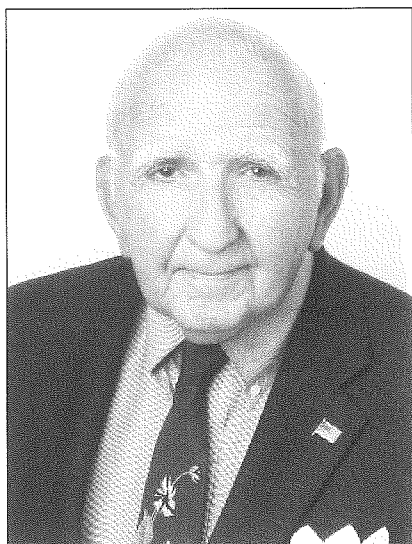
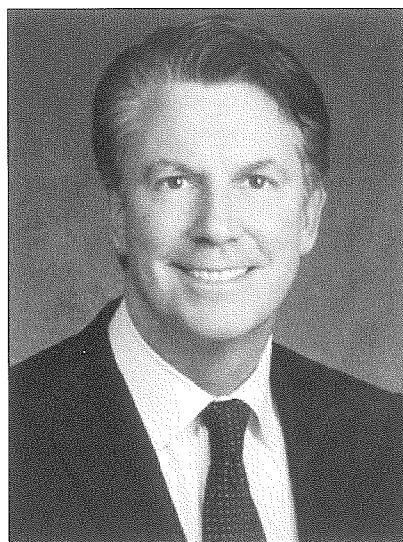


# Direct and Cross-Examination

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## — DIRECT EXAMINATION —

**C**ross-examination gets all the glory. Watching *Perry Mason* and *L.A. Law*, viewers see the hero annihilate a witness on cross. And lawyers love to share war stories about how they destroyed a witness on cross. But cases are usually won by presenting the evidence in your case in chief, i.e., cases are won as a result of direct examination. It's on direct examination that you present the substance of your case: your client's version of disputed facts and your key evidence (your documents, writings, and demonstrative exhibits).

But there is an important corollary: Jurors evaluate a witness's credibility on direct exam based on their composite view of the witness's performance under cross-examination. Judgment is suspended until the witness goes through the crucible. Jurors expect a witness to do well on direct. Direct examination is pivotal to credibility. The likelihood of being believed on cross-examination begins with the belief in the witness on direct exam. The

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circle is closed when the jurors — now satisfied that the witness has withstood the rigors of cross-examination — conclude the witness

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to discredit direct testimony,  
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In deposition,  
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her testimony before trial.’*

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is credible, with the groundwork having been laid on direct exam. The witness favored is the witness the jurors want to succeed.

## **— The Law of — Direct Examination**

- “Direct examination” is the first examination of a witness upon a matter not within the scope of a previous examination of the witness. (Evid. Code, § 760.)

- Evidence offered on direct must be relevant, authentic, not hearsay, and otherwise admissible.

- Leading questions are not allowed on direct or redirect examination. (Evid. Code, § 767, subd. (a)(1).) A leading question is one that “suggests to the witness the answer the examining party desires.” (Evid. Code, § 764.)

### **— Step One in Preparing a Direct Examination: Create a Detailed Outline or Storyboard of Your Entire Case —**

Before preparing any outlines for direct or cross-examination, first create a detailed outline or storyboard of your entire case that includes (1) all of the elements you need to prove, (2) all of the facts supporting your client’s claim or defense, and (3) all evidence that you intend to introduce at trial. Then review the outline to determine which witness will introduce each fact and which witness will authenticate and introduce every document, exhibit, or other evidence. After that exercise, you can prepare outlines of each direct examination. This detailed outline is also the first important step in crafting an opening statement.

### **— Witness Preparation —**

Every advocacy course in history begins with the admonition “prepare the witness.” The goal of witness preparation on direct exam is to instill in the witness the sense of confidence needed to encounter and defeat the cross-examiner. Absent the rare unquestionably impeaching document or prior

statement, the effect of cross-examination is measured more by the manner of response than the skill of the questioner. Jurors evaluate credibility based on how a witness responds.

Preparation for direct must give witnesses the confidence that they can respond to whatever comes their way on the witness stand. This includes predictable weaknesses to be exploited by the opponent, even if an attempt to diffuse it has been undertaken on direct. And this includes the unexpected — the e-mail, not found, which appears to impeach. In both instances, the direct witness who is calm in response, resolute in affirming her testimony, and able to remain eye to eye with the examiner has the greatest probability of being fully rescued on redirect or by other witnesses, or of being forgiven by the jurors who have already nurtured a favorable witness.

“Preparation” means helping the witness to understand the case in its entirety. What is the theory? How does the evidence support it? What are the vulnerabilities? How to respond to them? What are the opponents’ strengths? How to diminish them? What to concede to demonstrate credibility? What to resist no matter what?

The witness must believe that so much energy and commitment have been expended in preparation that nothing the opposition can do will prevail. The bond between lawyer and witness becomes so rooted in the lawyer’s obvious determination to protect the witness that the witness knows no swimming in deep water will be permitted until the art of survival is intrinsic to his being. Mock cross-examination must be done as a part of the preparation for direct. Language is honed to heighten the ability to express the points to be made. Even the truth must be well told.

The witness who is prepared to sustain cross-examination will be outstanding on

direct. The witness capable on direct will be enhanced on cross.

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### ‘General

*direct-examination principles*

*also apply to experts.*

*Ultimately,*

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### — Direct Examination Technique —

Trim every direct examination to its bare essentials. Ask yourself: Does the jury need anything else for deciding your way on the verdict form? Try not to ask a single question that is not directly on point.

Ask short questions. But answers need not be short. Answers must be as long or

short as necessary to give the jury a basis to be comfortable in evaluating the witness. A terse “no” can give evidence of resolute credibility. Turning to a jury and explaining why something was done or not done, even if this is a lengthy narration, can be the basis of establishing a bond of believability with jurors.

- Use clear, simple language.
- Begin direct examination questions with the following words: Who? Where? What? When? Why?
- The goal is for the witness to tell the story. Keep the witness the center of attention instead of the lawyer. The lawyer should stand and focus on the witness without any idle or distracting conduct. The lawyer should remain eyes-focused on the witness while the answer is given—as though counsel has never heard this answer before.
- Note-taking after an answer is a conscious way to allow the answer to be “heard.” The pace of questioning should be consistent with the fact that jurors are not experienced listeners.
- Periodic references to “the jurors,” as in “please tell the jurors directly,” reinforces their importance, gains their attention and requires the witness to return to speak to them.
- Questions that ask the witness to expand upon an answer as though not fully understood or a logical follow-up to what might well be in the mind of a juror, helps to convert a narrative into a colloquy.
- Think of different questions that will allow the witness to repeat and restate important points for your case.
- Illustrate the witnesses’ testimony with exhibits.
- Control your witness on direct. For example, if you wanted the witness to testify that a car ran a stop sign and hit a pedestrian, you would ask:  
Q: What did the car do?

A: It ran a stop sign.

Q: After the car ran the stop sign, what was the first thing that happened?

A: The car hit Mr. Jones.

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*Highlight*

*all assumptions*

*the expert relied on*

*in forming his opinion.*

*Highlight*

*what the expert did not do,*

*and records*

*he did not review.’*

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Q: What happened after the car hit Mr. Jones?

A: Mr. Jones was thrown at least 10 feet.

• Good direct examination guides the witness to the right topic without telling the witness what to say or how to say it.

- The classic advocacy guidance to ask “narrow” questions that lead witnesses to where they are supposed to go is not always applicable. Jurors are experienced in holding conversations and evaluating the person with whom they are engaged in that context. A skillful lawyer can “lead” a witness without asking “leading” questions.

- Use questions that orient the witness to the next topic. For example: “Mr. Smith, before we talk about executive compensation at XYZ Corporation, I’d like to talk to you about your background in the manufacturing industry before you came to work for XYZ. When did you start working in the manufacturing business?”

### **Steal the Cross-Examiner’s Thunder**

With your witness on direct, anticipate points that your opponent will bring up on cross-examination. Use the exact question that you anticipate would be asked on cross-examination of your own witness or client. For example: “Why was Mr. Jones, a male executive, paid more than 20% more than Ms. Smith, a female executive who has a very similar job description?”

Try to end your direct examination with an important fact. And try to elicit an important fact just before the jurors leave for a midday break or go home for the evening.

### **Your First Witness Is Critical**

After opening statements, jurors know the important issues. The direct examination should flow to the major issues without delay. Jurors’ interest in the party-witness is at its height when the witness first takes the stand. Expectations to finally have the opportunity to put their life experience to use as evaluators of credibility must not be disappointed.

The first witness should be able to tell

some significant part of the overall story. If you are the plaintiff, lead off with what the defendant did.

Your first witness must be cross-proof. Cross-examination of your first witness is the first time jurors see your case tested. If your witness holds up under cross, the jurors form an initial belief that you are credible. If the cross-exam shows holes in your claims, the jurors’ initial belief will be that you are not altogether credible. If your opponent is able to impeach your first witness, that’s enough to inject permanent doubt into your case.

### **— Expert Witnesses —**

General direct-examination principles also apply to experts. Ultimately, you want jurors to believe your expert and to disregard the other side’s hired gun. Two important goals for your expert’s direct exam are (1) to convince the jurors that your expert is more qualified, more prepared, and flat-out better than the opposing expert, and (2) to make sure that the jurors understand the complicated concepts that your expert is testifying about (e.g., statistics, engineering, or medicine).

Make sure that the jury understands the technical concepts that are necessary to your case as well as the work performed by the expert before discussing the expert’s opinion.

- Use simple language and examples to explain technical terms or concepts.
- Use short questions.
- Use demonstrative evidence to explain a point. With expert testimony especially, “a picture is worth a thousand words.”
- Use hypothetical questions and assumptions.
- Allow the expert to explain how each of his findings helps prove your case.
- Anticipate cross-examination to steal the opposing counsel’s thunder.

- Anticipate evidence from the opposing party's expert and allow your expert witness to rebut or refute the opposing expert.
- At the end of the expert's testimony, summarize the case with missing pieces filled in with the expert's testimony.

— **Cross-Examination** —

Cross-examination serves to discredit direct testimony, to discredit the witness, and to reflect on the credibility of other witnesses. In deposition, cross-examine the witness to summarize and lock in her testimony before trial.

- "Cross-examination" is questioning by a party other than the one who called the witness to testify, on matters within the scope of the witness's testimony on direct examination. (Evid. Code, § 761.)

- Right of Cross-examination: Cross-examination is the most reliable and effective way of testing witness credibility, knowledge, and recollection. (*Goldberg v. Kelly* (1970) 397 U.S. 254, 269-270.)

- Leading questions permitted: A leading question may be asked of a witness on cross-examination or recross-examination. (Evid. Code, § 767, subd. (a)(2).)

- Adverse Witnesses: Under Evidence Code section 776, subdivision (a), a party to the record of any civil action, or a person identified with such a party, may be called and examined as if under cross-examination by any adverse party at any time during the presentation of evidence by the party calling the witness.

- The general rule is that cross-examination is limited to the scope of the direct.

— **Cross-Examination Techniques** —

There are three times during trial when you can speak directly to the jury: (1) opening statement, (2) cross-examination, and (3) closing argument. Cross-examination is an opportunity to restate your case right in the middle of the other side's case. In a good

cross-examination, the lawyer is the real witness while the witness on the stand merely agrees with the lawyer's statements.

- Do not use cross-examination to ask the witness for information (you already know the information).

- Make a statement of fact and have the witness agree to it.

- Use short, clear, one-fact-at-a-time questions.

- Use cross-examination to get the information directly to the jury. For example:

Q: You read this contract before you signed it?

A: Yes.

Q: And you signed the contract on page 10?

A: Correct.

Q: And you initialed each page on the bottom right hand corner?

A: Yes.

Q: And paragraph 12 states that the contract can only be amended in a writing signed by both parties?

A: Correct.

Q: And you initialed immediately below paragraph 12?

A: Yes.

- Do not repeat the direct examination.
- Have no more than three or four points that support your theory of the case.

- Make your strongest points at the beginning and end of your cross-examination.

- Know the probable answer to your question before you ask it.

- Never ask the witness to explain her response.

- Impeach with prior inconsistent statements, e.g., inconsistent deposition testimony.

- Keep control over the witness.

- Be pleasant and courteous.

- Often the more hostile the examiner, the more sympathetic the jury will be to the witness. Clever questions asked by superbly trained, well-educated lawyers can evoke a

sense of anger in jurors, who realize that they could well be intimidated by such an examination.

- Jurors identify with the witness, not the lawyer.
- Elicit favorable testimony early in the cross-examination.
- Try to discredit unfavorable testimony. Show bias, interest, and motive. Bias is a tendency or inclination that a person has that prevents him from being impartial. This could involve showing a family, personal or employment relationship that renders the witness incapable of being impartial.
- Don't ask the proverbial one question too many. Stop when finished.

### \_\_\_ Expert Cross- \_\_\_ Examination Techniques

- Do you cross at all, or a short cross?
- Start with questions in more challenging areas.
- Use short, one-fact-per-question questions.
- Add to the foundation of your case by getting the opposing expert to agree with your expert as to facts not in dispute.
- Use witness control devices such as: "Move to strike as nonresponsive"; or "That is not my question. My question is..."; or "Doctor, the question called for a yes or no — just yes or no."
- Point out bias, interest, or prejudice.
- Ask commonsense questions. E.g., "And you would agree, doctor, that sometimes people fall and it's no one's fault but their own?"
- Highlight all assumptions the expert relied on in forming his opinion. Highlight what the expert did not do, and records he did not review. The most reliable attack on an opposing expert's opinion is to show how he ignored certain required steps in arriving at his opinions.
- Do not attempt to invade the province of

expertise in an effort to persuade the jury that the lawyer knows more about the topic than the expert.

- Be respectful to the opposing expert. Do not be sarcastic or rude. Do not interrupt except when absolutely necessary.
- Keep in mind that many very competent people of integrity may provide expert testimony for the other side.

### \_\_\_ The Key to Effective \_\_\_ Cross-Examination of an Expert at Trial Is to Thoroughly Cross-Examine the Expert in Deposition

Know the answer to the question before you ask the question. But how do you know the answer before you ask the question? You know because you were thoroughly prepared for the expert's deposition and cross-examined the expert at deposition. Even if the expert answered a question at deposition in a way that you did not anticipate (or don't like), you have locked the expert's testimony down before trial.

- Have your own expert supply you with technical questions for the opposing expert's deposition.
- Impeach the opposing expert with prior testimony, depositions, or other witnesses.
- Plan where to begin and end.
- Give the expert a chance to explain.
- Do not ask one question too many.

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