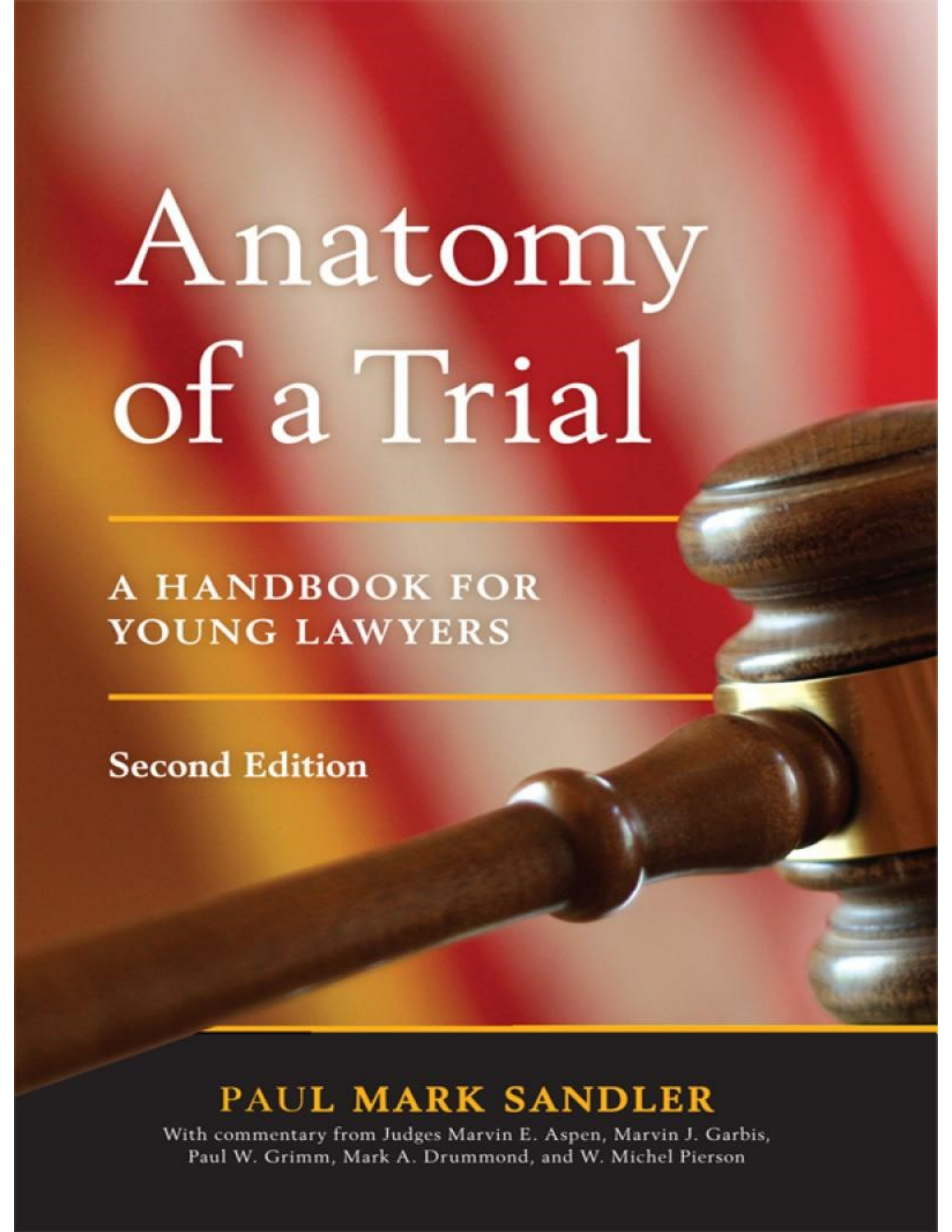
Anatomy of a Trial

A HANDBOOK FOR YOUNG LAWYERS

Second Edition



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With commentary from Judges Marvin E. Aspen, Marvin J. Garbis, Paul W. Grimm, Mark A. Drummond, and W. Michel Pierson

CHAPTER 4

THE HEART OF THE TRIAL—DIRECT EXAMINATION

Direct examination is the heart of any trial. It is also one of the attorney's greatest challenges. A trial never feels more unpredictable than during witness examinations. The back-and-forth between attorney and witness, no matter how well both individuals have prepared, can easily go off track with the utterance of one undesirable answer or question. At any moment the exchange can be interrupted by the judge or opposing counsel. Add to this theatrical presentation the use of exhibits and PowerPoint presentations, and you have a lot of balls in the air.

Direct examinations demand extensive preparation on the part of any attorney, no matter how seasoned. This chapter will attempt to point out rhetorical techniques and strategies that have aided trial lawyers for ages. It will also discuss some of the ways lawyers can effectively structure examinations, introduce witnesses, and elicit the vivid, memorable testimony that wins cases.

To illustrate these pointers, I will refer to the direct examination of witnesses in the *Rosen* trial, including that of Rosen himself. David Rosen's acquittal relied greatly on his own testimony. How this direct unfolded will prove illustrative of various techniques commonly used by experienced trial attorneys. We refer also to the testimony of the parties in the *Maffei* and *Oregon* cases, whose testimony ran contrary to each other.

Succinctly put, the purposes of direct examination are to argue your case by engaging in dialogue with the witness, to advance the proof of your case, and to protect your witness from damaging cross-examination.

For direct examination to be effective, the attorney must understand precisely what he or she needs to convince the jury of at that moment in the trial. You cannot easily begin or even plan for an examination without having a comprehensive vision of how you want the trial to proceed, from start to finish—you should generally know what will happen throughout direct, and how it furthers your theme. You must have a believable story to tell, and this requires a firm grasp of the elements of proof required to win. Bear in mind that all of us enjoy a good story. In presenting direct examination, question the witness in a manner that creates interest and tells a story consistent with your theme.

Beyond developing this "vision" of the case—its theme, progression, and critical facts—you need to establish the credibility of your witnesses and elicit compelling and memorable testimony. The jurors should believe your witnesses and, during deliberation, remember what they said.

PREPARING YOURSELF AND THE WITNESSES

Few outstanding direct examinations happen by chance. They are almost always carefully prepared. Your knowledge and mastery of the case and of the other side's case are the first steps in preparing for direct examination. Do not underestimate the importance of understanding the other side's case by reviewing discovery responses, witness and exhibit lists, and any pretrial memoranda submitted by the other side. You do not want surprises at trial. Moreover, you cannot present your own case in a vacuum. By the time of trial, discovery is closed in civil cases and Jencks Act (the act that regulates certain discovery in criminal cases) material is usually available to the defense in criminal cases. You should have available document chronologies, event chronologies, and point-counterpoint outlines that help you keep fresh in mind the facts and issues of the case.

As discussed in Chapter 2, every case should have a theme that serves as the guide for the case development and especially the witness testimony. Your witnesses on direct should develop the theme and help you defend it.

Before you meet with a witness, prepare a list of questions or topics you plan to raise during direct and perhaps include the answers you anticipate. Organize the exhibits you plan to show the witness so that you can

review them together. Whether you use written questions or an outline at trial is a personal decision that depends on your experience and the complexities of the case.

Also prepare the questions or points that you anticipate will be covered on cross-examination. When preparing for direct, it is important to review these points with the witness not only to forewarn him or her, but also to help yourself prepare. You may improve your credibility and the witness's by meeting head-on some of the vulnerable aspects of the case.

When preparing your client or witness in support of your case, be conscious that the opposing party can call that witness as an adverse witness in its case. It is important to prepare your client and witnesses for this situation. Plan how to minimize disruption to your case and to the client's and witnesses' equanimity if any witnesses of yours are called by the opposing party. Under these circumstances, opposing counsel can pose leading questions. In the *Oregon* case, the counsel for the plaintiff called as an adverse witness the director of Parks and Recreation of Baltimore County, Maryland. He commenced with leading questions. Counsel objected, but the court overruled:

> Q. Do you agree with me, Mr. Barrett, a supplemental leasing agreement imposes certain restrictive covenants for Oregon LLC's use of the property?"
>
> SANDLER: Objection.
>
> THE COURT: Sustained.
>
> PLAINTIFF'S COUNSEL: Your Honor, this gentleman works for the county. He's obviously an adverse witness. He is called in my case. I should like to treat him as such.
>
> THE COURT: So you would like to treat him as an adverse witness?
>
> PLAINTIFF'S COUNSEL: Yes, Your Honor.

THE COURT: All right. The objection is overruled. You may lead the witness.

An important consideration is to what extent you will want to question the witness when the adverse party completes questioning. In the *Oregon* case the plaintiff called a defense witness in its case as its first witness. Defense counsel can redirect the witness immediately or recall the witness in the defendant's case. Sometimes counsel will do both: bring out a few points after the defense completes its questioning and later recall the witness in its case in chief. Remember that the *Oregon* case was nonjury. The defense conducted its complete examination of its witness immediately. There was no reason to recall the witness. Were there a jury in the box, defense counsel would have posed a few questions and recalled the witness in its own case. You may wonder how often one party will call in its own case the opposing party. While it does not happen every day, it does occur from time to time. The technique can be effective by catching the witness off guard, and disrupting the opposing side, but it is not without risks. The responding party can effectively strengthen its case by conducting a powerful examination of its own witness while on the stand, having been called by the opponent. For example, in the *Oregon* case, the plaintiff called the owner of the restaurant, then asked a series of questions designed to elicit testimony that the restaurant initiated the repaving of the parking lot. But taking the risk of calling the defendant in its case did not pan out. Observe:

Q. You are the owner of the Oregon Grille, correct?

. . .

Q. Do you recall receiving that letter? [Letter from Baltimore requiring repaving of the parking lot.]

A. Yes.

Q. Do you recall having a communication with Mr. Barrett [author of the letter and director of Parks and Planning for Baltimore County]?

A. There was some conversation, certainly.

Q. And in this conversation, am I correct, Mr. Cowman recommended to you that you hire a contractor to pave the parking lot yourself rather than go through the county bid process and allow the county to do it?

A. Your statement is incorrect.

Q. How is it incorrect?

A. My recollection of that was Mr. Barrett just sent Mr. Cowman saying that he was going to do the work. I did not select Mr. Cowman.

This was not the answer counsel for the plaintiff desired. The plaintiff wanted to show that the restaurant was pleased to undertake the repaving of the lot and even selected the contractor to undertake the work. Thus the defense that it was acting under compulsion was a pretext for violating the county ordinances. Further questioning attempting to improve the situation ensued:

Q. So you did not select Mr. Cowman to perform the work?

A. I'd never met Mr. Cowman. No.

Q. So in other words, it's your testimony, I take it, that the county hired Mr. Cowman to perform the work?

A. They directed him to me as the person that would be doing the work.

Calling this witness as an adverse party in the plaintiff's case did not achieve the result the plaintiff desired on the issue of who engaged the

contractor to undertake the work. The plaintiff may have been better off not to have called the adverse party until cross-examination.

There are times when taking the risk is advisable—for example, when the plaintiff believes that to meet its burden of proof it must elicit facts from an adverse party.

How much you should share about your case with the witness depends on who the witness is—your client, one of the parties to the case, a witness under subpoena who has agreed to meet with you prior to trial, or an expert. Putting aside the expert for now, it may be helpful to orient the witness by explaining what information you seek from him or her and the importance of his or her testimony. Bear in mind that what you and the witness discuss may be the subject of inquiry by opposing counsel, either during trial or during deposition in civil cases. Be aware of any privilege or work-product doctrine protections and do not inadvertently waive them. If you believe a witness is hostile but still willing to see you, ask a colleague or assistant to accompany you while talking to the witness. The presence of someone else can thwart a witness from later claiming that you acted improperly during the meeting.

Practice the direct examination with the witness. Consider video recording the testimony for review, practicing before a small audience, or even staging a mock trial with a jury consultant. If you do so, also prepare your witness to anticipate questions about "rehearsals" during cross-examination or in a deposition if the case is civil. If your witness is asked on cross whether he or she practiced answering questions before a jury consultant, the witness should be prepared to respond, that is, to wait for an objection and not to disclose privileged communications unless directed to do so by the judge. Arguably, communications with a jury consultant or in "rehearsals" are protected by the attorney-client privilege or the work-product doctrine.[1]

When preparing your client and witnesses for direct examination, advise them to halt their testimony in court when an objection is stated, to wait

1. *See* Paul W. Grimm, Charles S. Fax, & Paul Mark Sandler, *Discovery of Jury Consultant, Focus Group Materials and Related Communications*, *in* DISCOVERY PROBLEMS AND THEIR SOLUTIONS, ch. 27 (3d ed. 2013).

for a ruling from the judge, and to answer questions directly without rambling or offering information beyond what the question calls for. Explain that you will have the chance to clarify their answers on redirect examination. Advise the witness to wait for counsel to complete the question before answering.

It is also important to alert clients and witnesses that in some courts all conversations in the courtroom are recorded or monitored even during recesses. Therefore, discreet conversation is important. Instances of embarrassment unfortunately abound. For example during the recess of one case, counsel explained to the client, in what counsel thought was a quiet tone, that the judge "did not know what he was doing." A few minutes later when the judge returned to the bench, he rendered a ruling on a motion beginning as follows while looking at counsel: "Although some in this courtroom believe I do not know "what I am doing. . . ." You do not want to be in the situation of the indiscreet lawyer.

You and your client should also be prepared for the occasion that could arise at trial when the judge intervenes and ask questions. Questions by the judge may or may not be helpful to your case. The ramifications may be different if the trial is jury or nonjury. One of the primary concerns when the court intervenes with questions is the effect it has on the jury. Most judges refrain from asking too many questions in jury trials, but they may be more active in a nonjury case. What if the judge asks a question that you believe is objectionable? Should you object? It depends on the importance of the objection balanced, against any harm to you in the eyes of the jury for appearing to criticize the judge. One approach is to ask for a sidebar conference with the judge. One attorney asked for such a conference, after the judge asked several questions. Counsel then objected, and the judge sustained the objection. Injecting some humor, the lawyer stated: "Your Honor, if you are going to take over my case, please don't lose it for me."

The Bounds of Ethics

Of crucial importance in preparing your witness is emphasizing his or her obligation to testify truthfully. Making this obligation clear is your ethical and legal responsibility. Be aware of rules of professional responsibility.

Consider, for example, the American Bar Association Model Rules of Professional Conduct (2013 Edition), especially those rules concerning your obligations if your witness testifies untruthfully at trial. For example, Rule 3.3 of the Model Rules provides that a lawyer must not knowingly offer evidence that he or she knows to be false. If you, your client, or a witness called by you has offered material evidence and you learn of its falsity, you must take reasonable remedial measures, including, if necessary, disclosure to the tribunal. Moreover, with the exception of the testimony of a defendant in a criminal case, you may refuse to offer any evidence you reasonably believe to be false.

All young lawyers should be particularly aware of Rule 5.2 of the Model Rules of Professional Conduct—Responsibilities of a Subordinate Lawyer. If you know that a witness is lying while the partner with whom you are trying the case is questioning a witness at trial, you cannot avoid your responsibility by relying on the partner to take action regarding the testimony.

In meeting with witnesses whom you anticipate calling, consider Rule 4.2 of the Model Rules. This rule prohibits you from communicating about the case with any individual or entity represented in the case and with any employee or agent of such a person or entity. This rule appears straightforward—but what could result from your contacting a former employee who had managerial responsibility at a company you are litigating against? If your communication relates to the case, the communication could be in violation of the ethical rule and have serious implications for you and your client.

Attorneys have a duty to refrain from inquiring into areas that may be protected by the attorney-client privilege or the work-product doctrine. At least one court has held that when an attorney interviews a former employee, he or she should notify the former employer's counsel to permit him or her to obtain a protective order limiting the scope of the interview.[2]

Under Rule 3.4 of the ABA Model Rules of Professional Conduct—Fairness to Opposing Party and Counsel—you cannot unlawfully obstruct

2. Smith v. Kalamazoo Opthalmology, 322 F. Supp. 2d 883, 891–92 (W.D. Mich. 2004).

another party's access to evidence or unlawfully alter, destroy, or conceal a document or other material having potential evidentiary value. You cannot falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law. In pretrial procedure, you cannot make a frivolous discovery request or fail to make a reasonably diligent effort to comply with a legally proper discovery request by an opposing party.

The rule provides that in trial, you may not allude to any matter that you do not reasonably believe is relevant or that will not be supported by admissible evidence; assert personal knowledge of facts in issue except when testifying as a witness; or state a personal opinion as to the justness of your case, the credibility of a witness, the culpability of a civil litigant, or the guilt or innocence of an accused.

Rule 3.4 also provides that you may not request a person other than a client to refrain from voluntarily giving relevant information to another party, unless (1) the person is a relative or an employee or other agent of a client and (2) you reasonably believe that the person's interests will not be adversely affected by refraining from giving such information.

These examples by no means exhaust the considerations of ethics in preparing for direct examination. A wise advocate should be familiar with all of the Model Rules of Professional Conduct.

Beware of Leading Questions

Ask Short Questions and Avoid Compound Questions

One of the challenges of direct examination is the prohibition of leading questions. The reason leading questions are prohibited on direct examination is that the jury must hear evidence from the witness and not from the lawyer.

Such questions can be posed only in limited circumstances, for example, when confronting a hostile witness, reviewing uncontroversial matters, questioning children or senior citizens, or introducing new topics in your examination with a topical oral sentence. The prohibition against leading questions on direct examination is one reason that direct examination is considered to be the most difficult part of a trial, and surprisingly, more difficult than most cross-examinations.

What then is the distinction between leading and nonleading questions? Simply stated, a leading question suggests the answer. A nonleading question does not. "It rained last night?" is a leading question. Some nonleading alternatives include, "Did it rain last night?" or "Do you recall whether or not it rained last night?"

Asking nonleading questions creates difficulties in controlling the testimony and the witness. When you ask skillful leading questions as permitted on cross-examination, you control the testimony by almost testifying for the witness: "It rained last night?" "You came home after midnight?" But when you must ask nonleading questions ("Can you tell us what the weather was last night?"), you could get more explanation than you wanted. ("Well, I can't recall, but I do remember that the road was very slippery, and cars were skidding all over the place.") Many lawyers have been stunned by a witness's response to an open-ended question on direct examination. Frequently even the most careful preparation of a witness is no safeguard against the witness's desultory response to your questions.

As you ask questions during direct, beware of the distinction between prohibited leading questions and leading questions that may be tolerated. These include questions that are used to save time, and do not relate to important facts or refer to facts that are generally in evidence. "You attended the Spago tea?" is leading, but it's more efficient than: "Did you attend the Spago tea at noon on June 11, 2000?" If the record is saturated with testimony that the witness was at the Spago tea on June 11 at noon, the shorter, leading question will probably be tolerated by opposing counsel and the court.

In the *Maffei* case, on direct examination of Mrs. Maffei, her counsel asked: "And then there was a time when he [Mr. Maffei] saw the doctor for the first time, is that correct?" There was no objection. The question was asked to transition from one topic to another and was innocuous. In the context of this examination an objection might have been annoying to the jury, and probably would have been overruled, with the judge commenting, "Let's not lead the witness, counsel." Sometimes objecting to a leading question can waste time, if not be outright annoying. For example, counsel for the plaintiff asked Mrs. Maffei on direct examination: "Now, Mrs. Maffei, the loss of your husband caused you emotional distress and

unhappiness?" Defense counsel objected. The objection was sustained, but wasted time as counsel rephrased the question: "Do you feel that your husband's absence at home, his lack of companionship and being with you has affected your life?" There was no objection and the witness answered: "Dramatically." Then counsel asked her to explain.

Another exception to the rule against leading questions during direct examination, as discussed above, is when you are calling an adverse witness to the stand, or a witness turns adverse and the court permits you to lead the witness. Generally, however, leading questions should be avoided on direct and saved for cross-examination. Sometimes in the heat of trial you may have trouble asking a nonleading question after an objection is sustained. This predicament is not unusual. Don't panic. Try rephrasing the query using the word "whether." For example: "You then went to the bar after the reception?" could be rephrased: "Can you tell us whether you went to the bar after the reception?"

The best form of question on direct examination is a short question that produces a clear answer. Here is an example from the *Oregon* case:

Q. Did you receive a letter from the county in June 2006 relating to the parking lot at the restaurant?

A. Yes.

Q. Please turn to the exhibit book and to page 24. Can you identify Exhibit 22 in the book?

A. Yes.

Q. What is it?

A. The letter of June 8, 2006.

Q. Did you take any action based on the letter?

A. Yes.

Q. Tell us, what did you do?

A. I called Mr. Barrett.

Q. Why?

A. To discuss the county's demand that we repave the parking lot.

On the other hand, complex or compound questions are difficult to understand. They are objectionable. Often they produce ambiguous answers. For example, consider this compound question (slightly restated) discussed by Professor Stephen Saltzburg:[3] "Q. Do you know Tyra Jackson, and that she is the girlfriend . . . of the defendant?" A. "Yes." But to what does "Yes" refer? That the witness knows Tyra Jackson or that he knows she is the girlfriend of the defendant? This question spawned the appellate case of *United States v. Watson*,[4] which held that question to be prejudicial to the defendant and reversed his conviction.

MAKE IT MEMORABLE

For the jury members to be convinced of the merits of your case in direct examination, they must not only understand the testimony but also remember it; if the jurors remember favorable testimony, it indicates that your ideas may have penetrated their minds. As the case proceeds and other evidence is introduced, a juror's memory of prior testimony will affect how he or she receives new evidence and arguments.

One effective way to emphasize and help people remember a point is to repeat it, thereby using the technique of frequency to help the jury remember the testimony. In direct examination, one must learn to do this without violating the rules of evidence, which prohibit asking a question already asked and answered. In earlier times, lawyers would feign not hearing an answer and ask the question a second time. Or they would repeat the answer over the objection of opposing counsel. Such efforts

3. STEPHEN SALTZBURG, TRIAL TACTICS 54 (3d ed. 2012).
4. 171 F. 3d 695 (D.C. Cir. 1999).

are stilted and obvious. They can prevent a listener from developing confidence in reaching her or his own conclusions. They may also insult jurors' intelligence.

Looping and incorporation are more effective means of impressing the jurors with important facts on direct. Looping involves using the answer to the previous question in the subsequent question. Here is an example of looping taken from the direct examination of David Rosen:

Q. When you arrived at the Spago tea, whom did you first meet?

A. Aaron Tonken.

Q. When you met Mr. Tonken, how much time did the two of you talk with one another?

A. Fifteen minutes.

Incorporation is very similar. You incorporate a previous answer in your question without making it obvious. The testimony above continued as follows:

Q. During the 15-minute conversation at your first meeting, did he discuss with you the costs of the gala?

A. Absolutely not.

Consider this example from the direct examination of Mrs. Maffei in our civil case:

Q. What concern did you have as you observed his symptoms?

A. I was afraid he was having a heart attack.

Q. Why were you afraid he was having a heart attack?

A. Because of the symptoms he was having.

Q. What were the symptoms he was having, giving rise to your concern about a heart attack?

By using the techniques of looping and incorporation, you can help imprint certain testimony in the minds of the jurors.

One of the most effective means of presenting memorable testimony is by competent use of exhibits and demonstrative aids. Studies reveal that we are far more persuaded by what we see than by what we hear. The more you use demonstrative evidence to enhance the jury's involvement, the more memorable your direct examination will be. Juries want to see the exhibit or demonstrative aid as you are questioning the witness about it. Demonstrative aids are documents or drawings, including enlargements that are referenced but not moved into evidence. Sometimes enlargements of documents that receive frequent attention are moved into evidence. They must be clear and legible from a distance. There is even authority that certain colors resonate more than others. Selection of colors might depend on whether you are the plaintiff or the defendant and whether you are depicting conduct or facts that you wish the judge or jury to view favorably or unfavorably.

When using exhibits or demonstrative aids, it is helpful to obtain the testimony about the subject matter first and then introduce the exhibit. The appearance of the exhibit will help corroborate the witness's key points. After exhausting the witness's testimony on the subject, you can ask him or her to cover the same ground by reviewing and explaining the exhibit, which may well serve as a memory anchor for the jury.

Avoid using the exhibit or aid as the main point of your examination unless the exhibit is the central part of the case. In other words, elicit the testimony about the document first. Then invite the witness to examine the document or aid and to explain or answer your questions about the exhibit. This approach, as with looping and incorporation, employs the technique of frequency.

Visuals

Demonstrative aids, also discussed in Chapter 2, play an important role in the examination of witnesses on direct and on cross in both jury and

nonjury cases. In the direct examination of David Rosen, he was asked to tell the jury about the organizational structure of the host group he believed was paying for the gala. Without any exhibits, such testimony would be hard to follow and dull. So defense counsel took the simple step of using employee photographs and an organizational chart. The witness referred to these exhibits during his testimony so that jurors were able to connect faces to names and responsibilities.

Similarly, the government, seeking to demonstrate the elaborate nature of the fundraiser, introduced one of the fancy director's chairs that guests sat in at the event. Rosen, the prosecution alleged, had complained about these chairs as being too expensive, a detail the prosecution emphasized to help establish the defendants' knowledge of the costs in question.

In the *Maffei* case, counsel for the parties extensively used demonstrative aids, and some of them were admitted into evidence. For example, to illustrate the difference between the normal flow of blood through the aorta and the flow with a dissection, counsel for the plaintiff used an enlarged diagram displayed on an easel. The court allowed it to be placed very close to and directly in front of the jury. During the direct examination of the experts, the court permitted counsel to invite the witnesses to step down from the stand and use the illustrations to explain their testimony. The scene in the courtroom became somewhat intimate as each expert and counsel all stood close to the jury. (See Figure 2)

Rarely will a scene like this be played out in court. Large illustrations, charts, or diagrams are seldom allowed so near the jury, and witnesses generally must work with illustrations from the stand. Still, as technology has evolved, there are many ways to display exhibits and work with demonstrative aids in the courtroom. For example, you can use PowerPoint presentations to recreate time lines or to display exhibits during your examination. (See Figure 3) Computer-generated visuals such as animations, charts, pictures, and documents with highlighted text can be effective. (See Figure 4) Consider using an electronic interactive white board (see Figure 5) or an ELMO. The latter is a document camera used with a projector. The ELMO can project not only a two-dimensional image but also a three-dimensional image. (See Figure 6) Thus it can display physical evidence, like a gun alleged to be the murder weapon.

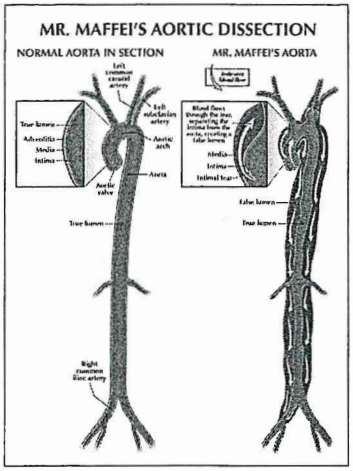

Figure 2

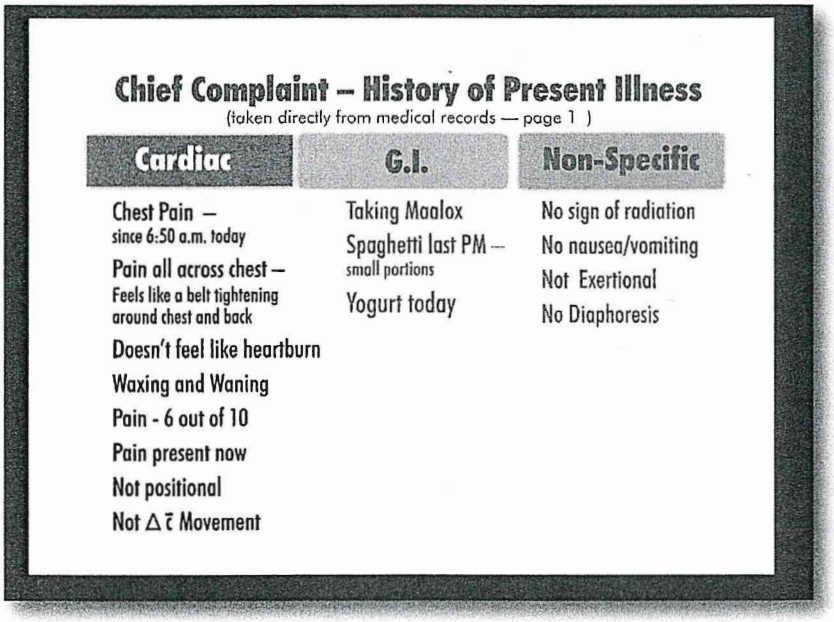

Figure 3

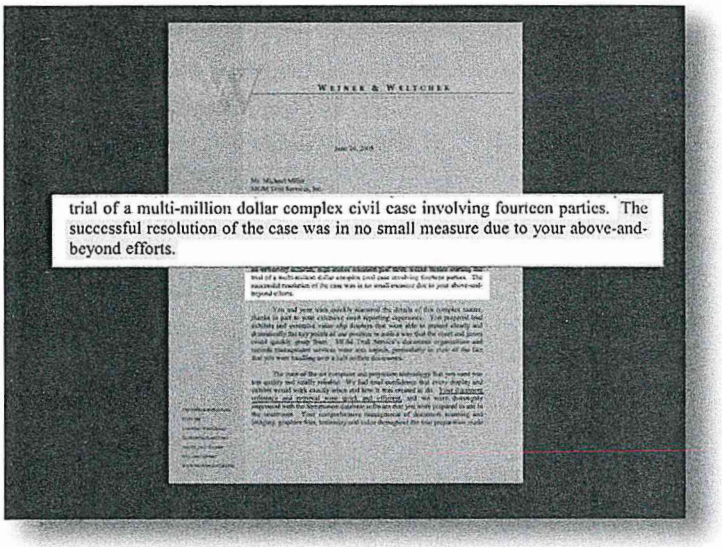

Figure 4

One advantage of the ELMO is that you can be more spontaneous in displaying documents than a PowerPoint presentation will allow, as they usually have a prearranged order. Most courtrooms have an ELMO available for counsel.[5]

When planning your examination (see Figure 3) and all phases of the case, you should consider whether you will use the documents or exhibits that already exist or whether you want to create exhibits to enhance your examination or argument. For example, in the *Maffei* case, counsel for the plaintiff created charts summarizing key points in the medical records. The summaries were admitted into evidence and displayed on the ELMO. An alternative approach could have been the use of the summaries as a demonstrative aid. Usually the court will agree to this if the summary has

5. *See* Ronald Waicukauski, Paul Mark Sandler & Jo Anne Epps, The Twelve Secrets of Persuasive Argument (2009).

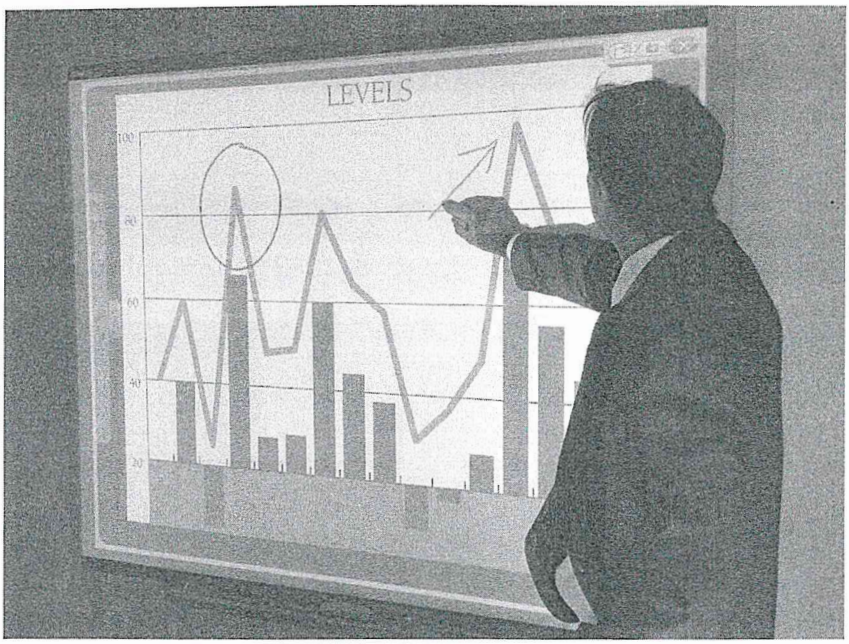

Figure 5

been demonstrated as accurate. As a demonstrative aid, the summary is not in evidence; hence the jury does not review it during deliberations. But summaries can also be admitted in evidence, as distinguished from their use as demonstrative.

Once you decide upon the exhibits and demonstrative aids, the next step is to consider by what method to display them. Whichever method you use, keep the display simple, legible from a distance, and attractive. It may be important to visit the courtroom in advance to test the clarity and visibility of your exhibit as presented. If it is an enlargement not displayed electronically, you will want to be sure the jury will be able see it clearly at the distance it will be displayed. Also if the document is to be displayed electronically, know how to work the projector or have someone available who does. You do not want your ethos to suffer because of fumbling that slows down the trial.

Sometimes the judge will allow you to "publish the exhibit to the jury"—that is, show the document to the jurors and allow them to read it

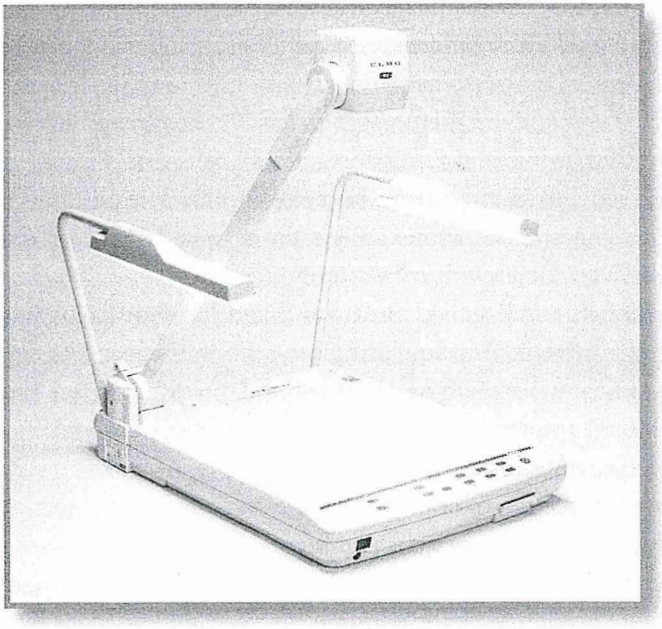

Figure 6

independently. You can imagine the time delay with this procedure. Don't rely on it unless your exhibit is a smoking gun.

You might also consider preparing a notebook of stipulated exhibits and asking the court whether you can give a copy to each juror so they will be able to follow along. The danger here is that the jurors will look at the notebooks when you want their full attention. In the *Maffei* case, for example, counsel prepared a notebook of medical records for the jurors to review during particular testimony of the medical experts, thus pulling their attention away at times from what the witnesses were saying.

In nonjury cases it may be more practical to give less attention to displaying visuals depending on the case and the judge. Providing the judge a book of exhibits and diagrams to review during the trial may be suitable for the case. On the other hand, computer programs and displays with counsel pointing to the screen may be an effective way to engage

the judge. Counsel in the *Oregon* case, which was nonjury, provided the court with an exhibit book and several diagrams, but did not use a projector or PowerPoint display.

Engaging the Jury

Equally critical to how well the jury remembers key points is the style with which you and the witness make those points in court. You should always strive to elicit vivid and engaging testimony.

Clear, short, and precise questions asked in plain English are most useful in this regard. You can easily lose your audience with convoluted queries, and if you allow your witness to drone on and on about irrelevant matters, you forsake control of the argument you need to make a thorough direct examination.

Establish a rhythm of short questions and answers that help the jury follow the development of your argument. Vary the structure of your sentences by using closed- and open-ended questions to help retain interest and develop momentum. For example, an open-ended query like "Tell us what happened to you after you arrived at the tea" offers the witness an opportunity to assume some control, narrate past events, and thus enhance his or her credibility with the jurors. On the other hand, too much narration will be overbearing and tedious, if not objectionable. Break up the testimony with concise, closed-ended questions like "After the collision were you able to walk?" This helps you vary the pace of the examination and hold the interest of the jury.

Likewise, it is helpful to break up the examination with introductory and transitional phrases that help you and the jurors organize information. For example: "Now let's discuss the morning of the event." Or "Let's move on to the next day." The so-called break-down question is not a question at all but a short statement that serves as an oral topical sentence. Such statements, considered improper years ago, are now welcome and help everyone follow the testimony with interest. As explained below, using transition sentences to alert the jury or judge that you are moving to a new topic is a helpful technique to achieve clarity.

Do not read from written questions. Reading or even relying extensively on notes can prevent you from observing the witness and jury. You lose

eye contact and the opportunity to alter your questions in the wake of an unexpected answer. To conduct careful but unscripted examinations, of course you must go into the courtroom with a very strong understanding of all the facts of the case. Without this understanding, your insecurity will force you to rely too much on notes, stumble over questions, hesitate, and miss opportunities. It is important to have your notes available, but don't allow them to become a crutch.

Style and Delivery

The elements of style and delivery presented in Chapter 2 apply to the examination of witnesses. Never discount speaking style and delivery as superficial elements of your case overall or your direct examinations in particular. As discussed, style is the form in which we put our ideas, the manner in which we convey the substance of our argument or questions to elicit testimony. Your choice of words and the use of open-ended questions or short staccato questions—these are aspects of style. Delivery involves how we regulate our voice, gestures, and demeanor. Style and delivery are critical instruments of persuasion. Before you even enter the courtroom, you should consider the tone you want to set during specific examinations, what expressions and gestures to use, and your demeanor, body language, and pacing.

Where you stand and how you move while conducting a direct examination are important. In the *Rosen* trial, Judge Matz required all counsel to remain at the podium, which was a distance of 15 feet from the jury. In this case, not being able to approach the jury or move about the courtroom limited the nonverbal modes of communication that are usually available to lawyers. In the *Maffei* case, on the other hand, the judge permitted counsel to stand close to the jury. In *Oregon*, the nonjury case, counsel spoke from the trial table, as the judge requested.

Prior to trial, it is prudent to ask the judge her or his preferences about where to stand when conducting examinations. When possible, it is often helpful to stand by the juror box while asking a witness to tell "us" about an event, as if you were part of the jury.

It can be difficult to control your body language so that it adheres to the overall impression you want to make. Facial expressions, in particular,

can betray you. You may find yourself frowning or grimacing upon hearing an answer you did not want. Obviously, such slips undercut your credibility. How can they be avoided? If you can truly internalize conviction in your argument, your confidence in the face of contrary evidence is likely to be evident to jurors during examinations.

Your convictions about the case will also become evident as you vigorously engage a witness. A lack of conviction, on the other hand, and a lack of imagination, can lead to lazy questioning. A dull sequence might go like this: "Well, tell us what happened." "And then?" "What happened after that?" Generally, the examination will unfurl much more vividly if you take charge of it, tailoring questions to draw out compelling details you know are there, waiting to shine before the jury.

One final note about style during direct. Remember that you are not speaking to lawyers. You are trying to communicate with the witness and with the jurors. Stilted, lawyerly language is not desirable. For instance, a question like "Did there come a time when you returned home that evening?" comes off as formal and aloof. Also avoid arched questions such as: "What, if anything, did you do next?" and instructions such as "State your name for the record."

AUTHENTICATING EXHIBITS

When introducing exhibits during trial, it is important to understand the rules governing admissibility. Remember that the document itself is not evidence unless it has been introduced and authenticated. The basic principle in document authentication is to obtain testimony that the document accurately represents what it purports to depict.

According to Federal Rule of Evidence 901(a), authentication "is satisfied by evidence sufficient to support a finding that the matter in question is what the proponent claims." Authenticity "is in the category of relevancy dependent upon fulfillment of a condition of fact," and is governed by the procedure set forth in Federal Rule of Evidence 104(b). There are various requirements and techniques for authenticating documents and real evidence. For example, private writings, business records, and medical records each have their own requirements. But the essence of each requirement is that the exhibit

is authentic.[6] Authentication is only a first step. The evidence must still satisfy numerous other rules of evidence: it must be relevant as well as authentic, it must not be hearsay or satisfy an exception, and of course its probative value must not be prejudicial.

The Federal Rules of Evidence do not address separately the admissibility of electronically stored evidence (ESI), so the same rules apply. Nevertheless, as with hard copy documents, nuances exist in authentication of ESI. Working with e-mails and other forms of ESI requires familiarity not only with the rules of evidence, but also the case law.[7] In *Lorraine v. Markel*, Judge Paul W. Grimm, then chief magistrate judge, analyzed the various methods of introducing ESI. E-mails may be self-authenticating. They may be admissible based on their distinctive characteristics such as their content, internal patterns, or other distinctive characteristics. Chain e-mails present more difficult problems. If they are introduced as a business record, under Federal Rule of Evidence 803(6), each participant in the chain must be acting in the regular course of business or qualify for admissibility by another exception to the rule against hearsay.

The introduction of other forms of ESI such as webpages and social media sources can be accomplished by various methods, including those used to introduce e-mails. For example, offering the evidence pursuant to Federal Rule of Evidence 901 (Requirement of Authentication or Identification) and 902 (self-authentication) are but two methods.[8] Notably, there are a few relatively inexpensive tools available to attorneys to assist with the admissibility of ESI, including the use of digital notaries and the Internet Archive Wayback Machine.[9] Authentication problems with ESI can best be resolved in pretrial conferences.

Given the challenges for authenticating Internet and social media sources of information, courts appear to be erring on the side of admissibility, and any concerns about the evidence itself—for example, contradictory

6. *See* Paul Mark Sandler & James K. Archibald, Model Witness Examinations (3d ed. 2010).

7. *See, e.g.*, Lorraine v. Markel Am. Ins. Co., 241 F.R.D. 534 (D. Md. 2007).

8. *See* Williams v. Long, 585 F. Supp. 2d 679 (D. Md. 2008) (Grimm, J.) (exhibits in the form of printed webpages were self-authenticating, and although hearsay, still met the requirements of the public records and reports exception to the hearsay rule).

9. http://www.archive.org/web/web.php.

testimony about whether or not someone authored a Facebook posting—is being left to the jurors to decide the weight that evidence should be given.[10] It is also important to be aware of the developing law that treats certain information stored on social media websites as "private" and subject to the Stored Communications Act.[11] Under this developing law, a civil subpoena would not be sufficient or, for that matter, appropriate for obtaining "private" information such as e-mails or instant message communications stored on a social media website or a private web-based e-mail account.[12]

In many trials today, such as the *Maffei* case, counsel agrees before the trial on the authenticity and admissibility of exhibits. In the *Rosen* case, many documents that needed to be authenticated could not be agreed upon, including photographs of the gala, receipts, invoices, and other business records. In the nonjury case of *Oregon*, all counsel agreed on the authenticity and admissibility of all exhibits.

In the following hypothetical example, defense counsel is introducing a budget to corroborate the witness's assertion that he did have a budget prepared for a political fundraising event held in his home:

> Q. Mr. Jones, was a final budget prepared for the fundraising event at your home?

10. *See* Matthew A.S. Esworthy & Justin P. Murphy, *The ESI Tsunami: A Comprehensive Discussion about Electronically Stored Information in Government Investigations and Criminal Cases*, 27 ABA CRIM. J. MAG. (Apr. 1, 2012) (collecting cases on admissibility); People v. Lesser, H034189, 2011 WL 193460 (Cal. Ct. App. Jan. 21, 2011) (officer's testimony that he cut and pasted portions of Internet chat transcript was sufficient for admissibility); State v. Thompson, 777 N.W. 2d 617 (N.D. 2010) (victim's knowledge of defendant's cell phone number and defendant's "signature" on text messages sufficient to authenticate threatening text messages); People v. Valdez, No. G041904, 201 Cal. App. 4th 1429 (Dec. 16, 2011) (conviction upheld where the court correctly admitted a trial exhibit consisting of printouts of defendant's MySpace page, which the prosecution's gang expert relied on in forming his opinion that defendant was an active gang member); but see Commonwealth v. Koch, 2011 WL 4336634 (2011 PA Super 201, Sept. 16, 2011) (text messages found inadmissible because authentication requires more than mere confirmation that the cell phone belongs to a specific person).

11. *See* 18 U.S.C. § 2701.

12. *See* Theofel v. Farey-Jones, 359 F.3d 1066, 1071–72, 1077 (9th Cir. 2004) (finding that an overbroad civil subpoena to plaintiff's Internet service provider violated the Stored Communications Act).

A. Yes, it was.

Q. Did the final budget itemize proposed expenses for the fundraising dinner at your home?

A. Yes.

Q. Do you recall the particular expenses that were itemized?

A. Most of them.

Q. What were they?

A. $500 for the caterer; $150 for refreshments; and $100 for miscellaneous costs.

Q. Mr. Jones, can you identify Exhibit 24 for identification?

A. Yes.

Q. What is it?

A. This is the formal budget for the event.

Q. Who prepared it?

A. I did.

Q. When did you prepare it?

A. One month before the event.

Q. Does this budget reflect the very costs you just described for the jury?

A. It does.

Q. Is this the final budget that you prepared for the event?

A. Yes, it is.

Q. Your Honor, I move into evidence as defendant's Exhibit 24, the final budget, Exhibit 24 for identification.

Mr. Jones, will you please read the expenses reflected on the budget?

A. $500 for the caterer; $150 for refreshments; and $100 for miscellaneous costs.

Q. Thank you.

Notice that the witness first testified without referring to the document, and then counsel introduced the document to emphasize the substance of the testimony. The jury in effect heard testimony on the matter twice and hopefully would better remember it as a result.

This technique can be trickier if the witness does not recall the information in a document on his own. Imagine that Jones cannot remember the costs of the fundraiser. In that instance, counsel would have to rely on what is known as the doctrine of present recollection revived:

Q. Mr. Jones, were budgets prepared to itemize proposed expenses for the fundraising dinner at your home?

A. Yes.

Q. Do you recall the particular expenses that were itemized?

A. I am sorry, it has been a while, and I just don't recall.

Q. Is there anything that would refresh your recollection?

A. If I could see the budget, that might help.

Q. Please examine Exhibit 24 for identification—the budget—and tell us whether that refreshes your recollection?

A. It does.

Q. Now please tell us the particular expenses that were itemized.

The key circumstances permitting a lawyer to present a witness with a document to refresh a recollection are:

1. The witness cannot recall the particular facts inquired about;
2. A document or memory aid might help the witness recall the facts in question; and
3. After reviewing the document, the witness's memory will be refreshed.

Remember that the document is not evidence unless it is authenticated and introduced.

If your witness's recollection is not refreshed after reviewing the document, you can still introduce the document as a prior hearsay statement pursuant to the doctrine of past recollection recorded. To accomplish this, counsel should elicit testimony that the writing was made or adopted by the witness at the time when the witness had a clear recollection. The testimony should also state that the document was accurate at the time the witness adopted the writing, that the witness presently vouches for the accuracy of the writing, and that the witness lacks sufficient recollection to testify fully and accurately about the events referred to in the document.

Hopefully you will have had the opportunity to prepare your witness before trial, and the need to stimulate memory from a document will not arise. There are occasions when you cannot prepare a witness, however, and understanding how to use documents to stimulate memory is important.

Authenticating documents before a jury, particularly in exhibit-heavy cases, can be time-consuming. Many courts, according to court rules or practice, will require you and your opposing counsel to agree to

the extent practical on authentication and admissibility prior to trial. Generally, you don't want to wrangle over authentication. Do you really want to require opposing counsel to subpoena the bank to send a witness to authenticate bank records? But just because you are willing to stipulate to authenticity of an exhibit does not mean that you desire to agree to its admissibility. The document may contain hearsay or be irrelevant. Under those circumstances, you would stipulate to authenticity but not to admissibility.

If the court requests it, you will have to submit the joint list of stipulations before trial. The court usually requests this by way of a proposed pretrial order submitted jointly by counsel. The court might decide to consider objections to exhibits in advance to avoid lawyers haggling over documents before the jury. Most judges, however, will wait until the exhibit is offered so as to consider the matter in the context of the trial.

STRUCTURING THE EXAMINATION

Listeners remember best what they hear first and last. Keep this maxim in mind as you plan the order in which you will call your witnesses. You will want to begin and end your case with strong witnesses. Less desirable witnesses belong in the middle of the lineup. Carried further, the concepts of primacy and recency suggest that individual witness examinations should begin and end forcefully, with the weaker portions in the middle.

Remember that direct examination is how you argue your case. You don't want the argument to consist of a string of disorganized questions and answers. Plot the direct as you would your opening statement or closing argument, with a clear introduction, presentation, and conclusion. More specifically, the direct examination can be divided as follows:

1. *The introduction*, where you establish the credibility of the witness and attempt to predispose the jurors to believe him or her;
2. *The context of the witness's testimony*, where you demonstrate that the witness is qualified to present credible testimony on the topics upon which the witness is called to testify;

3. *The main substance of the testimony*, where you advance the points you wish to argue or assert;
4. *Immunization*, where you pose questions that opposing counsel might ask on cross-examination to take the wind out of his or her sails; and
5. *The conclusion*, where you drive home your most important points in a memorable fashion.

Introduction

The introduction should often be warm and humanizing. Usually, but not always, you will want to introduce the witness to the jury by asking questions about the witness's background, including education, work experience, and occupation. This introductory phase helps you establish the witness's credibility and humanizes the witness. If the witness is your client, the introduction is critical.

In the introductory portion of David Rosen's testimony, the questions and answers portray the background of a hard-working young man who sold encyclopedias for a living and worked his way through school:

Q. And how do you explain what your occupation or work is, sir?

A. I'm a fundraiser.

Q. Mr. Rosen, would you briefly tell the jury your educational background?

A. I have two years of high school, I have a GED, and I graduated college with a B.A. in political science.

Q. And what about your work experience? When did you have, for example, the first job you can remember?

A. My first job was [at] 14 years old. I was a caddy at Olympia Fields Country Club in Olympia Fields.

Q. Can you give us a chronology of your work experience?

A. I caddied for two summers. When I was a sophomore in high school, I took a job at Burger King. After my sophomore year, a friend of mine called and presented me with an opportunity to work at a ski resort/summer resort in northern Wisconsin—Cable, Wisconsin. It was a job where I was a recreation director, and I took the job. I worked with a bunch of college students. Actually, my sister Ruth worked that summer too, and we organized activities for the guests there, from preschool through seniors, volleyball games, softball games, things to keep them busy. And after that summer was over, the college students returned to college; and the owner, Tony Wise, offered me a job at the resort full time to work through the winter.

Q. Did that, then, mean you dropped out of school?

A. I did. I dropped out of high school.

Q. And you then worked?

A. I—in Illinois, they had a law that you couldn't take the GED prior to your class's graduation, and in Wisconsin, they let you take the GED. So I took the GED. I worked at Telemark Lodge. I taught skiing to kids, and after—after about a year and a half, the Telemark Lodge went bankrupt.

Q. What did you do?

A. I took my GED in hand and went to the University of Wisconsin in Eau Clair, Wisconsin, and they admitted me on a probationary basis. Academic probation, it was called.

Q. Now we're focusing on your work. Were you working at that time?

A. I'm sorry. I wasn't sure.

Q. Where?

A. I delivered pizzas for Domino's.

Q. And for how long did you occupy that job or did that job occupy your time?

A. It was—I was going to school and working full-time. So it was a year.

Q. Did you work your way through school, these schools?

A. Yes, sir.

Q. Did you have other jobs after the pizza job?

A. I did. I transferred—after I was accepted as a full-time student, it was easy for me to transfer schools—I transferred to the University of South Florida in Tampa, and there was an advertisement for summer work outside of one of my sociology classes, and it said, "Summer job. Pays well." I went to the interview. I took the job. It was a college summer work program that taught students how to sell and manage, and I took that job, and all the—it was a college exchange program where they hired 4,000 students from 500 universities, and they participated in this exchange program, and they taught us how to sell, and we sold books.

Q. Where did you sell these books?

A. All over the country. . . . The students from Florida sold in upstate New York, and the students from New York sold somewhere else. They were, they were, like, encyclopedias, but they covered math, English, social studies, and science. More like for homework.

Q. Try to bring us current.

A. I'm sorry.

Q. In terms of the work that you did over the years.

A. I sold books for 10 summers. I was going to school part-time sometimes, full-time sometimes, and at one point I entered the full-time management program, moved to Baton Rouge, Louisiana. I was recruiting off the Louisiana schools, hiring and training the students, and then I'd take them off to sell during the summertime. And then my dad had a heart attack, and I moved back to Chicago, and I took—I wanted to be closer to where he was. I took a job selling law books to lawyers for Clark, Boardman & Callahan; and after about seven months at that job I decided I needed to complete my undergraduate degree. So I went back to school. I enrolled at DePaul University, which is where I finished up.

Q. Were you working while you were at DePaul?

A. I wasn't. I had money saved.

Q. Did you then take on a position after college?

A. I did. It was a volunteer. At my last quarter at DePaul, David Wilhelm came to teach a class, and he was a friend—did Bill Clinton's, President Clinton's '92 campaign, and a bunch of other campaigns. He was very well known. While studying political science at DePaul, I became excited about politics, wanted to get into politics, and David Wilhelm opened up a volunteer spot for me on the Clinton/Gore campaign.

It is worth noting that the content of the testimony transcends the facts of Rosen's resume. It contains many emotional cues and hints at his values. That he returns home to his father after the heart attack, for instance, indicates that he is a caring son. The story of his job at the ski resort suggests leadership ability, a fun-loving personality, and a certain independence, even as it explains the surprising fact that he did not graduate from high school. In preparing a witness for testimony, keep in mind that jurors remember details that may not be critical to the logic of your case, but that can predispose people to believe or disbelieve a witness.

In this exchange, the defense counsel allowed the witness to speak at length in response to a few open-ended questions. For many witnesses, this technique could be a bad idea, but in this instance, the defense needed the jury to gain an appreciation for the kind of man Rosen was, and what experiences had led to his career in political fundraising. Counsel steps in here and there to underscore an important point ("Did you work your way through school, these schools?") or guide the testimony down the chronological path. But for the most part, the witness himself tells the story, in his own voice, and beginning with his most youthful and humble work experiences.

The importance of allowing the witness on direct examination a degree of freedom of expression helps establish the witness's credibility. The jury can observe that the lawyer is not testifying for the witness, as is sometimes the perception on cross-examination. But beware of the "runaway witness." When the lawyer asks an open-ended question, and the witness runs off course, away from the main purpose of the question, trouble soon follows. You need to balance the witness's freedom to testify in his or her own voice with your need to control the course of the testimony. Which is why, in the previous example, the lawyer stepped in to ask a few pointed questions.

This brings us again to the subject of ethos. If the jury finds your witness to be likable and sincere, you and your witness enjoy a rising ethos. With nonexpert witnesses, ethos is complex and highly subjective. In addition to the substance of what the witness says, his or her body language, manner of speaking, word choice, and dress can all affect his or her ethos with the jury.

Contrast the seriousness and depth of the Rosen introduction with that of Stan Lee, a witness whom the defense wanted the jury to believe but who had a less significant role than Rosen:

> Q. Good afternoon, Mr. Lee. I would first ask you to describe to the ladies and gentlemen of the jury what your occupation is, what you do.
>
> A. I am basically a writer, and I have a new company now. I am the chairman of the company.

Q. What's the name of that company?

A. It's called POW, P-O-W, Entertainment, and we do television movies, DVDs, that sort of thing.

Q. Mr. Lee, how young are you at this time, sir?

A. Eighty-two years.

Q. And for how long have you been a writer?

A. Just about all my life.

Q. And have you lived in the Los Angeles vicinity most of your life, sir?

A. Twenty-five years.

Note what counsel did not ask here: He did not ask about POW Entertainment and Mr. Lee's role as "chairman." Instead, counsel zeroed in on the witness's fame as a writer and creator of popular characters in hopes of enhancing the jurors' interest in hearing what he had to say. Ultimately, this is one of the most important goals of the introduction—to excite the jury about what is coming next.

Q. Now, with the court's indulgence, I would like to ask if you've ever heard of a character known as Spider-Man?

A. Yes.

Q. And how is it you heard of that character, sir?

A. Well, I was the cocreator of Spider-Man.

Q. And have you heard of a character known as the Incredible Hulk? And that's definitely not me I acknowledge, but—

(Laughter in the courtroom.)

A. Yes, I have. Same reason.

Q. And can we ask, my last little dalliance, sir, about—have you ever heard of the X-Men?

A. Yes.

Q. And why is that?

A. I created that too.

Here the attorney plays a more active role in directing the testimony and setting the tone. With Rosen, the defense counsel allowed the witness's voice to dominate, but with Stan Lee, counsel intentionally interjects his personality and sense of humor. Doing so at appropriate moments can go a long way to improve an attorney's ethos, particularly if the proceedings appear to be boring the jurors. Had counsel simply asked, "Did you, sir, create Spider-Man, the Incredible Hulk, and the X-Men?" the testimony would have been less engaging.

Never underestimate the power of humor. In addition to making testimony more pleasurable for you and everyone in the room, it can aid you in your quest to persuade. On the flip side, an off-color, poorly timed, or unsuccessful attempt at humor can sink your ethos in a second.

Counsel in civil cases often demonstrate the same principle; they introduce their clients in a warm humanizing way to develop a rapport not only between their clients and the jury, but also between themselves and the jury. The jury's view of the lawyer is as important as its view of the client.

Compare the manner in which counsel in the *Maffei* case introduced their clients:

Q. Good morning.

A. Good morning.

Q. You want to introduce yourself again to the jury, please?

A. Good morning, again. My name is Mary Jean Maffei. I was married to Richard Maffei.

Q. You are the plaintiff in this case?

A. Yes, I am.

Q. Why did you become a plaintiff and bring this lawsuit that we are here today to hear about?

A. I actually did not understand how my husband could have left the hospital without a proper diagnosis based on the severe symptoms he had.

Q. Are you a resident of Baltimore County?

A. Yes, I am.

Q. And exactly what neighborhood do you live in?

A. I live in Perry Hall.

Q. How long have you lived at that address, Mrs. Maffei?

A. Twelve years.

Q. Do you now live alone?

A. Shortly after Rick died, I asked my son to move back home.

Q. And you were married prior to your marriage with Mr. Maffei?

A. Yes, I was.

Q. How old is your son now?

A. He's 33.

Q. And how is his health?

A. His health is fine. He was born with a hearing impairment, but other than that, he's a normal kid.

Q. I think the most difficult question I always ask of a witness in trial is coming up now. How young are you?

A. I'm 56.

Q. And tell us what occupation, if any, you now have?

A. I am a secretary.

Q. Where do you work?

A. I work for Bravo Health.

Q. What is Bravo Health?

A. Bravo Health is a supplemental insurance carrier for people on Medicare.

Q. And how long have you been employed there?

A. Almost two years.

Q. What do you do exactly?

A. I am the secretary for the senior executive vice president and chief medical officer.

Q. So what hours do you work?

A. Seven-thirty to five.

Q. And in your capacity as an assistant, what are the responsibilities that you have?

A. We work with extensive meetings, scheduling, typing, filing; we also work with his ten direct reports with all matters of their needs.

Q. Do you like your work?

A. Yes, I do.

Q. Do you like the people you work with?

A. Very much.

Q. Do you ever interact with any of them during the day?

A. Yes, occasionally.

Q. Where do you usually have lunch, for example?

A. We eat lunch at our desks; we don't go out.

Q. Do you ever socialize or meet with the people at work outside of work?

A. Occasionally.

Q. What are some of the circumstances that would cause that to arise when you would meet with people?

A. We have gone to parties at individuals' homes, cookouts, holiday parties.

Q. What is your educational background?

A. High school, twelfth grade.

Q. Where did you go to high school?

A. Parkville High School.

Q. Did you start work right after high school?

A. Yes.

Q. Mrs. Maffei, in terms of your activities generally when you are not working, I'd like to hear about some of the things that interest you generally?

A. Generally?

Q. What do you do with yourself, in other words?

A. Generally, I am a homebody, so I do a lot things just around the house, gardening, cooking, spend a lot of time with my family, Rick's family, lot of time with my two nieces.

Q. And how old are the nieces now?

A. They are 12 and 14.

Q. What is the date, if you can recall, that your husband passed away?

A. March 8th, 2006.

Counsel in his introduction of Mrs. Maffei wanted to present her as a working lady who had endured a terrible loss, but at the same time had struggled to overcome that loss as opposed to wallowing in self pity.

Q. Now, Mrs. Maffei, you and your husband were married for how long on that date?

A. At the time of his death, it was eight and a half years.

Q. I would like to talk to you a little bit about your husband and show a few pictures that might help our discussion. Why don't you take a second to describe your husband to the jury?

A. He was the most loving, kind, generous man I think I have ever known. He treated me better than I ever thought anybody could be treated. He loved me completely. I loved him. We did everything together. You looked forward to when you came home at night, saw that smile, got a hug. And those are things I miss terribly.

Q. Let's show some pictures, if we could, just so we could put him in his environment. Okay. Why don't you show us, where is Rick? Is your husband in this picture?

A. Yes, he's the one in the baseball cap.

Q. On the far right?

A. Yes.

Q. And who is he with?

A. He's with all of his brothers and sisters and his mother.

Q. Is that the young lady there second to the left?

A. Yes, it is.

Q. Is she with us today?

A. Yes, she is.

Q. How old is she?

A. Seventy-nine.

Q. And let's see, let's not take too much time with this, but let's go to another one. That's a picture we saw in the opening statement with you and your husband?

A. Yes.

Q. How tall was he?

A. Six-foot.

Q. How much did he weigh?

A. Approximately 230 on average.

The photographs introduced the jury to the late Mr. Maffei and made vivid and memorable the relationships that had been severed by his death.

Q. What did he do for employment?
We may have heard it, but we'd like to have you state it.

A. He was a heavy equipment operator by trade.

Q. What does a heavy equipment operator do?

A. He can run cranes, backhoes, loaders, bulldozers, most big earth-moving equipment.

Q. How would you describe his work ethic or the hours that he would work?

A. Impeccable. He took great pride in his work. He did the best he always could do. He was there whenever they needed him with no question.

Q. If we were to take a day in the life of Mr. Rick Maffei, what time would he leave for work?

A. Five o'clock in the morning.

Q. Generally, what time would he come home?

A. He was home by four, generally, if he worked a single shift.

Q. What were some of his interests outside of work?

A. He, since the age of 16, was an avid trap shooter. He absolutely loved doing that. He did it almost weekly.

Q. Did you ever go with him?

A. Yes, all the time.

Q. Where would he go for that?

A. He belonged to a private club in Carney, Maryland, Carney Rod and Gun Club. Then they would have other clubs around Maryland that they would go to occasionally.

Q. And what were some of his other interests?

A. He loved goose hunting. Even if he wasn't hunting, he just loved to go out in the environment just to watch.

Q. You didn't go goose hunting with him, did you?

A. No.

Q. Did he have other interests with family, for example?

A. We spent a lot of time with both families.

Q. Did he have any interaction with your nieces?

A. Constantly.

When the defense called Dr. Smedley to the witness stand, not only did counsel wish to portray his client as an outstanding individual but also as a competent physician. The attorney's challenge was to offset any momentum gained by the plaintiff through the direct examination of Mrs. Maffei and her supporting witnesses.

Q. Now, we've already heard your name mentioned a number of times during this trial. But the jury hasn't heard from you, so I want to ask you some background questions and then we'll talk about the events of March 8, 2006. You are an emergency physician, is that correct?

A. Yes, I'm an emergency medicine physician.

Q. Keep your voice up, please. And how long have you been practicing emergency medicine since you completed training?

A. I completed my residency in 1999. So I've been practicing post-residency for the last nine, almost ten years.

Q. Okay. And tell us about your educational background, beginning from college.

A. I went to college undergrad at Loyola College here in Baltimore.

Q. Did you grow up in Maryland?

A. I moved around a lot as a kid. Both my parents are from Baltimore, born and raised, so we had connections here.

Q. And is that why you came back to Loyola for college?

A. Yes. I still have other family around here as well. And in addition to that, my husband is from this area. And we were together at that time so—

Q. And after you—when did you complete Loyola College?

A. I finished in May of 1992.

Q. And then you went on to medical school?

A. That's correct.

Q. Where?

A. I went to University of Maryland Medical School here in downtown Baltimore.

Q. That's a four-year program?

A. Correct.

Q. And you completed that in what year? 1996?

A. Yes, I finished in 1996.

Q. So after you completed medical school, tell us about your training.

A. After medical school, I applied for residency and . . . did my residency [at University of Maryland] from '96 through '99.

Q. And tell us about what your residency consisted of.

A. The residency is a three-year period. In the first year of your residency, you spend your time divided between the intensive care units, the emergency department, the medical floors, orthopedics, the cardiac care unit, the surgical wards, ERs both at the VA and again at University. So our first year is spent sort of all over the hospital. Our last two years are focused in the emergency room. Again at several different institutions, we spend some time at Mercy, at the VA, and again back at University. Our last year of training is spent primarily at University, some time down at Children's Hospital down in D.C. as well. And as senior resident, so to speak, we are also responsible for running the ERs, supervising interns, and then reporting back to our attendings.

Q. Did you receive any portion of your training at Maryland Shock Trauma?

A. Yes, we spent our time both second year and third year over at the Shock Trauma Center to learn more about sort of what we think of as the Baltimore Gun and Knife Club, a lot of shootings, motor vehicle crashes, things of that nature.

Q. Okay. And what happened after you completed your residency? You went into practice?

A. That's correct. After I finished at University of Maryland, I went to work up at Greater Baltimore Medical Center in the emergency room.

The defendant here was portrayed as a competent physician, thorough and experienced in the emergency room. The cold transcript, of course, cannot portray the witness' demeanor and how it resonated with the jury. It is important in preparing witnesses for testimony to underscore the importance of conveying honesty, sincerity, and a likeable personality. In this respect, both parties in the *Maffei* case presented well.

Often the introductory portion of the direct examination is treated casually. This is a mistake especially when, as in most cases, credibility is an underlying issue. For the jury to have confidence in your case, it must

"You can believe this witness because he is trustworthy, was relied on by the county executive, and is a leader and a community servant."

Context of the Witness's Testimony

After you introduce the witness, it is helpful to question the witness about his or her relationship to the matters at hand. Before you ask the witness to describe something, you want to carefully establish his or her authority on the matter.

If the witness is an eyewitness, you might establish the foundation for his or her ability to accurately observe the event in question. Use your questioning to let the jury know, for example, whether the witness had a clear view and has excellent eyesight, is not on any medications, and has no personal interest in the case. Or, if you're trying to foster doubt about the eyewitness testimony, you might establish that the witness knew well the subject matter of the testimony, or was well acquainted with the individuals to whom the testimony referred.

Consider how the government developed the context of the testimony of Christopher Fickes, one of the witnesses called to testify against Rosen. Fickes was Rosen's friend and had worked for him. The government called Fickes to establish Rosen's sophisticated understanding of political fundraising and to establish Fickes' direct observation of Rosen's alleged bad conduct.

Q. Prior to going to law school, can you tell the ladies and gentlemen how it is you were employed?

A. Yeah. I started working on political campaigns after I graduated college, and after one year on a campaign in Iowa, I moved to Chicago to work on the fundraising team for the "Gore for President" campaign under Mr. Rosen's watch there.

Q. And when you say "Mr. Rosen," are you referring to the gentleman seated here at counsel table?

A. Yes.

not only *like* your client but also *trust* your client. The introduction is the place where you begin. Remember it is hard to undo a first impression.

In bench trials it may not be necessary to go into great detail introducing the witness, but certainly it should not be overlooked. In the *Oregon* case, the plaintiff called a county official to the stand. Counsel briefly introduced the witness as follows:

Q. Mr. Barrett, what is your position with Baltimore County?

A. Director of Parks and Recreation.

Q. How long have you held that position?

A. Nearly eight years.

Q. Were you employed by the county prior to that?

A. I was, sir.

Q. And in what capacity?

A. Senior executive assistant to the Baltimore County executive.

Q. And what did you do in that position?

A. I worked directly for the county executive.

Q. Doing what sort of things?

A. Policy, administrative duties, oversaw some of the department. . . .

This introduction—brief, and to the point—presents the witness as someone of responsibility whom the judge should find believable. Such an examination is a question-and-answer "argument" that says to the judge:

Q. When was it that you graduated college, sir?

A. 1998.

Q. And can you tell us what you did when you were in Chicago working with Mr. Rosen?

A. Yeah, I worked largely in a support capacity. He ran the Midwest region for the Gore fundraising operation, and I would just help him put together fundraising events, coordinate the logistics for the fundraising events, track the contributions, and just be a general support staffer.

Q. Where did you go to, in terms of your employment? Where did you go after working on the Gore campaign?

A. After that we went to—we moved to the Senator Hillary Clinton campaign in New York.

Q. Approximately when was that?

A. That was at the end of 1999.

Q. When you say "we," who are you referring to?

A. Mr. Rosen and myself.

Q. Now, can you tell us what kind of a relationship you had with Mr. Rosen?

A. Yeah, it was a, you know—over the, I guess, three-plus years that I worked with him, I think we had a very good working relationship. We spent a lot of time together working on events. It was a pretty—the job is just—wasn't an eight-hour workday. So we spent a great deal of time together, and I think we worked together very well.

Q. After you completed working on Mrs. Clinton's campaign, did you continue to work with David Rosen?

A. Yes. After that campaign, we moved—well, I'm from Chicago originally. So I moved back to Chicago, and he opened up a campaign fundraising consulting business, and I helped him with that.

Q. What was the name of that organization?

A. It was known as the Competence Group.

Perhaps the most important answer given was regarding the nature of Fickes' relationship to the defendant. The assertion that the two spent a lot of time together over the years and had a good working relationship was important. It grounded Fickes as someone who had no reason to hold any grudges against him.

Q. What was your position with the Competence Group?

A. I think the business card said vice president.

Q. When you left—when was it that you left the Competence Group?

A. In about the middle of 2002.

Q. Why did you leave it?

A. I had decided to go to law school. So that was—at that time I—that was the time it's done.

The prosecutor's purpose here was to establish the witness's credibility on the subject of David Rosen. The government wanted Fickes to offer proof that Rosen was responsible for collecting donation information for an event and should have reported certain expenses as in-kind contributions, and it was important to establish that Fickes knew Rosen well enough to have that proof.

In Mrs. Maffei's case, to develop the context for her testimony about the substantive matters at hand, plaintiff's counsel demonstrated that Mrs. Maffei was present with her husband at the hospital and that he had complained of chest pain to nurses before seeing the doctor.

Q. Tell us what occurred after you and your husband arrived at the hospital?

A. When we got there, they called a triage nurse immediately and they took him in the back. He never sat down. They took me to registration.

Q. How long were you at registration?

A. Approximately 15 minutes.

Q. And after that time, where did you go?

A. I asked if I could go where he was and they said, "Give us a few minutes." I waited in the waiting room for ten to 15 minutes.

Q. That's about 25 minutes between registration and waiting?

A. Give or take a few minutes.

Q. Other than that 25 minutes, were you with your husband the entire time?

A. Absolutely every minute.

Q. Where was he, where did you go to find him?

A. As soon as you leave the waiting room of the emergency room, there are two double doors that go back into the emergency room and immediately inside of those doors to the left is a little alcove that had a gurney and a curtain there and that's where he was.

Q. When you saw him on this gurney behind a curtain, was he lying down on the gurney or was he sitting up?

A. At that time I believe he was lying down.

Q. Now, did you at any time before he saw the doctor, tell anyone in the hospital your view of what was happening to him?

A. Yes.

Q. Tell us about that.

A. When we came into the hospital, we had said he had chest and back pain with tightness in his upper chest. I believe that's why they took him back immediately. I also had that conversation with the nurse that was with him.

Q. Did you have occasion to have any discussions with them about your husband's condition?

A. I did.

Q. What concern did you have as you observed his symptoms?

A. I was afraid he was having a heart attack.

Q. Why?

A. Because of the symptoms he was having.

Q. What were the symptoms as you understood them, please?

A. Chest pain, severe back pain, and tightness in the base of his neck and throat.

When it was the defense's turn on direct, the attorneys also sought to create suitable context for the doctor's testimony. In particular, counsel elicited facts about the defendant's experience and practices when seeing patients so that ultimately the jury would accept her critical assertion that Mr. Maffei had *not* told her that he'd been suffering chest pain.

Counsel desired to establish the predicate for Mrs. Maffei's subsequent substantive testimony: the reason she brought her husband to the hospital and what he told the doctor about his complaints.

Q. And how long did you work at GBMC?

A. I worked at GBMC for the next, I guess, seven years through the fall, almost the same time in the fall of 2006.

Q. Can you estimate for me prior to March of 2006 about how many patients you had seen or patient encounters you had experienced in the emergency department after you completed your training and started practicing?

A. After residency?

Q. Yes, ma'am.

A. Many. I would see between, depending on the volumes, 12 to sometimes 20 patients in the evening or night, and I worked about three days a week. So calculating that out, I'd say probably thousands.

Q. Okay. And during that period of time, can you tell us if you had any experience prior to March of 2006 with patients who had aortic dissections?

A. I did have some experience with patients with aortic dissection. I had seen them both at Maryland and at GBMC.

Q. We heard prior to today about the—testimony about the frequency or infrequency of aortic dissection in the general population. What is your experience with that and what is your training and knowledge as far as the frequency of aortic dissection in the general population?

A. Aortic dissection is a rare entity, but it's a deadly one that we are taught about in detail, and one of the reasons we also ask detailed histories if there's any question of chest pain.

Q. Do you have a number of patients that you can recall that at some point who were under care were diagnosed with aortic dissection prior to March of 2006?

In the *Oregon* case the plaintiff's counsel wants Mr. Barrett, who was introduced as the director of Parks and Recreation, to testify that the lease agreement between the county and Oregon required the parking lot of the restaurant to be nonpaved such as stone or a similar permeable surface. To give context to the testimony counsel posed the following questions:

Q. Are you familiar with the property that is the subject of this case?

A. Yes, sir.

Q. Where is it situated?

A. The southeast corner of Shawan and Beaver Dam Road.

Q. Are you familiar with the property reflected in the photograph? Do you recognize Defendant's Exhibit 17 as an accurate aerial photograph of the Oregon Grille property as it looks today?

A. Yes.

Q. Please describe the property.

The witness describes the property, pointing out streams and various buildings as well as explaining that the entire property owned by the county is acres, but that the restaurant sits on a smaller allocated acreage.

In presenting the context in which a witness will testify, always ask yourself, "Why should the jury believe what the witness is about to testify?" Your answer to that question will help you develop the testimony. For example, for the defendant in the *Maffei* case, the answer to the question is that the doctor was an experienced emergency room doctor who had treated hundreds of patients and had familiarity with dissected aortas. In the *Oregon* case, Mr. Barrett knows the property, including the location of streams and the bucolic nature of the environment. He is well equipped to answer questions relating to preserving the environment as allegedly required by the county.

Substance of the Witness's Testimony

After providing a foundation for a witness's authority, move on to the topics that prove your case or defend against your adversary's attacks. Always keep your audience in mind as you construct your questions. While you have been immersed in the facts of the case for weeks or months, the dispute is all new to the jurors. If you forget the story you are trying to tell and become mired in arcane detail, you are likely to lose people along the way. The challenge is to marshal the facts selectively so that the direct examination focuses on what is most important. How do you know what is most important? Go back to your theme. Bring out those facts that support the theory of your case.

In the *Rosen* case, the core argument for the defense was that Rosen did not conceal the costs of the so-called Hollywood Gala; rather, he was the victim of the event's sponsors' concealment, and he had no motive to cause any false reports to be filed with the Federal Election Commission.

But the government developed many sub-themes in efforts to thwart this argument. For example, the government wanted the jury to believe that Rosen was part of the planning group for the event and that he was very enthusiastic about it. Defense counsel wanted to prove that he had no enthusiasm for the event and in fact had no part in developing the idea, and even opposed it.

Some context: James Levin was a government witness. He was a friend of President Clinton and active as an adviser and fundraiser on the Hillary Clinton Senate campaign. He was also a former friend of the defendant. Levin played an important role in the case, and his direct was initially damaging for the defense. He testified about his first meeting with Aaron Tonken, the donor who would later bankroll the Hollywood Gala. He also testified that at this meeting Rosen and others were excited about planning the gala. The meeting took place in the year 2000 at a private fundraising event in Chicago (the Tullman event) that featured a performance by Olivia Newton-John. The events of that night were the subject of the government's direct of Levin, as excerpted below:

Q. And why is it you were at the event?

A. I was asked to come to the event by a woman who worked at the White House for the first lady by the name of Kelly Craighead who wanted me to meet Aaron Tonken.

Q. And did you meet Aaron Tonken at the event?

A. Yes, I did.

Q. And what was your reason for meeting Aaron Tonken?

A. To gauge whether he was for real and could be helpful with future events for us.

Q. And did you eventually meet Mr. Tonken?

A. Yes, I did.

Q. What happened? Were you alone or were you with anyone else?

A. No. We went out after the fundraiser with both Mr. Tonken, myself, Kelly Craighead, and David Rosen.

Q. Now just going back, I don't know if you answered this question: Whose event was that fundraiser with Olivia Newton-John in 2000 from the campaign? Who was supervising that?

A. That was—that was—David Rosen was.

Q. And where was it that you—do you recall where exactly you and Mr. Rosen, Ms. Craighead, and Aaron Tonken went?

A. It was on, I believe, Alston Avenue. It was an industrial-type loft building, and it was in the gallery or art space for a—one of our donors, Howard Tullman.

Q. And your purpose in going out with—the four of you going out was what?

A. To meet with Mr. Tonken and to—to find out if he was credible and if he could—and what he was capable of doing for us in the future.

Q. What was—what did he propose to you all?

A. He proposed to do a very large star-studded gala or event for the first lady in California.

Q. And what was Mr. Rosen's reaction?

SANDLER: Objection.

THE COURT: Overruled.

Q. You can only state what Mr. Rosen said or any—any reaction that you noticed physically, but not what you think was his thinking.

A. We were all verbally excited about the idea.

Q. And in the course of that evening, did Mr. Tonken bring up expenses that he had already expended for bringing in Olivia Newton-John?

A. Yes.

Q. Can you tell us about what he told you all?

A. Well, Mr. Tonken is a very gregarious person and a very—

Q. You can continue.

A. He stated that he had paid for Ms. Olivia Newton-John's travel to come by private plane, and he had paid for her suite at—I believe it was the Peninsula or Four Seasons hotel. And he also said that he had to pay for her sister's suite, who she brought along, and her entourage.

Q. What was Mr. Rosen's reaction—when that information was conveyed? What did he say?

MR. SANDLER: Objection.

THE COURT: Overruled.

That we didn't hear that; "you didn't tell me that."

Here we see the prosecutor doing an effective job moving the testimony swiftly to the critical testimony—that these four individuals met in a loft, where David Rosen allegedly became excited about the idea of a Hollywood fundraiser and also allegedly turned a blind eye to in-kind contributions made by Tonken in connection with the Chicago event that had just concluded that evening. The testimony is precise, to the point, and damaging.

Defense counsel was forced to respond and did so, not only in cross-examining Levin (which is discussed in Chapter 7, on cross-examination), but also in the direct examination of the defendant, David Rosen:

Q. At the event, when the event ended, the Tullman event, did you go out drinking with Jim Levin?

A. No.

Q. Did you go out drinking with Kelly Craighead?

A. No.

Q. Did you go with them and discuss costs of Olivia Newton-John?

A. No, sir.

Q. Did you go there and hear conversation about costs and say at this—

MR. ZEIDENBERG: Objection. Leading.

THE COURT: Overruled.

Q. [By Mr. Sandler] Did you go after the loft to this alleged separate get-together and hear complaints by Aaron Tonken about costs of Olivia Newton-John?

A. No.

Q. Now, the prosecutors pointed out through witnesses and Mr. Jim Levin, in particular, that you were at a separate meeting with him and Mr. Tonken and Ms. Craighead after the Tullman event. Did you hear that?

A. I did hear that.

Q. Were you at such a meeting, sir?

A. No, sir. I left right from the event. I was in the van with Mrs. Clinton, with the Secret Service, and we went to the Ebelings' residence; and after meeting Tom, I retired. I had an event the night before, I had an event the next morning, and I was dead tired.

Note in the above the use of repetition to drill a point home. Defense counsel wants the jury to know and believe and remember that the meeting between Rosen, Levin, Craighead, and Tonken did not take place, as Levin testified. But this refutation is elicited in pieces, with rapid, rhythmic, and repetitive questions.

Rosen's testimony on this topic continued as follows:

Q. All right. I want to talk to you now, if I could, about the first time you learned that there might be an event in August of 2000. Okay?

A. Okay.

Q. All right. Tell the jury, when did you first learn about the idea of an event in August 2000?

Note the way counsel introduces the new subject, by asking the witness at the end of the sentence, "Okay?" It is a simple technique, but provides a pause that is helpful for jurors trying to keep lots of information straight in their heads.

A. It was the next day. We woke up at the Ebelings, we attended a breakfast, and Kelly always traveled with Mrs. Clinton. She was her—Kelly Craighead was Mrs. Clinton's trip director. And Kelly had mentioned it to me, and then Jim Levin called me on my cell phone, and then Aaron Tonken called me on my cell phone, and they had all talked about this gala, potential gala during the convention.

Q. By the way, the night before the Tullman event, when you went to the Ebelings' home with the first lady and escort, did Kelly Craighead accompany you?

A. No, she went out with Jim Levin and Aaron Tonken. They invited me to go. I didn't go.

Q. And did she eventually—did you eventually see her the next day?

A. I did.

Q. What were the circumstances?

A. She traveled with Mrs. Clinton everywhere she went. We had an event the next morning.

After moving ahead by asking Rosen how he first heard about the gala idea, counsel backtracks and asks about the previous night and Kelly Craighead's whereabouts. This was called for because Rosen had just testified that Craighead "always traveled" with Mrs. Clinton, and some clarification was needed. But by switching subjects so quickly, attorneys risk losing or confusing jurors.

Q. So when you heard about this proposed event, were the people advising you about the event enthusiastic?

A. Yes.

Q. What was your reaction, Mr. Rosen?

A. I was less than enthusiastic.

Q. Why? Tell the jury.

A. I didn't know how, with the other events planned, we would be able to participate in such a large event; and I thought there would be some resistance from Vice President Gore's campaign, like we were raising some of his money or intruding on his convention; and I also thought

there might be some resistance from the people that were raising money directly for the convention itself here in Los Angeles.

Q. And time was a factor as well?

A. Yes.

Q. So did these issues or considerations that you just told us about get resolved?

A. They did.

Frequently, direct examination involves the testimony of a corroborating witness. In addition to Rosen refuting Levin's testimony, the defense called friends of Mrs. Clinton who corroborated Rosen's testimony that he did not go drinking with Levin but was with the first lady the entire time.

Here is an excerpt of the direct examination of Thomas Ebeling:

Q. Do you recall the approximate time when your wife and the senator did return from the Tullman event?

A. I would only guess at this point it was 10:00, 10:30, 11:00 o'clock at night.

Q. Do you remember who came back to your house directly from the event?

A. Well, there's always the Secret Service, and there was Mrs. Clinton, my wife, and David Rosen.

Q. Are you sure David Rosen came back with them?

A. I do, because David and I had a conversation in my kitchen.

Q. And how long did that conversation last?

A. Oh, maybe 10, 15 minutes.

Q. Can you tell the jury whether or not at some point he went to sleep?

A. After a while, I think—well, he went upstairs and retired, and Mrs. Clinton and I went into our family room and had a discussion. And then shortly after that, we all went to bed.

Another claim of the government was that Rosen and Levin entered into a pact to both lie about Rosen's alleged reporting of costs he knew to be inaccurate. Here is the substance of the direct examination of Levin on this point, presented by the prosecutor:

Q. And subsequent to that, did you have a meeting at a restaurant with David Rosen in which some of these same issues were discussed?

A. Yes, we did.

Q. Do you recall—what's your best recollection of what that conversation was?

A. I don't remember. It was sometime thereafter, not too long thereafter.

Q. Are you talking about 2001 at this point, if the gala was August of 2000?

A. I would imagine it's 2001. I am not sure.

Q. And how was it that you arranged to meet? Whose idea was it?

A. We both agreed that we should meet and talk but not on a cell phone.

Q. What was the point of your meeting?

A. To discuss the ongoing lawsuit [referring to a civil suit relating to the Hollywood Gala filed by Peter Paul against the Clintons and others] and the ongoing allegations by Peter Paul.

Q. Can you tell us about your meeting with Mr. Rosen and what was discussed?

A. We both agreed that both him and I were very credible and that Peter Paul and Aaron Tonken were not and that whose word in the end would people believe, them or us, and we were much more credible, much more believable; and they were just trying to paint a story to get themselves out of trouble; and we'd stick the line; and if we stick the line we won't have a problem, but we had to stay together.

Q. And your view of what you call your line, which was stick together and say you told the truth, was that, in fact, the truth?

SANDLER: Objection; it's vague as to what he is referring to.

THE COURT: Sustained.

Q. What was the story or the line that you and David Rosen agreed you were going to stick to?

A. That we had no understanding, we had no interpretation, and we did not know that Peter Paul's allegations of spending $1.2 million on this event was even remotely true.

Q. And was that line that you came up with, that you didn't know, was that the truth?

A. No.

Here is how on direct examination of David Rosen the defense addressed Levin's testimony:

Q. Did you ever talk to Jim Levin and tell him that there was illegal activity going on?

A. Absolutely not.

Q. Did you ever suggest to him that the costs—this will never be the cost of the gala?

A. No, I never said that.

Q. Did you ever have an occasion to sit down with Mr. Levin and talk about a pact that he won't say anything and you won't say anything and you would go forward?

A. No.

All these questions are asked in such a way that they elicit a concise and certain "no." They do not call for any explanation, and the witness gives none. Such questioning is helpful when you want to emphasize a position. Again, repetition is invaluable in direct examination if not overplayed.

The hotly contested facts in dispute in the *Maffei* case were whether the emergency room doctor had misdiagnosed Mr. Maffei. From the plaintiff's viewpoint the outcome hinged on whether the plaintiff could prove that Mr. Maffei had told the doctor that he was experiencing chest pains. Here is how Mrs. Maffei testified about this important aspect of the case:

Q. Let's now talk about the time your husband first saw the doctor.

A. Yes.

Q. Can you tell us about that?

A. Yes. Dr. Smedley walked in and said that she had the results of the blood test and that said negative, he was not having a heart attack, which I was very relieved.

Q. Did you react, other than your internal sense of being relieved, did you make any comments or say anything?

A. Yes, I was still concerned what all the symptoms were.

Q. I'm talking about your being relieved. Did you tell the doctor, that's a better question, did you state to your husband or to the doctor you were relieved?

A. Just, thank God, I just, thank God.

Q. Thank God for what?

A. That he wasn't having a heart attack.

Q. Was that from a blood test, is that what you are telling us?

A. Yes.

Q. Did you or your husband engage in further conversation with Dr. Smedley?

A. Yes she asked him questions and they talked.

Q. Tell us what they discussed?

A. She asked where Rick worked and he stated Sparrows Point.

Q. All right.

A. And she said, "I assume there is a lot of toxic stuff there" and he said, "I guess," you know. And she thought that possibly this was a reaction to something he had been around.

Q. Were you present during the discussions between the doctor and your husband about his symptoms?

A. Yes, I was.

Q. And do you recall whether your husband discussed with the doctor his symptoms and how he was feeling?

A. Yes, he did.

Q. What do you recall [about] what your husband said at that time when the doctor asked him about his symptoms and how he was feeling?

A. I recall him specifically telling her that he had a severe pain in his chest and back and felt the squeezing in the base of his neck and throat and it felt like heavy pressure.

Here, the questions go directly to the key dispute—what Dr. Smedley was told about Mr. Maffei's symptoms—and questions calling for short answers are used to slow down the testimony for the jurors, and keep their attention focused.

Q. Mrs. Maffei, did you make any comments about his symptoms to the doctor?

A. I did.

Q. What did you say to the doctor?

A. I asked if she would do an MRI.

Q. Was that the first meeting or was that at a later meeting?

A. I believe it was the first, but I can't be sure.

Q. Why did you ask for an MRI?

A. I still wasn't convinced there was nothing wrong with him. You don't get the severe chest and back pain for no reason. If it wasn't his heart, what was it? And I didn't know anything else to ask for.

Q. What was the response when you asked about an MRI?

A. She told me, no, we could not do that because it was a nonemergency procedure that we should see his primary care doctor [about].

Q. So, how long did the doctor spend on this first meeting with you and your husband?

A. Five minutes or so. I mean, you know, she checked him out; we talked.

Q. Were you under the impression, at least based on this meeting, that Dr. Smedley had ruled out a myocardial infarction or heart attack?

A. Yes.

Q. And did she ask, do you recall any other discussion?

A. At some point, at the second meeting, she started asking about a sore throat, which he never had a sore throat, but she said, "have you been around anyone with strep?" Ironically, the week before, Rick and I were taking care of my sister's children for the week and the youngest had strep throat. So she said she would do a strep test, but really believed that wasn't the problem.

Q. Do you recall any discussion at the second meeting between Dr. Smedley and your husband whether the doctor asked him about whether he was experiencing chest pain?

A. Yes.

Q. And what do you recall about that discussion?

A. He described he had a sharp pain in his chest that went through to his back and this tightness in his throat and he talked to her about this and I talked to her about this.

Q. Well, when you talked to her about it, again, did you or did he point to any area in the abdomen where he was referencing this pain?

A. He kept taking his hand with a squeezing motion at the base of his throat and upper chest.

There is an elliptical quality to this testimony. It does not build up to a climax or tell a story, but does vividly describe that Mr. Maffei demonstrated chest pain. Though compelling, the testimony would be aggressively countered by the defense when the emergency room doctor took the stand and gave exactly the opposite testimony.

Q. Now, I'd like to direct your attention to the day in question. It was a tragic day for Mr. Maffei and for Mrs. Maffei. But I'd like to ask you about your recollection. Do you have an independent recollection, do you have a memory distinct from the medical records of Mr. Maffei and your encounter with Mr. Maffei that day?

A. I do remember my encounter with Mr. Maffei that day.

Q. That's now a little over three years ago. Can you tell us, tell the ladies and gentlemen, you've probably seen hundreds of patients since

that time, how you have an independent recollection or memory of Mr. Maffei and your encounter with him that night?

A. I remember my encounter with Mr. Maffei because I remember talking to him. He was very calm, he was—his appearance was benign. And he had symptoms that were consistent with his physical exam. He had a red throat, he had a sore ear. And so when I found out what happened, I was shocked.

Q. When did you find out that Mr. Maffei had died?

A. I found out the following—the day after he had passed.

Q. I'm sorry. I interrupted you. You were telling us why you remember Mr. Maffei.

A. Yes. Cause it was just I couldn't think of what could have happened that would precipitate that, his death. He looked so well. When he left in the morning, his vital signs were all stable and there was nothing in the history that he gave that would indicate why he would have died.

Q. Okay. I'd like to go over with you some of the medical records; particularly the medical records that you would have seen and the medical records you would have created. When do you begin the care of or encounter a patient that comes into the emergency department?

A. I encounter the patient when they're brought back into the room. Or if there's nothing that the nurse is concerned about, then they bring them out of triage in the hallway area to evaluate the patient. In general after the patient is brought back, the patients are placed in an order of which the nurse in triage considers important, then I pick up the chart from a rack and go see the patient.

Q. What did you do when you first walked into the room with Mr. Maffei or any patient? What did you do initially?

A. I walk in the room, I look at the patient. I want to see if they look like they're in distress, any intervention I need to do right away generally on the monitor board there, repeat the last blood pressure again and the heart rate. If they're on a monitor, I can see the limit up on the monitor. And, well, when you walk in, I do a global assessment to make sure there's nothing I need to do right then to [stabilize] him. I also introduce myself to the patient so they know who I am, and they can correct me if I pronounce their name incorrectly. And in Mr. Maffei's case, while I was doing that, I also put the blood pressure cuff on and took his blood pressure. Because I wanted to be sure that again, that his blood pressure was stable and that that repeat blood pressure was the accurate one.

Q. What was his blood pressure when you retook it?

A. I did not write the number of the blood pressure down. Again, I took it to reassure myself that it was normal. And the nurses continued recording the vital signs, and they again remained normal.

Q. You didn't write down that you retook the blood pressure. How is it that you can testify today that you retook his blood pressure?

A. Because I remember that I retook his blood pressure and I remember that it was normal.

Q. Okay. And then what would you have done?

A. So once I had done those things, normally I would sit down, if there's a chair, and I ask patients why they came to the emergency department.

Q. Okay. And what did Mr. Maffei tell you?

A. Mr. Maffei told me that he had come in because around nine o'clock that night, he had a somewhat sudden onset of a sensation of his throat closing and feeling sore. He said it sort of happened over ten minutes or so, and that it was pain deep in his throat here.

Q. And what else did he tell you?

A. Well, after he told me that, I specifically wanted to ask him some other questions because clearly the triage note reflected that he had chest pain. And he didn't report that to me initially as why he came to the emergency room. And so I wanted to clarify that. So I—at that time I asked him how he had been feeling. And in particular at the time as well, Mrs. Maffei was also very concerned about him. So I wanted to clarify the chest pain. So I asked him, you know, are there any symptoms he's been having, has he been sweaty, has he been nauseated. He said no. He didn't appear short of breath and told me he wasn't feeling short of breath. And though I also specifically asked him about chest pain, he hadn't brought it up. And he told me he wasn't having chest pain and that he hadn't been having chest pain. And I said was it in your chest or your throat, [because] this can be confusing. So I specifically said are you having chest pain or is it in your throat, and he told me it was in his throat.

Q. And you also wrote—here read this. Fifty two—

A. It's 52-year-old white male comes in complaining of onset at 9 p.m. of sense of throat closing and sore. Rapid onset over about ten minutes.

Q. So the zero with the line through it means no or none?

A. Right. No nausea, no shortness of breath.

Q. That looks like SCO, that's SOB, shortness of breath?

A. Yes, shortness of breath. No chest pain. This is just an additional clarification of his throat pain. Because I want to make sure the throat pain wasn't something that was exertional because that can reflect more concern for something cardiac. The pain was not associated with exertion. Other than we talked—talked further about why he could have had this sudden sense of his throat closing, work allergens, anything he was exposed to at work because I became concerned with this more rapid onset that he potentially was having an allergic reaction, which he said there was certainly things at work that would cause him to have a respiratory reaction, it could cause a breathing reaction. And then we also talked about because he had this sore throat if he had any exposures to that. And he said his niece visited about a week ago and had strep throat.

Q. Now, we heard testimony from Mrs. Maffei yesterday that Mrs. Maffei and/or Mr. Maffei told you that he was having chest pain when you saw Mr. Maffei at 5:55 a.m. Do you recall that?

A. Mr. Maffei told me that he did not have chest pain. I asked him on more than one occasion. I particularly want to clarify, as I said, because chest pain is never a complaint I would ignore or not take seriously. There are some very dangerous things that kill folks when they have chest pain. There are many diagnoses that you need to rule out when someone has chest pain. He didn't have chest pain when I asked him directly. He was appropriately alert, he was perfectly communicative and able to tell me what was wrong with him. And he denied to me that he had chest pain.

Q. Did you ask Mr. Maffei if he had chest pain earlier that evening that had brought him to the emergency department?

A. I asked him if he had been having chest pain earlier and he said no. And I particularly again asked, when I do my review of systems, any chest pain, and he had not been having chest pain.

Q. Let's talk about the back pain. Mrs. Maffei described yesterday that Mr. Maffei was having severe back pain and that was also mentioned to you. What do you recall, if anything, about that?

A. Well—

Q. Did he describe severe back pain to you that also started around that evening?

A. No. Again, I spoke with him about the back pain because it was in the triage note. And that was when we talked about the nature of the back pain and was it like his kidney stones or not. You know, how long has he been progressing. And he told me he had had problems with the back in distant past that he'd seen an orthopedist for, that things progressively were getting worse over the last year or so.

Q. And then the next thing you would have done would have been what?

A. This is called the Review of Systems. And this is just where, you know, we kind of go through a laundry list of other problems that he may or may not be having so—

Q. Did you find—I'm not going to go through each and every one of these.

A. Okay.

Q. But it's—there's one, two, three—there's more than ten categories here. So you—would you have asked him—how did you find out the information? To respond to this by asking these questions?

A. Right I asked them, and then any things [he confirmed] I would back slash.

Q. Let's direct your attention specifically to CV. What does that mean?

A. That's cardiovascular.

Q. And then it's CR, that's—

A. Chest pain.

Q. And you drew a line through that. Why did you draw a line through that?

A. Again, because I asked him and he told me he wasn't having chest pain and he didn't have chest pain.

Q. And then you would have moved onto the physical examination?

A. Uh-huh.

. . .

Q. Now, based upon your history, based on your review of symptoms, based upon your physical examination, did you have any suspicion that Mr. Maffei had an aortic dissection in progress?

A. No, I had no suspicions that he was having an aortic dissection or any cardiac problem or chest-pain-related medical condition.

. . .

Q. Okay. Let me show you what's been marked as Defense Exhibit 6, without my reading glasses. There are a number of signs and symptoms to aortic dissection that you can see in a patient in an emergency department, correct?

A. Huh?

Q. Of this diagram?

A. I've seen that, yes.

Q. And these are various signs and symptoms that could be presented of an aortic dissection, including chest pain, excruciating chest pain, sudden chest pain, excruciating, ripping, tearing chest pain, shortness of breath, pale skin, sense of impending doom, extreme anxiety, sweating, heart murmur, nausea, vomiting, upper extremity pain, lower extremity pain, upper extremity weakness or paralysis, upper extremity meaning the arms, right?

A. Uh-huh.

Q. Lower extremity meaning the legs, abdominal pain, and stroke. Did Mr. Maffei have any of those when you saw him and examined him and took a history—

A. No.

Q. On March 8, 2006?

A. No, he had none of those signs and symptoms.

Q. What diagnosis did you make based upon your history and physical, review of the symptoms, and the laboratory work and EKG that were done on Mr. Maffei?

A. I made a diagnosis of recall otitis media, which is an ear infection, based on ear pain and redness of the ear, and sore throat, which is a pharyngitis, which is based upon the redness of the throat, his throat discomfort. He had been exposed to strep. And so I decided that I would treat him presumptively on the conservative side, to cover him for his ear infection and strep throat. Although most likely the symptoms are related to a viral infection, I don't like to wait and not treat them. I went ahead and started him on amoxicillin. The other concern was the feeling of closing in this throat, that concern he had reacted to

> something at work. That night when he came in, he was given—he was given Benadryl and steroids via a medrol dose pack. . . .

In presenting the testimony of their parties, each counsel utilized the basic principles of argument although in dialogue form. Working with counsel, each witness introduced herself effectively, presented the context for her testimony, and then testified about the substance of the case.

Mrs. Maffei's point was that she had great concern for her husband, she was present when he met with the doctor, and she heard him testify about his chest pain; she stated he had complained about chest pain to the nurses prior to visiting, which is reflected on the hospital records, and that the doctor should have diagnosed dissected aorta.

The doctor's responsive argument through testimony was that she is a thorough physician and caring toward her patients; she said she clearly remembered Mr. Maffei and that he not only specifically did not complain of chest pain but denied having chest pain. Furthermore, she noted in her medical records at the time of the visit that he did not have chest pain. Implied in her testimony is that she would not have anticipated his death at that time, and that she would not have stated in her records at the time that he denied having chest pain if such were not the case.

Immunization

It may be wise to ask questions the jury would expect your adversary to ask. Queries that may seem at first glance antithetical to your theme, if handled well, will only enhance your ethos and your witness's ethos in the courtroom.

This brings us to the technique of immunization, a means of taking the wind out of the opponent's sails. By being the first to recognize that you have a problem with your side of the case, you can then communicate to the jury that, when properly understood, the problem is minor or certainly not significant enough to cause the jury to decide against your client. Immunizations, of course, involve injecting a small amount of an infectious agent into the body to fight against the full disease.

For example, two of the government witnesses in *Rosen*, James Levin and Ray Reggie, had recently pleaded guilty to felony charges involving fraud. Rather than wait for their witnesses to be impeached on cross-examination, the prosecution elicited testimony on direct about the charges and subsequent pleas. In so doing, the prosecution sought to "immunize" its witnesses from attack by emphasizing that regardless of their wrongdoing, the witnesses were testifying truthfully about Rosen's alleged criminal conduct.

In immunizing a client against the claims of a witness, there may be the temptation to attack the witness as mendacious. Doing so can easily backfire, however, particularly if the witness appears credible. Nevertheless, it is important to meet the claims head on.

Whereas immunization defends against claims before they are articulated, refutation involves rebutting an adverse claim or testimony after it is revealed.

In *Rosen*, Whitney Burns, the compliance officer for the Democratic Senatorial Campaign Committee and a government witness in the case, testified that David Rosen had told her to reduce the recorded costs for the gala by $100,000. She also claimed that Rosen had told her Cher would not be attending and so further reductions could be made. (Cher did, in fact, attend.) On direct examination, Rosen specifically refuted these points.

Rosen did not, however, characterize Burns as a liar. He simply insisted that she had misunderstood him. At the time Rosen discussed the matter with her, he was talking hurriedly over the telephone. He testified that there was never a doubt that Cher would be attending, but that the gala would save money because Cher's band would not be coming. Rosen also explained that he had told Burns that the actual cost of the concert was $100,000 less than reflected on the budget she had been discussing with him. These responses were couched in the form of question and answer.

By addressing these matters on direct, defense counsel prevented prosecution from making a big show by throwing Burns' testimony at Rosen on cross. The claims had already been fully explained.

Similarly the defense in the *Maffei* case, seeking to refute the plaintiff's claims about the doctor's failure to order a chest x-ray, presented the following testimony:

> Q. Now, Mr. Sandler, read to the jury from your deposition taken previously where you stated that if a patient comes in with chest pain, you would order a chest x-ray.
>
> A. Yes.
>
> Q. Is that accurate?
>
> A. I would order a chest x-ray in a patient that came in with chest pain. That's routine practice, do an EKG and chest x-ray.
>
> Q. Why didn't you order a chest x-ray in Mr. Maffei's case?
>
> A. I didn't order a chest x-ray because Mr. Maffei told me he wasn't having chest pain. He was calm, cooperative, he was in no respiratory distress, no respiratory complaint. There was no cough that would have pushed me to do that because of a concern for pneumonia or anything of that nature. So once I had spoken to Mr. Maffei and clarified his history, and he had clearly told me told me he didn't have chest pain, at that point there was no reason for me to order a chest x-ray.

Asking these series of questions on direct examination of the doctor, defense counsel not only refuted testimony on direct examination in the plaintiff's case, but also immunized the doctor from cross-examination on the topic of not ordering a chest x-ray.

Conclusion

Always try to end your direct examination on a high note. Each examination calls for its own conclusion. Consider the conclusion of Rosen's direct examination:

Q. Mr. Rosen, I want you to tell the jury specifically the answers to some of these last questions I am going to pose to you. At any time—at any time during the Senate campaign and your work for the campaign, did you intend to cause a false statement to be filed with the Federal Election Commission or any governmental agency?

A. Absolutely not.

Q. Did you ever intend to falsify or cause the falsification of any documents to anyone?

A. No.

Q. Did you ever intend to violate any laws?

A. No.

Q. Do you believe, sir, in all and full honesty that you performed your work honestly?

A. Yes.

Q. With diligence?

A. With diligence.

Q. With sincerity?

A. Yes, sir.

Q. Are you innocent of the charges against you?

A. Yes. I am 100 percent innocent of these charges.

MR. SANDLER: Your Honor, thank you for the opportunity.

We have already touched on the virtues of rhythm and repetition in testimony, but here it is evident that these techniques can evoke the witness's emotion and, potentially, jurors' sympathy for the defendant in his most essential and important claim: his innocence. In concluding the direct, counsel did not merely ask for an affirmation of innocence, but also an affirmation of a job well done on Rosen's part. Again, the witness touches on the themes of diligence and sincerity that were hinted at in the introduction portion of the testimony.

Counsel concluded Mrs. Maffei's testimony by asking her to describe how her husband died:

A. And when I got to the bottom of the stairs, I saw him on the floor at a very odd angle in front of the sofa like with his butt up in the air like when you were getting up off a chair and flat on his face on the floor. His glasses had come off. And he was bleeding from the mouth and the nose.

Q. You were obviously terrified and upset. Did you call 911?

A. Immediately.

Q. Did you call, go to a neighbor's?

A. The 911 operator asked if he was breathing and I said, I don't think so, but I am not sure. She said, "Turn him over." And I couldn't because his legs somehow got wedged from the knees down under the sofa. He was stuck. She said, "Is anybody home with you?" And I said no. She said, "Do you have a neighbor close that can help you?" We live in townhomes. I said yeah. She said, "Go get help now." I ran out the door in my nightgown, screaming, pounding on the neighbor's door. They came immediately to assist me.

Q. And your husband died?

A. Yes.

Q. So, let's come forward a bit and just ask you, how [are] you doing now with all of this?

A. I am getting better. I am starting to try to pull my life together.

Q. Did you seek any counseling or help for your emotional anguish, ma'am?

A. Yes.

Q. I apologize for having to bring numbers to the table in light of what you just testified to, but do you feel that your husband's absence at the home and his lack of companionship, lack of being with you has affected you in your life?

This testimony forms an evocative image of the man's last minutes.

A. Dramatically.

Q. How are some of the ways it's affected you?

A. He was the love of my life. He was the person I never thought I would meet. He fulfilled my life in every way and I don't have that anymore.

Q. Over the years when you were married, did he ever give you advice or give you guidance?

A. I think we gave it to each other.

Q. What are some of the things you'd go to him and talk over with him that are not so personal that we can at least share?

A. We absolutely shared everything together from every day work experiences to finances, to our hopes and dreams of where our life would go.

> We met later in life, so we were hoping to make up for lost time with spending our lives together.

It would be easy for jurors to be touched by the widow's grief. Such pathos, especially when evoked in a memorable fashion, is often essential to effective witness examination.

REDIRECT EXAMINATION

After cross-examination you have the opportunity to conduct redirect. If you do so, be selective. You may not want to redirect on a topic if your case theme and theory were not harmed by it, or you have another witness to combat harmful facts elicited on cross. You may also feel that the topic, whether harmful or not, was covered in depth to the point that you do not want to draw any more attention to it and make matters worse, hoping that in closing argument you can resolve the matter.

After extensive cross-examination of Mr. Rosen in his case, defense counsel did not conduct any redirect examination at all. The reasoning here was two-fold: first, counsel believed there was no major point to cover on a redirect examination, and second, foregoing redirect examination was a way to communicate to the jury confidence in the witness' direct examination and how well he stood the cross-examination.

In the *Maffei* case, brief questions were asked of Mrs. Maffei on redirect examination that related to a discrepancy in the medical record and the date of death of her husband. The redirect examination was not extensive.

From the introduction to the establishment of context, to the substance of the testimony, to immunization and refutation, to the conclusion, the direct examination is a complex performance that must be *designed to persuade*. Unpredictable testimony may surface and opposing counsel will occasionally object, but the attorney on direct has a great deal of latitude with which to employ the most persuasive means of eliciting advantageous, credible, and memorable testimony. That freedom will help you win your case. It is wise to acknowledge this latitude, to appreciate your options, and to recognize the many techniques at your disposal. Only then will you be equipped to make the best choices for your particular case and witness

Learning Points for Chapter 4

- Do your homework: Prepare yourself and your witnesses thoroughly for direct and cross-examinations.
- Remember to prove elements of each claim or defense.
- Use nonleading questions.
- Maintain an easy control of the testimony with a mix of closed-ended and open-ended questions.
- Does your witness appear sincere and likable? Do what you can to make sure that he or she does. A high ethos is critical to success.
- Style and delivery matter. Consider body language and tone, use plain language, and coach your witness on his or her own delivery.
- Be vivid. What counts in the end is what jurors remember. Ask detailed questions to draw out engaging, memorable testimony, and find ways of repeating key information (e.g., looping and incorporation).
- Use demonstrative evidence to concentrate jurors' attention on, and anchor their memory of, important testimony.
- Prepare to authenticate exhibits if you do not have an agreement.
- Immunize the witness against anticipated attacks on cross-examination.
- Begin and end each examination with your strongest testimony, and arrange your lineup of witnesses likewise.