# S. DIRECT EXAMINATION

**OVERVIEW:**

Direct examination is the most important part of the trial. It is during this phase of the trial where the Trial Attorney establishes the GC's case-in-chief.

**OBJECTIVE:**

To provide guidance on the organization of direct examination which includes the objectives of direct examination, structuring the questions, what to avoid, and techniques to use to elicit testimony.

## 1. ORGANIZING THE DIRECT EXAMINATION:

- Introduce the witness;
- Establish witness credibility;
- Elicit information from witness needed to prove or corroborate the elements of GC's case;
- Elicit information from witness to refute proof or credibility of Respondent's case;
- Elicit facts that support accuracy and credibility of witness; and
- Elicit evidence that is not helpful to case, in least harmful manner, to blunt Respondent's cross-examination.

## 2. STRUCTURING THE QUESTIONS:

a. *Testimony must show that evidence is*:

- Relevant--probative of a fact in issue;
- Competent--sufficient foundation to be admissible; and
- Material--immediate to the facts in issue.

b. *Sample Direct:*

i. Introduction--questions to introduce and calm the witness:

- What is your name?
- Where do you work?
- How long have you worked there?
- What is your position?

ii. Background--questions to establish witness is familiar with subject matter.

iii. Body of Direct--the substantive part of the examination where the witness in his or her own words tells what s/he knows about the case.

iv. Format of questioning--Question and Answer Technique (i.e., who, what, where, and how):

- Who was present at the meeting?
- Where was the meeting held?
- What was said at the meeting?
- Then what happened?
- Are you familiar with the leave system at your facility?
- Describe how the leave system works.

☞ *The benefit of the Q & A format is that short, simple, and direct questions are easy to answer to structure the testimony so that key points are covered.*

v. Format of questioning--Narrative

"Tell the Judge in your own words what happened . . . and then what happened."

☞ *Some attorneys favor the narrative approach because it permits the witness to tell his/her story in a natural and convincing manner. To be used successfully, however, the witness must be confident and articulate, and s/he must cover key points without prodding. Be aware that opposing counsel may justifiably object on the basis that narrative testimony does not allow opportunity to preclude, by objection, inadmissible testimony.*

*If narrative questioning is used, the Trial Attorney carefully listens to the testimony and interjects a clarifying question if the witness does not respond properly to the question. Further, the attorney checks notes to ensure that the witness covers all points. If not, the Trial Attorney elicits the testimony with appropriate questions.*

vi. Leading Questions:

- Suggest the answer counsel desires, e.g., "Isn't it true …?" "Were you …?" "Did you …?"
- Generally are not permitted on direct examination.
- Generally are not helpful or advisable during direct because testimony is perceived as coming from the attorney instead of the witness--may also confuse witness;

- Are permissible:
  - To cover background introductory matters;
  - To cover uncontested matters;
  - To establish a place in time;
  - To examine a hostile or adverse witness;
  - To examine a confused witness; and
  - To establish necessary evidentiary foundations, e.g., was exhibit created in ordinary course of business?

## 3. WHAT TO AVOID ON DIRECT:

- Compound questions--two questions hooked together--are too confusing to answer;
- Questions that call for speculation--e.g., "What would have happened if. . . ?" are objectionable; and
- Verbal Static--echoing the witness' answer--e.g., "Ok"; "all right," "thank you," "uh-huh," "I see." These are distracting and add nothing to your presentation.

## 4. TECHNIQUES TO ELICIT TESTIMONY WHEN WITNESS CANNOT RECALL INFORMATION SOUGHT:

a. *Refreshing recollection--Fed. R. Evid. 612, as it relates to FLRA proceedings, provides in relevant part:*

Writing used to refresh memory

Except as otherwise provided in criminal proceedings by § 3500 of title 18, United States Code, if a witness uses a writing to refresh memory for the purpose of testifying, either -

i. while testifying, or

ii. before testifying, if the court in its discretion determines it is necessary in the interests of justice,

an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness. If it is claimed that the writing contains matters not related to the subject matter of the testimony the ALJ shall examine the writing in camera, excise any portions not so related, and order delivery of the remainder to the party entitled thereto. Any portion withheld over objections shall be preserved and made available to the FLRA in the event of an appeal. If a writing is not produced or delivered pursuant to order under this rule, the ALJ shall make any order justice requires.

*Questions to refresh a recollection:*

- Determine that the witness cannot recall the information sought;
- Ask the witness whether there is a writing or object that would refresh his/her memory;
- Tender the writing or object to the witness;
- Determine whether the witness' review of the writing or object refreshes his/her memory;
- Determine that the recollection is independent of the writing or object; and
- Once the recollection is refreshed, take writing or object back from the witness and continue with the examination.

☞ *Any object or writing can be used to refresh a witness's recollection and the document does not have to be admissible.*

*The Trial Attorney does **not** introduce the writing or object into evidence because the witness's testimony, not the item used to refresh the witness's recollection, is the evidence to be considered by the fact-finder.*

*The adverse party has the right to examine the writing or object for cross-examination and to introduce the writing or object into evidence.*

**EXAMPLE OF REFRESHED RECOLLECTION**

**Setting:** Witness, after prodding with the leading questions, cannot recall the details of a material conversation with management representative Jones.

**Q:** Can you recall what was said during this conversation?

**A:** No.

**Q:** Is there anything that would refresh your recollection of this conversation?

**A:** Yes, the affidavit I gave the Authority.

**Q:** Your Honor, may I hand the witness his affidavit?

**ALJ:** Proceed.

After witness finishes reviewing the affidavit--

**Q:** Did your review of your affidavit refresh your recollection of this conversation?

**A:** Yes.

**Q:** Can you now tell us what was said during this conversation?

**A:** Yes.

**Trial Attorney:** Let the record reflect that the witness has returned his affidavit to the GC-

**Q:** What was said during this conversation?

**A:** Jones said. . ..

b. *Past recollection recorded--Fed. R. Evid. 803(5) Hearsay Exception:*

**Recorded recollection.** A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

*Questions to introduce evidence of past recollection recorded:*

- Determine that the witness cannot recall the information sought, even with the assistance of written records or documents;
- Determine that the witness once had knowledge of the event referred to in the writing;
- Determine that the writing was prepared by or adopted by the witness when the information was known to him/her and that it accurately reflects his/her knowledge;
- The writing may then be read into the record; but

- Only the adverse party may introduce the writing into evidence as an exhibit.

## EXAMPLE OF PAST RECOLLECTION RECORDED

**Setting:** Same as above, but the witness after reviewing his affidavit cannot recall what was said during his conversation with Jones.

**Q:** After reviewing your affidavit, can you now recall what was said during this conversation?

**A:** No.

**Q:** Did you once have knowledge of this conversation?

**A:** Yes.

**Q:** When was that?

**A:** When I gave my affidavit.

**Q:** On what date was your affidavit prepared?

**A:** May 15, 1995.

**Q:** When was the conversation with Jones?

**A:** March 1, 1995.

**Q:** When you gave your affidavit was your conversation with Jones fresh in your mind?

**A:** Yes.

**Q:** Did you review your affidavit before you signed it?

**A:** Yes.

**Q:** To ensure it was accurate and complete?

**A:** Yes.

**Q:** Does your affidavit accurately reflect your knowledge of what was said during your conversation with Jones?

**A:** Yes it does.

**Trial Attorney:** Your Honor, I request that the witness be allowed to read into the record that part of his affidavit concerning his conversation with Jones.

**ALJ:** Proceed.

**Witness:** "Jones told me . . . ."

RESERVED