DIRECT EXAMINATION

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Trial Advocacy CLE
September 17, 2011

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UNDERSTAND THE ROLE AND IMPORTANCE OF DIRECT EXAMINATION	**NOTES**
Direct examination is the heart of the trial. It is the vehicle for conveying to the jury the information necessary to reach the conclusion your client desires. Rare is the case in which direct examination will not be the most important part of your case. Direct examination is your opportunity to use your witnesses to tell your story, to teach the jury the facts of your case. Your story must be relevant, coherent, and true. Direct examination supplies your evidence, and without your evidence you cannot prevail. "The first, although not the most exciting rule of direct examination, is that direct must cover all the elements of proof for your case. Second, the testimony *must* be believable. Third, the jury has to listen to it." Hazel, J. Patrick, "Direct Examination," in *The Litigation Manual: Trial*, p. 364 (ABA Section of Litigation 3rd Ed. 1999) (emphasis in original)	

PREPARE YOUR DIRECT EXAMINATION	**NOTES**
Establish your theme Establish your theme, stick with it, and make sure it is fully developed. Your theme is the overview of your case, the story you seek to leave with the fact-finder and the rationale for why the fact-finder should believe your story. Know your theme at the outset of your trial preparation (and, in fact, well before). It will guide your selection of witnesses, the order of their presentation, the questions you will ask them, and the documents you will introduce through them. Your theme should weave together elements of relevance, motive, moral authority, character, cause and effect, beliefs about responsibility for conduct, and any other factors that will influence the jury in your client's favor. For each witness, ask – Why does the witnesses' testimony matter? What does it say about the party's motive or reason for acting? Does it support for your witnesses' character and believability, or that of the party? Does it explain what happened and why? Will it sit well with the jury's notions of reasonableness, fair play, and personal responsibility? What elements of the claim or defense will the witness cover? Can you use this witness to rebut or impeach an	

element of the opponent's position? What exhibits will you introduce through this witness? Will this witness add moral strength to the presentation of your case? If you call the witness, it must be worth the jury's time and attention.	
Account for the elements of your case Account for the elements of your claims in your witnesses' testimony. Where at all possible, avoid relying on cross examination of your adversary's witnesses to establish the elements of your case (or to introduce documents you need for your case). Consider preparing your proposed jury instructions before preparing your witness outline – or use model jury instructions. Then make sure each element in the instructions is covered adequately. Based on the elements of your claims, develop a list of the essential facts to be covered in proving your case. Check them off as you cover them at trial. Allocate the facts to be established among your witnesses – with an eye to knowledge, confidence, credibility, presentation, and impact. Establish the order of your witnesses.	**NOTES**
CRAFT THE QUESTIONS Use plain language Avoid lawyer-speak; use plain English. Some examples from Professor McElhaney: "How long have you been so employed?"	**NOTES**

Compared to – "How long have you worked there?" "State what, if anything, unusual happened on that occasion." Compared to – "What happened then?" or "What did you see?" McElhaney, James W., *McElhaney's Trial Notebook*, pp. 403-05 (ABA Section of Litigation 4th Ed. 2005) Avoid such phrases as: "With respect to" (just ask the question), "Is it correct that you" (try "Did you…"), and "Let me ask this" (just ask the question). Eschew words like, "eschew." Remember, incomprehensible or just plain bad questions beget incomprehensible or just plain bad answers. Ask simple, direct questions. If you believe you've mastered this, read one of your trial or deposition transcripts to be sure.	

Focus attention on your witness	**NOTES**
"If the jurors remember one of your witnesses as being particularly convincing, but are not sure who conducted the direct examination, you have done your job well." Mauet, Thomas A., *Fundamentals of Trial Techniques*, § 4.1, p. 72 (Little, Brown and Company 3rd Ed. 1992) Focus the jury's attention on the witness and not on counsel. Counsel should "disappear" during direct examination. Make sure the jury knows who the witness is, why he's here, and why they should believe his testimony. Introduce the witness: Who are you? What do you do? Why are you here? What can you tell us? Explain fully why the jury should believe this witness. This is more than a matter of simply complying with N.C.R. Evid. 602 ("A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter."). The witness should demonstrate clearly that he observed, heard, or experienced the matter on which he testifies.	

Lead when appropriate	**NOTES**
Don't be afraid to lead when appropriate. The rules: N.C.R. Evid. 611(c) "Leading questions should not be used on the direct examination of a witness *except as may be necessary to develop his testimony*. Ordinarily leading questions should be permitted on cross examination. When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions." (Emphasis added.) N.C.R. Civ. P. 43(b) "A party may interrogate any unwilling or hostile witness by leading questions and may contradict and impeach him in all respects as if he had been called by the adverse party. A party may call an adverse party or an agent or employee of an adverse party, or an officer, director, or employee of a public or private corporation or of a partnership or association which is an adverse party, or an officer, agent or employee of a state, county or municipal government or agency thereof which is an adverse party, and interrogate him by leading questions and contradict and impeach him in all respects as if he had been called by the adverse party."	

The exceptions (as recognized by the N.C. Supreme Court): "[C]ounsel should be allowed to lead his witness on direct examination when the witness is: (1) hostile or unwilling to testify, (2) *has difficulty in understanding the question because of immaturity, age, infirmity or ignoranc*e or where (3) the inquiry is into a subject of delicate nature such as sexual matters, (4) *the witness is called to contradict the testimony of prior witnesses*, (5) the examiner seeks to aid the witness' recollection or refresh his memory when the witness has exhausted his memory without stating the particular matters required, (6) *the questions are asked for securing preliminary or introductory testimony*, (7) *the examiner directs attention to the subject matter at hand without suggesting answers* and (8) *the mode of questioning is best calculated to elicit the truth*." *State v. Greene*, 285 N.C. 482, 492-93, 206 S.E.2d 229, 236 (1974) (emphasis added) The exceptions allowing leading witnesses on direct are largely directed to permitting the efficient and clear presentation of testimony in circumstances where the opposing party will not be prejudiced. Counsel can (and generally should) lead through background and preliminary inquiry. Be thoughtful. *Even without objection*, leading on matters pivotal to the witness's testimony can give the appearance that counsel is putting words in the witness's mouth, robbing the witness of credibility.	**NOTES**

Organize and pace your examination	**NOTES**
Organize the direct examination in a way that is understandable and accessible. Frequently, the best organization may be chronological, but consider alternating organization to create focus on important testimony. For example, separate events can be organized by topic, and then, within the discussion of individual events, chronology may be used. Consider open-ended questions followed by tight follow-up questions. Slow down and fill in the picture on key points in dispute. "Unimportant matters are avoided or glossed over. Important ones are stressed, details are zoomed in on, and action is slowed down. Critical matters can be shown in stop-action sequences." Mauet, *Fundamentals of Trial Techniques*, § 4.2, p. 72 In all instances, seek to organize the testimony in a manner that reflects well on your witness's testimony and presents an understandable story to the jury. Remember "primacy" and "latency": Start strong and finish strong.	

Use transitions	**NOTES**
Help the jury take in the direct examination with *prologues*, *transitions*, and *loops*. Appropriate use of these techniques will show preparation, organization, and confidence. A *prologue* projects for the jury the topics that a particular witness will be asked to cover: Ms. Lee, I'm going to ask you some questions about your relationship with the deceased, what you saw at the time of the accident, and what you did just after the accident happened. Let's start with your relationship with the deceased." A *transition* signals that the topic of the witness's testimony is changing. "Ms. Lee, let's move now to the day of the accident. Please tell the jury where you were standing at the time of the accident." A *loop* repeats a key portion of the witness's immediately prior testimony for emphasis and as a starting point of the next question. "Ms. Lee, what did you do after you arrived at the deceased's home? I went straight to the kitchen. When you got to the kitchen, what did you see? I saw the deceased lying on the floor in a pool of blood." Use prologues, transitions, and loops judiciously. Don't overdo it. These techniques are well-accepted: "The record shows that the questions that Ms. Smith objected to during trial were not so much 'leading' as they were 'bridges' or summaries of testimony. In general, the questions did not suggest a particular answer." *State v. Smith*, 135 N.C. App. 649, 655, 522 S.E.2d 321, 326 (1999)	

Show and tell with exhibits	**NOTES**
Jurors – like all of us – tend to remember what they have seen. Use exhibits for more than simply their evidentiary value; use them as aids to memory. Use them liberally. Make sure exhibits are incorporated in your outline for direct examination so that they can be accessed and used naturally and easily. Practice authenticating documents with the witness adequately during preparation of his testimony so that he is (and you are) comfortable with the process. Avoid this situation: "When the lawyer asked the witness, 'Can you identify Plaintiff's Exhibit One?' the witness answered, 'No.'" Hazel, "Direct Examination," p. 373 Enter into stipulations of admissibility of documents when appropriate.	
Draw the sting – or not?	**NOTES**
Bad and troublesome facts will never simply go away. In civil cases, after competent discovery, both sides have a good idea of the information the opponent has that can damage the credibility of the witness. Consider "drawing the sting" and taking from the opposing lawyer the benefit of first raising and characterizing the fact. Consider using your witness to concede the information and put his best face on it. Be careful where this questioning is placed – not at the beginning and not at the end of the witness's testimony.	

Remember the importance of language Have the witness simply tell her story. Avoid characterizations – they are unnecessary and unhelpful shortcuts. Avoid unnecessary adjectives and adverbs. Instead of saying, "the apartment was in terrible shape," Describe the peeling paint. Describe the broken windows. Describe the missing floor boards. As a corollary, Avoid tentative language. Contrast: "He was wrong." With "I don't think he was necessarily right under the particular circumstances at hand."	
Trim the outline Trim the clutter from your direct. Cull out weak points, needless repetition (but not all repetition), and useless detail. If the question and answer are not needed, dump them.	**NOTES**
Can I remember all of this? Conduct as much of your direct examination as possible without written notes or an outline. Recognize that this does not come easily for all lawyers, even good trial lawyers. Consider writing your questions out to organize your thoughts and build confidence, but then not using the outline during direct examination.	**NOTES**

"Preparation for direct includes preparing the questions – partly to avoid leading. You need to write them out. There is nothing wrong – and much right – about writing out your questions. The wrong lies in doing the wrong thing with them. Do not read them!" Hazel, "Direct Examination," pp. 371-72 If you remain uncomfortable without notes, consider using cards with large print, or some other easily seen but not obtrusive writing. Above all else, get your head out of your notes. Pay attention to your witness. Your attention to the witness will help the jury pay attention to her. Paying attention to her answers will allow you to ask appropriate follow-up questions and make sure the witness explains herself fully. If something goes wrong with the witness's direct testimony, if she forgets something or fails to understand a question, take the blame and allow her to recover.	

PREPARE YOUR WITNESS FOR DIRECT EXAMINATION	**NOTES**
Preparing your witnesses for direct takes time – perhaps more than any other aspect of your trial – and there is no substitute for the investment of time. Your preparation will build the confidence of both witness and counsel. Make sure your witness understands the difference between direct and cross examination. On direct, she is the story teller. Answers must be complete and confident. Prepare your witness fully, but don't over-script. The answers must present as the witness's own and not as a series of canned statements.	

CONSIDER THE "FAIRNESS" OF WITNESS PREPARATION	**NOTES**
<u>How to prepare the witness?</u> Make sure the witness knows the topics to be covered, the questions to be asked, and has run through the examination (questions and answers) repeatedly – sufficiently to master the material and be comfortable testifying. Make sure the questions are geared to the witness's knowledge – matters on which the witness is competent – and not just to facts that fit into your outline. Have the witness read her deposition transcript thoroughly (if one exists) and relevant exhibits.	

How far to go?	**NOTES**
Prepare an "essay" of everything the witness needs to say and allow him to read it? Summit, Stuart A., "The Witness Needs Help,: in *The Litigation Manual: Trial*, p. 339 (ABA Section of Litigation 3rd Ed. 1999) Prepare a script of questions and answers for the witness? Less risky at trial than in deposition, but is it fair? Is it effective? Does it lead to mechanical testimony? Does it make the witness dependent on his script? The rules: N.C.R. Prof. Cond. 3.4(b) – lawyer shall not falsify evidence or counsel or assist a witness to testify falsely. N.C.R. Prof. Cond. 4.1 – lawyer shall not knowingly make a false statement of material fact or law to a third person. The Rules of Evidence: N.C.R. Evid. 612 – (a) "If, *while testifying*, a witness uses a writing or object *to refresh his memory*, an adverse party *is entitled* to have the writing or object produced at the trial, hearing, or deposition in which the witness is testifying." (b) "If, *before testifying*, a witness uses a writing or object *to refresh his recollection for the purpose of testifying* and *the court in its discretion determines that the interests of justice so require*, an adverse party is entitled to have those portions of any writing or of the object, which relate to the testimony produced, *if practicable*, at the trial, hearing, or deposition in which the witness is testifying." (Emphasis added.) What if the document falls into the adversary's hands?	

REHEARSE THE SETTING AND CONDUCT, NOT JUST THE WORDS	**NOTES**
Practice direct with witness in the most realistic manner possible. Take witness to the courtroom, if possible. Make sure the witness knows the arrangement of the court and the players (judge, jury, court reporter, counsel, observers). Tell the witness where to look, and when (counsel for questions, jury for answers). Discuss with the witness how to dress and how to present himself on (*and off*) the witness stand. Discuss with the witness any other factors that might contribute to his comfort in court under examination.	

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