

Direct Examinations

(See Student Attachment #5)

After the opening statements, the process of “witness examination” begins. First, the P/P’s team presents its witnesses, then the defense team. Each time a witness is called to the stand, the attorney who called the witness asks a series of questions called the “direct examination.” These questions are designed to get the witness to tell a story, reciting what he or she saw, heard, experienced or knew about the case. The questions must ask only for facts, not for opinions (unless the witness has been declared to be an “expert” in a particular subject, such as a doctor or a police detective). In addition, the attorney may only ask questions and may not make any statement about the facts, even if the witness says something wrong. When the direct examination is completed, an attorney for the other side then asks questions to show weaknesses in the witness’ testimony, a process called “cross examination.”

Objective: To obtain information from favorable witnesses you call in order to prove the facts of your case.

- Before you write your questions for direct examination, list the objectives you wish to obtain from each of your witnesses
- You should make at least one major point for your case from each witness during direct examination.
- The purpose of the direct examination is to have your witness give testimony relating directly to what he perceived through the use of his senses.
- The witness may not give opinions, conclusions, or speculations. Only a qualified expert may offer opinions and conclusions where the subject of the testimony is in his/her area of expertise.
- Procedural restrictions upon methods of receiving testimony are designed to insure that the jury does not receive objectionable material. (See *Teaching the Rules of Evidence and Procedures* section of this packet.)
- If physical evidence is to be produced, it must have a witness to identify it and testify to its relevancy.
- Physical evidence is introduced during the course of regular testimony and is subject to the judge’s approval as to its admissibility.

Advice in Preparing: What should be included?

- Isolate exactly what information each witness can contribute to proving your case and prepare a series of questions designed to obtain that information
- Be sure all items you need to prove your case will be presented through your witnesses.

Other Suggestions:

- Avoid asking leading questions. (There are, of course, a few generally accepted exceptions to this rule; i.e. questioning on matters such as name, address, occupation.) See *Teaching the Rules of Evidence and Procedures* section of this packet.
- Practice with your witnesses.
- Don't ask questions requiring opinion testimony, unless witness has been certified as an expert by the court.

Advice in Presenting

- Try to keep to the questions you've practiced with your witnesses and ask a limited number.
- Be able to think quickly if the witness gives you an unexpected answer and add a short follow-up to be sure you obtain the testimony you wanted.
- Be relaxed and clear in the presentation of your questions.
- Listen to answers.
- If you need a moment to think, ask the judge if you may have a moment to refer to your notes, or to discuss a point with your co-counsel for a moment. NOTE: Time does not stop. Refer to your case materials for more information about this rule.
- If you can, memorize your questions so you're not referring constantly to notes.
- Watch where you stand: Don't position yourself between the witness and the jury, or the witness and opposing counsel.

Forming Questions for Witnesses:

- You must "establish" your witness – who s/he is, background, etc.; "qualify" any experts.
- Establish a "foundation" – the court does not know anything; start from scratch.
- Questions should be "open-ended" – allow the witness to make your case. DO NOT LEAD.
- Questions should follow a logical order and build on one another. (Ex: Before you ask a witness what s/he saw, you must establish s/he was on the scene.) This is similar to second item above.
- Make a "train" of questions to prove each issue/point you are making.
- Listen to your witness and make sure s/he is answering the questions. Be flexible. Be able to ask extra questions if necessary.

DOs AND DON'Ts OF DIRECT EXAMINATION

DO	DON'T
1. Identify exactly what information each witness can contribute to your case.	1. Don't use leading questions.
2. Prepare a series of questions to obtain the information you need from the witness you will examine.	2. Don't use questions that call for an opinion from the witness, unless the court has recognized the witness as an expert.
3. Be relaxed and clear in the presentation of your questions.	3. Don't use questions that require the witness to draw a conclusion or speculate.
4. Listen to the answers to your questions.	4. Don't testify yourself, through your questions or in your objection responses – just ask the questions.
5. Practice with your witnesses.	

A. Style Points

- **Attorney Conducting Direct Examination:** Questions should be designed to get the witness to tell the story in a logical manner. Avoid lengthy or complicated questions. Leading questions cannot be used on direct examination. (See *Teaching the Rules of Evidence & Procedure* section.) Uncontrolled narrative questions are also not permissible – the attorney may not set her/his witness on “automatic pilot” with a narrative question and let the witness fly alone. Multiple and repetitious questions are objectionable, too. A well-conducted direct examination must be carefully prepared in advance by the attorney and practiced with the witness. The direct examination is most effective when questions are put to the witness in plain language, rather than legal or technical jargon that may seem unduly long, stilted or unnatural. Be prepared to rephrase questions in case the witness does not understand a question or fails to remember facts accurately, or in case the other side objects to a question. (Grounds for objections are discussed in *Teaching the Rules of Evidence* section.)
- **Opposing Attorney:** Listen carefully to the questions and the answers, since cross-examination must be limited to subjects discussed in the direct examination. Listen for violations of the Rules of Evidence, and be prepared to make good objections.

- **Witnesses:** The most important factor is the believability (often called “credibility”) of the witnesses. Witnesses should tell their stories clearly with as little hesitation as possible. It’s important for witnesses to know the facts thoroughly.

NOTE: At the close of the cross-examination, the attorney who conducted the direct exam may do a “redirect” at the discretion of the presiding judge. (See below.) A redirect examination follows the same rules as direct. However, the questions are limited to subjects discussed in the cross-examination.

What to Include: The following is a list of the sorts of questions that might be asked on direct examination:

- “What happened then?” or “What did you see?”
- “How long have you worked for Ms. Smith?”
- “What happened after you saw the yellow car?”
- “How far away was the other car when you first saw it?”
- “How long did you stand there?”

Redirect Examination: If the witness’ credibility or reputation for truthfulness has been attacked on cross-examination, the attorney whose witness has been damaged may wish to ask a few more questions with permission from and at the discretion of the presiding judge. These questions should be limited to the damage the attorney thinks was done by the opposing attorney on cross-examination, and should be phrased so as to try to save or “rehabilitate” the witness’ credibility. If the redirect examination is permitted, the cross-examining attorney will also be allowed to conduct a re-cross of the witness.

TEACHER/ATTORNEY COACH DISCUSSION QUESTIONS

1. Why is it important that leading questions be prohibited in direct examination?

Leading questions should be avoided on direct examination because in the interest of justice, the court does not want the attorney to put words into the mouth of his own witness. The court wants to know what the witness remembers – not what the attorney wants him to say.

2. What essential elements would the P/P want to establish when s/he asks the questions for each P/P witness of this year's case problem? The Defendant when s/he asks the questions for each Defendant witness?

Answers will vary based on case problem. This discussion can be the beginning stages of brainstorming the team's case strategy.

3. What would be examples of proper direct examination questions for the witness _____ . (For this exercise, pick any one or more witness affidavits to work on and write questions on black board or flipchart for students to see. Discuss why or why not these would be appropriate.)

Answers will vary.

STRATEGIES FOR TEACHING DIRECT EXAMINATIONS

1) Ask students to articulate the purpose of direct examination, then brainstorm with the class how it differs from cross-examination and list their responses on the board. (We suggest reviewing and teaching them together so they understand the subtle differences between the two components.)

2) To help them prepare direct (and later, cross) examination questions, students should set up a “question and answer checklist”.

- Draw a line down the center of a sheet of paper and head the two columns “questions” and “desired answers”.
- Then, after reading through the facts and witness statements of the mock trial problem, list the information they want to get out of a particular witness in the direct examination on the “desired answers” side of the sheet. (Remember, the witness answers should be relatively brief and very clear.)
- Once they have planned the testimony, sentence-by-sentence, that they want to elicit from the witness, the “questions” side of the sheet should be filled out.

This exercise illustrates the need for a careful and understandable delivery of the relevant facts to the jury via the attorney’s controlled questioning. In addition, it allows students to develop their analytical and writing skills.

3) Again, the best strategy for teaching students the purpose and format of direct examination is to let them try it themselves. Teachers could use the sample mock trials they selected for the opening statement exercise or choose another one for this activity.

- Divide the class in half and assign them sides of the case.
- You may wish to further divide each half of the class, asking each group of a few students to prepare direct examination of one the witnesses for their side.
- Collect and comment on all of their papers and select one student from each group to conduct his or her direct examination in front of the class (with another student acting as the witness).
- The rest of the class could act as opposing attorneys and make objections to any improper questions or answers. (Refer to the section on objections in *Teaching the Rules of Evidence and Procedures*.)