DIRECT EXAMINATION:
MAKING THE FACTS UNDERSTANDABLE

By Frank C. Jones
and Chilton Davis Varner

The British author Somerset Maugham, in his book *A Writer's Notebook*, cites a law professor who instructed his students: "If you have the facts on your side, hammer them into your jury. If you have the law on your side, hammer it into the judge. If you have neither, hammer on the table." Without question, the trial lawyer's greatest opportunity to "hammer" the facts to the jury comes during direct examination. It is then that the trial lawyer is able to converse with a friendly -- or at least neutral --witness; it is then he[1] should have greatest control of the organization and pace of the interrogation; and it is then he should be confident of what the answers will be.

Why, then, is direct examination so difficult? Even more to the point, why is direct examination so frequently boring, both to counsel and to the jury? Scratch the surface of any experienced trial lawyer, and you are likely to find someone who will tell you he plods reluctantly through the direct examination of his own witnesses only because it allows him to get to the greater excitement and challenge of cross-examining his adversary's witnesses.

Excitement is one thing; effectiveness is another. A slashing cross-examination may lend spark and fire to the courtroom, but it will rarely win a case where the lawyer has failed to put in his own version of the facts through effective direct examination. If, in Maugham's words, one is to be saved from hammering on the table, a coherent, logical statement of the facts is essential; without it, a jury is unlikely to accept your client's position in preference to the alternative.

Yet the pitfalls are formidable. The lawyer himself cannot put his carefully-crafted story into evidence. He can develop the account only through other people -- the witnesses -- who may not always be of his choosing; they may be inept, nervous, unintelligent, naive, unattractive, inarticulate, arrogant, or a combination of the above. The story must be developed through the artificial device of questions and answers. The rules of evidence governing the kinds of questions which can be asked are complicated and often inconsistent. The story may be fragmented by repeated hostile objections which distract both witness and jury. No wonder young advocates are frequently driven to the forbidden leading question, and anything else short of a teleprompter, in an attempt to control the witness and get the story told. For all who have

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[1] Masculine pronouns are used throughout for the sake of economy of expression. They are intended to denote both masculine and feminine genders.

endured the frightened, difficult, or inept witness -- and that is most of us -- it is understandable, if not excusable, that direct examination is often so poorly done.

To state the obvious, success or failure at trial rests in the manner in which we prepare and present our witnesses. Despite the myths of television courtroom dramas, most cases will not be won or lost on the basis of the lawyers' oratory. Instead, cases will turn on the witnesses' perception and recollection, and their ability to relate the crucial events in an understandable fashion. Studies show that juries usually identify with witnesses, not with attorneys.

If the role of the trial lawyer in direct examination could be distilled into a single duty, it would be this: we must take the witnesses which we are dealt and teach them first, how to listen, and second, how to communicate clearly and succinctly. These are not easy tasks.

A. Planning Ahead: What is the Witness' Role?

1. The Theme of the Case. When the trial lawyer plans his case, it has become axiomatic that he must determine a theme which will predominate, to which the witnesses will return again and again. That theme is the basic, underlying idea which explains both the legal theory and factual background of the case and which ties them together into a coherent and believable whole. Everything revolves around the theme, and all evidence should be tailored to support it.

This has obvious implications for direct examination. Each witness' testimony must be assessed against the theme of the case so that the theme can be advanced at every turn. The theme also helps the lawyer decide which witnesses to call and which to eliminate, because they might be repetitive or dull or actually inimical to the theme. Direct examination questions should be styled and ordered to emphasize the theme.

For example, suppose the case is a contract action in which the defendant concedes there was a technical breach but defends on grounds that the plaintiff suffered no damage. The defendant's theme is the simple one that "the plaintiff wants something for nothing," or -- in sports parlance -- "no harm, no foul." In assembling his direct examination, the defendant's attorney may wish to reverse the usual order, moving his inquiries about the lack of damages to the threshold of his interrogation. Indeed, if he can do so artfully without running afoul of a "cumulative" objection, the attorney may wish both to begin and end his examination with questions related to the damage issue. One approach would be to emphasize in one portion of the examination, the extra-contractual benefits the plaintiff received; and in another, the lack of contractual damages.

"Q. Has the Acme corporation over the years made available to the plaintiff certain benefits to help him sell Widgets?

A. Yes, it has.

Q. Describe some of those benefits for the jury.

A. Acme has offered marketing classes for our distributors' employees at no cost; we have provided field inspection and maintenance services; and we have provided free advertising materials.

Q. Did the plaintiff take advantage of those benefits?

A. Yes, he did; in each of the last 5 years his company has participated in programs in all three areas.

Q. Is Acme obligated under the contract to provide those services?

A. No, it is not; they are provided gratis as a means of improving our service and -- we hope -- to increase sales of our product.

Q. Who would benefit from such increased sales?

A. Certainly, the plaintiff would, since he would receive additional profit from every additional Widget sold and he would be spared the expense of providing his own inspection and maintenance for the product; and, indirectly, Acme would also benefit. It's in our mutual self-interest to sell more Widgets.

Q. How much did the corporation pay in the past five years to provide those marketing, maintenance and advertising services to plaintiff?

A. Approximately $100,000.

Q. Did the plaintiff share in that cost in any way?

A. No, he did not; Acme bore it all."

Having offered evidence that plaintiff got more than he bargained for in some areas, the attorney can then move on to establish the absence of damages from the technical breach:

"Q. What material was specified in the contract for the manufacture of the Widget gasket?

A. Neoprene.

Q. Has Acme continued to use neoprene to manufacture the gasket?

A. No, it has not. We began to use a new material, Wonderplex, fourteen months ago.

Q. Why did Acme make that change?

A. Wonderplex became generally available at that time as an alternative to neoprene. It lasts longer, is more flexible, resists corrosion better, and is less expensive.

Q. Did Acme do any sort of investigation to determine how Wonderplex compared to neoprene in terms of quality?

A. Yes, we did. We did both laboratory and field testing of Wonderplex gaskets for 18 months and found Wonderplex to be far superior in terms of value to the customer.

Q. Did Acme save money by switching from neoprene to Wonderplex?

A. Yes we did, while at the same time providing a superior product to the customer.

Q. Since the Wonderplex gasket was introduced, how many complaints has Acme received about its quality?

A. None.

Q. Since the Wonderplex gasket was introduced, how many complaints of any type has Acme received?

A. One -- the plaintiff's.

Q. Did that complaint relate to quality?

A. No it did not; the plaintiff only thought he was entitled to have the cost savings passed through to him in the form of a reduced price.

Q. One final question: who paid for the research and development of the Wonderplex material?

A. Acme did."

2. The Order of Witnesses. The careful lawyer will not allow the order of his witnesses to be casually decided; the order in which they appear is vitally important to a coherent presentation of evidence. The classical wisdom for both plaintiff and defendant is that the case-in-chief should start strong and finish strong.

At the outset of the trial, the jury is fresher and more interested than it will ever be again. Only a foolish or over-confident plaintiff will dissipate that advantage by beginning with a

boring witness whose piece of the puzzle is obscure and unimportant. Similarly, the defendant, whose motives and actions may have been maligned for weeks by the time the plaintiff rests, has a vested interest in strongly counterattacking at the earliest possible moment, with the defendant's first witness.

The final witness called by either side will provide the last impression the jury has of that party's case. Ideally, that final witness should be able to sum up the evidence in a way closely analogous to the theme of the case. Certainly for the defendant, it is useful to have a final witness whose strong testimony can provide a natural lead-in to the closing argument.

In between, the witnesses should be called in whatever fashion will make the theme the most understandable, logical, and coherent for the jury. The jurors are being asked to assimilate an imposing amount of information, and they are entitled to all the help you can give them. While the vagaries of witnesses' schedules may necessitate some juggling, care should be taken not to dissipate the orderly development of the tale.

3. What Will the Witness Say? Obviously, the decision of who fits where in the attorney's trial plan will be driven by what the witness' testimony is expected to be. There are various tools which can be used to determine the most effective division of labor amongst the respective witnesses.

Pretrial discovery should have provided any good lawyer with a reasonable view of the evidence available from each witness. From this information, the lawyer can then draft a summary of each witness' testimony in narrative or outline form, which can be shared with the witness to assure that his testimony has been accurately understood. This exercise is helpful not only to the lawyer in planning his case, but also to the witness in understanding exactly where he fits into the overall picture.

Example:

> *Emergency Medical Technician Brown will testify about the location and condition of the vehicles at the scene. He will describe that he found the driver of the truck pinned between the steering wheel and the seat, which had been torn from its mounting track in the collision. He will testify that the driver was unconscious; that an examination of his head, coupled with decerebrate posturing, suggested severe closed head injury; and that while the driver had broken ribs, he was not in respiratory difficulty. He will testify that the driver never regained consciousness and that he was well-oxygenated during the ambulance ride to the county hospital. He will state he saw no bruises or abrasions on the driver which would suggest he was belted at the time of the collision.*

With witnesses who are expected to give extensive or technical testimony (e.g., the inventor of the patent, the treating physician, the design engineer, the account executive, or the

retained expert witness), it can be extremely helpful to have the witness himself construct a summary or outline of the evidence he can bring to the case. The witness should be cautioned to think in terms of how he would explain his knowledge to an uninitiated layman; for example, he might be encouraged to consider how he would address the local Rotary Club or a ninth grade science class on the subject. Involving the witness in the construction of his own testimony not only can produce unexpected insights for the lawyer; it inevitably transforms the witness into an advocate. It can also make the inexperienced witness more comfortable with his testimony and the language in which it will be conveyed -- in short, a better communicator.

Finally, in planning the scope of the witness' testimony, it is essential that the lawyer have some grasp of the customary courtroom practices of the judge before whom the case will be tried. Is the judge strict or liberal on evidentiary matters? Will the judge freely allow the witness to come down from the witness stand to draw or write at an easel? Will the judge allow the witness to "teach" the jury by showing demonstrative or physical evidence directly to individual jurors? These kinds of issues have major impact on the shape of the witnesses' testimony. If a lawyer proceeds on an uninformed and ultimately incorrect assumption about how much latitude the Court will allow, the result can be embarrassing and, worse, harmful to the client, as both lawyer and witness scramble to find other ways to present the needed evidence.

B. Preparing the Witness: Will He Say What You Think?

A lawyer went to see Paul Newman's film *The Verdict* with a non-lawyer friend. As they left the theater, the non-lawyer complimented the movie as tough, gritty, and realistic, "except for that part where the lawyer met with the witness to discuss his testimony before he took the stand. You guys would never be permitted to do that, would you?"

To the contrary, most experienced trial lawyers concede that the time spent in preparation is equally or more important than the time the witness spends actually testifying. It is in such preparation sessions that the lawyer discovers the mannerisms and thought processes of the witness, the gaps in the witness' knowledge, his ability to take instruction and the bad answer which should be avoided.

Every trial lawyer has experienced the heart flutter and stomach churn which come when a key question is met by a look of utter incomprehension on the witness' face. There is no way to guarantee that a witness will be immune from this kind of brain cramp; but the old adage of "prepare" is certainly the best vaccine.

1. Prior Testimony. Most trial witnesses have been previously deposed during pretrial discovery. Each witness should be given a copy of his deposition transcript (and any interrogatory answers which relate to him) and asked to review that material carefully with the following in mind:

-- The witness should look for themes and avenues of attack which were pursued by

the opposing lawyer. It is likely those themes and attacks will recur at trial.

-- The witness should pay attention to his own answers, including any response with which he is now uncomfortable. The only reason the deposition will be used at trial is to impeach the witness with prior inconsistent statements, so (a) the witness' trial testimony should be as consistent as possible with his deposition; and (b) he should discuss with the lawyer how to handle any changes in emphasis which may have been necessitated by the passage of time, additional research, or the like.

-- The witness should be instructed that his role as a deponent and his role as a trial witness are very different. A deponent's primary role is not to persuade or to make out a case; his role is to answer only the questions asked, volunteering no additional information. The end result of a deposition is a written document -- the transcript -- and that is all that matters. In contrast, trial is an oral exercise in advocacy; the witness *will* be making out a case. He cannot be asked leading questions on direct, so he and not the lawyer must provide the substance of the evidence. The witness' demeanor, his appearance and his conviction will all be important to the jury, which is expressly charged with assessing credibility.

In protracted cases, where the parties have arranged for daily transcript, a question may arise as to whether the witness should be allowed as part of his preparation to review the testimony of other witnesses. For example, an expert for the defendant may be interested in reading the testimony of his counterpart in the plaintiff's case. If so, the lawyer must consider whether the rule of sequestration has been invoked (*see, e.g.*, Fed.R.Evid. 615), and he must determine whether that rule could reasonably be extended to transcripts of testimony. Unfortunately, the law on this question is not abundantly helpful. *See* Miller v. Universal City Studios, Inc., 650 F.2d 1365, 1373 (5th Cir. 1981) (violation of rule of sequestration may be even more pronounced with a witness who reads trial transcript than with one who hears testimony in open court, because the former need not rely on memory). Local rules and practice may supply some guidance. The stakes are high if the lawyer misjudges: a dispute before the jury about whether a witness has violated the rule by reading the transcript can be distracting and damaging. The safer procedure may be for the lawyer simply to cover the important points of the previous testimony orally when he prepares his own witnesses, without providing the written transcript.

2. Current Testimony. The heart of the preparation session will be the briefing on the substance of the direct examination. The short narrative of expected testimony (written by either lawyer or witness) mentioned in the previous section is a good starting point from which both lawyer and witness can explore the relationship of this witness' testimony to the overall theory of the case.

Different lawyers have different views on how detailed this portion of the preparation

should be. Some lawyers abhor written outlines of explicit questions and answers; other lawyers find them indispensable in assuring that important areas are not overlooked. Additionally, after the initial explorations of what the witness has to offer, some witnesses request written outlines for their own reassurance.

There is consensus, however, that if such aids are used, they should be a starting and not an ending point. Prudent witnesses and lawyers avoid slavish adherence to specific written questions and answers, since (a) the most effective witness will answer in his own vocabulary, not that of the lawyer or of other witnesses; (b) the interrogator must be free to extemporize or follow-up when the answer leads to new areas; and (c) once the witness wanders off the outline -- and he will -- he is at the mercy of the cross-examiner. One way of avoiding a wooden, rote performance is to allow the witness to read the outline once or twice to orient himself and then to take it away. Another device is to vary the order in which the outline is reviewed during the briefing sessions, starting at the end or in the middle; another is to vary the phrasing of the questions themselves; still another is to insert new areas of testimony which may not be pursued at trial but which may cast new light on the import of the evidence to be offered by this witness.

A final but fundamental word on this point: if the lawyer constructs an outline for the assistance of the witness, it must reflect the truth of what the witness himself has told the lawyer. In short, the lawyer must work with what he is given; he cannot and must not be the author of a more "creative" version of the facts.

The lawyer should remember throughout the preparation session that his goal is to have the witness communicate comfortably, simply and effectively. The following pointers may be helpful:

-- In going over the witness' story, the lawyer should listen like a layman, not like a lawyer.

-- The lawyer should stop the witness if he sounds defensive or speculative or if he starts to apologize. "To tell you the truth," "I guess I'm not sure," "Maybe," and "I always thought" should be excised from the witness' vocabulary for the duration of the trial.

-- The witness should speak in short, simple sentences.

-- The witness should occasionally address his answers directly to the jury, using the occasion to establish eye contact and to assess their understanding of and attention to his answers.

-- The witness should use his own vocabulary, not that of the lawyer.

-- The lawyer should take the witness to Court early and show him where he will sit, where the lawyers will stand, and where the jury will be. The microphone system

should be explained. (If a person is worth calling as a witness, he is worth being heard.) He should understand how he will be called to the stand and how he will be sworn. The goal is to make the witness as comfortable as possible with the proceedings.

3. The Use of Documents to Refresh Recollection. In a document-intensive case, the question arises of how to familiarize the witness with the documents which are critical to each side's case. As a starting point, the lawyer should plan this portion of the preparation with the recognition that there is at least a possibility that any documents shown to the witness may be discoverable, as is the fact that the witness has reviewed them. The Federal Rules of Evidence to provide that if a witness uses a writing to refresh memory for the purpose of testifying, the court may require the writing to be produced if the court determines "it is necessary in the interests of justice," and the court can permit cross-examination of the witness on that writing. Fed. R. Evid. 612. The purpose of the Rule is to promote the search of credibility and memory. Fed. R. Evid. 612 advisory committee's note, and judges of a liberal evidentiary bent may be inclined to allow substantial latitude to the cross-examiner. Accordingly, several safeguards are prudent:

-- All documents used in preparation should be first reviewed by the direct examiner specifically to determine whether he is willing to have his witness interrogated about them on cross-examination, even if they are not mentioned on direct. The answer will probably be "yes" for some documents, "no" for others.

-- An aggressive cross examiner may even inquire into the possible existence of a written outline or summary of the witness' testimony for preparation purposes (see the preceding section). It should be strongly argued that such an outline is not for purposes of "refreshing the witness' recollection" -- a statutory requirement for disclosure under Rule 612 -- but instead is protected work product used only for purposes of organizing the witness' testimony. Nonetheless, care should be taken in drafting the outline so that it avoids the appearance of a teaching or recollection tool.

-- Privileged or work product communications which the witness does not otherwise recall should be treated with great caution. There is conflicting authority on the issue of waiver by use to refresh the recollection; but there is sufficient adverse case law to be troublesome. Compare Boring v. Keller, 97 F.R.D. 404 (D. Col. 1983) (privilege waived by provision to expert of attorney's summary and analysis of plaintiff's deposition) with Bogosian v. Gulf Oil Co., 738 F.2d 587 (3d Cir. 1984) (disclosure to expert of attorney's work product documents in antitrust case did not waive privilege).

-- The case of Sporck v. Peil, 759 F.2d 312 (3d Cir. 1985) is of particular interest.

There, an attorney had prepared his expert for deposition by reviewing with him a collection of key documents. The opposing attorney sought to compel identification of which documents had been shared with the expert. The court held that there was no such obligation to identify the collection of documents in its entirety, since that would invade the work product of the preparing attorney (revealing which documents the attorney believed to be most important). Instead, the proper way to proceed would be for the opposing attorney to select the documents he wished to interrogate the expert about; in the course of his interrogation, it would then be permissible for him to ask if a given document was among those reviewed in preparation for the deposition.

4. The Cross-Examination Drill. The best preparation for cross-examination is for the witness to be confident of his direct testimony. The witness should be cautioned, however, that after he completes his direct, the evidence he has offered will be subjected to unfriendly or even hostile scrutiny by the other side. He should also be warned that, out of concern for jury reaction, his lawyer may be more constrained in his ability to object and protect him from the adversary's hostility than was true at the pretrial deposition. In short, the witness will be on his own for the great majority of the cross-examination.

In determining the likely areas of cross-examination, two sources are indispensable: (i) the depositions taken during pretrial discovery from witnesses for both sides (which reveal the adversary's theories and attacks); and (ii) the witness himself, who may have insightful ideas about vulnerable areas. It goes without saying that these areas should be carefully explored and discussed, so that the witness is not surprised or embarrassed by unexpected questions.

Finally, the witness should be cautioned about being either too evasive or too argumentative during cross-examination. A witness who is cooperative on direct but churlish and vague on cross is rarely a jury favorite. Moreover, the witness should be advised that there are some issues on which he can concede without hurting the case and that to do so may improve his credibility. For example:

The plaintiff's expert economist has calculated his estimate of the value of the decedent's life using a discount rate at the low end of the current market range. He should be advised to concede on cross that a higher discount rate could have been used and that the use of that rate would have reduced the damage figure. The expert will fare far better if he defends his opinion on the basis that the lower figure is reasonable, rather than on a theory that no other discount rate was possible.

This means, of course, that the witness must be thoroughly familiar with which issues are the critical ones to be defended at all costs, as opposed to which may be conceded.

5. To Videotape or Not to Videotape? For important or difficult witnesses, many lawyers choose to videotape a mock examination prior to trial. The witness is able to see his

physical mannerisms; he can assess the effectiveness of his answers to critical questions; and he obtains a feel of how he looks to the jury. The benefits of this process are not limited to the witness; the lawyer can also determine how he might improve his interrogation and how he might best help the witness.

There are downsides to this practice, however. The already-nervous witness can be further distracted by the process. Some witnesses can develop a skewed notion not only of their testimony but of the whole judicial process as a dramatic play, rather than a search for truth. Finally, there is the potentially embarrassing spectre of a witness being cross-examined on the stand about his pretrial preparation meetings and whether as part of those sessions he was videotaped. Some judges with restrictive views on the work product doctrine may view such cross-examination as entirely proper explorations of credibility.

These competing considerations must be carefully weighed. Nonetheless, the video process has been increasingly used by careful trial lawyers to prepare important witnesses. It is, after all, an unusually instructive tool for the lawyer's most important task -- teaching the witness to communicate simply and effectively.

6. The Rules of Evidence and the Need for Objections. Most witnesses have no previous acquaintance with the limitations of direct examination. It pays to educate them, so that they can appreciate the constraints under which they are interrogated. A brief discussion of the applicable rules of evidence can be helpful, as well as an explanation of the way objections will be made and met.

C. The Direct Examination: Are the Facts Understandable?

The organization of the direct examination is frequently a casualty of a rushed trial schedule where there is too much to do in too little time. Unfortunately, such organization may be as important as any aspect of the trial, and it should not be neglected simply because the lawyer assumes he has the comfort of a friendly witness and control of the examination.

1. Organizing the Direct. The goal of the lawyer should be to impose some system of organization on the direct examination which will lead the jury where the lawyer wants it to go. One way to assist the jury is to tell them at the outset what the witness' role is and why he is there:

"Q. Tell us, Mr. Brown, why you are here today.

A. As Sales Manager, I am responsible for collecting sales information about the Widget, and I have done various studies of our market share. I am here to testify about the results of those sales studies."

This kind of examination can help the jury to put the witness' testimony in perspective; and it can alert the jury to the particular portions of the testimony which the lawyer himself regards as the heart of the evidence.

In going forward with the direct examination, the organization most frequently used to develop the story is a simple chronology -- the "what happened next?" school of direct examination. This format may be used quite effectively with percipient witnesses who are testifying about a crime or a personal injury; it is less helpful with a technical or expert witness. For these latter witnesses, the lawyer usually imposes a subject-matter organization, moving from one area to the next with some sort of "bridge" question or statement which signals to the jury what is coming:

"Q. Now that we have discussed the laboratory testing of the product, Mr. Williams, let's explore how Acme satisfied itself about the actual performance of the product once it was released to the public. To begin with, did Acme have in place any procedures for monitoring field performance?

A. Yes we did.

Q. Tell the jury what those procedures were."

The key to this tactic is the first sentence. It does not ask a question; it announces a new topic. It orients both witness and jury.

Interestingly, the same technique can be equally effective in corralling a witness who wants to move on too quickly:

"Q. I understand you are concerned about what happened after the ambulance got to the hospital, but let's finish talking about what happened at the scene."

Whatever the organization of the direct, the overriding goal should be to make the story as simple and understandable as possible and to tie that story irrevocably to the theory of the case.

2. The Form of the Question. This chapter began with the question "Why is direct examination so difficult?" The shortest answer to this inquiry is the dog-eared rule that a lawyer is not permitted to lead his own witness. After all, getting the right answer is infinitely more cumbersome when the lawyer is precluded from suggesting what that answer is. The lawyer on direct is truly at the mercy of the witness, who is required to formulate his own version of what happened. Unfortunately, most of us have dangled slowly in the wind as a witness departs totally from the answers given in the briefing session to thrash about in unfamiliar territory. Even more unfortunate is the situation of a witness overcome by sudden amnesia; rather than giving an unexpected answer, he gives no answer at all. The lawyer, confronted by glazed incomprehension, must find a way to remind the witness of what he knew only yesterday --

again, without leading questions.

Too frequently, this sorry state of affairs drives the inexperienced and increasingly desperate lawyer to ask a leading question. Predictably, such questions trigger delighted and repeated objections from the opponent. These objections -- particularly if they are sustained -- can make the imbroglio even worse, conveying to the jury that the lawyer is inept and incapable of getting the story he wants without putting it in the witness' mouth.

What, then, is the answer to these predicaments? Consider the following lifelines:

(1) Persuade the court that your leading question really relates only to preliminary matters. In the interests of economy, it is perfectly appropriate to lead a friendly witness on direct examination as to matters which are not seriously in dispute. Fed. R. Evid. 611(c); J. Weinstein and M. Berger, *Weinstein's Evidence,* ¶ 611[05] (1975). Sometimes a lawyer can phrase a series of "preliminary" leading questions which will gently guide the witness back on to the reservation before the critical question must be asked.

(2) Withdraw the leading question immediately, without waiting for a ruling. Rephrase it to eliminate the objectionable suggestion it previously contained.

-- The most reliable way is to ask a question which begins with "who, what, where, when or how" to remove any possibility of an objection. Unfortunately, some witnesses need far more help than is available under this approach (else the lawyer would not have led them in the first place). In such situations:

-- A surprising number of courts will accept an amendment in which the previously leading question is prefaced simply by "tell the jury whether or not . . . ." This can be your first recourse.

-- If your court is not so agreeable, consider a question in which you contrast opposites, leaving the witness to choose. Instead of asking "Was it dark when you got there," ask "Was the street well-lit or dark when you arrived?"

Finally, your advice to the witness to keep his answers short and concise is equally applicable to your own interrogation. *Practice asking short questions.* They are easier for both jury and witness to understand; they are less likely to be criticized as leading; and they will get the job done more quickly.

3. The Use of Non-Verbal Evidence. By now, communication specialists have established beyond cavil that a picture is worth a thousand words. Nowhere has this been established more dramatically than in the courtroom, where jurors' comprehension and retention

has been impressively expanded with the use of visual aids. It makes perfect sense: any saint would be thankful to have two weeks of verbal testimony finally interrupted by a videotaped demonstration of a high speed crash test of an automobile, or a vivid computer animation of the progress of environmental pollution. Jurors usually watch better than they listen, and a canny trial lawyer should take this into account in planning his direct examination.

There has been, of course, an historic debate over whether a lawyer's presentation can be too "Hollywood" to be effective, *i.e.*, whether the lawyer will alienate both Court and jury by a parade of expensive and ultimately distracting visual aids. Unfortunately for low-tech lawyers (a group in which the authors proudly place themselves), the evidence is accumulating indisputably in favor of such devices. Juries are now composed of people who have grown up with television, whose attention spans can be measured in sound bytes, and who are accustomed to the razzle-dazzle videos of modern advertising. Indeed, there is a burgeoning theory that jurors may attribute greater veracity and authority to something they see on a video screen than they do to a lawyer or witness who speaks to them in person. All of this means that an effective direct examination should be interspersed with a variety of non-verbal evidence. Depending on the importance of the case and the budget of the client, these range from inexpensive, easily available equipment to the full-scale dramatic production:

-- Overhead projectors and transparencies (which can be done in your own office on a Xerox machine), offer an easy means by which important documents can be immediately and effectively published to the jury. Important portions can be highlighted or marked with grease pencil.

-- More ambitious lawyers, who have the courage of their conviction that jurors truly are products of the TV age, have used a closed-circuit video camera for the same effect. A video camera is placed above and pointing downward toward a flat surface on which the original of the document is placed. The image of the original is then televised on televisions placed close to the jury box.

-- Photographs which are crucial to a witness' testimony can (and should) be enlarged and mounted on foam board so that the jury need not guess at what the witness is pointing.

-- Videotape offers an inexpensive and convenient way of introducing the jury to the scene of the accident, the condition of the assembly plant, or a variety of other evidence.

-- For the large case, there are an increasing array of full-scale litigation support organizations which offer services ranging from computer graphics to display boards which present documentary evidence in dramatic ways proven by psychological research to be meaningful and persuasive. These services, which draw their personnel from the fields of computer science, psychology, and advertising, can be extremely helpful in assuring that the jurors will remember a key image when they retire for their deliberations. These services can also be very

expensive, so competitive bids may be advised.

4. Spiking Their Guns: When Do You Bring Out the Damaging Evidence? For years, the usual admonition has been that the good trial lawyer should not wait for the adversary to demolish his witness on cross-examination; he should instead bring out the vulnerable areas on direct -- in a gentler, kinder way. There is undeniable logic to this: the toughest questions are lobbed to the witness by the most sympathetic interrogator and the responses can be discussed in advance.

A word of caution is advised, however: lawyers who have labored long to learn the total landscape of their client's case may sometimes be better equipped to spot weaknesses than is the adversary. Accordingly, the over-cautious lawyer may give away more than is necessary. A careful assessment of the opposing lawyer is an integral part of this equation. How prepared is he? How intuitive? How experienced in this kind of litigation? If there is a chance the opponent will miss the landmine, that chance can be worth taking, so long as the witness is properly prepared for an aggressive cross-examination. Even if the eventual decision is that the troublesome matter should be explored on direct, it should be treated briefly and not belabored: juries usually find it curious that someone charged with vigorously representing a client would spend so much time dealing with damaging information.

5. What Do You Do When Your Witness Makes a Mistake? It is one of the lawyer's worst nightmares. His witness, exhaustively prepared, inexplicably recites the wrong answer when questioned about critical measurements. The lawyer is plunged into the quandary of whether to follow the ostrich approach, casually skipping ahead, ignoring the error, and hoping the jury does not notice (his most devout wish is never to deal with this issue again); or whether to enter the treacherous waters of correcting his witness in full view of the jury (again without the assistance of leading questions). No matter how appealing the former alternative, there is but one answer to this question: for all but the most innocuous errors, the lawyer must correct the record. Most juries understand and forgive honest mistakes; they do not understand or appreciate attempts to cover them up.

"Q. When you measured the wall, how far was it from the property line?

A. Six feet, ten inches.

Q. Excuse me, Mr. Smith. You may have misunderstood my question, or I may have misunderstood your answer. How far was the wall from the property line?

A. (stubbornly). Six feet, ten inches.

Q. Is that six feet, ten inches, or ten feet, six inches?

A. Oh, I'm sorry. I meant ten feet, six inches.

Q. (smiling). Now, which is it?

A. Ten feet, six inches.

Q. Describe for the jury when and how you arrived at that measurement.

A. I measured it with a steel tape extended from the wall to the iron pin, when I visited the site on January 12.

Q. And what distance did you determine?

A. Ten feet, six inches."

This exercise demonstrates that Irving Younger's admonition to listen to the witness' answer is at least as important on direct examination as it is on cross.

D. Conclusion.

Despite the pitfalls, there is one undisputed advantage to direct examination: even if the lawyer is prohibited from leading, he has the opportunity of discussing the testimony beforehand with the witness. This means that the good lawyer can be as good and effective as his preparation. The only penalty is the time needed for that preparation -- and no time could be more valuable to the client.

Hammer those facts to the jury.