

DIRECT EXAMINATION

TCBA END OF YEAR CLE—DECEMBER 14, 2018

Ground Rules



- Direct examinations are arguably the least glamorous, but **most important**, aspect of the trial.
- Why most important?
 - 1) Facts that flow from a “good” direct examination are the **meat and potatoes** of the trial.
 - 2) The **judge is listening** to the testimony in order to “check off” the **elements** of your cause of action or affirmative defense.
 - 3) Facts elicited on direct examination help **determine jury instructions**.

Some Worthy Goals

The first and highest priority is **to persuade** the fact-finding decision maker of the validity of your version of the facts, your theory, and your case.

- **Three things you want the jury to do:**
 - Listen** to your witness.
 - Like** your witness.
 - Believe** your witness.
- **Prove the elements of your case** and if possible, disprove your opponent's case.
- **Inoculate.**



Technique



- Most **witnesses are nervous** and apprehensive—**make them talk** (early).
- Start the examination relatively close to the witness (**umbilical cord**). The intent is to calm the witness.
- Ask an **open-ended question** about their **background**. As they are talking, slowly move to the far corner of the jury rail.
- A good first question: “Mrs. Ball-of-nerves, tell the jury a little **about yourself**—w ho your family is, where you live and work.”

Technique



- Conduct your direct examinations as if it's the **first time** you have heard this testimony.
- Performing a direct examination correctly means **parking your ego** at counsel table—it's **not about you**.
- You should not “star” in this portion of the trial—be more like the **writer, director and producer**.

Technique

- Make your direct **interesting**, but how?
- Do not ask leading questions! The jurors are listening to YOU.
- Rather, use **short open-ended** questions.
- Four **first words of the question** designed to make the witness talk:

Why?

How?

What?

Describe.



Technique

- Other questions that need to be included:

Who?

When?

Where?



- Think of yourself as **painting a picture** on a large canvas for the jury to see—the witness supplies the objects, their color, and their position on the canvas.
- The trial should be a **movie of your story** and a witness's testimony a **video of a scene**.

Technique



- **Technique:** Use a **headliner statement (or question)**, then proceed with short, open ended questions.
- Example of a headliner **statement:** “Mr. Smith, let’s talk about the night of June 1 of last year.” You’re leading the witness’s attention to the subject matter.
- Then ask, “What did you do that night?”

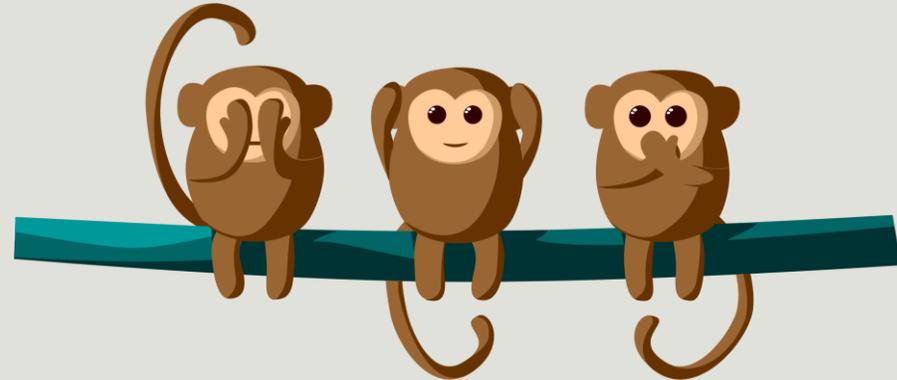
Technique

- Headliner **question**: “Do you remember the night of June 1 of last year?”
- Then follow up with **short open-ended questions**.
Answer: “Yes, I do.”
“**Why** do you remember it?”
Answer: “Because _____.”
“**What** was the first thing you saw?”



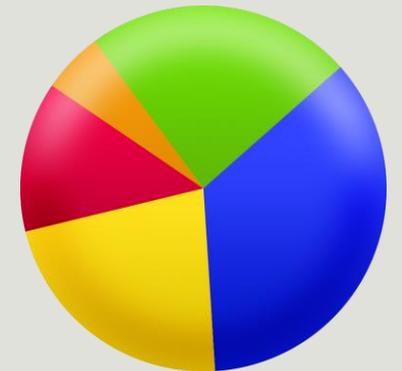
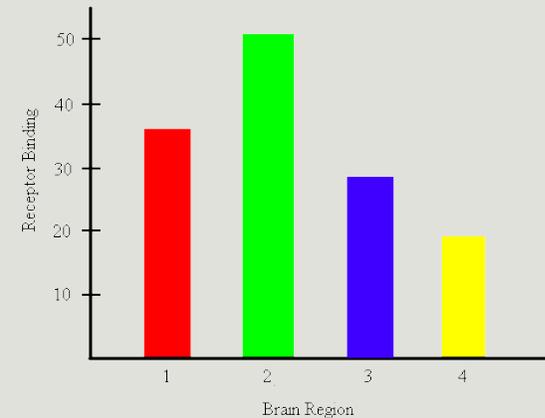
Technique

- **Important: Look at the witness!**
- Resist looking down at your notes.
- **Listen** to the witness!
- Once you start asking questions and looking at the witness, you can start following up on the answers.
- Use **voice inflection** to ask questions.
- **Seem interested** in the testimony!
- **Personalize** your witness—you want the jury to relate to your witness.



Strategy—Points To Ponder

- **“What happened next”** is usually a poor question.
Instead of asking, “What happened next” incorporate the witness’ last answer into your next question.
Example: “I was going 65 mph.” “When you were going 65 mph, what did you see ahead of you?”
- **Use visuals and demonstrative aids:**
Power points, Blow ups, Photographs and Charts
- Position them **6-8 feet from the jury.**
- Get **witnesses down** and use the demonstrative aid.



Inoculate

- Remember to **inoculate!**

Bring out any bad fact—before your opponent does.

If you listened to your opponent's opening statements or had a motion *in limine* hearing, **you know what is coming.**

- **Example** of inoculation:

Q: “Have you ever served time in jail?”

A: “Yes.”

Q: “For what?”

A: “Receiving stolen property.”



What not to do



Mistakes lawyers make:

- Asking **leading questions**.
- Doing the direct in flat **monotone**.
- **Going back** over a subject.
- Using pretentious or **grandiose words**.
- Starting a question with an **annoying word** such as “And” or “Now.”

Tips

- If you get an **objection for leading**, i.e. “Were you looking at the light?” Rephrase the question to, “Please state *whether or not* you were looking at the light.”
- You can use **notes** to do a direct, but only use an **outline** of topics!
Example: “Prove BAC.”
- **To introduce a photograph into evidence** :“I show you Defense **Exhibit 1.**” “Do you know what it is?” “**What is it?**” (The witness identifies it) “Is it an **accurate representation** (depiction) of the position of the vehicles **as they were on April 28, 2018 after the collision?**” “**We offer it.**”
- For an **object**: Same, except: “Is it in the same, or substantially the same, condition . . . ?”



Example of an Experts Direct:



- What do you do for a living?
- At my direction, did you review some documents that pertain to this case?
- What documents did you review?
- After your review of those documents were you able to form any opinions?
- How many?
- Are your opinions to a reasonable degree of _____ certainty?
- Will your opinions assist the jury in understanding the evidence? [ARE 702 (a)]
- Before you give your opinions, what does your first opinion concern?

Example of an Experts Direct:

- **Write it** on a demonstrative or board.
- What does your second opinion concern? (write it)
- Tell the jury what **training and experience** you have had that enables you to give an opinion in this case. [ARE 702 (a)]
- Do **Daubert** questions if necessary. [ARE 702 (b) (1-3)]
- **Tender** the witness (If required).
- **What is your first opinion?** (Time for objections if there are any)
- Then **complete “painting the picture”** in the jury’s mind with *What, Why, How* questions.

