

DIRECT EXAMINATION

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## **A. Generalized thoughts about direct examination**

1. **A direct examination can be very simplistic** - just read questions out of predicates; use who, what, when, where, why. However, that would not be a good or effective direct. To be effective there is much more going on.

A good direct examination does not need to be boring or monotonous. Remember that you are telling a story just like with an opening, except with questions. How you tell the story is up to you: meaning at the beginning or at the crime or at the end and then back with explanation.

Remember that you are going to communicate a lot of information to the jury in a format that is unnatural to them. A major part of any good direct is to give the jury a feel for the witness and the witness' credibility. As you humanize your witness the jury will get to know them and that will enhance their credibility.

When preparing decide how many and which witnesses you are going to use. Personally, I believe less is more. Don't put on multiple witnesses for same point (Unless you must.) Sometimes that can create a conflict which gives the defense not only a good cross but a reasonable doubt argument. You must have a purpose for putting on every witness. Determine your objectives for each witness and how you plan to accomplish those objectives.

Unlike a cross examination the witness needs to be the focal point. Try to place yourself away from the witness. I suggest going toward the back of the jury box away from the witness, so the witness must look toward the jury and speak towards the jury to speak to you and answer you. You can think of this as a triangle with the witness and the jury and you as the points. Keeping this thought in mind will keep focus and eliminate the extraneous people.

A good direct will show the jury that you are in control and you have proven the case. By anticipating what areas will be attacked in cross during your direct, you show your control.

Don't forget to use your notes during the direct. No one is so good that they can do a complete direct without them. Never begin a direct empty handed.

## **2. Handling Objections**

Responding to objections will tell the jury and judge a lot about how you are as an attorney.

If you do not react in an angry or annoyed manner and respond appropriately you will appear more professional and prepared. Of course, being prepared will make it easier to do this.

The best response to an objection where you feel you need to say something is to say to the judge "May I be heard on that? Or may the State respond.

Good judges will ask for your response if it is necessary. Bad judges will not wish to hear anything, and you may have to press the point.

If it is a tricky point be ready to respond with the law.

One of the most used defense tricks is to object to a question as being leading. They will invariably do this when the question calls for a yes or no. Be prepared for this.

**Remember:** *A leading question is one that suggests or puts the desired answer into the mouth of the witness, or one that assumes the existence of material facts that have not been proved.*

The actual objection, which no one uses anymore, is leading and suggestive.

[I]t may be said that ordinarily a question is not improperly leading unless it suggests what the answer should be or contains facts which in the circumstances can and should originate with the witness." Porter v. State, 386 So. 2d 1209 (Fla. 3d DCA 1980).

Have case law: at the first objection bring out the law so that in future you may say to court just the name of the case. But be sure you know the law.

*With respect to questions calling for a "yes" or "no" answer, a question that suggests only an affirmative answer, or only a negative answer, is leading; however, a question which may be answered either "yes" or "no," and suggests neither answer as the correct one, is not leading. Thus, a question is not necessarily leading simply because it calls for a "yes" or "no" answer; rather, a "leading question" is one that points out the desired answer.*

**See** Florida Motor Lines Corp. v. Barry, 158 Fla. 123, 27 So. 2d 753 (1946); Ward v. State, 75 Fla. 756, 79 So. 699 (1918). Rowe v. State, 128 Fla. 394, 174 So. 820 (1937). Chisholm v. Chisholm, 98 Fla. 1196, 125 So. 694 (1929). Porter v. State, 386 So. 2d 1209 (Fla. 3d DCA 1980); Happ v. State, 922 So. 2d 182 (Fla. 2005).

## **B Preparation**

If possible, you should prepare 5 minutes for every minute you will be in trial

Why is preparation so important?

Let's you not only be confident but also you will be ready for unexpected events.

You can focus on issues.

## 1. Basic preparation

Be sure that you know all important dates and times, don't be afraid to use a checklist. Your checklist can also include venue and identification, so you don't miss them.

Your witness notes should include where you are asking about venue, so you don't forget venue.

Be sure that you know the location of all criminal (and important acts). The best is if you can visit the scene before you start trial. That will give your presentation a more realistic feel for you.

Be sure that you know your theory of the case.

Be sure that you know your witnesses. If possible know their personality, background, relationships to case, any significant history of value, and their demeanor.

Practice any demonstrative aids with your witness ahead of time.

Show your witness the evidence you are using with them and review predicate questions with the witness.

Try to review all questions and areas of questioning with the witness in advance. If something is going to be difficult or traumatic or emotional warn the witness and prepare them.

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## 2 Preparation of Evidence list

Make a list of all evidence that the State wants to use at trial.

List out which witness is necessary to introduce the evidence that you want admitted. Also try to list all other witness that you might want to discuss the exhibit with even if they are not the witness who was used to introduce the exhibit. Make sure you have listed any demonstrative aids you want to use that may not be admissible and which witness you will be using those with.

Put list of evidence for each witness at the top of your direct examination notes for that witness.

If you know what evidence you wish to introduce with what witness, you can prepare how to introduce it and what legal arguments you might need to get the evidence in.

## 3 Preparation of Evidence predicates

Predicates can be helpful and necessary but do not use as them a crutch.

Be sure that you understand why you are asking the questions.

Hopefully you will get to know some of these without having to refer to them each time. However, having the statutory predicate and case law available is always useful.

Business records FS 90.803(6)

Public records FS 90.955; 92.29

RAH: relevance, authenticity, hearsay

Photographs:

Example: Booking photograph of defendant

Relevance: Recognize exhibit?

True and accurate picture of the defendant at time of arrest  
on \_?

Expert predicate FS 90.702

Admissible hearsay or non-hearsay FS 90.801

For example: excited utterance FS 90.803 (2)

spontaneous statements FS 90.803(1)

identification FS 90.801(2)c

Refreshing memory FS 90.613

#### 4 Motions

Keep all pretrial motions listed and in mind.

Know the Defense motions to suppress whether it is statements or evidence based  
on the stop, on PC, on Miranda, on the search

Gear questions in the direct toward those issues, don't hide from them.

Know any defense Motions in Limine and prepare as if they were granted.

However, fight against them and be ready with alternatives.

Consider motions in limine you might need to file. But be prepared to deal with  
the issues on direct if the motion is not granted. (Here are some areas but check  
with the Motion in Limine outlines for extensive ideas and areas)

Inappropriate Witness priors

Generalized police misconduct

Witness occupation

Uncalled witnesses

Negative descriptions of the area where the crime occurred

#### C Formulating direct exam

##### 1. Traditional Method

Write out your questions.

This makes it very thorough.

However, I believe that this is boring.

This can also lead to mechanical recitation of questions without regard for  
the answers.

This method prevents the examiner from pivoting to issue as they come up.

If you are a novice trial attorney then writing out the questions, sounding them out and being sure you are asking what you need is the way to start.

2. Non-traditional method

Write out the answers to the questions you need.

Be thorough as to each answer you want.

This way the examiner can be more spontaneous as to the phrasing of questions. This also makes it easier to pivot away from something if it becomes necessary.

3. Hybrid method (mine)

Write out the areas that you need to cover.

Write out some specific questions if the questions need to be phrased a certain way. For example, hypotheticals; facts for an expert opinion, specific predicates.

Write out some specific answers that you need to have come out and in a certain way.

Make sure that you have appropriate exhibits available to discuss and use, so that you can then just talk about the exhibits without formal language.

## **D The Direct**

1. Delivery

The delivery sometimes is as important as the subject matter.

Talk to the witness as if this is a conversation. Listen to the answers and tailor questions accordingly.

Avoid legalese as much as possible. Use simple language like you would at a bar.

Try to be conversational - ex: tell us your name, not state your name.

Watch out for your use of fillers such as “Ok” and “And...” “Um...”

A police officer’s testimony must be conversational as well.

Do not use police officer “jargon” in your questions. Ask police officers to use everyday terms. If a police officer uses “police jargon”, ask them to explain what the term means.

Do not use leading questions *unless you need to*. Keeping in mind that some leading is usually permitted if it is to direct to an area.

Using leading questions to *headline* where you are going is very helpful and appropriate.

For example: Let’s go to May 10, 2020 where something unusual happened to you or

Officer let's discuss the events of May 10, 2020. or  
I'd like to ask you some questions about how you came to be at the  
1350 NW 12<sup>th</sup> Avenue address. or  
Let's review the steps you took when you got there.

2. Introduction of the witness.

Make it a greeting. (Hello, Mr. Smith, would you please introduce yourself to the Jury/Judge).

3. Headline what the witness is going to talk about so the jury knows they should listen to them. This is important with each witness.

Examples: **Mrs. Evans** you were the best friend of Sandra the victim in this case and you saw her just before she died.

**Det.** You are the lead detective in the case of State v Smith, aren't you?

If you can have the witness go through the story in an open-ended manner initially that is good. Then you can go back and bring out details as you use evidence or photos.

4. Humanize each witness. Sympathetic witness are easy to humanize, others may not be so easy.

Humanize any police officer if you can. Why they became a police officer can be very good. (If it makes good theater) In today's world you need to be sure the jury sees a police officer as a person.

Let's talk about how you became the lead in this case.

Bring out the officer's history in law enforcement. How long and where.

For example, they may have been in military and served with the military police.

Show the officer's training and background and progress within the department.

Just as with a police officer you can and must humanize an expert or civilian witness.

How long have you lived in the area? or

How long have you known the victim? or

What do you do for work? Or

Any special groups that you are involved in? or

Why were you at that location? Or

What were your plans?

5. Use of the active voice (*meaning not past tense*)

Put the witness at the scene during the event if you can.

Try to bring out the senses so the jury is with them.

For example; Officer when you arrive at \_\_\_\_\_ on May 10, 2020 what are you looking at?

What do you hear?

What do you smell?

What do you taste?

What are you touching?

What is the mood at that scene?

These *sense* types of questions can and should be used for civilians as well.

They work extremely well with an eyewitness, a surviving victim or any type of victim.

6 Details are important

Take a witness through their story with detail.

Remember this is their story and yours.

Keep in mind that witness is there for a good reason and you want the jury to know it.

7 Use exhibits and aids to assist in telling the story. Each one should be used for a piece of the story if you can.

Keep in mind the exhibits (evidence) are there for a reason and you want the jury to understand that purpose.

The use of demonstrative aids and exhibits can break up any monotony of a direct exam (of course if you follow these rules you will not be monotonous).

And use of exhibits and evidence lets the jury see a witness in different setting.

### **E. Direct of the expert**

1. The introduction is still a greeting.

Doctor please introduce yourself to the Jury/Judge.

2. The headline: Doctor you are here today because you have an opinion that you are going to share with us, right? (Note at that point you do not ask the opinion)

3. You need to be familiar with the field of expertise.

*Best to spend 2/3 of time with the expert witness on qualifications and background and 1/3 on the expert's opinion.*

4. Humanize and create belief

What is your field?

Why did you choose this field?

How long did you have to study and prepare to know this field?

What kind of education does this field require? How and where did you get that education?

How long have you been in this field?



As part of your work do you often have to testify in court?  
How often do you do that?  
Have you ever been qualified as an expert in this field?  
This is a case about \_\_\_\_\_; have you had experience with similar cases?

5. Active voice (If possible-sometimes difficult with an expert)  
How do you begin your evaluation?  
What is first thing that you are doing?  
Why  
What is reason?  
What are all the things that you are doing before you can come to an opinion?  
Why?  
Have you reached an opinion on this matter?  
What is that opinion?

**F. Introducing evidence**

Remember that as important as the evidence is, the way you introduce the evidence can be equally valuable.

1. Be sure each exhibit is marked individually.
2. I personally do not like composites as it is more difficult to describe them to the jury and for the record.
3. You must always keep the record in mind when you are introducing any evidence.
4. After the exhibit is marked, show it to opposing counsel and make sure that you announce that you are doing so.
5. Use the exhibit/evidence with your witness.
6. Remember to ask court for permission to approach witness. If you are going to have to approach often then ask for leave to do so. Showing respect to the court makes the Judge happy and lets the jury know that you are respectful of the law and rules.
7. Show the evidence/exhibit to witness and ask if the witness recognizes exhibit. (You should have already shown this to witness before the trial)
8. When the evidence is properly authenticated say “at this time the state is moving States exhibit \_\_ for Id into evidence”.
9. Be smart in how you show (publish) the evidence to the jury. Unless the judge stops you; you want to be sure that each juror can see the evidence individually.
10. With photos I like to pass them to the jury. If I don’t do that then I hold them and walk them past the jury slowly.

11. Often the witness should be asked to step down and show the evidence to the jury. Sometimes they are able to explain it. Having the witness down and talking to the jury adds some personalization.

### **Technology**

12. Remember that there is (what I call) the new school approach where exhibits are shown on an Elmo. That needs to be prepared as well. The exhibits need to be in the order in which they are to be shown.
13. If you are showing exhibits which are in evidence, you need to announce their exhibit number just as you would any time you show a piece of evidence.
14. If using an Elmo for a slide show be sure that you have tested the Elmo. And have practiced how you show it to the jury.
15. Check all the technology that you plan to use before the trial and then again, the day you are going to use it. Of course, make sure that the whole jury can see what you show.
16. Since our courtrooms are not well equipped with technology, be sure how each piece works and how the judge wants things shown and done and be sure that the judge can observe what you show.
17. If using an Elmo or computer to play a video or DVD/CD, test to be sure that it will be audible.
18. If there is a transcript to go with the sound be sure that there are sufficient copies for all jurors, the judge, defense counsel, and the court reporter.
19. Be sure the transcript is marked as a demonstrative aid so that there is a record of it and that the clerk has a copy.