

# The Gentle Art of Conversational English in Direct Examination

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## I. Introduction

Direct examination is the most important though perhaps the least exciting part of any trial.<sup>1</sup> It displays the facts of the prepared case for the jury whose verdict is ultimately based on their perception of these facts. Direct examination is one of the most difficult of all trial skills to master, yet cases are won or lost through the examination of witnesses, particularly the direct examination of witnesses.<sup>2</sup>

The generally accepted purpose of direct examination is two-fold: to inform and to persuade jurors.<sup>3</sup> A more accurate representation of this interchange would be that of facilitating communication between the witness who is aware of the facts and the jurors who need to become aware of them.<sup>4</sup> The primary thrust of direct examination consists of an attorney convincing the jury that *his* facts and *his* witnesses are more believable than his opponent's.

## II. The Art of Direct Examination

The difficulty and the art of direct examination arise as the result of a number of factors, not the least of which is

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1. J. TANFORD, *THE TRIAL PROCESS* 329 (1983).

2. J. MCELHANEY, *MCELHANEY'S TRIAL NOTEBOOK* 237 (2d ed. 1987).

3. J. TANFORD, *supra* note 1, at 339.

4. Lecture by Professor Anthony J. Bocchino, N.C. Bar Foundation's Third Annual Summer Trial Techniques (July 26, 1989) (in cooperation with NITA) [hereinafter Bocchino].

that the lawyer must develop testimony from the mouths of other people.<sup>5</sup> Unfortunately, these mouths are often not so reliable as one would like. Each witness knows only a small part of the entire story.<sup>6</sup> A few witnesses may not have good memories;<sup>7</sup> some of them may contradict what others have said; and to make matters worse, because the rules of evidence severely limit the form of questions as well as the content of the testimony, opposing counsel can object in the midst of the examination.<sup>8</sup>

Yet another difficulty arises because of the loss of ultimate control. This loss unfolds as the product of a joint effort on behalf of lawyer and witness.<sup>9</sup> Not only must the lawyer decide what information to introduce into evidence: he must also teach someone else how to do so effectively.<sup>10</sup> Trial preparation involves countless hours of working with witnesses to prepare them to testify.<sup>11</sup>

Once the attorney has interviewed key witnesses, the need arises to review the information they divulge and decide upon a theory or a theme for the case. He must plan the testimony of each witness around that theory and abandon information which does not somehow support and advance that theory.<sup>12</sup>

Eliciting direct testimony from a witness is like a dance,<sup>13</sup> and the theory of the case is the music which lawyer and witness must follow. The lawyer must guide his partner across the floor,<sup>14</sup> making his partner appear comfortable, relaxed and graceful as he follows the lead. The dance of

5. J. TANFORD, *supra* note 1, at 329.

6. *Id.*

7. *Id.*

8. *Id.*; see also J. MCELHANEY, *supra* note 2, at 237.

9. J. TANFORD, *supra* note 1, at 339.

10. *Id.*

11. J. MCELHANEY, *supra* note 2, at 32.

12. *Id.*

13. Hamlin, *Effective Direct Examination*, LITIGATION, Winter 1986, at 15, 15 (adapted from S. Hamlin, *What Makes Juries Listen* (1985)).

14. *Id.*

direct examination must be rehearsed with the witness, but not to the point of rote memorization of testimony.<sup>15</sup> Over-preparation results in the witness appearing stilted and inflexible rather than comfortable, relaxed and sociable. It destroys the spontaneity and vitality that characterizes an honest witness.<sup>16</sup>

To employ another metaphor, direct examination must paint a word picture for the jury.<sup>17</sup> The lawyer is the artist and his witness is the brush; the canvas is the collective mind of the jury.<sup>18</sup> The lawyer must paint the picture with clear and simple lines so that each juror can visualize the *same* picture. Direct examination should verbally transport the jurors to the scene of the event and make them feel as though they were with the witness, seeing what he saw, hearing what he heard, and feeling what he felt.<sup>19</sup>

The lawyer should teach his witnesses the value of "impact" words which make their descriptions more vivid.<sup>20</sup> Even if an attorney is dissatisfied with his witness' choice of language, he should never substitute his own words for the layman's.<sup>21</sup> The witness' words must be his own. They will sound contrived and insincere if they are of someone else's choosing.<sup>22</sup>

Simplicity of form dictates prohibiting witnesses from estimating times, distances, or directions.<sup>23</sup> Everyone is capa-

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15. Bracken, *Direct Examination: Lawyers Need to Prepare Both Witnesses and Themselves*, TRIAL, June 1987, at 63, 63.

16. J. TANFORD, *supra* note 1, at 342 (citing 1 S. SCHWEITZER, CYCLOPEDIA OF TRIAL PRACTICE 70 (1970)).

17. Videotaped address by John A. Burgess, NITA Lecture Series 2, Principles of Direct Examination.

18. *Id.*

19. *Id.*

20. Axam & Altman, *The Picture Theory of Trial Advocacy*, LITIGATION, Winter 1986, at 8, 8.

21. J. TANFORD, *supra* note 1, at 341.

22. *Id.* (citing J. KELNER & F. MCGOVERN, SUCCESSFUL LITIGATION TECHNIQUES § 8.01 (1981)).

23. Overby, *Preparing Lay Witnesses*, TRIAL, April 1990, at 88, 89.

ble of doing so if asked, but most of us are not good at it.<sup>24</sup> Watching a witness struggle to establish a specific number of feet or yards leads to jury boredom and inattentiveness. Likewise, it is difficult for most people to process directions such as north, south, east, and west.<sup>25</sup>

Preparing questions for direct examination demands conversational, natural speech. A search for the perfect term or turn of phrase to incorporate into the perfect question runs the risk of sounding artificial and unnatural.<sup>26</sup> Conversational English is not necessarily grammatically correct.<sup>27</sup> Although the question, "With whom did you ride to the game?," is grammatically correct, "Who did you ride with?" sounds more natural and conversational.

An effective direct examination should invite the jury into the lawyer's conversation with the witness.<sup>28</sup> An example of how many lawyers neglect to do this on direct examination of a witness might read:

- "State your name for the record."
- "Are you employed?"
- "By whom are you so employed?"
- "For how long have you been so employed?"
- "Do you reside in this county?"
- "Where do you reside?"
- "How long have you resided there?"

Certainly, the foregoing more closely resembles an interrogation than a conversation.<sup>29</sup> It is so far removed from ordinary conversation that, like much of the other requisite alien behavior and mannerisms that is displayed in the courtroom, the jury is invited to pure boredom. A more con-

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24. *Id.*

25. *Id.*

26. J. McELHANEY, *supra* note 2, at 236.

27. *Id.*

28. Bocchino, *supra* note 4.

29. *Id.*; see also J. McELHANEY, *supra* note 2, at 233.

versational approach to eliciting the same information might read:

“Tell us your name.”

“Mr. Witness, where do you live?”

“Have you lived here in Winston-Salem all of your life?”

“What do you do for a living?”

This is an easier tack for both the witness and the jury to follow, but maintaining a conversational approach to direct examination seems to stymie lawyers who have spent three years in school learning to speak the alien tongue of the law. They are loathe to abandon this new way of speaking, perhaps because the education came at such a cost.<sup>30</sup> But one can reduce all education of whatever persuasion to the concept of simply mastering a new vocabulary. Once the full import of these new words and phrases is understood, then the educational endeavor in that direction is complete. Having spent years mastering a new, technical vocabulary, it is often difficult to turn around and translate these words and concepts back into conversational English. How does the statement, “What, if anything, did you have an occasion to observe on that particular date?” improve on “What did you see?”<sup>31</sup>

The occupants of the jury box do not speak in this manner and neither should lawyers.<sup>32</sup> Speaking in “legalese” serves to remind the jury that lawyers are professionals and that jurors frequently are not.<sup>33</sup> This risks the appearance of pretention and pomposity. Lawyers should be *forced* to say “before” and “after” instead of “prior to” and “subsequent

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30. J. MCELHANEY, *supra* note 2, at 235.

31. Wims, *Introduction*, 27 A.F. L. REV. 1, 2 (1987); *see also* H. STERN, WINNING TRIAL ADVOCACY TECHNIQUES 65 (1986).

32. Wims, *supra* note 31, at 2-3; *see also* L. SMITH & L. MALANDRO, COURTROOM COMMUNICATION STRATEGIES § 3.27, at 315 (1985).

33. H. STERN, WINNING TRIAL ADVOCACY TECHNIQUES 63 (1986).

to.”<sup>34</sup> To quote a former professor, “Nowhere in the world does anything occur subsequent to something else except in the mind of a lawyer.”<sup>35</sup> Lawyers should ask witnesses what they remember, not what they recall or recollect. Furthermore, witnesses do not “exit their vehicles.” They get out of their cars just as everyone does. Jargon and legalese should be left to police officers and ineffective attorneys. Police officers are *taught* to speak this jargon as a neutral language so they do not appear to be biased witnesses.<sup>36</sup> This is why they speak of “accidents” instead of “crashes.” Lawyers, on the other hand, are advocates who are *not* neutral; therefore, they should not speak in neutral terms.

Professional witnesses should not speak in technical terms either.<sup>37</sup> A lawyer should not allow an expert physician witness to testify that a decedent died from a “myocardial infarction” lest some jurors presume that the client died in the midst of a perverse activity.<sup>38</sup> The physician should be prepared in advance to say “heart attack.” If he violates that directive, then the lawyer should stop the physician and ask him to back up and explain “for us all” what he means in simple conversational English.<sup>39</sup> A witness should never be asked to explain something “to the jury” as though jurors are the only people in the courtroom too simple to understand what is meant.<sup>40</sup> Again, this means *inviting* the jurors into the conversation with the witness,<sup>41</sup> not merely tolerating their presence while condescending to simplify things for them.

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34. J. MCELHANEY, *supra* note 2, at 234; *see also* Wims, *supra* note 31, at 3.

35. Bocchino, *supra* note 4.

36. J. MCELHANEY, *supra* note 2, at 235.

37. J. TANFORD, *supra* note 1, at 443; *see also* H. STERN, *supra* note 33, at 36.

38. Address by Mr. Norman B. Kellum, Jr., Wake Forest University School of Law (Sept. 8, 1989) [hereinafter Kellum].

39. J. MCELHANEY, *supra* note 2, at 364-65.

40. T. MAUET, FUNDAMENTALS OF TRIAL TECHNIQUES § 4.8, at 121 (2d ed. 1988).

41. Bocchino, *supra* note 4.

If it is necessary to ask a question containing more than ten words, and if any of these ten words contains more than three syllables, do not ask it.<sup>42</sup> Rephrase and simplify language, reducing it to its lowest common denominator.

A lawyer needs to be a "wordsmith." He must strive to find the perfect word for what he wants to say. Particularly in this regard, connotation is of paramount importance.<sup>43</sup> The North Carolina Civil Pattern Jury Instructions, for instance, contain two sets of instructions which are used in medical malpractice cases.<sup>44</sup> They are identical except for two words, "negligence" and "malpractice."<sup>45</sup> The set preferred by the plaintiffs' lawyers refers to the tort of "medical negligence," the theory being that a jury will be more amenable to finding a doctor merely "negligent" than finding him guilty of "malpractice."<sup>46</sup> The torts of medical malpractice and medical negligence are the same, but the connotations of the two terms are vastly different. Heated arguments are carried on over which set of instructions the judge should give the jury because jurors are more reluctant to find a doctor guilty of "malpractice" than "negligence."<sup>47</sup>

Having mastered the art of being conversational with the witness on direct examination, the next and more challenging step is to learn to be invisible.<sup>48</sup> If he simply cannot master that, then the successful trial lawyer must at least *pretend* he is invisible. He must strive to fade into the background and let the witness be the star.<sup>49</sup> The witness is the one who has the information the jury needs to hear, not the lawyer.

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42. *Id.*; see also L. SMITH & L. MALANDRO, *supra* note 32, § 3.28, at 316.

43. Axam & Altman, *supra* note 20, at 8.

44. 1 N.C. PATTERN JURY INSTRUCTIONS FOR CIVIL CASES §§ 808-09 (June 1990).

45. *Id.*

46. See D. DANNER, PATTERN DISCOVERY: MEDICAL MALPRACTICE 150 (2d ed. 1985).

47. *Id.*

48. J. TANFORD, *supra* note 1, at 329.

49. T. MAUET, *supra* note 40, § 4.1, at 75.

An effective direct examination should be 80% witness and 20% lawyer.<sup>50</sup> Directing the flow of information from witness to jury with minimal obvious involvement must be carried out so that jurors remember *everything* the witness has said and little, if any, of what the lawyer has said.<sup>51</sup> The lawyer accomplishes this by asking short, simple questions that allow the witness to do most of the talking.<sup>52</sup> Some of the most brilliant questions a trial lawyer can ask on direct examination include, "Where did he go?" "What did he do then?" "Who else was there?" "Tell us what happened," "Could you explain how this thing works?" and the best question of all, "What happened next?"<sup>53</sup>

To some extent, it is necessary to approach direct examination journalistically, sticking to the "who, what, when, where and why" questions.<sup>54</sup> Witnesses are nervous enough without the lawyer compounding the problem by asking questions which are long, convoluted and incomprehensible.<sup>55</sup> Anything beyond a minimal involvement with simple conversational questions is doomed.

### III. Constructing an Effective Direct Examination

There are three concatenated steps in constructing an effective direct examination.<sup>56</sup> The first step is accrediting the witness; the second, setting the scene; and the third, playing the action.<sup>57</sup> Accrediting the witness should begin by eliciting background information in conversational language. Getting these kinds of preliminary matters out first enables a witness to relax and allows the judge and the jury to get to

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50. Address by Jean Spearman, NITA Southeastern Regional Trial Advocacy Program (May 11, 1990) [hereinafter Spearman].

51. J. TANFORD, *supra* note 1, at 364.

52. *Id.*

53. J. MCELHANEY, *supra* note 2, at 252.

54. *Id.*

55. J. TANFORD, *supra* note 1, at 364.

56. J. TANFORD, *supra* note 1, at 347-49.

57. *Id.*

know something about the witness as a *person* before they are asked to accept his testimony as truth.<sup>58</sup> This preliminary step is also modeled after normal social behavior.<sup>59</sup> When meeting someone for the first time, it is customary to begin talking to a stranger by asking him a few simple, non-threatening questions like "What is your name?," "Where do you live?," and "Tell me a little bit about yourself and your family."<sup>60</sup>

The direct examination of a witness should proceed in exactly the same way. Not only is such socially acceptable behavior familiar to the witness: it is also a polite way to ease the jury into his testimony.<sup>61</sup> Many judges allow a witness to give a reasonable amount of background information about himself and allow even more leeway when the witness is a party, an expert witness, or a character witness.<sup>62</sup>

The lawyer should bring out noteworthy achievements of the witness with leading questions so the witness does not appear to be patting himself on the back.<sup>63</sup> The attorney can say, for example, "Mr. Policeman, you received four merit citations for heroism in the line of duty, didn't you?" During direct examination, leading questions are permitted for the purpose of obtaining background or preliminary information.<sup>64</sup> Even a despicable lout can be accredited, but in a different way. If, for example, he is a drug dealer with fifteen felony convictions, the lawyer can accredit him on the basis of his knowledge of the drug trade, which should be substantial.<sup>65</sup>

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58. *Id.* at 347.

59. J. JEANS, TRIAL ADVOCACY § 9.7, at 218 (1975).

60. *Id.*

61. *Id.*

62. Bocchino, *supra* note 4.

63. T. MAUET, *supra* note 40, at 123.

64. I. YOUNGER, THE ADVOCATE'S DESKBOOK: THE ESSENTIALS OF TRYING A CASE 186-87 (1988); *see also* FED. R. EVID. 611(c) ("Leading questions should not be used on the direct examination of a witness *except as may be necessary to develop the witness' testimony.*") (emphasis added).

65. Bocchino, *supra* note 4.

Once these preliminary points are passed, however, there is a general prohibition against leading the witness.<sup>66</sup> A lawyer is incompetent to "testify" through the use of leading questions because he witnessed nothing that bears on the case and he did not take the oath.<sup>67</sup> The jury needs to hear, believe, and remember what the *witness* says, not what the lawyer says.<sup>68</sup>

An alternative approach to direct examination is to start with the most important broad concept the jury should remember rather than beginning with obligatory background information.<sup>69</sup> For example:

Q: "You are Mr. Byron Jones?"

A: "Yes."

Q: "You understand that you are charged with robbing the Wachovia Bank on Main Street, don't you?"

A: "Yes."

Q: "Mr. Jones, did you rob that bank?"

A: "I most certainly did not."<sup>70</sup>

The attorney should then proceed to accredit the witness. This approach, if used sparingly, can produce a more dramatic effect than the traditional approach.<sup>71</sup>

The second step in constructing an effective direct examination consists of setting the scene.<sup>72</sup> During this phase of direct examination, the witness describes the background for the events about which he will testify. At the beginning of his testimony, he should tell the jury about the people, equipment, and locations involved so that his description of

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66. I. YOUNGER, *supra* note 64, at 187.

67. J. TANFORD, *supra* note 1, at 364.

68. E. LOFTUS & J. DOYLE, *EYEWITNESS TESTIMONY: CIVIL AND CRIMINAL* 220 (1987); *see also* 1 L. SCHWARTZ, *PROOF, PERSUASION AND CROSS-EXAMINATION: A WINNING NEW APPROACH IN THE COURTROOM* 203 (1973).

69. J. TANFORD, *supra* note 1, at 346-47.

70. *Id.* at 347.

71. McElhane, *Creating Tension*, A.B.A. J., June 1, 1988, at 84.

72. T. MAUET, *supra* note 40, at 79-81.

the event is put in its proper context.<sup>73</sup> The witness should do this first so that the attorney does not have to interrupt him later. The attorney should avoid making the witness backtrack to explain something just as he is beginning to engage in the third step, "playing the action," which entails letting the witness tell the jury what he knows about the dispute in question.<sup>74</sup>

The easiest way to get a witness to tell the jury what he knows is to ask him to start at the beginning and proceed in chronological order.<sup>75</sup> The more difficult task, however, is to teach the witness how to be persuasive.<sup>76</sup> Persuasiveness in large part is simply getting the jury to *like* the witness, and the lawyer should make the witness acutely aware of how important this rapport can be.

In conveying this idea to the client in particular, it is sometimes necessary to be blunt. A lawyer should explain to a civil plaintiff, for example, that he will be asking twelve people whom he has never met before and probably will never see again, to award him money.<sup>77</sup> The more they like him, the more money they are likely to give him. The less they like him, the less he is likely to receive. Basic greed can motivate even a boor to be charming for only an hour or so.<sup>78</sup>

Testimony is more persuasive if the jury feels that the witness not only saw the event, but that he remembers it and has a good memory.<sup>79</sup> The jury should perceive the witness as a person in good health who has acute sensory perception and who was alert at the time of the event he is

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73. J. TANFORD, *supra* note 1, at 348.

74. T. MAUET, *supra* note 40, at 80.

75. E. LOFTUS & J. DOYLE, *supra* note 68, at 218.

76. *See generally* L. SMITH & L. MALANDRO, *supra* note 32, at 237-42 (discussing communication principles which apply to persuasion).

77. Bocchino, *supra* note 4.

78. *Id.*

79. 1 L. SCHWARTZ, *PROOF, PERSUASION AND CROSS-EXAMINATION: A WINNING NEW APPROACH IN THE COURTROOM* 306 (1973).

describing.<sup>80</sup> If the witness can associate the event with something important to him, the jury's perception of the accuracy of his memory will be enhanced. If, for example, he remembers the exact date he witnessed a shooting because it was his mother's birthday, that can be a very effective technique to fix time by reference to some contemporaneous event.<sup>81</sup> It renders a witness' testimony immeasurably more credible.

A renowned jury psychologist, Dr. Elizabeth Loftus, has conducted studies showing that a jury is more likely to believe a witness who can provide details of what he saw, even if such details are irrelevant to the case.<sup>82</sup> In one hypothetical case study, a robbery victim who testified that she saw the defendant drop "some things" as he ran out of the store did not convince the jury to convict as often as another victim who testified that she saw the defendant drop "a pack of Milk Duds and a Diet Pepsi."<sup>83</sup> Jurors assume that a witness is unlikely to invent small and insignificant facts and is therefore probably being truthful as well as perceptive.<sup>84</sup>

In fact, however, the opposite may be true. An eyewitness who is so preoccupied with detail and peripheral matters may be totally mistaken about the central aspects of the perceived event.<sup>85</sup> Despite this, the persuasiveness of any testimony depends upon how accurate the *jury* perceives the witness' recollection to be. Whether they are correct in their thinking really does not matter.<sup>86</sup>

Dr. Loftus also concluded that jurors more readily believe witnesses who seem confident on the witness stand.<sup>87</sup> This

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80. *Id.*

81. *Id.* at 307.

82. Loftus, Bell & Williams, *Powerful Eyewitness Testimony: Lessons from the Research*, TRIAL, April 1988, at 64, 65.

83. *Id.*

84. *Id.*

85. *Id.*

86. Loftus, Bell & Williams, *supra* note 82, at 66.

87. *Id.* at 65-66.

underscores the importance of practicing with witnesses until they develop a confident demeanor.<sup>88</sup> Any evasiveness or hesitation by a witness will immediately call his credibility into question, even if he is simply struggling to tell the truth.<sup>89</sup> Unfortunately, pathological liars make superb witnesses.

The jury must always believe that the witness is fair, impartial, and unbiased. The attorney should demonstrate that the witness was at the scene of the accident fortuitously,<sup>90</sup> that he knows none of the parties, witnesses, or attorneys in the case; and that the only reason he is in court is because he was subpoenaed. All witnesses should be served with a subpoena so they can truthfully say this on the witness stand.<sup>91</sup> In fact, failing to subpoena a witness because he "promised" he would come without being formally summoned will leave the lawyer with no recourse when the witness conveniently forgets to show up for court.<sup>92</sup> Judges are absolutely unforgiving of such an error by counsel.<sup>93</sup>

Counsel should attempt to make life easy for the witness. One way to do this is to ask simple, straightforward questions, one at a time.<sup>94</sup> Compound questions are objectionable and confusing to the witness.<sup>95</sup> When a witness answers a compound question with a "yes" or a "no," the jury is never sure which part of the question he has actually answered or if the answer is the same to both parts.<sup>96</sup> Also, the lawyer should avoid including negatives in phrasing questions.<sup>97</sup> For example, "You do not know whether the defendant was there?" followed by "No" has absolutely no mean-

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88. *Id.* at 66.

89. *Id.*

90. E. LOFTUS & J. DOYLE, *supra* note 68, at 222.

91. J. JEANS, *supra* note 59, at 158.

92. *Id.*

93. *Id.*

94. J. TANFORD, *supra* note 1, at 364.

95. *Id.* at 299.

96. *Id.* at 364.

97. *Id.*

ing. It introduces at least three possible logical interpretations: "No, I do not know whether the defendant was there," "No, he was not there," or "No, I do know, but I am not going to tell you."<sup>98</sup>

One of the biggest problems in direct examination, particularly in a lengthy trial, is retaining the jury's attention. Studies have shown that comprehension retention forms a U-shaped curve.<sup>99</sup> Its peak is at the beginning and end of a presentation. The use of topic sentence questions can create several mini-beginnings and -endings within the testimony of each major witness.<sup>100</sup> This enables the jury to determine when one topic is finished and another is beginning.<sup>101</sup> It also helps the witness formulate better answers because it tells him where the lawyer is headed and helps break up his testimony into discrete segments.<sup>102</sup> A good topic sentence question revitalizes the jurors' powers of concentration because it lets them know the questioning is moving on to something new and different.

This technique is also useful because it allows the lawyer to lead the witness wherever he wants him to go.<sup>103</sup> The rules of evidence allow the lawyer to lead witnesses on preliminary matters that are related to each topic within the direct examination and not merely on background information at the beginning of each witness' testimony.<sup>104</sup> An effective topic sentence question in a personal injury case might be: "Now that we've talked about how the wreck happened, let's discuss your injuries for a moment. How badly were you hurt?" After this topic has been thoroughly covered, the

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98. *Id.*

99. Spearman, *supra* note 50.

100. J. JEANS, *supra* note 59, at 222.

101. *Id.*

102. *Id.*

103. *Id.*

104. I. YOUNGER, *supra* note 64, at 186-87.

attorney should use another topic sentence question to introduce the next topic.<sup>105</sup>

An attorney should never begin a topic sentence question with the phrase, "Directing your attention to."<sup>106</sup> This is pure television drama. People simply do not speak this way in conversation.<sup>107</sup> If trial lawyers are to represent themselves as genuine people, they dare not employ histrionic speech. A good trial lawyer uses the language of the man on the street because that man occupies each of the twelve seats in the jury box.

The lawyer should also change the style and manner of questioning to dramatize a point and to make it more formal for a moment.<sup>108</sup> A good example is: "I now ask you, sir, had you ever seen this woman before?" Highlight questions can be used to build drama and intensity. Preceding a question with, "I want you to think carefully before you answer this question because the answer is very important" alerts the jury to the revelation of a crucial piece of information, and they will pay more attention to the witness' answer.

A change in the pace of the examination can create tension and drama, too. A momentary pause before or after asking an important question can be very loud.<sup>109</sup> When a lawyer falls silent, the jury is generally amazed.<sup>110</sup> Though silence can be a very effective attention-getter, timing is everything.<sup>111</sup> Too long a silence and the jury will assume the lawyer is lost. Creating the impression of being at a loss for

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105. J. JEANS, *supra* note 59, at 222.

106. Bocchino, *supra* note 4.

107. L. SMITH & L. MALANDRO, *supra* note 32, at 315.

108. *Id.* at 130, 138.

109. *Id.* at 137-38. One of the more effective masters of the dramatic pause is news commentator Paul Harvey.

110. Bocchino, *supra* note 4.

111. L. SMITH & L. MALANDRO, *supra* note 32, at 138; *see also* J. McELHANEY, *supra* note 2, at 252.

what to do next in the midst of a trial is not exactly desirable.

When a witness says something particularly wonderful, the lawyer should call attention to it by incorporating it into his next question.<sup>112</sup> If an eyewitness to a murder testifies that he saw the murder weapon drop from the defendant's hand, the lawyer should reiterate this important piece of testimony for the jury. The attorney can ask, for example, "After you saw the gun drop from the defendant's hand, what did you do?"<sup>113</sup>

Using visual aids is the most effective way to capture the jury's attention and enhance retention.<sup>114</sup> A juror will remember something better if he is shown a picture of it.<sup>115</sup> He is also more likely to believe something that is written.<sup>116</sup> *Overuse* of exhibits, on the other hand, can diminish their effectiveness.<sup>117</sup> Generally speaking, exhibits should be introduced just as the witness reaches the most important part of his testimony because this is when the jury needs to be alert.<sup>118</sup>

As the late, great Irving Younger said, "You've gotta have rhythm to examine a witness."<sup>119</sup> Direct examination should pulsate in an irresistible forward motion.<sup>120</sup> The lawyer should change the pace occasionally to keep everyone awake. He should ask a very short question or two followed by a longer, more involved question. A narrative by the witness will be more interesting than a monotonous repetition

112. J. JEANS, *supra* note 59, at 224; *see also* J. MCELHANEY, *supra* note 2, at 252.

113. J. JEANS, *supra* note 59, at 224.

114. L. SMITH & L. MALANDRO, *supra* note 32, at 676.

115. *Id.*; *see also* T. MAUET, *supra* note 40, at 87.

116. L. SMITH & L. MALANDRO, *supra* note 32, at 676.

117. Lecture by Arthur H. Patterson, N.C. Bar Foundation's Fourth Annual Summer Trial Techniques (July 26, 1990) (in cooperation with The Professional Education Group, Inc.).

118. *Id.*

119. I. YOUNGER, *supra* note 64, at 192.

120. *Id.*

of short questions followed by short answers.<sup>121</sup> “The endless cadence of question-answer-question-answer has been described as ‘dull torture, not unlike being nibbled to death by ducks.’ ”<sup>122</sup>

It is equally important for the lawyer to train himself to listen to what the witness is saying.<sup>123</sup> Although this sounds obvious, it is common for an attorney to be so anxious and concerned about his own performance that he forgets the jury’s perception of the *witness* is much more important.<sup>124</sup> It is a tragic and frequent mistake for a lawyer, thinking he *knows* what the witness is going to say, to *assume* that the witness has answered the question as expected.<sup>125</sup> Witnesses are full of surprises, and nothing can make an attorney look more ridiculous than not paying appropriate attention to his witness’ answer. For example,

Attorney: “Were you drunk?”

Witness : “Drunk as a skunk.”

Attorney: “You mean you are trying to tell this jury that you had not had anything to drink that night?”

One way that a lawyer must show the jury he is listening to his witness is with his body language.<sup>126</sup> He should look at his witness as he testifies<sup>127</sup> and act as though the witness is telling the best story he ever heard. When examining the witness from behind a podium, it is permissible for the attorney to lean over it slightly at intermittent intervals to demonstrate attentiveness. If the attorney sets the example of being interested, the jury will follow his lead. Also, the

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121. *Id.* at 193.

122. J. TANFORD, *supra* note 1, at 363 (quoting J. JEANS, TRIAL ADVOCACY § 9.7, at 213 (1975)).

123. J. TANFORD, *supra* note 1, at 365.

124. *Id.*; *see also* Hamlin, *supra* note 13, at 17.

125. J. TANFORD, *supra* note 1, at 365.

126. Hamlin, *supra* note 13, at 17.

127. L. SMITH & L. MALANDRO, *supra* note 32, at 565.

attorney's occasional nod of his head serves to reinforce this concept<sup>128</sup> and offers the witness some measure of reassurance.<sup>129</sup> Because he is likely to be even more nervous than the lawyer, the witness will appreciate this gesture.<sup>130</sup> The lawyer should note that a formal and overly professional approach to questioning a witness appears pompous and neglects the small, human touches that characterize pleasant conversation. He should behave as though he *likes* his witness, and a warm smile is not out of place when direct examination begins.<sup>131</sup> Jurors respond positively to this, as does the witness.<sup>132</sup>

The lawyer should never read questions to the witness, nor should he direct his gaze away from the witness as the witness answers his questions.<sup>133</sup> Looking down to read each question leads the jury to believe that the lawyer is following a script in order to ensure that everything is going according to plan.<sup>134</sup>

Some lawyers instruct their witnesses to look at the jury the entire time they are on the witness stand. This results in a contrived and artificial posture. As a rule, when responding, the witness should look at the lawyer who asked the question.<sup>135</sup> In a jurisdiction where the lawyer is allowed to stand during witness examination, he should be fairly close to his witness in order to convey warmth, sincerity, interest, and support.<sup>136</sup> Once again, the attorney needs to use eye contact during questioning to convey the impression of a conversation to the jury.

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128. Hamlin, *supra* note 13, at 16.

129. *Id.*

130. *Id.*

131. *Id.*; see also L. SMITH & L. MALANDRO, *supra* note 32, at 72.

132. Hamlin, *supra* note 13, at 16.

133. Hamlin, *supra* note 13, at 17; see also L. SMITH & L. MALANDRO, *supra* note 32, at 72.

134. E. LOFTUS & J. DOYLE, *supra* note 68, at 216.

135. Hamlin, *supra* note 13, at 17.

136. *Id.*

As the witness moves into the heart of his testimony, the lawyer should move toward the far corner of the jury box.<sup>137</sup> Questions eliciting crucial information should begin with "Tell the jury. . . ."<sup>138</sup> Gesturing with one hand toward the jury box as these words are spoken imparts to the jury the feeling that the witness is following the lawyer's direction when he looks at them. It suggests that the lawyer has turned the witness loose to tell his own story in his own words without prompting.<sup>139</sup> When trying a case to the bench, the same technique may be used by saying, "Tell the judge. . . ."

Proximity of the lawyer to his witness is dictated by the *content* of the witness' testimony.<sup>140</sup> There is an appropriate time for dialogue between lawyer and witness as well as for witness monologue.<sup>141</sup> If, for example, certain portions of the testimony involve very emotional topics and the witness loses his composure in the midst of a narrative, the lawyer should immediately move closer and ask questions intended to help him wade through these difficult portions of the testimony.<sup>142</sup> Staying too close for too long, on the other hand, prevents effective interaction between witness and jury.<sup>143</sup> If the lawyer positions himself directly in front of the witness stand, the witness will tend to speak too softly for jurors to hear.<sup>144</sup> Wherever the lawyer stands, he must never obstruct the jury's view of the witness.<sup>145</sup>

Successful direct examination should be controlled by the attorney but *appear* to be dominated by the witness.<sup>146</sup> The

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137. *Id.*; see also J. JEANS, *supra* note 59, at 216.

138. J. JEANS, *supra* note 59, at 216.

139. J. TANFORD, *supra* note 1, at 362-63; see also Hamlin, *supra* note 13, at 17.

140. Hamlin, *supra* note 13, at 17.

141. *Id.*

142. *Id.*

143. *Id.*

144. J. JEANS, *supra* note 59, at 216.

145. L. SMITH & L. MALANDRO, *supra* note 32, at 705.

146. J. TANFORD, *supra* note 1, at 364.

lawyer must keep the witness on track and prevent wandering testimony about irrelevant and potentially objectionable material.<sup>147</sup> A witness should not be allowed to evade questions, leave out essential information, or confuse the jury with ambiguous responses.<sup>148</sup> If a witness gives a bad answer to a question, the attorney must immediately decide whether it is worth interrupting him to rectify the problem.<sup>149</sup> Interruptions are generally aggravating to listeners and may be viewed by the jury as a lawyer's lack of trust in his witness' testimony.<sup>150</sup> Some mistakes, however, are so devastating that the attorney *has* to stop the testimony and make corrections immediately.<sup>151</sup>

The lawyer must correct the witness delicately; otherwise his witness will look foolish for making a mistake.<sup>152</sup> If the lawyer merely asks a witness whether he is sure about his last answer, this only invites him to repeat incorrect information, guaranteeing that the jury will hear it.<sup>153</sup> A leading question is a more effective means to get a witness back on track,<sup>154</sup> even if opposing counsel's objection is sustained. The leading question will have served its purpose by reminding the witness of the proper answer.<sup>155</sup>

Disclosure of weaknesses during direct examination is likewise a matter of some delicacy.<sup>156</sup> Being the first to mention potentially harmful evidence assures that it is cast in the most favorable light possible.<sup>157</sup> But taking advantage of this opportunity during direct examination should not be carried to the extreme by saying, for example, "Now Mr.

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147. *Id.*

148. *Id.* at 364-65.

149. *Id.* at 365.

150. *Id.*

151. J. TANFORD, *supra* note 1, at 365.

152. *Id.*

153. *Id.* at 365-66.

154. *Id.* at 366.

155. L. SMITH & L. MALANDRO, *supra* note 32, at 660.

156. J. TANFORD, *supra* note 1, at 357.

157. *Id.* at 357-58; *see also* J. MCELHANEY, *supra* note 2, at 245.

Smith, you have been convicted five times of felony larceny, haven't you?"<sup>158</sup> This scores no points with anyone. The lawyer should confront weaknesses obliquely and tactfully, avoiding undue emphasis yet concomitantly robbing his opponent of the opportunity to mention harmful information first.<sup>159</sup>

Alex Tanford has devised one of the best methods for preparing a direct examination.<sup>160</sup> It involves dividing a legal pad into three columns.<sup>161</sup> On the right side is a detailed outline of all the essential facts about which a witness must testify.<sup>162</sup> It is actually more logical to outline what a *witness* is expected to say because it is he who should be doing most of the talking.<sup>163</sup> The middle column contains notes about what the lawyer must say, and the left column is a summary of any research done on potential evidentiary objections so that appropriate responses are obvious and handy.<sup>164</sup> The lawyer should prepare a different sheet of columns for each witness. As a witness' testimony covers the facts in the right hand column, they can simply be checked off.<sup>165</sup> Ideally, an associate can do this, allowing the examining attorney to appear more spontaneous and less contrived.

The use of legal pads is strongly recommended. Note cards are reminiscent of a high school debate team, and they can litter counsel's table. The jury may associate a cluttered table with a messy, disorganized mind. Shuffling through a stack of papers to figure out what to ask next reeks of incompetence.<sup>166</sup>

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158. J. McELHANEY, *supra* note 2, at 245-46.

159. *Id.*

160. J. TANFORD, *supra* note 1, at 360-63.

161. *Id.*

162. *Id.* at 360-61.

163. *Id.* at 360.

164. J. TANFORD, *supra* note 1, at 360-61.

165. *Id.* at 362.

166. *See* T. MAUET, *supra* note 40, at 1.

#### IV. Conclusion

Oversimplification in preparation and execution of a successful direct examination is a sheer impossibility. Interaction among lawyers, witnesses and jurors must be carried out in straightforward, easily understood language, the gist of which is immediately obvious. Because jurors rely on auditory absorption of information at one hearing,<sup>167</sup> if they misconstrue what is said, the case is either damaged or lost. Auditory information is the least memorable form of information presentation, so it *must* in essence be oversimplified.<sup>168</sup> Trial lawyers must learn to live by the words of Henry David Thoreau: "Simplify, simply."<sup>169</sup>

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167. *Id.* at 76.

168. *Id.*

169. H. THOREAU, WALDEN 110 (The Franklin Library 1976).