Chapter 11. Trial
Section 6. Examination of Lay Witnesses

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Attorneys often underestimate the impact of non-party lay witness testimony at trial. The finder of fact may discount the testimony of parties and experts because they are expected to support their respective positions. The plaintiff predictably will try to maximize liability and damages while the defendant is expected to do the exact opposite. Experts are paid to testify and are expected to support the proponent's case. In contrast, nonparty lay people such as eye witnesses, lower level company employees, and non-party fact witnesses may have little or no stake in the outcome of the case and therefore are perceived as truthful and unbiased. Because lay witness testimony generally comes with an underlying presumption of credibility, it may tip the scales in an otherwise close case where the party witnesses and expert witnesses have neutralized each other. This is ample reason to prepare as diligently for lay witness testimony as any other aspect of trial.

I. Cross-Examination of Non-Party Lay Witnesses at Trial

A lawyer has four opportunities to speak to the jury during trial: jury selection, opening statement, closing argument – and cross-examination. By exercising control of plaintiff's lay witnesses through narrowly tailored, leading questions, cross-examination allows defense counsel to "speak" to the jury through the witnesses during the plaintiff's case. Cross-examination is a prime opportunity to elicit from the adverse witness favorable testimony, if any, limit the witness's testimony, and/or discredit the witness's testimony.

In federal court, the scope of cross-examination is limited to that of direct examination, but the court may allow inquiry into other areas. *See* FED. R. EVID. 611(b). In practice, cross-examination is generally permitted on any relevant issue. Counsel may ask about any of the topics covered on direct examination, have the witness repeat favorable facts and bring out new information related to those facts. Counsel may also test the memory, perception, and credibility of the witness. While cases are generally won or lost on direct examination of one's own witnesses, cross-examination of lay witnesses, at a minimum, can neutralize their testimony so the fact finder is receptive to hearing from the defense witnesses later in the trial.

A. The Goals of Cross-Examination

Cross-examination of the plaintiff's lay witnesses should advance the overall theory of the defense case, either directly or by detracting from the plaintiff's case. The goal of cross-examination is rarely to destroy the witness. In fact, portions of the witness's testimony may advance the defense theory of the case. Favorable testimony given on direct examination should be highlighted on cross-examination. These admissions will have greater impact coming from the plaintiff's own witnesses.

At times a discrediting cross-examination is warranted to demonstrate that the witness's direct testimony, or portions of it, is untrue or unreliable. Traditional areas in which to discredit the witness

include memory, perception and credibility. Each of these can be broken down further. The witness may have given what she believed to be honest testimony on direct examination, but her perception of key events may have been compromised by her vantage point, distractions, eyesight, or alcohol or drug use. Her memory can be challenged by demonstrating her inability to recall details about the event or her inconsistent testimony about the event. If the goal is to demonstrate that the witness's direct testimony was untrue, her credibility might be attacked by demonstrating motive, interest, bias, prejudice, prior inconsistent statements and, in certain cases and depending upon the jurisdiction, the witness's reputation for untruthfulness and prior convictions and bad acts. For example, love, hate, revenge and greed are strong influences that can be brought out on cross-examination.

Most cross-examinations contain a mix of questions designed to highlight favorable testimony and discredit unfavorable testimony given on direct examination.

B. When Not to Cross-Examine

Some trial lawyers advocate not cross-examining a witness who does no damage on direct examination. This is an overly defensive view of cross-examination. With the above mentioned goals of cross-examination in mind – eliciting favorable testimony and discrediting unfavorable testimony – much good can come from cross-examining a witness who does no damage on direct examination. Admissions obtained from the plaintiff's own witnesses will be more powerful than similar testimony from the defense witnesses. Likewise, cracks in the plaintiff's case are more glaring when chiseled by the plaintiff's own witnesses.

For example, assume a vehicle accident case in which the plaintiff arguably was intoxicated according to the results of a blood alcohol test. The witness is the plaintiff's fiancé, who gave emotional testimony on direct examination about the impact of the plaintiff's injuries. If the severity of the injuries is largely undisputed, and if the defense intends to present a toxicologist to testify that the plaintiff was intoxicated at the time of the accident, should the fiancé be cross-examined? The answer, of course, is it depends. If cross-examination would serve only to give the witness a platform to repeat her emotional testimony from direct examination, the answer is no. But if the fiancé's deposition revealed that the couple had been celebrating Cinco de Mayo earlier that day at a local watering hole – where the plaintiff consumed six margaritas, four amber ales and three shots of tequila – and the fiancé had implored the plaintiff not to get behind the wheel after drinking, cross-examination is warranted. It will provide powerful and easily understood context and texture to the scientific testimony of the toxicologist to follow in the defense case.

The question whether to cross-examine turns on the good that can be done on cross, not on whether the direct examination was damaging.

C. Organizing the Cross-Examination

Cross-examination is not a jumble of pointed questions fired at the witness at random. Good cross-examination is a goal-oriented series of progressions strategically organized to communicate a message to the jury. Above all, cross-examination should advance the overall theory of the defense case.

A cross-examination outline should be prepared for each witness. The outline can be divided into short topics, with the topic written at the top of each page. Each page would then include the questions to be covered as part of that topic, with annotations in the margin for the source for each question. For example, if the source of the question comes from the witness's deposition, the page and lines of the deposition question and answer should be noted in the margin of the outline. This can also be done in table format, with one column for the question and a second column for the source of the question. This will enable efficient impeachment if the witness strays from her prior testimony or statement.

The entire questions need not be written on the outline unless the specific wording is critical. This promotes engaging the witness without being wedded to notes. Additionally, each topic should be limited to one page; additional questions can be broken into a new topic or sub-topic. This will keep the examination moving forward.

Finally, the strongest points should be made at the beginning and end of the cross-examination. The theory of primacy is that people tend to remember what they hear first. The theory of recency is that people tend to remember what they hear last. Together, these theories suggest that the cross-examiner should start strong and end strong. Difficult topics, if they must be covered, are best addressed during the middle of the cross-examination.

For example, assume a trip and fall case against a property owner. The lay witness is a friend of the plaintiff who witnessed the accident and testified on direct examination both about the accident and the plaintiff's resulting injury. The overall goal on cross-examination may be to discredit the witness's testimony, yet give hope about the plaintiff's recovery. The initial topic of the cross-examination might elicit testimony that the witness is biased in favor of the plaintiff. Bias can be demonstrated through the history and nature of the friendship, such as the length of the relationship and significant experiences (e.g., employment, military service, high school, college, sports teams, fraternities/sororities, hobbies, religious worship, social clubs, organizations and attendance at each other's weddings, birthday parties and children's parties, etc.). Any favorable testimony about the plaintiff's recovery could be elicited at the end of the cross-examination. The middle topics of the cross-examination might include more challenging questioning regarding the witness's perception, memory or credibility (e.g., the witness was not in the direct vicinity of the accident; the witness's attention was elsewhere during the accident; the witness gave a different version of the accident in deposition; etc.).

This is just one example of how a lay witness cross-examination might be organized—beginning with bias, but ending on a hopeful note about the plaintiff's future recovery. Of course, one size does not fit all cross-examinations. The takeaway is not to engage in random acts of cross-examination, but to organize the presentation in a logical progression – the one most likely to advance the defense theory of the case.

D. Cross-Examination Tactics and Techniques

1. Positioning in the Courtroom

In a jury trial, if the court permits, the podium should be placed relatively close to the witness and directionally away from the jury. In this manner the witness is looking at the cross-examining attorney and away from the jury. In contrast, the cross-examining attorney is looking directly at the jury – as though the attorney is testifying while the witness is acting as a sounding board by agreeing with the questioning. The goal on cross-examination, unlike direct examination, is for the attorney, not the witness, to be the teacher of the facts. This is best accomplished on cross-examination when the lawyer, not the witness, is looking at and building rapport with the jurors.

2. Tone

Tone is especially important when cross-examining lay witnesses because they likely have little or no stake in the outcome of the case and therefore are perceived to come to court with an air of reliability. When in doubt, tread lightly. As the saying goes, you attract more flies with honey than vinegar. The lawyer has no reason to raise her voice on cross-examination (or, for that matter, at any time in trial).

3. Leading Questions

Leading questions are permitted on cross-examination and generally prohibited on direct examination. *See* FED. R. EVID. 611(c). This is the fundamental distinction of cross-examination. Leading questions permit the lawyer to control the examination and reduce the risk of harmful testimony. As importantly, leading questions focus attention on the lawyer and away from the witness. This is not done for ego reasons but again to cast the lawyer, not the witness, in the role of the teacher of the facts.

So what are leading questions? They are short declarative statements to which the witness must agree. Leading questions never ask the witness to explain who, what, when, where, why or how. These are open-ended questions appropriate for direct examination.

Consider, for example, the following three questions:

a. What color was the light?
b. Was the light red?
c. The light was red?

Most attorneys recognize the first question as non-leading because it does not suggest the answer. On the other hand, many lawyers and judges believe that the second question is leading because it can be answered either "yes" or "no" and is somewhat suggestive of the answer. It is not, however, a leading question for purposes of cross-examination. Only the third question is appropriate for cross-examination because it does more than just suggest the answer – it declares it. If the question mark is removed, the question would be a short declarative statement.

Cross-examination questions need not contain "tag lines" like "isn't it true?", or "isn't it correct" or "right?" These tag lines, whether placed at the beginning or end of the question, violate the rules of primacy and recency by robbing the question of its impact. Instead, the question can be denoted through voice inflection if necessary. And if the witness asks, "Is that a question?", the cross examiner can simply respond, "Yes."

How is the cross-examiner able to make short declarative statements to which the witness must agree? Because the cross-examiner never asks a question to which the answer is unknown. Every question is based on source material to which the witness should assent. The source material could be the witness's direct examination, prior trial or deposition testimony, discovery responses, statements, documents, e-mails or some other writing or testimony to which the witness has expressed actual or implied assent. Each question in the cross-examination outline should be keyed to the source material. If the witness disagrees with the question, the examiner may then impeach the witness with the source material. Occasionally, the only basis for the question is irrefutable logic. If the witness attempts to refute the question, impeachment can be based on logic alone.

4. One Fact Per Question

Questions asked on cross-examination should be as simple as possible, preferably containing only one fact. Compound questions containing multiple facts give the witness wiggle room to deny the question. By asking only one fact per question, the disputed fact is isolated and can be dealt with appropriately. By the same token, the fewer adjectives in a question, the better. The witness can more easily deny qualitative statements or conclusions than hard-edged facts. Moreover, facts are more persuasive than conclusions. The more factual detail established during the examination, the better. Finally, and most importantly, the jury is better able to follow short, simple questioning than long-winded, convoluted diatribes.

5. General to Specific Facts

The progression of cross-examination can be thought of as an inverted pyramid, beginning with general facts and concluding with specifics. Witnesses will more readily agree with general questioning before they are confronted with specific facts. By having the witness agree to general facts at the beginning of the examination, the escape hatches are closed before the witness realizes where the questions are heading.

For example, suppose that the goal of the first section of the cross-examination is to demonstrate that the witness is biased in favor the plaintiff. The witness is unlikely to agree to bias, and should not be asked to agree with that conclusion on cross-examination. Instead, the examiner should lay the ground work through fact-specific, goal-oriented cross-examination to explain in closing argument that the witness is biased in favor of the plaintiff. The bias section of cross-examination might look like this:

Q: Mr. Smith, you have known plaintiff for 20 years?
A: Yes.
Q: Since high school?
A: Yes.

Q: You have stayed in touch since high school?
A: Yes.
Q: He attended your wedding?
A: Yes?
Q: He was the best man in your wedding?
A: Yes.
Q: You attended his wedding?
A: Yes.
Q: You were the best man at his wedding?
A: Yes.
Q: He is your friend?
A: Yes.
Q: You are his friend?
A: Yes.
Q: As his friend, you want what's best for him?
A: Yes.
Q: As his friend, you would help him however you could?
A: Yes.
Q: As his friend, you don't want to see him fail?
A: True.
Q: You met with your friend's attorney before today?
A: Yes.
Q: You discussed your testimony with your friend's attorney?
A: Yes.
Q: You obviously realize that your friend has filed a lawsuit against the XYZ Company?
A: Yes.
Q: You are here today to testify in the lawsuit brought by your friend?
A: Yes.
Q: You hope your friend wins his lawsuit?
A: That's not in my control.
Q. Well, you don't hope your friend loses his lawsuit.
A. Of course not.
Q. You would like to see him win his lawsuit?
A. Yes, that's true.
Q: And you hope your testimony helps your friend win his lawsuit?
A: Yes, I suppose so.

If the last question had been asked early in this series, it may not have garnered an affirmative response. But by proceeding from general to specific, fact-based questioning, the admissions were locked in before the witness appreciated the peril. The witness agreed to the qualitative characterization of the plaintiff as his "friend" early in the examination – a fact which could not credibly be denied based on the earlier fact-based admissions. The word "friend" was then "looped" back to the witness in all of the subsequent questions. The witness's agreement on the friendship helped seal off the escape hatches,

making *credible* denials of the more troublesome questions at the end of the examination all but impossible.

6. Listen Carefully to the Witness's Testimony

The cross-examiner must listen carefully to the witness's testimony on both direct and cross-examination. The witness's testimony on direct examination will impact the questions asked on cross-examination. And the witness's answers on cross-examination will impact follow-up questions during the same cross-examination. Both require defense counsel to pay close attention to the witness's testimony. This means that on cross-examination defense counsel cannot slavishly follow her outline. While the outline is certainly necessary as a guideline, it does not supplant the need to listen to the witness's responses. A good practice is to look at the witness until the answer is complete. The answer will inform the next question, which may turn out to be different – and more effective – than the one initially outlined.

7. Impeachment

In the broadest sense, impeachment occurs any time a witness or her testimony is discredited. Subjects of impeachment include the witness's memory, perception, knowledge, credibility, bias, character, prior convictions and competency. One of the most powerful forms of impeachment is with the witness's prior inconsistent statement. *See* FED. R. EVID. 613. In civil cases, prior statements frequently take the form of depositions. As a result, good impeachments are born of good depositions. The deposition must be thorough and the questions and answers specific and unambiguous. As many admissions as possible should be obtained in the deposition. Then, if the witness testifies at trial inconsistent with her deposition, the deposition may be used to impeach the witness. *See* FED. R. EVID. 613, 801(d)(1).

While impeaching the witness with a prior inconsistent statement can be one of the most dramatic and memorable events in a trial, before doing so the following issues should be considered:

- Is the current version of the witness' testimony better of worse than the deposition? If the current version is better, impeachment may do more harm than good. An exception is impeachment done to show that the witness is simply untruthful and unworthy of belief on any issue.
- Is the inconsistency important? Impeachment should be reserved for matters of significance; otherwise it will come across as petty.
- Is the inconsistency a lie or a lapse in memory? In the latter situation, a "soft impeachment" may be appropriate to refresh the witness's memory.

If the decision is made to impeach the witness with a prior inconsistent statement, the impeachment should consist of three general parts: (1) tying the witness to the current inconsistent statement, (2) sanctifying the witness's prior statement and (3) exposing the inconsistency. Consider, for example, a car accident case in which the witness, the biased friend of the plaintiff discussed above, testified in deposition that the plaintiff ran the red traffic light. At trial, however, the witness testified on

direct examination that the light was yellow. Against this backdrop, the three-part impeachment process is illustrated below.

Part 1 – Tie the Witness to the Current Inconsistent Statement

The cross-examiner is not permitted to question the witness regarding her deposition testimony without first laying the predicate that the current testimony is inconsistent. Not only would the questioning violate evidentiary rules, *see* FED. R. EVID. 801(d)(1), the impeachment would lack context.

Continuing with the hypothetical case, once the bias/friendship section of the cross-examination is developed, impeachment of the witness with his deposition might begin as follows:

Q. Mr. Smith, you testified on direct examination about the car accident?
A. Yes.
Q. You testified about the color of the traffic light when your friend's car entered the intersection?
A. Yes.
Q. You testified specifically that the traffic light was yellow when your friend's car entered the intersection.
A. Yes.
Q. Your sworn testimony today is that the light was yellow?
A. Yes.
Q. Today, your sworn testimony is that the light was not red?
A. Correct.

With these questions and answers locked in, the witness is now tied to his current version that the traffic light was yellow. The ensuing impeachment now has a contextual predicate.

Part 2 – Sanctify the Prior Statement

Once the witness is tied to his current version of events, the circumstances surrounding the witness's prior testimony should be developed. The jury likely has no idea what a deposition is. Consequently, the importance of the witness having given truthful and accurate testimony during the deposition must be developed.

Continuing with the hypothetical impeachment:

Q. Mr. Smith, quite a while ago you gave a sworn statement called a deposition?
A. Yes.
Q. That was two years ago, on January 15, 20xx?
A. I don't remember the exact date, but that sounds about right.
Q. You came to my office?
A. Yes.
Q. And I asked you questions about the car accident?
A. Yes.
Q. Your friend's lawyer was present?

A. Yes.
Q. Just like he is today?
A. Yes.
Q. And a court reporter was present?
A. Yes.
Q. And the court reporter recorded your testimony word-for-word?
A. Yes.
Q. Just like the court reporter here in court today?
A. Yes.
Q. At the beginning of the deposition, you swore an oath?
A. Yes.
Q. In fact, it was the same oath you swore today?
A. Yes.
Q. Like today, you swore in your deposition to tell the truth?
A. Yes.
Q. And after you swore that oath in your deposition, I instructed you only to answer those questions that you understood?
A. Yes.
Q. You agreed to do that?
A. Yes.
Q. And once your deposition was typed, you were given an opportunity to correct any mistakes in your testimony?
A. Yes.

With this testimony, the jury understands the nature and importance of a deposition. The stage is now set to expose the inconsistency.

Part 3 – Expose the Inconsistency

Q. Mr. Smith, you testified in your deposition about the color of the traffic light when your friend's car entered the intersection?
A. Yes.
Q. Specifically, at page 40, lines 10-13, you testified:
  Q. Mr. Smith, what color was the traffic light when the plaintiff entered the intersection?
  A. Red.
A. Yes.
Q. That was your sworn testimony in your deposition.
A. Yes.
Q. You testified in your deposition that the light was red?
A. Yes.
Q. Not green?
A. Correct.
Q. Not yellow?
A. Correct.

Q. But red?
A. Correct.
Q. That is different than your sworn testimony today?
A. Yes.
Q. Today the light was yellow?
A. Yes.
Q. Your deposition was closer in time to the date of your friend's car accident?
A. Yes.
Q. Two year's closer?
A. Yes.
Q. Your memory of the accident was fresher in your deposition than it is today?
A. I suppose so.

A few points are worth noting here. First, in many jurisdictions, the impeaching attorney is not required to show the deposition to the witness. *See*, *e.g.*, FED. R. EVID. 613(a). However, a copy of the deposition should be given to the judge, preferably at the start of the cross-examination so as not to interrupt the flow and drama of the impeachment. For the same reason, defense counsel should ensure that plaintiff's counsel has a ready copy of the deposition before the cross-examination begins. Second, the impeaching attorney should read the witness's inconsistent deposition testimony rather than delegate that function to the witness. That way the attorney can add the appropriate voice inflection and tone to maximize the dramatic effect. Finally, the witness should not be given an opportunity to explain the inconsistency (e.g., "Can you explain this inconsistency?", or worse, "Were you lying then or now?"). If given the chance, most witnesses will be able to explain the inconsistency. Better to revisit the matter during closing argument when the witness is not in a position to respond.

II. Direct Examination of Non-Party Lay Witnesses at Trial

The goal of direct examination of non-party lay witnesses is similar to that of cross-examination – to establish facts that advance the defense case and weaken the plaintiff's case. However, unlike cross-examination, in which the lawyer essentially is "testifying," the witness is the star of direct examination. Ideally, the witness will be compliant with defense counsel and will testify favorably to open-ended, non-leading questions. The exception is when a hostile witness, adverse party or witness identified with an adverse party is called on direct examination. In that event, leading questions can and should be used on direct examination. *See* FED. R. EVID. 611(c).

A. Selection and Preparation of Non-Party Lay Witnesses

Some things cannot be accomplished by e-mail, text message or telephone. Selecting and preparing non-party lay witness for trial is one of them. Witness selection and preparation is done in person, face-to-face, preferably by the lawyer who will be conducting the witness's trial examination.

Lay witness meetings should be held early and often. The venue of the meetings can vary depending on the circumstances (e.g., the scene of the incident, the witness's home or workplace, a restaurant or coffee shop, the lawyer's office, etc.), but always with a view toward the witness's convenience. The first objective of the meetings is to establish a rapport, build trust and dispel any fears

and uncertainty about the trial process. The witness should be told why her testimony may be necessary at trial and that she will not be asked to testify to anything other than the truth.

Only after the witness has attained a level of comfort about testifying in court can the details of the witness's factual knowledge be explored. At the same time, the witness's effectiveness and credibility must be evaluated based on her background, intellect, memory, perception, bias, personal characteristics, etc. Lay witnesses should be called for a specific purpose, not merely because they possess relevant information. In deciding whether to present the lay witness at trial, defense counsel should engage in a cost-benefit analysis by considering: (a) what facts the witness possesses that advance the defense case (e.g., introducing into evidence a defense exhibit through the witness) and/or weaken the plaintiff's case; (b) what facts the witness possesses that advance the plaintiff's case and/or harm the defense case; (c) the witness's effectiveness and credibility; and (d) whether another witness can be called who ranks more favorably on the cost-benefit scale.

Note that plaintiffs frequently call most if not all the key fact witnesses in a case, so much of this analysis may prove academic. In that event, facts that would have been presented on direct examination of the witnesses can be established on cross-examination during the plaintiff's case in chief. Duplicative or weak lay witnesses should not be called during the defense case merely for the sake of calling witnesses.

If, after a reasoned analysis, the decision is made to call the witness at trial, defense counsel should outline the witness's anticipated testimony. If the witness will be testifying about an accident, the scene of the accident should be visited with the witness if possible. Considerable time should be spent practicing both the direct examination and anticipated cross-examination with the witness. However, the witness should not memorize the testimony because it will come across as scripted and thus untruthful. Moreover, the outline itself should not be given to the non-party witness to avoid waiving its work product protection. The witness should be instructed to sit up straight when testifying and to speak loudly, slowly and clearly. The witness should look at the lawyer when receiving a question and at the jury when testifying. The witness should be counseled to be respectful but not capitulatory on cross-examination. The defense theory and themes should be shared with the witness. If the witness becomes flustered while testifying, he/she can always fall back on them. The witness should be reminded throughout preparation to tell the truth.

The non-party witness should be instructed that she is under no obligation to speak with opposing counsel. If contacted by opposing counsel to discuss the case, the witness may politely decline the invitation. If the witness feels compelled to speak with opposing counsel, the communication can be short and to the point. The witness should communicate that defense counsel was insistent that the witness's testimony be truthful.

Finally, logistics should be addressed with the witness. The witness should be clear on the location of the courtroom, when to arrive, where to park and, especially, what to wear. The witness should dress consistent with her occupation or station in life. Provocative clothing, excessive makeup or jewelry or extreme appearances should be avoided. The lawyer's administrative assistant or paralegal should have the contact information for the witness and vice versa.

B. Organizing the Direct Examination

Once the facts to be established during the direct examination are determined, the examination should proceed in a clear and logical order. While the organization may differ depending on the particular witness and case facts, the direct examination frequently proceeds chronologically. For example, consider a slip and fall case at a grocery store in which the witness, a fellow shopper, will testify that the plaintiff herself dropped the very jar of applesauce on which she slipped. The direct examination might be organized as follows:

- Witness's background
- Reason for witness being at the grocery store
- Position of the plaintiff leading up to and during accident
- Position of the witness leading up to and during accident
- Clear view of the plaintiff
- Detailed description of the accident
- Detailed description of the aftermath of the accident

C. Direct Examination Techniques

1. Positioning in the Courtroom

In a jury trial, if the court permits, the podium should be placed at the far end of the jury box, with the lawyer out of the jury's line of site to the witness. In this manner the witness, not the lawyer, is the center of attention. The positioning allows the witness to maintain eye contact and establish a rapport with the jury. It also forces the witness to speak up. The examination should be conducted in a manner in which the lawyer does not distract or detract from the witness.

2. Non-Leading Questions

Leading questions are not permitted on direct examination of a non-hostile witness except on preliminary matters. *See* FED. R. EVID. 611(c). This is the fundamental distinction of direct examination. Non-leading questions do not suggest the answer. Rather, they are open ended questions that ask the witness to explain who, what, when, where, why or how. Because defense counsel has prepared the witness to testify, the answers to these questions should be known beforehand.

3. Keep it Simple

Too much time can be spent eliciting background information and not enough time on the critical aspects of the testimony. Background testimony generally should be brief, and critical facts should be developed in detail. The questioning also should be simple—especially word choices. "Did you exit the vehicle after the collision?" is never as clear as "Did you leave your car after the accident?" The simpler the better.

The critical portion of the examination should be slowed down and developed. The questioning is still simple, just detailed. And the detail should be facts, not conclusions. "What did you see?"

"What did you hear?" "What did you do?" "What happened next?" All are questions that elicit factual detail and allow the jury to experience the incident through the eyes and ears of the witness.

Finally, listen closely to the witness's testimony. The jury takes cues from the examining attorney. If the lawyer appears uninterested in what the witness has to say, the jury may follow suit. More importantly, if a response to a question is unclear, the examiner must have the witness explain it. A light mist of ambiguity over the witness stand becomes a heavy fog of confusion by the time it hits the jury. Clear up the testimony before moving on. And so as not to demean the jury, the lawyer should say that she does not understand the testimony rather than suggest that the jury may be confused: "I'm sorry Mr. Smith, *I* didn't understand your answer. Where exactly were you standing when you saw Ms. Jones fall?"

4. Make it Visual

Verbal testimony alone can be difficult for the jury to follow and retain without accompanying visual aids. Consider a case involving a car accident occurring in a busy intersection. An eye witness would struggle to describe the accident without some visual representation of the intersection and the vehicles. By the same token, the jurors are more likely to understand the facts when they both hear and see them. This is true for most witness testimony. Visual aids make witness testimony far more interesting, understandable and memorable than verbal testimony alone.

Whether admitted in evidence or used only for demonstrative purposes, visual aids come in many forms: tangible objects and exemplars, photographs, sound and video recordings, diagrams and models, drawings by the witness, demonstrations by the witness, charts, graphs, medical films, business records, e-mails, letters, documents, contracts, computer generated animations and presentations, etc. Consider well in advance of trial what foundation or predicate must be made to enable the witness to refer to the evidence or demonstrative aid while testifying. Once permission from the court is obtained to display the item to the jury, consider whether the display will be low-tech (e.g., flip chart, dry erase board, blowup, tangible item, etc.), high-tech (e.g., a monitor or screen using a display camera, presentation software, etc.) or some combination of the two. All display methods have pluses and minuses, so the question should be considered as thoughtfully as any other aspect of trial. However, having documents or other items passed from juror to juror while the witness is testifying generally should be avoided because it takes the jury's attention away from the witness.

5. Anticipate and Defuse the Cross-Examination

Weaknesses in the witness's direct testimony that are likely to be brought out on cross-examination should be defused. The witness will have an easier time explaining the weakness during friendly questioning. This will take some of the sting out of the coming cross-examination. Given the principles of primacy and recency, the beginning and end of the examination are likely to have the biggest impact on the jury. Therefore, direct examination, like cross-examination, should begin and end on a strength, not weakness. Weaknesses should be addressed during the middle of the direct examination.

III. Conclusion

Experienced trial lawyers know that lay witness testimony can make or break a case. By locating lay witnesses early in the litigation, developing their testimony, and following basic rules for examining them at trial, defense counsel can make a quantum leap toward the ultimate goal of hearing those two coveted words: "Defense Verdict."