

Direct examination: asking questions in the right order

By: F. Dennis Saylor IV and Daniel I. Small ◉ April 13, 2017



Every direct examination should unfold in a logical sequence. That principle applies not only at the macro level — where testimony typically begins with the introduction of the witness, followed by the setting of the stage, then the telling of the story in a chronological manner — but at the micro level, as well.

Whether you want the witness to describe what happened, or you're trying to get a document into evidence, it helps a great deal to ask your questions in a disciplined and logical order.

For example, it is often necessary to establish that a witness has a factual basis for his or her testimony. This arises in many contexts, and has many labels: laying a foundation, establishing personal knowledge, and so on. It's usually pretty simple stuff:

1. *Where were you?*

[in a position where I could see]

What did you see?

[the event]

2. *Where were you?*

[in a position where I could hear]

What did you hear?

[the statement]

For some reason, lawyers often ask those questions in reverse order:

1. *What happened?*

[the event]

How do you know that?

[I was in a position where I could see]

2. *What is this?*

[the relevant object]

How do you know that it's the object?

[explain]

A good rule of thumb is that if you have to ask the witness, "How do you know that," you've asked the questions in the wrong order.

Most of the time, this doesn't matter very much, and your opponent and the judge will let it slide. But sometimes it matters a whole lot. And it's usually less effective to do it that way, regardless.

Here's an even uglier example:

Do you have an understanding as to what happened?

[yes]

What is that understanding?

[that the event happened]

What is that understanding based on?

[I saw it]

This is technically incorrect, may draw an objection, and is pointless. Don't do it.

This same principle also applies to laying foundations for admitting documentary evidence.

Did you prepare a draft contract?

[yes]

I'm showing you what has been marked as Exhibit 3. Do you recognize it?

[yes]

What is it?

[it's the draft contract]

Again, don't ask the questions in the wrong order:

What is this?

[it's the draft contract]

How do you know that?

[I wrote it]

Again, it doesn't usually matter — but sometimes it does, and it's always better to do it right.

The admission of an object (for example, a firearm or a plastic bag containing drugs) often requires proof of a chain of custody. If so, the order of the questions may be very important indeed.

If the witness, for example, needs to go through a number of steps to authenticate a firearm, take the witness through those steps first: recovering the gun at the scene, tagging it, noting its serial number, placing it in an evidence envelope, and so on. Wait until the end to ask the important question:

What did you do with the firearm after you found it?

[I photographed it, tagged it, wrote down the make, model and serial number, put it in an evidence bag, and put it in the evidence locker]

When did you next see it?

[this morning when I took it out of the evidence locker]

How does the [tag/serial number] compare to the [tag/serial number] you put on that day?

[it's the same]

Is this item in the same condition as when you found it?

[yes]

What is it?

[the firearm I recovered at the murder scene]

Don't ask the last question first, and then ask the witness how he knows. It's not proper and should draw an objection.

In practice, trials are often sloppy affairs. There's really no reason why that should be so. Try to be disciplined and correct as to all things, large and small. Great athletes work constantly on mastering the details and doing things right, so that in the heat of battle doing it right will come as second nature. That's an excellent model for trial lawyers to follow.

Previous installments of Tried & True can be found here. Judge F. Dennis Saylor IV sits on the U.S. District Court in Boston. Prior to his appointment to the bench, he was a federal prosecutor and an attorney in private practice. Daniel I. Small is a partner in the Boston and Miami offices of Holland & Knight. He is a former federal prosecutor and teaches CLE programs across the country.

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