KEY GOALS OF EXAMINATION-IN-CHIEF

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"Examination-in-chief…is the heart of your case. It is the fulcrum of the trial – the aspect upon which everything else turns. Every other aspect of the trial is derivative of examination-in-chief."[1]

Introduction

Few trials are won based on the opening or closing address of counsel or on the cross-examination of witnesses. Rather, it is examination-in-chief of witnesses that is the foundation upon which a successful case is built. An examination-in-chief is more than an interrogative dialogue between a witness and counsel; it is the presentation of evidence in a manner to persuade the judge or jury of the existence of facts as asserted by the witness.

Key goals of examination-in-chief include: **(1)** to prove the elements to support the cause of action through the facts as deposed to by a witness; **(2)** to establish the credibility of a witness and, ultimately, the case itself; **(3)** to lay the foundation to properly introduce exhibits into evidence; and **(4)** to capture and maintain the trier of fact's attention. Each of these goals is pursued in order to assist the judge or jury in reaching a verdict in favour of your client.

This paper will briefly address these key goals of examination-in-chief in the context of fact witnesses. This discussion is followed by a brief reference to considerations

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* This paper was originally presented at The Advocates' Society Civil Litigation Skills Certificate Program for Effective Examinations in Chief. It has been reproduced here with the permission of its authors.

[1] Steven Lubet, *Modern Trial Advocacy: Canada*, 2d ed. by Sheila Block and Cynthia Tape (Notre Dame: National Institute for Trial Advocacy, 2000) at 43.

associated with the direct examination of expert witnesses. A chart illustrating the key goals of an examination-in-chief appears as an appendix to this paper.

Proving the Facts to Support a Cause of Action

"The purpose of examination-in-chief is deceptively simple: to prove by oral testimony an essential element of one's case (which is either an affirmative point or the negation of the evidence of the other side)."[2] It is counsel's opportunity to submit the evidence and illustrate that his or her position is not about *opinion*, but about *facts*.[3] It is these facts that support counsel's theory of the case and persuade the trier of fact to accept this theory. Through the testimony of witnesses, direct examination is the occasion for counsel to establish who, what, where, when, why and how the particular event took place in order to prove the elements of the cause of action. As many of these elements as possible should be proven during direct examination.

Counsel must identify the evidence a witness is capable of giving in order to prove the essential elements of the cause of action. This occurs through adequate preparation prior to trial.[4] Before trial, the advocate decides why the witness must be called, decides what is to be proven by calling the witness, knows how the witness can hurt the case, prepares the

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[2] Robert B White, QC, *The Art of Trial* (Aurora: Canada Law Book Inc, 1993) at 98.
[3] The exception, of course, is expert testimony.
[4] For a more detailed discussion on the preparation of witnesses, see Bryan Finlay, QC, TA Cromwell & Nikiforos Iatrou, *Witness Preparation: A Practical Guide* (Aurora: The Cartwright Group Ltd, 2010).

witness to give evidence, organizes the examination and explains to the witness how the court process works.[5] This preparation is crucial to conducting an effective examination-in-chief.

The direct examination will consist of undisputed and disputed facts. Undisputed facts can include admissions by the parties, a set of facts agreed to by counsel, as well as background information about the witness. Disputed facts are those facts which the judge or jury must decide in order to reach a verdict. The foundation of argument and the ultimate result of the case are rooted in addressing evidence in a manner that will result in having disputed facts decided in your client's favour. This is a fundamental goal of examination-in-chief.

Establishing Credibility

Examination-in-chief is also the primary opportunity to establish the credibility of a witness and, ultimately, the case itself. Credibility is important because it determines the relative persuasiveness of the witness's testimony.

One way to establish credibility is through "believability". The trier of fact will generally accept the evidence of a witness, and rule in favour of the case, that is most believable. If the witnesses called by one side are more believable, and hence more credible, then it is deserving and just for that side to win the case. The believability of a particular witness can be enhanced by personalizing the witness. The individual personality of a witness is an important factor for the trier of fact's assessment of whether a witness is worthy of trust and, therefore,

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[5] Bryan Finlay, QC, *Examination- in-Chief of the Lay Witness* (Toronto: Canadian Bar Association, January 28, 1994) at 1.

whether their testimony should be given weight. Witness personality can also be important because a trier of fact likes to hear the testimony of a witness that he or she can identify with. In the case of a corporation, it is difficult for judge or a jury to relate to a corporate structure, but representatives of that structure can give the corporation a human aspect.[6] Humanizing the corporate entity allows a judge or jury to connect with the corporate party. Another way to generate believability is by emphasizing the witness's position in the case. By showing the witness's objectivity and lack of interest in the case, his or her ability to observe, and the basis of his or her knowledge,[7] counsel is illustrating why the witness's testimony is believable and therefore credible.

At the crux of credibility is often the consistency of a witness's testimony. Is the evidence internally consistent, and is the testimony consistent with external, incontrovertible facts such as dates or documents? The more consistent the testimony is, the more credible the testimony will be. On direct examination, the witness can explain any apparent inconsistencies and clarify any confusing facts or issues. Credibility is lost if these inconsistencies are not addressed. Therefore, if the advocate believes that the opposing side may have knowledge of harmful information, it is far better to expose the weaknesses of the case before the opponent exposes them: "Where counsel is faced by an important unfavorable factor, resulting from facts that cannot be denied or minimized but will be harmful if unexplained, it is nevertheless often desirable to bring out these facts through his own witnesses. Here, the strategic concept is

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[6] Lee Stuesser, *An Advocacy Primer*, 3d ed (Toronto: Thomson Canada Ltd, 2005) at 208.
[7] Lubet, *supra* note 1 at 44.

anticipation."[8] This technique can help offset the damage of the cross-examination. This self-exposure will help increase the witness's credibility with the court. Damaging facts can be defused by the witness disclosing them on direct examination, and explaining them away. This method also illustrates to the trier of fact that the party, and counsel, have been candid with the court.

Credibility will turn on the substance of the testimony, the consistency of the witness's statements, demonstration of lack of bias and the opportunity to observe the events at issue. These factors are brought forward through the direct examination. Your goal is to ensure that the credibility of your witness is accepted by the trier of fact, and to achieve this goal, the witness's examination-in-chief must be effectively handled.

Introducing Exhibits Into Evidence

Through examination-in-chief, counsel is able to introduce exhibits into evidence. Documents and physical evidence can be made part of the trial record. To accomplish this task, a proper foundation must be laid for the exhibit's admissibility. The proper foundation is established if: **(1)** the exhibit is *relevant* in the sense of having some probative value; **(2)** the exhibit is *authentic* in the sense that there has been no tampering with the item or, in the case of demonstrative aid such as a chart, it does not distort the underlying facts; and **(3)** the exhibit's authenticity is *verified by a witness* capable of doing so.[9] Once the foundation is laid, the document or physical evidence should be marked as an exhibit and may then be used in the trial.

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[8]Howard Hilton Spellman, *Direct Examination of Witnesses* (New Jersey: Prentice-Hall Inc, 1968) at 90.
[9]Stuesser, *supra* note 6 at 228.

For example, a contract should be entered and important provisions read, a signature should be verified to prove a disputed document and a weapon should be identified and marked as an exhibit. Exhibits constitute evidence in themselves. In addition, the use of exhibits can make a witness's testimony more credible and memorable.

Exhibits can also be used to highlight important testimony in the case and explain complex issues. Sometimes "… no matter how well a witness testifies, there are some situations in which, either because of the complexity of the issues or because some matters may be better understood by visualization than by description, it is advantageous to offer visual proof."[10] Diagrams, models, plans and photographs can be helpful visuals. These instruments provide an added dimension to testimony. Such aids help to heighten interest and maintain the attention of the court.

Keeping the Court's Attention

Maintaining the court's attention is an important objective of examination-in-chief. It is the better presentation and delivery of the evidence that will keep the trier of fact interested and that will ultimately be more persuasive. The manner in which counsel organizes the witnesses as well as the narrative dialogue during the examination of a particular witness are key factors in maintaining the attention of the court. The order of witnesses is important because it can provide an easy to follow, logical and organized structure of the evidence. It is often recommended that chronological order is best so that the trier of fact can follow how the story is told. Topical order of the witnesses is suggested when dealing with a number of discrete issues.

[10] Spellman, *supra* note 8 at 130.

The witness's testimony should also be organized in a logical structure. Questions regarding a particular issue should be grouped together. The use of “headlines” (e.g. “I now wish to turn to the night of the accident”) at transition points in the evidence helps the trier of fact, and the witness, by signalling where the evidence is going. Doing this makes the evidence far easier to follow.

When deciding on the order of witnesses, it is important to start strong and finish strong.[11] This rule applies to the structural organization of the witnesses and to an individual witness's testimony. Remember, it is not necessary to make your client your first witness. Counsel should be selective in the witnesses called and choose a witness who is best able to tell the story. Sometimes it is best to leave out a witness altogether; these are the critical judgment calls that counsel are paid to make. A witness's testimony, like all stories, should have a beginning, middle and end. The conclusion of an examination should be strong.

During an examination-in-chief, the obvious role of counsel diminishes and counsel’s ego has to take a back seat. An examination-in-chief is not the opportunity for counsel to show the court his or her great skills in a showy display of oratory. On the contrary, good counsel demonstrate their skill in far more subtle ways during an examination-in-chief. The responsibility of putting forward the elements of the cause of action shifts to the witness. Counsel's role becomes one of creating a context to foster a natural and engaging dialogue. This goal of examination-in-chief is:

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[11]Thomas A Mauet, Donald G Casswell & Gordon P Macdonald, *Fundamentals of Trial Techniques*, 2d Canadian ed (Toronto: Little, Brown & Company (Canada) Ltd, 1995) at 358.

> …to elicit from the witness a complete, orderly story, told by the witness in his own natural way, with a minimum of prompting…The true technique is to guide the witness without leading him. He must not be shown what answer is expected from him, but he ought to be given the clearest possible indication of the point on which his evidence is required, one way or the other.[12]

Natural dialogue is important to revealing the truth to the trier of fact. The court wants to reach a decision that carries out truth and justice, not a decision based on the best rehearsed testimony. A natural dialogue is important because it helps to demonstrate that that the witness is telling the truth and gives the trier comfort that counsel has prepared the witness, but has not coached the witness.

An effective examination-in-chief consists of counsel asking clear questions and the witness telling what happened. Counsel must listen to the answers, looking at the witness, rather than staring at his or her notes out of a fear of not being ready with the next question. Clear, simple and concise questions ensure that both the witness and the trier of fact understand the questions put before them. Legal jargon, compound questions and pedantic language must be avoided. Counsel should only ask relevant and pertinent questions that have some probative value. The goal is for the witness to tell the story with clarity and precision. Short, single-fact, non-leading questions will extract the story in bite size pieces for the trier to digest and understand. In addition, for the trier-of-fact to become interested in the testimony, counsel has to appear interested as well. As stated, counsel must listen to the answers!

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[12] JH Munkman, *The Technique of Advocacy* (Toronto: Butterworth & Co (Publishers) Ltd, 1991) at 39-40, 41.

Examination-in-Chief of an Expert

Unlike the examination-in-chief of a lay witness where the goal is to establish matters of *fact*, the main goal of a direct examination of an expert is to put forth the expert's *opinion* to the court. The expert testimony should "… assist the fact-finder in coming to a proper conclusion based on the evidence in situations where, without the assistance of an expert, the 'common mind' is not 'equal to the proper solution' of the problem presented."[13]

Because great weight can be given to expert opinions, the court must be convinced of the expertise and qualifications of the expert. Therefore, a foundation must be laid to qualify the witness as an expert.[14] The background, education, experience and training of the expert should be put forward. The curriculum vitae of the expert is a critical document in accomplishing this task; spend time with the expert in ensuring that sufficient attention is paid to preparing this important document. The trier of fact must also be confident that the expert has used an appropriate methodology to reach his or her conclusions. There can be no room for "junk science" in a courtroom. The court must also feel that the expert has approached the issues objectively. The expert is not *advocating*, but giving opinion evidence to the court. The evidence of an expert who has become an advocate for a party will be discounted. If the proper foundation for the expert opinion is not made through direct examination, opposing counsel will successfully limit the scope of the opinion or succeed in having the court refuse to hear the evidence of the expert altogether.

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[13] Spellman, *supra* note 8 at 136-137.
[14] John Sopinka, Donald Houston & Melanie Sopinka, *The Trial of An Action* (Markham: Butterworth Canada Inc, 1998) at 85.

When giving his or her opinion, the expert should reduce the technicalities of the opinion to small steps so that it can be explained to the lay individual. It is the expert's job to educate the trier of fact about the technology and science behind the case: "It must be interesting, simple, and as brief as is consistent with getting the necessary concepts established.…it must not become a lecture by the expert."[15] Consistent with lay witness direct examinations, clear and natural testimony is the most persuasive to the trier of fact. Counsel must work with the expert to make complex matters simple. As a starting point, counsel must understand the expert's proposed testimony. If the testimony of the expert cannot be understood by counsel, the trier of fact cannot be expected to understand it with the result that the evidence will be of little worth and may even do positive damage to the case by confusing matters.

Depending on the situation, an expert's written report may be entered in the trial record as an exhibit. The report must clearly and fully set forth the basis upon which the expert is making his or her opinion. The report itself, if entered as an exhibit, will then become the reference point for the expert's evidence. The report should be presented so it is easily understood by the trier of fact. This will allow the trier to refer to and rely upon the expert's opinion as expressed in the report even after the submissions are complete and the trier is in deliberation. If the report is not entered as an exhibit, the expert's opinion and the basis for the opinion must be adduced through oral testimony without the assistance of the report. A further challenge for counsel is to ensure that key facts upon which the expert is basing his or her opinion are proved through admissible evidence in the course of the trial. This is often

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[15] Olen R Brown, *The Art and Science of Expert Witnessing: The definitive guide for attorneys and experts* (Leawood: Cypress Publishing Group Inc, 2002) at 209.

accomplished through examination-in-chief of other witnesses. Altogether, the goal of the direct examination of an expert is to offer a credible, logical, simple -- and therefore influential -- opinion to the court to advance your theory of the case.

Conclusion

Constructing and conducting an effective examination-in-chief takes preparation and skill. Although an examination-in-chief may not seem as glamorous to counsel as cross-examination, it is the stuff of which trials are won. Through direct examination your case is built to advance your theory, undermine the other side's theory, and persuade the trier of fact that your case is just. It is your opportunity to ask questions of witnesses to establish the necessary facts that are the foundation stones upon which you will stand to argue the case at the end of the day. The ability of properly and effectively conduct an examination-in-chief is the most important and fundamental trial skill to be mastered by an advocate.

REMEMBER, IN CONDUCTING AN EXAMINATION-IN-CHIEF:

- **The testimony must advance your theory of the case.**
- **The testimony must be clear.**
- **The testimony must be consistent.**
- **The testimony must be credible.**
- **The testimony must maintain the trier of fact's attention.**

Key Goals of Examination-in-Chief