

DIRECT EXAMINATIONS

Litigation Academy

2017 Direct & Cross Examination Skills Program

Hon. William E. Smith

Brooks Magratten

Direct v. Cross Examination

	Direct	Cross
Lead the Witness		X
Prep the Witness	X	
Lawyer Testifies		X
Witness Testifies	X	
Witness Control		X

FRE 601: Competency to Testify

- Every person is competent to be a witness unless these rules provide otherwise.
- Where state law supplies the rule of decision, then state law governs the witness's competency to testify.

FRE 602: Need for Personal Knowledge

- A witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter.
- Evidence to prove personal knowledge may consist of the witness's own testimony.

What is a Leading Question?



What is a Leading Question?

1. Tell us what you saw as you entered the intersection.
2. What was the color of the light when you entered the intersection?
3. Was the stoplight green when you entered the intersection?
4. The light was green when you entered the intersection, right?

You can lead on direct...sometimes

- Witness background
- Undisputed matters
- Foundation to admit exhibits
- Hostile witnesses
- Problem witnesses (FRE 611(c))

Structure of the Direct Examination

- Chronological
- Impact



Use a Picture Frame



- Give your witness context.
- Help focus your witness's testimony.

Lay Opinion (FRE 701)

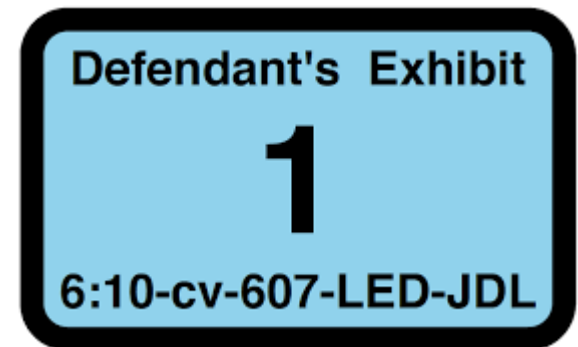
- Lay opinion must be:
 - a) rationally based on the witness's perception;
 - b) helpful to clearly understanding the witness's testimony or to determining a fact in issue;
 - c) not based on scientific, technical, or other specialized knowledge.

Diction

How Lawyers Talk	How Real People Speak
Prior to	Before
Subsequent to	After
With respect to	(never use)
Did you have occasion to	Did you
Exit your vehicle	Get out of your car
By whom are you employed?	Where do you work?
State your full name	What's your name?

Moving Exhibits In Evidence

- Ask witness to identify the document / thing.
- Have witness explain why they recognize the document / thing.
- Lay the foundation. See Chapter 7, Trials.



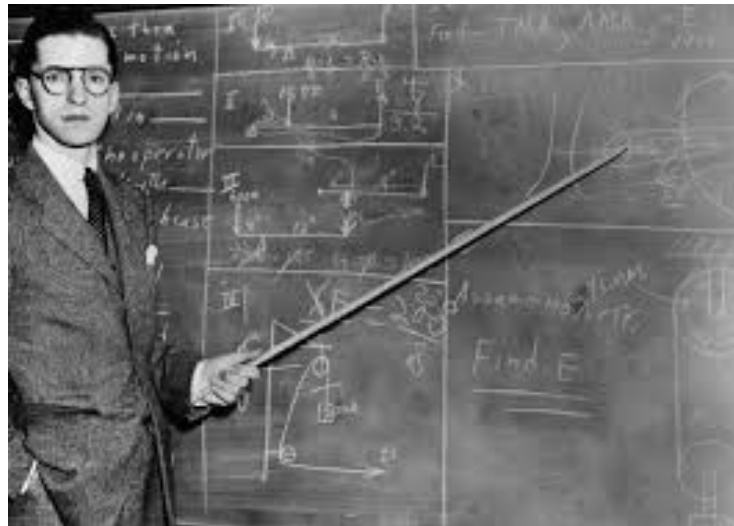
Prepare Your Witness

- Review testimony with your witness.
- Show witness the courtroom.
- Make sure the witness knows what to expect.



Bring Testimony To Life

- Consider using demonstrative aids.
- Get your witness on their feet.
- Weave exhibits into the story.
- Be careful about having your witness draw.



Refreshing Recollection

1. Witnesses will forget important facts.
2. Show the witness the document / object that may refresh recollection.
3. Ask the witness if the document / object refreshes their recollection about the facts at issue.
4. Take the document / object away from the witness.
5. Have the witness testify from their refreshed recollection.

Redirect

- Don't do it unless you need to.
- Keep it short.
- Stay within scope of cross.



Quinlan v. Kane

- Prepare 12 – 15 minutes of direct exam.
- Prepare your witness tomorrow.
- Email opposing counsel about topics you plan to cover.
- Think about exhibits.
- Think about documents / objects you can use to refresh recollection.

Questions?



CONTACT

Brooks Magratten
Pierce Atwood LLP
72 Pine Street
Providence, RI 02903
bmagratten@pierceatwood.com
401-490-3422

Prof. Niki Kuckes
RWU School of Law
Ten Metacomet Ave.
Bristol, RI 02809
nkuckes@rwu.edu
401-254-4505