

How to Ask a Question

Construction techniques to make your next direct exam more informative, interesting, memorable, persuasive, clear and conversational.



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Introduction

The objectives of a direct examination are both to inform and persuade. Therefore, the six characteristics of an effective direct examination is to be (1) informative; (2) interesting; (3) memorable; (4) persuasive; (5) clear; and (6) conversational. In this training session, we will have an opportunity to roll up our sleeves and work on these skills using examples from impaired driving cases.

This presentation is not meant to be a comprehensive overview of what a direct exam is or how to conduct one. Instead, we will use the time we have to take portions of a direct exam and practice improving “How to ask a Question” following the six characteristics outlined above. Let’s get to work . . .

“1 Object”

Nothing slows down a direct examination more effectively than a valid objection. We should not be afraid of objections -- and we won’t be able to stop all objections -- but we can avoid valid objections by asking proper questions.

After you had the defendant perform the field sobriety tests, and read him the implied consent form, what did you do next?

Objection? _____

Officer Jones, did you, or anyone else, speak to Mr. Rogers on Thursday morning?

Objection? _____

Did you know that 99% of all statistics only tell 49% of the story?

Objection? _____

Please describe the weather conditions on the evening of February 8, 2021.

Objection? _____

How can you remember what happened on June 3rd when you can't remember anything about June 4th?

Objection? _____

After you got out of your car, what did you tell the police officer about the defendant's behavior?

Objection? _____

And was that the time you saw the defendant put the pipe in his pocket?

Objection? _____

So, what happened the next day?

Objection? _____

Please describe the defendant's clothing when you first saw him.

Objection? _____

Moral of the Exercise

The rules of evidence limit the form of questions and the content of the testimony. Many of the rules, such as the hearsay rule, defy common sense, make telling the complete story difficult, and make testimony different from normal conversation. Defense counsel can object and interrupt testimony, diverting attention of the jurors.

The goal of a good direct examination is to overcome these and other obstacles and present the testimony of witnesses in an understandable and persuasive manner. This requires a clear, logically organized presentation in which each witness describes the activities he or she observed or participated in. It requires that you concentrate not only on presenting enough evidence to make a prima facie case, but also on making that evidence persuasive and rememberable. A legally sufficient case is not enough — you must persuade a jury the defendant is guilty beyond a reasonable doubt. The direct examination can help accomplish this goal only if it is carefully prepared and conducted.

6 Characteristics of a Good Direct

1. Informative

Use your jury instructions to build your direct exam.

FELONY DUI - ICJI 1000 and 1008:

In order for the defendant to be guilty of Driving Under the Influence the State must prove the following:

- ✓ On or about **May 21, 2020**
- ✓ In the state of Idaho: **to wit: Pocatello, Bannock County**
- ✓ The defendant **Michael Johns**, drove or was in actual physical control of;
- ✓ A Motor Vehicle; **to wit: White 1986 Isuzu Pickup**
- ✓ Upon a highway, street or bridge, or upon public or private property open to the public; **to wit: Benton and Arthur Street**
- ✓ While Under the Influence of alcohol and/or drugs or intoxicating substances
- ✓ Defendant having plead guilty to, or been found guilty of, two misdemeanor offenses of DUI, thereto within the past 10 years; **to wit: In the District Court of the Seventh Judicial District of the State of Idaho, in and for the County of Teton, on the 16th of October 2018, and the District Court of the First Judicial District of the State of Idaho, in and for the County of Kootenai, on the 29th of December, 2019, as is shown by the judgments of conviction on file with the said Court.**

Use headnotes to drive the story.

In journalism, a headline's purpose is to quickly and briefly draw attention to the story. This is similar to using headnotes in a direct examination. A headnote is a "conversation starter." Not only are you trying to draw attention to your story, but you are letting everyone in the courtroom know what is coming so they understand the **context** and the **relevance**.



A good headnote will guide the witness — and everyone else — through the story of your case. A bad headnote will annoy jurors and distract from the witness's testimony. I have put together a list of general rules when constructing your headnotes. As with most general rules, there are exceptions, but for today we will stick with a good basic foundation.

Headnote Construction Rules



1. The goal is to orient everyone in the courtroom.
2. Less than 10 words
3. Neutral
4. Avoid value-laden words
5. Do not construct them to argue with the witness.
(*"Let's talk about what happened after you refused the field sobriety tests."*)
6. Change it up – don't start every headnote with the same phrase.
7. Use simple language when crafting your headnote.

Simple Example:

Headnote: *"Let's talk about the location of the traffic stop."*

- Where was it?
- When was it?
- Who was there?
- Why did you make the traffic stop?

Bad Examples:

Here are some common phrases that sound like headnotes, but are not.

- "Ok, changing gears."
- "Fast forwarding to Friday."
- "Ok, moving on."

Let's Practice:

After you had the defendant perform the field sobriety tests, and read him the implied consent form, what did you do next?

Fix it: _____

And was that the time you saw the defendant put the pipe in his pocket?

Fix it: _____

Please describe the weather conditions on the evening of February 8, 2021.

Fix it: _____

Let's Compete - Best Headnotes Wins

State v. _____

Witness: _____

Headnotes:



A large yellow notepad with horizontal lines and a vertical red margin line on the left side.

Change it up!

- | | |
|--------------------------------|--------------------------------|
| ☀ Let's talk about . . . | ☀ I want to turn to . . . |
| ☀ Now, I want to discuss . . . | ☀ Now, let's turn to . . . |
| ☀ Next, let's look at . . . | ☀ Let's focus for now on . . . |

General Outlines To Help Construct Headnotes in your Next DUI Case

Witness: Officer	Witness: Toxicologist
<ul style="list-style-type: none"> • Qualifications <ul style="list-style-type: none"> - Education/Background - Training - Experience • Officer's Observations <ul style="list-style-type: none"> - Vehicle in Motion - Personal Contact • Field Sobriety Tests (HGN, Walk and Turn, One Leg Stand) <ul style="list-style-type: none"> - Describe how officer was trained to administer each test - Describe how officer actually administered each test - Describe how defendant performed on each test • Decision to Arrest (based on what?) • Implied Consent Advisement • Evidentiary Test (blood, breath and/or urine) <ul style="list-style-type: none"> - Describe how officer was trained to administer the test - Describe the procedures actually used to administer the test - Test result 	<ul style="list-style-type: none"> • Qualifications <ul style="list-style-type: none"> - Education/Background - Training - Experience - Studies - Publications - Memberships • Effects of alcohol/drugs on a person • Alcohol testing procedures in general • Reliability of chemical testing • Testing procedures used in this case • Expert's opinion

Conclusion on Headnotes:

Headnotes are a great way to eliminate direct examination construction issues that bog down the case and detract from our goal of perfect communication. Headnotes fix many issues that can crop up at trial. Headnotes can fix objections, reduce the number of verbal crutches ("um's," "ok's," "and's, etc.), slow your pace, avoid legalese, and help you listen to the witness rather than have your head in your note pad.

I recommend you practice using headnotes at home. When your family and friends no longer recognize you are using headnotes, is when you have likely crafted good ones. Remember, craft your headnotes before you walk into court and you will reap the benefits.

2. Interesting

May I Have Your Attention Please!?!



We do not pay attention to boring things! This is not likely a shocking revelation. As a prosecutor, you have mere seconds to grab juror's attention and only 10 minutes to keep it. Dr. John Medina, a developmental molecular biologist, and author of ***Brain Rules*** explains that at 9 minutes and 59 seconds, something must be done to regain attention and restart the clock. This something must be emotional and relevant. Also, the brain simply needs a break. Ask interesting questions!

P: Officer can you please state your name for the record?
O: Yes, Thomas Selby.

Fix it: _____

P: And, uh, Officer Selby, how are you employed?
O: Uh, employed with the city of Newport.

Fix it: _____

P: How long have you been employed with them?
O: Uh, I've been employed with them for 2 years.

Fix it: _____

P: Okay, and how long have you been a police officer?
O: Nineteen.

Fix it: _____

P: Nineteen Years... And what are your assigned duties?
O: Uh, night-shift patrol.

Fix it: _____

P: Alright, and um, were you employed with Newport on 9/5, on September 5th of last year?
O: Yes, ma'am.

Fix it: _____

P: Okay and on that day did you have an occasion to be in the vicinity of East 8th Street and Saratoga?
O: I did.
P: Okay, was that in Newport, Campbell County, Kentucky?
O: Yes.
P: Alright, did you have an occasion on that evening to come into contact with the defendant in this case, Carly Bryan?
O: I did.
P: Do you see Ms. Bryan in the courtroom?
O: I do.
P: Where is she?
O: She is seated next to her counsel there in a blue suit.
P: Okay, your honor, I would just ask that, let the record reflect that he has ID'd the witness, er I'm sorry, the defendant.
J: So moved.
P: Okay.

3. Memorable

The defense does not want you repeating information that is harmful to the defendant's story. You must repeat information in order to be sure it is imprinted on the minds of the jurors. Despite this need to repeat information, repetition is arguably objectionable. "Objection – Asked and Answered." Or worse, when the repetition becomes obvious to the jurors you may suffer the "Same donkey, different saddle" effect. We must devise a method of repeating information without being repetitive. How?

We Loop!

When you get good information in an answer, you loop back to the good information and incorporate it into your next question.

- A: Then he stabbed me again.
Q: When he stabbed you again, where were you hit?
A: I was hit in the shoulder.
Q: When you were hit in the shoulder, did it cause you any pain?
A: The pain was excruciating.
Q: Did this excruciating pain cause you any trouble?
A: Yes, I couldn't move my arm.
Q: When you realized you couldn't move your arm . . .



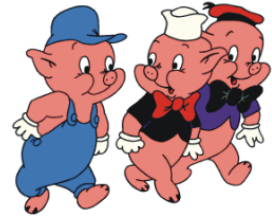
Be careful not to wander into the "Same donkey, different saddle" territory by overusing looping. This technique is best when you want to highlight a key word or phrase of your witness. How can you repeat the phrase without drawing an "Asked and Answered" objection from your opponent?

The answer is simple. You are not going to repeat your question, and you're not going to ask the witness to repeat the answer. Instead, you are going to ask three brand **new** questions, asking for three **new** pieces of information. Using these new questions, the jury will hear your important phrase not once, not twice, but **three** times. Save this technique to highlight the two or three most important portions of your witness's testimony, and you'll ensure that the jurors remember what you need them to remember.

Practice Examples: (How would you loop the following answers)

- Witness testifies, "I looked over and saw the big guy pounding on the little guy."
- Witness testifies, "I realized what the driver dumped out of the cup was vomit."
- Witness testifies, "Both passenger-side wheels crossed over the fog line."

4. Persuasive



Repetition is the sincerest form of persuasion. You must repeat every important point at least three times in order to ensure every juror hears it and understands it. Humans process information using patterns. Three is the smallest number of elements required to make a pattern. As a child, everything you did and learned seemed to be centered around three — A-B-C, 1-2-3, Three Blind Mice, Three Little Pigs, Three Billy Goats Gruff, Three Musketeers, Three Stooges and Huey, Louie and Dewey. It did not stop in our youth. Consider additional examples in advertising, “Stop, drop, and roll,” “Stop, look, and listen” or even, “Snap, Crackle and Pop.”

It is simply easier for your jurors to remember things in a group of three. Not two. Not four. The magic number is three. Trilogies are not just for movies. Think in terms of three to help persuade your jurors.

Prepare Your Witnesses Using Trilogies:

We will review a few transcripts in the training to demonstrate how using the “Rule of Three” would improve the persuasiveness of the direct examination.

How would you have fixed the question(s) asked by the prosecutor in the transcript? (From presentation slides)

Tangible Evidence Trilogies:

Use the “Rule of Three” when introducing your evidence. For example — have the witness recount the story in a narrative, then produce a map or chart and have the witness walk back through the testimony a second time. Now pull out a photograph and go back through the occurrence a third time having the witness identify the photographs and explain their significance to the event.

5. Clear

Employing the strategies, we have discussed will certainly make the direct examination clearer. To clean your direct exam further, do not forget your visuals. We live in a technical and visual society. Most of your jurors have grown up with television, movie theaters and computers. When watching television, we see the newscasters use charts, video and other visual aids. In many business meetings, it is extremely common to see PowerPoint or other visual aids to assist in getting the message across. In an impaired driving trial, if you only put on the arresting officer, without any other visuals, the message you have sent to the jury is that this case is not that important.

Why a Visual Trial for the Jury?

- . A jury comes with certain expectations. They see visuals being used in trial whether the trial is real or fictional. Many jurors still compare what they are seeing in your trial with what they saw in the O.J. Simpson trial and/or the latest celebrity trial.
- . A visual trial focuses the jury's attention on what is being discussed and makes it easier to follow the prosecutor and/or witness.
- . It will improve the jury's retention of the material. Studies have shown that jurors retain about 20% of the content of evidence presented during an oral trial. Add demonstrative evidence such as graphs, pictures or blow-up documents, and jurors retain up to 80% of the evidence being offered.
- . The more senses (visual, touch, smell, taste, hearing) you use in your trial, the more credibility the jury will give to you and your case. The case will be a complete picture in the juror's mind and make sense.
- . It has been found that a visual trial shortens the actual trial time by 40%. The parties are better prepared, more organized and therefore better understand their own case, thus the case moves quickly and smoothly.

Tips to Help Your Direct Exam

- ☼ Get the witness out of the box and in front of the jury
- ☼ We learn and remember best through pictures
- ☼ Use visual aids to repeat testimony

6. Conversational

Use simple language.

Practice talking like a regular person wherever you are. In the office or at home. Inside the courtroom or outside the courtroom. This is easier if you also write like a regular person in personal letters, tweets or professional briefs. Unless you have a very good reason for using a precise legal term — use simple language.

Perpetrator	=	_____
Accident	=	_____
Motor Vehicle	=	_____
Operate	=	_____
SFST's	=	_____
NHTSA	=	_____
DRE	=	_____
Intoxicated	=	_____

Avoid Legalese.

Legalese rarely belongs in your direct exam. You personalized yourself during jury selection. You personalized yourself in your opening statement. Don't become a robotic lawyer on direct. Ask a stiff question of your witness and you will likely get a stiff answer. Rambling question equals rambling answer. Incomprehensible questions equals confused witness. Ask a question with legalese and watch your witness parrot it back. It is a conversation no one . . . I mean no one . . . wants to be a voyeur to — including judges and lawyers.

Be Brief — Brevity is next to godliness.

Short simple questions command instant comprehension from both the witness and the jurors. The longer the question, the more likely you lose control of your story. Valid objections are found. Witness becomes confused. Jurors become bored. Your job is to make sure the jury hears the whole story from the witness. A short question beginning with "who, what, when, where, how and why" generally does the trick.

Let's Practice:

"Alright, did you have an occasion on that evening to come into contact with the defendant in this case, Carly Bryan?"

Fix it: _____

"How was it that you happened to be called to that area?"

Fix it: _____

"Tell us about what you did after you got that call."

Fix it: _____

"On that date, and at that time, did you perform an Alcohol Influence Evaluation on someone who later became known to you as Carly Bryan?"

Fix it: _____

"Subsequent to the commencement of these legal proceedings did you speak with the defendant's lawyer?"

Fix it: _____

"Officer, isn't it true, that there are three different field sobriety exercises you were taught."

Fix it: _____

"Did you see the defendant approach the subject with an instrument in his hand?"

Fix it: _____

"Tell us exactly what you saw on September 19, 2020 at 6:30 p.m.?"

Fix it: _____

"Officer Hayes, have you had the opportunity to use a videotape camera within your employment by the Custer County Sheriff's Office?"

Fix it: _____

Conclusion

No one should be better at asking questions than a prosecutor. No other lawyer has the daily opportunity to enter a courtroom and engage in a direct examination of a witness. But daily repetition will not make you better if you do not deliberately practice the craft. Every prosecutor should continuously refine the tools used for examining witnesses. I hope you will take some of the tools shared today and refine your skills in preliminary hearings, motions to suppress, infraction trials, probation hearings, conversations at the dinner table, in front of a mirror, or even conversing with your dog.

We are in the business of competitive storytelling. Ultimately, the task is to decide which questions to ask and which questions to leave unasked. The questions you ask should lead the jurors to the truth, the whole truth, and nothing but the truth. To that end, an effective direct examination will be (1) informative; (2) interesting; (3) memorable; (4) persuasive; (5) clear; and (6) conversational.

A legally sufficient case is not enough — you must persuade a jury the defendant is guilty beyond a reasonable doubt. The direct examination can help accomplish this goal only if it is carefully prepared and conducted. I hope you have come away with either a new idea or a renewed commitment to improve “*How to Ask a Question*.” I challenge you to immediately get started by professionally integrating at least one thing we discussed and practiced today within the next 72 hours.

I (and the Idaho Prosecuting Attorneys Association) would love to hear your feedback. Let us know if you are using what you have learned in this presentation. Is there something you found especially useful and relevant? Is there something discussed today that is deserving of greater focus? What else would you like to learn about direct examinations? Who have you seen do a great direct exam? Anything else you think we should know? Feel free to contact us at idaho-prosecutors@ipaa.us or email me directly at jared.olson@post.idaho.gov.

Thank you!