TRIAL TESTIMONY
Effective and Exciting Direct Examination

WHAT IS DIRECT EXAMINATION?

Questioning by an attorney of a witness called by that attorney to present testimony of facts known or opinions held by that witness if not adverse to the party is direct examination. To quote Judge Philip Padovano, “[d]irect examination is the principal method by which a party presents the evidence in a case.” Florida Civil Practice, 2007 Edition, §19.5, Philip J. Padovano, Thomson/West. Direct examination is the opposite of cross-examination in which leading questions are permitted.

WHAT IS A LEADING QUESTION?

A leading question is a question that suggests the answer in the question. However, the fact that a question calls for a simple “yes” or “no” does not, in and of itself, make it leading. Happ v. State, 922 So.2d 182 (Fla. 2005) To be leading the question must “point out the desired answer.” Murrell v. Edwards, 504 So.2d 35 (Fla. 5th DCA 1987)[If the question suggests that the answer could be either “yes” or “no” it is not leading. If it suggests that only “yes” or only “no” is the proper answer, it may be leading.]

PRACTICE TIP: If an objection to a question is made that the question is leading and it is sustained, it generally is a very simple matter to restate the question in a non-leading manner so the question will be proper and the testimony admissible.

PROFESSIONALISM POINTER: Most attorneys will not interject objections of “leading” to preliminary matters unless they are critical to the case. Further, unless the direct is replete with leading questions most attorneys will not assert such objections even to non-preliminary matters unless it involves a critical issue or defense in the case.

MAY LEADING QUESTIONS BE ASKED OF A WITNESS ON DIRECT EXAMINATION OR ON RE-DIRECT?

Generally, “[l]eading questions should not be used on the direct examination of a witness …. ” Fla. Stat. §90.612(3) Erp v. Carroll, 438 So.2d 31 (Fla. 5th DCA 1983) The same holds true of re-direct examination. See, Ehrhardt’s Florida Evidence, 2009 Edition, Charles W. Ehrhardt, §612.1

Exceptions do exist however: Fla. Stat. §90.612(3)
(1) Where it may be necessary to “develop the witness’s testimony.”
(2) Where the witness is:

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1 Any cases or authorities cited in the outline should be confirmed, before utilizing, as to validity, or continued validity, of the citation and their application to the principle(s) for which they are cited.
a. Very young witnesses (usually under 14)
   b. Timid, ignorant, unresponsive, or infirm witnesses
   c. Adults with communication problems
   d. Witnesses who demonstrate memory issues
   e. “undisputed preliminary matters;” as well as time consuming foundational information. See, Stine v. Marathon Oil Co., 976 F.2d 254 (5th Cir. 1992); Schultz v. Rice, 809 F.2d 643 (10th Cir. 1986)

(3) With a hostile witness (determined at the time the witness testifies)
(4) An adverse party
(5) A witness identified with an adverse party.
(6) When a witness is called by the Court as the Court’s witness Fla. Stat. §90.615(1)

Note that the Court does have significant discretion in permitting or restricting the use of direct examination versus the use of leading questions. See, H.I. Holding Co. v. Dade County, 129 So.2d 693 (Fla. 3rd DCA 1961)

WHAT LIMITATIONS ARE THERE ON RE-DIRECT EXAMINATION?

“The purpose of the questioning on redirect is to clarify, explain or limit facts brought out on cross examination. The right to question a witness on redirect examination cannot be used as an opportunity to bring out facts that were not discussed on cross examination. To the contrary, the questions on redirect must be within the scope of the cross examination.” Florida Civil Practice, 2007 Edition, §19.5, Philip J. Padovano, Thomson/West.

CONSIDERATIONS IN PREPARING FOR DIRECT EXAMINATION:

1- Choose the witness you will use to present the facts on direct examination very carefully. Consideration of credibility, the impression the witness will make, their appearance, potential impeachment vulnerability, their ability to answer questions competently, their composure, and their ability to speak under stress (cross) should all be taken into account.

2- Develop an order of proof with your presentation of “direct evidence” witnesses in mind. Consider how each will fit into the presentation of the elements that you need to prove or disprove. Determine whether your presentation will be time line oriented, issue oriented or presented in some other manner.

3- Questioning should be outlined ahead of time and consideration given to going over the questions with the witnesses. While the attorney wants the testimony to appear spontaneous and unrehearsed, the questions and subject matter should not come as a total surprise to the witness.

PRACTICE TIP: Under the standard criminal jury instruction 3.10(7.) specifically provides “[i]t is entirely proper for a lawyer to talk to a witness about what testimony
the witness would give if called to the courtroom. The witness should not be discredited by talking to a lawyer about [his][her] testimony.”

PROFESSIONALISM POINTER: Preparing a witness to testify is appropriate, ethical and professional. Encouraging a witness to change, falsify, “forget,” or otherwise modify the witnesses recollection is not only unprofessional and unethical but illegal. Counsel must be extremely careful not to cross the line. The individual attorney is responsible for her/his own actions and it is his/her license to practice law that is at risk. No matter what may be suggested by a senior partner, a partner, another associate, or even your own client, preparation of a witness for future testimony must be conducted carefully ethically and professionally.

4- Use of evidence and demonstrative aids during direct examination can add interest and “tag” and emphasis testimony so that it will be remembered by the jury during deliberations. It generally is advisable to show the witness the evidence or exhibits that will be used before showing it to them on the stand for the first time.

5- Even on direct examination be cautious about asking questions which call for long narrative answers. Use short, plain English questions (not legalese).

Judge John Marshall Kest  September 2010
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2 Comments, recommendations, “practice tips” and “professionalism pointers” are solely those of Judge John Kest. When appearing in front of a specific judge, each attorney should check with that judge for the individual procedures, policies and requirements of that judicial division or judge.