SOME STRAIGHT TALK ABOUT DIRECT EXAMINATION

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INTRODUCTION

Unlike prosecutors who must call and question witnesses to establish the elements of charged crimes and prove a defendant’s guilt beyond a reasonable doubt, defense attorneys typically rely on cross examination of adversary witnesses to establish weaknesses and expose flaws in the People’s proof.

Hence, on those few occasions when the defense puts on a case by calling witnesses, their direct examinations tend to sound a lot more like cross examinations littered with leading questions rather than open-ended ones which are the hallmark of direct exam.

WHAT IS DIRECT EXAMINATION?

Direct examination is the act of questioning a witness by the attorney who called that witness to the stand. As noted above, except with preliminary background questions (e.g., “are you married?”), or clarifying an answer already given, (“by ‘unmarried’ do you mean divorced or single?”), questions on direct exam should invite the witness to tell his/her story in his/her own words rather than agree with facts stated by counsel (see Guide to New York Evidence [GNYE] 6.06 [4][a]): Scope & Manner of Witness Examinations)

One of the most effective ways to ask an open-ended question is to begin with “WHO, WHAT, WHERE, WHEN, HOW or “DESCRIBE.”

For example: “Who were you meeting at the Chat-n-Nibble bar that night?”

 “Who is he/she to you?”

 “What time (when) did you arrive?”

 “Where is the bar located.?”

 “Describe the bar as you saw it when you first walked in?”

 “Tell the jury what happened after that?”

Cross examination, by contrast, involves confronting the witness with facts that counsel knows or believes to be true (based on review of discovery materials including prior depositions and/or testimony at a prior proceeding such as a felony hearing or grand jury presentation). If properly framed, the question (actually, the declaration) should call for a “yes,” “no” or “I don’t know/remember” response.

Such as: “You were meeting your lover at the Chat-n-Nibble, weren’t you?”

 “You arrived at 10:00pm?”

 “That was about a half hour after your spouse left your house to go out of town?”

 “So, within a few minutes of his/her leaving the house, you were on your way to meet your

 lover at the Chat?”

 “The bar is located on Sheridan Drive, is it not?”

 “About a 10-to15-minute drive from your house?”

 “When you walked into the bar, you had to look around to find your lover, didn’t you?”

 “That’s because the place was packed with people drinking and dancing, wasn’t it?

 “And for a minute, you felt a little panicky because you thought you may have been stood up,

 didn’t you?”-

 “But then you felt a tap on your shoulder, and, to your relief, there he/she was.”

Often, direct examination which places the witness at center stage (and counsel on the sidelines except when presenting the witness with an exhibit), is generally less appealing to counsel than cross examination where counsel can control the witness (and, hopefully, the narrative) by eliciting facts that are helpful to his/her case or harmful to the prosecution’s cause.

That is not to suggest, however, that direct examination is any less important. That is because its purpose is the same, which is to contradict or cast doubt on the People’s proof and/or to elicit facts that support the defense’s theory of the case.

WHAT MAKES A GOOD DIRECT EXAMINATION?

Once counsel has decided that the People’s case requires something more than cross examination to create reasonable doubt, a decision must be made as to what witness(es) to call to offset the prosecution’s evidence.

Depending on the nature of the case (e.g., identification, self-defense, mental disease or defect), counsel must decide what witness(es) is/are available and competent to testify (GNYE 6.01), for example, to establish an alibi, justification, or the defendant’s lack of mental capacity to understand the nature and consequences of his/her conduct and that it was wrong.

Witnesses may be simple fact witnesses to contradict the People’s version of events, character witnesses (to attack another witness’ reputation for truthfulness[ GNYE 6.23] or to bolster the defendant’s character on a relevant character trait [GNYE 4.07.1]), or an expert witness to rebut the People’s expert (GNYE 7.01) (or, for example, to establish the defendant’s lack of capacity or extreme emotional disturbance)(See GNYE 7.01 [5][d][i]]).

Ultimately, a decision must be made (by the defendant) whether he/she will testify on his/her own behalf. That should be determined by a reasoned assessment the quality of the People’s case, the presence or absence of other witnesses who can credibly cover the issues in question, the nature and extent of the defendant’s criminal history (as allowed by the court’s Sandoval ruling [GNYE 6.19 [1][b][ii]), and his/her perceived ability to listen to questions and give believable answers, and to withstand the parries and thrusts of cross examination.

PREPARATION

Whomever the witness may be, the key to an effective direct examination is PREPARATION. Counsel should insist that the witness read any prior statements or testimony that he/she has given to avoid interruptions (to refresh recollection) and to minimize the opportunity for impeachment by prior inconsistent statements (GNYE 6.15).

Counsel should also explain the nature of the case and the defenses so that the witness understands his/her place in the scheme of things (e.g., “the prosecution claims that your boyfriend robbed the Stop-and-Go store on [date] and [time]. You are being called as an alibi witness because he says that he was with you at your apartment on the other side of town on that date and time.”). If the witness says, “SAY WHAT??,” then he/she probably shouldn’t be called to the stand.

FOREWARNED IS FOREARMED

It is important to highlight the points that counsel will be covering and the questions that he/she will be asking on direct examination. (A dry run of the direct may help the witness get into a proper groove). Counsel should also inform the witness of the likely questions that will be asked on cross examination (maybe by doing a mock cross exam if necessary) and instruct the witness to be forthright and truthful rather than argumentative, evasive, or deceptive.

Whether for direct or cross exam, witnesses should be told to listen to the questions, ask for clarification if they don’t understand a question (which means that counsel should ask comprehensible questions) and to limit their answers to the question asked rather than ramble on and provide more fodder for cross examination. They should not quibble with or qualify answers calling for a yes or no answer, but they should not roll over when faced with argumentative or misleading questions.

KNOW YOUR SURROUNDINGS

Ideally, witnesses should get an advanced look at the courtroom and get acquainted with the locations of all relevant players in the trial process. They should not be looking at exhibits for the first time on the witness stand. They should also be instructed to stop talking when there is an objection and only finish the statement if the objection is overruled. One of the keys to an effective witness is to minimize the trauma and maximize his/her comfort level in this strange and formal setting.

If the witness is an EXPERT, counsel should make sure that he/she has appropriate (and hopefully unassailable) credentials that are germane to the subject matter of the case (e.g., cause and origin of a fire). Counsel should thoroughly vet the expert’s testimonial history to make sure that he/she is not a charlatan or a hired hack who only testifies for one side.

Since experts typically rely on reports, records, and other documentary materials, they should be provided with all relevant items of discovery. Counsel should also consider asking the court to allow the defense expert to sit in during the opposing expert’s testimony, especially where counsel may need assistance in formulating appropriate questions to ask the People’s expert on cross exam with respect to complex, technical matters.

STRUCTURING THE DIRECT EXAMINATION

As with cross examination, counsel should prepare an outline of the direct exam so that the witness’ testimony will flow in a logical progression rather than scatter about like confetti in a windstorm. The questions should guide the witness through his/her story with signposts (“turning our attention to the night of September 11tth, 2022.” “Now, I’d like to talk about, your educational background and training.”).

Counsel should show (or at least feign) interest in the witness and his/her testimony by using an appropriate tone of voice and asking appropriate follow-up questions that show engagement in the dialogue. If a witness’ memory falters, counsel must know how to refresh his/her recollection with whatever item will do the trick (e.g., a prior deposition, the accusatory instrument, a newspaper) (See GNYE 6.09). If the witness’ memory cannot be refreshed but the prior deposition was made close in time to the incident and was accurate when made, counsel should consider offering that deposition as a past recollection recorded (See GNYE 8.25].

IDENTIFY POTENTIAL OBJECTIONS AHEAD OF TIME

Rather than march blindfolded through a minefield, counsel must anticipate the objections (e.g., relevance, hearsay) that are likely to be raised in opposition to a particular line of questioning. That way, when the objection is made, counsel can respond with confidence and authority and keep the examination moving forward. If the objection is sustained, and the evidence is important, an OFFER OF PROOF should be made to enlighten the court and preserve the record for appeal.

If counsel runs into an objection on the grounds of RELEVANCE, (and the relevance of the proffered evidence can be established through another witness (whose schedule does not permit his/her being called sooner), the testimony should be offered conditionally (i.e., subject to connection) (See GNYE 4.01, 4.05).

EXPERTS

If the witness is an expert, counsel and the witness should map out the direct examination so that a proper FOUNDATION is laid for opinion testimony. Typically, this will include laying bare the witness’ area of expertise, his/her educational background, training and experience, the expert’s purpose in testifying (e.g., to rebut the People’s expert, to help establish self-defense or the accused’s lack of mental capacity, to discuss the factors affecting the reliability of identifications [GNYE 7.17] or the factors giving rise to false confessions [GNYE 7.15]), and a discussion of materials reviewed in preparation for testifying.

Ideally, the expert will have relied on scientific principles and methodologies that enjoy general acceptance in the relevant scientific community. That way (assuming the expert’s approach is neither new nor novel), counsel can avoid getting mired up in a *Frye* hearing which, if decided adversely, could result in preclusion the expert’s testimony altogether (See GNYE 7.01[2]).

Like other witnesses, experts should also be prepared for the likely questions with which they will be confronted on cross examination. If the witness has skeletons in his/her closet (e.g., prior suspension or reprimand, contradictory conclusions in other cases involving the same subject matter), counsel may want to consider raising the issue and clearing the air on direct examination.

The expert should be urged to answer questions directly and forthrightly and to avoid coming across as a condescending know-it-all. (Some can’t seem to help it). In such cases, counsel should consider finding another expert. Down-to-earth straight shooters are usually the most effective expert witnesses.

Virtually all experts are compensated (handsomely) for their time spent on the case in and out of court. Counsel should not be afraid to elicit the amount of the fee (paid and expected) and not tolerate a witness’ claimed ignorance of his/her earnings in the case (e.g., “you’d have to check with my office manager.”). Such a deflection comes across as dismissive and disingenuous. The witness should be instructed to check with his/her office manager before coming to court.

SOME TIPS

1. While open-ended questions are the norm on direct examination, counsel should not be afraid to ask an occasional leading question to get through preliminary or background matters or to clarify confusing answers.
2. Wait for the judge’s green light before launching into the direct exam.
3. Position yourself out of the jury’s sight line to the witness.
4. Ask short, simple, and clear questions.
5. Make sure the witness answers the question you asked.
6. If an opposing objection is overruled, make sure to re-ask the question and obtain the answer.
7. Bootstrap or loop your questions (e.g., “After the complainant came at you with the broken beer bottle as you just described, what happened next?”).
8. Set the scene before having the witness describe the action (e.g., “Describe the lay out of the subway car.” “How many people were between you and the complainant when you first laid eyes on him?” “When did you notice that he had a knife in his hand?” “In which hand did he hold the knife?” “Describe what he did with that knife before you pepper sprayed him.”
9. When the witness gives a powerful, dramatic, and/or helpful answer, pause and let the jury take it in before moving on to the next question.
10. Use exhibits, where appropriate, to illustrate the witness’ testimony (see GNYE 11.01: Real Evidence and GNYE 11.03: Demonstrative Evidence).
11. Take the sting out of cross examination by addressing weak points (e.g., the witness’ criminal history, state of sobriety at the time of the incident, bias in favor of the accused) somewhere in the direct exam (other than the beginning or the end).
12. Begin and end on high notes.

REDIRECT EXAM

1. This should only be employed to clarify or explain a harmful answer given on cross exam.
2. Unlike many prosecutors, do not ask leading questions that feed the witness the desired answer.
3. DO NOT JUST REHASH the direct exam.
4. If the witness really hasn’t been hurt on cross exam, leave well enough alone and say, “no redirect your honor.”

FINAL THOUGHT

Trial lawyers are known to seek the limelight of center court but must keep in mind that direct examination, unlike cross examination, is all about the witness (and his/her testimony) and not the lawyer (and his/her brilliant questions).

Instead of swinging for aces, counsel on direct examination should be lobbing slow, hanging fat ones that enable a friendly witness to hit safely over the net. When both parties are in sync, the result can be a thing of beauty. When they’re not, counsel may end up wishing that he/she rested after the People’s case-in-chief.