

DIRECT EXAMINATION©

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A. PREPARATION OF THE WITNESS

1. An attorney who places a witness on the stand at trial must meet with the witness and prepare that witness for the upcoming testimony. However, situations occur that may not allow an attorney to prepare a witness.
2. In Petrillo v. Syntex Laboratories, Inc., 148 Ill.App.3d 581, 499 N.E.2d 952 (1st Dist. 1986), the Illinois Appellate Court held that ex parte communications between defense counsel and a plaintiff's treating physician are prohibited because such communications are adverse to a patient's expectation that the information disclosed to the physician will remain confidential. However, Petrillo, also concluded that a plaintiff's treating physician must communicate with defense counsel by way of discovery. In Young v. Makar, 207 Ill.App.3d 337, 565 N.E.2d 1030 (2nd Dist. 1991), the Illinois Appellate Court held that defense counsel cannot communicate with the patient's treating physician even after the physician's deposition has been taken. Thus, defense counsel is unable to speak with a plaintiff's treating physician after the deposition has been taken but before the treating physician takes the witness stand at trial. Barring a Petrillo situation, no excuse exists for an attorney not to meet and prepare a witness whom he or she intends to place on the witness stand at trial.
3. When counseling a witness who is to appear at trial, the attorney should advise the witness about proper attire. Therefore, if a truck driver is going to be a witness at trial, it is not necessary that the truck driver appear in a tie and suit. Rather, clean working clothes that the truck driver normally uses when he or she drives a truck should be encouraged.
4. Witnesses should be counseled that they are to make eye contact with the jury while testifying. It is not necessary that the witness fixates his or her vision upon the jury, but should look at the jury from time to time, especially regarding important points of the testimony. The witness should also look at the attorney questioning that witness, but should not fixate his or her vision on the attorney at all times.
5. All documents such as previous statements of the witness, if in existence, should be covered as well as any photographs. If the attorney intends to have the witness draw a diagram at trial, the potential diagram should be discussed. Potential testimony of the witness should be covered by the attorney and the witness at length. It is also advisable to do a mock cross examination of the witness to prepare that witness for the cross examiner's potential questions.

B. HOW TO TESTIFY

1. In preparing a witness, the witness should be counseled that he or she should always tell the truth. Telling the truth under oath is not only moral but practical. The truth is easy to remember. Also, if the attorney places words in the witness's mouth that may not be accurate, the witness, if questioned later about the accuracy of his or her testimony, cannot say that the attorney told me to testify in that manner.
2. The witness should be counseled to stick to the facts and neither exaggerate nor speculate. In the case of an expert witness who is entitled to go beyond fact and into opinion, the expert should be counseled that at all times, that expert should be affirmative about his or her opinion and not negative. In other words, if an expert is asked in his or her opinion, "Did your client conform, adhere to, or follow existing standards of practice?" the answer should be an unequivocal "yes." Conversely, if that expert is asked upon cross examination, "Did your client deviate, stray from or violate any existing standards of practice?" that answer should be unequivocally "no".
3. The attorney should counsel the witness to pay attention to the question that is asked and answer that question as succinctly and clearly as he or she can without volunteering any extra information. The admonition to pay attention to the question asked is relevant not only during direct examination, but also cross examination.
4. When testifying, the witness should be counseled to be neither arrogant nor hostile.
5. If the witness does not know or cannot remember any information that is solicited, the witness should merely say that he or she does not know or does not remember the information requested. However, a good preparation of the witness will keep those remarks at no more than 5% to 10% of the witness's testimony.
6. The witness should be counseled to look at the jury but not stare them down. The advice not to stare down the jury also applies to the examining lawyer. The witness should be counseled not to just look at the lawyer, but exchange glances from the lawyer to the jury when appropriate.
7. The witness should be counseled that if an objection by the opposing counsel occurs, the witness should immediately stop testifying, even if the witness is in the middle of his or her answer. The witness should then be counseled to wait for the judge to instruct that witness whether he or she can continue to testify in the

way that he or she just has. It is probably prudent to educate the witness as to what overruling or sustaining an objection is.

8. The witness should not be afraid to answer the opposing attorney's question as to whether the witness spoke to the attorney doing the direct examination and presenting the witness. If asked what was the discussion, the witness can answer that we spoke about what I am testifying here at the present time.

C. **SOME COMMON FOUNDATIONS**

1. Present Memory Revived.

- a. If a witness forgets something at trial and has no memory about a particular point, the witness, while testifying at trial, is able to refresh his or her memory with any written or tangible object. People v. Griswold, 405 Ill. 533, 92 N.E.2d 91 (1950); People v. Olson, 59 Ill.App.3d 643, 375 N.E.2d 533 (4th Dist. 1978). However, the writing or tangible object used to refresh a witness' recollection need not independently be admissible as substantive evidence and, in fact, is not substantive evidence that is introduced. In Re: Thomas, 65 Ill.App.3d 136, 382 N.E.2d 556 (1st Dist. 1978).
- b. In the case of a writing, once the memory of the witness is revived, the witness cannot continue to read from that writing but must testify in accordance with the refreshed memory. People v. VanDyk, 40 Ill.App.3d, 275, 352 N.E.2d 327 (1st Dist. 1976).

2. Past Recollection Recorded.

- a. If the memory of the witness cannot be sufficiently revived after reviewing a written document, the information contained in that written document may be independently admissible under the doctrine of past recollection recorded. Noumoff v. Rotkovich, 88 Ill.App.3d 116, 232 N.E.2d 107 (1st Dist. 1967).
- b. The proper foundation for a past recollection recorded exists if the following four elements are met:
 - (i) The witness has firsthand knowledge of the event recorded;
 - (ii) The written statement is an original statement made or adopted by the witness at or near the time of the event while the witness had a clear and accurate memory of the event;

- (iii) The witness lacks any present recollection of the event; and
- (iv) The witness vouches for the accuracy of the written statement.

Johnson v. City of Chicago, 103 Ill.App.3d 646, 431 N.E.2d 1105 (1st Dist. 1981)

If past recollection recorded is admitted, the document may be read into evidence, but should not itself be received as an exhibit unless the adverse party chooses to do so. People v. Olson, 59 Ill.App.3d 643, 375 N.E.2d 533 (4th Dist. 1978).

3. Photographs/Motion Pictures.

A photograph or motion picture may be admitted as demonstrative evidence if:

- a. The person testifying has personal knowledge of the scene depicted in the photograph or motion picture; and
- b. The person testifies that the depicted scene is a fair and accurate representation of the depicted scene at the relevant time. Clauson v. Lake Forest Improvement Trust, 1 Ill.App.3d 1041, 275 N.E.2d 441. (2nd Dist. 1971).

4. Real Evidence.

- a. The object must be proved to be what it purports to be. People v. Berkman, 307 Ill. 492, 139 N.E. 91 (1923).
- b. How proved.

- (i) Chain of Custody.

In civil cases, every possibility of doubt need not be negated, but every person with knowledge of the object and its condition should testify about the chain of custody. Woolley v. Hafner's Wagon Wheel, Inc., 22 Ill.2d 413, 176 N.E.2d 757 (1960).

- (ii) A Unique Object.

People v. Pittman, 28 Ill.2d 100, 190 N.E.2d 802 (1963).

(iii) An Object Made Unique.

For example, a person can place identifying marks on an object to make it unique. People v. Ransom, 65 Ill.2d 339, 357 N.E.2d 1164 (1976).

5. Demonstrative Evidence – Drawings, Blackboard and Charts.

Demonstrative evidence such as a drawing, blackboard or chart may be used by a witness to explain his or her testimony if relevant. Madigan v. Browning Ferris Industries, 61 Ill.App.3d 842, 378 N.E.2d 568 (2nd Dist. 1978)

6. Business Record.

The foundation for introducing a business record is as follows:

- a. Was it the practice of the business to make this kind of record in the regular course of business;
- b. Was it the practice of the business to keep this kind of a record in the regular course of business;
- c. Was this record made at or near the time of the events noted in this record by one who had personal knowledge of the events recorded during the regular course of business; and
- d. Was this record kept in the regular course of business. ILL. R.Evid., 803 (6); Holland v. Schwan's Home Service, Inc., 2013 Ill.App. (5th Dist.) 110560; J.P. Morgan Chase Bank, N.A. v. East-West Logistics, LLC, 2014 Ill.App. (1st Dist.) 121111.

A custodian of the record or other person familiar with the business and its operation is able to testify as to the above foundation. Neither the original entrant nor the individual possessing personal knowledge of the event itself is required to testify as to the above foundation. Benford v. Chicago Transit Authority, 9 Ill.App.3d 875, 293 N.E.2d 496 (1st Dist. 1973); Agrico Chemical Corp. v. Forreton Fertilizer Co., 32 Ill.App.3d 986, 337 N.E.2d 76 (2nd Dist. 1975).

D. SOME OF THE COMMON OBJECTIONS MADE TO THE FORM OF THE QUESTION ASKED BY THE EXAMINER ON DIRECT

1. Leading Questions.

Generally, asking leading questions of one's own witness is not permitted. People v. Culbreath, 343 Ill.App.3d 998, 798 N.E.2d 1268 (4th Dist. 2003).

Leading questions, which suggest the answer, are allowed in the following situations:

- a. When questioning an adverse party or an agent of an adverse party. 735 ILCS 5/2-1102.
- b. Preliminary Matters. Cannon v. People, 141 Ill. 270, 30 N.E. 1027 (1892).
- c. A Hostile Witness. Uhr v. Lutheran General Hospital, 226 Ill.App.3d, 236, 589 N.E.2d 723 (1st Dist. 1992).

2. Assuming a Fact Not in Evidence.

3. A Question that was Previously Asked and Answered.

4. An Improper Foundation as to the Evidence Intended to be Introduced.

E. TECHNIQUE

Cross examination may be more exciting, but direct examination makes your case. Nevertheless, an attorney can make the direct examination interesting.

First of all, pace and rhythm should be used. Pace and rhythm is variation. A short question can be followed by a longer question that asks for a more narrative answer. A narrative answer, however, must not be too long and should be interrupted by further short questions. Questions should not be written, except for maybe key foundational questions or that all important case controlling question, but most questions should be outlined by topic the examiner.

The examining attorney should make the witness the center of attention. The questions should be open ended allowing the witness to give the necessary explanation. When doing a direct examination, it is advisable for the attorney to position himself or herself in between the witness and the jury so as to enable the witness to speak directly to the jury. The witness, therefore, can then look at the jury when answering the attorney's questions.

The attorney's questions should be in jury speak rather than attorney speak. In other words, the attorney should use plain language. For example, the attorney's questions should not be, "When operating the vehicle in question, etc.," but ("when driving your car," etc.). "Before and after" should be used rather than "prior and subsequent".

An attorney should have the witness tell a story. The witness should use the present tense as much as possible in order to place the jury in the situation of the witness seeing the testifying event as it develops. The jury will then be in a better position to see the facts from the point of view of the witness. Whenever possible, use visuals to help explain the testimony of the witness. Photographs and diagrams can be a big help in aiding the testimony of the witness.

Try to keep the testimony, if possible, brief. In this day and age, juror's attention spans are limited. There is a reason why television sitcoms are no more than one-half hour.

Finally, try to end the examination on a high note that will elicit a good answer that the jury will remember and take to the jury room.

F. REDIRECT

In general, the redirect examination is limited to the scope of the opponent's cross examination. Norman v. American National Insurance Co., 198 Ill.App.3d 269, 555 N.E.2d 1087 (5th Dist. 1990). Redirect examination, therefore, is not intended to reiterate the direct examination.

The goal of the redirect examination is to clarify any problems that occurred during the opponent's cross examination. Such problems include explaining contradictions, clarifying confusion in the testimony, and allowing the witness to explain any yes or no answer that the witness gave on cross examination. It is also recommended that the redirect end on a high note.