

New York Law Journal

October 29, 2002, Tuesday

**SECTION:** NEWS; Vol. 228; Pg. p. 3, col. 1

**HEADLINE:** Trial Advocacy;  
Direct Examination: The Basics

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**BODY:**

NOTHING IS more overlooked in trial practice than a good direct examination. Most of us do not devote enough time to its preparation and execution.

Before beginning, determine all the areas you must cover to make a prima facie case. Prepare your witness carefully and thoroughly. Utilize the basic tools of direct examination: open-ended, non-leading questions that call for a narrative response. As a general rule, do not ask leading questions - questions which contain within them the answer, suggest the answer or call for a yes or no answer - or your direct will be interrupted with sustained objections. Do not be outwardly repetitive to avoid the classic objection of "asked and answered." And do not be the star. Blend into the background, allowing your witness to be the featured act.

To elicit narrative responses, begin each question with any of the following words: "Who," "what," "were," "when," "how" and sometimes "why." Employ these words throughout the direct examination. Since most directs begin with pedigree or background information, utilize these skills from the start.

Q: What is your full name?

Q: Where do you live?

Q: How long have you lived there?

Q: Who do you live there with?

Q: How long have you been married?

Q: What is your wife's name?

Q: How many children do you have?

Q: What are their names?

Q: How old are they?

Q: Where do they go to school?

Q: What is your educational background?

Q: When did you graduate from college?

Q: What do you do for a living?

Q: How do you like your job?

Q: Why did you go into that avenue of employment?

Although you could technically conduct an entire direct using who, what, where, when, how and why, the occasional use of transitional phrases is critical. For example, once getting through the witnesses' background information, you may want to get to the facts of your case. The easiest way to do this is with the following type of question:

Q: I direct your attention to May 2, 1999, at approximately 2:30 in the afternoon; where were you at that time?

Notice that you are basically telling the witness the date and time of the relevant incident, and asking the witness to tell the jury the place it occurred. This type of transitional question allows you to place the witness in the precise spot you would like to begin the actual testimony.

Although these types of questions are technically leading, they are considered transitional questions making leading permissible.

After using this transitional question, revert back to your open-ended, non-leading questions. Go back to who, what, where, when, why and how, following up with "what happened next," "what happened then" and questions like that:

Q: I direct your attention to Sept. 15, 1999 at approximately 10:30 in the morning; where were you at that time?

A: I was in my car at the intersection of Third Avenue and 42nd Street.

Q: What were you doing at that time?

A: I was driving.

Q: Where were you going?

A: I was going to do volunteer work at a soup kitchen.

Q: What happened next?

A: I was stopped at a light and struck from behind.

Q: How long were you stopped before being struck from behind?

A: About 10 seconds.

Q: What was the impact like?

A: It was very severe.

Q: What do you mean by that?

A: The crash was loud and it threw my body within the car.

You should add to your repertoire short, to the point, questions to allow the direct to flow more smoothly. Words like "describe" and "explain" are very helpful. Phrases like "what happened next" can get you through most of the direct.

Q: Describe for us how your body was thrown within the car.

A: My head and neck were thrown backwards and forward, and my head hit the steering wheel.

Q: How did you feel at that time?

A: I felt dizzy and my neck hurt.

Q: Explain what you mean by your neck hurt?

A: It was stiff and I had sharp pains going into my shoulder area.

Q: What happened next?

A: I just sat in the car.

Another transitional phrase used to direct the action to another time or place is, "Did there come a time that ...?" The language sounds archaic and convoluted, but it contains words of transition that are recognized by courts and lawyers throughout the state as phraseology consistent with direct examination.

Q: Did there come a time that an ambulance arrived at the scene?

A: Yes.

Q: What happened next?

A: The attendants approached me and asked me some questions.

Q: Without telling us what they said, tell us what they did as a result? [This is a good way to avoid a hearsay objection].

A: They put me in a neck brace with a back board and placed me on a stretcher and then into the ambulance.

Of course, you want to vary the types of questions within the direct examination to avoid juror boredom. Therefore, avoid the constant follow-up questions involving the words, "What happened next?" Instead, encourage the reluctant witness with simple words as, "continue"; "proceed"; "go on." The following questions are a good example:

Q: What happened once you arrived at the emergency room?

A: A nurse approached me.

Q: What happened next?

A: She looked at my leg and left to get bandages.

Q: Continue.

A: She cleaned the wound, put the bandages on and called the doctor.

Q: What happened then?

A: The doctor came in and looked at me.

Q: Proceed.

A: He took the bandage off, admitted me to the hospital and sent me to X-ray.

There are times that you may want to highlight certain testimony that was already given during the direct testimony. Repetition wins cases. The problem is that you cannot blatantly be repetitive, repeat questions or characterize past testimony. For example, say the witness in a criminal case just testified that the defendant thrust a machete deep into the chest of the victim. What you cannot do is simply repeat the direct testimony by asking, "You just testified that the defendant thrust a machete deep into the chest of the victim." Nor can you ask the same question the same way to elicit that dramatic testimony again. What you can do is utilize the following technique known as "double direct":

Q: After the defendant thrust the machete deep into the chest of the victim, what did he do next?

Q: After the defendant thrust the machete deeply into the chest of Vicky Victim, what, if anything, did he say?

The following example of double direct involves the questioning of a plaintiff in a personal injury case. You have just elicited testimony that the plaintiff felt knifelike pain shooting from his back, down to his right leg.

Q: How did you feel after the accident?

A: I felt pain in my lower back with a knifelike pain shooting down my right leg.

Q: How much time elapsed from the accident until you felt this knifelike pain shooting down your right leg?

A: About two minutes.

Q: During the two minutes prior to feeling this knifelike pain shooting down your leg, what were you doing?

A: I was lying in the backseat of the car in shock.

Q: Once feeling this knifelike pain shooting down your leg, what did you do next?

As you can gather from reading these types of questions, you can only use this type of technique one or two times during each examination.

Leading questions are defined as those that suggest the answer, contain within them the answer or call for a yes or no answer. Aside from asking questions that begin with who, what, where, when, how and

why, stay away from prefacing questions with words that will always call for a yes or no answer. Any question beginning with words like "did," "didn't," "does," "doesn't," "is," "isn't," "aren't," "will," "won't," "can," "can't," "could," "couldn't," "would," "wouldn't," will always call for a yes or no answer. Here is an example of what not to do:

Q: Did you see the accident?

A: Yes.

Q: Does your back hurt?

A: Yes.

Q: Are you currently employed?

A: Yes.

Instead, change these questions to the following non-leading form. It will save time, be more proper and be more interesting to the fact-finder:

Q: What, if anything, did you observe?

A: I saw the accident.

Q: What part of your body bothers you?

A: My back.

Q: Where do you work at the present time?

Sometimes leading questions are unavoidable during direct testimony. There are times that the witness freezes up, has a complete failure of recollection, and your attempts to refresh the witness' recollection fail. If you must, ask the question in leading form, reverting back to non-leading form after receiving a sustained objection, yet refreshing the witness' recollection, nonetheless. The following questions and answers demonstrate this approach:

Q: What did the defendant have in his hands at the time he threatened you?

A: I know he had black gloves on.

Q: Did he have anything else?

A: I know he had on those black gloves.

Q: Did he have a gun in his hand?

By counsel: Objection, your honor, leading.

The Court: Sustained counselor, do not lead.

Q: What, if anything, did the defendant have in his hand?

A: A gun.

Another way to do the same thing is just to suggest the answer but in typically non-leading, open-ended form. Take, for example, a case where the defendant was driving while intoxicated, and yet you are having difficulty eliciting from your witness that she smelled alcohol on defendant's breath:

Q: After the accident how close did you get to the defendant?

A: I was standing next to him.

Q: What did you notice about him at that time?

A: He was just barely conscious.

Q: Did you notice anything else?

A: No.

Q: What, if anything, did you notice about his breath?

By defense counsel: Objection. Leading the witness.

The Court: Overruled.

A: He smelled of alcohol.

As you can see, the question began with "what, if anything," language clearly evoking the nature of direct examination. Therefore, the court permitted it in this instance. Even if the court had not allowed the question, counsel could have easily reverted to purely non-leading form, confident that the witness had her memory refreshed about the obvious smell of alcohol on the defendant's breath.

Direct examination is an overlooked art within trial practice. Preparation should be just as thorough as any other part of the trial. It is generally best to take a witness chronologically through the relevant facts that bring him to the witness stand. Avoid objections by asking non-leading questions that call for a narrative response from the witness. Make the witness the star and, as the lawyer, blend into the background. Stick with sentences beginning with who, what, where, when, how and why to ensure the non-leading nature of direct. Organize the examination starting with background or pedigree information, sparingly using transitional questions, and following up with words like describe, explain, what happened next, proceed, go on and continue. Only lead when you have to in order to avoid an outright dismissal, a loss or a legal malpractice suit. An artful direct can go a long way in convincing a jury to find in your client's favor.