

**TESTIMONY FROM YOUR OWN WITNESSES:  
DIRECT EXAMINATION STRATEGIES**

**JAMES L. MITCHELL**  
Payne Mitchell Law Group  
2911 Turtle Creek Blvd, Suite 1400  
Dallas, Texas 75219  
214/252-1888  
214/252-1889 (fax)  
[jim@paynemitchell.com](mailto:jim@paynemitchell.com)

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## **DIRECT EXAMINATION—SOME PROBLEMS AND THEIR SOLUTIONS**

### **I. THE PROBLEMS OF DIRECT EXAMINATION.**

Direct examination is harder and more important than cross examination. There are many reasons, including the following:

A. **DIRECT MEANS THAT YOU HAVE CALLED THIS WITNESS.**

The Jury expects you to prove something by the witness. Jurors assume the witness will be friendly and helpful to you.

B. **THE WITNESS IS USUALLY NOT A GOOD STORYTELLER, BUT THAT'S WHAT IT TAKES.**

Most witnesses are not adept at telling a story in the strange format of question-and-answer that a trial involves.

C. **THE WITNESS IS OFTEN FRIGHTENED.**

A rape victim testifies in front of twelve jurors, a gallery of spectators, a judge, two lawyers—and one rapist. But the rape victim is not unusual. Most witnesses feel that all eyes are on them. It is a pressure situation, and it makes ordinary people unable to testify effectively.

D. **THE JURY DOES NOT UNDERSTAND THE PRESSURE THE WITNESS FEELS.**

The jury will not make allowances for your impediments or for the pressure the witness feels—unless, that is, you make them understand it.

E. **THE RULES OF EVIDENCE LIMIT THE ASSISTANCE YOU CAN GIVE THE WITNESS IN TELLING THE STORY.**

Rules limiting opinions, leading questions, hearsay, etc. are particularly difficult barriers to effective exposition of the story. They do not fit the way most people talk. IMPORTANT NOTE: Judges differ dramatically in their enforcement of these rules, and relaxed enforcement is useful. But the attorney doing the direct needs to have the tools to deal with this problem.

F. **MANY OF THE DECISIONS THAT JURIES MUST MAKE ARE NOT DEPENDENT UPON ONE-DIMENSIONAL, YES-NO ISSUES.**

Questions such as, “was the defendant ‘negligent’?,” “was the product ‘defective’?” “was the defendant ‘unreasonable’ in the force he used in self defense?” or “was the defendant’s conduct ‘fraudulent’?,” require the jury to know a complete story to answer correctly. The mood of the occasion has to be explained to them. Thus many jury decisions, the most important ones, depend upon the jury’s having a complete picture of the way the parties went about their business. This sort of understanding is hard to convey by words, and it is harder still in the atmosphere of witness examination.

Yet it is exactly what the direct examiner undertakes to convey.

G. THE JURY HAS TROUBLE FOLLOWING DIRECT EXAMINATION.  
The witness understands it because she was there. The lawyer understands it because he has prepared it. But the jury wasn't there, hasn't prepared and can't ask questions. Furthermore, most people are unaccustomed to receiving large amounts of detailed material in original, unedited form by spoken word only—and that's what a trial consists of. Direct examination must start at ground zero and build slowly and carefully.

H. THE TECHNIQUES OF CROSS EXAMINATION ARE CHEAP AND EASY BY COMPARISON.  
The picture you have built by a careful development may be tarnished by a single question, and so direct examination that does not anticipate the cross is a weak examination.

I. MANY OF THE FIFTY-CENT WORDS THAT LAWYERS ARE USED TO USING DO NOT COMMEND THEMSELVES TO THE UNDERSTANDING OF THE WITNESS OR JURY.  
This is particularly so when the witness is under pressure. Nor are they readily comprehended by the jury.

These are formidable difficulties, but there are techniques for handling them.

II. SOME SOLUTIONS TO THE DIFFICULTIES OF DIRECT EXAMINATION.  
Here are some techniques for handling the difficulties alluded to above:

A. A PATTERN FOR FACT DEVELOPMENT FROM A NARRATIVE WITNESS.  
The following is one possible way to examine a fact witness (e.g., one who has seen an automobile accident, etc.):

1. Ask the Witness' Name. "State your name for the members of the jury, please."
2. Ask a Short Question, in Leading Form, That Shows the Witness' Connection With the Case. "You are here to tell the jury about a certain accident, the accident in question, which you saw; is that right?" (Leading is often permitted in preliminary matters.) The jury now knows who this witness is and what to expect. Now, you are not going to have the jury think the testimony is from a medical witness during half his testimony.

3. Establish the Witness' Background. The jury wants to know who the witness is-what he does for a living, how old he is, things of that nature. "How are you employed?" "And how long have you been a Police Officer?" "What divisions have you worked in?" "Do you and your family, your wife and kids, live here in Houston?" "And I believe you attended San Jacinto Junior College and graduated from there before becoming an officer?" It is amazing how often there will be a juror who also attended San Jacinto Junior College. For her, the witness is now more of a person and more credible: indeed, that is so for all of the jurors, possibly. The exact questions will vary with the nature of the witness and with his importance. For a minor witness, it might be possible and advisable to dispense with this background evidence altogether. For a party testifying in his or her own behalf, on the other hand, the picture should be carefully drawn. It is surprising how often this step is omitted or neglected.
4. Take the Witness to the Relevant Event. "Directing your attention to the day in question, October 20, 2004, did you investigate an automobile accident involving the parties to this suit?" The dangling participle in this question is poor grammar but good interrogation technique. It represents the subordination of English purism to communication. The witness knows how to answer this, and the jury understands that you are now about to start talking about the accident. Incidentally, do not ask the witness, "What date did all this happen?" because you are likely to find the witness drawing a blank under the pressure of the witness stand. "Uh-I don't remember." Incorporate the date into your question.
5. Pick Out a Logical Starting Point-Usually the First Event in Chronological Sequence-and Proceed Through the Event Chronologically. "When did you first arrive at the accident scene-what time?" "And what did you do first?"
6. Carry the Witness Through the Story, and Actively Ensure That It Is Chronological. "What happened next, after you interviewed the defendant?" "All right, you measured the skid marks. Tell the jury, please, how you went about that." Just prompting the witness with "what did you see after that?" or "What happened next?" may be enough, or you may have to be more specific. In any event, remember that you are the examiner. Notwithstanding the limits on leading questions, you are the leader. The witness should address the subjects you direct. She should address them in the order you direct. Do not permit aimless rambling. Do not allow monosyllabic answers to stand, either. It is perfectly appropriate to say to the witness, "Wait-stop a minute. I want to ask you this question," or "You're getting ahead of me; let me ask you about so and so-."

7. Let the Witness and the Jury Know When You Switch Subjects. “Now, officer, I believe you went to the hospital to find the plaintiff, right? I want to ask you some questions about that.” The jurors are struggling to keep up with you. Often, you are on to another point before they have grasped the one you made three questions back. If you orient them, they’ll follow better.
8. Let the Jury and the Witness Know When You Are Asking a Purely Formal Question. When you must ask a peculiar question, such as the predicate for admissibility of evidence, let your listeners know what you’re doing and why. “Now, Ms. Witness, I need to ask you some questions about these records. The questions I will ask you are required by the rules. . . . Are these records prepared in the ordinary course of business; and by that, I mean ... is it ordinary for your business to make records of this kind?” Without this introduction, a witness sometimes may be thrown by the question, “are these prepared in the ordinary course of business?,” may answer inappropriately, and may cause you difficulty in getting the evidence in.
9. Pay Attention to Your Witness’ Testimony and Not to the Objections of Your Opponent. While there are exceptions, only rarely should you focus on the objections of your opponent. Your eyes and your attention should be on the witness. Remember the points you want to make. Remember the sequence. If an objection is sustained against you, you’ll rephrase automatically.

These tactics apply to “fact” witnesses; other techniques are applicable for different kinds of witnesses such as character witnesses, predicate witnesses, experts, etc., but if you understand how to question a fact witness, you are halfway to understanding other kinds.

**B. DRAWING THE STORY FROM A WITNESS WHO IS NOT A GOOD STORYTELLER.**

Many of the difficulties of direct examination concern the inability of witnesses to tell a coherent story under direct examination conditions. Some of the following techniques may help.

1. Non-Leading Question Formulas. The rules of evidence generally prohibit direct-examination questions that suggest the answers (leading questions). The trouble is, questions that do not suggest the answer often do not suggest what the question is about, either. “Describe what you saw” may or may not lead the witness to the relevant factor. If it doesn’t, use one of the following: “Directing your attention to . . . ;” “What was unusual about. . . ;” “State whether or not . . . ;” “Describe the such-and-such aspect of . . . ;” “Was it \_\_\_\_\_ or was

it \_\_\_\_\_ ?” This last formula, giving the witness a choice, can be very effective. Don’t ask, “Describe how the robbers were running;” ask, “Were the robbers just sort of loping along, or were they really hauling it?”

2. Judicious Use of Leading Questions. Sometimes the solution is, “Go ahead and lead the witness!” The rules allow for leading questions on direct under a variety of conditions. These conditions include background information and witnesses who have difficulty relating events (e.g., children). The rules give the judge discretion to allow leading questions. But the judge will never get a chance to rule that your leading question is appropriate if you don’t ask it. Many skilled lawyers follow the practice of leading as a matter of course until forced not to by objections that are sustained; there is an ethical problem with that position if the lawyer knows he is violating the rules. But that doesn’t mean that you shouldn’t try leading if the witness is having severe difficulties with your questions.
3. Down-to-Earth Language. Common words, even folksy terminology or slang, are better than high-sounding language. Within limits, it’s better yet if you can get the witness to use it too. The example given above, “Were they just sort of loping along, or were they really hauling it?” conveys the idea. And if the witness answers, “They looked like they wuz about ready to run outa they socks,” you’ve really scored.
4. Make the Witness Feel Comfortable. “Is this the first time you’ve ever testified before a jury? Well, that’s all right. Tell it like you saw it. The good people of this jury just want to hear what you have to say in your own words.”
5. Prepare the Witness. It’s a good idea, in preparing the witness to testify, to explain to the witness what a leading question is, what a non-leading question is, what the difference is, and what the limitations are on direct. “I can’t tell you the answers. I have to use non-leading questions. You have to tell the story on your own. Now, Mr. Opponent can use leading questions like ‘The light was red, wasn’t it?’ and try to put words in your mouth, but I can’t. So here’s what you do: Don’t automatically answer ‘yes’ to Mr. Opponent; watch out for what he’s asking you. But for my questions, try to figure out what I’m asking you, and answer with what you think I’m trying to get at.” This should be followed with examples of leading and non-leading questions from the fact situation of the case and practice answers from the witness. Also, don’t hesitate to tell the witness to say a particular thing that he has said to you. There is no ethical problem with this so long as the witness is the source of the statement.

C. VIVIDNESS: SHOW THEM THE MOVIE.

The greatest art in direct examination is in supplying answers to the vague, general, mood-oriented questions the jury has to answer: questions like “negligence,” “reasonableness,” and so forth. These questions require a complete picture. They require use of the following techniques:

1. Development of Symbolic Detail. Unfortunately, the answers to these general questions are not general; they come from careful buildup of relevant detail. For example, assume that you are trying a case in which a child has been killed while crossing the street. You learn that the child’s father found the child’s glasses later. The frames were on one side of the street, one of the lenses on the other. You establish this fact. But you are not content to stop there. You show, carefully, how the father recognizes them. He bought them, often saw the child wearing them, and knows every tooth-mark where she chewed on them. You lead the father through every step he went through to find them, searching on his hands and knees in the weeds in his business suit because it was the most compelling urge in the world to him at the time. He almost thought it would bring the child back. It took longer because his eyes were wet and he couldn’t see. You haven’t yet gotten to the point of the distance between the frames and the lenses (this you will develop with the same care). The evidence has minor relevance, but it symbolizes the blamelessness of the child and the carelessness of the defendant. It is symbolic detail.
2. Physical Evidence. You will, of course, introduce the glasses themselves into evidence, indicate their locations on a diagram, maybe even have the father get down to demonstrate how he searched, or place the pieces of the glasses in their spatial relationship-the same distance apart-in the courtroom. A picture is worth a thousand words, and the real thing is worth a thousand pictures.
3. Show the Jury the Movie. A jury sits in comfortable chairs. Jurors watch other people telling their stories, but they do not always feel the occurrence as it happened. Indeed, they have been told not to feel sympathy for the participants. They are like the audience at a movie-and that comparison is the essence of the task of the direct examiner. The jury expects from the witness something that is concrete, something that is real. With all the limitations of direct, the examiner must show them the movie.