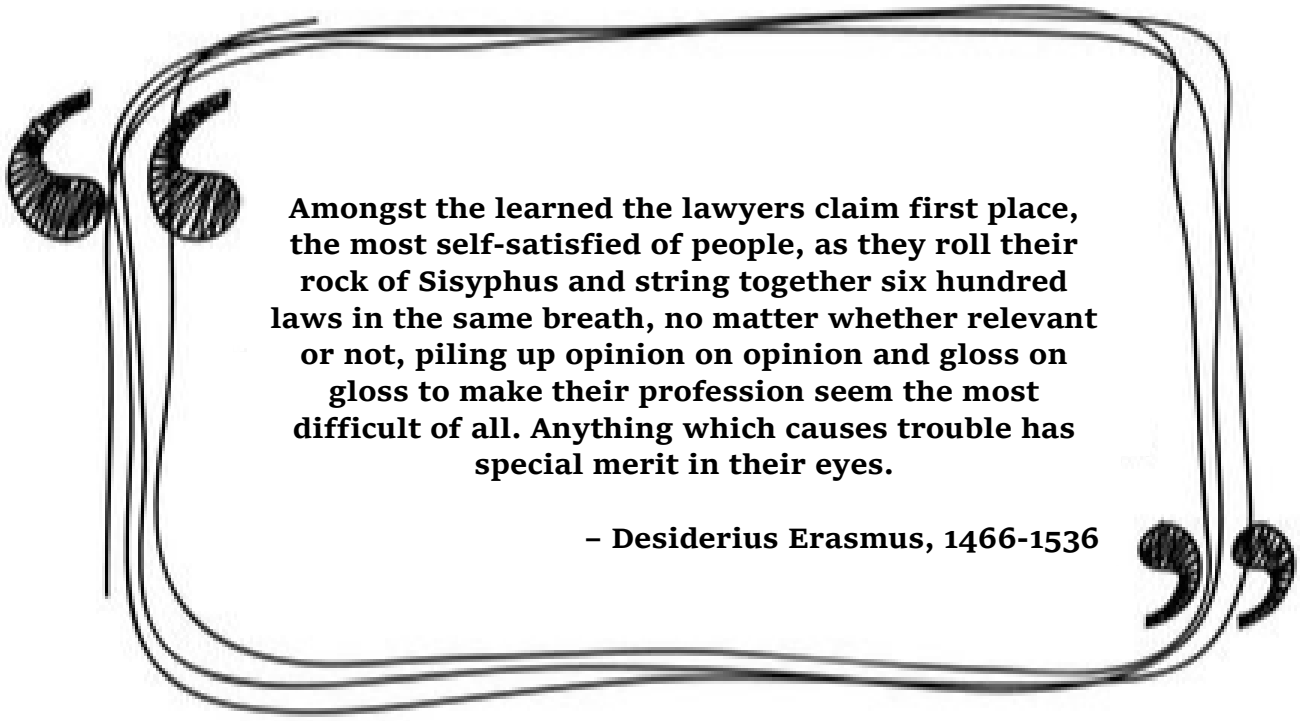
Chapter 5

DIRECT "EXAMINATION"

Direct examination, really direct "conversation," is not about crafting a questions-and-answers script that counsel and the witness practice over again in anticipation of a perfect presentation at trial. Unsurprisingly, that perfect plan never materializes. Direct "conversation" is about your role in guiding the witness through their testimony, a journey that may not be, and need not be, a straight line. Direct "conversation" emphasizes your role in the presentation, embrace it.



Amongst the learned the lawyers claim first place, the most self-satisfied of people, as they roll their rock of Sisyphus and string together six hundred laws in the same breath, no matter whether relevant or not, piling up opinion on opinion and gloss on gloss to make their profession seem the most difficult of all. Anything which causes trouble has special merit in their eyes.

– Desiderius Erasmus, 1466-1536

Chapter 5 – Direct Examination

Direct examination is the right field of trial practice. For those unfamiliar with the analogy, in Little League baseball right field is where the team parks their least talented player and hopes the other team does not hit a ball to him (or her). I am a right-field veteran. I can recount many an innings where my one hope was the same as my coach's—please don't hit the ball to right field.

But real-life trial practice is the major leagues. There is no "Little League" right field to hide liabilities at this level. And as the key to "winning" at trial is the facts, and as direct examination is 75 percent of the mechanism by which those facts are developed (cross examination being 24 percent of the rest, with various evidentiary mechanisms—*e.g.,* judicial notice, the remaining 1 percent), it is important that direct examination be done right.

Done right, direct examination is a delicate dance between counsel and witness. Counsel leads with the question, but the witness decides how to follow with their answer; it is controlled but improvisational, counsel and witness are in harmony, listening to each other, reacting to each other's moves. Google "what is a tango," you will get the idea.

Thus, to do direct examination right, dispense with the idea that counsel conducting direct examination should be the high-school-dance wallflower of the courtroom. Too often trial counsel take this wallflower analogy to an extreme, believing they should do everything possible to recede into the background and let the full spotlight fall on the witness. The result is that these counsel over prepare their witnesses and script their testimony in the hopes that the witnesses' in-court testimony will flow as smoothly as planned. And the result of that is a stilted presentation in which the question "what happened next" is repeated to nausea (*ad nauseam* to my Latin scholars).

Or even worse, as no plan survives first contact with "the enemy"—and "the enemy" here is not your opponent, but the reality of the unpredictability of trial practice—when the witness goes off-script counsel is not flexible enough to adapt and overcome. Witness and counsel talk past each other. But counsel, who is wedded to their script, and nervous, focuses on preparing to ask their next question rather than listening to the answer to their last. Thus, some version of the following occurs:

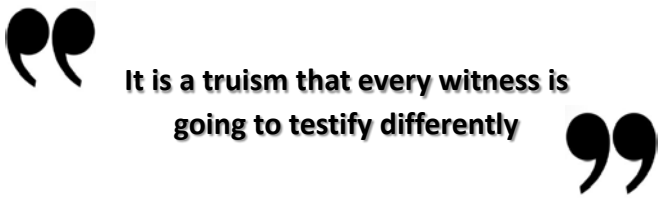
Q: What did you see?
A: I saw a green dog.
Q: And what color was the dog?
A: It was a green Chihuahua.
Q: And what kind of dog was it?
A: [*rolls eyes*] Ugh, hello, I just said it was a Chihuahua.

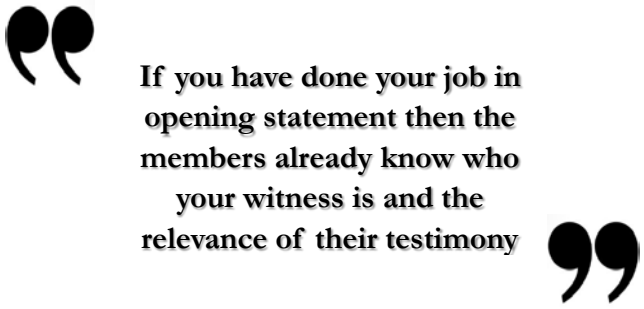
And that occurs again, and again, and again. Counsel goes one direction, the witness goes in another. Direct examination devolves into a disjointed mess. It irritates the members and the witness, and crushes counsel's credibility. It is a Little League error.

Testifying is the witnesses' journey; your role as the guide is to make sure that the journey arrives at the right destination, [it is] a guided journey, a conversation, that gets the witness from A to Z, but it need not hit each letter in between in "perfect" sequence

So let's build a major league right fielder. The key to being an effective litigating right fielder, to conducting an effective direct examination, is the same key as any other part of trial litigation—knowing the facts and evidence better than every person in that courtroom. This will give you the confidence to be flexible, to adapt and overcome. When you knows the facts, you are not worried about going off-script; in fact, you are not worried about having a script at all. In direct examination, when you know the facts and evidence better than every person in that courtroom, you are the guide rather than the wallflower. Testifying is the witnesses' journey; your role as the guide is to make sure that the journey arrives at the right destination. In direct examination, it is both the journey and the destination that are important. It is a back-and-forth, it is a conversation, not an "examination." It really should not be called "direct examination"; it should be called "direct conversation."

Practically, this means do not write out all of your direct-examination questions. Rather, prepare a checklist of facts you want to pull from the witness and group those facts under a transition/topic sentence/question. For example, recall the Example 2 opening statement in the "**Opening Statement**" article … the one hopefully you just read and which totally changed your life. Picture trial counsel standing up to conduct the direct examination of the victim, Jane Doe. Here is a peek at what trial counsel's notes should look like:





DIRECT EXAM: JANE DOE

INTRO:
Q: Pls state name for the record
Q: What happened to you in the early morning hours of Feb 2d?
A: Tim Blue broke into my house and hit me in the head with a rock.
Transition: Ok, let's talk about the details of that, first …

TOPIC: Relationship w/Accused
__ Met at work August 2017
__ On same tiger team/late nights what/Picture?
__ Other mbrs (F.Green)
__ Made sexual advances/rebuffed
__ "you're ho" - "I want to kiss you"
__ Pushed him away
__ "Not appropriate/not interested"
__ Complained to supervisor
__Jan 2018 moved to different team
__ Passed in hall="dirty looks"

TOPIC: Layout of the House [Ex 32] breathe
__ Bedroom Location[A]/stairs [B]
__ Kitchen Location [C]/backdoor [D]
__ Stove/Night light [E]
__ Path from bedroom/kitchen

TOPIC: Frances Green's Party [Ex 13]
__ 3 blocks from her house
__ Invited to party
__ Knew ACC invited/stayed home
__ ID Girlfriends [who were at party]

TOPIC: Assault
__ Bed at 10pm
__ Heard crash/unsure

__ Slippers on/walked down to kit
__ Stove light on
__ Saw ACC
__ Shoes/pants/hoodie
__ Looked "angry"
__ Crunch of glass
__ Cold breeze
__ "Get out of my house"
__ Stepped toward her
__ Heart beating/catch

__ Shadow toward her head
__ Pain/Vision narrows/goes dark

TOPIC: Wake up hospital/injuries
[more bullets … excised for space]

TOPIC: Identify ACC
Q: Is the person who broke into your home and struck you with this rock in the courtroom today? [ID for record]

Without having every question scripted out, this approach might seem a little scary at first. It might feel like walking a tightrope without a safety net [*I know, I know, lots of analogies in this chapter*]. But remember the goal—direct examination is a guided journey, a conversation, that gets the witness from A to Z, but it need not hit each letter in between in "perfect" sequence. As the guide for that journey, the moderator for that conversation, it is incumbent on you to allow the witness to find their own way, standing by to get them back on track if they stray too far. If you overstep that role, and dictate the path the journey takes (through scripting out every question and demanding adherence to preset answers and preset sequence of answers), the direct examination will come across as stilted, inauthentic, and frankly, boring.

So, in the above, the transition to the series of questions about the assault could start like this: "What happened after you had gone to bed that night." Then Jane Doe tells her story, talking about how she was asleep, some noise woke her up, and she walked downstairs to investigate. You check off each of these bullets on your list, not panicking that she missed a couple. Maybe she takes a breath at this point and it seems like a good opportunity to ask a question to fill in some of the blanks, to check off some of the bullets/details she did not address: "That noise you mentioned, what did you think it was?" Answer; check. Or "What did you have on your feet when you walked downstairs?" Answer; check.

Or maybe not. It may be (and probably is) too early to interrupt the flow and loop back to fill in details so soon after starting the journey. Maybe you just nudge the journey forward: "Once you got to the bottom of the stairs, what did you see [where did you go] [what did you hear] [what did you feel]?" And then Jane Doe tells the rest of the story of her attack, her pace increasing to match the stress of the memories, maybe she is crying, maybe she forgets to mention a number of details as her testimony pours out. No worries, just loop back to these details in a sequence that seems natural once she has reached the end. If she just got through testifying about the rock hitting her head and the intense pain, but did not mention seeing the shadow out of the corner of her eye or earlier in her testimony did not mention that the stove light was on, which fact is probably best to pull out at that moment? If you guessed "the shadow," good job: "Did anything catch your eye before he hit you in the head with the rock?" Little

push; answer; check. Maybe she also forgot to mention hearing the crunch of broken glass: "When you saw the Accused standing there in your kitchen, did you hear anything?" Little push; answer; check.

It is a truism that every witness is going to testify differently. You might get the opposite from the steam-of-consciousness Jane Doe. You might have a witness who you prepared the best you could to be comfortable in court, but who freezes up spelling his last name. No worries. You have your outline of what you need from that witness and you can just work through the "little push-answer-check" mechanism: "What time was it when you heard this noise?" "What did you do after you heard this noise?" "What did you think at the time the noise was?" "What did you do after you heard the noise?" Little push; answer; check. At some point the witness will settle down, settle in, and the conversation will flow more freely. Or, worst-case, you may have to ask a couple dreaded "What happened next" questions just to keep things moving along.

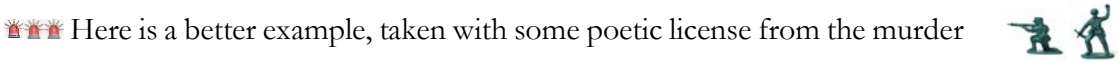
Your direct-examination notes may look different. You may want to write out transitional questions to start the conversation for each topic.  I always write out the introductory and concluding questions, though by the time I get to trial I know how I want to start and finish and rarely read them verbatim. But it is your product, design it in a way that is comfortable to you … as long as it does not resemble a script!

Next, I want you to go to whatever template you are using for crafting a direct examination, probably the standard version of your office's script, and cross out the template "introductory" direct-examination questions that have become rote in courts-martial. You know what these are, some version of the following:

> TC: The Government calls Airman First Class Jimmy James to the stand.
> *[Airman James enters courtroom, walks to witness box, remains standing, trial counsel swears him in …]*
> TC: Please be seated. Airman James please state your name for the record and spell your last night.
> JJ: My name is James Little James, J-A-M-E-S.
> TC. And Airman James, are you a member of the United States military? *[Note: Amn James is in uniform]*
> JJ: Yes sir.
> TC: And what branch of service are you with?

JJ: The Air Force.
TC: And what is your rank?
JJ: I am an E-3, Airman First Class.
TC: Where are you assigned?
JJ: I'm assigned to the 345th Aircraft Maintenance Squadron.
TC: And that's here at Jones Air Force Base, correct?
JJ: Yes sir.
TC: Airman James, do you know the accused in this case, Staff Sergeant Greg Smith?
JJ: Yes sir.
TC: Can you point him out here in the courtroom? *[Amn James points at SSgt Smith]*.
TC: Proper identification of the accused. Airman James where were you on the night of …

Wow, how exciting! I am not sure if this approach is a warped sense of "protecting the record," or whether the drafters of the templates have adopted it because of a lack of faith in trial counsel's ability to establish these factual issues on their own at appropriate points in a competent direct examination, but this approach is boring. It is particularly boring and ineffective for those key witnesses whose testimony has been highly anticipated since your scintillating opening statement—this approach simple sucks the life, the theater, out of what should be a dramatic moment.



Here is a better example, taken with some poetic license from the murder trial of *United State v. Staff Sergeant Sean Oliver*. There, who had committed the murder was in dispute; the Government believed it was SSgt Oliver (obviously), the defense pursued a variety of theories, included SODDI (Some Other Dude Did It). Thus, when the Government called Army Private Tom "SODDI" Jones, under a grant of immunity to testify on Day Ten of the trial, the members already had heard plenty about him and knew exactly what the relevance of his testimony would be. Here is the introduction from his direct examination:

TC: The Government calls as its next witness Army Private Tom Jones.
[Private Jones enters courtroom, walks to witness box, remains standing, trial counsel swears him in, he sits …]
TC: Private Jones, who killed [the Victim]?
TJ: Sean Oliver killed him sir.
TC: How do you know that?
TJ: I was at the apartment when it happened, I saw the body, and he told me he killed him.

[Momentary pause—to allow the courtroom to take a deep breath]
TC: OK, let's unpack that a bit. Tell us about ...

Boom! By that point in the trial, if we had allowed any member of the jury the opportunity to conduct the direct examination of Private Jones, those are exactly the first two questions they would have asked of him. That is what they wanted to know, and by asking it for them, without the rote personnel-record buildup, we satisfied their expectation. Whenever you satisfy the members' expectation, no matter how small, you enhance your credibility. And as I have mentioned *ad naseum* by now and will continue to do, credibility is the key. The more credible you are to the members, the more likely they are going to credit your presentation and arguments to them over the course of trial.

You have permission to be more than a wallflower during direct examination

This is not to say the Government failed to address those foundational, personnel-record and identification questions during Private Jones' direct examination. We did. We just did it at more appropriate times. We discussed Private Jones' rank and service when we discussed how he knew SSgt Oliver (they worked together in a joint environment). And we saved the identification for the end, to close the direct examination with a bit more theater:

> TC: Private Jones, it is probably obvious by now, but for the record, is the person who killed [the Victim] in this courtroom today?
> TJ: Yes sir?
> TC: Who is that and where is he?
> TJ: *[pointing at the Accused]* He's sitting right there. Sean Oliver killed [the Victim].
> TC: For the record, Private Jones has pointed out the Accused, SSgt Sean Oliver, as the person who killed [the Victim].

The form of those questions potentially objectionable? Yep. Objections? Nope. At this point we were just restating the obvious, theatrically, and the defense objecting would have made them look silly in the eyes of the jury. And did we "script" the introductory questions and closing questions with Private Jones? Of course we did; we did not tell him what to say, but we certainly let him know exactly what we were going to ask and allowed him an opportunity to practice his answers before this in-court presentation.

Defenders of the rote likely would argue that the personnel-record questions allow the witness (and young trial counsel) an opportunity to quell those testifying (and performance) jitters and ease into a conversation. But if you have prepared your witness as suggested earlier (*see* **Preparing Witnesses**), that is not necessary. Nor is it necessary to introduce the witness to the members in this fashion. If you have done your job in opening statement then the members already know who your witness is and the relevance of their testimony—thus, you can get to those personnel-record issues at a more appropriate time in the direct, most likely when discussing the relationship between the witness and the Accused (or when just discussing the witnesses background in a subtle effort to bolster their credibility—*e.g.,* their law-enforcement background).

But big picture, you have permission to be more than a wallflower during direct examination. There are a multitude of other techniques that I use to ensure the direct examination is more conversation than examination. But if you consider the direct examination to be a journey, a conversation, during which you play an important role, you will figure out how best to conduct a direct conversation rather than a direct examination. Or at least you can give it a major-league effort.

> **Testifying is the witnesses' journey; your role as the guide is to make sure that the journey arrives at the right destination. In direct examination, it is both the journey and the destination that are important. It is a back-and-forth, it is a conversation, not an 'examination.' It really should not be called 'direct examination'; it should be called 'direct conversation.'**