

TRIAL ADVOCACY: DIRECT EXAMINATION

Faculty: Ehsan Chowdhry, Esq

- a. Sequestration issues
- b. Order of Appearance
- c. Build background of witness so that jurors can assess credibility
 - i. Sample Law Enforcement
 - ii. Sample Lay Witness
 - iii. Sample Character Witness
- d. Must have personal knowledge
- e. During your examination you may enter an area where opposing counsel demands a side bar for request of a “proffer” or an “offer of proof”
- f. Primacy / Recency – “Why are you here today?”
- g. Positioning
- h. Non leading questions generally
 - i. You can lead under FRE 611 if hostile witness, child witness, forgetful witness, expert’s credentials or relatively minor things not in issue)
- i. Questions must be who, what, when, where, why, how
- j. Chronologically
- k. Use of signposts (I would like to turn your attention to ... Let’s shift gears and talk about ...)

l. Refresh recollection if necessary (see past recollection recorded exception to hearsay)

i. Is good and shows that witness is human and that testimony is not absolutely rehearsed and therefore the product of natural recollection

ii. Under New Jersey, N.J.R.E. 803(c)(5) ... see also FRE 803(5)

1. the statement must have been previously made by the witness or under the direction of the witness, OR by some other person for the purpose of recording the witness' statement at the time it was made, AND must be one which would be admissible if made by the witness while testifying

m. Ask questions in present tense

n. Refer to as Mr. Smith or Officer Smith versus lax attitude of referring to by their first name

o. Volunteer weakness in the middle of the case (appears that you are not hiding anything and it draws the sting out of hearing it on cross examination)

p. Have witness explain in his own words

q. Use adjectives / descriptive word(s) b/c they help jury recreate images (heights, weights, distances, smells, touch, taste, colors, numbers, emotions, expressions, etc.)

r. Use details (b/c gives weight to the witness' testimony)

s. Have witness explain in his own words and then empower the judge/jury subtly by say for the "court/jury's benefit"

t. Have witness step down to explain a diagram after he has already verbally described it (beneficial because judge/jury gets to hear it a second time)

u. Have witness identify defendant

- v. Use pregnant pauses to emphasize a strong answer
- w. Looping / Echoing
- x. If witness links too many ideas together, politely ask to go through each item piece by piece
- y. Avoid pronouns
- z. Do not use legalese (i.e. did you observe the male individual exit the vehicle V. did you see the man get out of the car)
 - aa. Rare occasion where State's or Plaintiff's witness turns hostile (FRE 607 allows you to impeach your own witness)
 - bb. Casually observe the jurors reactions
 - cc. Cannot enhance or support witness credibility or character before it has been attacked (otherwise improper bolstering objection)
 - dd. Do not end your examination, either direct or cross, on an objection (leaves the confused jurors more confused and the jurors that know what is going on it leaves a poor impression)
 - ee. Defense attorneys in criminal cases often use the question of force of subpoena versus voluntarily testifying on behalf of defendant
 - ff. Nothing further, No further questions on direct, That is all that I have, I pass the witness
 - gg. Rehabilitation on re direct
 - hh. Must be limited to scope of cross or else objection will be beyond the scope of cross examination (and essentially let's the direct examiner improperly delve into an area he should have done)
- ii. If allegation or inference that witness' testimony is a lie or recent fabrication, FRE 801(d)(1)(B) allows as non hearsay a prior consistent statement as substantive evidence that witness is not fabricating

jj. If your witness was impeached by prior inconsistent statement and was not given an opportunity to explain either b/c cross examiner simply cut him off or said answer yes or no OR b/c court did not allow you to explain here are your remedies: Get up and now under the FRE 106's completeness doctrine finish off the context in which witness was trying to explain (makes cross examiner look deceitful now); Under FRE 613b now witness has opportunity to explain away the inconsistency