby by using a doll).

[96] *Yamobi v. State,* 672 N.E.2d 1344, 1348 (Ind. 1996).

[97] *E.g.*, *Naughton v. Bankier,* 691 A.2d 712, 719 (Ct. Sp. App. Md. 1997).

[98] *State v. Golphin,* 533 S.E.2d 168 (N.C. 2000).

[99] *But see Gesel v. Haintl,* 427 S.W.2d 525 (Mo. 1968) (jurors permitted to pull on hand scale to help them correlate force with the foot-pound scale).

[100] *See State v. Donesay,* 19 P.3d 779, 781–82 (Kan. 2001) (doctor who performed autopsy used two people to stage in-court demonstration of his conclusion as to positions of defendant and deceased during their struggle).

[101] *See LeMaster v. Chicago, Rock Island & P. R.R.,* 343 N.E.2d 65 (Ct. App. Ill 1976) (amputated stump could be shown).

[102] *See Lester v. Sayles,* 850 S.W.2d 858, 870 (Mo. 1993) (good discussion of various kinds of injury demonstrations).

often involves using one or more exhibits. These are common throughout trial, and are safe to use because the witness controls the outcome.

A second type of demonstration is similar to a silent witness exhibit in that it is intended to recreate and simulate the event itself. The jury draws its inferences from the demonstration rather than the witness. For example, in a homicide self-defense case, the forensics expert may set up a demonstration to show how blood would splatter if the victim were stabbed from the front, as the defense claims, or the back as the prosecution claims, and then let the jury compare the results of the experiment to photographs of the blood-splatter patterns found at the scene. These in-court experiments are rarely used. They are risky — they may come out differently than you expected, putting your case in trouble. With modern technology, there rarely is a need for live experiments anyway. Most jurisdictions permit the use of videotaped experiments, and the foundation is generally easier to lay, because you can more closely simulate the conditions of the original event outside the courtroom than in it. Another advantage is obvious — if it doesn't come out right, you can do it again.

If you decide to use a live demonstration in your direct examination, it must be carefully planned and rehearsed.

- Make sure the demonstration faces the jury, so they can see the event unfold. If you want the jury to see what the advancing gunman looked like, the witness must demonstrate it in a way that the gunman advances toward the jury.
- It is very difficult for one witness to demonstrate what two people were doing simultaneously. Demonstrations are more effective if the witness is demonstrating what one person did.
- You should not participate in the demonstration. You are not a witness and cannot place evidence into the record. If you cannot plan a demonstration that the witness can conduct with you out of the way, then don't do it at all.
- If you need a second person in a demonstration, use the jury. If you want the witness to demonstrate that she was close enough to the robber to see his face clearly, ask the witness to demonstrate that distance in relation to the front row of jurors, not in relation to you, to your co-counsel, or to some inanimate object in the courtroom.
- Do not conduct a demonstration without rehearsing.
- Use demonstrations only for important facts. Demonstrations, like exhibits, will emphasize the facts being demonstrated.

Even if you do not plan any demonstrations, they are unavoidable. Witnesses will use gestures to help explain their testimony: They point to the accused, indicate size with their hands, and shake their heads in answer to questions. While this evidence is clear to the jurors, at least to those who are looking at the witness, it will rarely be reflected in the record, because the court reporter can take down only what he or she hears. You must make sure that this nonverbal conduct is translated into words. We are all, of course, familiar with one common way of doing this — the attorney announces, "May the record reflect that the witness has pointed out the defendant."

Tactically, it usually is better for witnesses to provide the verbal descriptions in their own words. For example, if a witness indicates a distance with his or her hands, you can ask the witness to estimate that distance verbally. If the witness does so, no further statement need be made for the record. Indeed, no further statement should be made. You should avoid needless repetition. If the witness answers a question about size by spreading his or her hands two feet apart and saying "About two feet," it is unnecessary for you to add, "May the record reflect that the witness has indicated a distance of about two feet." Sometimes, of course, you may want to make a formal request for the record to reflect a gesture such as pointing out the accused, because it creates a moment of drama that emphasizes important evidence.

The following transcript indicates how demonstrations might be included in the record:

Q: What happened next?

A: We were standing in front of the trailer when the defendant turned to his wife and said he was going to beat the stuffing out of her if she didn't get back inside.

Q: Are you sure those were his words?

A: Yes, only he didn't say "stuffing."

Q: How close were you standing to him?

A: Real close.

Q: Could you demonstrate this distance for the jury?

A: Yes.

ATTORNEY: May the witness step down and conduct a brief demonstration?

COURT. Yes

Q: Will you approach the jury and stop when you are the same distance from the front row of jurors as you were from the defendant when he said he was going to beat the stuffing out of his wife?

A: Sure [witness takes a position].

Q: So you were about four feet apart?

A: Yes.

Q: Did you observe the position of the defendant's arms at that time?

A: Yes, I did.

Q: Do you think you can accurately illustrate that using your own arms?

A: Sure.

Q: Will you demonstrate to the jury what the defendant did with his arms as he made the threat?

A: Sure. He made fists like this [demonstrates] and took a step toward her like this [demonstrates].

Q: We have to put this into words for the court reporter. Describe exactly how the defendant was holding his fists.

A: Both fists were doubled [demonstrating again], down at his side. He took a step toward her and held the left fist up at shoulder level and the right fist about at his waist, like a boxer's stance.

ATTORNEY: Thank you. Please take your seat again.

## § 6.08 CONDUCTING REDIRECT EXAMINATION

Redirect examination is available to rehabilitate an impeached witness or to correct mistakes, clarify obscurities and uncertainties, refute misleading inferences from cross-examination, and respond to new issues raised on cross. Before you undertake a redirect examination however, you should appraise carefully whether any further questions will improve the situation. If cross-examination has not weakened the direct, then you would be wise to forgo redirect examination. If the cross-examination has seriously discredited the witness or testimony, redirect is indicated, subject to these provisos:

- You should usually limit redirect to important items and skip over minor points.
- You must be reasonably certain that you can effectively rehabilitate the witness or counteract the cross-examination, and will not simply dig yourself deeper into a hole. Redirect examination is always risky — you may do more harm than good by focusing the jurors' attention on damaging evidence. An attempt to clear up a misstatement may fail, reinforcing the error, or you may signal to the jury that you are dissatisfied with your own witness.

If you decide to conduct a redirect examination, how should you proceed? First, keep it as short as possible. Respond to major issues, not minutiae. Second, avoid complicated, leading questions on redirect examination that summarize the direct testimony and the cross-examination and suggest an explanation all in one sentence. For example:

Q: Mr. Smith, in your cross-examination, when you were talking about the second fistfight, you said that it was five to ten minutes from the time you first saw the plaintiff to the time the defendant arrived, yet on direct you said the whole incident took less than two minutes; didn't you mean five to ten seconds?

There is no reason to vary from the principle of direct examination that short, simple questions that encourage the witnesses to talk are most effective. Redirect examination can follow the same format as direct examination — direct the witness's attention to the controversy and ask the witness to explain it. For example:

Q: Mr. Smith, could you clear something up for me. You recall the second fistfight?

A: Yes, I do.

Q: How long did it last altogether?

A: Maybe two or three minutes.

Q: When did the defendant arrive?

A: After the plaintiff, maybe five or ten seconds later.

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